

THE 'SPECIAL VALUE' OF LAND IN COMPULSORY ACQUISITION CASES

A summary of the legal approaches to a
contentious issue in valuation practice.

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ABSTRACT

Recent valuations cases have only served to broaden the argument over the limits of the 'special value' element in compulsory acquisition cases. From *Eagle v Charing Cross Railway* (1867) to *Pastoral Finance Association Ltd v The Minister* (1914) the underlying principle remained focused on the owner's entitlement to receive as compensation "the value of the land to them whatever that might be." That is, if the dispossessed owner is to receive compensation, the measure of compensation must take account of the peculiar value to the owner of the property compulsorily acquired. In recent times the discussion of 'special value' has embraced the concept of 'special adaptability' under certain circumstances. This paper is a fundamental analysis from first principles supported by case law references and presents the benchmarks to be considered in any exercise involving questions of 'special value'.

Introduction

The final years of the Twentieth Century were exceptional times for stock market investors. They witnessed the meteoric rise and unpredictable demise of internet stocks as new technology companies traded globally the future value of their intellectual properties. For a time investors were mesmerised by the intrinsic value of new technology assets but ultimately the fascination with the new gave way to the proven value of the old economy corporations. In passing, the world was left to wonder, once again, why certain assets are so difficult to value.

Over the centuries the courts have had to grapple with the same question when considering the 'special value' of land to an owner or interested purchaser in compulsory acquisition cases. The science of valuation in this arena is overflowing with case law scenarios that challenge the intellectual rigor and imagination of any valuer or lawyer. The discussion which follows incorporates the leading cases in England, Australia, Canada and New Zealand since 1820, and summarises, to the limited extent possible, the principles which operate in the present day.

The special value principle

Where both seller and buyer are willing to transact a transfer of the land in question for an agreed price the prevailing principle to be applied under Australian Law is the rule in *Spencer v Commonwealth* (1907) 5CLR 418. However, if the land has a special value to the owner over and above the market value, the Privy Council decided in *Pastoral Finance Association Ltd v Minister* [1914] AC 1083, drawing on the 19th Century resumption cases,¹ that an owner was entitled to be compensated for what the land was worth to them:

“That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them ... the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.”²

Therefore, the dispossessed owner is entitled to either market value (*Spencer*) or its special value to the owner (*Pastoral Finance*), whichever is the greater.³

The *Pastoral Finance* principle has been incorporated in major land acquisition statutes in Australia,⁴ but as noted in Douglas Brown's Australian text:⁵ "None of the provisions adopt the precise words used in *Pastoral Finance*. Clearly the statutory provisions have the same broad object as *Pastoral Finance*. The principle recognises that the market value of the land may not necessarily be the real value of the land to the dispossessed owner"⁶

Having stated in broad terms the principles that flow from *Pastoral Finance* it is necessary to qualify the limitations that guide its application. The *Pastoral Finance* principle is controlled by a number of caveats.

- * Special value does not justify a ransom value that might be extracted from a hypothetical purchaser with a special need for the land.⁷
- * Value to the owner is the value of the land at the time of the expropriation, with all its existing advantages and possibilities, excluding any advantage due to the carrying out of the scheme for which the land has been acquired.⁸
- * Special value cannot be used to compensate an owner for the sentimental value of the land.⁹
- * The statutory codifications distinguish special value from reinstatement and disturbance damages. There is a need to distinguish between enhanced property valuation (special value) and compensation for damage (disturbance and re-instatement costs).¹⁰

Special adaptability of land: Highest and best use

The *Land Clauses Consolidation Act 1845* (UK) s.63 allowed for the compensation, in excess of market value, for the *special adaptability of land*.¹¹ A wider statement of

this concept is the *highest and best use* principle (the *Turner* principle). This principle pursues a valuation based upon a property's best and most advantageous use, rather than its current use and market value.¹² The *Turner* principle was applied to allow the owner to establish the probable existence of a special purchaser with such a use.¹³ However, this augmented value does not include any increase arising from the actual implementation of the statutory scheme for which the compulsory acquisition was made.¹⁴

