HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

Matter No S24/1999

JOHN BOLAND APPELLANT

AND

YATES PROPERTY CORPORATION
PTY LIMITED & ANOR RESPONDENTS

Matter No S28/1999

JOHN WEBSTER APPELLANT

AND

YATES PROPERTY CORPORATION PTY
LIMITED & ANOR RESPONDENTS

Boland v Yates Property Corporation Pty Limited
Webster v Yates Property Corporation Pty Limited
[1999] HCA 64
9 December 1999
S24/1999 and S28/1999

ORDER

1. *Appeals allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 5 August 1998 (as varied by the orders made on 30 November 1998), and in place thereof, order that the appeals to that Court (other than the appeal of Ian Francis Yates against the order as to costs made against him by Branson J on 14 August 1997) are dismissed with costs.*

3. *Remit to the Full Court for further consideration the appeal of Ian Francis Yates against the orders as to costs made against him by Branson J on 14 August 1997.*

On appeal from the Federal Court of Australia

Representation:

Matter No S24/1999

R B S Macfarlan QC with A G Bell for the appellant (instructed by Minter Ellison)

D M Quick QC with C D Curtis for the respondents (instructed by Bruce and Stewart)

Matter No S28/1999

D F Jackson QC with S T White and E A White for the appellant (instructed by Moray and Agnew)

D M Quick QC with C D Curtis for the respondents (instructed by Bruce and Stewart)

CATCHWORDS

Boland v Yates Property Corporation Pty Limited
Webster v Yates Property Corporation Pty Limited

Negligence – Professional negligence – Legal practitioners – Standard of care.

Acquisition of land – Determination of compensation – Special value of land to dispossessed owner – Theory of "head start" to developers.

Legal practitioners – Professional liability – Negligence – Barristers and solicitors – Immunity from action.

Words and phrases – "market value" – "special value" – "head start".

Trade Practices Act 1974 (Cth), s 52.
Public Works Act 1912 (NSW), s 124.
Darling Harbour Authority Act 1984 (NSW), s 12C.

1 GLEESON CJ. These two appeals were heard together. They arise out of actions for damages for professional negligence.

2 Each appellant is a legal practitioner. The first respondent, Yates Property Corporation Pty Limited ("Yates") was the client of the appellants. The first appellant, Mr Boland, was sued by Yates as a representative of Abbott Tout Russell Kennedy ("Abbott Tout"), a firm of solicitors engaged to act for Yates in the conduct of a compensation claim before the Land and Environment Court of New South Wales. The second appellant, Mr Webster, is a barrister who acted as junior counsel in the proceedings before the Land and Environment Court. Mr Webster was led in those proceedings by Mr Simos QC, who was also sued by Yates. The second respondent to each appeal, Mr Yates, is the controlling shareholder of Yates. He was not a party to the original actions brought by Yates, but was joined in the proceedings when an order for costs was sought and made against him.

3 The actions were all heard by Branson J in the Federal Court. She found in favour of the defendants[1].

4 Yates instituted two appeals against the judgments of Branson J on liability (No NG 495 of 1997) and costs (No NG 716 of 1997). Mr Yates appealed from that part of the judgment against him on costs (No NG717 of 1997). The appeals were consolidated by an order made on 22 September 1997. Orders for security for costs were made against Yates by Davies J in favour of each of the respondents, including Mr Simos. No security was provided in respect of Mr Simos and, on 13 February 1998, Davies J ordered that the appeals by Yates against Mr Simos be dismissed.

5 The Full Court (Drummond, Sundberg and Finkelstein JJ) allowed the appeals which remained on foot[2]. It ordered Mr Boland and Mr Webster to pay the costs of the appeals by Yates. (Nos NG 495 and 716 of 1997). It ordered those parties and Mr Simos to pay the costs of the appeal by Mr Yates.

6 Although the primary claim made by Yates against its former legal representatives was for damages for negligence, (including, in the case of the solicitors, breaches of a contractual obligation to exercise care and skill), Yates relied on other causes of action, including allegations of contraventions of s 52 of the *Trade Practices Act* 1974 (Cth) and s 42 of the *Fair Trading Act* 1987 (NSW), (misleading and deceptive conduct), and allegations of breaches of fiduciary duty. Those other claims also failed before Branson J. Subject to one qualification, it was not suggested that they added anything to the claims based on professional negligence. The matter was argued, both in the Federal Court and in this Court,

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1 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169.

2 *Yates Property Corporation v Boland* (1998) 85 FCR 84.

upon the basis that, if Yates could not succeed in establishing professional negligence, it could not make out the factual foundation for its other causes of action. The qualification relates to the question of an immunity claimed by all defendants. Having regard to the way in which they decided the case, it was unnecessary either for Branson J, or for the Full Court, to deal with the question whether the immunity from suit relied upon by Mr Boland and Mr Webster would have defeated the other causes of action. Branson J held there was no negligence. The Full Court of the Federal Court held there was negligence, but that such negligence was not covered by any immunity. It would only be if this Court were to uphold the finding of negligence, but to conclude that it was covered by the immunity, that a question as to the significance of the other causes of action would arise.

7 In order to explain the nature of the allegations of professional negligence, and the issues to which those allegations have given rise, it is necessary to examine, in some detail, the litigation out of which they arose. The course of that litigation was complicated. The original compensation proceedings were heard by Cripps J, the Chief Judge of the Land and Environment Court, in early 1990[3]. Both parties were dissatisfied with the outcome. There was an appeal, and a cross appeal, to the Court of Appeal of New South Wales. That appeal was heard in late 1990, and judgment was given in July 1991[4]. The Court of Appeal (Kirby P and Handley JA, Mahoney JA dissenting) allowed the appeal in part, allowed the cross appeal, and remitted the proceedings to the Land and Environment Court for rehearing on certain issues. The matter was reheard before Cripps J in March 1992[5]. At that stage Yates terminated the retainer of Abbott Tout and instructed other solicitors to lodge a further appeal to the New South Wales Court of Appeal. In November 1992, the further appeal was settled on the basis of payment to Yates of an additional amount. That put an end to the primary litigation. Yates then pursued claims against its former legal representatives.

8 During the course of the relevant events, Yates went into liquidation. That fact, and the respective roles of the liquidator, and the second respondent, were material to some aspects of the case, but they are not presently significant, and may be disregarded.

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3 *Yates Property Corporation Pty Ltd v Darling Harbour Authority* (1990) 70 LGRA 187.

4 *Yates Property Corporation Pty Ltd (in liquidation) v Darling Harbour Authority* (1991) 24 NSWLR 156.

5 *Yates Property Corporation Pty Ltd (in liquidation) v Darling Harbour Authority,* unreported, Land and Environment Court of New South Wales, Cripps J, 1 April 1992.

The primary litigation

9 In 1981 Yates purchased land in the Darling Harbour area. The purchase price was $5.1 million. Yates decided to investigate the possibility of developing the land as a retail market place. The company sought expressions of interest from prospective stallholders, and obtained written agreement from 40 of them to take a stall if the market were constructed. In 1983, consultants were engaged to carry out the work necessary to obtain approval from the Sydney City Council to develop the land as a market. Such approval was given. Yates also engaged architects to prepare plans for a market building. In 1984 the existing structures on the land were demolished and a builder was retained to carry out the construction of the building in accordance with the plans that were prepared. In July 1984 Yates obtained the authority of the Sydney City Council to construct a market building that would house 896 market stalls. Expenditure incurred to reach that stage exceeded $2.7 million.

10 In June 1984 it was announced by the New South Wales Director of Public Works that the land was likely to be resumed for the purposes of the Darling Harbour Authority. Yates was told to hold its development proposals in abeyance. In May 1985 the land was acquired by the Darling Harbour Authority pursuant to the *Darling Harbour Authority Act* 1984 (NSW). Pursuant to s 12C of the *Darling Harbour Authority Act*, Yates was entitled to receive compensation. A claim for compensation was to be dealt with as if it were a case in which a claim had been made by reason of the acquisition of land for public purposes under the *Public Works Act* 1912 (NSW). The *Public Works Act* contained provisions setting out the basis on which compensation was to be calculated. By virtue of s 124 of that Act, for the purpose of ascertaining the compensation to be paid, regard was to be had to the value of the land taken, and to the damage (if any) caused by the severing of the land taken from any other lands of the owner or by the exercise of any other powers by the resuming authority otherwise injuriously affecting such other lands. Jurisdiction to deal with any disputed claim for compensation was vested in the Land and Environment Court.

11 The function of the court was to assess the compensation payable according to the value of the land at the time the land was resumed. The "value of the land" means "value of the land to the owner"[6]. What is to be noted, however, is that the basis of compensation was the value of the land taken and not, apart from the specific kinds of damage referred to in s 124, the general or particular financial harm otherwise suffered by Yates as a consequence of the resumption.

12 The parties to the proceedings in the Land and Environment Court were Yates as applicant and the Darling Harbour Authority as respondent. Mr Simos QC and Mr Webster, instructed by Abbott Tout, appeared for Yates. The proceedings

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6 *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083.

lasted for eight weeks. Forty-one witnesses were called, more than 20 of whom were experts dealing with matters such as town planning, financial feasibility, and valuation. Six expert valuers were called. Their valuations of the subject land ranged between $12.74 million and $75 million. On behalf of the Darling Harbour Authority, Mr Weir assessed the value at $12.74 million, Mr Vaughan, a valuer from the Valuer-General's Department, assessed the value at $16.75 million and Mr Gilbert assessed the value at $16.6 million. Three valuers were called on behalf of Yates. Each was found in the Federal Court to be an experienced and highly regarded expert in his field. Mr Parkinson fixed compensation at $75 million, made up of "market value" of $53 million and "special value" of $22 million. Mr Woodley valued the land at $60.6 million, including special value. Mr Egan fixed a market value, based on comparable sales, of $27 million, to which he added $10.8 million for "special value". The range of the six valuations, in relation to land which had been acquired in 1981 for $5.1 million, indicates, if any indication be necessary, that the valuation of land is not an exact science.

13 At the conclusion of the first hearing, Cripps J fixed compensation in the sum of $22,334,500.

14 One of the issues raised and argued before Cripps J was whether compensation ought to be fixed on the basis that the land had a "special value" to Yates. It is convenient to say something briefly about that concept at this point. It will be necessary to return to it in due course.

15 It was common ground that the starting point for the determination of the value of land was the principle stated in *Spencer v The Commonwealth*[7], that is to say, to consider, from the point of view of persons conversant with the subject at the relevant time, what, according to then current opinion of land values, a willing but not anxious purchaser would have to offer to induce a not unwilling vendor to sell the land. That is the market value.

16 In some circumstances, land may have a "special value", which reflects a value to the owner over and above the price which a hypothetical purchaser may pay. What is often referred to as a useful explanation of the concept appears in *Pastoral Finance Association Ltd v The Minister*[8]. That was a case in which a dispossessed owner conducted a wool and meat freezing business on Kirribilli Point across Sydney Harbour from Darling Harbour. The business expanded, and the owner bought land at Darling Harbour, which was a site to which the business could suitably have been transferred. The owner then obtained plans and estimates for the erection of buildings adapted to the needs of the business. Before commencement of the erection of the buildings, the owner learned of an intended

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7 (1907) 5 CLR 418 at 432.

8 [1914] AC 1083.

resumption, and did not proceed with construction. The land was resumed. The Privy Council said[9]:

> "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. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably 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."

17 The three valuers called on behalf of Yates each expressed an opinion that the subject land had a special value. Mr Parkinson, for example, having expressed an opinion as to the market value of the land, went on to assess special value by reference to what it would cost to acquire an alternative market[10]. This he treated as a basis for estimating an amount, in addition to market value, which a hypothetical purchaser in the position of the owners would have been willing to pay to return the subject land.

18 In his reasons for judgment, Cripps J did not adopt and apply the opinions of any one of the valuers who gave evidence. Rather, his Honour made comments on some aspects of the valuation evidence, expressed a preference for some parts of it over others, and then stated his own conclusions.

19 In relation to the matter of special value, Cripps J made particular reference to *Pastoral Finance Association Ltd v The Minister*, *Housing Commission of New South Wales v Falconer*[11], and *Kennedy Street Pty Ltd v The Minister*[12]. He accepted that the subject land had "a special value". He rejected a submission made by the Authority that the principle enunciated in the *Pastoral Finance* case could have no application to vacant land or, if it could, could have no application

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9 [1914] AC 1083 at 1088-1089.

10 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 89.

11 [1981] 1 NSWLR 547.

12 [1963] NSWR 1252.

to vacant land where the dispossessed owner was not carrying on a business elsewhere[13]. Cripps J said[14]:

> "I am of the opinion that conformably with the above-mentioned authorities, the subject land did have a 'special value' to Yates. That is, a purchaser in the position of Yates would have regard to the potentiality of the subject site by reason of its size and location for use as a market and for that reason would be prepared to pay something above the land value rather than not obtain it."

20 Later, his Honour said[15]:

> "Yates did a considerable amount of work in preparation for the markets. It hoped it could replace Paddys [Markets] but if it could not it was prepared to compete with it. Of special significance is the circumstance that approximately 718 recorded registration forms were received from people interested in becoming stall holders at the Harbour Street markets. Each paid $50 to register interest. Perhaps of more significance is the circumstance that about forty people paid rent in advance, about $100,000 for the right to occupy stalls in the market yet to be built.
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> …
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> Having regard to the evidence of Mr Byrne and Mr Banks, I am of the opinion that a prudent purchaser in the position of Yates would have considered that there was some potential for a successful market and there was a possibility that such a market would be highly successful. However, he would also be aware that there was a risk of failure and a high risk that the markets would not function at anything like the profit levels forecast by Mr Dimasi."

21 After considering the evidence of individual valuers, including evidence of special value, Cripps J said[16]:

> "As will be seen, I have fixed compensation by reference to a rate per square metre derived from comparable sales. In arriving at my conclusion, I have had regard to relevant comparable sales and to what I find to be the special value of the land to Yates. Yates had available a large area of land

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13 (1990) 70 LGRA 187 at 200.

14 (1990) 70 LGRA 187 at 201.

15 (1990) 70 LGRA 187 at 203-204.

16 (1990) 70 LGRA 187 at 210.

> which had the potential for use as a market. The subject land was close to the CBD and Chinatown and within an area where market use was established albeit under the authority of the State. It presented Yates with an opportunity to establish a profitable market of the type proposed. It is true that in part the opportunity available to Yates was the result of the entrepreneurial skills of Mr Yates. On my understanding of the authorities, I can make no allowance in favour of Yates for this because Yates' entrepreneurial skills were not affected by the resumption. (In the proceedings I was asked to assume an identity between Mr Yates and his corporation.) But the opportunity also arose by reason of the size of the land and its location. In my opinion, it is that which gave the land a special value to Yates. Because, as I find, there was no other land immediately available for market purposes, upon resumption Yates lost the opportunity to exploit its land for its market potential. As I have said, I do not accept that a reasonably minded purchaser would have accepted Mr Dimasi's figures without qualifications and that he would have paid almost no regard to Mr Parkinson's estimates. Nonetheless, the expressions of interest received by Yates and the receipt of almost $100,000 rent in advance before any building works were undertaken support Yates' optimism concerning the success of the market. Yates had development consent and building approval from the Sydney City Council. In my opinion, *someone in Yates' position* would have been prepared to have paid something more than what I might describe as 'land value' sooner than lose it." (emphasis added).

22 Cripps J did not make separate assessments of market value and special value, but included special value in the compensation which he ultimately fixed in the sum of $22,334,500.

