LAND COURT OF QUEENSLAND

CITATION:	*Bresnahan v Coordinator-General* [2015] QLC 15
PARTIES:	Debbie Ann Bresnahan (applicant) v Coordinator-General (respondent)
FILE NO:	AQL214-13
DIVISION:	General Division
PROCEEDING:	Claim for compensation payable pursuant to the *Acquisition of Land Act 1967* as a consequence of the taking of land pursuant to the *State Development and Public Works Organisation Act 1971*
DELIVERED ON:	4 June 2015
DELIVERED AT:	Brisbane
HEARD ON:	5-8, 12 May, 10 October 2014 Submissions closed 8 December 2014
HEARD AT:	Brisbane
MEMBER:	PA Smith
ORDERS:	**1. Leave granted to the applicant to make written submissions on the respondent's objections.** **2. The extra cost the respondent was put to in addressing the applicant's submission after the close of the hearing be paid by the applicant in any event.** **3. Compensation is determined in the amount of One Hundred and Thirty One Thousand, Eight Hundred and Thirty-three Dollars ($131,833.00), of which the respondent has already paid the sum of Sixty Thousand Five Hundred Dollars ($60,500.00) by way of advance.** **4. In addition, interest is also awarded on the amount determined by the Court taking into account the relevant dates upon which costs were incurred and taking into account the advance made by the respondent, to be agreed as between the applicant**

and the respondent or, failing agreement, to be determined by the Court. In the event that the quantum of interest is not agreed between the parties by 19 June 2015, the parties are each to file and serve a statement and submissions detailing their assessment, with full calculations, as to what amount the proper award of interest should be, such statement and submissions to be filed by each party by no later than 4:00pm on 26 June 2015.

5. **Any party seeking any order as to costs is to file and serve their submissions as to costs by 4:00pm on 19 June 2015. Any submissions in response are to be filed and served by 4:00pm on 3 July 2015 and any submissions in reply are to be filed and served by 4:00pm on 10 July 2015.**

CATCHWORDS: Statutes – Interpretation – words and phrases – evidence – where s 7(a) *Land Court Act* 2000 (Qld) provides that, "In the exercise of its jurisdiction, the Land Court is not bound by the rules of evidence and may inform itself in the way it considers appropriate…" – where Land Court required to consider multiple objections to hearsay evidence in compensation proceedings – objections considered individually in light of particular circumstances – need to avoid unfair advantage or disadvantage of parties – *Maroochydore Central Holdings Pty Ltd (No. 2) v Maroochy Shire* Council discussed

Evidence – admissibility – statement – s 92 of the *Evidence Act 1977* – proceeding – reasonable diligence – circumstances of case – found or identified – undue delay or expense – direct oral evidence – personal knowledge – called as witness – information supplied – record – undertaking – maker or supplier – witness – dead – unfit – bodily or mental condition – attend as witness

Evidence – admissibility – objections – relevance – repetition – repeated evidence – hearing and assumption of facts – scandalous or inflammatory evidence – allegation of theft – no police complaint – nothing more than suspicion – submissions – comments – swearing the issue – opinions – expressions – observations – balance of probabilities – hindsight – hearsay – documentary hearsay – cross-examination – oral evidence – weight adequately challenged – otherwise tested – documents speak for themselves – without prejudice – statements

Evidence – burden of proof – *Jones v Dunkel* – *Browne v Dunn* – rule of practice – did not cross-examine or suggest – challenge or contradict – veracity or reasonableness of the claim – analysis of evidence – evidentiary onus – pre-

trial pleadings – respondents points of defence – evidence likely to be called – failure to call a material witness – when one witness sufficient – *Lowry v Coordinator-General-Liaweena (NSW) Pty Ltd v McWilliams Wines Pty Limited – Courtney Bay Pty Ltd v Gold Coast City Council – Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* – discussed

Practice and Procedure – failure by applicant to provide submissions – application for leave – explanation – oversight – interest of justice – cost – prejudice – finality of litigation – leave granted – respondents additional costs to be met by applicant – *Urban Transport Authority v Nweiser* considered

Determination of Compensation – valuation – methodology – before and after – exclusive of disturbance – joint expert valuers report – easement area – percentage diminution – severance – injurious affection – balance land structures – improvements – land value – comparable diminution – severance – injurious affection – balance land structures – improvements – land value – comparable sales analysis – assessment of diminution of the easement area 35% of easement land – *Longeranong Pty Ltd v Electricity Trust of SA* discussed

Determination of Compensation – disturbance items – s 20(5) *Acquisition of Land Act 1967* – separate consideration – discretion and doubt in favour of applicant – loss earnings – difficult to apprehend and quantify – two stage test – reasonable sum claimed and reasonable to incur – painting walls – telephone and fuel – 328 pairs of damaged shoes – dust and grime – loss of purchase cost and opportunity to make profit – storm water drain reinstatement – drain and driveway not located on applicant's property – colorbond fencing and gate over easement area – air valve – reasonable remedy to visual amenity – removal of rubbish left on easement area – material equipment on adjoining land – loss of rent from project works – horse supplement – fresh turf not available due to works – alternative costs of agistment similar amount – loss on sale of mare – mare injured when spooked by noise of reversing forklift outside notified hours – link to injury established – loss incurred on sale of injured mare – costs of water, electricity and fertilizer re replacement grass – no expert evidence – liberal approach adopted – claim allowed – landscaping and turf blend – no expert evidence – photographic evidence – surface over pipeline trench – matter assessed on basis that pipeline and underground work not be visible – reasonableness – lack of invoices – unsatisfactory position requires

"guesstimate" – liberal approach – loss of lilly pilly trees not re-grown after easement works

Determination of Compensation – disturbance items – s 20(5)(a) *Acquisition of Land Act 1967* – legal fees – reasonably incurred in relation to preparation and filing of claim for compensation – s 20(5)(a) *Acquisition of Land Act 1967* – actual cost statement strays beyond items claimable – *Lowry v Coordinator-General* – applicant must prepare costs statement or other document clearly stating which costs are sought under which provisions – valuation fees reasonable and agreed to by respondent – interest on compensation – interest tables as set out by the Land Court – multiple disturbance claims – parties to see if they can come to an agreed position – otherwise to be determined by the Court

Acquisition of Land Act 1967
Evidence Act 1977
Land Court Act 2000
State Development and Public Works Organisation Act 1971
State Development and Public Works Organisation Regulation 1999
Water Regulation 2002

Browne v Dunn (1893) 6 R 67
CH4 Pty Ltd v The Minister for Natural Resources, Mines and Energy and Minister for Trade [2010] 31 QLCR 52
Courtney Bay Pty Ltd v Gold Coast City Council [2004] QLC 103
EB v. CT (No 2) [2008] QSC 306
Hancock Coal Pty Ltd v Kelly & Ors [2013] QLC 9
Jones v Dunkel (1959) 101 CLR 298
Joyce v Northern Electric Authority of Queensland (1974) 1 QLCR 171
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11
Longeranong Pty Ltd v Electricity Trust of SA (1990) 71 LGRA 316
Lowry v Coordinator-General (2011) 32 QLCR 263
Lowry v Coordinator-General (2012) 33 QLCR 263
Maroochydore Central Holdings Pty Ltd (No. 2) v Maroochy Shire Council [2007] 28 QLCR 95
R v War Pensions Entitlement Appeal Tribunal; ex parte Bott (1933) 50 CLR 228
Urban Transport Authority v Nweiser (1992) 28 NSWLR 471

APPEARANCES: Mr ANS Skoien of Counsel for the applicant
Mr DA Quayle of Counsel for the respondent

SOLICITORS:	Butler McDermott Lawyers for the applicant Clayton Utz for the respondent

Background

[1] This is a claim for compensation by Debbie Ann Bresnahan (the applicant) for compensation consequent upon the taking of a critical infrastructure easement (the easement) over the applicant's land by the Coordinator-General (the respondent) in order to enable the construction and operation of the Northern Pipeline Interconnector Stage 2 (the project)

[2] The taking occurred pursuant to the *State Development and Public Works Organisation Act 1971* (the SDPWOA).

[3] The applicant's property is located at 209 Bunya Road, North Arm, and has a total area of 19,470 m². The easement affects 1,515 m² of the applicant's property.

[4] The easement accommodates an underground water pipeline which was laid in the applicant's property in 2011.

[5] The easement overlays an existing electricity easement (the electricity easement) granted to SEQEB in 1992 and now held by Energex.

[6] The electricity easement accommodates overhead, high voltage power lines.

The Project

[7] On 15 May 2009 a declaration was made pursuant to s 76E of SDPWOA that the project be both a "prescribed project" and a "critical infrastructure project". The purpose of the project was to ensure water supplies in South East Queensland, under the *Water Regulation 2002*, by the construction of an underground reverse-flow water pipeline from the Landers Shute Water Treatment Plant, Eudlo, to the Noosa Water Treatment Plant, near Cooroy.

[8] Pursuant to the then *State Development and Public Works Organisation Regulation 1999*, the Southern Regional Water Pipeline Company Pty Ltd (SRWPC) was directed by the respondent to carry out the works for the project. SRWPC traded at all relevant times as LinkWater Projects.

[9] The respondent licenced LinkWater Projects on 24 December 2009 to enter the easement over the applicant's land and other land covered by the easement in order to construct the project in accordance with the easement terms.

[10] LinkWater Projects appointed the Northern Network Alliance (NNA) as the contractor to construct the project. NNA was an alliance made up by Kellogg Brown and Root Pty

Ltd, Abigroup Contractors Pty Ltd, McConnell Dowell Constructors (Aust) Pty Ltd and LinkWater Projects.

[11] On 27 June 2012 the respondent licenced the Queensland Bulk Water Transport Authority (QBWTA) to use the easement in accordance with the easement terms. QBWTA traded at all relevant times as LinkWater.

[12] LinkWater Projects handed the pipeline and all associated infrastructure to LinkWater on 6 July 2012.

[13] On 1 January 2013 the easement was transferred by regulation from the respondent to the Queensland Bulk Water Supply Authority, known as Seqwater. Seqwater is the successor to LinkWater.

The Resumption

[14] It is common ground between the parties that the respondent took the easement on 1 December 2009 (the date of resumption).

[15] The compensation payable by the respondent to the applicant as a consequence of the taking of the easement falls to be assessed under the *Acquisition of Land Act 1967* (ALA).

[16] The easement runs in a north/south direction through the applicant's land. The easement is 30.3 m wide and 50 m long. A dwelling house is located to the east of the easement. The balance of the applicant's land is improved by various fences, paddocks, a round yard, a horse wash-down area, and other rural improvements.

The Claim for Compensation

[17] The applicant's total claim for compensation is $215,088.65, comprised of $113,000.00 for land value and $102,088.65 for disturbance.

[18] The case is unusual in that there are a large number of disturbance items, some of which are for small sums. Only one of the disturbance items is agreed by the respondent.[1]

[19] Of course, even though some components of the disturbance claim are quite small, in total they amount to almost 50% of the total claim, and much of the evidence at the hearing concerned disturbance costs.

[20] A break-down of the disturbance costs is as follows:

(a)	Lost earnings	$15,000.00
(b)	Painting internal walls	$3,000.00
(c)	Painting external walls	$7,400.00
(d)	Telephone and fuel expenses	$2,500.00
(e)	Stock damage (shoes stored under the dwelling):	$3,280.00
(f)	Reinstatement of a storm water drain:	$3,300.00

[1] That being valuation fees of $3,025.00.

(g)	Colourbond fence to northern boundary (80 m):	$6,800.00
(h)	Costs of removal of contractor's material:	$270.00
(i)	Value of materials and equipment on adjoining land:	$956.80
(j)	Loss of rent:	$7,220.00
(k)	Horse supplement:	$4,144.00
(l)	Loss on sale of mare "Demi":	$2,100.00
(m)	Cost of Water and Electricity:	$500.00
(n)	Cost of fertilizer:	$384.00
(o)	Landscaping mix:	$16,920.00
(p)	Turf blend:	$538.85
(q)	Lilly Pilly trees:	$1,000.00
(r)	Legal Fees:	$23,750.00
(s)	Valuation fees:	$3,025.00
TOTAL		$102,088.65

The Hearing

[21] The hearing of this matter originally occupied five sitting days, including an inspection of the applicant's property and sales properties referred to by the expert valuers. The inspection assisted the Court with understanding evidence given in this matter.

[22] The applicant was represented by Mr Skoien of Counsel, instructed by Butler McDermott Lawyers. The respondent was represented by Mr Quayle of Counsel, instructed by Clayton Utz.

[23] Expert valuation evidence was provided by Mr Henderson, called by the applicant, and Mr Rabbitt, called by the respondent. Both were subject to detailed cross-examination.

[24] Oral evidence was also provided by the applicant. The applicant also relied on a number of affidavits by others who were not required for cross-examination.

[25] Mr Edwards gave oral evidence on behalf of the respondent.

[26] Both the applicant and the respondent made written objection to parts of the affidavit evidence relied on by the other. It was agreed that decisions with respect to each objection would be dealt with as part of the final decision by the Court, with the parties each providing to the Court written submission in response to the objections.

[27] I subsequently undertook a substantial amount of work in preparing this matter for its decision, which was expected to be handed down in late September/early October 2014. However, it became apparent that the Court did not have the applicant's written submissions in response to the respondent's objection to various parts of the statements relied upon by the applicant.

[28] Accordingly, the matter was relisted. The applicant advised that the response submissions to the respondent's objections had unfortunately been overlooked.

[29] The applicant subsequently made an application for leave to make written submissions on the objections. The applicant also provided written submissions on objections in the event that leave was granted.

[30] Submissions finally closed on 8 December 2014 and the matter was reserved for decision.

[31] Given the applicant's application for leave to make written submissions on objections it is appropriate that I turn next to consider that application.

Application for leave to make written submissions on objections

[32] As already indicated, the applicant has made an application for leave to make written submissions on objections. The basis of the application for leave is as follows:[2]

> "(a) the parties proceed at the hearing on the basis that such written submissions would be provided;
>
> (b) there can be no prejudice to the Respondent from the provision of those written submissions, since it was always anticipated that such written submissions would be provided and any costs associated with responding to those submissions would always have been incurred.
>
> (c) in fairness, the Applicant ought to have an opportunity to provide such a response, and, in any event, the Court ought to make its decision in respect of the objections on the basis of submissions from both parties; and
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> (d) the submissions are in relatively short compass (reflecting the limited scope of the objections taken by the Respondent)."

[33] The parties agree with the principles which the Court has to consider in deciding an application such as this. Firstly, it is necessary for the applicant to explain the failure to make submissions at trial. This has been done by the applicant, who has explained that the failure was through oversight.

[34] As that hurdle is overcome, it is next necessary for the Court to determine if the interests of justice are better served by allowing or refusing the application.[3] This inquiring requires the weighing of competing matters, such as the prejudice (if any) to the applicant if leave to reopen is not granted; the prejudice to the (innocent) respondent if leave is granted; and the overarching need for the Court to control its own processes and to encourage the finality of litigation. To this can be added the overriding philosophy of the Court to facilitate the just and expeditious resolution of the real issues in dispute in proceedings with a minimum of expense.

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2 Applicant's submissions 17 November 2014.

3 See *EB v. CT (No 2)* [2008] QSC 306.

[35] In this regard, I note the observations of Clark JA in *Urban Transport Authority v Nweiser*.[4] Such observations were cited with approval by Shepherdson J in *EB*. Clark JA stated that:[5]

> "The primary purpose for the rules pursuant to which cases are contested in this State is the furtherance of the interests of justice. For this reason the exercise of the discretion to allow an application to reopen depends essentially upon the trial judge's view as to whether the interests of justice are served better by granting than refusing the application. Of course there needs to be finality in litigation and a limit upon the number of issues which it is open to the parties to contest at a hearing"

[36] The respondent opposes the application for leave on three grounds. Firstly, the respondent contends that the objections are not complex and that the Court is well equipped to rule on the objections whether or not the applicant puts submissions to those objections.

[37] Secondly, the respondent says that there will be a material cost prejudice to the respondent if leave is given. This is said to arise because the respondent's advisers are not now as familiar with the material as they were at the time the submissions by the applicant should have been made, which was at the hearing. In short, the respondent says that its advisors will have to reacquire lost knowledge, which can only be done at a cost to the respondent.

[38] Finally, the respondent submits that a refusal by the Court to grant leave will promote efficiency in both time and cost and promote the finality of litigation.

[39] The respondent concludes by submitting that in "circumstances where a refusal will not materially prejudice the applicant, these considerations, and fairness to the respondent, are persuasive".[6]

[40] Turning to the first point which is the assertion that the objections are not complex, the applicant points out that, whether the objections are complex or not, the applicant has an entitlement to natural justice which dictates that the applicant has a right to be heard.

[41] To an extent, I agree. However, any such right cannot be without limits. Clearly, enough, the applicant unquestionably had the right to respond to the objections during the actual hearing. She failed to do so by oversight, not because of any reasoned, concluded decision on her part.

[42] As regards the second point, the applicant says that the respondent cannot suggest that the objections are so simple and routine that the applicant does not need to be heard, but that, if the applicant is heard, the respondent would be put to greater cost in responding to

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4 (1992) 28 NSWLR 471.
5 Ibid [476].
6 Respondent's submissions, 4 December 2014, paragraph 9.

those submissions because the hearing ended some time ago. The applicant then goes on to submit as follows:[7]

> "Examination of the objections themselves and both the Applicant's proposed Written Submissions and the Respondent's proposed Written Submissions reveals the hollow nature of the Respondent's contentions that it will be '*prejudiced*' in having to respond at this time. The Applicant contends that the relevant evidence is admissible because it tells the full story of the Applicant's experience during the resumption process and the works, in respect of which the Applicant claims certain limited sums for certain limited expenses that she has reasonably incurred or will reasonably incur. The Respondent effectively says that all such evidence, except from the evidence of the actual expenses themselves, is inadmissible. The difference in approach to evidence reflects the difference in approach to the question of reasonableness in assessing compensation."

[43] As to the third point relating to efficiency and finality of litigation, the applicant says that her proposed written submission on the respondent's objections are evidence themselves that the grant of leave will promote efficiency and finality to the litigation; provide fairness to both parties; and avoid any material prejudice to any party.

[44] On balance, I agree with the submissions of the applicant regarding the second and third points. I do accept however, that although not complex, the respondent was put to greater expense in responding to the submissions of the applicant many months after the hearing than it would have been had hose submissions been made during the substantive hearing. That however is more an issue which can be addressed through an award of costs rather than a refusal of the application.

[45] I am satisfied that it is appropriate given all the circumstances of this matter to grant leave to the applicant to make written submissions on the respondent's objections. I am further satisfied that there should be an award of costs to the respondent consistent with that sought by the respondent, which is that there be an order that the extra cost the respondent is put to in addressing the applicant's submissions after the close of the hearing by paid by the applicant in any event.

Objections to Statement Evidence

[46] As I have already indicated, both the applicant and the respondent have objected to certain evidence contained in affidavits presented by the other. There is no shortcut or easy way to deal with these objections; each must be answered individually. However, there are some general observations which should be made before I embark on the exercise of addressing each objection.

[47] There is an over-riding principle which must be applied in the Court. That is, the Court is to be guided by equity and good conscious in exercising its jurisdiction, and is not bound

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7 Applicant's submissions, 8 December 2014, paragraph 7.

by the rules of evidence. This is set out in s 7 of the *Land Court Act 2000* (LCA) which provides as follows:

> "**7 Land Court to be guided by equity and good conscience**
> In the exercise of its jurisdiction, the Land Court—
> (a) is not bound by the rules of evidence and may inform itself in the way it considers appropriate; and
> (b) must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other courts."

