HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

WALKER CORPORATION PTY LIMITED APPELLANT

AND

SYDNEY HARBOUR FORESHORE AUTHORITY RESPONDENT

Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority
[2008] HCA 5
27 February 2008
S307/2007 & S308/2007

ORDER

Appeals dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

N J Young QC with J J Webster SC and I J Hemmings for the appellant (instructed by Minter Ellison)

B W Walker SC with A E Galasso SC and M G Gilbert for the respondent (instructed by Lexlawd)

CATCHWORDS

Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority

Real Property – Compulsory acquisition – Amount of compensation – Market value – Respondent acquired industrial zoned land by compulsory process under the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) – Local council resisted attempts to rezone land for residential development before its acquisition – Whether effect of council's conduct on value of land should be disregarded in determining market value under s 56(1) of the Act.

Statutes – Interpretation – *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) – Section 56(1) of the Act defined market value – Pursuant to s 56(1)(a) any increase or decrease in the value of land caused by the carrying out of, or the proposal to carry out, the public purpose for which land was acquired was to be disregarded – Whether conduct of local council was part of proposal to carry out the public purpose for which land was compulsorily acquired by the respondent – Relevance of common law principles derived from other jurisdictions.

Words and phrases – "market value", "proposal", "scheme".

Land Acquisition (Just Terms Compensation) Act 1991 (NSW), ss 55, 56(1)(a).

1 GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. On 19 February 2002 the Premier of the State of New South Wales, Mr Carr, issued a News Release under the heading: "NSW GOVERNMENT RETURNS BALLAST POINT TO PUBLIC".

The text of the News Release included the following:

> "One of Sydney Harbour's most significant headlands – Ballast Point – is to be opened up to the public and preserved for future generations, under a plan announced by the State Government today ...
>
> The State Government will now commence negotiations to purchase Ballast Point on the Birchgrove Peninsula. Currently, Caltex Petroleum owns the 2.5 hectare site.
>
> For some 80 years, Ballast Point has been used as a fuel depot, but the Government now intends to return the land to the public by creating a harbourside park.
>
> The acquisition will neatly complete the work begun by former Premier Jack Lang who, in 1926 – directly opposite Ballast Point – returned Balls Head to public ownership. The two headlands will now form permanent green beacons on the western harbour corridor ...
>
> To create the new Ballast Point park, it would be necessary for the State Government to take planning control for the land.
>
> Ballast Point will be added to the list of state-significant sites with Planning Minister, Dr Refshauge as the consent authority.
>
> In addition, it is likely that compensation will need to be paid to Caltex and, possibly, to McRoss Developments Pty Ltd, which has an option to develop the site ...
>
> The Sydney Harbour Foreshore Authority has the power to compulsorily acquire land in the interests of protecting and enhancing the natural and cultural heritage of the foreshore area.
>
> Ultimately, Sydney Harbour Foreshore Authority would manage the site and ensure that it is maintained for community use."

2 To the circumstances outlined in the News Release the following should be added. At all material times Ballast Point ("the Land") has been situated

within the area of the Municipality of Leichhardt. From 1928 the Land was used as a bulk terminal for the storage and distribution of petroleum products. The name "Ballast Point" had been coined in the 19th century, apparently because ships at deep water anchorages had taken on as ballast stone quarried from the site. A substantial residence named "Minervia" had been built in the 1860s on the ridge at the site. This was demolished in 1929 after the site was purchased by Texaco.

3 McRoss Developments Pty Ltd is now styled Walker Corporation Pty Ltd ("Walker") and is the appellant in this Court. On 2 September 1997, the registered proprietor of the Land, Ampol Petroleum Pty Ltd ("Ampol") had entered into a call option agreement with Walker Group Pty Ltd ("Walker Group"). Ampol had previously been known as Caltex Ltd and Caltex Oil (Australia) Pty Ltd and despite the changes in name was referred to in this litigation as "Caltex". It is convenient here to continue to do so. Shortly before the News Release of 19 February 2002, Walker Group nominated Walker as its nominee under the call option. The option was to acquire the Land for $16,500,000. On 19 April 2002 Walker exercised the option to purchase the Land and contracts were exchanged.

4 The contract between Caltex and Walker was still on foot when on 18 September 2002 the Sydney Harbour Foreshore Authority ("the Foreshore Authority") declared that the Land was acquired by compulsory process under the provisions of the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) ("the Compensation Act") and "for the purposes of the *Sydney Harbour Foreshore Authority Act* 1998" (NSW) ("the Foreshore Authority Act").