23 Yates appealed to the Court of Appeal of New South Wales, and the Darling Harbour Authority cross appealed. At the hearing of the appeal, both sides agreed that Cripps J had made one error, although there was argument as to whether it was an error of fact or an error of law. In the course of his judgment, Cripps J said that no claim was made by Yates for abortive expenditure. This was a reference to expenditure incurred in relation to the proposal to develop and use the land as a market. Before the Court of Appeal, both sides agreed that this was an error, and that Yates had claimed that a sum of $217,443.78 should be taken into account.

24 One of the other issues the subject of argument in the appeal concerned special value apart from the matter of abortive expenditure. The Darling Harbour Authority argued that Cripps J erred in holding that special value could be taken into account in the circumstances of the case. That argument failed. Mahoney JA was of the view that there was no demonstrated error of law in the approach taken by Cripps J to the matter of special value. With that view, Kirby P and Handley JA disagreed, but the extent of their disagreement was limited.

25 Kirby P said[17]:

> "It is incontestable, following *Pastoral Finance*, that the appellant was entitled to compensation for 'special value' if it could establish that it qualified for such compensation. Cripps J concluded that it had so qualified. However, the basis upon which he so concluded is unclear. In so far as it is explained it appears to relate to considerations apt for the assessment of 'market value' and insufficient for the determination of 'special value'. It therefore appears that an error in law has occurred in the provision of reasons which entitles the appellant to have its claim for 'special value' compensation re-determined. It could not be re-determined by this Court. The re-determination should carefully avoid the danger of duplicating compensation for aborted expenditure and 'special value' to the owner."

26 Certain observations made in the reasons for judgment of Handley JA were later taken up in support of the claim for professional negligence now advanced. In dealing with the matter of special value, Handley JA criticised the reasons of Cripps J as ambiguous. He referred to a submission made on behalf of the Darling Harbour Authority that the case of *Kennedy Street Pty Ltd v The Minister*[18], upon which Mr Simos had relied, was wrongly decided, and rejected that submission. He noted the acknowledged error in relation to the abortive expenditure. He also referred to a line of authority relating to the duty of a judge to give adequate reasons to explain a judicial decision.

27 Handley JA, in discussing the claim for special value, and the decision in *Kennedy Street Pty Ltd v The Minister*, referred to the work done by Yates which confirmed the suitability of the subject land for use as a market in the hands of any owner. This, his Honour said, was a factor which, in accordance with *Spencer,* would be taken into consideration by any prudent purchaser. However, in relation to the information which Yates had obtained concerning the names and addresses of persons expressing interest, and of persons prepaying rent, Handley JA said that the documents recording that information would not pass to a purchaser on a sale of the land. (That proposition has been contested on this appeal. The appellants contend that Handley JA appears to have assumed that, as an act of self-denial, a vendor would decline to provide a purchaser with information which might motivate the purchaser to pay more for the subject land). His Honour referred to a Western Australian case on the subject of stamp duty, which turned upon the

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17 (1991) 24 NSWLR 156 at 162.

18 [1963] NSWR 1252.

conclusion that a hypothetical purchaser would not be entitled to such a document. Handley JA said [19]:

> "If the documents recording this information would be of value to a purchaser, they would also be of value to the owner. In such a case because the owner does not either have to purchase the documents, or repeat the work, the land may be worth more to him than to anyone else."

28 This, it may be noted, was a rather narrow basis for a claim of special value, and was unlikely to have been of such significance having regard to the amounts of money involved in the dispute as to market value. Furthermore, the criticism which the present appellants make of the reasoning behind it is valid.

29 Handley JA went on to say[20]:

> "The findings by the trial judge in relation to the other matters which made the land suitable for markets raised questions of law as to which of them were relevant to market value and which were relevant only to special value. It is not clear whether [Cripps J] misdirected himself in deciding these questions and indeed whether they were decided in favour of the appellant or the Authority."

30 In brief, putting to one side the abortive expenditure, and the documents recording information about prospective tenants, Handley JA's decision concerning special value turned upon the proposition that it was impossible to tell from the reasons of Cripps J whether he had given proper consideration to the question of special value, and to the relationship between market value and special value.

31 Handley JA said, in a passage that turned out to be critical,[21]:

> "The existence of the appellant's work etc *may have given* the appellant an advantage or head start over other purchasers in the development of markets on this land. *The judge made no finding to that effect*. If such an advantage or head start did exist it would generally be worth money to a developer in the position of the owner. Hence it would generally give rise to some special value. *These issues raise questions of fact.*

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19 (1991) 24 NSWLR 156 at 187.

20 (1991) 24 NSWLR 156 at 188.

21 (1991) 24 NSWLR 156 at 188.

However it is impossible to determine on the face of his Honour's reasons whether he made any allowance for special value determined on this basis. Had his Honour separately assessed a sum for special value this problem may not have arisen." (emphasis added)

32 Later, Handley JA said [22]:

"In my respectful opinion the trial judge failed to give a sufficient indication of the basis of his decision on the question of special value and he therefore erred in law.

It may be that during the trial neither party supported a finding of special value based on *Kennedy Street*. However facts were found capable of supporting such a finding and the judge may have found special value on this basis. While he may not have erred in law in ignoring an entitlement to special value which was not relied upon, at the same time he would not have erred in law if he allowed for an element of special value which lay between the forensic positions adopted by the parties.

The existing evidence may, or may not, enable the amount of such special value, if any, to be fixed with precision. The principles previously referred to may nevertheless enable a judicial valuer to arrive at a proper award. In any event the appellant has its alternative claim for abortive expenditure.

In remitting these issues for further determination I should make it clear that the appellant is not entitled to compensation for both the expenditure it incurred and any increased market or special value produced by that expenditure. The development and building approvals eliminated uncertainty and reduced the risks costs and delay faced by a purchaser wishing to establish markets on the land. Accordingly they would have increased the price which a prudent purchaser wishing to use the land for that purpose would have been prepared to pay. The appellant would not also be entitled to the cost of obtaining such approvals. Such expenditure would not have been abortive.

The expenditure incurred other than in securing such approvals may have contributed to any special value which the land had for the appellant. It would be entitled to compensation for the loss of such special value but, in that event, not for the expenditure which created it. If the expenditure incurred was greater than the special value it created the difference was lost to the appellant for reasons other than the resumption and cannot be allowed for. If the special value created exceeded its cost the appellant would be entitled to compensation for the higher figure. In many cases no doubt parties

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22 (1991) 24 NSWLR 156 at 189.

> agree to compensation being awarded for expenditure rendered abortive by the resumption without an elaborate inquiry into whether it was all productive or whether the value it created was greater than its cost."

33 In the above passage, his Honour speculated that it may be that during the trial neither party supported a finding of special value based on *Kennedy Street*. At the trial, the Darling Harbour Authority argued that no claim for special value was available. The written submissions and the record of oral argument show that Yates undoubtedly made a claim for special value based particularly on *Kennedy Street*. Cripps J referred to *Kennedy Street* in support of his finding of special value.

34 When the case went back to Cripps J, Mr Simos, for Yates, endeavoured to tender additional evidence said to be relevant to the claim for special value. In brief, that evidence fell into two categories. First, there was an attempt to put a modest value, ($79,000), upon the documents containing information about potential occupiers of the proposed markets, which Handley JA had suggested could have a separate value. Secondly, there was evidence relating to the costs, estimated at several million dollars, of re-locating the proposed markets to a different site. As will appear, the nature of that evidence was misunderstood by the Full Court of the Federal Court. Cripps J rejected the evidence on the ground that it added nothing material to what he already knew. However, he added the abortive expenditure of $217,443.78, which included expenses incurred in consequence and in furtherance of the development and building approvals, costs of conducting investigations in relation to the proposed markets, and expenses incurred in signing up proposed stallholders, to the amount he awarded.

35 Cripps J summed up his conclusions as follows, referring in part to his earlier reasons:

> "I adopted a per square metre estimate of the value of the land. I said that compensation payable for the acquisition of the Harbour Street land should be fixed at a square metre rate of $1450 per square metre and the James Street land at $1500 per square metre (less $58,000 demolition costs). I do not understand that method to be inappropriate provided, of course, that I did not duplicate compensation. In an endeavour to put an end to this litigation, I indicate that I fix (and did fix) the sum of approximately $35 per square metre on the Harbour Street property as 'the special value' component of the compensation. That amounted to approximately $500,000 being the amount of money over and above the 'market value' a person in the position of Yates would have paid sooner than not obtain the land because of the special value the land had to Yates by reason of the work done and expenditure incurred and referred to in the decision of Handley JA.
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> I have been asked to add to the compensation I awarded the sum of $217,443.78. As I have said, a part of that was referrable to expenditure

incurred in actually obtaining these expressions of interest. I do not think, however, that it is appropriate to deduct that sum from the figure agreed upon ie $217,443.78. When I considered the 'special value' to Yates, I knew that some money had been spent but I paid no particular regard to the actual amount because I was of the opinion that, however Yates acquired that interest, it was relevantly of special value to it. I propose to allow all the amounts in exhibit 14 as 'abortive expenditure' and in doing so I have been careful not to duplicate compensation.

In accordance with these findings, I fix compensation for the resumption of both parcels of land in the sum of $22,551,944."

36 As was noted above, Yates again appealed to the Court of Appeal. This further appeal was compromised, the Darling Harbour Authority agreeing to pay Yates an additional sum of $1.25 million. The additional amount paid by the Darling Harbour Authority to settle the threatened second appeal to the Court of Appeal is not presently material. In brief, it involved an agreement to pay a sum to Yates based on stamp duty and legal and other expenses that would have been incurred in relation to acquiring an alternative site. Since it was paid by way of a negotiated settlement, it is fruitless to consider the legal basis on which the payment was justified. Perhaps it could be explained by reference to "disturbance", a concept which will be considered below. It seems to have had nothing to do with "head start". That also gave rise to a misunderstanding on the part of the Full Court of the Federal Court.

The alleged negligence

37 Yates sued Mr Simos, Mr Webster, and Abbott Tout, in the Federal Court, asserting that it had suffered financial loss by reason of the fact that the "special value" aspect of its claim for compensation had not been adequately presented, and that this was a consequence of breach of professional duty by each of the defendants.

38 At the time of the primary litigation, Mr Simos was a senior member of the New South Wales Bar, with substantial experience in land and valuation matters. He had appeared as junior to Mr Mahoney QC in the *Kennedy Street* case. Mr Webster, as well as being a junior barrister, was himself a qualified valuer, and had worked for a number of years as an officer in the New South Wales Valuer-General's Department. There has never been any suggestion that Abbott Tout were negligent in the selection of counsel to represent the interests of Yates in the primary litigation. On the contrary, the negligence action was conducted upon the basis that Yates was represented in the primary litigation by experienced senior and junior counsel who had a reputation for competence in the field which warranted their being retained on behalf of Yates.

39 The central criticism which Yates made of the lawyers was that they failed to identify, and pursue, by way of evidence and argument, what has come to be called "the head start case". That expression is taken from one of the passages in the reasons of judgment of Handley JA set out above. The contention was that Yates, at the resumption date, was in a position of advantage relative to any other prospective purchaser wishing to build markets on the land. That position was said to have arisen by reason of a number of matters which may be summarized as follows:

1. Yates had undertaken investigations and market research concerning the use of the land for the purpose of markets. Those investigations and research had brought it to the point, by June 1984, of receiving registrations of interest in the markets proposal from prospective stallholders. Those registrations of interest accounted for more than 100% of the available space. Yates had also procured licence agreements and prepaid rents from a number of interested participants.

2. Yates had undertaken work and incurred expenditure in designing and obtaining development and building approvals for a structure on the land to house the markets and a carpark. By mid 1984 all relevant Council consents (subject to satisfaction of conditions) had been obtained.

3. Further preparation had been undertaken for the construction of the structure by the preparation of working drawings relating to the final form of the building.

4. Yates had negotiated with the Sydney City Council to purchase from the Council a property at 23 Pier Street, Haymarket, to be used for car parking associated with the markets in order to comply with the conditions of the amended development consent. Yates was also the assignee of leasehold interests in lands owned by the State Rail Authority which was adjacent to the resumed land and which was to be used for car parking and other amenities in connection with the markets.

5. By mid 1984 Yates was in a position to commence construction (the estimated time for construction being 23 weeks) having negotiated and selected a builder of the structure to be constructed on the land and having obtained finance.

40 It was said that any prospective purchaser would have been required to repeat the steps taken by Yates and that it would have taken at least 20 months to do so. Having regard to a factual issue that arose before Branson J, proposition 5 above is of particular significance.

41 Yates contended that its legal advisers should have propounded a case of special value on the basis that a hypothetical purchaser in the position of the owner

would have paid more for the subject land than an ordinary hypothetical purchaser because the hypothetical purchaser in the position of the owner could have commenced development of the land more quickly than any other hypothetical purchaser. This was because, although both the hypothetical purchaser in the position of the owner and the ordinary hypothetical purchaser have the benefit of the development approval and the building approval, only the hypothetical purchaser in the position of the owner would commence development of the land immediately after purchase, whereas the ordinary hypothetical purchaser would delay for 20 months before commencing to develop the land, during which period it would either obtain a new development approval and building approval more suited to its requirements, or repeat the work done by the dispossessed owner in order to be satisfied that the existing development approval and building approval were, in fact, suitable to its requirements.

42 The allegations of negligence were met head on. The legal practitioners who were sued denied that there was any material inadequacy in the manner in which the special value aspect of Yates' claim for compensation was presented and argued in the primary litigation. They contended that the criticisms of their performance were misconceived, and that the so called "head start" claim as now formulated by Yates was based upon both factual error and a misunderstanding of valuation principles. They said there was no failure to lead any relevant evidence, or address any legally and factually supportable argument, in the primary litigation. They argued that such of the matters associated with "head start" as might legitimately be taken into account in a claim for compensation were taken into account in the evidence and arguments advanced in the primary litigation, either in connection with the estimation of market value, or in connection with the estimation of special value. They denied any failure to present Yates case to its best advantage. It was also submitted that, if there were any respects in which Yates' claim could have been put differently, or better, in the primary litigation, that did not, in the circumstances, amount to professional negligence, and at most involved a matter of professional judgment. In particular, Mr Webster and Abbott Tout relied upon the experience and judgment of Mr Simos, and said that there was no act or omission for which they were responsible that amounted to negligence. Additionally, all three relied upon a principle of immunity from action which they said they were entitled to invoke.

43 At first instance in the Federal Court, Branson J found in favour of all defendants on all grounds[23]. Her Honour held that there was no negligence on the part of any of the defendants, and that in any event all three defendants were immune from action, although it was unnecessary for them to invoke that immunity.

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23 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169.

44 The appeal against the decisions in favour of Mr Webster and Abbott Tout was successful[24]. The Full Court of the Federal Court held that there had been negligence on the part of Mr Webster and Abbot Tout, and that there was no relevant immunity from action. The court ordered that the matter be remitted to a single judge to assess damages.

The decision of Branson J[25]

45 In the proceedings before Branson J, the defendants gave evidence. In addition, there was further evidence from expert valuers, and from senior counsel experienced in valuation law and practice. Her Honour relied upon that evidence, and upon her own opinions and judgment, in reaching her conclusions.

46 Branson J addressed the contention by Yates that it was in an advantageous position at the date of the resumption of the subject land relative to any other prospective purchaser of the land wishing to build markets, and that this was the basis of a special value case that should have been, but was not, put in the primary litigation[26]. Her Honour observed that the expression "head start", in the context of special value, appeared to have been coined by Handley JA, and was not previously used in judgments, or professional literature, on the subject of valuation[27]. She then considered two decided cases referred to by Handley JA and relied upon by Yates to support its argument, namely, *Kennedy Street Pty Limited v The Minister*[28] and *Baringa Enterprises Pty Ltd v Manly Municipal Council*[29]. She noted that Mr Simos had appeared as junior counsel in *Kennedy Street*, and that the decision had been referred to both in argument before, and in the reasons for judgment of, Cripps J. She analysed the facts and decisions in the two cases.