On Brown's reading of the land acquisition statutes the "highest and best use" is not expressly recognised in the legislation. He notes that:

"the acquisition statutes do not direct that the dispossessed landowner shall receive compensation for the highest and best use of the land. The statutes require compensation to be assessed for the value or for the market value of the land. The highest and best use of the land is a factor governing the ascertainment of the market value of the land. In determining the highest and best use of the land, that is to say, where it is claimed that the land has a greater value if it were used for a different purpose from its existing use, the claimant needs to establish:

- (a) the best use must be legal – it must come within the planning and building regulations;
- (b) the best use must be within the realm of probability – it must be likely, not speculative or conjectural; and
- (c) the best use must be of a kind to come within the imagination of a particular purchase."¹⁵

'Special value' was the critical issue in *Yates Property Corp v Darling Harbour Authority* (1991) 24 NSWLR 156. The New South Wales Court of Appeal (Kirby P, Handley JA, Mahoney JA) was reviewing the quantum of compensation to be paid to the dispossessed owner whose futuristic plans for a generous parcel of land at Sydney's Darling Harbour included the creation of an extensive market emporium.

Kirby P concluded (at 162):

“Special value can only arise where, at the time of compulsory acquisition, the owner is actually putting the property to some use for which it is especially well suited. It is a term of art used to describe a characteristic of the expropriated interest which is of economic value to the owner but which would not enhance the market value of the interest and hence would not be included in the ‘market value’ component as the compensation to which the statute entitles the owner following resumption.”

Mahoney JA illustrated the process of reasoning through three examples (at 165-166):

“The way in which special value or (as it is in some cases) disturbance is to be taken into account depends of course upon the circumstances of the particular case. However, in a sense what is involved is that the owner is treated as one of the persons “willing but not anxious” to become the purchaser of the subject land. The court then looks, as it has been described, to what the owner, as a potential purchaser, would pay for the land rather than not obtain it. The inquiry as to special value seeks to identify what the owner as such purchaser would pay. The process of reasoning may be illustrated by taking, by way of example, three cases.

In the first case, the owner is not yet using the land for the particular purpose but the use to which the owner would put the land is the same as that to which it would be put by any other hypothetical purchaser, namely, the best and highest use of it. In such a case, there would, without more, be no special value.

In the second case, the special use on which the owner relies is the same as the best and highest use to which any other hypothetical purchaser would put the land but there is the additional factor that the owner is

already, at the date of the resumption, putting the land to that use, for example, as part of a business. In such a case, if the owner did not secure the land on the hypothetical sale, he would be “disturbed”: he would suffer the loss resulting from the land not being any longer available for use in his existing business. He would lose the profits he would have earned if he had continued to carry on the business and he would bear the cost of having to move the business from the land. In that case, he may have to take account of the special value of the land to him, compensation which includes something for that special value.

The way in which that factor is to be taken into account in such a case has been the subject of consideration in a number of cases. It is referred to in the judgments of the High Court in *Commonwealth v Reeve* (1949) 78 CLR 410, and *Commonwealth v Milledge* (1953) 90 CLR 157 at 164. It is not necessary for present purposes to pursue that matter. It is sufficient that, in cases of this kind, the award of special value or disturbance as part of the special value of the land to the owner is rationalised on the basis that, as a hypothetical bidder for the land, the owner would take into account that, if he did not secure the land, he would suffer the loss represented by, for example, the disturbance of his business and would, the hypothesis is, therefore pay more than an ordinary hypothetical purchaser would.