5 Caltex received as compensation for the compulsory acquisition of its interest in the Land the sum of $14,375,000. This was calculated by deducting from the purchase price of $16,500,000 the sum of $2,125,000 as the estimate of the cost of remediation of the Land, an activity which Caltex was obliged to perform pursuant to its contractual arrangements. No question in the litigation which now comes to this Court turns upon the measure of compensation to Caltex. The dispute fixes upon the entitlement of Walker.

6 In a proceeding in the Land and Environment Court of New South Wales heard by Talbot J, the Court ordered that the compensation payable to Walker pursuant to the Compensation Act was $43,555,138.50[1]. This was arrived at by

---

1 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2004) 134 LGERA 195.

deducting from the market value of the interest of Walker in the Land, assessed at $60 million, the purchase price as representing the actual cost of completing the contract of sale. Walker had contended that the market value of its interest was $81 million.

7 On appeal by the Foreshore Authority to the New South Wales Court of Appeal (Beazley and Basten JJA and Stein AJA)[2] the order of Talbot J was set aside and the matter was remitted to the Land and Environment Court to be dealt with according to law. On that remitter[3] Talbot J again fixed the compensation payable to Walker in the sum of $43,555,138.50. On appeal by the Foreshore Authority ("the second appeal"), the Court of Appeal (Handley, Beazley and Basten JJA)[4] set aside this order of the Land and Environment Court and once more remitted the matter for assessment of the market value of the interest of Walker in the Land according to law. Basten JA and Beazley JA were parties to both appeals and Basten JA gave the leading judgment in the first appeal.

8 By special leave, Walker appeals against the decisions of the Court of Appeal in both the first and second appeals. For the reasons which follow the appeals to this Court should be dismissed. This will leave standing the remitter order made by the Court of Appeal on the second appeal.

9 It is convenient to turn now to the relevant statutory provisions.

The legislation

10 The Foreshore Authority Act constitutes the Foreshore Authority as a corporation (s 10) which for the purposes of any statute is a statutory body representing the Crown (s 11). Among the functions conferred upon it by s 12 are the protection and enhancement of the natural and cultural heritage of the foreshore area and the promotion of orderly and economic development and use of that area. Although the Foreshore Authority came into existence only on

---

2 *Sydney Harbour Foreshore Authority v Walker Corporation Pty Ltd* (2005) 63 NSWLR 407.

3 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2006] NSWLEC 138.

4 *Sydney Harbour Foreshore Authority v Walker Corporation Pty Ltd (No 2)* (2006) 151 LGERA 186.

14 December 1998 its functions encompass purposes always within the power of the State itself to effect. Hence in what follows in this judgment, as in the judgments in the Court of Appeal and at first instance, there is no relevant distinction between the Foreshore Authority and the State.

11 Section 17(1) of the Foreshore Authority Act authorises the Foreshore Authority to acquire land "for the purposes of" the Foreshore Authority Act by agreement or by compulsory process in accordance with the Compensation Act. Part 3 of the Compensation Act (ss 37-68) is headed "Compensation for acquisition of land". General provision for compensation is made by s 37. This states:

> "An owner of an interest in land which is divested, extinguished or diminished by an acquisition notice is entitled to be paid compensation in accordance with this Part by the authority of the State which acquired the land.[5]"

It will be noted that the entitlement to compensation is consequential upon the acquisition already effected by the acquisition notice.

12 Part 3 of the Compensation Act lays down procedures for the making of claims for compensation and (in s 47) for the determination by the Valuer-General of the amount of compensation to be offered to claimants. In the present case the compulsory acquisition excluded a leasehold interest of Energy Australia. The Valuer-General determined the amount of compensation to be offered to Walker for its interest at $10,100,000, a significantly lesser sum than that subsequently determined in the Land and Environment Court. Walker, pursuant to s 66 of the Compensation Act, lodged an objection with the Land and Environment Court which was then required to hear and dispose of Walker's claim for compensation. Pursuant to s 57 of the *Land and Environment Court Act* 1979 (NSW), an appeal might be brought to the Court of Appeal from such a decision but only on a "question of law". In each of the appeals to the Court of Appeal, that Court proceeded on the footing that the factual assessment by the

---

5 The expression "an interest in land" means (s 4(1)):

> "(a) a legal or equitable estate or interest in the land, or
>
> (b) an easement, right, charge, power or privilege over, or in connection with, the land."

primary judge miscarried by reason of error in the construction of the Compensation Act[6].

13 The focus of the dispute between the parties is upon the provisions in Pt 3 of the Compensation Act dealing with the determination of the amount of compensation. These are found in Div 4 (ss 54-65). Section 54(1) states the general principle as follows:

> "The amount of compensation to which a person is entitled under this Part is such amount as, having regard to all relevant matters under this Part, will justly compensate the person for the acquisition of the land."