47 Branson J referred to evidence given before her by Mr Simos concerning his opinion on the relevant issues. She also referred to evidence given by two legal experts, Mr McClellan QC and Mr Davison SC. Mr McClellan was called by Yates, and Mr Davison was called on behalf of the defendants. Mr McClellan was not asked to, and did not, express an opinion on whether the approach adopted by Messrs Simos and Webster to the subject of special value was one which could

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24 *Yates Property Corporation v Boland* (1998) 85 FCR 84.

25 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169.

26 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 198-199.

27 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 192.

28 [1963] NSWR 1252.

29 (1965) 15 LGRA 201.

reasonably have been taken by competent senior and junior counsel[30]. Mr Davison, a barrister with extensive experience of valuation law and practice, expressed the opinion that the views which had informed the presentation and conduct of the primary litigation by Mr Simos and Mr Webster were views which could reasonably have been held by competent senior counsel at the time of the proceedings and, in addition, were views with which Mr Davison personally agreed[31].

48 Mr Simos, in his evidence as to the way in which the case was presented to Cripps J, insisted that *Spencer's* case required hypotheses which negated a supposed "head start" in Yates. Furthermore, as the case on market value was presented on behalf of Yates, especially in the evidence of Mr Parkinson, it was assumed both that a market development was the highest and best use of the land, and that a hypothetical purchaser would have available, and could use, the information in the possession of Yates, the approvals it had obtained, and the arrangements into which it had already entered. It was both legally and forensically inconsistent with the way in which the case on market value was presented to argue a case on special value based upon the hypothesis that the hypothetical purchaser would be significantly less ready to develop the land for markets than Yates. Thus, it was said, the assumption upon which the theory of head start turns was legally impermissible, and potentially damaging to the market value case. To that may be added the consideration that Branson J also found the hypothesis to involve a factually erroneous assumption as to Yates' readiness and ability to proceed with the development.

49 Branson J said[32]:

> "In the circumstance that no expert has expressed a view which I regard as plainly out of line with the established authorities, I have considered it appropriate to place reliance principally on the expert evidence in considering the issue of whether the conduct of the respondents in failing to advise of the existence of, or to propound or cause to be propounded on behalf of [Yates] before the Land and Environment Court, a head start claim, conformed to the standard of reasonable care demanded by the law, of competent legal representatives in their respective positions.
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> Having regard principally to the expert evidence, but attaching weight also to my own reading of the authorities, I have formed the view that no

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30 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 197.

31 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 197.

32 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 198.

> negligence has been established against any respondent in connection with the alleged head start claim of [Yates].
>
> I find that the views of the law held by Messrs Simos and Webster at the relevant time were views which it was reasonably open to barristers of their respective seniorities experienced in valuation law to hold.
>
> Even were I of the contrary view to that expressed above, and subject to the alleged errors of principle said to have otherwise tainted the valuers' assessments of special value (which are discussed below), I would not uphold the complaints of the applicant that the second and third respondents should have caused evidence of the kind said by the applicant to support the head start claim to be called in the Land and Environment Court proceeding. The evidence establishes that the valuers were comprehensively briefed as to the factual background against which their valuations were to be prepared and none of them identified a claim for special value of the head start kind. The special value claims which they respectively identified were based on premises inconsistent with such claims and, if accepted, had the apparent potential to lead to higher levels of compensation to [Yates] than the head start claim now identified by [Yates]. The second and third respondents were not, in my view, under a duty to require the valuers to consider and give evidence concerning every alternative method of assessing special value which could be advanced consistent with legal principle."

50 Branson J examined criticisms made on behalf of Yates of the evidence of the three valuers called on behalf of Yates in the primary proceedings[33]. She considered the respective roles of lawyers and valuers in compensation litigation and came to the conclusion that it would not be unreasonable for the legal representatives of Yates in the primary litigation to have called the valuation evidence which was led on behalf of Yates[34].

51 In summary, Branson J, having regard to her own understanding of the authorities on the relevant valuation issues, and the evidence before her, including the evidence of Mr Simos, and Mr Davison came to the view that the approach taken by the legal representatives of Yates in their presentation of the special value claim was orthodox, that it was not unreasonable of the legal representatives of Yates to have presented their case as they did, that it was not unreasonable of them to have called the valuation evidence that was called, that the proper performance of their professional duty did not require them to attempt to argue a "head start" claim of the kind for which Yates was now contending, and, that such a claim had the potential to undermine other aspects of Yates' case. Her Honour rightly

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33 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 202.

34 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 205.

criticised the idea that, as barristers conducting litigation, Messrs Simos and Webster were under a duty to call evidence, and advance argument, "concerning every alternative method of assessing special value which could be advanced consistent with legal principle"[35]. Having rejected the complainant's case as to the conduct of counsel, and having rejected the suggestion that Yates' case on special value had not been put to its best advantage in the primary proceedings, Branson J, inevitably, found no fault on the part of the instructing solicitors.

52 Having regard to one aspect of the decision of the Full Court, it is necessary to emphasise a finding made by Branson J, to which the Full Court made no reference.

53 Branson J rejected a substantial part of the factual basis on which Yates claimed to have a head start over a hypothetical purchaser. It was in the interests of Yates, as a hypothetical vendor, to provide a purchaser with every opportunity to develop the land in accordance with its highest and best use and, in that respect, to provide all relevant information. Moreover, Branson J found as a fact that Yates would not have been in a position to develop the site for retail markets as promptly as it claimed. She found that, as at the date of resumption, Yates did not have the financial capacity immediately to erect the markets[36]. She also rejected evidence of Mr Yates concerning the stage he had reached with plans to form a unit trust to develop markets[37]. In that respect she formed an adverse opinion as to Mr Yates' credibility.

54 Mr Hart, who gave evidence before Branson J in support of the head start argument on behalf of Yates, acknowledged in the course of his cross-examination that his theory of head start was based in part upon the assumption that for some reason, which he was unable to explain, the vendor would withhold from a prospective purchaser information which would assist the purchaser to develop the land. There was no warrant for such an assumption, which is contrary to common sense. It is also contrary to the principles explained by Isaacs J in *Spencer v The Commonwealth*[38].

55 Branson J was also aware that the evidence as to market value called on behalf of Yates proceeded, in a number of respects, upon the hypotheses that a hypothetical purchaser would begin to build markets immediately and would complete them within 6 months.

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35 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 198.

36 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 174.

37 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 177.

38 (1907) 5 CLR 418 at 441.

The decision of the Full Court of the Federal Court[39]

56 The fifth occasion upon which a special value claim was considered was before the Full Court of the Federal Court, on appeal from Branson J. (The appeal to this Court constitutes the sixth occasion).

57 The appeal by Yates against Mr Simos had been dismissed, in the circumstances explained earlier in these reasons, before the hearing by the Full Court. However, the Full Court held that Mr Webster and the instructing solicitors had been negligent and, by plain implication, they were of the same view concerning Mr Simos.

58 Before examining any details of the reasons of the Full Court in this respect, it is worth noting the position that had been reached in the litigation by the time the Full Court came to deal with the matter. Cripps J, the Chief Judge of the Land and Environment Court, had considered a special value claim and allowed it to a certain extent. In the Court of Appeal, the dissenting judge, Mahoney JA, found no error of law in the approach taken by Cripps J to the question of special value. The majority in the Court of Appeal found that Cripps J had failed to give sufficient reasons for his decision and, in addition, had made an error about a particular matter concerning abortive expenditure. The case was remitted to Cripps J for further consideration. When it came back before Cripps J, an attempt was made on behalf of Yates to propound, by evidence and argument, an alternative approach to special value, insofar as the lawyers for Yates were able to reconcile that approach with what they regarded as settled principle. Cripps J rejected the evidence and the argument, saying that it did not add anything of relevance to what Yates had advanced on the first occasion, although he added to the compensation the amount for abortive expenditure. A further appeal to the Court of Appeal was compromised on the basis of a payment to Yates of an additional amount of compensation which was not based on a head start approach. Yates then sued its lawyers for negligence. At the hearing before Branson J, the lawyers gave evidence explaining the approach they had taken to the matter of special value. They were supported in their opinions on the subject by the evidence of other senior counsel. Branson J, on the basis of the evidence before her, and also her own views as to the relevant legal principles, concluded that the conduct of the primary litigation by the lawyers for Yates was reasonable, and in accordance with her own views of the law, and that there was no justification for a conclusion that the claim for special value had been advanced other than competently.

59 In addition, there had to be considered the role of the expert valuers. Although the lawyers accepted an obligation to check the evidence of the valuers to ensure that it conformed to established legal principles, it was the valuers who were retained to form and express opinions as to the value of the relevant land,

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39 *Yates Property Corporation v Boland* (1998) 85 FCR 84.

whether that be market value, or market value plus special value. None of the six valuers in the primary litigation expressed an opinion in conformity with the approach for which Yates was contending in the Federal Court.

60 It is to be emphasised that, as Handley JA had pointed out, what was involved was an issue of fact. That issue had to be litigated and decided in accordance with established legal principles, but it was, ultimately, a factual argument. Moreover, it was a factual argument that had to be dealt with in conjunction with other factual arguments, some of which might have involved elements of inconsistency. What was being criticised by the client was the manner in which its lawyers fought one aspect of a complex factual dispute.

61 The Full Court began an examination of the reasoning of Branson J with the observation that it seemed that, in the conduct of the case before her Honour, the parties "lost sight of the real issue that required determination"[40].

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40 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 97.

62 Their Honours said[41]:

> "It will be apparent that both sides proceeded on the assumption that if Yates was in a position to develop the market immediately by reason of the work undertaken before its land had been resumed, that resulted in an advantage that was of economic value and for which it was entitled to receive compensation. Indeed Mr Simos said in evidence that it was 'obvious' that an ordinary hypothetical purchaser who intended to develop the resumed land immediately after purchase in accordance with the existing development approval and building approval would pay a higher price for the land. We agree with this observation.
>
> The difference between the parties was that Yates submitted that the economic value of this advantageous position formed part of the special value of the land and the respondents asserted that it should form part of the market value of the land. Here each party proceeded on an unfounded assumption. The unfounded assumption made by Yates was that if its advantageous position was not compensable as special value it was not otherwise compensable. The unfounded assumption made by the respondents was that the Land and Environment Court was in a position to assess that advantageous position as part of the market value of the land. The latter assumption was unfounded for the reason that no evidence had been led to properly identify or quantify the economic value of being in a position to immediately commence the development of a market."

63 The above passage contains what is argued on the present appeal to be a significant error in its account of the evidence given by Mr Simos. That is a matter to which it will be necessary to return.

64 The Full Court examined the cases of *Spencer v The Commonwealth*[42], *Kennedy Street Pty Ltd v Minister*[43] and *Baringa Enterprises Pty Ltd v Manly Municipal Council*[44]. They concluded[45] that those cases, especially the last two, stood for the principle "that land will have a special value to its owner if that owner is in fact in a position where he can develop that site more expeditiously than could the hypothetical purchaser".

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41 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 98.

42 (1907) 5 CLR 418.

43 [1963] NSWR 1252.

44 (1965) 15 LGRA 201.

45 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 101.

65 In considering the case against Abbott Tout, the Full Court rejected a contention that, having retained experienced counsel and expert valuers, the solicitors were not obliged to give independent consideration to the precise manner in which the special value claim was presented to Cripps J[46]. Their Honours said that the standard of care required of the solicitors was to carry out their retainer as would a reasonably competent solicitor expert in the law relating to resumption of land, since they professed expertise in that area[47]. They then went on to consider whether a reasonably competent solicitor expert in the law relating to the resumption of land "should have advised Yates to advance a case that Yates was entitled to compensation for the work it had done to bring the proposed market to a point where it was capable of immediate development"[48]. Answering that question in the affirmative, the Full Court said[49]:

> "Subject to one potential qualification there can be no doubt that this is the advice that should have been given and how the case should have been put. Yates was entitled to be compensated for the economic value of being in a position of commence the market project. To the extent that it added to the market value of the land, some of that work, (for example, obtaining a development approval and a building approval), would be the subject of compensation in the ascertainment of market value. The remainder of the work, for example preparing plans for the market development, engaging the services of a builder and gathering together prospective stallholders, would give the land a special value to Yates. However, for present purposes it makes no difference whether the balance of the work ought to be taken into account as part of the market value of the land as the respondents allege or as part of its special value as we have held. Once it is accepted that the work had economic value that value should have been put forward as part of the compensation to which Yates was entitled whether for the purpose of assessing the market value of the land or in the assessment of the special value of the land to Yates. That is to say, a competent solicitor experienced in the law relating to the resumption of land would have appreciated that Yates was entitled to compensation as a result of being in a position to immediately develop the land and he would have advised Yates to put forward that claim whether the solicitor was of the view that the proper characterisation of the claim was as an element of the market value of the land or as an element of its special value. If there was any doubt about the

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46 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 103.

47 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 105-106.

48 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 106.

49 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 107.

proper characterisation of the claim, the advice to give was that the claim should be put as falling under one or other head of compensation."

66 The potential qualification referred to at the commencement of that passage related to an important point made on behalf of Abbott Tout and Mr Webster. It was observed that there was an inconsistency between an argument based upon the assumption that a hypothetical purchaser would not have been in a position to construct markets on the subject land for a substantial period, and the assumptions made by the valuers called on behalf of Yates before Cripps J. Those valuers had assumed, in estimating market value, prompt development by a hypothetical purchaser. The "head start" claim now envisaged would have partially undermined their opinions. The Full Court did not disagree with that, but said that, since no consideration was given to making the head start claim, the question was hypothetical and need not be examined further[50]. This being essentially a dispute about the way a factual argument should have been presented and conducted, the question was not hypothetical; it was of practical consequence.

67 As to the contention, accepted by Branson J, that, in all the circumstances, Abbott Tout were entitled to follow the advice of counsel as to how the case was to be run, the Full Court described the proposition as "curious" and involving "real difficulty"[51]. The answer to the contention was said to lie in the fact that no specific advice was ever sought from counsel as to the proper approach to valuation. Furthermore, even if specific advice from counsel on the point had been taken, there was a duty on the solicitors to consider it and form their own views as to it correctness[52]. It was concluded that Abbott Tout were negligent in failing to advise Yates how its claims should be properly presented, in terms of evidence and argument.

68 As has been noted, one of the findings of fact made by Branson J went to the crux of the head start claim. That claim involved the proposition that a prospective purchaser would have taken about 20 months longer than Yates would have taken to be in a position to commence building markets. Branson J found that at the date of resumption Yates did not have the financial capacity and arrangement immediately to erect the markets. That finding was based partly on credit. She also found that it was not reasonable to hypothesise that a prudent purchaser would not repeat all the steps which Yates have taken in relation to the land. The Full Court did not explain or justify departing from those findings.

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50 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 107.

51 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 107.

52 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 108.

69 The conclusions adverse to Mr Webster were based on considerations similar to those concerning Abbott Tout. However, nowhere in their reasons for judgment did the Full Court refer to the fact that there was no contractual relationship between Mr Webster and the lay client, that the action in negligence against him was framed solely in tort, and that damage was the gist of the action. There was no finding by the Full Court that the value of any head start claim, properly assessed, would have exceeded, or added to, the amount awarded by Cripps J for special value. The Full Court left unresolved the question of what, if any, damage resulted from what they found to be Mr Webster's negligence and, therefore, left undecided the question whether such negligence was actionable. Although the form of the order made by the Full Court remitted the matter for the assessment of damages, in so far as the claim again Mr Webster was concerned, there was an outstanding issue going to liability.