[48] As I said in the acquisition case of *Lowry v Coordinator-General*,[8] the question of what it means for a judicial body to not apply, or not be bound by, the rules of evidence, has itself been subject to much discussion, both by commentators and by the judiciary. As Mr Justice Giles said in his article "Dispensing with the Rules of Evidence" in the Australian Bar Review:[9]

> "Writing in 1947, Maguire said that:
> > … a student of evidence must accustom himself to dealing as wisely and understandingly as possible with principles which impede freedom of proof. He is making a study of calculated and supposedly helpful obstructionism.
>
> The thrust of the chapter in which this appeared was that the rules of evidence were generally concerned with excluding relevant evidence, rather than evaluating the evidence which was let in – regarding as relevant evidence anything which had a logical tendency to establish one way or another the contested issues of fact. The description of the rules of evidence as exclusionary of probative material is generally accepted, see *Cross on Evidence* stating that by those rules 'the law of evidence declares that certain matters which might well be accepted as evidence of a fact by other responsible inquirers will not be accepted by the courts'.
> Why should relevant evidence, probative evidence, evidence upon which we may act in everyday life, be excluded? Thayer espoused a theory of evidence by which –
> > ... the rules of evidence should be simplified; and should take on the general character of principles, to guide the sound judgment of the judge, rather than minute rules to guide it. The two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."

[49] A case considering when the principles should be applied, was the High Court decision of *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott*.[10] In that case Justice Everett was in the minority, but he made the following comment which has been oft repeated:[11]

> "Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to

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8 (2011) 32 QLCR 263.
9 (1991) 7 Australian Bar Review 233
10 (1933) 50 CLR 228.
11 Ibid at 256.

evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of enquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'."

[50] What though does it mean to administer 'substantial justice'? In the article I referred to earlier, Justice Giles makes the following pertinent observation:[12]

> " Commonly, natural justice will require that the opposing party be allowed to test the evidence by some form of cross-examination. But natural justice does not necessarily require testing by cross-examination (see *Bott's* case), and fairness may be met by an opportunity to contradict and comment. Even to the contrary: in *Bushell v Secretary of State for the Environment* Lord Diplock suggested that cross-examination might be unfair as 'over-judicialising' an administrative enquiry.
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> Natural justice may go so far as to require that evidence which is relevant none the less be excluded because it would be unfair to admit it. For example, in *Re Pacific Film Laboratories Pty Ltd and Collector of Customs*, the Administrative Appeals Tribunal rejected the tender of the transcript of a tariff enquiry because it would be unfair to have regard to it when the applicant had had no opportunity to cross-examine those who appeared before the enquiry. With this may be compared *Re Barbaro and Minister of Immigration and Ethnic Affairs* where Davies J admitted the Woodward Report (the Royal Commission into Drug Trafficking) for its findings in relation to the applicant although the applicant had not appeared before the Commission. Another example comes from *R v Hull Visitors; Ex parte St Germain (No 2)* where it was said by the Divisional Court that although the tribunal could receive hearsay evidence, the overriding obligation to provide a fair hearing could mean that if the original source of the evidence was not available for cross-examination the tribunal might have to exclude it."

[51] The Land Court and the Land Appeal Court has considered the impact of s 7 of the LCA many times. For instance, the Land Appeal Court had this to say in *Maroochydore Central Holdings Pty Ltd (No. 2) v Maroochy Shire Council*:[13]

> "[46] Finally, while this Court is required pursuant to s.7 of the *Land Court Act 2000* to act according to equity, good conscience and the substantial merits of the case, that does not mean that well-established principles of law are to be disregarded. Legislative provisions such as s.7 of the *Land Court Act 2000* are intended to be facultative and to free the Court from some of the more technical constraints applicable in superior courts. However, they do not provide a means of allowing the Court to act in an arbitrary way or in a way to avoid the consequences of established rules of law."

[52] In *CH4 Pty Ltd v The Minister for Natural Resources, Mines and Energy and Minister for Trade*,[14] I had this to say:

> "[27] Section 27 of the LAC is the overarching principle of the Court as propounded in many Land Court and Land Appeal Court decisions and upheld in the Court of Appeal in the case of *Townsville City Council &*

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12 (1991) 7 Australian Bar Review 248.
13 [2007] 28 QLCR 95 p 10, [46].
14 [2010] 31 QLCR 52.

Anor v Department of Main Roads [2015] QLC 226 per McMurdo P, Keane JA, White J.

[28] This does not mean that the principles of natural justice and procedural fairness are dispensed with. Rather, as stated in a recent decision by then Member Jones in *Body Corporate for Parklands CTS and Anor v. Department of Natural Resources and Water* [2009] QLC 0065 at paragraph 18 paraphrasing *Cox v. Commissioner of Water Resources* (1992) 14 QLCR 304 (LAC):

> 'The equity and good conscience provisions do not empower the Land Court or the Land Appeal Court to ignore established principles of law or to dispense justice other than in accordance with basic principles of natural justice to all parties.'

[29] Member Jones goes on to say at [21-22]:

> '…it must be stressed that I am not attempting to formulate a test or rigid formula applicable to all applications brought in the Land Court. Each must be dealt with on its own facts, circumstances and merits…The force and effect of s.(7) of the LCA must not be construed in such a way as to limit the flexibility Parliament intended the Land Court to have in the exercise of its jurisdiction. However, in applications such as this and in many other cases no doubt, hearsay evidence, if admitted, runs the real risk of unfairly advantaging one party and disadvantaging the other. That is so because the evidence cannot be adequately challenged or otherwise tested."

[53] What can be seen as a paradox in applying s 7 of the LCA was discussed by the Court in the case of *Hancock Coal Pty Ltd v Kelly & Ors*:[15]

> "Now that itself can be a difficult provision to apply because it also contains provision that the Court is not to be bound by the rules of evidence, and is to follow principles of equity and good conscience. It is of course, the very rules of evidence that have to be considered in applying what relevance and weight is provided to any material, and so it simply comes to a strange situation where you receive material which may not have otherwise been received under the rules of evidence, and use those same rules of evidence to deal with that material. So even on its face, a legislative provision which appears to make the Land Court, as it has been referred to, as the 'People's Court', is not as straightforward as it would otherwise seem."

[54] The authorities I have discussed above will be used by me to help inform as to the manner in which my discretion is to be exercised with respect to each objection by each party.

[55] I turn first to consider the objections made by the applicant to certain parts of the affidavit of Nathan Edwards (Edwards) filed on 17 April 2014. The Edwards' affidavit is Ex 4.

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15 [2013] QLC 9 at [2].

[56] The respondent has conceded the objection raised to paragraph 41 of the Edwards' affidavit. Accordingly, it is not necessary to consider paragraph 41 further. Paragraph 41 of the Edwards' affidavit is excluded.

[57] None of the other objections made by the applicant to the Edwards' affidavit have been conceded. Those objections fall into three categories: hearsay; documentary hearsay; and "without prejudice" communications. Save for a few stated exceptions, the applicant objects to all the documents exhibited to the Edwards' affidavit (the documentary hearing objection).

[58] Edwards holds the position of Director of the Land Acquisition and Delivery Division in the office of the respondent, and has done so since 2008, save for a period when he acted in another position with the respondent. What Edwards has done with his exhibits, essentially, is to collate the relevant material that the respondent has been able to obtain which relate either specifically or generally to the applicant's claim. The documents were not originally created by Edwards.

[59] Consistent with the approach taken by the respondent in its submissions in response to the applicant's objections, I will deal with the documentary hearsay objections first.

[60] The applicant has not expanded her objections further than the bare contention of documentary hearsay. No authorities are cited. There has been no examination of the impact of s 7 of the LCA.

[61] The respondent contends that the exhibited documents are admissible as exceptions to the rule against documentary hearsay contained in s 92 of the *Evidence Act 1977* (Evidence Act) in particular ss 92(1)(b) and 92 (2)(d).

[62] The respondent then goes on to submit as follows:[16]

> "2. The respondent submits that the objection advanced at paragraph 3 should not be upheld because: …
>
> (b) these proceedings are civil and the facts contained in the documents exhibited to Mr Edwards' statement are facts about which direct oral evidence would be admissible;
>
> (c) as Mr Edwards explains in paragraph 18, and reinforced orally, the exhibited documents form part of the records relating to the undertaking of the respondent and were made in the course of that undertaking – namely the Northern Pipeline Interconnector Stage 2. The term 'undertaking' has been given very wide application and unarguably, the respondent's undertaking in the taking of easements for the purpose of construction of the project as explained by Mr Edwards at paragraphs 1 – 15 of his affidavit, engages the section.;

[16] Respondent's written objection response submissions, handed up on 12 May 2014, paragraph 2(b) – (f).

(d) it may reasonably be supposed that such documents were made from information supplied (directly or indirectly) by persons who had personal knowledge of the matters dealt with in the documents – as much is self-evident from the face of the documents themselves;

(e) furthermore, as is explained by Mr Edwards (in paragraphs 4 to 15 of the affidavit) and again, reinforced under cross-examination, the project was a large and complicated project involving a number of departments and, it can reasonably be inferred, a great many people, many of whom dealt with multiple landowners and did not stay in the same roles for the entire duration of the project; and

(f) in those premises, it is a safe inference that while those who wrote the letters and generated the documents which are exhibited to Mr Edwards affidavit, can reasonably be supposed to have had personal knowledge of the matters referred to in those documents when they were created, it cannot reasonably be supposed that those people would have any personal recollection of the matters dealt with in those documents now, given the lapse between 2 and 4 years and given the volume of exchanges such persons would have had with the people affected by the project."

[63] Section 92 of the Evidence Act provides as follows:

"**92 Admissibility of documentary evidence as to facts in issue**

(1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if—

(a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or

(b) the document is or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.

(2) The condition in subsection (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where—

(a) the maker or supplier is dead, or unfit by reason of bodily or mental condition to attend as a witness; or

(b) the maker or supplier is out of the State and it is not reasonably practicable to secure the attendance of the maker or supplier; or

(c) the maker or supplier can not with reasonable diligence be found or identified; or

(d) it can not reasonably be supposed (having regard to the time which has elapsed since the maker or supplier made the statement, or supplied the information, and to all the circumstances) that the maker or supplier would have any recollection of the matters dealt with by the statement the maker made or in the information the supplier supplied; or

(e) no party to the proceeding who would have the right to cross-examine the maker or supplier requires the maker or supplier being called as a witness; or

(f) at any stage of the proceeding it appears to the court that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling the maker or supplier as a witness.

(3) The court may act on hearsay evidence for the purpose of deciding any of the matters mentioned in subsection (2)(a), (b), (c), (d) or (f).

(4) For the purposes of this part, a statement contained in a document is made by a person if—

(a) it was written, made, dictated or otherwise produced by the person; or

(b) it was recorded with the person's knowledge; or

(c) it was recorded in the course of and ancillary to a proceeding; or

(d) it was recognised by the person as the person's statement by signing, initialling or otherwise in writing."

[64] While I appreciate the force of the respondent's submissions, I am not necessarily satisfied that a period of two to four years is enough to support an assertion that the persons who made the documents could not reasonably be held, as at the date of the hearing, to have any personal recollection of those documents. My concerns in this regard are tempered somewhat by the size and complexity of the project which has been well described by Edwards.

[65] My concerns are further lessened following a perusal of the exhibits to the Edwards' affidavit. The exhibits can generally be described as consistent with what one would expect to find on government files for a project of such size and complexity that it requires coordination by the respondent. These documents include ones such as the LinkWater Consent Guidelines, February 2010.[17] Another document is a letter from the Minister for Infrastructure and Planning,[18] written in response to a letter to the Minister by the applicant (which is also exhibited).[19]

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17 Ex 4 pages 42-62.

18 Ex 4 pages 163-4.

[66] Were the Land Court a superior court to which all of the rules of evidence applied, the objections to documentary hearsay made by the applicant may have some force, at least for some of the documents. However, I must also take into account s 7 of the LCA, which I have already discussed in detail.

[67] Specifically bearing the provisions of s 7 of the LCA into account, and noting the exceptions to documentary hearsay contained in s 92 of the Evidence Act, I consider it appropriate, on balance, to reject the objections of the applicant based on documentary hearsay.

[68] I now turn to the applicant's objections based on hearsay. These objections relate to paragraphs 20, 21, 22, 23, 24, 25, 27, 29, 30, 31, 32, 33, 34 and 35 of the Edwards' affidavit.

[69] Again, the applicant has said nothing more in her submissions other than that the paragraphs contain hearsay.

[70] In response, the respondent has submitted as follows:[20]

> "To the extent Mr Edwards has set out a précis of the contents of some of the documents he exhibits, that is no more than an aid to comprehension and, in circumstances where the document is exhibited so that the reader of the affidavit may assess the reasonableness and accuracy of the précis, is appropriate and permissible."

[71] As the authorities referred to earlier show, the Land Court may receive evidence which would otherwise be excluded on the basis of hearsay, but the weight which will be given to such evidence will be determined by analysing such evidence through the prism of the rules of evidence.

[72] I agree that the mentioned paragraphs of the Edwards' affidavit contain hearsay. However, I also agree with the assertions of the respondent that such hearsay is in effect nothing more than a summary of what is contained in documents which are exhibited to the Edwards' affidavit. The exhibited documents speak for themselves, but the stated paragraphs are helpful, albeit in a very limited sense. The objections to each stated paragraph of the Edwards' affidavit are refused, but the weight to be given to paragraphs 20, 21, 22, 23, 24, 25, 27, 29,30,31, 32, 33, 35 and 35 is minimal

[73] The final aspect of the applicant's objections relate to additional objections to exhibited documents to the Edwards' affidavit contained at pages 24 to 27 on the basis that they contain "without prejudice" negotiations.

[74] The respondent has not responded to these objections.

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19 Ex 4 pages 161-2.

20 Respondent's written objection response submissions, handed up on 12 May 2014, paragraph 4.

[75] The document at page 24 to 25 is a letter from the Alliance Manager to the applicant's solicitor. Part of that letter is clearly marked "without prejudice", and the letter is not authorised by the respondent so the respondent cannot waive the claimed privilege. Accordingly, the objection is allowed for so much of the letter at pages 24 and 25 which is clearly within that marked "without prejudice", being all of the words from and including the words "without prejudice" on page 24 to and including "freecall 1800 243 998" on page 25. Such words are struck out.

[76] I now turn to consider the respondent's objections. They are quite numerous. There are 66 distinct objections to the applicant's statement; one objection to the entirety of Peita Hills' statement; five objections to the statement of Paul Garner; one to the statement of Rachel Geering; one to the entire statement of Ross Little; 10 to the statement of Vera Taylor; three to the statement of David Gaffa; and 11 to the statement of Jodie Ticknell; making a total of 106 objections in all.

[77] The respondent submits that its objections need to be dealt with on a case by case basis, taking particular note of the contents of each part of each statement objected to. The respondent's submissions address each objection individually.

[78] The applicant, on the other hand, has summarised the objections into five discreet heads, and has then made submissions relating to each head of objection.

[79] As the respondent has discretely addressed each objection, it is appropriate for the Court to make a ruling on each objection. However, there is of course overlap in the objections, so the process will be assisted by, firstly, considering the five groupings of objections as arranged by the applicant, and the specific submissions of the parties to those groupings. I note of course that, whilst maintaining each individual objection, the respondent also made submissions based on the applicant's grouping of submissions.

[80] The applicant's groupings of the respondent's objections are as follows:

- Relevance
- Repetition
- Hearsay and Assumption of Facts
- Submissions/Comments/Swearing the Issue/Opinions
- Scandalous or Inflammatory Evidence

[81] I will examine each of these groups sequentially, under separate sub-headings, and then turn to address each individual objection. My comments as regards the relevant statutes and case law detailed in my analysis of the applicant's objections of course continue to apply, where relevant, to the analysis of the respondent's objections. As well as I can, I

will attempt to limit repetition, particularly of general comments such as the operation of s 7 of the LCA.

[82] Due to the manner in which the applicant has addressed the respondent's objections, for the purposes of the five groupings I will refer first to the applicant's response submissions and then to the respondent's reply submissions. What will follow each analysis is a general finding relating to that group. Specific findings will only be made on the analysis of each individual objection and the respondent's submissions on each such objection.

[83] In the scheme of things, the parties' written submissions on each objection grouping are relatively short. I will therefore mostly allow those submissions to speak for themselves.

Relevance

[84] In her written submissions on the issue of the objections made by the respondent which the applicant has classified as relevance objections, the applicant had this to say:[21]

> "3. It is quite apparent that the Respondent's Objections about relevance highlight the failure of the Respondent to come to terms with the basis for the Applicant's limited claims for compensation (small as they are) arising from the Applicant's complaints about the effect of the resumption and the consequent performance of works on her land. The Respondent's claims that parts of the statements of the Applicant's witnesses are irrelevant depend upon the Respondent's apparent view that the reasonableness of the Applicant's conduct and, of consequently, the reasonableness of the Applicant's limited claims for compensation for various aspects of loss and damage suffered by her, are entirely unrelated to the Applicant's experiences as a result of the resumption and the works.
>
> 4. As the Court is well aware (from the oral submissions already made at the hearing in respect of the substantive issues in the case), the Applicant submits that the merits of her claims ought to be viewed in the context of the Applicant's experiences at the hands of the constructing authority (and its servants, agents, contractors etc.).
>
> 5. Evidence of these experiences is able to be given by the Applicant herself and by other witnesses. In such circumstances, evidence does not have to be directly related to a particular claim or disputed fact in order to be relevant and admissible in the proceeding.
>
> 6. There is no substance to the suggestion that evidence is irrelevant."

[85] The respondent has responded to such submissions as follows:[22]

> 8. The applicant meets all of the many objections based on relevance by reference to the submission made in paragraph 4: *'…the Applicant submits that the merits of her claims ought to be viewed in the context of the Applicant's experiences at the hands of the constructing authority…"*. The

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21 Applicant's response submissions to the respondent's objections, 17 November 2014, paragraphs 3-6.

22 Respondent's reply objection submissions, 4 December 2014, paragraphs 8-11.

thrust of this submission is that irrelevance is overcome by characterising the evidence as context.

9. It may well be right that on the question of whether certain behaviour of the applicant was reasonable or not and so whether certain claims, if otherwise proved to the requisite standard, are found to be causally related to the resumption, evidence of relevant context, if given in an admissible form will be received. But the limitations are self-evident as the underlining shows. The applicant cannot make irrelevant evidence admissible merely by labelling it context.

10. The point can be tested by attempting to align the applicant's submission with the following exemplar paragraphs from the applicant's evidence which are objected on the ground of relevance:

    (a) from the statement of Ms Ticknell:

        15. As an example, Brittany in 2010 was selected with six other children to represent OLD [sic: QLD] in New Zealand through Pony club to compete and represent our State being the team of 2011 which is a programme that has been in place for many years. Our representatives selected are then billeted by a New Zealand family and in turn when the New Zealand riders arrive in Australia, we as a zone billet their children selected out in our homes and they compete in event in Australia. Debbie was under such enormous pressure she book Brittany's flight to New Zealand and booked her into the wrong airport. Brittany was meant to fly into Auckland but as Debbie's focus was on the pressures of the pipeline construction she booked Brittany into Christchurch International Airport being on the southern island of New Zealand and not the northern island. Debbie than had to organise extra domestic flights so her daughter was not stranded in New Zealand on the wrong island.

    (b) from the statement of Ms Taylor as follows:

        12. In my opinion the pipeline workers did not have to use Debbie and Tim's property after they completed laying the pipes on their land, as they could have driven out of their driveway and drove 200 metres to the corner and used the public road to access the properties further on down the line, but instead they used Debbie's property like a highway for more than one year, with no regard for the safety of my grandchildren and everyone else for that matter, not to mention the inconvenience of the access to our stock.

11. These paragraphs are irrelevant. They are not admissible context. The objections are not made to admissible context. The objections on the ground of relevance should be upheld."

[86] Relevance of any particular piece of evidence can at times be a difficult concept to get one's head around, particularly if the opposing parties present their cases in different ways, as has occurred in this matter.