Section 55 contains an exhaustive list of the relevant matters to be considered. It states:

> "In determining the amount of compensation to which a person is entitled, regard must be had to the following matters *only* (as assessed in accordance with this Division):
>
> (a) *the market value of the land on the date of its acquisition*,
>
> (b) any special value of the land to the person on the date of its acquisition,
>
> (c) any loss attributable to severance,
>
> (d) any loss attributable to disturbance,
>
> (e) solatium,
>
> (f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired." (emphasis added)

The critical provision is that respecting "market value". This is defined in s 56(1), in terms set out later in these reasons. It is convenient now to say something more of the facts and the events preceding the News Release in 2002.

---

6 Cf *Hope v Bathurst City Council* (1980) 144 CLR 1.

The Ballast Point saga

14 The News Release made by the Premier on 19 February 2002 contained the following statements attributed to a Minister who was also the local member in the Legislative Assembly. She was quoted as saying:

> "The Ballast saga has been a long one. For the past decade, the Ballast Point Campaign Committee and I have shared frustration as we endured false alarms and dawns, confusion over actual ownership of the site and its valid zoning, and ever changing and evolving development proposals, all of which were unacceptable."

In the News Release the Premier described the local member as a ceaseless advocate for Ballast Point who had lobbied him constantly on the conversion of the industrial site to parkland.

15 Here may be discerned the issue of the construction of the definition of "market value" in s 56(1) of the Compensation Act which has divided the primary judge and the Court of Appeal. That issue was approached in submissions to this Court as calling for the identification in the circumstances of this case of any decrease in value which was to be disregarded because, in the terms of that definition, it was "caused by ... the proposal to carry out" that public purpose for which the Land was acquired by the Foreshore Authority on 18 September 2002.

16 At that time the bulk of the Land was zoned for industrial use, reflecting the use to which it had been put for many years. The primary judge, Talbot J, had regard to what he saw as "steps" in "the resumption process". This involved a "scheme" to make the Land available as a harbourside park and the "scheme" had begun at a meeting of Leichhardt Council on 10 December 1991. In November 1989 an application had been submitted on behalf of Caltex for the Land to be rezoned from "Waterfront Industrial 4(c)" to "Residential 2(b2)" and thus permit residential development by the construction of 163 home units. The public discussion which followed led to the Council meeting of 10 December 1991, subsequent intervention on behalf of the then State government, and deferral of residential development proposals.

17 Talbot J found that thereafter the market value of the Land had been constrained by actions of the Council to maintain the industrial zoning in order to thwart any change in zoning that would permit development for residential purposes. His Honour held that maintenance of the industrial zoning had reduced

the value of the Land at the time of its eventual resumption in 2002 from what would have been its value at that date for residential development.

18 His Honour said in his first set of reasons[7]:

> "The maintenance of the industrial zone as a holding zone can be regarded as a means of freezing the development of the [L]and until the council was in a position, directly or indirectly, to arrange for its acquisition for the public purpose by whatever means became available to it. It was ultimately successful in achieving that purpose vicariously.
>
> If the council had not taken the stance it did, the [L]and would have been zoned residential by the making of DLEP 81 consistently with the recommendation of the Commission of Inquiry or by an overriding action by the State Government."

19 The reference to "DLEP 81" is to one of four draft Local Environment Plans prepared by Commissioners of Inquiry for Environment and Planning under the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act"). The stated aims and objectives of DLEP 81 in respect of the Land had included the encouragement of residential development appropriate to the scale, character and diversity of the locality and the characteristics of the site.

20 In 1991 the Council rejected a proposal that it adopt DLEP 81 and passed a resolution rejecting intervention by the State Government in its affairs. The Council and the State Government of the day (the administrations of Mr Greiner and, after 1992, of Mr Fahey) were at odds respecting the future of the Land. On two occasions, 1992 and 1995, the relevant Minister of the State sought unsuccessfully to intervene to ensure that a significant part of the Land was used for residential development. A further application by Caltex, made in 1994, for a development approval for residential development of the Land was ultimately unsuccessful.

21 Provision is made in the *Local Government Act* 1993 (NSW) ("the LG Act") for the acquisition of land by a body such as Leichhardt Council. It is empowered by s 186 to acquire land, including an interest in land, for the purpose of exercising any of its functions including the making available of the

---

7 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2004) 134 LGERA 195 at 219-220.

land for any public purpose for which it was reserved or zoned under an environmental planning instrument. Section 187(1) stipulates that to such an acquisition the provisions of the Compensation Act apply. However, the effect of s 187(2) is that without the approval of the Minister it is not competent for a council to give a proposed acquisition notice under the Compensation Act.