The Full Court's approach to the facts

70 It was submitted by the appellants in this Court that the decision of the Full Court of the Federal Court was affected by significant factual errors, by a failure to have due regard to findings of fact made by Branson J, and by misunderstandings as to what had occurred at various stages of the primary litigation. It is necessary to deal with some only of the matters the subject of those submissions, which have been made out.

71 First, on the factual basis of the head start claim, the Full Court incorrectly recorded what was said by Handley JA. The Full Court said[53] that Handley JA referred to the "fact" that Yates was in a position where it could construct a market on the land more quickly than any hypothetical purchaser, that this gave Yates an "advantage" and that Cripps J had failed to take this into account. Handley JA had not referred to such a "fact", but to a possibility, as a passage from his judgment quoted above demonstrates.

72 Secondly, Branson J made findings contrary to the supposed "fact", which the Full Court disregarded. It gave no reason for departing from those findings, which were based in part upon evidence that had not been before Cripps J, and in part upon her views as to Mr Yates' credibility.

73 Thirdly, the Full Court made an error in recording the history of the proceedings before Cripps J when the matter was remitted. Their Honours said[54] that counsel for Yates sought leave to reopen the case "to lead evidence to quantify the economic value to Yates of being in a position to develop a market on the land immediately". If that were so, it might have been regarded as an implied admission

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53 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 96.

54 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 96.

that there was available evidence, as to the head start theory, which should have been addressed in the first place. The Full Court appears to have misunderstood the nature of the evidence which Yates sought to adduce at the second hearing before Cripps J, and to have believed it was similar to the evidence Yates led at the hearing before Branson J concerning "head start". Leaving aside the minor matter of the supposed value of certain documents, the evidence tendered at the second hearing before Cripps J constituted an attempt to prove what it would have cost Yates to relocate to an alternative site. Cripps J took the view that this added nothing material to the evidence that had been before him on the first occasion.

74 Fourthly, the Full Court, in describing the way in which the case was presented to Cripps J originally, said that the case was not prepared on the basis that the advanced state of the development project should be reflected in the market value of the land[55]. That is incorrect. On the contrary, the valuation evidence called on behalf of Yates in the primary litigation treated that as of considerable importance in relation to market value.

75 Fifthly, the Full Court, in referring to the evidence given by Mr Simos before Branson J, attributed to him, as though it were a concession, an observation that it was "obvious" that an ordinary hypothetical purchaser who intended to develop the resumed land immediately after purchase in accordance with the existing development approval and building approval would pay a higher price for the land[56]. That failed to have regard to the context. Mr Simos was speaking of market value, and was making the point that the work which had been done, and the information which had been obtained, to advance the development project would be substantially reflected (as Cripps J held) in market value, not special value. Mr Simos pointed out that Cripps J had before him, in the original proceedings, all available relevant evidence as to the work Yates had done in relation to the project. Mr Simos was also concerned to make the point that, consistently with the assumptions required and justified by *Spencer* in relation to market value, there was no warrant for assuming that a hypothetical purchaser would be materially slower than Yates in proceeding with the development and, as has already been noted, Yates' arguments as to market value were to the contrary of such an assumption, and would have been undermined if it had been made.

76 Sixthly, as has already been noted, the Full Court appears to have taken the view, incorrectly, that the additional sum paid to compromise the second appeal from Cripps J was calculated to reflect, albeit insufficiently, the supposed head start enjoyed by Yates.

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55 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 112.

56 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 98.

77 It was argued for the appellants in this Court that there were other errors in the reasoning of the Full Court, but that the most important error related to the assessment of the merits of the "head start" theory of special value. It is necessary to turn now to that issue.

The "head start" theory of special value

78 It is unnecessary for present purposes to examine fully the theoretical foundation of the concept of "special value to the owner". At this stage of the matter there is no party wishing to argue that the concept was inapplicable to the facts of the case, although such an argument was advanced, unsuccessfully, on behalf of the Darling Harbour Authority in the primary litigation. However, in order to consider the head start theory of special value, which is fundamental to the allegations of professional negligence made by Yates, it is necessary to make certain preliminary observations.

79 In *Spencer*[57], Griffiths CJ pointed out that, in a context such as the present, "value" means "exchange value", which presupposes a person willing to give what is being valued in exchange for money and another willing to give money in exchange for what is being valued. In the case of chattels for which there is an established market, the exercise may be simple. In other cases it may not be simple. There may be no readily identifiable market, or the market may be controlled or for some other reason artificial[58]. There may be room for argument as to the nature of the relevant market. It is necessary to make the hypothesis of a sale between a willing but not anxious vendor and a willing but not anxious purchaser. A decision as to what price would be achieved in such a sale involves a factual judgment, and may be made by reference to comparable sales, or a capitalization of profits formula, or, in certain circumstances, by reference to costs of reinstatement or other criteria[59].

80 It was established in *Pastoral Finance Association Ltd v The Minister*[60], which has been followed in many subsequent cases, that in some circumstances land may have a special value to the owner which exceeds the market value. If, in a given case, it is contended that such special value exists, that also raises an issue

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57 (1907) 5 CLR 418 at 431.

58 *Minister for Public Works v Thistlethwayte* [1954] AC 475.

59 *Housing Commission of New South Wales v Falconer* [1981] 1 NSWLR 547.

60 [1914] AC 1083.

for factual judgment. The subject matter of such factual judgment was explained by Bray CJ in *Arkaba Holdings Ltd v Commissioner of Highways*[61]:

> "It is, of course, well established that it is the value to the owner which must be paid, even if that value exceeds the market value … The additional element is commonly called 'special value to the owner' ... But this special value must in my view arise from some attribute of the land, some use made or to be made of it or advantage derived or to be derived from it, which is peculiar to the claimant and would not exist in the case of the abstract hypothetical purchaser. Would a prudent man in the position of the claimant have been willing to give more for this land than the market value rather than fail to obtain it or regain it if he had been momentarily deprived of it?"

81 Bray CJ went on to give, as a typical example of special value, a case where the land is peculiarly adapted to a certain use made of it by the claimant, such as agricultural land worked in connection with a neighbouring residence or farm buildings[62].

82 The idea that an item of property may have a value to one person which exceeds the price it would bring if sold to a third party in an open market is not peculiar to this area of discourse. It is also reflected in insurance law and practice, where a distinction is sometimes drawn between the market value of property and its value to an insured[63].

83 There is a difficulty which has been adverted to by the courts, but which they have not permitted to stand in the way of allowing just compensation to a dispossessed owner[64]. There is a degree of tension between the concept of value as exchange value, which carries with it the notion that the value of something is the price the owner can get for it, and the concept of a special value to the owner over and above the price which a hypothetical purchaser would pay. However, as was pointed out in *Minister for Public Works v Thistlethwayte*[65], the hypothesis of a willing seller and purchaser is merely a useful and conventional method of

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61 [1970] SASR 94 at 100.

62 *Minister of Works v Robinson* (1965) 13 LGRA 390.

63 *Franke v CIC General Insurance Ltd (The "Coral")* (1994) 33 NSWLR 373 at 376; *Fire & All Risks Insurance Co Ltd v Rousianos* (1989) 19 NSWLR 57 at 65-68; *Roumeli Food Stores (NSW) Pty Ltd v New India Assurance Co Ltd* [1972] 1 NSWLR 227 at 236-238; *Randell v Atlantica Insurance Co Ltd* (1985) 80 FLR 253 at 285-287; *Halsbury's Laws of England*, 4th ed, vol 25, par 655.

64 cf *Turner v Minister of Public Information* (1956) 95 CLR 245 at 292 per Kitto J.

65 [1954] AC 475 at 491.

arriving at market value. Market value, or the amount that would be realised from a sale in a market where the price is agreed by freely contracting parties, provides a measure of value from the perspective, not only of the particular purchaser and vendor, but also of others in the market who are not parties to the particular transaction. Special value to the owner directs attention to the perspective of the vendor. What is insisted upon is that, leaving to one side any claim for damages founded upon the relevant statutory provisions, what is in question is the value of the land or other resumed or acquired asset, not the fixing of compensation for all loss resulting from the resumption or acquisition. The dividing line between those two ideas sometimes becomes blurred by claims for special value based upon what is called "disturbance", or upon wasted ("abortive") expenditure upon resumed land. Although such claims have on occasion been accepted as legitimate, in a statutory context such as that which applied to the present case, they can only be justified if they support the conclusion of special value, and not merely some form of loss or damage to the dispossessed owner. In *The Commonwealth v Milledge*[66] Dixon CJ and Kitto J said:

> "There remains the item of the plaintiff's claim described as business disturbance. Though it was considered convenient in this case, as it often is, to deal with this topic as a separate matter, it must always be remembered that disturbance is not a separate subject of compensation. Its relevance to the assessment of the amount which will compensate the former owner for the loss of his land lies in the fact that the compensation must include not only the amount which any prudent purchaser would find it worth his while to give for the land, but also any additional amount which a prudent purchaser in the position of the owner, that is to say with a business such as the owner's already established on the land, would find it worth his while to pay sooner than fail to obtain the land. … Disturbance, in other words, is relevant only to the assessment of the difference between, on the one hand, the value of the land to a hypothetical purchaser for the kind of use to which the owner was putting it at the date of resumption and, on the other hand, the value of the land to the actual owner himself for the precise use to which he was putting it at that date."

84 Their Honours went on to make a point about consistency, which has some bearing on the present case. They observed that if the market value of land is determined on the basis of the suitability of land for the more profitable form of use to which the owner was putting it, there could be no justification for finding a special value, on the basis of disturbance, related to such use. That, it was said, would involve an obvious inconsistency, the inconsistency arising out of the assumption on which market value had already been ascertained. There is a similar form of inconsistency involved in the application of the head start theory to the

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66 (1953) 90 CLR 157 at 164.

present case, by reason of the assumptions upon which arguments as to market value were advanced.

85 In *Milledge,* the references to a claim for special value based upon disturbance were made in the context of a consideration of an existing, especially profitable, business being conducted on the resumed land by the dispossessed owner. Ten years later, in *Kennedy Street Pty Ltd v The Minister*[67], a decision which has received mixed reviews, Hardie J applied a similar process of reasoning to a case, not where an existing business was being conducted on the subject land, but where such a business was about to be conducted. The plaintiff company had been formed for the purpose of acquiring certain land, subdividing it, and selling the subdivided lots. At the date of assessment no subdivision approval had been obtained. A claim for compensation included a claim for special value. Hardie J allowed a modest amount for special value, which he described giving rise to a difficult question. He said[68] that there was a particular relationship between the plaintiff company and the subject land which caused him, as a matter of fact, to conclude that the case was one of special value. The relationship existed because the plaintiff company had been specifically formed for the purpose of acquiring, developing, and selling the land. It had paid stamp duty and legal fees to acquire the land, and it had paid surveying and engineering fees and a council fee in relation to a subdivision application. These monies, and the knowledge and expertise acquired by the principal shareholders in preparing for subdivision, were, as a result of the resumption, largely wasted. The plaintiff's profit earning capacity was diminished, one factor relating to that being the length of time reasonably required by the plaintiff to undertake another similar venture. Hardie J considered it reasonable to assume that it would take the plaintiff two or three months to re-establish itself in the business of selling vacant land in subdivision. He inferred that the plaintiff, having expended the amounts referred to and undertaken the work considered, so as to be in a position to proceed expeditiously with the completion of the purchase and the subdivision of the land, and being confronted with cost and delay in re-establishing a similar venture elsewhere, would have paid an amount over and above what a hypothetical purchaser would have paid. This amount was special value.

86 The decision of Hardie J was one of fact. His Honour referred to *Pastoral Finance Association Ltd v The Minister*, but did not expound upon the principles. The correctness of the decision of Hardie J was doubted in some later cases[69].

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67 [1963] NSWR 1252.

68 [1963] NSWR 1252 at 1256.

69 *Rosenbaum v Minister for Public Works* (1964) 82 WN (Part 2) (NSW) 220 at 229 per Walsh J; *Altona Estate Pty Ltd v Shire of Altona* (1966) 20 *The Valuer* 63; *Nahum*

(Footnote continues on next page)

However, it has been accepted as correct in other cases[70]. In *Yarn Traders Pty Ltd v Melbourne and Metropolitan Board of Works*[71] abortive expenditure similar to that which had been considered in *Kennedy Street* was taken into account in a finding of special value. *Kennedy Street* was considered, and explained, by the Court of Appeal of New South Wales in *Housing Commission of New South Wales v Falconer*[72]. In that case, Hope JA, considering an allowance for future increases in costs during delays in an owner's building programme following resumption, discussed special value in terms of "disturbance"[73]. Mahoney JA[74] referred to both *Kennedy Street* and *Baringa Enterprises* in the context of disturbance.

87 It was on the basis of disturbance, and wasted expenditure, that the claim for special value advanced on behalf of Yates at the first hearing before Cripps J was made. The submissions as to a special value referred to, and relied upon, *Pastoral Finance Association Ltd v The Minister, The Commonwealth v Milledge, Housing Commission of New South Wales v Falconer,* and *Kennedy Street Pty Ltd v The Minister*. The submissions, framed in that way, were consistent with established authority, and also with the manner in which the subject of special value had been treated in the leading textbooks on the subject[75]. They were also consistent with the way in which the case on market value was presented. Although Cripps J, who accepted the claim for special value, was found by the Court of Appeal not to have given adequate reasons for his decision in that respect, when his reasons for his first decision are read together with his reasons when the matter was remitted to him, it is evident that he was noting *Kennedy Street*, and taking into account disturbance and wasted expenditure, in conformity with the way in which that case

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v Roads and Traffic Authority, unreported, Land and Environment Court of New South Wales, Bignold J, 2 November 1990.

70 *Chapman v The Minister* [1966] 2 NSWR 65; *Yarn Traders Pty Ltd v Melbourne and Metropolitan Board of Works* [1970] VR 427; *Fisher v The Minister* (1980) 38 LGRA 412; *Redwood Court Pty Ltd v Roads Corporation* (1992) 76 LGRA 358.

71 [1970] VR 427 at 433.

72 [1981] 1 NSWLR 547.

73 [1981] 1 NSWLR 547 at 557.

74 [1981] 1 NSWLR 547 at 573.

75 See Fricke, *Compulsory Acquisition of Land in Australia*, 2nd ed (1982) at 32, 104 and 105; Brown, *Land Acquisition*, 2nd ed (1983), pars 3.19 and 4.05; Hyam, *The Law Affecting the Valuation of Land in Australia* (1983) at 144-147; Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14, (1980), pars 234-239.

had been explained by the Court of Appeal in *Housing Commission of New South Wales v Falconer*.

88 Until the speculative reference to head start made by Handley JA in the Court of Appeal, no judge or text writer had ever referred to head start in the context of special value, and no reference to it was made by any of the senior counsel, who, in addition to Mr Simos, had advised Yates prior to the primary litigation. Nevertheless, the Full Court of the Federal Court decided the case upon the basis that the idea, which had hitherto escaped the attention of everybody, was not only right, but so obviously right that failure to advert to it and pursue it as a factual argument constituted professional negligence.

89 Contrary to what was held by the Full Court, there are serious problems about the head start argument, both as a matter of principle, and in its application to the particular facts of the present case.