[87] Issues of relevance fall into one of three categories from my experience, being either evidence that is clearly relevant, clearly irrelevant, or in a grey area somewhere in between.

[88] I understand the applicant's point in attempting to put forward evidence to paint a picture of the impact of the project on the applicant's life particularly during the construction phase of the project, and of the argued resulting impact that the project in the manner in which it was undertaken had on the specific heads of claim made by the applicant for disturbance items. However, that does not mean that every moment of the applicant's life throughout the period of construction of the project is evidence that would be relevant in these proceedings. Far from it. There must be some nexus between the claims made by the applicant pursuant to the provisions of the ALA and the evidence.

[89] In general terms, I propose to allow all of the clearly relevant evidence, as I am of course bound to do, as well as that evidence which falls into the "grey" category, although the weight to be given to such evidence will necessarily be lessened. I will generally accept evidence where there is some doubt as to its relevance, taking a conservative approach in favour of the applicant and in accordance with my understanding of s 7 of the LCA.

[90] Applying this approach to the two examples provided by the respondent, I intend to rule in each case that such evidence is irrelevant and should be excluded. As regards the evidence of Ms Ticknell relating to the applicant booking her daughter to the wrong airport in New Zealand, such evidence does not have even a cursory relationship to any of the claims made by the applicant in these proceedings.

[91] As regards the contents of paragraph 12 of the statement of Ms Taylor, I am also of the view that it is irrelevant what opinion Ms Taylor has as to the manner in which the construction work undertaken on the easement as part of the project was conducted. What is important to the claims for disturbance items made by the applicant is evidence relating to the actual disturbance suffered by the applicant which is properly claimable under the ALA. Ms Taylor's paragraph 12 is irrelevant.

Repetition

[92] As to the respondent's objection on the basis of repetition, the applicant has this to say:[23]

> "7. Production of evidence that repeats evidence of other witnesses is not objectionable. This is not a valid ground of objection.

[23] Applicant's response submissions to the respondent's objections, 17 November 2014, paragraphs 7-9.

8. Here, mindful that the Respondent has chosen to challenge the numerous, small claims by the Applicant, and bearing in mind that the Applicant maintains that her claims are reasonable, given her treatment by the constructing authority, the Applicant has proffered evidence from various witnesses to corroborate her own evidence. That corroboration involves both direct observation of matters and evidence of the Applicant's complaints about matters.

9. The fact that the Respondent has chosen not to challenge the Applicant about most of the Applicant's poor experiences during the lengthy construction works does not render inadmissible the evidence of numerous other witnesses about those same matters – rather it serves to strengthen the Applicant's case and establish the reasonableness of her limited claims."

[93] The respondent replied as follows:[24]

"12. Again, because of the manner in which it is framed, the response misfires. It can be accepted that there are instances where evidence which repeats or corroborates the evidence of other witnesses will be received, but the instances in this case where objection is taken on this ground, when addressed individually as they must be, do not fall into this category.

13. Also, there is a theme in the response generally that any evidence to which objection is taken, concerns *'the Applicant's poor experiences during the lengthy construction works…*'; paragraph 9 is an example as are paragraphs 3 and 4. That is a further gloss. By way of example: objection is taken to paragraph 6 of Ms Hill's statement because it addresses in a very superficial way, topics addressed in very substantial detail by others. It is not about the applicant's poor experiences and would not be rendered admissible if it was."

[94] The respondent's objections made on the basis of repetition alone are relatively easily dealt with. If evidence is not admissible, repeating that same evidence multiple times does not serve to somehow make it admissible. Each statement of inadmissible evidence remains inadmissible.

[95] However, if what is occurring is nothing more than evidence which sets out to collaborate admissible evidence already given by another source, then the repeated evidence is equally admissible.

[96] Of course, if there is an oppressive amount of repetition which is clearly not necessary, that may well be a different issue. At the very least, that may be an issue that would be appropriately raised at any costs assessment at the end of the day.

[97] It is difficult to have anything more definitive to say regarding this generalised ground of objection as it really will be dependent upon the particular evidence in particular paragraphs objected to whether or not such evidence is repeating inadmissible evidence or collaborating admissible evidence.

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24 Respondent's reply objection submissions, 4 December 2014, paragraphs 12-13.

Hearsay and Assumption of Facts

[98] Objections on the basis of hearsay and assumption of facts have been grouped together by the applicant, who makes the following submissions in this regard:[25]

> "10. The Respondent alleges that some parts of the statements of some of the Applicant's witnesses contain hearsay, although, in reality, there is very little challenge to the Applicant's evidence on this basis.
>
> 11. As noted above, it is submitted that the evidence adduced by the Applicant's witnesses concerning statements of the Applicant and others, consistent with the Applicant's case concerning her poor experiences following the resumption, are admissible in evidence to confirm the complaints by the Applicant about those experiences.
>
> 12. Insofar as the Respondent says that parts of the statements of the Applicant's witnesses are inadmissible because they do not expressly identify other facts upon which such evidence may be based, these objections by the Respondent simply go to the weight to be afforded to that evidence. In circumstances where the Respondent did not seek to question relevant witnesses about their ability to make statements, it is submitted that the Court should accept that evidence at face value.
>
> 13. Finally, it is submitted that the Respondent's Objections to evidence on the basis of hearsay and assumption of facts ought to be assessed in the light of the case put forward by the Respondent at the hearing. Whereas the Applicant called witnesses who had knowledge of various matters affecting the subject land and the Applicant at relevant times, the Respondent:
>
> (a) did not seek to cross-examine any of those witnesses;
>
> (b) largely did not challenge the Applicant about any of her statements about her experiences or matters affecting the subject land or the works; and
>
> (c) in contrast, called only one witness, Mr Edwards, who had no personal knowledge of any relevant matters and who merely produced a bundle of documents prepared by other people, who were not made available for cross-examination and whose absence was not explained.
>
> 14. At the end of the day, it is submitted that the Court would reject the Respondent's submissions that the Applicant's statements contained inadmissible hearsay or statements based upon assumed facts and give considerable weight to that evidence where it is considered important."

[99] Again, the respondent rejects the contentions of the applicant. The respondent put its reply this way:[26]

> "14. The themes of context and evidence of poor experiences are taken up again – paragraph 11; as is the complaint directed at the election not to cross-examine which is addressed above. The submission in paragraph 13 is irrelevant – it is no answer to an objection to assert that a portion of the

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25 Applicant's response submissions to the respondent's objections, 17 November 2014, paragraphs 10-14.

26 Respondent's reply objection submissions, 4 December 2014, paragraphs 14-16.

objector's own evidence suffers the same vice (not that the respondent's evidence does). In the event, the submission does not actually address the objections.

15. In *CH4 Pty Ltd v The Minister for Natural Resources Mines and Energy and Minister for Trade* [2010] QLC 37 per Mr PA Smith, this Court endorsed the observations of Member Jones in *Body Corporate for Parklands CTS and Anor v Department of Natural Resources and Water* [2009] QLC 65 where the learned member observed:

The force and effect of s.(7) of the LCA must not be construed in such a way as to limit the flexibility Parliament intended the Land Court to have in the exercise of its jurisdiction. However, in applications such as this, and in many other cases no doubt, hearsay evidence, if admitted, runs the risk of unfairly advantaging one party and disadvantaging the other. That is because the evidence cannot be adequately challenged or otherwise tested"

16. The objections on these bases (which are related) should be upheld."

[100] I have already examined in some detail the considerations that the Land Court is bound to take into account when considering whether or not to receive hearsay evidence when I ruled on the objections made by the applicant to hearsay contained within the Edwards' affidavit.

[101] In the *CH4 Pty Ltd* case, I repeated and endorsed observations earlier made by Member Jones regarding the receipt of hearsay. As Member Jones put it, a fundamental consideration is an analysis of the risk of unfairly advantaging one party and disadvantaging the other party by receiving hearsay evidence.

[102] Given the particular circumstances of this matter, I do not believe that the receipt of hearsay evidence can be said to unfairly advantage or disadvantage either party over the other.

[103] Of course, I must stress that having multiple statements by persons based on hearsay supporting evidence which is otherwise irrelevant to the case does not in any way make that evidence relevant. It should be excluded, not on the basis of hearsay, but on the basis of relevance. Likewise the situation with assumed facts. Having one, two, or ten people say the same thing, but all based on an assumption of facts, does not strengthen the underlying fact which must remain a mere assumption. There needs to be some direct evidence of the assumed fact, otherwise evidence of assumed facts will be either not admissible or, if admitted, of such little weight to be of virtually no assistance.

[104] Again, these objections can only be properly addressed on a case by case basis after carefully considering the specific objections made to certain evidence. However, by way of general comment, I am inclined to allow the hearsay evidence to be admitted, just as I allowed the Edwards' hearsay

evidence to be admitted, but giving such hearsay evidence relatively low weight, depending upon the specific circumstances relating to each piece of evidence.

Submissions/Comments/Swearing the Issue/Opinions

[105] The applicant had this to say as to these grounds of objection:[27]

> "15. Insofar as the Respondent objects to statements that are said to contain opinion, it is submitted that:
>
> (a) the statements do not really constitute an opinion (rather, they are the expressions of observations); [For instance, where it is suggested that Mr Garner expresses opinion evidence when he says that it was necessary to 'gurney' certain property. It is hardly opinion evidence to suggest the property is so dirty that it needs to be cleaned with a high pressure hose.] and/or
>
> (b) to the extent that the evidence is opinion evidence, that evidence can still be accepted as evidence of that witness' view about matters, which is relevant to the reasonableness of the Applicant's conduct.
>
> 16. Similarly, it should be noted that statements by witnesses that may be said to constitute submission or comment ought be given such weight as the Court considers appropriate in considering the Applicant's evidence about her experiences at the hands of the constructing authority and the reasonableness of her claims for compensation."

[106] The respondent essentially contends that the applicant has not addressed these objections. The respondent puts it this way:[28]

> "17. The applicant contests the objections on this ground as not really constituting an opinion – but rather being innocent (and admissible) expressions of observations; an example from Mr Garner's evidence is offered. This is a further gloss.
>
> 18. The applicant makes a claim for $7,400 to paint the outside of the house. In the scheme of the case it is a material claim (not that it matters). The applicant bears the onus which, it is well to record, is not discharged by simply producing some evidence no matter of what quality; the claim must be made out on the balance of probabilities. In an attempt to discharge that onus, the applicant attempts to deploy evidence from Mr Garner who is not a painter or otherwise relevantly qualified and whose evidence is not (as footnote three in the applicant's submissions suggests) limited to gurneying; rather Mr Garner opines that *'[the house] needed to be gurneyed, washed down and repainted…'*. The objection is well founded.
>
> 19. It is right (but not a response to an objection) to say that the Court may receive the offensive evidence but give it limited weight. The respondent maintains its objections but says that if the objected to evidence is to be received, it should be given no, or limited weight."

[107] Given the parameters of s 7 of the LCA, I have no doubt that evidence is able to be received by this Court by a lay observer as to expressions of their observations. There is

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27 Applicant's response submissions to the respondent's objections, 17 November 2014, paragraphs 15-16.

28 Respondent's reply objection submissions, 4 December 2014, paragraphs 17-19.

however a fine line when an observation actually turns into an expression of opinion. Paragraph 16 of the statement of Mr Garner is a good example of this. It is in this paragraph that Mr Garner says of the house that "it needed to be gurneyed, washed down and repainted". There is no objection made by the respondent to the preceding sentence by Mr Garner where he says that "the house was filthy from the outside". This is clearly admissible observation evidence. However, in expressing the view that the house needed to be gurneyed, washed down and repainted, Mr Garner has strayed into opinion evidence.

[108] By paragraph 4 of his statement, Mr Garner indicates he is a retired police officer and further that "I have done all sorts of work in the past, including building and painting". By such statement, in my view, Mr Garner does not profess to be a professional painter, but merely to have done painting work. It is not said if such work was paid or unpaid, and it is linked in with "all sorts of work". In the circumstances, given that Mr Garner has only expressed some knowledge of painting, the statement even if allowed is of little or no weight.

[109] Each other objection under this head will be treated on a case by case basis.

Scandalous or Inflammatory Evidence

[110] The applicant contends that evidence which may be embarrassing to the respondent simply goes to establish the nature in which the applicant was treated during the construction of the project. Her submissions are:[29]

> "17. It would seem that the Respondent objects to certain statements by the Applicant's witnesses about the experiences of the Applicant, on the basis that those statements are scandalous and inflammatory. With respect, those submissions of the Respondent ought to be viewed by the Court merely as an acknowledgment of the embarrassment that ought to be felt by the constructing authority as a result of the occurrence of the relevant events (i.e. because the Applicant was put through such experiences).
>
> 18. For instance, evidence of theft of items by construction workers or contractors during the course of the works is indeed scandalous, but the fact does not render the evidence of the theft inadmissible. [Similarly, unreasonable demands leading to 'a Mexican standoff' (described by the Applicant as 'blackmail') are equally unacceptable.] There is no evidence that the constructing authority had any permission to remove the relevant item (e.g. a hose or soil) without the Applicant's permission and, in the absence of that permission, a statement that the 'item' was stolen is accurate. They explain the difficult circumstances in which the Applicant found herself.
>
> 19. The matters considered by the Respondent to be scandalous and inflammatory are, in fact, matters which are part of the factual matrix in which the reasonableness of the Applicant's conduct (including the way she

[29] Applicant's response submissions to the respondent's objections, 17 November 2014, paragraphs 17-20.

sought to manage her affairs to avoid or mitigate loss and damage) and the reasonableness of her claims for compensation ought to be considered. That mix of facts confirms that the Applicant was treated extremely poorly (having to deal with matters that she should not have had to deal with) and that her limited claims for compensation are entirely appropriate.

20. It must be remembered that the Respondent effectively seeks to argue that, as things turned out (i.e. with hindsight), certain decisions of the Applicant were poor decisions. However, the Applicant's evidence indicates just how difficult were the changing circumstances in which the Applicant found herself and how unfair it would be to use hindsight in determining the reasonableness of both the Applicant's conduct and her claims for compensation."

[111] The respondent not only maintains the objection, but says that such evidence is "fundamentally inadmissible":[30]

"20. The response submissions offers up its own example of the very point the respondent makes and thereby emphasises the force of the objections – there could be no complaint, assuming relevance for the moment, if the applicant had said that she had a hose and it vanished in circumstances where she gave no permission to take it. But rather the applicant says the respondent's contractors stole her hose.

21. Such evidence does not *'...explain the difficult circumstances in which the Applicant found herself..."* rather, by the scandalous and inflammatory way it is expressed, it tends to distort and distract from the real issues in the proceeding and so is fundamentally inadmissible.

22. To the extent the applicant again repeats the mantras of context, poor treatment at the hands of the respondent, and the reasonableness of her limited claims, those matters are irrelevant to the ground of objection – the objection under consideration is that the evidence contains scandalous, inflammatory assertion – if those are proper descriptors of the particular paragraphs, the objection should be upheld".

[112] I am in complete agreement with the respondent's submissions in this regard. It is one thing for the applicant to allege that some soil or a hose went missing from her property; it is quite a different thing to not only accuse someone of having stolen the property, but to name that someone as the respondent, its servants or agents.

[113] The applicant had a very simple course to take in circumstances where she thought some of her property had been stolen. Just as is the right of every other Queenslander, the applicant could have reported the suspected theft to the police. There is no evidence whatsoever in this matter to show that any such complaint was ever made by the applicant to the police.

[114] It is indeed scandalous for the applicant, or any other witness for that matter, to impute on another criminal activity on nothing more than suspicion. Evidence such as this is

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30 Respondent's reply objection submissions, 4 December 2014, paragraphs 20-22.

scandalous and not admissible. That does not of course mean that in all circumstances where the respondent has made an objection on this basis that such objection will be upheld. Again, each such objection will be considered on a case by case basis to determine if the statement is in fact scandalous.

Analysis of each of the respondent's objections to evidence

[115] Having considered the general grounds of objection raised by the respondent in the manner in which they were grouped together by the applicant, it is now necessary to consider each of the 106 objections on a case by case basis.

[116] In order to achieve this task as efficiently as possible, what I have done below is set out the objections made by the respondent as they were initially made in tabular form. To the respondent's three columns I have added a fourth, which I have headed "Decision on Objection".

[117] Each decision on each objection is expressed in a shorthand form only. The reasoning underpinning each of my decisions on each objection can generally be inferred from my overarching comments as to the admissibility of evidence before this Court. However, in circumstances where additional reasoning is warranted, I have expanded, albeit still in limited form, on my reasons in the column where I give the decision with respect to each respective paragraph.

Respondent's Objections to the statement of Debbie Ann Bresnahan

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
1	9	Irrelevant: the paragraph does not explain what improvements were on the property at the date of resumption. The cost of improvements at some unidentified time in the past is immaterial.	Objection upheld but only to the extent to which the paragraph refers to the costs of improvement. The words "at a total cost of $16,000" are excluded from 9(a); the words "costing $5,000" and "Total cost $3,000" are excluded from paragraph 9(b) and the words "Total cost with sand inclusive $5,000" are excluded from paragraph 9(c). The objection is otherwise dismissed.
2	13	Second sentence: irrelevant.	Objection upheld.
3	15	Third paragraph: beginning "The costs for the above …" is irrelevant.	Objection upheld.
4	16	Irrelevant.	Objection upheld.
5	19	Irrelevant.	Objection dismissed.
6	20	Aside from the words	Objection dismissed. Last

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
		"Rachel Geering became a tenant in 2009", the balance of the paragraph is irrelevant and the last sentence is heresay.	two sentences of little weight.
7	24	The last sentence beginning "This can be verified by …" is irrelevant.	Objection upheld.
8	32	Irrelevant.	Objection upheld.
9	33	Irrelevant.	Objection upheld.
10	34	Irrelevant.	Objection upheld.
11	35	Irrelevant.	Objection upheld.
12	37	Second last sentence beginning "At no stage …", is irrelevant and swears the issue. Last sentence beginning "I do not remember …" is irrelevant.	Objection dismissed.
13	41	Last sentence, irrelevant.	Objection dismissed.
14	42	Is irrelevant. There is no pleaded claim based on "agreements". Generally, evidence of the non-financial consequences of works and things said by the claimant or licensees of the respondent in respect of such things are irrelevant.	Objection dismissed.
15	46	Aside from the first two sentences: irrelevant and hearsay.	Objection dismissed, but sentences of little or no weight.
16	47	Hearsay, irrelevant.	Objection dismissed.
17	51	Irrelevant.	Objection upheld.
18	54	From the third sentence beginning "Linkwater and Northern Network Alliance …", the paragraph is irrelevant and scandalous.	Objection upheld.
19	56-58	Irrelevant.	Objection upheld.
20	59-62	Irrelevant.	Objection upheld.
21	65	Aside from the first sentence through to the words "adjoining my property", the balance of that sentence and the rest of the paragraph is irrelevant.	Objection dismissed.
22	67	Irrelevant.	Objection dismissed.
23	68	Irrelevant.	Objection dismissed.
24	76	Irrelevant.	Objection upheld.