22 The Leichhardt Council did not undertake any exercise of its own powers of compulsory acquisition. Rather, it resolved in 1991 to seek funds from the State and Commonwealth to acquire the whole of the Land but such funds were not forthcoming.

23 After a general election held in March 1995 the administration of Mr Fahey was replaced by that of Mr Carr, and his government was returned to office at a general election held in March 1999. There followed significant changes in policy respecting the Land.

24 In August 1997 the new Premier issued a statement headed "Sydney Harbour Foreshore". Among the "Guiding Principles" set out in that document was the following:

> "The first step in determining the future use of a surplus foreshore site should be to establish whether the site or part of the site is suitable for regionally and locally significant open space that will enhance the harbour foreshore open space network."

Thereafter the Foreshore Authority Act was enacted and on 19 December 2000 the Minister for Urban Affairs and Planning made the Leichhardt Local Environment Plan 2000 ("LEP 2000") under the EPA Act. This re-zoned part of the Land from "waterfront industrial" to "industrial" and a small part of the Land from "residential" to "industrial". It was this zoning which remained operative in 2002 at the time of the News Release and compulsory acquisition.

The decision of the primary judge

25 In his second set of reasons, Talbot J referred to the attempts by Caltex to obtain development consent for the construction of residential accommodation on the Land, as indicative that Caltex had been "winding down" its activities there. His Honour concluded that it was not seriously contemplated by any State or local government authority or by Caltex or Walker that the Land would be used for any industrial purpose save perhaps for a small historical use that might be maintained or established. He concluded that the industrial zoning was a "low

risk device" to ensure that development antipathetic to the creation of a harbourside park did not occur.

26 The primary judge also referred to the involvement of both Leichhardt Council and the Minister in the preparation of LEP 2000 as indicative of a "unity of purpose" displayed by the two arms of government; there was no reason why in the period before the change in the State government the activity of Leichhardt Council alone could not be accepted "as part of the proposal to carry out the public purpose for which the [L]and was acquired [in 2002]". His Honour concluded that:

> "by 22 December 2000 the market would still have rated the chance of a rezoning to permit the extent of residential development adopted for the purpose of my valuation as it was in 1992, namely, at 100 per cent. If unity of purpose is a prerequisite the time that the proposal was adopted was the date of the making of LEP 2000. However I find that the Mayoral Minute made 6 February 1992, following the preceding decision of the council in December 1991, was a clear and unequivocal decision which formed part of the proposal to acquire the [L]and for the public purpose. I also find no subsequent facts or events, extraneous to the proposal, had the effect of increasing or decreasing the value of the [L]and. Accordingly the consistent refusal to rezone the [L]and for residential purposes and the maintenance of an industrial zoning must be disregarded."

The Court of Appeal

27 In its reasons in the second appeal, the Court held that to approach in this way the issues respecting the application of the definition of "market value" in s 56(1) of the Compensation Act was to desert the terms of the statute. The statute speaks not of "the scheme" but of "the proposal", nor does it use expressions such as "steps in the resumption process".

28 In both appeals the Court indicated that the primary task was to construe the legislative text and that the consequence of this was that whilst decisions from other jurisdictions upon other legislation might assist in determining the precedents from which the statutory text was derived, it could not be decisive.

"Common law" and statute

29 Several further points should be made here. The first concerns the role of "the common law" and the significance of observations by the Privy Council in *Melwood Units Pty Ltd v Commissioner of Main Roads*[8]. What was in issue there was the operation of the *Main Roads Acts* 1920-1952 (Q). Their Lordships said[9] that notwithstanding the absence of any reference to the matter in the statute:

> "it is a part of the common law deriving as a matter of principle from the nature of compensation for resumption or compulsory acquisition, that neither relevantly attributable appreciation nor depreciation in value is to be regarded in the assessment of land compensation".

The nature of the "common law" spoken of in this passage does not readily appear. Even if there remains in Australia any scope for the operation in this regard of the "war prerogative"[10], a remark of Viscount Radcliffe in *Burmah Oil Co Ltd v Lord Advocate*[11] is in point. His Lordship observed that it seemed clear that in the United Kingdom the Crown never claimed or sought to exercise in time of peace a right to take land, except by agreement or under statutory powers, even if it was required for the defence of the realm. Subsequently, Lord Pearson explained that there can be no "common law principle" which is engaged in resumption cases "because compulsory acquisition and compensation for it are entirely creations of statute"[12].