In the third case, the use to which the owner is putting or desires to put the land is different from that to which any other hypothetical bidder on the hypothetical sale would put it. In such a case and subject to certain limitations: of eg, *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer Vizapatam* (the *Raja* case) [1939] AC 302; there may be special value to be taken into account. But, in such a case, it is important to avoid confusion because of the terms used. If the use to which the owner is putting or desires to put the land is different from that to which other hypothetical purchasers would put it, it may be itself the “best and highest use” and so there will be no special value. But where the

owner's use or proposed use is different from the use of others, then it is sometimes said that the land has to the owner a special use different from the ordinary market use or "best and highest use": in that sense the owner's use has been described as a special use and so there may be a special use to be taken into account."

Special adaptability and sole purchasers

A problem is said to emerge where there is but *one* purchaser who, attracted by the special adaptability of land, might be persuaded to pay in excess of market value. There has been some disagreement as to whether such a situation justifies an augmentation of market value.¹⁶ In the UK, s.2, Rule 3 of the *Acquisition of Land (Assessment of Compensation) Act 1919* (UK) disallowed the augmentation of market value in such circumstances.¹⁷ However, in the absence of such legislation, augmentation of market value is allowed.

The Privy Council in *Raja*¹⁸ allowed for increased value in circumstances of a compulsory acquisition where the land was worthless unless used for the purpose for which it was being compulsorily acquired. In *Raja* an Indian statutory authority in the process of constructing a harbour compulsorily acquired adjoining malarious swamp land because it was a source of fresh water which was required for industrial users of the harbour as well as to carry out anti-malarial works. To parties other than the statutory authority the land had, on all the evidence available, no value and its future value came from the very scheme for which the acquisition was made. On application of the principles established in *Clay and Glass v IR Commissioners*¹⁹ the Privy Council held that the land was to be valued on the basis of its expected future use which included the uses of a compulsory acquirer who, but for speculators, was the only possible purchaser. The Privy Council's decision in *Raja* was followed in Australia,²⁰ New Zealand,²¹ and Canada.²²

The 'highest and best use' approach is often adopted where a special purchaser is identified. Marks²³ remarked that "the special value aspect, which is reflected in the best and most advantageous use of a property, has often been applied where the owner has been able to establish the probable existence of a special purchaser with

such a use²⁴ but has been limited in such a way as not to include any increase arising from the actual implementation or carrying out of the statutory scheme for which the compulsory acquisition was made.²⁵

Some concluding remarks

The evidentiary issues in 'special value' cases are more often than not of paramount importance in persuading the court to adopt or reject the valuations put forward. In the majority of cases courts have had to consider whether or not it was reasonable to assume that special purchasers would have actually bid in the market place for the subject land because of its adaptability or usefulness to them or because possession or control would provide further development opportunities.²⁶ Lord Scott in the Court of Appeal in *Robinson Bros (Brewers) Limited v Durham County Assessment Committee*²⁷ said "every factor, intrinsic or extrinsic, which tends to increase or decrease either demand or supply is economically relevant and is, therefore, admissible evidence"²⁸ and concluded that the proper enquiry was primarily an economic and not a legal one.