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
25	77	Last sentence, the words "… made an agreement with me …" are objectionable as they swear the issue and/or assume facts not proved or amount to a legal submission.	Objection dismissed but words of little or no weight.
26	78	Second sentence, irrelevant.	Objection upheld.
27	79	Irrelevant.	Objection dismissed.
28	80	Irrelevant.	Objection dismissed.
29	82	Irrelevant.	Objection dismissed.
30	83	Irrelevant.	Objection dismissed.
31	85	Irrelevant.	Objection dismissed.
32	86	Irrelevant.	Objection dismissed.
33	87	Irrelevant.	Objection dismissed.
34	89	Irrelevant.	Objection dismissed.
35	90	Irrelevant.	Objection dismissed.
36	91	Irrelevant.	Objection dismissed.
37	92-95	Irrelevant.	Objection dismissed.
38	96-98	Irrelevant.	Objection dismissed.
39	101	Generally, to the extent it is said that things were "agreed upon", or speaks of "agreements to supply …" etc. The paragraph is a submission and thus irrelevant. Sub-paragraph (f), aside from the first sentence (and subject to the general objection just made) is hearsay.	Objection dismissed but paragraph is of minimal relevance.
40	107	Irrelevant – no claim is made in reliance of these facts.	Objection dismissed. This is disturbance claim B(12) and shows actual purchase price of the horse.
41	110-115	Irrelevant.	Objection dismissed.
42	116	Aside from the first two sentences is irrelevant.	Objection dismissed.
43	117	Irrelevant.	Objection upheld
44	118-119	Irrelevant.	Objection dismissed.
45	120-121	To the extent it is said that workers "stole", the paragraphs are scandalous and irrelevant and inflammatory.	Objection upheld
46	122	Irrelevant and scandalous and inflammatory.	Objection upheld
47	123	Irrelevant.	Objection upheld
48	128	The last sentence is irrelevant	Objection dismissed.

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
		comment.	
49	131	Irrelevant.	Objection dismissed.
50	134	The second sentence is irrelevant comment.	Objection dismissed.
51	136-140	Irrelevant.	Objection dismissed as regards paragraph 136. Objection upheld as regards paragraphs 137-140.
52	141	Irrelevant: hearsay.	Objection upheld.
53	142	Irrelevant.	Objection upheld.
54	145	Irrelevant.	Objection upheld.
55	146	Irrelevant.	Objection upheld.
56	148-170	Irrelevant.	Objection upheld with respect to all paragraphs referred to save for paragraph 163. As regards 163, the objection is dismissed.
57	171	Irrelevant, scandalous and inflammatory.	Objection upheld
58	172-183	Irrelevant.	Objection upheld for all paragraphs save for paragraph 178. As to paragraph 178, the objection is dismissed.
59	186-188	Irrelevant.	Objection upheld.
60	189-191	Irrelevant.	Objection upheld.
61	192	Irrelevant and assumes facts not proved and constitutes opinion.	Objection dismissed.
62	198	Irrelevant.	Objection upheld.
63	202	Irrelevant: there is no claim based on these matters.	Objection upheld.
64	203	Irrelevant.	Objection dismissed.
65	208-216	Comment in the submission and irrelevant.	Objection to each paragraph referred to dismissed, save for paragraph 215. The objection to paragraph 215 is upheld.
66	225	Irrelevant.	Objection dismissed.

Respondent's Objections to the evidence of Peita Hill

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
1		General objection: the affidavit is, in its entirety irrelevant and not sufficiently probative of any matter in	The objection is dismissed for each paragraph of the statement, save for paragraph 8. The objection to paragraph

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
		issue in the proceedings as to warrant receipt into evidence. The matters, the subject of paragraph 6, concerning the state of the house on the property are addressed by a number of other witnesses but, more to the point in significant detail, including photographic detail by the claimant. The matters in paragraph 7 are addressed in substantial detail by the claimant also and are irrelevant to any matter in issue in the proceedings. The same position applies in relation to the matters set out in paragraph 8.	8 is upheld.

Respondent's Objections to the evidence of Paul Garner

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
1	8	Third sentence beginning "Debbie and John …" is hearsay and irrelevant. Second last sentence beginning "Debbie didn't pay John …" is hearsay, assertion or assumes facts not proved, namely that there was some basis on which this witness knew what Debbie did. The last sentence is indirect, hearsay evidence which this witness cannot give (or has not provided sufficient facts to found a basis for him to give it)	Objection dismissed.
2	13	Irrelevant, and in any event, addressed by the claimant.	Objection dismissed.
3	14	Is conclusory, assertion and assumes facts not proved and is evidence of the state of mind of another person given without any identified basis.	Objection dismissed.
4	16	The first sentence and last sentence are admissible. The	As regards the second sentence and third sentence,

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
		second sentence beginning "It needed to be gurneyed" is an opinion and this witness is not an expert. The third sentence is hearsay or assertion.	each objection is dismissed but the statements are of little or no weight.
5	17	Irrelevant.	Objection upheld.

Respondent's Objections to the evidence of Rachel Geering

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
1	13-15	Irrelevant.	Objection dismissed.

Respondent's Objections to the evidence of Ross Little

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
1		General objection: the entire affidavit is irrelevant to any matter in issue in the proceedings. In large part it concerns the deponent's property and not the land the subject of the proceeding and otherwise addresses matters which are at best speculative, and at worst scandalous (paragraphs 4 and 5) and which are in any event, of themselves, entirely irrelevant.	The objection is dismissed for paragraphs 1, 2, 3, 6 and 7. The objection is upheld for paragraphs 4, 5, 8 and 9.

Respondent's Objections to the evidence of Vera Taylor

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
1	7	Irrelevant.	Objection dismissed.
2	9	Irrelevant – there is no claim based on an inability to access the shoes under the house.	Objection upheld, save for the last eleven words commencing "when we could".
3	10-13	Irrelevant and, in the case of paragraph 12, an opinion.	The objection is upheld save for paragraph 11. The objection to paragraph 11 is dismissed.
4	14	The last sentence beginning "She was very attached …" is irrelevant.	Objection dismissed.

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
5	15	Irrelevant.	Objection upheld
6	16	Irrelevant, hearsay, assertion.	Objection upheld
7	18-22	Irrelevant.	Objection upheld
8	23	Aside from the first two sentences and the last sentence, the balance of the paragraph is irrelevant, assertion, secondary evidence and assumes facts not proved.	Objection upheld
9	24	After the word "dirty", the evidence is an opinion.	Objection upheld
10	25	Irrelevant.	Objection dismissed.

Respondent's Objections to the evidence of David Gaffa

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
1	4-6	Irrelevant.	Objection dismissed.
2	9-11	Irrelevant.	The objection to paragraph 9 is dismissed. The objection to paragraphs 10 and 11 is upheld.
3	13	Irrelevant.	Objection dismissed.

Respondent's Objections to the evidence of Tim Bresnahan

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
1	7-11	Irrelevant.	Objection upheld.
2	15-26	Irrelevant.	Objection dismissed.
3	27-35	Irrelevant.	The objection is dismissed for paragraphs 27, 28, 29 and 30. The objection is upheld for paragraphs 31, 32, 33, 34 and 35.
4	38	Irrelevant.	Objection upheld.
5	40	Irrelevant.	Objection upheld.
6	41-48	Irrelevant.	The objection is upheld with respect to paragraphs 42, 44, 45, 46, 47 and 48. The objection is dismissed with respect to paragraphs 41 and 43.
7	50	Aside from the second last sentence, is irrelevant and comment or assertion.	Objection dismissed.
8	52	Irrelevant, hearsay and opinion which is impermissible from a lay	Objection dismissed but little or no weight.

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
		witness.	

Respondent's Objections to the evidence of Jodie Ticknell

Objection Number	Paragraph of Statement	Basis of Objection	Decision on Objection
1	3	After the first sentence is irrelevant.	Objection upheld.
2	6	Irrelevant.	Objection upheld for first sentence only. Objection otherwise dismissed.
3	7	Irrelevant.	Objection upheld.
4	8	Irrelevant.	The objection is dismissed with respect to the first sentence of the paragraph. The objection is upheld for the balance of the paragraph.
5	9	Irrelevant, hearsay, assertion and assumes facts not proved.	Objection upheld.
6	11	Irrelevant, hearsay, assertion and assumes facts not proved.	Objection dismissed.
7	12	Irrelevant, assertion and assumes facts not proved.	Objection upheld
8	13	Irrelevant, assertion and assumes facts not proved.	Objection upheld
9	14	Irrelevant, assertion and assumes facts not proved.	Objection upheld
10	15	Irrelevant, assertion and assumes facts not proved.	Objection upheld
11	16	Irrelevant, assertion and assumes facts not proved.	Objection upheld

[118] I should put it on record that some of my decisions on the respondent's objections above could have gone either way. For any such decisions, I decided in favour of the applicant, believing it appropriate in a compulsory acquisition case to take a liberal approach (from the applicant's perspective).

Valuation Evidence

[119] As already indicated, expert valuation evidence was given by two valuers, Mr Henderson and Mr Rabbitt. Both are highly experienced valuers. They also both adopted the same methodology for their respective valuations (before and after) which makes the Court's task in considering and assessing the expert evidence much clearer than it would have been had differing methodologies been adopted.

[120] The valuation positions of Mr Henderson and Mr Rabbitt are well summarised in their joint expert valuers report[31] as follows:[32]

"**VALUATION PROSITIONS / COMPENSATION ASSESSMENTS**

Mr Henderson

Easement Area of 1,515m² is assessed at $25/60/m²

1,515m² assessed @ 60% diminution	$23,270
Severance & Injurious Affection	
17,955m² balance land @ $25.60/m² @ 15%	$68,947
Plus **Structures**	
$136,000 @ 15%	$20,400
	$112,612
ADOPT	**$113,000**

Mr Rabbitt

Compensation is assessed in accordance with the positions in this report as follows:

Easement Area	
1,515m² @ $20.54/m² @ 25% diminution in value	$7,779
Exclusive of Disturbance	
Injurious Affection to Balance Land	
17,955m² @ $20.54m² @ 5%	$18,439
Injurious Affection to Improvements	
$136,000 @ 15%	$20,400
	$46,618
ADOPT	**$50.000**

Note: The positions are exclusive of disturbance"

[121] Mr Henderson has simplified matters even further by producing a summary of the points of agreement and disagreement:[33]

"Land Values were assessed as follows.

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31 Ex 6 Tab 3.
32 Ibid p 12.
33 Ex 6 Tab 5.

Mr Henderson for applicant assessed at $500,000

Mr Rabbitt for respondent assessed at $400,000

Improvements agreed at $136,000

Percentages of Diminution of the Easement Area.

Mr Henderson 50% $19,453

Mr Rabbitt 25% $ 7,779

Injurious Affection.

Mr Henderson - Balance Land @ 15%
Improvements @ 15%
Plus rectification works

Mr Rabbitt - Balance Land @ 5%
Improvements @ 15%"

[122] As can be seen, there are only three points of disagreement between the valuers. These points of disagreement are Land Value; Diminution of the Easement Area; and Injurious Affection Balance Land.

[123] In general terms, I was impressed by the evidence of both valuers. They both have rational reasons for their various opinions which are well thought out. Accordingly, without saying anything further, I accept the agreed aspects of their valuations, which are as follows:

- Improvements agreed at $136,000
- Injurious Affection Improvements @ 15% $20,400

[124] I will now deal with the areas of disagreement sequentially, explaining for each my reasons for favouring the opinion of one valuer over the other.

Land Value

[125] Both Mr Henderson and Mr Rabbitt have arrived at a valuation for the whole property from which they have then derived a rate per m², which they have applied to the 1,515 m² of the easement area.

[126] Mr Henderson's value for the total area of land (obviously pre resumption) is $500,000. He arrived at this figure through his analysis of four sales which I have summarised as follows:[34]

Sale No	Date of	Location	Area	Sale Price	Comment	Comparison

[34] Summaries from Henderson sales evidence Ex 6 Tab 1 pages 4 and 5.

	Sale					to Subject
1	7/6/09	Collins Road Yandina	2.223 ha	$427,500	Vacant parcel Gently sloping Regrowth	Inferior
2	26/5/08	134-142 Fairhill Road Ninderry	2.48 ha	$500,000	Vacant parcel Irregularly shaped Good red soil frontage	Not stated
3	23/12/09	92 Old Coach Way North Arm	2.379 ha	$760,000	Improved parcel Dwelling, 2 cottages etc. Land value assessed at $400,000	Inferior low lying land
4	23/8/08	82-90 Old Coach Way, Ninderry/North Arm	2.86 ha	$590,000	Improved parcel. Dwelling, barn etc. Land value assessed at $390,000	Inferior Forest soils

[127] Mr Rabbitt has assessed the value for the total area of the land (pre-resumption) at $400,000. He analysed six sales to arrive at his valuation, which he summarised as follows:[35]

"

Sale No.	Address/RPD	Date of Sale	Sale Price	Area	Comments	Analysis
1	69 Pathara Rd North Arm Lot 5 RP 987853	19/09/09	$235,000	5,286m²	A near regular shaped vacant, cleared allotment with a moderate cross slope.	Site value $235,000 Inferior
2	302 Bunya Rd North Arm Lot 2 RP 809493	23/09/09	$490,000	8,485m²	Improved with an average quality, low set brick dwelling with 3 bedrooms, 2 bathrooms, 3 bay colorbond shed and 2 x shade houses.	Sale Price $490,000 Less Impts $210,000 $280,000 Inferior
3	35 Wegner Rd North Arm Lot 7 SP 125252	25/8/08	$412,000	1.06 ha	Property has frontage to the Maroochy River and is improved with a basic, low set block dwelling, double garage, double carport and shed.	Sale Price $412,000 Less Impts $170,000 $242,000 Inferior
4	55 Running Creek Rd	15/7/09	$590,000	3.91 ha	A slightly	Sale Price $590,000

[35] Ex 6 Tab 4 page 13, with comparison to subject taken from page 15 and added to columns "Analysis".

Sale No.	Address/RPD	Date of Sale	Sale Price	Area	Comments	Analysis
	North Arm Lot 6 RP 139315				irregular shaped, gently sloping lot improved with a basic, low set, 3 bedroom block dwelling, pool, shed, garage and carport.	Less Impts $220,000 $370,000 Comparable
5	268 Gold Creek Rd North Arm Lot 26 SP 172895	19/6/09	$290,000	1.86 ha	An irregular shaped, steeply sloping, mostly timbered site, improved with a 6 metre x 9 metre enclosed steel frame zincalume shed.	Sale Price $290,000 Less Impts $20,000 $270,000 Inferior
6	1 Wegner Road North Arm Lot 2 RP 211633	17/11/08	$630,000	3.46 ha	Property has frontage to the North Maroochy River and is improved with a large, two level timber dwelling with reportedly 5 bedroom and 2 bathroom.	Sale Price $630,000 Less Impts $250,000 $380,000 Comparable

"

[128] There was an attempt to introduce another sale into the mix, being that of the property immediately to the north of the north-east boundary of the subject. This sale occurred on 28 May 2012 and, although both valuers were aware of the sale, neither included it in their valuation reports.

[129] It may be true that a fair indication of "after" value of the subject would be obtained through an analysis of this sale, as both the pipeline and electricity easements run through the sale property. However, the sale is not only 2.5 years post acquisition, it is also post the global financial crisis (GFC).

[130] In my view, both valuers were correct to initially treat this sale as suspect and exclude it from their consideration. It is late in time and post GFC, which has a clear impact on value, as shown by the reduction in the unimproved value of the sale property from 30 June 2011 to 30 June 2012.[36]

[36] See Ex 7.

[131] Returning to an assessment of the valuation reports in Ex 6, the applicant's written submissions do little more than assert that the Court should accept Mr Henderson's assessment of $500,000.

[132] By contrast, the respondent's written submission has this to say:[37]

> "15. Mr Rabbitt's opinion on this topic is explained in the joint report and in his individual report. The subject land was, and has always been, a rural homesite of about 2ha. It is improved by a dwelling which is situated close to the Bruce Highway and suffers as a result, from material road noise impacts. It is located to the west of the Bruce Highway amongst other rural homesites. Rural homesites of the kind in question are acquired by purchasers who primarily wish to use them for that particular purpose: for rural living as distinct from any form of primary production. Rural living includes activities such as keeping some horses or having a chicken run but does not, in the ordinary course, involve cultivation of crops for profit or the grazing of animals for profit.
>
> 16. In Mr Rabbitt's opinion, the value of such sites:
>
> (a) is best determined by reference to their site value rather than as a rate per hectare or rate per square metre. Mr Henderson accepts this and that to the extent the approach the valuers took sees the site value reduced to rates per square metre, that was by dint of the need to determine the value of specific areas of the subject land;
>
> (b) is governed by a number of factors which reflect the market in which they are transacted and the purpose for which they are used and which include location, outlook, access, noise, topography. Size, although related to value is not, in this market, as significant as in others.
>
> 17. Mr Henderson includes, indeed places primary emphasis on, the amenity afforded by the land having what he calls '…good quality red soils'. It is submitted that the emphasis Mr Henderson places on this feature is too great:
>
> (a) for the reasons identified above; and
>
> (b) because as the applicant's use of the subject land shows, the quality in this sense, of the soil is essentially immaterial to the ability of owners such as the applicant to use the land for the purpose for which it was acquired;
>
> (c) because none of the comparative sales identified by either valuer were being used in any way which would have benefited by more rather than less fertile and attractive soil.
>
> 18. Both valuers support their opinions as to the site value of the subject land by reference to comparative sales. As the cross examination showed, the comparative sale analysis hinges on fine distinctions.
>
> 19. The sales that Mr Henderson relies on are those identified in his report of 29 December 2011. They are plotted on the aerial photograph which is part of Exhibit 5 as are the sales used by Mr Rabbitt.

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[37] Respondent's submissions, paragraphs 15-24.

20. It can be seen that Mr Henderson's sales are all to the south east of the subject land and are all to the east of the Bruce Highway and so closer to the coast – factors which Mr Rabbitt contends elevate value. Mr Henderson's sales are much closer to, indeed actually on the fringe of, denser urban development.

21. Furthermore:

    (a) Sale 1 (Collins Road Yandina) is remote to the subject land and, contrary to Mr Henderson's analysis, was improved – even if there is dispute about the value of the improvements the analysis must be adjusted to reflect the value of those improvements;

    (b) Sale 2 (Fairfield Road Ninderry) has river frontage and is superior in that sense and in its outlook. Although it was unimproved at the date of resumption, the elaborate, contemporary improvements that has since been constructed, support Mr Rabbitt's analysis of it as well superior to the subject;

    (c) Sales 3 and 4 (92 and 82 – 90 Old Coach Way Ninderry) are superior in outlook and position. The improvements on Sale 4 are markedly superior yet its price was $590,000 as against the price (including improvements) Mr Henderson puts on the subject land of $636,000.

22. Mr Rabbitt's sales offer a persuasive foundation for the view he expresses as to value:

    (a) Sale 5 (268 Gold Creek Road) is an example of an inferior site with a price which reflects its terrain and timbered nature. It provides a baseline for analysis of value of the subject site;

    (b) Sales 2 and 4 (302 Bunya Rd and 55 Running Creek Rd) each have features that inform the value of the subject land – they are geographically the closest sales and both have superior outlooks and are not adjacent to, and so affected by, the highway;

    (c) Sale 1 (69 Parhara Rd North Arm) is an example of a vacant site of similar regularity to the subject land. It is materially smaller and more remote to access;

    (d) Sales 3 and 6 (35 and 1 Wegner Road North Arm) both offer insights into the way the market treats the features the subject sale has. Sale 3 is close to the Bruce Highway though not as close. Both sales have frontage to the Maroochy River.

23. In Mr Rabbitt's view, the proximity of the subject land, and specifically the dwelling on it, to the Bruce Highway is material. Mr Henderson does not agree on the basis that the highway is below the level of the subject land. That may be true but the highway and the noise it produces is an inescapable feature of the subject land. It is a feature that logic suggests will be of materiality to the market for those seeking rural homseite living – for the very reason that at the heart of the decision to live in a rural environment will usually be the desire to escape the negative features of urban dwelling, one of which is traffic intrusion.

24. For these reasons the opinions of Mr Rabbitt as to the site value of the subject land at the date of resumption ought, it is submitted, be preferred."

[133] I have provided such an extensive quote from the respondent's submissions above because I find myself in the position of being in complete agreement with them as regards this aspect of the evidence.

[134] Any differences of opinion between the two valuers are relatively slight, although having said that, I find it rather curious that there are no common sales.

[135] Mr Henderson placed too much importance on the capacity of the red soils on the subject to grown crops. Clearly, the highest and best use of the subject is as a rural residential block. Mr Henderson also did not fully take into account the impact that the Bruce Highway has on the subject, even though the subject is elevated from the highway.