30 The reference in *Melwood* to "the common law" is better understood as a reference to a body of case law which may be built up in various jurisdictions where there are in force statutes in the same terms or, at least, in relevantly similar terms. Moreover, in the United Kingdom there were many judicial

---

8 [1979] AC 426.

9 [1979] AC 426 at 435.

10 See *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 318, 325; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 55.

11 [1965] AC 75 at 115.

12 *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202 at 214.

decisions construing the tersely expressed ss 49 and 63 of the 1845 legislation which, as amended and supplemented from time to time, was given the title *Land Clauses Consolidation Act* 1845 (UK)[13] ("the 1845 Act")[14].

31 The caution required in construing modern Australian legislation by reference to "principles" derived in this way is indicated by McHugh J in *Marshall v Director-General, Department of Transport*[15]. That case concerned the expression "injuriously affecting" as it appeared in s 20 of the *Acquisition of Land Act* 1967 (Q); ss 49 and 63 of the 1845 Act had used the same phrase as had the subsequent legislation in various jurisdictions. Differing interpretations had been given to the expression in question. McHugh J noted the similarity in the terms of the legislation and went on[16]:

> "But that does not mean that the courts of Queensland, when construing the legislation of that State, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court's jurisdiction. Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation."

32 The 1845 Act enacted a standard code at a time when, as for many years thereafter, compulsory purchase of land generally was authorised by private statutes conferring powers on promoters to take specified lands[17]. Section 49

---

13 8 & 9 Vict c 18.

14 This appellation was given to the legislation by s 23 of the *Interpretation Act* 1889 (UK) 52 & 53 Vict c 63.

15 (2001) 205 CLR 603 at 632-633 [62]

16 (2001) 205 CLR 603 at 632-633 [62].

17 See the discussion by Lord Reid in *West Midland Baptist (Trust) Association (Inc) v Birmingham Corporation* [1970] AC 874 at 892.

provided for a jury inquiry relating to "the Value of Lands to be purchased, and also to Compensation claimed for Injury done" and to the delivery of its verdict for:

> "the Sum of Money to be paid by way of Compensation for the Damage, if any, to be sustained by the Owner of the Lands by reason of the severing of the Lands taken from the other Lands of such Owner, or otherwise injuriously affecting such Lands by the Exercise of the Powers of this or the special Act, or any Act incorporated therewith".

Section 63 dealt with the measure of compensation to be assessed by arbitrators, justices and surveyors slightly differently in terms, but equally tersely and without significant difference[18].

33 The judicial exegesis of these sections encouraged the statement in 1909 in the first edition of Halsbury's *Laws of England*[19]:

> "The numerous cases upon the interpretation of [the Land Clauses Act] and the special Acts have led to the enunciation of certain principles which may be said to govern the whole law of compensation."

However, as Lord Pearson explained in *Rugby Joint Water Board v Shaw-Fox*[20], many of these "principles" turned upon the interpretation of the statutory term "value".

34 To somewhat similar effect is the treatment by Dixon J in *Nelungaloo Pty Ltd v The Commonwealth*[21] of the provision made for "claims for compensation" in the National Security (Wheat Acquisition) Regulations in respect of the appellant's wheat crop grown in accordance with its licence under the National Security (Wheat Industry Stabilization) Regulations. Dixon J said[22]:

---

18 See the comment of Blackburn J in *Holt v Gas Light and Coke Co* (1872) LR 7 QB 728 at 736-737.

19 Vol 6, *Compulsory Purchase of Land and Compensation*, at 32.

20 [1973] AC 202 at 215.

21 (1948) 75 CLR 495.

22 (1948) 75 CLR 495 at 571.

> "Now 'compensation' is a very well understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. It is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived."

He continued[23]:

> "As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it. You do not give him any enhanced value that may attach to his property because it has been compulsorily acquired by the governmental authority for its purposes (*Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam*[24]). Equally you exclude any diminution of value arising from the same cause."

35 There may be seen in play here general considerations which have been influential in the fleshing out of compulsory acquisition provisions drawn in brief terms. But as the facts respecting the Land illustrate, the machinery of modern land use regulation has become complex, its procedures protracted and the range of public bodies involved extensive. One result, as the terms of the Compensation Act show, is more comprehensively drawn legislation dealing with compulsory acquisition. It is to this that primary regard must be given.

The present case

36 In a broad sense this litigation turns upon the application to the events concerning the Land of the generally expressed proposition in *Nelungaloo* that there is to be excluded any diminution in value arising from the compulsory acquisition "by the governmental authority for its purposes"[25]. As will appear, the Foreshore Authority does not quibble with that proposition and accepts that it is expressed in the terms of s 56(1) of the Compensation Act. On the other hand,

---

23 (1948) 75 CLR 495 at 571.