Endnotes

- 1 *Eagle v The Charing Cross Railway Co.* (1867) (NS) 36 CP 297; *Bailey v Isle of Thanet Light Railways Co.* [1990] 1 QB 722.
- 2 *Pastoral Finance Association Ltd v Minister* [1914] AC 1083 at 1088.
- 3 *Wollams v The Minister* (1957) WN (NSW) 103 at 106.
- 4 *Lands Acquisition Act 1989* (Cth) s.55(2)(a)(ii); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) s.57; *Land Acquisition and Compensation Act 1986* (Vic) s.40.
- 5 Douglas Brown *Land Acquisition* (4th ed) Butterworths, Sydney, 1996.
- 6 Pastoral Finance "has achieved almost biblical authority": Justice J S Cripps, *Acquisitions – principles and recent cases* (1991) 31 *The Valuer* 338.
- 7 *Cedar Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569 at 576; *Geita Sebea v Territory of Papua* (1941) 67 CLR 544; *Collins v Livingstone Shire Council* (1972) 127 CLR 477.
- 8 *Fraser v City of Fraserville* [1917] AC 187 at 194; *Grace Bros Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 292-293 (Dixon J). Thus, planned subdivision may justify special value: rejected in *Turner v Minister of Public Instruction* (1955) 95 CLR 245; but allowed in *Kennedy Street Pty Ltd v Minister* (1962) 8 LGRA 221; *Chapman v Minister* [1966] 2 NSW 65.
- 9 *Wilson Bros Pty Ltd v Commonwealth* [1948] SASR 61.
- 10 *Leppington Pastoral Co Pty Ltd v Commonwealth* (1997) 76 FCR 318 at 338-349 (Beaumont J); *Director of Building & Lands v Shun Fung ironworks Ltd* [1995] 2 AC 111 at 125-128; *Richardson v Roads & Traffic Authority of New South Wales* (1996) 90 LGRA 294.
- 11 *In re Countess Ossalinsky and Manchester Corporation* (unreported 1883 Queen's Bench ref. in *Re Lucas and Chesterfield Gas and Water Board* [1908] 1 KB 571 at 579 (Bray J); *Tynemouth Corporation v Duke of Northumberland* (1903) TLR 630; *Re Gouth and The Aspatria Silloth and District Joint Water Board* [1904] 1 KB 417.
- 12 *Turner v Minister for Public Instruction* (1956) 95 CLR 245.
- 13 *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGRA 410; *Hill v R* (1980) 7 QLCR 128; *Brighton City v Road Construction Authority* (1985) 59 LGRA 262.
- 14 *Point Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands (Trinidad)* [1947] AC 565; *E A Woollams v The Minister* (1957) 75 WN (NSW) 103, 489.
- 15 Douglas Brown *Land Acquisition* (4th ed) Butterworths, Sydney, 1996 at page 105.
- 16 *Re Lucas and Chesterfield Gas and Waterboard* [1909] 1 KB 16 at 31 (Fletcher Moulton LJ rejects) and at 21 (Vaughan Williams LJ allows); *IR Commissioners v Clay, IR Commissioners v Buchannan* [1914] 3 KB 466 (Court of Appeal allowed it).
- 17 Now, *Land Compensation Act 1961*, s.5, Rule 3.
- 18 *Raja Vyricherla Narayana Gajopatriraya v Revenue Divisional Officer, Vizagpatam* [1939] AC 302.

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- 19 *Clay and Glass v IR Commissioners* (1915) 52 Scot LR 414.
- 20 *Geita Sebea v Territory of Papua* (1941) 67 CLR 544; *Turner v Minister for Public Instruction* (1956) 95 CLR 245; *Collins v Livingstone Shire Council* [1972-1973] ALR 651; *Universal Land and Investments Ltd v Commonwealth* (1987) 87 FLR 220; *Goold v Commonwealth* (1993) 114 ALR 135.
- 21 *Tan Raruni Farm Ltd v Auckland Regional Authority* [1976] 2 NZLR 230; *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324.
- 22 *Fraser v The Queen* [1963] SCR 455.
- 23 Bernard Marks *Valuation Principles in the Income Tax Assessment Act* (1996) 8(2) *Bond Law Review* 114.
- 24 See for example *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGRA 410; *Hill v R* (1980) 7 QLCR 128; *Brighton City v Road Construction Authority* (1985) 59 LGRA 262.
- 25 The application of the Privy Council decision in *Pointe Gourde Quarrying & Transport Co. Ltd v Sub-Intendent of Crown Lands (Trinidad)* [1947] AC 565. See *Fraser v The Queen* [1963] SCR 455 and *E A Woollams v The Minister* [1957] 75 WN (NSW) 103, 489.
- 26 See Bernard Marks, note 23 on “Evidentiary Issues” (page 149).
- 27 [1937] 2 KB 445 at 470-471.
- 28 *ibid.*