[136] Mr Rabbitt's sales 2 and 4 are both close to the subject and sold close to the easement acquisition date. I also agree with Mr Rabbitt's analysis that his sales 4 and 6 are comparable to the subject.

[137] I agree with Mr Rabbitt's assessment that his sales demonstrate a value for the subject as at the acquisition date of the easement of between $350,000 to $400,000. I also consider it appropriate to err in favour of the applicant, as Mr Rabbitt has done, in settling on the figure of $400,000 which equates to $20.54/m².

Diminution of the Easement Area

[138] Mr Henderson contends for a diminution of 50%[38] for the easement area, while Mr Rabbitt says that a diminution of 25% is appropriate.

[139] Mr Rabbitt has reached his conclusion primarily for two reasons. Firstly, he says that the market shows that there is no marked diminution when a second easement is placed on a property, as the greatest impact is caused by the initial easement. Secondly, Mr Rabbitt was of the view that the terms of the pipeline easement are generally the same as the electricity easement.

[140] Mr Henderson on the other hand says that the pipeline easement has much more stringent conditions than the electricity easement and that a prudent purchaser would take those more onerous conditions into account.

[141] Mr Henderson further notes that the pipeline easement is close to the front of the dwelling on the subject land, and that the easement has to be crossed whenever access is required to or from the dwelling. I accept that there are weight restrictions which apply to any vehicle driven across the pipeline. This is of course of particular importance in this case given the location of the dwelling. I also accept that extensions to the dwelling will

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[38] Although at some parts of his evidence he puts the figure at 60% - for instance in the Joint Report Ex 6 Tab 3 page 12.

be more difficult than they would have been under only the electricity easement, and that landscaping and other such features in the easement area in front of the dwelling are now more problematic.

[142] I am urged by the respondent to take into account what the Court had to say about the impact of easements in *Joyce v Northern Electric Authority of Queensland*[39] where the Court observed that:

> "…the correct approach is not one of reading the grant of easement document and assuming the worst, but adopting a practical view of the matter and conducting enquiries which would lead to an intelligent assessment of the risk of future intrusion…"

[143] The respondent further submits as follows:[40]

> "33. Mr Rabbitt's view was that the market did not apply a critical eye to the existence of a second easement; that the level of sophistication in the market on such issues was low and that where there were two easements the material diminution was caused by the first.
>
> 34. That opinion was fortified by the work identified on page 10 of the joint report and Ex 12. Mr Rabbitt accepted that such analogies were not perfect and that there were, as one would expect, no precisely comparable sales. But it reflected careful and diligent inquiry and consideration of the central controversy about the effect of a second easement. The criticisms made of it are not to the point. What can be taken, safely it is submitted, from that work, is that there is some foundation for the inherently logical position Mr Rabbitt adopts."

[144] I accept the force of what the Court had to say in *Joyce*. I also note the detailed work done by Mr Rabbitt both in the Joint Experts Report and in Ex 12 regarding the impact of easements on the market, although it is fair to say that some of Mr Rabbitt's work in this regard was found wanting under cross-examination.

[145] I am inclined to agree with the conclusions reached by Mr Rabbitt, save for the fact that his assessment is based on his assumption that the two easements are effectively identical. My view of the two easements is that the pipeline easement is more onerous than the electricity easement. In short, Mr Henderson has overstated the impact of the pipeline easement, and Mr Rabbitt has understated it.

[146] Taking all of the evidence on this point into account, given the particular facts of this case, it is appropriate to allow a diminution of 35% for the easement land.

Injurious Affection to the Balance Land

[147] Both Mr Henderson and Mr Rabbitt agree that there is some impact to the balance land. Mr Henderson assesses this as 15% while Mr Rabbitt puts it as 5%. However, in arriving

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39 (1974) 1 QLCR 171 at 202.

40 Respondent's submissions, paragraph 33 and 34.

at his 5%, Mr Rabbitt says that the easement on the subject land has in effect no impact on the balance land, the only impact coming from the above ground "pigging pit" located to the south of the dwelling and bordering the subject land to the north and west of the pigging pit.

[148] Relying on the comments of Jacobs J in *Longeranong Pty Ltd v Electricity Trust of SA*,[41] the respondent points out that the injurious affect of a feature such as an easement will diminish as the parcel gets larger. Jacobs J put it this way:[42]

> "It is not unreasonable in the context of this case to link injurious affection with severance. These concepts often overlap. The way in which the easement and the powerline divided the land on either side of the easement for the purpose of aerial spraying and seeding contains an element of severance … But an element of injurious affection as well in the impaired effectiveness of such operations. In my view, however, there is a fallacy in this case in assessing compensation by reference to a percentage adverse effect on the property as a whole, for it means that the longer and more valuable the property through which the easement passes, the greater will be the compensation … But suppose, for example, the affected parcels extended further to the west or east of the easement. Then, presumably, the compensation would be higher although the fact is that the further one moves from the easement the less is the injurious affection. It must be remembered that the factors calling for assessment are such matters as noise, radio interference, visual intrusion on the landscape and the risk of fire or health hazards, all of which diminish or in some cases disappear the further one moves from the immediate precinct of the easement. True it may be that in other cases, not involving an easement it may be possible to assess the adverse effects of the acquisition by reference to the diminished value of the property as a whole, but in a case such as the present in which the adverse effects of the acquisition are so relatively very slight in relation to the whole property, it is more realistic to restrict their effect to a much smaller portion of the land."

[149] The applicant submits that:[43]

> "the impact of the subject easement upon the value of the balance of the subject land covered is more likely to have been a 15% reduction in value, rather than the 5% reduction suggested by Mr Rabbitt (in addition to the impact of the pigging pit next door, there is the potential disruption to the use of the entire property arising from the imposition of the subject easement – which interruption would not likely occur under the existing electricity easement."

[150] Again, I find that Mr Henderson has overstated the impact on the balance lands, and Mr Rabbitt understated it.

[151] I accept Mr Henderson's evidence that the location of the dwelling to the east of the easements and the balance land to the west necessarily involves some impact to the balance land. If, for example, the applicant ever sought to bring very heavy equipment onto the land, in circumstances where the weight of same exceeded the maximum

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41 (1990) 71 LGRA 316.
42 Ibid at 331-332.
43 Applicant's submissions, paragraph 1.18(e).

allowed to traverse the pipeline, such equipment could not be housed beside the dwelling and would have to be stored on the balance land. The overall impact in this regard is still minimal and in my view would be something under 5%. However, to this needs to be added the impact of the pigging pit to the balance land.

[152] Just as the pigging pit has an impact on the dwelling, so too must it have an impact on the balance land. However, as Jacobs J points out, this impact will diminish the further one moves away from the pigging pit. I am prepared to accept that the impact on the balance land immediately to the west of the pigging pit may be in the order of 15% or so (taking into account not only visual amenity but also noise from the pigging pit) but that such impact diminishes to virtually nothing by the time the furthest point of the balance land is reached from the pigging pit. This would average out at about 7.5%.

[153] Given that this is a compulsory acquisition case, I intend to err on the side of generosity to the applicant and allow diminution to the balance lands of 5% plus 7.5%, making a total of 12.5%.

Conclusions regarding valuation evidence

[154] In light of my findings above, I assess the value of the land in light of the pipeline easement as follows:

Easement Area		
1,515 m² @ $20.54/m² @ 35% diminution in value		$10,891.36
Injurious Affection to Balance Land		
17,955 m² @ $20.54/m² @ 12.5% diminution		$46,099.46
Injurious Affection to Dwelling/Improvements		
$136,000 @ 15% diminution		$20,400.00
		$77,398.82
	ADOPT	$77,400.00

[155] To the amount of $77,400 must be added an amount for disturbance items, which I will now turn to consider.

Disturbance

[156] As indicated, the applicant has made quite a number of claims for disturbance. Each will be considered separately. However, before turning to each disturbance claim, it is necessary to understand the legislation which the applicant says makes these claims claimable. This is s 20(5) of the ALA, which is in the same form today as it was at the date of acquisition of the easement. Section 20(5) of the ALA provides as follows:

> "(5) In this section—

costs attributable to disturbance, in relation to the taking of land, means all or any of the following—

(a) legal costs and valuation or other professional fees reasonably incurred by the claimant in relation to the preparation and filing of the claimant's claim for compensation;

(b) the following costs relating to the purchase of land by a claimant to replace the land taken—

(i) stamp duty reasonably incurred or that might reasonably be incurred by the claimant, but not more than the amount of stamp duty that would be incurred for the purchase of land of equivalent value to the land taken;

(ii) financial costs reasonably incurred or that might reasonably be incurred by the claimant in relation to the discharge of a mortgage and the execution of a new mortgage, but not more than the amount that would be incurred if the new mortgage secured the repayment of the balance owing in relation to the discharged mortgage;

(iii) legal costs reasonably incurred by the claimant;

(iv) other financial costs, other than any taxation liability, reasonably incurred by the claimant;

(c) removal and storage costs reasonably incurred by the claimant in relocating from the land taken;

(d) costs reasonably incurred by the claimant to connect to any services or utilities on relocating from the land taken;

(e) other financial costs that are reasonably incurred or that might reasonably be incurred by the claimant, relating to the use of the land taken, as a direct and natural consequence of the taking of the land;

(f) an amount reasonably attributed to the loss of profits resulting from interruption to the claimant's business that is a direct and natural consequence of the taking of the land;

(g) other economic losses and costs reasonably incurred by the claimant that are a direct and natural consequence of the taking of the land.

Example of costs for paragraph (g)—
cost of school uniforms for children enrolled in a new school because of relocation from the land taken"

[157] There is a further threshold point that needs to be addressed before turning to the individual claims for disturbance. This point relates to the rule in *Jones v Dunkel*[44] and the rule in *Browne v Dunn*.[45] The applicant explained the issue this way:[46]

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44 (1959) 101 CLR 298.
45 (1893) 6 R 67.
46 Applicant's submissions, paragraph 2.9 – 2.14.

"2.9 In short, despite denying effectively all of the Claimant's claim for disturbance costs, the Respondent has chosen to adduce no positive evidence (and no admissible evidence) to challenge the evidence of the Claimant and her witnesses.

Jones v Dunkel and Browne v Dunn

2.10 The Claimant relies upon the rule in Jones v Dunkel in this case.

2.11 The Claimant says that the various potential witnesses associated with the Project and the works are properly able to be viewed as witnesses in 'the camp' of the Respondent. Mr Edwards confirmed that, save for one exception, he was unaware of any attempt to try to locate such potential witnesses. Instead, the Respondent has attempted to rely upon evidence, purportedly brought through Mr Edwards, that is clearly inadmissible hearsay (both documentary and oral).

2.12 Furthermore, the Claimant relies upon rule in Browne v Dunn in this case.

2.13 Save for a half-hearted attempt to put to the Claimant that her decision to continue to use the subject land during the works was unreasonable, the Respondent:

(a) did not suggest to the Claimant that she was wrong in her recollection of any matter;

(b) did not suggest to the Claimant that any matter affecting the subject land was not connected to the resumption or the works in the way she indicated;

(c) did not suggest to the Claimant that there was any error in the amount of any item of her claim;

(d) did not suggest to the Claimant that any aspect of the claim was unreasonable;

(e) did not cross-examine any of the Claimant's witnesses; and

(f) in short, did not challenge or contradict her about her claim.

2.14 In the circumstances, the Respondent cannot know (sic) make submissions about the veracity or reasonableness of the Claimant's claim or her conduct."

[158] Mr Quayle of Counsel for the respondent addressed these criticisms during oral submissions:[47]

"… can I address two criticisms made of us by our learned friend's outline? And those are complaints by reference to the ruling in Jones v Dunkel and Brown v Dunn. Taking Brown v Dunn first, your Honour, we reject outright that criticism and, with respect, wonder at it being levelled at us. The rule, it is trite to say, is a rule of procedure. It's directed to but one thing. And that is, fairness to the

47 T 5-3 line 1 – T 5-5 line 10.

relevant witness or the relevant party and that's the extent to which it does extend. The application – the rule depends on the circumstances of the case. It will, for example, be very much constrained in circumstances where the evidence of the parties, as here, has been provided in written form ahead of the trial. In this case, your Honour, the respondent directly pleads that it denies the applicant's various claims for disturbance. The evidence of Mr Edwards exposes the only positive basis on which those claims are met and, in our respectful submission, by it's delivery unarguably gave notice to the claimant of what those grounds were to the extent that they were to be positively advanced

The applicant however, your Honour, bears the persuasive onus, again with respect, in our submission, that is a trite observation. It's she who must make out the claim she brings before the court, on the evidence before the court. The rule is not offended in our submission, your Honour, by the respondent now submitting that she's not discharged that onus by reference to the evidence before the court, primarily evidence which the applicant herself has led. A party is entitled to say, in our submission, by reference to the evidence before the court, that the onus their opponent bears, has not been discharged.

To the extent that a positive case is advanced about the elements of the disturbance claim, it was fairly put to the applicant under cross-examination. And I instance your Honour to a number of matters that her claim for lost earnings was curious, given the difference in the statement and the document which is in exhibit 14, behind tab B1, that the interior paint claim is curious given the absence of photographs of the interior of the house post the works, either before or after cleaning in circumstances, where exhaustive photographs had been taken and where the claimant had indicated she had paid a great deal of attention to taking photographs and gathering evidence. That the exterior painting claim was weak by reason of the fact that all else aside, on the applicant's own case, the house was last painted in 2008. That her decision to leave the shoes in situ was unreasonable in the relevant sense, that the determination to construct an 80 metre Colorbond fence on the northern boundary was not driven by or not totally driven by a desire to obscure the air event. That the sale of the mere Demi on the basis she contends is unlikely, given, inter alia, that she did not have the horse treated by a vet. That the phone records of themselves, shown to the applicant, do not identify in any apparent way, a particular increase in phone expenses. That she does not know who paid for the removal of the contractor's material. That the agreement with Mr White, pursuant to which she affixed certain items to the land adjoining her property to the north, was silent as to what would happen to that material. That two of the lilli pilli trees she claims for are not intended to be planted.

Your Honour, what point, in terms of fairness to the applicant, we ask rhetorically, would it have been served, for example, for it to be put to her that much of the claim she makes for legal fees does not relate to preparation and filing of her claim? What point would there have been in putting to her the claim she makes for substantial sums to rehabilitate the land are unsupported by any evidence from anyone who can actually say if anything is needed and if so, what is needed and at what expense?

The question, your Honour, in our submission, was whether in all of the circumstances of the case, there was any want of fairness in the way the applicant was treated in cross-examination, given the way the case had been run and given the state of the respondent's submissions. Your Honour will see, in fairness, that to the extent that the disturbance items are not addressed by reference to things addressed in the affidavit of Mr Edwards of directly in cross-examination. All that he said is:

The claim, by reference to an analysis of evidence led by the claimant, fails for want of proof. It is entirely appropriate for a party to say, in respect of all the evidence led by another party who has an onus to discharge, that that onus has not been discharged. And that's in this sense, what we do.

We say, a finding on this topic, Your Honour, that really – non-compliance with Brown v Dunn is a bit like a panda bear, your Honour. Most of us may not have seen it, but when – may only have heard of it, but when you see it you know what it is. And in our submission, there is plainly no want of that fairness in this instance here. And, as we say, we reject that criticism out of hand.

So far as Jones v Dunkel is concerned, your Honour, Mr Edwards gives evidence that - the effect of which is, that my client was somewhat removed from the events of the case. He explains that the project has been brought into completion and that the parties licensed by the Coordinator-General to do certain things, have now passed on the project to others. In these circumstances, it is a long bow, we submit, to criticise the respondent for not calling parties or people who are self-evidently not its employees or within its control. The evidence Mr Edwards gave was to the effect that – to the extent anyone was approached about giving evidence, that had been rebuffed. It is acknowledged that others were not approached. But that is seen against the landscape I've just explained.

…

… But to the extent that Mr Edwards was cross-examined on the topic, in our view, in our submission, reinforces that proposition. All he said was, that to the extent that anybody had been contacted about it, there had been a – it had been rebuffed, in those circumstances. And given the size and complexity of the project and the passage of time, in our submission it's a perfectly reasonable inference for the court to draw, that those persons couldn't assist the matter. In the ultimate event, your Honour, the highest the inference goes, in any event, is that the evidence would not have assisted – not that it would have counted against the case.

[159] Mr Skoien of Counsel gave oral submissions in response. Relevantly, he had this to say:[48]

"Your Honour, the claimant does press the points - the Jones v Dunkel and the Brown v Dunn points. Can we start firstly with the Brown v Dunn point. Your Honour, in a number of instances in my learned friend's submissions, your Honour will see reference there in the submissions, there's no evidence of that or the only evidence of that is assertion. Your Honour, the evidence of assertion is the evidence of the claimant on oath and in some instances supported by other witnesses' testimony. Your Honour, those submissions therefore can be taken either two ways. Either that they're wrong and that there is evidence of that matter; sworn evidence from the witness.

Putting aside the issues as to ability of the person to talk about the matter, or else the respondent is saying that the claimant is either mistaken in respect of that particular matter or is misleading or lying to the court. Now, with all due respects, your Honour, it's well and good for my learned friend to come along and say that in a number of instances he put certain matters to the witness for her comment. There were a large number of instances, including instances that found various submissions that are made now, where matters were not put squarely to the witness for the

48 T 5-25 line 34 – T 5-27 line 47.

witness' comment. And that, with respect, is the fairness proposition behind the rule in Brown v Dunn.

HIS HONOUR: What about what Mr Quayle says, that the actual question is not that, but it goes one step further to say that one party must know that it's being challenged on this point and the fact that the issues are all challenged in the notice of contention, or whatever the document was that was filed, that it was known at an early stage that these were not challenged, but these were challenged.

MR SKOIEN: With the greatest respect, your Honour, if the witness' evidence is, is that despite all of the hard work of her and three or four others, there were 328 shoes that were not able to be salvaged and were damage and note sold, then unless my learned friend is going to put to the witness that she's mistaken about that, or that she's making it up, he can't then make the submission in his written submissions, to that effect. Because the witness hasn't had the opportunity to comment in relation to that. Your Honour, the example of the phone records is a perfectly good example of a circumstance in which the witness gave evidence of an estimate as to how much she had spent. She said she thought it was an underestimate, because she was being very fair in terms of her phone records and fuel. That was not challenged in cross-examination. It was not suggested to her that that was wrong, that it was far less than that, that the phone records didn't reveal it, that phone numbers – how could she identify phone records. Your Honour, the witness is entitled, in fairness, to have those matters put to her, in order for her to answer.

HIS HONOUR: But isn't there also a point where the applicant is required to prove her claim?

MR SKOIEN: Absolutely, your Honour. And the evidence of the witness – sorry, the only evidence – the only sworn evidence before the court – the only evidence, is the evidence of the claim that herself, on oath, that she estimated, based upon her having lived through it, in her dairy entries, she estimated that she had spent no less than $2000. Now, your Honour, with the greatest respect, that is the end of the matter. It discharges the evidentiary onus – this court is entitled to rely upon that evidence of this witness. Unless there is some reason to suspect that that recollection – that sworn evidence is in error, or mistaken or is intentionally false. And if it is either of those two, the witness ought to have been given an opportunity to comment.

HIS HONOUR: Well that may – just so I accept what you say, that would get through the first [indistinct] of what I said about the reasonable quotation, that reasonably, a reasonable sum. But it still wouldn't show that it was reasonable for her have made so many calls.