24 [1939] AC 302 at 318.

25 (1948) 75 CLR 495 at 571.

Walker goes further to draw within the disregard required by the terms of s 56(1) the consequences of the activities of other official actors, in particular those of the Council over a lengthy period.

What is to be ignored?

37 This Court in *The Crown v Murphy*[26] was dealing with the 1967 Queensland legislation and referred to a "principle" derived from legislation in other jurisdictions dealing with compulsory acquisition of land. The "principle" was that restrictions on land use maintained as a result of consultation with the resuming authority must be ignored for the purpose of assessing the value of land when resumed by that authority. In a joint judgment, Mason CJ, Brennan, Deane, Gaudron and McHugh JJ said[27]:

> "One purpose of this principle is to ensure that a resuming authority does not employ planning restrictions to destroy the development potential of the land and then assess compensation for its resumption on the basis that the destroyed potential had never existed[28]... The principle applies in cases where there is a direct relationship between the planning restriction and the scheme of which resumption is a feature and extends to cases where there is merely an indirect relationship, provided that the planning restriction can properly be regarded as a step in the process of resumption."

With respect to the Land, the Council was not "a resuming authority" within the scope of the first sentence, in which their Honours cited *Melwood.* But Walker relies upon the second sentence. As authority for the proposition in that sentence of *Murphy*, their Honours referred to the earlier decision of this Court, dealing with New South Wales legislation, in *Housing Commission of NSW v San Sebastian Pty Ltd*[29].

38 In *San Sebastian*, this Court applied s 124 of the *Public Works Act* 1912 (NSW). The terms of s 124 required compensation to be assessed according to

---

26 (1990) 64 ALJR 593; 95 ALR 493.

27 (1990) 64 ALJR 593 at 595; 95 ALR 493 at 496.

28 *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426 at 434.

29 (1978) 140 CLR 196 at 206-207.

the value of the resumed lands at the time of publication of notification of the resumption, "without reference" to any alteration in that value "arising from the establishment of ... public works upon or for which such land was resumed". The Court held that the proposed zoning of the land in question for residential development, contained only in a draft interim development order which came into force a month after the resumption, was a zoning for which the land had been resumed and a step in the process of that resumption; therefore it should be ignored in assessing compensation.

39 Earlier in *Minister v Stocks & Parkes Investments Pty Ltd*[30] this Court had applied s 124 in an analogous situation. Land zoned as part of the "green belt" was resumed for the provision of a school. At the date of the resumption a plan of development of the area had been approved by the State Planning Authority and the plan showed the land in question as zoned "special uses (school)". What s 124 required was compensation assessed without any alteration to the value of the land because it was already known that it was to be the site for a school[31].

40 In *San Sebastian* Jacobs J gave the leading judgment and said, apparently with reference to the concluding words of s 124[32]:

> "This provision states in statutory form a principle which had been developed in the cases independently of express statutory provision. See *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands*[33]."

Pointe Gourde

41 Reference was made in argument to the significance of what was decided in that case for the issues in the present appeals, and on that subject the following may be said. In *Pointe Gourde* their Lordships first had emphasised that the outcome of the appeal (from Trinidad and Tobago) turned upon "the actual wording of the enactment"[34]. The colonial law (in s 11(2)) reproduced s 2(3) of

---

30 (1973) 129 CLR 385.

31 (1973) 129 CLR 385 at 392.

32 (1978) 140 CLR 196 at 205.

33 [1947] AC 565 at 572.

34 [1947] AC 565 at 571.

the *Acquisition of Land (Assessment of Compensation) Act* 1919 (UK). This had been passed to modify the perceived effect of *Inland Revenue Commissioners v Clay*[35]. That case, however, had concerned valuation for the purposes of land tax legislation[36], not compulsory acquisition. In *Clay* Scrutton J and the Court of Appeal upheld a valuation of the fee simple of a dwelling house at £1,000, where £250 thereof was attributable to the price paid by an adjoining owner which had decided to extend its premises where a nurses' home was conducted.

42 *Pointe Gourde* arose in very different circumstances. The litigation was a sequel to the Lend Lease arrangements made in 1941 between the United Kingdom and the United States. The United States had special need for a large quantity of stone for the construction of a naval base on Trinidad, near the subject land. Limestone had been quarried there and sold for many years. It was held that s 11(2) of the Trinidad law did not exclude from the compensation award the $15,000 attributable to what would have been increased quarry profits had the land remained in the hands of the appellant. The needs of the United States to quarry stone did not bring the case within the statutory exclusion in respect of "special suitability or adaptability of the land for any purpose", because the exclusion was not concerned with the value attributable to the use elsewhere of the products of the land[37].