90 The first problem concerns the question of consistency. The Full Court seems to have thought that, when the present appellants referred to the inconsistency between the head start theory of special value and the case as to market value being advanced on behalf of Yates in the primary litigation, they were concerned only with a matter of tactics. There was more to it than that. All of the valuers called on behalf of Yates assessed market value on the assumption that the highest and best use of the land in question was for development as a site for markets, and upon the assumption that a hypothetical purchaser would undertake such development promptly. They allowed for no significant delay on the part of the purchaser over and above any delay that would be involved for Yates. Thus, to refer to the point made by Dixon CJ and Kitto J in *Milledge*, they were estimating market value in a manner inconsistent with a claim for special value based upon the premise that Yates had a significant advantage over a hypothetical purchaser in terms of the speed with which it could develop the land.

91 Secondly, as was pointed out by Mr Simos, and by Mr Davison, in evidence before Branson J, there is nothing in *Spencer* which warrants the assumption that a hypothetical purchaser of the land would delay for any substantial period over and above the period which would be taken by Yates to develop the markets. Witnesses called on behalf of Yates before Branson J endeavoured, unsuccessfully, to persuade her Honour that it was reasonable to make such an assumption, but that attempt ignored the abstract nature of the hypothetical purchaser in contemplation in the plaintiff's case. As was acknowledged in evidence, some purchasers might have delayed, others might have proceeded immediately, and some might have taken some intermediate time. However, that kind of individualised prediction is outside the scope of the exercise involved in estimating market value.

92 Thirdly, Branson J rejected evidence on behalf of Yates to the effect that Yates would and could have proceeded immediately to develop the land as a site for markets.

93 Particular reference was made by Handley JA, and the Full Court of the Federal Court, to the case of *Baringa Enterprises v Manly Municipal Council*[76]. That case turned upon its own special facts. By reason of established council policy, the owner of the resumed land in question was the only person who could have expected to be allowed to develop the land to its maximum potential. The highest and best use available to anybody else was of a more restricted nature. Whether or not Hardie J was factually right to conclude that the case was a proper one for allowing special value, that conclusion involved no inconsistency with the assumptions on which market value had been assessed, and there was a reason why it could have been regarded as necessary to assume that any hypothetical purchaser would be able to put the land to a use less profitable than that to which the dispossessed owner might have expected to put it. The case had never been regarded by commentators or judges as a case of head start. It was a case in which there was a difference between the use to which the dispossessed owner might have put the land and the use to which anyone else would have been able to put it. That is the basis upon which the decision has been explained subsequently[77].

Conclusion

94 Branson J was correct in deciding that negligence had not been established on the part of any of the legal representatives of Yates in relation to the manner in which its case before Cripps J was prepared and conducted.

95 It is unnecessary to examine the significance that might attach to the differences between the respective roles of senior counsel, junior counsel and solicitors. Whilst Abbott Tout and Mr Webster developed substantial arguments in relation to that matter, the case can be decided without exploring those arguments. The finding of negligence by the Full Court of the Federal Court was founded upon an erroneous view of the merits of the head start theory of special value, an unjustified departure from important findings of fact made by Branson J, and a number of significant factual errors and misunderstandings.

The immunity issue

96 Because there was no negligence on the part of the appellants, (and, therefore, as is conceded, no misleading or deceptive conduct or breach of

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76 (1965) 15 LGRA 201.

77 eg *Housing Commission of New South Wales v Falconer* [1981] 1 NSWLR 547 at 573; Fricke, *Compulsory Acquisition of Land in Australia*, 2nd ed (1982) at 32.

fudiciary duty) the claims for immunity from suit based upon the decision of this Court in *Giannarelli v Wraith*[78] need not be resolved. Branson J would have upheld such claims had it been necessary to do so. The Full Court of the Federal Court took a different view. Both courts were bound by the decision in *Giannarelli v Wraith*. On appeal to this Court it was submitted on behalf of the respondent that, if the issue of immunity had to be resolved, the Court should reconsider *Giannarelli v Wraith*. Because the issue does not arise, it is inappropriate to deal further with that submission.

97 It should be said, however, that I consider that, in relation to the practical application of the immunity to the circumstances of the present case, which was the point upon which there was disagreement between Branson J and the Full Court, the views of Branson J, which are in accordance with the majority opinion in *Keefe v Marks*[79], are to be preferred to those of the Full Court of the Federal Court. The Full Court, in its reasons for judgment, did not refer to *Keefe v Marks*. Branson J was correct in her application of that decision to the present case.

Orders

98 The appeals should be allowed with costs. The orders of the Full Court of the Federal Court should be set aside, and the appellants in the appeals to that Court should be ordered to pay the costs of the respondents to the appeals. The orders made by Branson J should be restored, except insofar as they concerned the order for costs against the second respondent in this Court, Mr Yates. That order was to the effect that Mr Yates be personally liable for the costs of the present appellants on an indemnity basis in certain eventualities. Mr Yates' appeal to the Full Court of the Federal Court challenged that order, but it was unnecessary for the Full Court to deal with the matter. Mr Yates has never had that issue determined on its merits, and in that respect only, the matter should be remitted to the Full Court of the Federal Court to consider that aspect of his appeal.

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78 (1988) 165 CLR 543.

79 (1989) 16 NSWLR 713.

99 GAUDRON J. I agree with the orders proposed by the Chief Justice and, subject to the matters mentioned below, I agree with and adopt his Honour's reasons.

100 The first matter I would mention is the decision of Hardie J in *Kennedy Street Pty Ltd v The Minister*[80]. I agree with Callinan J, for the reasons his Honour gives, that that case was wrongly decided and should no longer be followed.

101 The second matter I would mention is s 52 of the *Trade Practices Act* 1974 (Cth) ("the Act"). The respondents' actions in the Federal Court alleged breach of s 52, as well as negligence. Section 52 provides, in sub-s (1):

> " A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

Section 82 allows for recovery of the amount of loss or damage suffered in consequence of a contravention of s 52.

102 Of course, neither the appellant solicitors nor the appellant barrister are corporations. However, the effect of s 6(3) of the Act is that, relevantly, s 52 has additional effect as if it were "confined in [its] operation to engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services" and the reference "to a corporation included a reference to a person not being a corporation".

103 So far as concerns s 52 of the Act, the respondents alleged, in effect, that, in making various postal and facsimile communications and in settling a letter to be sent by post or facsimile transmission, the appellant solicitors and the appellant barrister, respectively, engaged in conduct that contravened that section. And in consequence of those contraventions, it was asserted, the respondents allowed the Land and Environment Court proceedings to be conducted in a way that involved no claim for compensation for their "head start" advantage and, thereby, suffered loss. The claim in negligence was similarly framed. In particular, it was alleged that by reason of the failure of the appellants to give proper advice, the respondents allowed the proceedings to be conducted without any claim being made for the asserted "head start" advantage. No claim was made that the appellants were negligent in what they did in court.

104 The relationship between the law of negligence and the combined operation of ss 52 and 82 of the Act is brought into question in this case. It is not uncommon for claims under s 52 to be joined with claims in negligence. And it is not uncommon, it seems, for such matters to be determined on the basis that the outcome of the negligence claim will determine the outcome of the s 52 claim. That seems to have been the premise upon which the present litigation was

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80 [1963] NSWR 1252.

conducted. The premise is correct in this case but only in the sense that, given the facts, if the conduct of the appellants was not negligent then it was neither misleading nor deceptive and, conversely, if that conduct was negligent, it was also misleading and deceptive.

105 Had it been concluded that the conduct of the appellants was negligent and, also, misleading or deceptive, it would then have been necessary to consider whether the conduct of the appellants was conduct in trade or commerce to which s 52 of the Act applied. And if s 52 did apply it would, in my view, have operated to exclude the general law of negligence. Liability in damages for conduct in contravention of s 52 depends simply on contravention and loss. It is not confined by those considerations that determine liability in negligence. In particular, liability for contravention of s 52 does not depend on proximity or the foreseeability of loss.

106 Moreover, the damages recoverable for breach of s 52 of the Act are not necessarily co-extensive with those recoverable in negligence[81]. In particular, damages are confined to actual loss[82] and, thus, do not include punitive damages. Further, it is possible that they are not limited either by the foreseeability of consequential damage or remoteness[83]. And significantly for present purposes, if s 52 had applied in this case, there would be no occasion to consider whether the appellants were "immune from suit". That question could only arise if it were found that the appellants were negligent but that s 52 did not apply to their conduct.

107 Had the question of "immunity" arisen, I would have granted leave to re-open *Giannarelli v Wraith*[84]. In my view, proximity – more precisely, the nature of the relationship mandated by that notion – may exclude the existence of a duty of care on the part of legal practitioners with respect to work in court. Whatever the position, it is one that derives from the law of tort, not notions of "immunity from suit". However, these questions do not arise because the conduct of the appellants

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81 *Marks v GIO Australia Holdings Ltd* (1998) 73 ALJR 12 at 16 per Gaudron J, 20-21 per McHugh, Hayne and Callinan JJ, 29 per Gummow J, 42 per Kirby J; 158 ALR 333 at 339, 344-345, 357, 375.

82 See *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526 per Mason CJ, Dawson, Gaudron and McHugh JJ.

83 See *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 526 per Mason CJ, Dawson, Gaudron and McHugh JJ; *Marks v GIO Australia Holdings Ltd* (1998) 73 ALJR 12 at 19 per McHugh, Hayne and Callinan JJ; 158 ALR 333 at 344 and *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 73 ALJR 901 at 907 per Gaudron J; 163 ALR 611 at 621.

84 (1988) 165 CLR 543.

was neither negligent nor misleading or deceptive for the purposes of s 52 of the Act.

108 The appeals should be allowed and orders made as proposed by the Chief Justice.

109 GUMMOW J. These appeals should be allowed and orders made as proposed by the Chief Justice.

110 I agree with the reasons of the Chief Justice for the conclusion that the findings by the Full Court of negligence were based upon an erroneous view of the merits of the "head start" doctrine, an unjustified departure from important findings of fact by Branson J[85] and a number of significant factual errors and misunderstandings. Thus, this litigation does not turn upon any reformulation of the principles of law with respect to professional negligence.

111 However, with respect to the meaning and significance of the decisions of Hardie J in *Kennedy Street Pty Ltd v The Minister*[86] and *Baringa Enterprises Pty Ltd v Manly Municipal Council*[87], I would go somewhat further than the Chief Justice. On that aspect of these appeals, I agree with the analysis by Callinan J in his reasons under the heading "Should *Kennedy Street* and *Baringa* be applied?". Further, whilst the observations by Dixon J in the two authorities to which Callinan J there refers are particularly significant for legislation governed by s 51(xxxi) of the Constitution, they also are of general importance in construing State resumption legislation such as that involved in these appeals.

112 There remains the issues respecting the immunity of legal practitioners which emerge from or involve the reasoning in *Giannarelli v Wraith*[88]. Counsel for the respondents sought leave to re-open that decision. I would refuse leave. The allowing of the appeals so that the claims in negligence fail, and, as explained by the Chief Justice, the consequential failure of the other claims against the appellants, means that any reconsideration of *Giannarelli* would be moot. In disposing of this ground of the respondents' application, I should not be taken as indicating any enthusiasm for such a course had the question of reconsideration of *Giannarelli* squarely arisen.

113 On the footing supplied by the decision in *Giannarelli*, various related and subsidiary issues respecting the common law immunity have arisen in intermediate courts of appeal. One[89] concerns the identification of "work done out of court

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85 *Yates v Boland* (1997) 145 ALR 169.

86 [1963] NSWR 1252.

87 (1965) 15 LGRA 201.

88 (1988) 165 CLR 543.

89 See eg the decision of the New South Wales Court of Appeal in *Keefe v Marks* (1989) 16 NSWLR 713 and the decision of the English Court of Appeal in *Arthur J S Hall & Co (A Firm) v Simons* [1999] 3 WLR 873, in respect of which the House of Lords granted leave to appeal on 19 May 1999 ([1999] 3 WLR 873 at 921).

which leads to a decision affecting the conduct of the case in court". These terms were used by Mason CJ in *Giannarelli*[90].

114 Another is the position, in a profession divided functionally, if not also legally, of solicitors, such as the appellant solicitors in the first appeal who conducted the litigation in the Land and Environment Court and in the New South Wales Court of Appeal which gave rise to the present actions, who brief counsel, such as the appellant in the second appeal. Upon these matters different views were expressed by Branson J and the Full Court. Those of Branson J were avowedly *obiter*[91], given her Honour's other findings which, it transpires, are determinative of the appeals to this Court. The views of the Full Court were perceived by it as essential to its orders, given its holdings, now to be reversed, on liability[92]. The outcome of these appeals involves the setting aside of those orders and the removal of their basis, the factually flawed findings of negligence, from which the Full Court considered the defences of immunity. The treatment of that subject by the Full Court will now lack authority as precedent[93] and, given the defective factual foundation, will lack persuasive force.

115 Questions also arise as to the operation of the immunity with respect to legal practitioners in a profession which, as a matter of fact or law or both, is amalgamated or has never been divided. Further, Pt VIIIA of the *Judiciary Act* 1903 (Cth) (ss 55A-55G) deals with rights to practise as a barrister or solicitor, or both, in federal and certain Territory courts and State courts exercising federal jurisdiction. There may also be issues as to the impact, if any, upon the common law immunity of statutory norms. Examples include those imposed by the *Trade Practices Act* 1974 (Cth) and like legislation[94]. Statute also, in some jurisdictions, may have qualified or even attempted to displace the authority of courts following their English inheritance to control those who may appear as advocates before them[95].

116 Such matters, if they are to be agitated in this Court, are for another day.

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90 (1988) 165 CLR 543 at 560.

91 *Yates v Boland* (1997) 145 ALR 169 at 219.

92 *Yates Property Corporation v Boland* (1998) 85 FCR 84 at 114.

93 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 642.

94 See *MacRae v Stevens* [1996] Aust Torts Rep ¶81-405.

95 See *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 at 674-675; The Honourable Justice Ipp, "Lawyers' Duties to the Court", (1998) 114 *Law Quarterly Review* 63.

117 KIRBY J. These appeals challenge orders of the Full Court of the Federal Court of Australia ("Full Court")[96]. That Court reversed a decision of the primary judge (Branson J)[97]. It upheld the arguments of Yates Property Corporation Pty Ltd ("Yates"), supported by its controlling shareholder Mr Ian Yates (who was added as a party). They argued that the appellant legal practitioners were liable in negligence to Yates. The alleged defaults of the appellants concerned the claim which Yates made, the evidence it called and the arguments it advanced in proceedings in the Land and Environment Court of New South Wales. Those proceedings involved Yates' claim for compensation pursuant to the *Darling Harbour Authority Act* 1984 (NSW), s 12C. That claim arose out of the compulsory acquisition of Yates' property at Darling Harbour, near Sydney. Mr John Boland (the appellant in the first appeal) is a representative of the partners of the firm of solicitors ("the solicitors") whom Yates retained to advise and represent it. Mr John Webster (the appellant in the second appeal) ("the barrister") is a member of the New South Wales Bar. He was at one time a property valuer. Relevantly, he was junior counsel retained by the solicitors to advise Yates and, with senior counsel, to represent Yates in the proceedings.

The issues

118 The circumstances giving rise to the proceedings, the applicable legislation, the history of the litigation and the essential reasons of the primary judge and of the Full Court are set out in the opinions of Gleeson CJ and of Callinan J. I will refrain from unnecessary repetition. Many issues were argued or mentioned before this Court. Principal amongst those issues were the following.

(1) *The "special value" issue:* In the elaboration of statutory provisions[98], obliging the resuming authority to pay Yates compensation for "the value of the land", is there a principle entitling the party affected to compensation for any "special value" of the land to it? If so, what is its content? Did it apply to Yates in these proceedings and what was its value in money terms? In the context of the applicable legislation would the notion of "special value" be fundamentally inconsistent with the hypothesis essential to the calculation of "the value of the land", as distinct from compensation for the other losses suffered by the owner of the land as a result of the compulsory acquisition?