MR SKOIEN: Your Honour, the first thing is that you have – and I'll obviously urge your Honour to look at all of the evidence of Ms Bresnahan, her statement, her sworn evidence as well and the exhibits to her statement. But her statement was that she had – her sworn evidence was that she estimated that the time that she had spent in respect of dealing with the liaison officers from the NNA and SEQ Water, dealing with – having to deal with the issue surrounding the interruptions to the land and the like, was no less than $2000. Now, that's not challenged, in any respect, by my learned friend. It wasn't suggested that that was wrong. It wasn't suggested that they were unrelated. We know my learned friend went to the trouble of looking at exhibit 18 – preparing exhibit 18, with a – with a volume of phone records and utility bills, which far exceed the quantums – far exceed the quantum in total of the estimate that Ms Bresnahan has provided. Again, corroborative of that, to the extent that it was all necessary. But my learned friend didn't have the courage to go the extra step and put to the witness, well, I'm suggesting to you that 2000 is [indistinct]

a – was not related to the claim and you just can't demonstrate this from any of these phone bills you've provided.

HIS HONOUR: I don't know if it's a matter of courage. It's a matter more of tactics.

MR SKOIEN: I understand. Well, your Honour, they do run hand in hand. He bolstered the evidence before the court, in respect of the phone records, which have been provided on disclosure for a long time. He bolstered the evidence before the court, so that if unless there have been – there could've been a suggestion that it may well have been adduced had it not – had he not provided those documents. That in fact there's no evidence that Ms Bresnahan in fact had bills exceeding $2000 for the whole period we're talking about. So how could it all have been related to the resumption process. Your Honour, that's been dealt with by my learned friend in his questioning. But there's no need to – in his evidence, I should say, tendered through Ms Bresnahan. There's no need to go further than that.

HIS HONOUR: Who's obligation is it to show that the cost has been reasonably incurred?

MR SKOIEN: It is the claimant's obligation. And where the claimant produces sworn evidence herself, that she on oath estimates that more than $2000 was attributable to her having to deal with the resumption process, then that, in my submission, is sufficient. Having said that, one needs – one would then only need to go further, if there was some challenge to that issue.

HIS HONOUR: Well, that's where I wonder and accept, I think what you say to begin with, that it's up to the claimant to show both the reasonable quantum and the reasonable incurring.

MR SKOIEN: Your Honour, certainly insofar as the phone records are concerned, of course. I don't shy away from my principal submission that it's, in the absence of any challenge, the sworn evidence of the witness is sufficient evidence to satisfy the evidentiary onus, both with regard to the incurring of that quantum and with regard to the reason for that quantum."

[160] I appreciate that to non-legally qualified readers of this decision, references to the rules in *Jones v Dunkel* and *Browne v Dunn* are nothing more than legal doublespeak. I will attempt to give some meaning to the rules by reference to the learned text by J.R.S. Forbes "*Evidence Laws in Queensland*".[49]

[161] As regards the rule in *Jones v Dunkel*, Forbes has this to say:[50]

> "**[A.118] Failure to call a material witness**: the weight of a party's case may be enhanced if the opponent, without any acceptable explanation, fails to call a material witness who is only available — or who is more readily available — to the opponent. Such a failure is not additional evidence, and it cannot cure a defective prima facie case, but it can support an inference that the missing witness would not have supported the case of the party who is deemed responsible for his or absence.

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49 Third Edition, LBC, 1999.

50 Forbes [A.118], [A.119] and [A.123].

> **[A.119]** It is not appropriate to invoke *Jones v Dunkel* when it is apparent that a missing witness is hostile towards the party concerned, or if the witness is equally accessible to each party.
>
> …
>
> **[A.123] Limits of Jones v Dunkel:** warnings against overdoing *Jones v Dunkel* arguments appear in *Steel v Mirror Newspapers Limited*, and in *Liaweena (NSW) Pty Ltd v McWilliams Wines Pty Limited*. In *Liaweena* it was held that an adverse inference should not be drawn from a failure to call a company secretary to testify about negotiations for a contract. Although the secretary did have some knowledge of the matter, another officer who knew more **was** called, and that was enough.
>
> Kirby P observed:
>
> > 'Care must be taken … lest an over-exuberant application of [*Jones v Dunkel*] … forces upon litigants … the tedious tender of innumerable witnesses … where one would suffice, out of fear of later facing arguments based upon … that case.'" [footnotes omitted]

[162] The rule in *Jones v Dunkel* was discussed by the High Court in the case of *Kuhl v Zurich Financial Services Australia Ltd*.[51] Justices Heydon, Crennan and Bell had this to say at paragraph 63 of their joint judgment:

> " '*The rule in Jones v Dunkel is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled witness would not have assisted the party's case. That is particularly so where it is the party which is the uncalled witness. The failure to call a witness may also permit the Court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in an position to cast light on whether the inference should be drawn*'."

[163] Member Scott considered the application of *Jones v Dunkel* in *Courtney Bay Pty Ltd v Gold Coast City Council*.[52] He had this to say:[53]

> "The principles that are relevant in a situation such as I now confront invite me to lean in favour of the claimant and to resolve such obscurity as exists in its favour (*Robinson & Co v Collector of Lands Revenue* (1980) 1 WLR 1614 at 1621).

[164] I agree that it is appropriate to proceed in this case in a manner consistent with Member Scott in *Courtney Bay*. That however is not the end of the matter.

[165] I considered a similar acquisition case which included disturbance items claimed by the applicant which were challenged by the respondent. However, like in this case, the respondent's challenge was more in the nature of putting the applicant to proof of their claim than it was to lead evidence itself rebutting the applicant's claim. The case was *Lowry v Coordinator-General*.[54] I made the following observations:[55]

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51 [2011] HCA 11.
52 [2004] QLC 103.
53 Ibid at [190].
54 (2012) 33 QLCR 263.

"[96] I agree with Mr Allan's contention that, in order to properly construe the provisions of s.20(5) of the *ALA*, it is necessary to give consideration to the natural and ordinary meaning of the words contained in the section in accordance with the usual principles of statutory construction. In essence, this is the test as set out in *Project Blue Sky Inc v Australian Broadcasting Authority*. However, whilst I accept that that is the appropriate test to apply, I do not agree with Mr Allan that such a test leads to the narrow construction that he contends for. In my view, the clear and plain meaning of the provisions of s.20(5) of the *ALA* are that disturbance costs in order to be properly claimed must be reasonable, and that the question of that reasonableness relates both to the issue of whether or not it was reasonable to incur that nature of cost, and whether the quantum of the cost was reasonable or not.

[97] Because of the manner in which Mr Allan has approached the meaning of reasonable in s.20(5) of the *ALA*, the evidence led by the applicant in this matter goes to show, at least in the majority of cases, that the disturbance costs claimed by the applicant were costs actually incurred by the applicant, and that it was reasonable of the applicant to incur costs of that nature, but not specifically of that quantum. Although Mr Allan contends that the respondent has not led evidence as to what reasonable costs could properly be claimed by the applicant that of course misses the point. It is a matter for the applicant to make out his claim for compensation in accordance with the provisions of the *ALA*. In my view, it simply is not sufficient for the applicant to give evidence, such as he did as regards his incurring of solicitor, barrister and valuation expert fees that he simply relied upon the expertise of those providing the service and paid the bill accordingly. Such evidence contains no proper analysis as to whether or not the costs incurred were reasonable.

[98] Further, it would have been a very simple matter for the applicant to have provided the Court with affidavit or like evidence from the professionals who provided the legal and valuation services to the applicant, detailing in a claim by claim manner why each element of the costs incurred were both reasonable to incur, and why the quantum of each such cost was also reasonable in light of prevailing legal and professional standards in light of the complexity or otherwise of this case."

[166] The rule in *Jones v Dunkel*, and the manner in which the respondent chose to run its case, does not absolve the applicant of establishing that claims for disturbance items under s 20(5) of the ALA must be both reasonable in their quantum and reasonably incurred.

[167] I now turn to consider the rule in *Browne v Dunn*. Forbes has this to say regarding the rule:[56]

"**[A.94] Browne v Dunn**: an important rule of practice relating to cross-examination is the 'rule in *Browne v Dunn'*. The authorities are reviewed at length in *Allied Pastoral Holdings Pty ltd v Commissioner of Taxation*. When a cross-examiner proposes to ask the court to reject the evidence of an opponent's witness, that witness must be given a fair chance to dispute or to comment upon the version which the cross-examiner is proposing. Apart from fairness to the witness and the party who called the witness, it is desirable that the court should see and hear the

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55 Ibid at [96] – [98].
56 Forbes at [A.94] – [A.95].

witness's response to contradiction. An example of a clear breach of the rule may be seen in *Payless Superbarn (NSW) Pty Ltd v O'Hara*. In an action against an occupier for negligence the plaintiff testified to slipping on some grapes scattered on the floor shop. This story was not challenged in cross-examination, but later the defence tendered evidence that 'there was nothing on the floor'.

[A.95] The rule in *Browne v Dunn* is less important where pre-trial pleadings, affidavits, or other communications between the parties have already made it clear that certain evidence will be disputed. In such a case the failure to cross-examine may be of little or no significance. In *Echegaray v GIO of NSW* it was obvious from medical evidence already disclosed that the defence would accuse the plaintiff of malingering. In these circumstances the trial judge was entitled to reject the plaintiff's complaints of persistent chest pains, despite the absence of cross-examination on that point. Forewarnings which obviate the need to follow the *Brown v Dunn* process tend to be more common in courts where evidence in chief is given on affidavit.

The most severe sanction for non-observance of the rule in *Browne v Dunn*, when applicable, is a refusal to admit any evidence in contradiction of the witness who was not properly cross-examined. But the judge may take the milder course of allowing the party who witness was not challenged to recall that witness to deal with the competing story. There is no absolute rule that unchallenged evidence must be accepted but in *Poircanin v Australian Consolidated Industries Ltd* it was said that in many cases it would be wrong, unreasonable or even perverse to reject evidence upon which there was no cross-examination." [footnotes omitted]

[168] The applicant's complaint about the breach of the rule in *Browne v Dunn* is clearly answered by Forbes in [A.95] above.

[169] The respondent made its Points of Defence on 20 September 2013. They are contained in Ex 1. The Points of Defence are extensive in nature, putting the applicant on ample notice that the applicant's disturbance items were challenged.

[170] Having disposed of the issues raised by the rules in *Jones v Dunkel* and *Browne v Dunn*, I now turn to address each of the disturbance claims of the applicant.

[171] It should be noted that the parties have approached consideration of the disturbance claims quite differently. Consistent with her approach which says that this is actually a very simple claim, the applicant has addressed all of the claims for disturbance under a short, single written submission as follows:[57]

> "1.19 With regard to the claim for disturbance costs, it is submitted that the Court would conclude that:
>
> (a) the Claimant has incurred the loss and damage of which she has given evidence;
>
> (b) that loss and damage was caused by the resumption;
>
> (c) the Claimant has already incurred cost, or will incur cost, in remedying that loss and damage;

[57] Applicant's submissions, paragraph 1.19.

(d) those costs are reasonable; and

(e) compensation for disturbance should be assessed in the amount of $101,756.65."

[172] The respondent, on the other hand, has made separate written submissions with respect to each of the applicant's claims for disturbance.

[173] Mr Skoien for the applicant, following receipt of the respondent's written submission, went to some length in oral submissions to address each item of disturbance.[58]

[174] There are a total of 19 disturbance items, ranging in quantum from $270 for B(8) to $23,750 for B(18). I am concerned that providing a detailed analysis of each and every claim will make this decision unduly long and out of all proportion to the quantum of the claims. I have no doubt that a lengthy decision could be written on each disturbance claim, carefully analysing all of the evidence and related submissions. The interests of justice however dictate that I speed up the process, thus necessitating a more shorthand approach to each disturbance item.

[175] What follows therefore will be an overview and my assessment of each item of disturbance. I must stress that, even though I will address each disturbance item in a shorthand way, I have nonetheless considered all of the evidence and submission in great detail. I have read all of the affidavits in support of the applicant's case many times. I have reviewed all of the oral evidence. I have considered all of the exhibits. I have taken into account all of the submissions, both written and oral.

Lost Earnings

[176] The applicant claims $15,000 for lost earnings. This is calculated by a claimed inability to attend 10 festivals at which she expected to earn $1,500 per festival. It is claim B(1) in Ex 14.

[177] The applicant's claim is difficult to fully apprehend and quantify. It is not helped by the fact that the nature of her claim has changed from that set out in her statement to that ultimately given during her oral evidence. The changes are reflected both in the actual festivals that the applicant says she was unable to attend, as well as in the total number of days that she lost. In many ways, the claim as formulated is opaque at best.

[178] Mr Skoien of Counsel during oral submissions did his best to adequately quantify the applicant's claim.[59] In summary, Mr Skoien submits that the applicant lost net income

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58 Generally, at T 5-26 line 13 to T 5-41 line 25 and specifically at T 5-41 line 27 to T 5-65 line 18.

59 T 5-41 lines 27-34.

from a failure to attend 18 days of festivals at something between $500 and $1,250-$1,300 net a day.

[179] As I indicated in my decision in *Lowry*, it is necessary for claims for disturbance to pass a two stage test: the actual sum claimed must be reasonable; and it must have been reasonable to incur the cost.

[180] Taking the entirety of the evidence into account, and noting, in particular, the disruption caused to the applicant by the project construction occupying some 18 months instead of approximately three weeks as initially advised, I understand, and accept as reasonable, the applicant's claim that she was unable to attend some festivals that she would otherwise have attended but for the project works.

[181] I now turn to consider whether or not the actual claim of $15,000 is reasonable. At the outset, I must point out that Mr Skoien's figures given in his submissions do not accord with the evidence. The evidence shows a gross loss of between $750 and $1,750 per day. This must be reduced by the operating costs of approximately 40% to arrive at a net loss per day. When this is done, the net loss is seen to range between $450 and $1,050 per day.

[182] I am further concerned that the loss claimed by the applicant is not reflected in the applicant's earnings as recorded in Exhibit 19. This is well put in the respondent's submissions as follows:[60]

> "55. The Gross profit the plaintiff recorded for the 2012 financial year within which, bar one month, this claim falls, is recorded in Ex 19 as approximately $51,000. The applicant attended local markets twice each week in addition to festivals at the rate (according to Ex 14, B1 of approximately 10 per 6 months). In any twelve month period then, assuming 4 weeks holiday, the applicant would attend approximately 116 markets or festivals which result in a return of about $440 per festival (irrespective of its duration in days). That is a sum which is inherently more probable as the average daily gross return from selling hats and plastic shoes, than the sum contended for by the applicant. If her return were, as she contends, her gross income would have been within the range of $87,000 - $203,000.
>
> 56. The financial statements for the relevant year do not suggest a decline in income. It is safe to make that observation because on the case for the applicant, the gross income shown in the 2011 financial year would have been in the order of $3,000 (3 x $750) and $5,250 (3 x $1,750) higher and in the 2012 financial year would have been in the order of $11,250 (15 x $750) and $26,250 (15 x $1,750) higher. Those increases would have been disproportionately and inexplicably higher than earlier years."

[60] Respondent's submissions paragraphs 55 and 56.

[183] The respondent says that the applicant's claim for lost income is sufficiently uncertain as to warrant its dismissal or reduction. I do not consider the claim to be so uncertain as to warrant dismissal outright, but it is my view that the claim should be reduced.

[184] As the applicant conceded, it was very difficult to know what earnings would be made at any particular festival as there were so many variables, including of course the weather. I take this to mean that if a festival was heavily washed out the income for that day would effectively be zero (and indeed the applicant would incur a loss for her costs in fuel etc in attending). This of course has a marked impact on any attempt to average the applicant's losses across 18 days. I also accept the respondent's submission that the applicant's income does not properly reflect the loss that the applicant contends for, and that if the earnings of the applicant were at the upper end of earnings for each festival day, then her yearly earnings could have been up to approximately $200,000 gross.

[185] An allowance to the applicant of a net $450 per day over 18 days equates to $8,100. This of course does not take into account any major wet days, nor does it take into account any highly prosperous days. However, given the state of the evidence, it is an award which I consider can be comfortably made and which it is likely properly reflects the loss suffered by the applicant under this head.

[186] I assess the applicant's loss of income under claim B(1) as $8,100.

Painting internal and external walls

[187] The applicant claims the sum of $3,000 for painting the internal walls of the house, and $7,400 for painting the external walls of the house. These claims are B(2) and B(3) in exhibit 14 respectively.

[188] The evidence reveals that the applicant has had the interior of the house repainted but has not repainted the exterior of the house. Exhibit 14 contains a quote for external painting of the house at $7,400 as claimed, and for internal painting at $5,700. It is the applicant's evidence that she was able to have the internal painting undertaken at a cost of $3,000.

[189] At the outset, I accept the applicant's evidence that she had the interior of her house repainted after the project works and that she expended the sum of $3,000 on such painting. However, that does not mean that I find it reasonable for the applicant to have incurred this loss.

[190] As the respondent has correctly pointed out in my view, the applicant has provided a huge number of photographs showing the manner in which the pipeline project impacted her property. Indeed, it is fair to say that anything that the applicant thought would support her claim for compensation, or her complaints against NNA or related agencies,

were photographed. It is against this background that the lack of any photographic evidence at all taken by the applicant as to the state of the interior of the house post wash down and cleaning by the respondent and pre repainting needs to be considered.

[191] During cross-examination, the applicant explained the lack of photographs showing the condition of the inside of the house post wash down and cleaning and before repainting as "I – you just – I didn't think".[61]

[192] I am concerned by the applicant's lack of photographs of the interior of the house at the time post wash down and cleaning but before repainting. Her evidence of basically forgetting is not credible. What is more, even if the applicant did simply forget to take a photographic record, she could have easily overcome this difficulty by having either the painter who provided the quote for the internal and external painting, or the painter who actually painted the interior, provide a short affidavit to the Court stating their professional opinion that the state of the painting of the house post project and post wash down and cleaning was such that it required, in their professional opinion, repainting.

[193] Given that the amount claimed under this disturbance item exceeds $10,000, the cost incurred to the claimant in obtaining such a statement to assist in proving her claim would not have been great. I of course note that the applicant did have some supporting statements from lay people agreeing with her view that the interior and exterior needed repainting, but those statements are of little if any weight.

[194] The absence of photographic evidence showing that the exterior of the house requires repainting is even more telling. Although there are numerous photographs showing the current state of the exterior of the house, none of those show the discolouration or markings which the applicant says are such as to require repainting of the exterior. As the exterior has not been repainted, at any time right up until the final preparations for hearing the applicant could easily have organised close-up shots showing any particular areas where the applicant believed that the exterior painting was damaged and required repainting.

[195] I accept that it may be the case, and given the totality of the evidence given by the applicant, probably is the case that the applicant is a person who likes to have her possessions in pristine quality. I am sure that that is the reason why she had the interior repainted. But that does not make such action objectively reasonable.

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61 T 4-34 line 7.

[196] I find no compelling evidence on behalf of the applicant showing that it was reasonable to have either the interior or exterior of the house repainted. Accordingly, I reject claims B(2) and B(3).

Telephone and fuel expenses

[197] The applicant's claim with respect to telephone and fuel expenses is $2,500, made up of $2,000 for additional telephone expenses and $500 for fuel expenses. This is claim B(4) in exhibit 14.

[198] The applicant's claim is supported by a large bundle of telephone records contained within exhibit 18.

[199] The applicant gave clear evidence that she incurred these additional costs. Given the nature of the manner in which the project works proceeded, and the extreme nature of those project works compared to what was originally advised to the applicant, I consider it reasonable for the applicant to have made the large number of telephone calls that she clearly did, and for her to have incurred additional fuel costs by means of additional travel in light of the easement resumption.

[200] The respondent contends that there is no sufficient quantification of the claimed loss and that accordingly the claim should be dismissed or discounted.

[201] It is true that the applicant did not undertake any analysis of the telephone numbers that she called as set out in the accounts in exhibit 18 to demonstrate that these numbers called were indeed associated, either directly or indirectly, with the disruption to her caused by the project. However, in my view this is a two edged sword for the respondent. It is clear from the material exhibited to Mr Edward's affidavit that the respondent itself had details of a great number of telephone numbers that were used by NNA and related entities, as well as of course the respondent's own telephone details. If the respondent had chosen to, the respondent could have undertaken a review of the telephone numbers contacted by the applicant to show that those numbers were not project related phone calls. The respondent failed to do any analysis, on the material that I have seen, of the various phone numbers from its own knowledge.