43 Nevertheless, the component of $15,000 was held to have been correctly excluded. Their Lordships held that this was so because (a) "compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition"[38], and (b) here, the relevant "scheme" was not merely the acquisition of the quarry, but included the construction of the naval base in the vicinity[39].

---

35 [1914] 1 KB 339, affd [1914] 3 KB 466.

36 *Finance (1909-10) Act* 1910 (UK) 10 Edw 7 c 8.

37 [1947] AC 565 at 572.

38 [1947] AC 565 at 572.

39 [1947] AC 565 at 573.

44 The Privy Council described the proposition (a) as "well settled" and cited statements[40] which may be traced back to authorities upon the 1845 Act, including *In re Lucas and Chesterfield Gas and Water Board*[41]. The distinction was drawn there (as the Privy Council later had put it[42]) between allowing for the possibility of enhancement by the carrying out of an undertaking (permissible) and the value of that realised possibility (impermissible). It was, as Buckley LJ put it in *Lucas*[43], the possibility and not the realised possibility of the site being required for the purpose for which it is specially adaptable which ought to be considered.

45 In the United Kingdom, any "*Pointe Gourde* principle" was not left to case law construing the word "value" in the statutes that superseded the 1845 Act. The *Town and Country Planning Act* 1959 (UK)[44] and the *Land Compensation Act* 1961 (UK)[45], both contained statutory provisions upon the topic[46].

46 What was meant in *Pointe Gourde* and other cases by references to "the scheme" does not readily appear. As is illustrated by the reference earlier in these reasons to *Nelungaloo*[47] the constitutional law of this country includes

---

40 [1947] AC 565 at 572 citing *South Eastern Railway Co v London County Council* [1915] 2 Ch 252 at 258; *Fraser v City of Fraserville* [1917] AC 187 at 194.

41 [1909] 1 KB 16 at 28, 35, 37.

42 In *Cedars Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569; this was an appeal from Quebec but their Lordships asserted (at 576) that "[t]he law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England."

43 [1909] 1 KB 16 at 38.

44 Section 9(2), (7).

45 Section 9.

46 However, in *Camrose (Viscount) v Basingstoke Corporation* [1966] 1 WLR 1100 at 1107; [1966] 3 All ER 161 at 164, Lord Denning MR said *Pointe Gourde* still had some concurrent operation with the statutory provisions.

47 (1948) 75 CLR 495.

analysis in many decisions of this Court of statutory "marketing schemes" involving in particular the compulsory acquisition of wheat and other crops with the objective of market "stabilization". In the context of statutory compulsory acquisition of land, a "scheme" may be taken to be a broad expression derived from the promotion in the 19th century of bills for a special statute to permit the construction of canals, railways, dams and other complex infrastructure. The "scheme" referred to the obtaining by the promoters of compulsory powers without which their proposal could not be implemented[48]. With that background in mind, the description in *Pointe Gourde* of the resumption of land to assist the construction of an air force base under Lend Lease as part of a "scheme", may readily be understood.

47 The term "scheme" is not found in the Compensation Act but was used throughout his reasons by the primary judge. It is the terms of that legislation that are determinative and it is not to be assumed that they reproduce or attempt to reproduce an understanding of "principles" derived by way of gloss upon the spare terms of ss 49 and 63 of the 1845 Act. The critical provision of the Compensation Act should now be considered.

The definition of "market value"

48 Section 56 of the Compensation Act is introduced by s 37 which is set out earlier in these reasons and confers an entitlement to payment of compensation by the resuming authority of the State; here, the Foreshore Authority.

49 Section 56(1) states:

> "***market value*** of land at any time means the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer, disregarding (for the purpose of determining the amount that would have been paid):
>
> (a) *any increase or decrease* in the value of the land *caused by* the carrying out of, or *the proposal to carry out*, *the public purpose* for which the land was acquired, and

---

48 Cf *Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302 at 319.

(b) any increase in the value of the land caused by the carrying out by the authority of the State, before the land is acquired, of improvements for the public purpose for which the land is to be acquired, and

(c) any increase in the value of the land caused by its use in a manner or for a purpose contrary to law." (emphasis added)

50 The phrase "public purpose" is defined in s 4(1) as meaning "any purpose for which land may by law be acquired by compulsory process under the [Compensation] Act". Paragraph (a) in the definition of "market value" may be read with par (a) in the statement in s 3(1) of the objects of the Compensation Act. That object is:

> "to guarantee that, when land affected by a proposal for acquisition by an authority of the State is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition".