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96 *Yates Property Corp v Boland* (1998) 85 FCR 84.

97 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169.

98 Such as those contained in s 12C of the *Darling Harbour Authority Act* 1984 (NSW) incorporating by reference *Public Works Act* 1912 (NSW), s 124.

(2) *The "head start" issue:* Did any such "special value" include, in the circumstances found to exist, a component known as "head start"[99]? Was this a time-related advantage enjoyed by a particular landowner which entitled it, in accordance with the legislation and applicable principles, to additional compensation for such "special value" over and above the compensation which the landowner would otherwise recover for "the value of the land"? If so, in the facts found, did such "head start" component apply to Yates' entitlements?

(3) *The negligence issue:* To the extent that issues (1) and (2) were affirmed as applicable principles of valuation, did the appellants respectively fail to advise Yates about its entitlement to claim "special value" for the "head start" which Yates enjoyed? If they did, did they thereafter fail to plead such a claim and procure the evidence necessary to prove it in the proceedings for compensation? If so, by the standards of reasonable care applicable to the appellants (as respectively a large firm of solicitors and a barrister, both claiming to have special expertise in the field of land valuation law), did this amount to negligent advice and conduct entitling Yates to recover damages for its consequential loss?

(4) *The evidentiary issue:* Assuming that issues (1), (2) and (3) were otherwise resolved in favour of Yates, is it a complete answer to the claims by Yates that the facts found by the primary judge show that the solicitors and barrister advised upon, and procured evidence relevant to, that claim from valuers of incontestable expertise, and that all evidence relevant to such claim was in fact placed before the judge who had the responsibility of determining the compensation to which Yates was entitled? Did this constitute a complete discharge of the duties owed by the solicitors and barrister to Yates so that any complaint which Yates might have concerning a suggested error or oversight in the provision of compensation for the "head start" component was one to be corrected by appeal from the judge's calculation of compensation (such as in part occurred), and not by a claim for recovery against the solicitors or the barrister for their supposed negligent errors or oversight?

(5) *The professional judgment issue:* The primary judge accepted as honest, the evidence of the barrister and of senior counsel (Mr T Simos QC) who represented Yates in the initial compensation proceedings. She accepted that they had given consideration to a claim for "special value" and had subsequently concluded that propounding such a claim presented certain difficulties or dangers to the recovery by Yates of maximum compensation for "the value of the land". In these circumstances, did the manner in which

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99 The phrase was first used by Handley JA in *Yates Property Corporation Pty Ltd v Darling Harbour Authority* (1991) 24 NSWLR 156 at 188.

the claim for compensation was initially mounted in the original proceedings in the Land and Environment Court constitute, a reasonable exercise of their professional judgment? Even if, in retrospect, the precise conduct of the case were judged to be less than ideal, was it such as to rebut a claim of negligence on the part of the barrister, amounting to a reasonable exercise of his professional judgment as to the best interests of the client, Yates, in a complex and imprecise area of the law?

(6) *The barrister's immunity issue:* Having regard to the actions on the part of the barrister which were alleged by Yates to constitute negligence on his part, was he entitled to immunity from liability to a claim in negligence on the basis that he could not be sued by Yates in respect of his conduct of the case in court or for work out of court which led to a decision affecting the conduct of the case in court[100]? Is it an answer to such a claim to say, in this case, that the advice given by the barrister concerning the existence or otherwise of a cause of action, and the elements of that cause of action were neither in-court conduct by the barrister nor otherwise such as to attract the immunity from a suit in negligence[101]? Or was the advice on the part of the barrister, now impugned by Yates as negligent, although given out of court, so intimately connected with, or ancillary to, the conduct of the case in court as to attract the barrister's immunity from legal liability[102]?

(7) *The solicitors' immunity issue:* Having regard to the function of solicitors generally, and that of the solicitors in this case in particular, if the barrister is entitled to immunity in respect of the negligence alleged by Yates, were the solicitors also entitled to immunity in respect of a claim in negligence or for a suggested negligent breach of the contract of retainer with Yates? In the facts found by the primary judge, given the role actually played by the solicitors, barristers, experts and Mr Yates himself for or on behalf of Yates, did the solicitors adequately discharge their separate duty of care to Yates by retaining barristers of accepted expertise in the field, securing expert witnesses of requisite knowledge and skill and then acting as advised by them? Even if the solicitors owed a duty[103] to advise Yates of any error or oversight on the part of the barristers retained by them, was there any breach of such duty given the advice which the barristers gave and the evidence to which the expert witnesses deposed, the problematic and disputable features of the applicable law and the absence of previous reference in legal authority

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100 *Giannarelli v Wraith* (1988) 165 CLR 543 at 560 (hereafter "*Giannarelli*").

101 *Yates Property Corp v Boland* (1998) 85 FCR 84 at 114.

102 cf *Keefe v Marks* (1989) 16 NSWLR 713 at 719; *Rees v Sinclair* [1974] 1 NZLR 180 at 187.

103 *Hawkins v Clayton* (1988) 164 CLR 539.

to the component of "head start" which formed the foundation for Yates' claim of error and oversight on the part of the solicitors and barrister concerned?

(8) *The reopening of the immunity issue:* In the event that, either as against the barrister, or the solicitors, or both, the claim by Yates would fail by reason of the immunity from suit enjoyed by the legal practitioner or practitioners concerned, Yates asked this Court to reopen and reconsider its holding in *Giannarelli*[104]? Should the holding in *Giannarelli* be reviewed to abolish entirely the immunity from suit of barristers and solicitors (to the extent that the latter are entitled to the immunity), thereby rendering them all liable to their clients for defaults in the same way as members of other professions? Alternatively, should any such immunity be confined to the conduct of a barrister or solicitor-advocate in relation to criminal proceedings? Or should the immunity be limited to proceedings in court generally, so that the line is drawn at the door of the court? Should there be no immunity for anterior advice on a cause of action, on tactics, the presentation of a claim, witnesses to be called, negotiations for settlement etc all of which can be assessed out of court without the particular pressures imposed upon an advocate's courtroom decisions? Given the statement of the law in *Giannarelli* and other statements in England[105], New Zealand[106] and Ireland[107], is any change in the principle established by *Giannarelli* one which may legitimately be made by this Court? Or is it a change, potentially with significant retrospective operation on the civil liabilities of many persons, such that it should only be introduced by a legislature, able to consider the limitations to be imposed and with notice which would afford those affected the opportunity of securing insurance or taking other steps to minimise their exposure to liability hitherto thought not to exist[108]?

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104 (1988) 165 CLR 543.

105 *Rondel v Worsley* [1969] 1 AC 191; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198. See also as to Scotland: *Purves v Landell* (1845) 12 Cl & Fin 91 [8 ER 1332]; *Batchelor v Pattison and Makersy* (1876) 3 R 914 at 918.

106 *Rees v Sinclair* [1974] 1 NZLR 180; *Biggar v McLeod* [1978] 2 NZLR 9; *Glasgow Harley v McDonald* unreported, New Zealand Court of Appeal, 11 August 1999.

107 *Mulligan v M'Donagh* (1860) 2 LT 136; *Robertson v Macdonogh* (1880) 6 LR Ir 433.

108 See recommendations for legislative change: Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Report No 48, (1992) at 50.

(9) *The statutory claims issue:* Even if the immunity from suit of the kind upheld in *Giannarelli* applies to a claim against solicitors and a barrister framed in negligence (and in the case of the solicitor, in negligent breach of the contract of retainer), would such immunity extend to the separate claims brought by Yates based on the provisions of the *Trade Practices Act* 1974 (Cth)[109] and the *Fair Trading Act* 1987 (NSW)[110]? Yates conceded that if the claims in negligence against the barrister and solicitor were dismissed on their merits, no claims under the statutes could succeed. However, Yates asserted that if the claims in negligence were dismissed only upon the basis of the applicable immunity, the claims under the statutes would be pressed with the contention that a common law immunity, of whatever extent, could not defeat any entitlements to which Yates was entitled under the statutes[111].

(10) *The appellate court issue:* Concluding as it did, in the appeal from the decision of the primary judge, did the Full Court err in making findings of fact inconsistent with the findings made by the primary judge where her findings were dependent, in whole or part, upon her conclusions as to the acceptability of the evidence of Mr Yates given in the case for Yates? Alternatively, did the Full Court rest its conclusions upon a mistaken understanding of the history of the original proceedings for compensation? To the extent that the Full Court departed from the findings made by the primary judge which were not dependent on her views as to Mr Yates' credibility, did it give any or sufficient reasons for doing so, taking into account the fact that the proceedings at trial involved a seven week hearing and a very large amount of evidence and argument which afforded the primary judge considerable advantages, that an appellate court would find difficult to recapture[112]?

Two crucial arguments: immunity and negligence

119 Amongst the foregoing issues, the mind, like quicksilver, searches for the crucial points, the answers to which will yield most efficiently a resolution of the

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109 Sections 52, 82.

110 Sections 42, 68.

111 The primary judge held that, if it had been necessary for her to decide the point she would have concluded otherwise: *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 212-216.

112 *Devries v Australian National Railways Commission* (1993) 177 CLR 472; *Jones v The Queen* (1997) 191 CLR 439 at 466-467; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 330; 160 ALR 588 at 619-620; *Lend Lease Developments Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210.

many matters in contention between the parties. In effect, the appellants tendered two central arguments either of which, if it succeeded, would entitle them to victory. The first, was the claim that they were severally entitled to the immunity from suit afforded to legal practitioners for the acts and omissions upon which Yates founded its claims of negligence (and in the case of solicitors, negligent breach of contract). The second, was the claim that by the standards of reasonable care and diligence applicable to them, the appellants were not negligent.

120 Pursuing the claim to immunity has a certain attraction. It would allow the decision-maker to proceed directly to what is argued as a complete answer, in law, to the substance of the claim as made. An answer upholding the appellants' arguments on this point would substantially obviate the necessity of investigating the detail of the facts and the findings about those facts which would be essential in deciding the issues relevant to the suggested negligence of the solicitors and barrister (issues 3, 4, and 5 above). It would save the Court from the rather unsatisfying task of examining the "principles" developed by the courts (including this Court) to flesh out the meaning of the simple phrase "the value of the land" which provided the statutory foundation for Yates' entitlement to compensation. Many of those so-called "principles" are "ambiguous and contentious"[113]. They may be necessary in cases of this kind, in the same way as the "principles" of sentencing are necessary. They may help to guide the decision-maker to a rational, just and consistent process of decision-making. However, like the "rules" governing sentencing[114], the "principles" governing the valuation of land in cases of its compulsory acquisition involve inconsistencies, overlaps, internal conflicts and occasional illogicalities that make their exploration a rather unrewarding one. It is not a task to be embarked upon with enthusiasm or in the absence of clear necessity.

121 In the present appeals, there is an additional reason for considering, at the threshold, the appellants' contention of the immunity from suit. This is because, to the extent that the negligence issues (issues 3, 4 and 5 above) necessitate consideration of the valuation issues (issues 1 and 2 above), they invite examination of those questions in inappropriate proceedings between inapposite parties.

122 The proceedings are inappropriate because, in point of law, the appropriate vehicle for challenging the holdings of the New South Wales courts about "special value" and the suggested component for Yates' "head start", was either by way of

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113 *Yates Property Corp Pty Ltd v Darling Harbour Authority* (1991) 24 NSWLR 156 at 159.

114 *Griffiths v The Queen* (1977) 137 CLR 293 at 310, 326-327; *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476; *R v Olbrich* (1999) 166 ALR 330 at 341; *Inge v The Queen* (1999) 166 ALR 312 at 324.

an application for special leave to appeal to this Court from the decision of the Court of Appeal[115] or by the pursuit by Yates of its appellate rights against the redetermination of compensation made by Cripps J after his initial decision was set aside by the Court of Appeal[116]. Although in each case appellate proceedings were contemplated, and even commenced, they were not ultimately pursued by Yates. In these proceedings the content of valuation law is a necessary ingredient in the claims against the solicitors and barrister. But it is not under direct challenge as it would have been had the earlier appeals been pursued and decided by this Court.

123 The parties are also inapposite because, in the Federal Court and in this Court, there was no contest that Yates was entitled to compensation on the basis of "special value". There is, therefore, no contradictor to dispute Yates' entitlement on that score. The clarification of the content of the "principle" of compensation for "special value" of land to the owner (and of any supposed elaboration of that "principle" in terms of the so-called "head start" which a particular owner enjoys by reason of steps taken by it) would be far better decided in a case where the entitlement to "special value" was in issue. Similarly, the concepts of "special value" and "head start" and their differentiation from other established heads of compensation, would be better clarified in proceedings in which at least one party was contesting both their applicability and content. These are advantages which this Court does not have in the present appeals so far as "special value" is concerned. All parties were in ardent agreement that Yates was entitled to compensation on that footing.

124 Notwithstanding the special problems that would remain to be addressed in respect of the claims by Yates based in statute, there are therefore a number of attractions to considering the claims for immunity at the threshold, as the appellants urged. This could permit this Court to ascertain whether the appellants are wholly exempted from liability to Yates, as they contend. The primary judge indicated that she would have reached this conclusion had a decision on the immunity point been necessary[117].

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115 *Yates Property Corporation Pty Ltd v Darling Harbour Authority* (1991) 24 NSWLR 156.

116 *Yates Property Corporation Pty Ltd v Darling Harbour Authority* unreported, Land and Environment Court of New South Wales, 1 April 1992.

117 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 220-221 (Mr Webster) and 222 (the solicitors).

Scope of legal practitioners' immunity from suit

125 Let the negligence (and in the case of the solicitors, additionally, negligent breach of the contract of retainer) on the part of the appellants be accepted as a hypothesis (despite the appellants' strenuous denials). Can it be said that in each case the claims by Yates are nonetheless inadmissible in law because, on the uncontested facts as to their relationships with Yates, the appellants are entitled to the immunity from suit for their conduct of the litigation?

126 The respective positions of the appellants are not identical in this regard. The barrister was entitled to any immunity belonging to a barrister in a profession observing the traditional distinctions derived originally from the English legal profession, between the respective roles of a barrister and a solicitor. At the time of the events in question in these proceedings, New South Wales was a jurisdiction which substantially observed those distinctions[118]. The barrister submitted that, in accordance with the decision of this Court in *Giannarelli*, a barrister could not be sued by Yates for negligence in the conduct of Yates' case in the New South Wales courts or for work outside those courts "which leads to a decision affecting the conduct of the case in court"[119]. Because the entirety of the preparation of Yates' case by the barrister was directed to the formulation and proof of the claim on behalf of Yates, the gathering of evidence and the preparation of submissions in relation to the proceedings in the Land and Environment Court, it was argued that, within the principle of *Giannarelli,* the barrister was wholly immune from Yates' suit. Accordingly, there was no necessity to consider any other issue as relevant to the barrister's suggested liability. In effect, the suit against him was totally misconceived. Subject to any special questions raised by the claims based on statute, it ought not to have got as far as it did[120].

127 So far as the solicitors were concerned, they also sought the protection of the legal immunity. They did so not on the basis of any in-court conduct or because they fell into the category of a "solicitor-advocate"[121]. Instead, they relied on the argument that the "policy considerations which support the immunity of advocates

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118 The *Legal Profession Act* 1987 (NSW), s 4(1) introduced common admission for "legal practitioners". This change has no application or relevance to the present proceedings.

119 (1988) 165 CLR 543 at 560 per Mason CJ.