[202] The applicant has provided sworn evidence. She was tested on cross-examination. It was reasonable for her to incur additional costs given the nature of the work undertaken in furtherance of the project. It is clearly difficult for her to determine exactly how much extra fuel she used and how many additional telephone calls she made. I note that the applicant has not sought to overstate her claim by making a claim at a rate per kilometre travelled, but has instead relied upon the cheaper replacement fuel cost.

[203] As regards this claim, I resolve any doubts in favour of the applicant. The claim of $2,500 for additional telephone and fuel expenses in item B(4) is allowed.

Stock damage (shoes stored under the dwelling)

[204] The applicant claims the sum of $3,280 for stock damage, being shoes that were rendered unsellable as a result of damage occasioned by the project works. The claim is assessed at the amount of $10 per pair for 328 pairs of shoes. This is claim B(5) in exhibit 14.

[205] I am satisfied that the applicant had under her house at all material times a stockpile of 14 large crates of plastic styled shoes, and that she sold those shoes as part of her market and festival stall enterprise. I also accept that the applicant sold the shoes for $10 per pair.

[206] Although the respondent says that there is no proof that 328 pairs of shoes were rendered unsellable, I accept the applicant's evidence that many more pairs of shoes than this were covered in dust and grime and that, following a great deal of work by five people to clean the stock of shoes, there were only 328 pairs that were unable to be salvaged. There is also tendered evidence by way of photographs which show some of the damaged shoes.

[207] The respondent has also raised the issue of the reasonableness of the applicant's actions in not ensuring that her stock of shoes was protected from dust etc. I agree that an applicant has a responsibility to act reasonably with respect to any claims made. However, such reasonableness must be viewed through the prism of the circumstances that the applicant found herself in. She understood that works were only to take place on her property for approximately three weeks. I have no doubt that this was conveyed to her by a representative or representatives of NNA. I also accept that, for whatever reason, the pigging pit and her property were used as an entry point for works further along to the north of her property (within the easement) and that this resulted in approximately 18 months of works disruption.

[208] It may be argued that the applicant could have avoided all of her loss of shoes, and her time in cleaning other shoes, simply by placing relatively inexpensive tarpaulins over her stored stock. Indeed, it could be said that, even without the project works, a reasonable person may have protected the stock of shoes from the elements by tarpaulins or other inexpensive coverings in any event. However, it could equally be said that the NNA knew that it was working in very close proximity to the applicant's house and knew that there would be significant dust and other pollution caused by the works and therefore it should have taken reasonable steps to ensure that items under the house were protected, particularly when the disruption to the house changed from one of three weeks to 18 months.

[209] Accordingly, while I question the reasonableness of the applicant's claim, the actions of the respondent (through its servants and agents) in this regard are certainly not beyond reproach. Adopting a generous approach in favour of the applicant, and as I am satisfied that she has suffered loss of 328 pairs of shoes as claimed, I consider it appropriate that she be recompensed for her loss in this regard. However, I do not consider that her loss is $10 per pair.

[210] It is clear on the evidence that the applicant sold the shoes for $10 per pair. This was, therefore, her gross earnings per pair of shoes. I have already accepted that her costs associated with attending markets and festivals etc (which I take to include the cost of her stock) is approximately 40%, leaving a net return of 60%, which equates to $6 per pair of shoes. The applicant has made similar submissions as to the actual loss incorporating her expenses being taken into account, but the respondent's position would appear to include a doubling up of the cost of the shoes at $2.25 per pair and the 40% cost of attending festivals. I am prepared to accept however that the net loss of the applicant is $6 per pair.

[211] The respondent has also made the point that, as the applicant had a large stock of shoes, the loss of 328 pairs of shoes was at best a loss sometime in the distant future and should be heavily discounted. The respondent says that, being generous, the applicant could be awarded the sum of $3 per pair.

[212] I accept that what the applicant has lost is the actual cost of purchasing the shoes, being $2.25 per pair, plus the opportunity to make a profit from the sale of those shoes. Unfortunately, I have no evidence as to what the replacement cost would be of 328 pairs of shoes at today's value, the only evidence being that when the applicant purchased the shoes some years earlier, she was only able to obtain the price of $2.25 per pair by purchasing a container load of shoes in bulk.

[213] Doing the best that I can on the evidence before me, and accepting that the applicant would have made a net profit of $6 per pair on the sale of the shoes, and noting from the evidence that the applicant had already sold almost half of her stock of shoes as at the commencement of the project works, I consider the probability to be quite good that she would have sold the damaged shoes within the not too far distant future. Taking into account the fact that her loss must fall somewhere between $2.25, being the bare cost of the shoes, and $6, being the net loss of profit, and erring on the side of generosity to the applicant, I am prepared to allow the sum of $5 per pair of shoes rendered unsellable. Three hundred and twenty-eight pairs of shoes at $5 per pair equals a total sum of $1,640. I award the sum of $1,640 to the applicant with respect to claim B(5).

Reinstatement of stormwater drain

[214] The applicant claims the sum of $3,300 to reinstate a stormwater drain and driveway at the entrance to her property. This is claim B(6).

[215] On my understanding of the evidence, a number of points are clear. Firstly, the stormwater drain did suffer damage as part of the works. Further, that damage did extend to the driveway on and around the stormwater drain. Further, damage to the stormwater drain was also caused, or at least exacerbated by, the flooding rains experienced in the area in 2011. Finally, and most importantly, the stormwater drain and driveway referred to is located outside of the applicant's property on what could colloquially be termed the footpath leading to the road pavement. Essentially, the relevant driveway and stormwater drain is on a roadway, not owned by the applicant, but understood to be owned and controlled by the local authority.

[216] I do not doubt the reasonableness of the quote obtained from DA and AJ Daniels to rectify the damage to the driveway and stormwater drain. That however does not mean that it is appropriate for the applicant to be compensated by the respondent for this amount.

[217] The key point is that the stormwater drain and driveway is not located on the applicant's property. There is nothing in the evidence to show that the applicant has obtained any authority from the local authority to undertake works on the local authority's road. Had the local authority given any such authorisation, and further stipulated that such works to be undertaken at the cost of the applicant, then there may well have been a claim possible under this head by the applicant. However, the evidence does not support that.

[218] In short, barring any arrangement between the applicant and the local authority, this matter is one for the local authority to deal with, either as part of its normal maintenance program, or by arrangement or taking action itself against the respondent, NNA, or other contractors. Accordingly, I make no award to the applicant for this claim of disturbance.

Colourbond fence to northern boundary

[219] The applicant claims the sum of $6,800 to erect a colourbond fence to a length of 80 m on the northern easement boundary. This is claim B(7) of exhibit 14.

[220] The evidence regarding the need for an 80 m colourbond fence, with a gate, is quite clear. I have no doubt that part of the reason the applicant required a colourbond fence along part of her northern boundary was to block the visual impact of an aboveground air vent built as part of the project works on the property to the north of the applicant's property. I also accept that the respondent required gates on the easement part of the northern fence

to allow easy access along the easement. However, the applicant also had additional reasons for wanting an 80 m long colourbond fence. These are set out at paragraph 101(e) of her statement which is located in exhibit 2. As the applicant put it, "This fence would act as more security for my property. It would also act as a barrier too [sic] give our neighbour privacy and keep dust at bay from the round yard which is adjacent to the neighbouring house".

[221] Further, exhibit 20 is an email from the applicant which she sent to the owner of the property to the north of her property. She was seeking the shared cost of a colourbond fence that she was having to build "for security reasons due to the issues we have had to deal with from the tenants that have rented the house on your property over past years. My children have been exposed to very unsavoury men that have come onto my property under the influence of alcohol and drugs causing us to be concerned for our safety … recently with the new tenants their young children were playing and throwing oranges around which were on the ground and this caused our horses to spook putting the lives of my children at risk. As the present tenants next door give us great concern and do not maintain the property we would like to erect the fence to prevent us from constantly having to look at the unsightly condition the house and grounds are kept".[62] After this explanation, the applicant went on to also describe the need for a fence to block the view of the pipeline air valve.

[222] Very helpfully, the applicant's quotation set out at page 2 behind tab B(7) in exhibit 14 is a quote from a fencing company which breaks the cost of the 80 m colourbond fencing down into two components; one being for 40 m of colourbond fencing including a gate in the vicinity of the easement to match the colourbond fencing on the southern boundary, and the balance of the quote being for a further 40 m of colourbond fencing between the applicant's property and her neighbour's property.

[223] I am in no doubt, using the applicant's own words, that the reason for the second part of the quotation was primarily for the safety of her children to form a barrier between her property and the neighbouring house. It was also to stop dust escaping from her round yard into the neighbouring property. This is a cost that should be borne either by the applicant herself or shared to some degree between the applicant and her neighbour. It is not in any regard a cost which should be borne by the respondent.

[224] However, the same does not apply with respect to the 40 m of colourbond fencing over the easement area which includes a gate. There is no doubt that the visual amenity

62 Exhibit 20 page numbered 3 at about the centre of the page.

enjoyed by the applicant from her property has been impacted by the air valve, and that this visual amenity is remedied by the construction of the 40 m colourbond fence and gate. Even without the issues regarding the applicant's difficulties with her neighbours, I consider it reasonable for such a colourbond fence and gate to have been constructed over the 40 m segment of the boundary. The quotation at page 2 behind tab B(7) of exhibit 14 shows that the segment of fencing on and near the northern boundary of the easement to cost the sum of $3,850. I find such sum reasonable. Accordingly, I find in favour of the applicant that she should recover the sum of $3,850 with respect to item B(7).

Costs of removal of contractor's material

[225] The applicant claims the sum of $270 being the cost of removal of rubbish left on the easement area after the completion of the project works. This is item B(8) in exhibit 14.

[226] As regards this claim, the respondent contends that there is no reliable evidence that NNA left anything on the applicant's land or that the applicant expended $270 in having the rubbish removed. I reject that submission.

[227] To begin with, exhibit 17, volume 1, tab 10 is titled "rubbish left behind" and behind that tab are a series of photographs showing various forms of rubbish lying on the applicant's property. Additionally, the applicant gave clear oral evidence that the rubbish was left behind by NNA and that she expended the sum of $270 in arranging for its removal.[63]

[228] It is of course correct that the applicant does not have any documented evidence to support her payment of the sum of $270. She does not have the name of the contractor who removed the rubbish. These are clearly deficiencies in the applicant's case. However, they must be viewed in context of the evidence that she gave. As she said, she had a contractor working on her property using a bobcat to do private work for her. While the bobcat operator was working, the applicant asked the operator if he could clean up and remove the NNA rubbish. The contractor said that he could clean up the rubbish and remove it in his truck for an additional sum of $270.

[229] I find it completely understandable that the applicant used the services of a contractor on her property for a different purpose to clean up the NNA rubbish, and I also find it understandable why there is not a documented paper trial showing that expense.

[230] In the scheme of things, the claim for $270 is small. The evidence of the applicant as regards the manner in which she incurred that cost are clear. In my view, it is appropriate

63 T 1-75 line 20 to T 1-76 line 2.

that the respondent reimburse the applicant for the cost of $270 for removal of the rubbish as claimed in item B(8).

Value of material and equipment on adjoining land

[231] This claim is number B(9) in exhibit 14 and is there titled "value of materials and equipment used for the horse paddocks that the respondent's contractors dismantled throughout the construction works". Item B(9) is claimed in the sum of $956.80.

[232] The applicant's evidence is that she and others erected a paddock on her neighbour's property with the permission of her then neighbour Mr John White. The agreement was to the effect that the applicant could fence off a paddock and use that paddock for the housing of horses without paying any agistment costs, on the basis that she would maintain the paddock and surrounds and also mow his house paddock as the mowing and upkeep was becoming too much for Mr White due to his age. The applicant's evidence is supported by the affidavit evidence of Ms Rachel Geering.[64] I note that at the relevant time Ms Geering was a tenant in the applicant's dwelling and that Ms Geering housed her horse in the paddock built on the neighbouring property.

[233] I have no doubt that the arrangement was put in place as stated by the applicant and Ms Gerring. Such an arrangement was obviously beneficial to both the applicant and Ms Geering and Mr White. However, as the respondent rightly points out, there was nothing or at least in the evidence presented to the Court, to show what would happen to the material if the agreement came to an end.

[234] The fencing that was constructed on the neighbouring land was clearly substantial. It was strained fencing built to a standard to withhold horses. I agree with the respondent's categorisation that it amounted to a fixture on the neighbouring land.

[235] Absent the existence of any evidence showing that ownership of the fencing materials was meant to remain with the applicant despite it being installed on the neighbouring property, in my view the items claimed under this heading are in essentially the same category as the items claimed in item B(6). That is, the items are not on the applicant's land. It was a matter for the owner of the neighbouring land and the resuming authority to determine compensation for the removal of that property as part of the easement process on the neighbouring property. It matters not that the neighbouring property was, I understand it, the property of a State Government department and that John White was a tenant. The same legal principals apply.

[236] The claim under item B(9) is rejected.

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64 Exhibit 2 Tab 3 paragraph 8.

Loss of rent

[237] The applicant claims the sum of $7,220 for loss of rent as a result of the project works from 1 November 2011 to 7 March 2012 at the rate of $380 per week. This is item B(10) in exhibit 14.

[238] The basis of this claim is straightforward. At the time that the pipeline construction work began, the dwelling was rented to Ms Geering and her family for the sum of $380 per week. I accept that the dwelling was very suitable for Ms Geering as she was able to co-locate her horse to the property, and to the horse yard subsequently in the neighbour's property. There is a clear inference, which I accept, that but for the project works, Ms Geering would have remained as a tenant for some time. I also accept that Ms Geering and her family vacated the dwelling due to the disruption caused by the construction of the project.

[239] Had the dwelling simply been re-let after the end of the project (and once the dwelling was rehabilitated) then the claim for lost rental would have been direct and simple. However, the facts are not that straightforward.

[240] NNA paid the applicant for the loss of rental for the period from when Ms Geering left the dwelling up until the end of October 2011. Payments were then ceased. By the applicant's own evidence, this is when a "Mexican standoff" began between herself and NNA over rectification works to the dwelling. Ultimately, the standoff ended with the dwelling being washed and cleaned. However, at this time, instead of being put back on the rental market, the applicant's ex-husband took up residency in the dwelling and paid no rent.

[241] I find this item to be another example where my discretion should fall, if there is doubt, in favour of the applicant. Clearly, had NNA washed and cleaned the dwelling in November, on the evidence as I have found the dwelling would have been ready for re-tenanting from that time. It would also, of course, have been reasonable to expect some delay in re-tenanting the property. However, NNA, for its own reasons, played its own part in the "Mexican standoff". To continue the colloquialism, "it takes two to tango".

[242] The simple fact is that NNA did not wash and clean the dwelling for a number of months. During that time, it was uninhabitable in circumstances where, but for the project, the evidence suggests that Mr Geering and her family would have still been tenants of the dwelling. Further, there is no evidence to suggest that there was any intention on the applicant's ex-husband's part to move into the dwelling earlier than March 2012. This

proposition was not put to the applicant nor was any other witness even required for cross-examination.

[243] I am satisfied that the claim is made out in full as sought by the applicant with respect to this item of disturbance. The applicant should recover the sum of $7,220 with respect to item B(10).

Horse supplement

[244] The applicant claims the sum of $4,144 as the cost of horse supplement for the period 1 November 2011 to 1 March 2012. This is item B(11) of exhibit 14.

[245] I accept the applicant's evidence that she had reached an agreement with NNA that NNA would pay for supplement for the horses on the property until such time as fresh turf was laid and had an opportunity to knit. The arrangement was two bales of supplement per day. The arrangement was for a period of four months, to be reviewed after three months.

[246] It is unclear from the applicant's evidence[65] as to whether NNA ceased delivering the supplement after a period of three months or four months. In the scheme of things, it makes no real difference. The point is that the respondent complains in its written submissions that the applicant had seven, or perhaps even nine, horses on her property at the time that the agreement regarding supplement was reached with NNA. The evidence however does not bear this out. At paragraph 14 of her statement[66] the applicant states that she had seven horses on the property as at the date that the easement was registered. This is of course a long period before the agreement with NNA occurred which, the evidence would suggest, occurred in about July or August 2011.

[247] Mr Skoien of Counsel for the applicant also makes a strong submission that the evidence shows that, had the applicant agisted her horses at the respondent's expense instead of keeping the horses on the property, and assuming, as I find most likely, that the NNA would have paid for the cost of agistment, that the cost of agisting four horses, based on the evidence, for the period for which B(11) is claimed would have amounted to an amount of approximately $3,600 – in other words, quite close to the amount claimed for horse supplement.

[248] I am not persuaded by the submissions of the respondent that it is appropriate to reduce this item of disturbance. I find the amount of $4,144 to be both reasonably incurred and itself reasonable. The claim for $4,144 for item B(11) is allowed.

Loss on sale of mare "Demi"

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65 T 1-78 line 15.

66 Exhibit 2, tab 9.

[249] This item is described in B(12) in exhibit 14 as "lost value to mare injured during works (excluding claim for increase in mare's value since purchase) – purchased for $3,300, sold as brood mare for $1,200" leading to a total claim of $2,100.

[250] At the outset, the point must be made that the sum of $3,300 referred to in B(12) is not correct. The purchase price of the mare "Demi" was in fact $3,000.[67]

[251] The accident that occurred to "Demi" has been well set out in both the applicant's statement and in her evidence in chief and cross-examination. The applicant's account of the accident has stayed consistent throughout. In short, the applicant had been advised by NNA that work would not commence in the easement area until 7:00am each day. The applicant therefore attended her horses before 7:00am to care for them by way of providing feed etc. It was also before 7:00am that her daughters rode the horses. This is eminently reasonable. On 2 June 2010 at 6:52 am a forklift started reversing which caused a beeping sound which startled "Demi". "Demi" was spooked and took flight. Unfortunately, the ground was dewy and "Demi" slipped and rolled three times. It is the applicant's very strong evidence that "Demi" suffered injury as a result of the fall. Demi's rug was destroyed. NNA paid for replacement of the rug. NNA also paid for Bowen Therapy which was provided to "Demi" in an endeavour to alleviate a back injury "Demi" had suffered. Although the applicant is not an expert in the treatment of injured horses, I do accept that the applicant falls within, and self identifies with, people that the evidence has classified as "horsey-people". She clearly spends a great amount of time around horses and has an intimate knowledge of their nuances. She is also, in my view, acutely aware of when a horse is suffering injury.

[252] I accept the applicant's evidence that "Demi" suffered injury during the fall and that such injury was not rectified by Bowen Therapy. I also accept the evidence that the applicant had "Demi" seen to from time to time by a chiropractor. I also accept that the applicant spelled "Demi" for a period in excess of 12 months in order to see if the injury settled, and that from time to time she tested Demi's injury by saddling her up and having her daughters ride the horse, but that it was clear after a short period of time that "Demi" was still in discomfort.

[253] I further accept the applicant's evidence that "Demi" was a horse of an exceptional character and that the applicant had high hopes that "Demi" would become a good show jumping horse. No claim is made by the applicant for the loss of potential of the horse. I also accept that the applicant reluctantly sold "Demi" as a brood mare once it became

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67 Applicant's statement exhibit 2 tab 9 paragraph 107 and T 1-79 lines 7-13.

obvious to her that Demi's condition was unlikely to improve. Given the circumstances of the treatment and spelling that the applicant put "Demi" through, together with the applicant's intimate knowledge of horses in general and "Demi" in particular, I find it understandable even if not entirely reasonable in the circumstances that the applicant did not incur the additional expense of having "Demi" treated by a vet.