Conclusions

51 The opening words of the definition in s 56(1) ("means the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer") reflect what for a century has been taken from *Spencer v The Commonwealth*[49]. That case arose under the tersely expressed provisions of the first federal legislation in the field, the *Property for Public Purposes Acquisition Act* 1901 (Cth). Section 19(1) thereof spoke merely of "the value of the land taken". The result of the judicial exegesis in *Spencer* was summed up by McHugh J in *Kenny & Good Pty Ltd v MGICA (1992) Ltd*[50] as follows:

> "Value is determined by forming an opinion as to what a willing purchaser will pay and a not unwilling vendor will receive for the property[51]. In determining that value, there must be attributed to the parties a knowledge of all matters that affect its value. Those matters will

---

49 (1907) 5 CLR 418.

50 (1999) 199 CLR 413 at 436 [49]-[50].

51 *Spencer v The Commonwealth* (1907) 5 CLR 418.

include the predicted impact of future events as well as the experience of the past and the rates of return on other investments. As Isaacs J pointed out in *Spencer v The Commonwealth*[52]:

> 'We must further suppose both to be perfectly acquainted with the land, and cognisant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, *of a rise or fall for what reason soever* in the amount which one would otherwise be willing to fix as the value of the property.' (emphasis added)

The market for the property is, therefore, assumed to be an efficient market in which buyers and sellers have access to all currently available information that affects the property."

52 Counsel for the Foreshore Authority in oral submissions did not resist findings by the primary judge to the effect that had it not been for the history of resistance by the Council to the wishes of the Greiner and Fahey Governments for residential redevelopment of the Land, the Land would have been rezoned to permit that development. But that had not come to pass and after 1995 the Carr Government set a quite different course. In particular, that history of resistance by the Council occurred, on the case made by the Foreshore Authority, before there had come into existence "the proposal" upon which par (a) of the statutory definition turns.

53 The Foreshore Authority submitted that (i) the statutory definition required what might be called a *Spencer's Case* valuation in the sense explained above; but (ii) this was to be followed by any disregard which par (a) required; and (iii) the reference in par (a) of the objects set out in s 3(1) to eventual acquisition indicated that the proposal might predate by a significant period the acquisition of the land in question; (iv) but (iii) did not render applicable to s 56(1) the proposition drawn from *San Sebastian*[53] as to the sufficiency of an "indirect relationship" where the maintenance of the planning restriction by the

---

52 (1907) 5 CLR 418 at 441.

53 (1978) 140 CLR 196 at 206-207.

Council is seen as "a step in the process of resumption"[54]; (v) this is because the market value disregard in par (a) looks to the public purpose for which the Land might by law be acquired by the Foreshore Authority by compulsory process under the Compensation Act and to "*the* proposal" to carry it out; (vi) "*the* proposal" here was not that of the Council as the proposed resuming authority, or some aggregation over time of the policies of the Council and later of the Carr Government; (vii) to give the statutory expression that operation, as had the primary judge in fixing upon "unity of purpose displayed by the two arms of government", was an error of law.

54 This reasoning should be accepted. The construction of the market value disregard in par (a) for which the Foreshore Authority correctly contends, links "the proposal" to that of the resuming authority. It puts aside anterior discussions or agitations by the Council and others in favour of classifying the Land as public space. In this way there is reflected in the terms of par (a) of s 56(1) a policy to require a disregard only of that increase or decrease (as in this case) in value for which the resuming authority is responsible.

55 Two further points should be noted. The Foreshore Authority correctly accepted that the market value disregard for which par (a) provides is predicated upon the application of *Spencer's Case* by the opening words of s 56(1). Matters of debate or doubt as to the outcome of controversy respecting use of particular land might affect the perception of the willing but not anxious market participants well before there is "the proposal" which is the means selected by the resuming authority to end the controversy. How that proposition would apply to the facts and valuation process in the present case is beyond the scope of these appeals.

56 The second point concerns the time-scale of "the proposal" of the resuming authority in this case. In its second set of reasons the Court of Appeal expressed some doubt as to the findings of the primary judge. It said that before the announcement of 19 February 2002, the Planning Minister had had "a certain preference, but declined to take a decision which might commit the State Government to significant expenditure". The primary judge had seemed to recognise that it was not until shortly before February 2002 that the State Government itself had adopted the proposal to carry out the public purpose. In its written submissions, Walker sought to place the date of the proposal by the State at some significantly earlier time.

---

54 *The Crown v Murphy* (1990) 64 ALJR 593 at 595; 95 ALR 493 at 496.

57 Resolution of any controversy of this nature must be for the further proceedings in the Land and Environment Court on the remitter ordered by the Court of Appeal on 21 December 2006.

Orders

58 The appeals should be dismissed with costs.