120 *Keefe v Marks* (1989) 16 NSWLR 713 was an application for leave to appeal from a decision of a District Court judge striking out a statement of claim or alternatively for an order under the *Supreme Court Act* 1970 (NSW), s 69 quashing the order in question. The statement of claim had been struck out in the District Court on the basis that the claim was inadmissible in law.

121 *Donellan v Watson* (1990) 21 NSWLR 335.

would support such immunity being extended to [the solicitors]"[122]. Thus, the solicitors submitted, it would be "an anomalous and unjustifiable distinction if, in respect of advice and decisions affecting the conduct of proceedings, counsel should have immunity but the solicitors should not where both are held to be obliged to give the same type of advice in respect of the conduct of the proceedings"[123].

Reasons why the legal immunity is inapplicable

128 In my view these appeals cannot be disposed of on the basis of the immunity issues (issues 6, 7 and 8 above). Contrary to the opinions stated by other members of this Court[124], it is my opinion that *Giannarelli*, so far as it expresses the immunity from suit enjoyed by legal practitioners in Australia, is confined in its holding and should not be expanded in its application. In my respectful view, the minority opinion in the New South Wales Court of Appeal in *Keefe v Marks* is to be preferred[125]. In this respect, I favour the general approach of the Full Court of the Federal Court concerning the scope of the legal immunity from suit[126]. In particular, I agree with their Honours' criticism of the

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122 *Yates Property Corporation Pty Ltd v Boland* (1987) 145 ALR 169 at 222.

123 (1987) 145 ALR 169 at 222, citing the submission of the solicitors.

124 Per Gleeson CJ at [97]; per Gummow J at [112]-[114]; per Callinan J at [363].

125 (1989) 16 NSWLR 713 at 725 per Priestley JA.

126 *Yates Property Corp v Boland* (1998) 85 FCR 84 at 114.

argument[127] that a barrister's negligent advice as to whether a cause of action exists, falls within the immunity[128]. I regard such a view of the ambit of the immunity as erroneous. It pushes the advocate's protection from an action for negligence beyond any point that could be justified by binding authority or public policy. My reasons for these conclusions are as follows.

129 First, an immunity from liability at law, to the extent that it exists, is a derogation from the normal accountability for wrong-doing to another which is an ordinary feature of the rule of law and fundamental civil rights[129]. Being held liable in law for negligence is unpleasant. However, such liability extends to other professions such as surgeons, physicians, architects and accountants, many of whom have to make decisions at least as difficult and often as urgent as those typically made by legal practitioners, including advocates[130].

130 The provision of an immunity from suit by the law to practising professionals of its own discipline is criticised by other professionals. They contrast the imposition upon them of ever more stringent obligations of care[131] with the immunity accorded by the law to its own. This contrast has been noted in much legal writing[132]. Potentially, the immunity has a significant economic effect on

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127 *MacRae v Stevens* [1996] Aust Torts Rep ¶81-405 at 63,690 per Beazley JA.

128 (1998) 85 FCR 84 at 114.

129 cf *Osman v United Kingdom* unreported, European Court of Human Rights, 28 October 1998 at pars 150-154; Lord Hoffmann, "Human Rights and the House of Lords" (1999) 62 *Modern Law Review* 159 at 164; *Arthur J S Hall & Co (A Firm) v Simons* [1999] 3 WLR 873 at 882.

130 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 218-219 per Lord Diplock, 228-229 per Lord Salmon.

131 See eg *Rogers v Whitaker* (1992) 175 CLR 479; *Chappel v Hart* (1998) 195 CLR 232; *Woods v Lowns* (1995) 36 NSWLR 344, affd [1996] Aust Torts Rep ¶81-376.

132 Ross and MacFarlane, *Lawyers' Responsibility and Accountability: Cases, Problems and Commentary*, (1997) at 330; Masel, *Professional Negligence of Lawyers, Accountants, Bankers and Brokers*, 2nd ed (1989) at 192; Heerey, "Looking Over the Advocates' Shoulder: An Australian View of *Rondel v Worsley*" (1968) 42 *Australian Law Journal* 3 at 7; Brookes, "Time to Abolish Lawyers' Immunity from Suit" (1999) 24(4) *Alternative Law Journal* 175; Williams, "Immunity in Retreat?" (1999) 15 *Professional Negligence* 75; Hocking, "An Immunity Built on Shifting Sands: The Barrister, the Expert, the Judge and the Law" (1999) 15 *Professional Negligence* 185; Yeo, "Dismantling Barristerial Immunity" (1998) 14 *Queensland University of Technology Law Journal* 12.

justifiable loss distribution in a generally inelastic market[133]. To the extent that a legal immunity survives for advocates at common law, it needs to be fully justified by considerations of binding legal authority and incontestable arguments of legal policy[134]. To the extent that legal authority is uncertain, the immunity, being anomalous, should not be expanded. The scope of the immunity rather than being enlarged, should be confined to essentials.

131 Secondly, the immunity of barristers from suit has derived from historical, social and professional circumstances many of which have since changed markedly. The changes that have occurred suggest the need to reconsider the foundations, or at least the scope, of the immunity. At one stage, the immunity of barristers was explained by reference to their inability to sue the client for professional fees[135]. However, it is now accepted that this fact alone could not justify the immunity[136]. It would be absurd to suggest that an honorary surgeon was relieved of the legal duty to perform the skills of that profession without negligence; or for that matter that any service provider, relied upon by a client, was exempt from a legal duty of care because he or she provided a service without fee[137].

132 The law affording the immunity to a barrister was substantially developed at a time when a person injured could not recover for harm occasioned by negligent advice. With respect to negligent mis-statements causing economic loss, that anomalous rule was overthrown following the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[138]. Such liability now attaches in

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133 cf Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Report No 48, (1992) at 23. Note the abolition of the immunity was supported in Victoria by the Law Institute (representing solicitors) but opposed by the Bar Council and members of the Judiciary.

134 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 219 per Lord Diplock; *Giannarelli* (1988) 165 CLR 543 at 594 per Dawson J.

135 *In re Le Brasseur and Oakley* [1896] 2 Ch 487 at 494; *Robertson v Macdonogh* (1880) 6 LR Ir 433 at 438; cf *Rondel v Worsley* [1967] 1 QB 443 at 513 per Danckwerts LJ (CA); *Rondel v Worsley* [1969] 1 AC 191 at 292-293 per Lord Pearson.

136 *Rondel v Worsley* [1969] 1 AC 191 at 240-244, 258-263, 277-279, 288-289; *Giannarelli* (1988) 165 CLR 543 at 555.

137 *Giannarelli* (1988) 165 CLR 543 at 555 per Mason CJ discussing *Rondel* generally; see also *Hawkins v Clayton* (1988) 164 CLR 539, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

138 [1964] AC 465.

Australia to members of the legal and other professions[139]. There would need to be extremely sound reasons, that could not be criticised as merely self-interested, to exempt legal practitioners from the economic consequences of negligent advice, given that such consequences attach to so many other advisers with no immunity or exception.

133 Thirdly, the social and economic circumstances in which the immunity of legal practitioners developed in England have changed. Many of them are inapplicable to contemporary Australia. Grounding the immunity in a judicial appreciation of the position of barristers, as the small professional *cadre* from which most judges are drawn, seems out of place in the egalitarian social circumstances of this country[140]. In any case there are many more barristers today than in earlier times at the Bar. It is differently organised in different Australian jurisdictions. Solicitors increasingly practise in very large, even national and international partnerships. Specialisation of practice both of solicitors and barristers has increased in recent years. The number of non-barrister advocates has expanded. Proposals for multidisciplinary practices with other professions are under consideration. Professional indemnity insurance is standard; and not just for solicitors.

134 Legal advice, directed ultimately or potentially at litigation, may involve huge financial undertakings. The welfare of many people and the safety of their persons and capital may depend upon the accuracy and comprehensiveness of the advice given. In trans-national situations, the advice of legal practitioners in several jurisdictions may be obtained, most of whom could claim no immunity from suit in the case of negligently mistaken advice. The foregoing considerations suggest the need for scrupulous examination of the reasons given for affording immunity from suit to legal practitioners in contemporary Australia. They also suggest that, where the immunity exists as a matter of law, it should be confined to cases where it is clearly essential and fully justified by undisputed legal authority resting on compelling legal policy.

135 Fourthly, when attention is focussed on the reasons of policy commonly advanced for maintaining the immunity, the given reasons do not, in my respectful view, always bear close analysis. Certainly, they do not justify expanding the immunity beyond that of protecting the conduct of a legally qualified advocate when engaged, as such, in conduct performed in court. It is here only that the

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139 *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556; *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628 (PC).

140 See eg the remarks of Kindersley VC in *In re May* (1854) 4 Jur NS 1169 to the effect that he would "never willingly derogate from the high position in which a barrister stands and by which he is distinguished from an ordinary tradesman". cf *Giannarelli* (1988) 165 CLR 543 at 575 per Wilson J.

advocate is in a position analogous to that of the judge, juror, witness or court official who cannot by law be sued for their acts and omissions as such[141]. It is here that instant decisions must be made and judgments exercised which involve the advocate in the inexact but important functions of advocacy with its special contribution, in the adversary system, to the administration of justice[142]. It is here, primarily, that the advocate must fulfil the "paramount"[143] duties to the court even where these incur "the displeasure or worse of his client"[144].

136 Whilst it is true, as Mason CJ observed in *Giannarelli*[145], that decisions made outside the courtroom inevitably affect the conduct of proceedings that later occur in that place, and whilst the drawing of the line of immunity may be difficult on some of the tests propounded, most of the reasons which sustain a measure of immunity for conduct in court lose their urgency in respect of decisions which the advocate can make in the comparative calm of the office or chambers[146]. It is in the courtroom that the advocate is brought to immediate account before the judicial power which is invoked. It is there that difficult and usually instantaneous decisions must be made that may necessitate subordination of the wishes of the client to the duty to the court[147]. It is there too that the advocate is, with judge, juror, witness and court official, an actor in the public functions of the state and not (as is usually otherwise the case), simply another professional person engaged in private practice for personal reward[148].

137 It is obviously desirable that a clear line establishing the limits of an advocate's immunity should be drawn. No bright line can be derived from the test

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141 Sir William Brett MR in *Munster v Lamb* (1883) 11 QBD 588 at 603; *Cabassi v Vila* (1940) 64 CLR 130; *Giannarelli* (1988) 165 CLR 543 at 558 per Mason CJ; *Glasgow Harley v McDonald* unreported, New Zealand Court of Appeal, 11 August 1999.

142 *Rondel v Worsley* [1967] 1 QB 443 at 517-518 per Salmon LJ (CA).

143 *Giannarelli* (1988) 165 CLR 543 at 556 per Mason CJ.

144 *Rondel v Worsley* [1969] 1 AC 191 at 227-228; cf *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 212 per Lord Wilberforce.

145 (1989) 165 CLR 543 at 559-560.

146 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 220 per Lord Diplock.

147 *Giannarelli* (1988) 165 CLR 543 at 556 per Mason CJ.

148 cf *Cabassi v Vila* (1940) 64 CLR 130 and *Munster v Lamb* (1883) 11 QBD 588. Many of the cases which are commonly cited in this connection concern the defences available in actions for defamation where the applicable privilege is separate and narrower than a general immunity from suit for negligence.

borrowed in *Giannarelli*[149] from that propounded by McCarthy P in *Rees v Sinclair*[150]. That test is expressed in terms of the "intimate connection" of the particular pre-trial work for which immunity is claimed with the conduct of the cause in court. The phrase is capable of being expanded to include a large proportion, perhaps most, of the advice given by many barristers and this demonstrates its potential overreach. This is evidenced in a number of cases since *Giannarelli*[151]. Tradition may sustain those decisions. So may an understanding for the occassional mistakes of the particular profession involved. But the proper accountability of advocate advisers, the protection of the public and a non-discriminatory application of general principles of legal liability to the law's own profession suggest to my mind that the immunity has been pushed far beyond its essential ambit.

138 Fifthly, the contention that the narrowing of the immunity would open the floodgates to litigation and expose to suit advocates and other legal practitioners, destroying the finality of judicial proceedings and encouraging relitigation of the original case[152], does not bear objective examination of the evidence. Nor does the occasional embarrassment of conflicting opinions of courts of coordinate authority (or the suggested peril that every advocate will become a pedant for detail, chasing "every rabbit down its burrow" for fear of a negligence suit by the client) justify an over-broad immunity[153]. There is no such immunity from suit for attorney-advocates in the United States of America[154]. This has not led, in that litigious country, to a flood of malpractice suits against attorneys for their failure

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149 (1989) 165 CLR 543 at 560.

150 [1974] 1 NZLR 180 at 187.

151 See eg *Keefe v Marks* (1989) 16 NSWLR 713 and *MacRae v Stevens* [1996] Aust Torts Rep ¶81-405.

152 This was one of the policy bases expressed in *Rondel v Worsley* [1967] 1 QB 443 at 504 per Lord Denning, 518-519 per Salmon LJ (CA); *Rondel v Worsley* [1969] 1 AC 191 at 248-251 per Lord Morris; *Giannarelli* (1988) 165 CLR 543 at 558 per Mason CJ, 574 per Wilson J, 594-595 per Dawson J.

153 *Giannarelli* (1989) 165 CLR 543 at 556 per Mason CJ. See also *Rondel v Worsley* [1969] 1 AC 191 at 272-273 cf *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 222-223, 235-236. In *Arthur J S Hall & Co (A Firm) v Simons* [1999] 3 WLR 873 at 900 it was held that an action classified as not more than a collateral attack in an earlier judgment would be treated as an abuse of process and would ordinarily be struck out on that ground.

154 *O'Neill v Gray* 30 F 2d 776 (1929) cert denied 279 US 865 (1929); *Armstrong v Adams* 283 P 871 (1929); *Young v Jones* 256 SE 2d 58 (1979); *Smith v Becnel* 396 So 2d 444 (1981); *Rapuzzi v Stetson* 145 NYS 455 (1914).

to prepare and present the client's case with reasonable care, skill and diligence. The courts of that country have recognised that an attorney is not liable for an error of judgment made in the conduct of litigation where he or she has acted in good faith and with an honest belief that the action taken is in the best interests of the client[155].

139 In Canada too, there is no general immunity for a legal practitioner. The attempt to import into Canada the rule in *Rondel v Worsley*[156] was rejected in *Demarco v Ungaro*[157]. Instead of cloaking legal practitioners in that country with a general immunity, the courts have preferred to fashion rules which recognise the special problems that legal practitioners often face in conducting legal proceedings and giving legal advice[158]. Cases exist in Canada where legal practitioners have been held liable for negligent mistakes that have occurred in the preparation and even the presentation of a case for trial[159]. The rule applied in Canada is that stated by Matheson J in *Garrant v Moskal*[160]:

> "[T]he public interest in the administration of justice does not require that lawyers engaged in court work be immune from action at the suit of their clients for negligence in the conduct of a civil case in court. With respect to the duty of counsel to the court and the risk that, in the absence of immunity, counsel will be tempted to prefer the interests of the client and thereby prolong trials … there is no empirical evidence that it is so serious to justify rendering the client remediless."

140 It is true that the organisation of the legal profession in the United States and Canada is different from that in England, Ireland and New South Wales at the times relevant to the present proceedings. However, the experience in North America, appears to contradict the fears mounted by the defenders of immunity of a flood of bogus and worthless claims against legal practitioners. In any case, there are remedies against unmeritorious claims. The experience in Canada and the United

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155 *McCullough v Sullivan* 132 A 102 (1926); *Hodges v Carter* 80 SE 2d 144 (1954).

156 *Rondel v Worsley* [1969] 1 AC 191.

157 (1979) 95 DLR (3d) 385 followed in *Hunter v Roe* [1990] 6 WWR 85; *Guardian Insurance Co v McCullogh* (1988) 87 NBR (2d) 210.