[254] As regards the sale of "Demi", I find that the sale occurred following the applicant placing an advertisement for "Demi" as a brood mare and that the applicant negotiated that sale with a buyer over the telephone and that the applicant has simply forgotten the name of the buyer which was provided to her at the time. I also find that the applicant's daughter did not affect the sale of "Demi"; this occurred in substance during the applicant's telephone call with the buyer. Unfortunately, the applicant was at work at the time that the buyer could collect "Demi" and so it was left to the applicant's daughter to be at the property when the buyer arrived and collect the cash sum of $1,200 from the buyer and arrange for the buyer to depart with "Demi".

[255] The respondent asserts that the injury to "Demi" was in fact caused by the dew on the ground. I reject this submission. The dew on the ground would not have caused "Demi" to fall had "Demi" not taken fright. "Demi" would not have taken fright but for the loud beeping sound from the reversing forklift. Post 7:00am, had the accident not occurred earlier, I accept that the applicant would have had "Demi" located and positioned on the property in such a way "just as she had each other morning by 7:00am, so that there was a greatly lessened likelihood of Demi or other horses taking fright at the sound of construction machinery".

[256] The respondent also questions the applicant's motivation for selling "Demi". I accept that the applicant's reasons for selling "Demi" related directly to the injury "Demi" suffered as a result of the reversing forklift. Although the respondent says that this item of disturbance must fail for want of proof, NNA was satisfied enough of the incident to both pay for a replacement rug for "Demi" as well as the cost of Bowen Therapy. Just as NNA was satisfied of the causative link between the injury and the beeping sound of the reversing forklift, so am I.

[257] I am satisfied that the applicant should recover the disturbance item B(12) in the sum of $1,800, which is the difference between the purchase price and sale price of "Demi".

Cost of water and electricity and cost of fertilizer

[258] These items are contained in disturbance claims B(13) and B(14) in exhibit 14. B(13) relates to cost of water and electricity for maintaining replacement grass at approximately

$50 extra per quarter, resulting in a total claim of $500. B(14) relates to the cost of fertilizer for maintaining replacement grass and is in the sum of $384.

[259] The respondent makes short, sharp submissions urging me to reject the disturbance claims B(13) and B(14). The respondent submits that even if it is accepted that the applicant uses the fertilizer and water as claimed, there is a lack of evidence as to any need to do so or that any such need is causatively related to the project. The respondent also makes the point that no expert or qualified independent evidence was called with respect to these claims, and that the claim for both disturbance items is nothing more than unsupported assertion.

[260] The applicant met the respondent's submissions in a number of ways. Firstly, as regards the question of expert or independent evidence, Mr Skoien submitted that it was essential to take into account the size of the disturbance item claimed and the relative cost of obtaining expert independent opinion in order to determine if, in litigation of this sort, such independent expert advice was a necessity.

[261] Mr Skoien also submitted that with respect to these two disturbance items, a liberal approach should be taken to the applicant's claim. Mr Skoien's submissions were of course that a liberal approach, consistent with the authorities, should be taken to all of the applicant's claims for compensation as a result of the resumption of the easement. I agree. To remove any doubt, I indicate that I have taken a liberal approach to all of the claims of the applicant, both with respect to the valuation claims and with respect to each and every disturbance claim (including those which I am about to turn to). Even in those circumstances where I have rejected the applicant's claim for a particular disturbance item, I have done so after applying a liberal approach to all of the evidence.

[262] In my view, a liberal approach saves the applicant's claims with respect to B(13) and B(14). As the applicant explained in her evidence-in-chief, NNA left the turf that it had laid without any watering, and the turf all but died. As the applicant put it "so we were asked to save them and the initial couple of days we spent just watering, and then once it settled, after the first month we put two bags on then, to really get it going again, and then from there its been a regime of, yeah, every six months, two bags".[68] Taking a liberal approach, I accept the evidence of the applicant. It was clearly unreasonable for NNA to lay turf and then leave such turf to die without watering that turf in. In the absence of any evidence to the contrary, I accept that it was NNA who asked the applicant to save the turf. In the scheme of things, the quantum claimed for B(13) and

68 T 1-81 lines 22-26.

B(14) is small, and could certainly (at least in part) have been avoided by NNA undertaking a proper watering regime itself of the newly laid turf.

[263] I have decided to allow claims B(13) and B(14) in full in the respective amounts of $500 and $384.

Landscaping mix and turf blend

[264] Item B(15) of exhibit 14 relates to landscaping mix to return the soils to a pre-construction state. The disturbance claim is $16,920. Claim B(16) in exhibit 14 is for turf blend to return the grass to its pre-construction state. It is in the amount of $538.85. It is appropriate to deal with both items together.

[265] The respondent says that neither the applicant nor any of the other witnesses are qualified to offer any opinion as to the need for the treatments specified in B(15) and B(16). Further, the respondent contends that the documents behind tabs B(15) and B(16) of exhibit 14 say nothing about what the landscape mix and under turf blend is or might relate to. Further, the respondent submits that there is nothing to show that use of the mix and blend contemplated is appropriate to meet any particular issue with the soil. In the respondent's view, both items B(15) and B(16) should be rejected.

[266] Both the applicant and her ex-husband gave evidence as to the difficulties that they have with re-establishing grass on the easement area. The applicant gave evidence that the state of the ground post project construction in the easement area is such that when it rains, the water flows differently to what it did pre-construction.

[267] I have closely examined the photographic evidence provided in this matter showing the easement area in front of the dwelling post project works. There is a clearly noticeable strip of grass that looks different to the rest of the grass on the property. It is almost as if a mark has been left on the surface of the easement indicating where the pipeline trench was dug and where the heavy machinery used the easement as a "highway" (to use the words of the applicant).

[268] Of course, it was the evidence of the expert valuers, and in particular Mr Rabbitt, that the easement was for underground works leaving no visible sign on the property, and the valuation experts assessed the loss of value with respect to the land of the applicant on that basis. To be clear, in assessing the valuation evidence, I accepted that the pipeline was an underground work not visible from the surface, with the surface post-construction meant to be in a state where the existence of the pipeline easement was not visually recognisable. It must be with that understanding of the manner in which I dealt with the valuation evidence that this claim is considered.

[269] On the basis of the evidence before me, I find that the grass and soil in the easement area of the applicant's land does respond differently to the balance of the grass and soil on her property. I also find that it is reasonable for the applicant to make a claim seeking the rectification of the grass in the easement area so as to make it uniform with the balance of the property, particularly given that the easement corridor runs so close to the front of the dwelling in circumstances where visual amenity both to and from the dwelling is an important factor.

[270] My chief concern with respect to these two items of disturbance relates to the reasonableness of the amount claimed for each item. The quotations behind tabs B(15) and B(16) of exhibit 14 are extremely light on information. On the face of the invoices, and particularly taking into account the conditions of delivery stated on each invoice, the invoices are purely from a firm which supplies landscape and garden supplies and delivers those supplies to the client. There is nothing in either invoice to show that the costs claimed relate to any work to rectify the difficulties that the applicant has with the turf in the easement area. I find the lack of description in the invoices telling. It would have been a very simple matter indeed for some detail to have been provided as to any investigations that the supplier had undertaken on the applicant's property and their recommendation for a course of action to rectify the problem. Equally, it would have been very easy to have obtained a short affidavit from the supplier outlining the proposed work and the reasons for that work. Given the detailed evidence with respect to some of the claims in this matter which are for amounts substantially lower than this claim, I find the absence of detail surprising.

[271] I also have difficulty in determining the reasonableness of each item claimed as I have nothing to compare those costs to. Again, it is not as if these are costs of only a few hundred dollars for which it would perhaps not be reasonable to go to a great amount of effort to obtain multiple quotes. But this is a claim, when the two items are combined, for well in excess of $17,000.

[272] There is no explanation from the applicant as to why she chose this particular supplier and whether or not she obtained quotes from any other supplier. There is also nothing from the applicant or any of her other witnesses to state their view that the invoices are in any way reasonable.

[273] On the state of the evidence before me, I find it impossible to link the invoices as supplied with a resolution of the problem that the applicant has with the turf on the

easement area. I have no way of knowing if the invoices are an exorbitant charge, about right, or highly competitive.

[274] Were it not for the basis upon which I analysed the valuers' evidence as to loss of value of the applicant's land, I would have no hesitation but to dismiss both items claimed under B(15) and B(16). However, as indicated, I do find that there is a visual difference in the turf within the easement corridor than the balance lands of the applicant for which the applicant should either be compensated by way of rectification as a disturbance item, or otherwise compensated as an impact on the land. I also take into account the liberal approach that I should adopt in considering the applicant's claims.

[275] I am in the very unsatisfactory position where the best that I can do is arrive at my best guesstimate of loss under these two heads of disturbance. I find this most unsatisfactory, but to be as fair as possible to the applicant, it is a position that I am willing to adopt. Taking all factors into consideration, I am prepared to allow the amount of $10,000 as the total amount for the disturbance items B(15) and B(16).

Lilly Pilly trees

[276] The applicant claims the sum of $1,000 for the loss of four fully established lilly pilly trees at the rate of $250 per tree. This is item B(17).

[277] It is the applicant's evidence that she plans on re-establishing the lilly pilly trees that she had prior to the pipeline easement acquisition, and that she has been fortunate that a number of the lilly pilly tress that were interfered with have regrown. However, the applicant concedes that of the four lilly pilly trees that have not regrown, it is only possible to re-establish two trees as the other two trees would be located in the gate access way on the easement.

[278] The applicant has supplied a quotation[69] for the purchase and delivery of four established trees. Including freight and GST, the quotation is in the sum of $1,039.50.

[279] The respondent says that the applicant should only be compensated for the two trees to be replanted in the amount of $519.75, being half of the sum set out in exhibit 16, and that the claim should be otherwise denied.

[280] I do not agree with the respondent. The simple facts of the matter are that the applicant had four established lilly pilly trees on her property which are no longer in existence. She should be compensated for the loss of those four mature trees. I note her desire to replant two of the trees in their former location, but because the other two cannot be planted in the gateway, to plant the mature trees somewhere else on her property. I find this, in

69 Exhibit 16.

truth, to be irrelevant. Even if the applicant ultimately chooses not to replace the two lilly pilly trees which cannot be planted because of the gateway, the applicant has still lost two mature trees which she previously had pre resumption and works.

[281] In the circumstances, I consider it appropriate to allow her claim with respect to this disturbance item in full. I allow the sum of $1,000 with respect to item B(17).

Legal fees

[282] The applicant claims the sum of $23,750 for legal fees. This is item B(18) in exhibit 14.

[283] Behind tab 14 is a document headed **"Costs statement"**. What then follows is 66 pages of itemised legal fees and an invoice from Mr Henderson. On page 65, the invoice is totalled in the sum of $34,131.51. However, the last page of the documents set out behind tab B(18) is a document which relevantly provides as follows:

> "**FEES INCURRED FOR DEBBIE BRESNAHAN AS AT DATEOF FILING CLAIM FOR COMPENSATION WITH THE COORDINSTOR-GENERAL ON 28 NOVEMBER 2012**
>
Professional Fees	$17,477.92
Care & Conduct (@ 29.5%)	$5,160.30
Outlays (not including Bob Henderson Valuer Fees)	$1,111.78
TOTAL	**$23,750.00**
>
> "

[284] A claim for $23,750 is obviously a substantial amount. I will let Mr Skoien's own words argue why this claim is claimable under s 20(5) of the ALA:[70]

> "Certainly, it's quite apparent the respondent appears to be approaching the matter on the basis that the only legal costs that a claimant can claim are those associated with the preparation and filing of the claim. And your Honour will see in subparagraph (a) of subsection 5 of section 20 of the Acquisition of Land Act that indeed there is an express entitlement to claim those costs as part of the disturbance items. But, your Honour, there's no reason to read down other provisions in section 20(5) to exclude legal costs.
>
> Firstly that would be inconsistent with general statutory construction. Secondly, this is a piece of legislation dealing with the interference with property rights which ought to be narrowly construed against those interfering with the rights and broadly construed in favour of the person – the [indistinct] land owner. Thirdly, your Honour, this is clearly a beneficial provision which ought to be construed broadly. Your Honour, specifically the claimant relies on subparagraphs (e) and (g) of subsection 20(5), that's subsection 5 of section 20 of the Acquisition of Land Act to justify the claim for costs.
>
> And at the end of the day, picking up the comments from your Honour to my learned friend during the course of his submissions on this very point, if using those were assessed that your Honour identified, and which I broadly agree with, if your Honour concludes that there was an issue that was causally connected with the resumption process; that it was reasonable for someone to do something about

[70] T 5-38 line 26 to T 5-39 line 6.

> it and that the amount expended on doing something about it was reasonable, then your Honour would – there is no reason why your Honour would not be able to allow the amount under other financial costs reasonably incurred or that might reasonably incur as a direct and natural consequence of the taking of the land, that's sub E. Or other economic losses and costs reasonably incurred by the claimant as a direct and natural consequence of the taking of the land."
>
> [obvious transcript errors corrected]

[285] For its part, the respondent strongly submits that the only costs recoverable are those "reasonably incurred by the claimant in relation to the preparation and filing of the claimant's claim for compensation …" pursuant to s 20(5)(a) of the ALA. The respondent relies on the decision of this Court in *Lowry v Coordinator-General*.[71] Relevantly in *Lowry* I had this to say regarding the recovery of legal costs under s 20(5) of the ALA:[72]

> "Mr Allan valiantly attempts to found his claim for legal and valuation costs both under s.20(5)(a) of the *ALA* and s.20(5)(g) of the *ALA*. Despite his efforts, in my view his attempt to found the claim under s.20(5)(g) is misconceived. On any fair reading of s.20(5) there is a specific statutory reference to legal and valuation costs in sub-paragraph (a), whilst (g) generally refers to other economic losses reasonably incurred. The general provision cannot override the specific statutory provision set out in 20(5)(a). Accordingly, in my view the applicant is limited to legal costs and valuation and other professional fees reasonably incurred in relation to the preparation and filing of the applicant's claim for compensation."

[286] Despite Mr Skoien's submissions to the contrary, I do not accept as a proposition of law that it is appropriate to extend a claim for legal costs to s 20(5)(e) and (g) of the ALA. However, even if I was minded to reconsider my views in *Lowry*, on the facts of the matter this is not an appropriate case. This is because the actual costs statement itself set out behind tab B(18) clearly indicates that it is a costs statement prepared pursuant to s 20(5)(a) of the ALA. The costs statement behind tab B(18) of exhibit 14 titled as follows:

> "**RE: CLAIM FOR COMPENSATION PURSUANT TO THE ACQUISITON OF LAND ACT 1967 IN RELATION TO THE NORTHERN PIPELINE INTERCONNECTOR STAGE 2**
>
> **THE COSTS STATEMENT CONTAINS LEGAL COSTS REASONABLY INCURRED BY THE CLAIMANT IN RELATION TO THE PREPARATION AND FILING OF THE CLAIMANTS' CLAIM FOR COMPENSATINO FOR THE PERIOD 16.02.10 TO 11.07.13 AND HAS BEEN PREPARED IN ACCORDANCE WITH THE COSTS DISCLOSURE AND CLIENT AGREEMENT DATED 22.02.10**"

[287] Mr Skoien by his submissions has effectively conceded that the costs statement strays beyond the costs associated with the preparation of a claim which can properly be

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71 (2012) 33 QLCR 263.

72 Ibid at p 310 [106].

claimed under s 20(5)(a) of the ALA. The respondent contends that the applicant has substantially strayed from a claim under s 20(5)(a), and I agree. It is clear from a reading of the costs statement in its entirety that a great number of the items claims cannot be reasonably seen in any way to fall under s 20(5)(a) of the ALA.

[288] I note that Mr Skoien was able to point to no authorities in support of his contention that the claim for legal costs could be expanded to be made under s 20(5)(e) and (g) of the ALA. In my view, if it was indeed the applicant's intention to seek to expand the nature of the claim for legal costs beyond s 20(5)(a), then it was incumbent upon the applicant to prepare separate costs statements, or some such other document, setting out clearly which costs as claimed were sought under which provisions of the ALA. That way, the Court would have had some concrete evidence to go on in support of Mr Skoien's submission, which as I have indicated is directly at odds with the stated title of the costs statement itself.

[289] The respondent has undertaken a detailed analysis of the various numbered claims in the costs statement. I agree with the approach taken by the respondent. The claims that the respondent has identified appear to be properly referrable to s 20(5)(a). I note that, adopting a liberal approach, the respondent says that the costs of preparing this claim should be no more than $10,000. I agree. In making such a finding, I am reminded of the applicant's written submissions where the applicant asserts that the claim for compensation of the applicant under the ALA is indeed a simple one. A simple claim should not incur substantial legal fees in preparing the claim.

Valuation fees

[290] The applicant claims the sum of $3,025 for valuation fees. This is item B(19) of exhibit 14.

[291] This item is agreed by the respondent. It is accordingly unnecessary for me to give it any further consideration, save to agree that I find the claim reasonable.

[292] I award the applicant the sum of $3,025 with respect to item B(19).

Interest

[293] The applicant also claims an award of interest on the applicable components of her award of compensation. There is, of course, nothing unusual about a claim for interest. I consider it appropriate to make an award of interest in favour of the applicant applying all usual factors to such an award of interest, including the relevant interest tables as set out by the Land Court. Given the circumstances of the multiple disturbance claims in this matter, I consider it appropriate to firstly order the parties to see if they can come to an

agreed position as to the amount of interest properly payable to the applicant. In the event that the parties are unable to reach common ground as to the amount of interest properly payable, then the question of determination of interest is to be referred back to the Court for my final determination of the interest component.

Costs

[294] Due to the lengthy nature of this decision, it is appropriate that I allow the parties time to properly reflect on the issue of costs. Accordingly, I propose to order a timetable for the making of submissions by the parties as to costs.

Determination

[295] In summary, I make the following determination with respect to the applicant's claim for compensation in this matter:

Compensation for Interest in the Resumed Land		$77,400.00
Disturbance Items		
B(1)	$8,100.00	
B(2)	Nil	
B(3)	Nil	
B(4)	$2,500.00	
B(5)	$1,640.00	
B(6)	Nil	
B(7)	$3,850.00	
B(8)	$270.00	
B(9)	Nil	
B(10)	$7,220.00	
B(11)	$4,144.00	
B(12)	$1,800.00	
B(13)	$500.00	
B(14)	$384.00	
B(15)/(16)	$10,000.00	
B(17)	$1,000.00	
B(18)	$10,000.00	
B(19)	$3,025.00	
Total Disturbance Items	$54,433.00	$54,433.00
	SUB TOTAL	$131,833.00
Less Advance paid		$60,500.00
	TOTAL	$71,333.00

Orders

1. Leave granted to the applicant to make written submissions on the respondent's objections.

2. The extra cost the respondent was put to in addressing the applicant's submission after the close of the hearing be paid by the applicant in any event.

3. Compensation is determined in the total amount of One Hundred and Thirty One Thousand, Eight Hundred and Thirty-three Dollars ($131,833.00), of which the respondent has already paid the sum of Sixty Thousand Five Hundred Dollars ($60,500.00) by way of advance.

4. In addition, interest is also awarded on the amount determined by the Court taking into account the relevant dates upon which costs were incurred and taking into account the advance made by the respondent, to be agreed as between the applicant and the respondent or, failing agreement, to be determined by the Court. In the event that the quantum of interest is not agreed between the parties by 19 June 2015, the parties are each to file and serve a statement and submissions detailing their assessment, with full calculations, as to what amount the proper award of interest should be, such statement and submissions to be filed by each party by no later than 4:00pm on 26 June 2015.

5. Any party seeking any order as to costs is to file and serve their submissions as to costs by 4:00pm on 19 June 2015. Any submissions in response are to be filed and served by 4:00pm on 3 July 2015 and any submissions in reply are to be filed and served by 4:00pm on 10 July 2015.

PA SMITH
MEMBER OF THE LAND COURT