158 *Winrob v Street* (1959) 19 DLR (2d) 172; *Karpenko v Paroian, Courey, Cohen & Houston* (1980) 117 DLR (3d) 383 at 397; *Garrant v Moskal* [1985] 2 WWR 80 at 82 (Affd [1985] 6 WWR 31); Linden, *Canadian Tort Law*, 6th ed (1997) at 151.

159 For example in *World Wide Treasure Adventures Inc v Trivia Games Inc* (1987) 16 BCLR (2d) 135; *Location Panorama Inc v Gaucher* [1991] RJQ 1237.

160 [1985] 2 WWR 80 at 82 citing *Demarco v Ungaro* (1979) 95 DLR (3d) 385.

States also demonstrates that the doctrinal limitations inherent in the tort of negligence (or negligent breach of the contract of retainer where applicable) are usually sufficient to safeguard the legal practitioner from the prospect of a flood of claims relitigating matters in courts of coordinate jurisdiction. In Australia, there are further inhibitions which are not always available in the United States, including costs orders[161]. The solution to the problem of unmerited claims "does not involve bolting the door against meritorious plaintiffs"[162]. Certainly, it does not involve extending the immunity beyond that which clear legal authority, founded on persuasive legal policy, fully justifies[163].

141 Sixthly, whilst in contemporary Australian circumstances it seems appropriate to assimilate the solicitor-advocate with the position of a barrister so far as the protection of any immunity from suit is concerned, the solicitors in these proceedings could not invoke such protection[164]. At no stage did they act as advocates. The proper analysis of the duty of care owed by a solicitor, other than in respect of in-court advocacy, is to be found not in any immunity secured by analogy, inference or suggested necessity from the immunity enjoyed by a barrister-advocate retained by the solicitor. It rests instead upon general principles governing the liability of a solicitor, operating in a divided legal profession, where he or she has retained a barrister to provide advice and, if it proves necessary, for the barrister to conduct any proceedings in court that may ensue. In such a case the solicitor will, in general, be entitled to act in accordance with instructions given by the client on the basis of the barrister's advice, so long as the solicitor has taken care to retain a barrister of competence with the skill necessary to advise and represent the client in the field of legal practice in question and has properly and

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161 These may extend in exceptional circumstances, to costs against the advocate personally: *McDonald v FAI (NZ) General Insurance Co Ltd* [1999] 1 NZLR 583.

162 Heerey, "Looking Over the Advocate's Shoulder: An Australian View of *Rondel v Worsley*" (1968) 42 *Australian Law Journal* 3 at 8.

163 In the 27 months between May 1985 when Marks J in the Supreme Court of Victoria held that the barristers in *Giannarelli* were liable in negligence and before the reversal of that decision by the Full Court of the Supreme Court of Victoria in August 1987, there was no evidence either of an increase of the number of claims for negligence against barristers nor of the duration of criminal trials conducted by barristers. See Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Report No 48, (1992) at 35.

164 cf *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 at 96.

competently instructed the barrister to the best of the solicitor's care, skill and ability[165].

142 Ordinarily in a divided legal profession it is responsible conduct for a solicitor (particularly if he or she has no disclosed specialist experience in a field of legal practice) to rely upon a competent barrister's advice. Doing so makes proper use of the specialised Bar. However, the solicitor must not accept the barrister's advice blindly. He or she retains a legal duty to the client, separate, independent and personal, both by reason of the general law of negligence and the contract of retainer. The solicitor must exercise independent judgment to the extent that it is reasonable to demand this having regard to the solicitor's reputed knowledge and experience, the complexity of the case and the skill and experience of the barrister who has been retained. If the solicitor reasonably considers that the barrister's advice is obviously wrong, it is the solicitor's duty to reject that advice and to advise the client independently, including as to the wisdom of retaining a fresh barrister[166]. In a divided profession, the immunity enjoyed by an advocate does not automatically extend to a non-advocate solicitor[167]. The answer which such a solicitor, who has retained a barrister may give to a client's later allegation of negligence is not that the solicitor is immune from suit. It is that, although liable to suit, the solicitor is not negligent because reliance on the advice of the barrister was proper and reasonable in the circumstances and no occasion arose for that advice to be rejected.

The narrow holding in *Giannarelli*

143 From these considerations of principle and policy I return to what this Court actually held in *Giannarelli*[168]. Did its holding in that case apply (subject to the separate issue presented by the statutory claims) to knock out the claim by Yates against the solicitors and barrister in these proceedings?

144 As Priestley JA remarked in *Keefe v Marks*[169], finding the ratio decidendi in a case where every member of this Court wrote separately (and three dissented from the orders of the Court) involves "to mutilate Kipling … nine and sixty ways of construing judges' lays, and every single one of them is wrong". However, there are certain basic rules. Tedious although the ascertainment of the binding principle of a case may sometimes be, it remains a duty not only of courts subject to this

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165 *Locke v Camberwell Health Authority* [1991] 2 Med LR 249 at 254.

166 *Ridehalgh v Horsefield* [1994] Ch 205 at 237.

167 *Acton v Graham Pearce & Co (a firm)* [1997] 3 All ER 909 at 924.

168 (1988) 165 CLR 543.

169 (1989) 16 NSWLR 713 at 724.

Court's authority[170] but also of the members of this Court and especially when they are invited (as we have been) to reopen past authority and to reconsider a previous holding.

145 *Giannarelli* involved the alleged failure of four legal practitioners in Victoria to notice and raise in defence of their clients (the Giannarellis) certain provisions of the *Royal Commissions Act* 1902 (Cth)[171] which rendered evidence given by the clients to a Royal Commission inadmissible in criminal proceedings later brought against them. The clients were charged and convicted of perjury in evidence given before the Royal Commission. They were sentenced to custodial punishment. One of them did not appeal. The others appealed unsuccessfully to the Court of Criminal Appeal of Victoria. Only when the special leave hearing reached this Court was the provision of the *Royal Commissions Act* raised for the first time. One of the four legal practitioners was the appellants' instructing solicitor. The others were their barristers. The negligence proceedings against the instructing solicitor were ultimately withdrawn. Although he remained a nominal party (appellant) his separate situation was not before this Court for its determination[172]. No holding of the Court in *Giannarelli*, therefore, purported to concern the liability in law of a non-advocate instructing solicitor. On the contrary, because of the invocation of the *Legal Profession Practice Act* 1958 (Vic), s 10(2), the sole question for the holding of the Court related to the liability of legal practitioners in Victoria who practised exclusively as a barrister. Accordingly, nothing in *Giannarelli* binds this Court or any other Australian court to a rule governing the immunity of solicitors. At most, there are remarks, not binding as a matter of legal authority, concerning the status of solicitor-advocates[173].

146 The claims of the clients in *Giannarelli* expressed the negligence alleged against the barristers in terms of their failure to advise that the *Royal Commissions Act* would render the evidence given by the clients to the Royal Commission inadmissible (and thus defeat the Crown case) as well as their failure to object to the tender of that evidence in the criminal trials. However, only the latter failure was critical. This was because the effect of the Act was confined to rendering the evidence inadmissible in (criminal) proceedings. It thus addressed, at least ultimately, what the barristers did in the conduct of the proceedings in court. They might have failed to notice the defence earlier when representations to the Crown or other pre-trial steps could have been taken. But the critical omission on their part, and the one causing the real damage to the clients, arose during the actual

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170 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403, 417-418.

171 Section 6DD.

172 *Giannarelli* (1988) 165 CLR 543 at 554.

173 *Giannarelli* (1988) 165 CLR 543 at 559, 569; cf *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 227-229 per Lord Salmon.

conduct of the criminal proceedings in court when the point about the admissibility of the Royal Commission evidence was overlooked, or certainly not taken[174].

147 *Giannarelli* was also a case which turned, in part, on the construction of the Victorian Act referred to. It was upon that construction that this Court divided. Four members of this Court supported the majority view[175]. Three dissented[176]. In deriving the binding rule established by *Giannarelli*, it is necessary to disregard the opinions of the dissentients. However, it cannot escape attention that two of their Honours[177] rested their opinions not on any general rule as to a barristers' immunity but on the peculiar provisions of the Victorian Act. *Giannarelli* is thus a decision of a divided Court. This affords yet another reason for confining the binding rule which the decision establishes to the circumstances with which the Court was there necessarily dealing.

148 *Giannarelli* concerned criminal proceedings. More stringent safeguards are adopted in criminal cases to prevent a miscarriage of justice. The highly developed rules and practices established to consider a suggestion of wrongful conviction may make it more appropriate to recognise further restrictions on the availability of proceedings against a practitioner in respect of the conduct of criminal rather than civil proceedings[178]. However that may be, the foregoing analysis makes plain that *Giannarelli* was concerned with the immunity of barristers, practising at a separate Bar, in respect of their failure to take an objection in court based upon a statute which rendered particular evidence inadmissible in the proceedings before that court. In my view, the observations of the majority in *Giannarelli* concerning the scope of the immunity of legal practitioners in Australia are, as a matter of binding legal precedent, confined to such a case.

149 I am strengthened in this conclusion by a reflection on the considerations mentioned in the dissenting opinion of Deane J in that matter[179]. His Honour was not convinced that a legal practitioner was immune in every case from liability even for in court negligence "however gross and callous in its nature or devastating

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174 An analogous point was made by Meagher JA in *Keefe v Marks* (1989) 16 NSWLR 713 at 728.

175 Mason CJ, Wilson, Brennan, and Dawson JJ.

176 Deane, Toohey and Gaudron JJ.

177 Toohey J (Gaudron J agreeing).

178 Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Report No 48, (1992) at 30 par 64; cf *Carmel v Lunney* 511 NE 2d 1126 (1987).

179 *Giannarelli* (1988) 165 CLR 543 at 587-588.

in its consequences"[180]. My opinion is also reinforced by the expressed views controlling the growth of the ambit of the legal immunity stated by Lord Reid in *Rondel v Worsley*[181] and by Lord Diplock[182] and Lord Salmon[183] in *Saif Ali v Sydney Mitchell & Co*. Lord Diplock, noting the expansion of the law of negligence and its rigorous application to so many other professional persons, observed (in words which I would echo) that it is[184]:

> "hard to justify founding the decision of the instant appeal upon an uncritical acceptance of the highest common factor in the observations of the majority … in *Rondel v Worsley*[185] as defining the work done by a barrister *outside the courtroom door* in respect of which he is immune from liability for negligence". (Emphasis added)

150 Accordingly, both as a matter of the legal authority for which in this country *Giannarelli* stands, and as a matter of legal principle and policy, I would confine the scope of the legal immunity from suit to immunity for a legal practitioner advocate in respect of in-court conduct during proceedings before a court or like tribunal. The "intimate connection" test propounded by the advocates of an expansive immunity is impermissibly vague. As *Keefe v Marks*[186] shows, it extends immunity to situations where it is clearly as unjust as it is unjustifiable[187].

151 Upon that basis, the claim by the solicitors in their appeal to this Court for the protection of that immunity wholly fails. Similarly, the negligence claim by Yates as eventually pressed against the barrister does not rest upon any decision which the barrister made in court during the actual conduct of the trial before Cripps J. Accordingly, the claim of all of the appellants to immunity from suit, simply because of their status as legal professionals answering a claim against them by a client, must be rejected. The suggestion that this might provide a ready answer, obviating the necessity of examining the many remaining issues in these appeals, is not borne out. I therefore turn to the remaining issues. However, I can

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180 (1988) 165 CLR 543 at 588.

181 [1969] 1 AC 191 at 231.

182 [1980] AC 198 at 219-220.

183 [1980] AC 198 at 231.

184 [1980] AC 198 at 219.

185 [1969] 1 AC 191.

186 (1989) 16 NSWLR 713.

187 cf *Arthur J S Hall & Co (A Firm) v Simons* [1999] 3 WLR 873 at 901, 904.

deal with them quite briefly. Upon them, I am in substantial agreement with the reasons of Gleeson CJ.

The legal practitioners were not negligent

152 It will be observed that I participated in the majority decision of the Court of Appeal of New South Wales in 1991 whereby it upheld the first appeal by Yates against the initial decision of Cripps J awarding compensation to Yates for "the value of the land" acquired by the Darling Harbour Authority. In those proceedings, Mr Simos QC (no longer a party to these proceedings) appeared successfully for Yates. The barrister was Yates' junior counsel. The solicitors, then retained by Yates, instructed those barristers. Notwithstanding my earlier involvement, no party to these appeals, when asked, raised any objection to my participation in these proceedings although issues 1 and 2 (above) necessarily overlap, to some extent, with the issues decided by the Court of Appeal.

153 Judges who in later cases are asked to reconsider an opinion which they earlier expressed sometimes take the opportunity to clarify what they said or (in the case of an appellate court) what others have taken to be the implications of an opinion with which they are recorded as having agreed[188]. However, there are two complications which impose on me limitations in respect of any reinterpretation of what I said in the Court of Appeal. The first is that this is not a case where I am revisiting earlier remarks in circumstances completely divorced from those in which those remarks were offered. In such a case, a judge is free to revise an earlier opinion in the light of fresh persuasion, subsequent legal developments or a belated recognition of the error of earlier views. Here, the actual parties to the litigation may be different. But there is a coincidence in some of the *dramatis personae.* And to a degree, there is an overlap in some of the legal controversies.

154 Moreover, I am now participating as a member of this Court in an appeal from the Full Court of the Federal Court. Clearly, it would be undesirable in discharging my present functions that I should, in effect, review the correctness of an opinion earlier expressed by me in a different judicial capacity or re-express that opinion in a way inconsistent with the record of the earlier determination. There were times when judges and barristers of our legal tradition participated in

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188 Thus Olsson J did in *R v Bednikov* (1997) 193 LSJS 254 at 284. See *Inge v The Queen* (1999) 166 ALR 312 at 321; cf *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 11 CLR 311 where Higgins J participated in a challenge, on constitutional grounds, to an award he had earlier made in the Commonwealth Court of Conciliation and Arbitration. His Honour concurred in upholding the challenge. See also *Collins v The Queen* (1975) 133 CLR 120 at 124 per McTiernan J in relation to earlier participation in the making of a rule of court in question in the proceedings.

reconsideration of their earlier opinions[189]. However, such times have passed. Consent by the parties could not now cure such an embarrassment.

155 These considerations make it important, at least so far as I am concerned, that this Court should deal, and deal only, with the issues necessary to its decision. This is not, and should not be permitted to become, an appeal *de facto* from the decision of the New South Wales Court of Appeal of 1991. There being no special statutory or other entitlement to bring a belated appeal against the 1991 orders of the Court of Appeal, we should not permit by a "side wind"[190] the appeal from the Full Federal Court to be turned into an effective revival of the earlier abandoned attempt to appeal from the Court of Appeal or, by-passing that Court, an appeal from the second decision of Cripps J.

156 The decision of the Court of Appeal in 1991 plays a part in the history of the proceedings which bring the present (different) parties to this Court. For the reasons that I have stated earlier, this is not the occasion, nor are these the parties, to agitate the kind of review of the law on "special value" that might have been appropriate had this Court heard an appeal from the 1991 decision or even from Cripps J's second ruling. Therefore, confining myself strictly to the reasons which were given by the Court of Appeal in its 1991 decision as part of the historical facts, it is sufficient to note a number of points.

157 All members of the Court of Appeal addressed the issue of Yates' entitlement to compensation on the basis of the "special value" of the land, the subject of the compulsory acquisition[191]. None of the judges suggested that the Darling Harbour Authority should have succeeded on the basis that Cripps J's findings of fact "were not capable of sustaining a finding of special value"[192]. No member of the Court, except Handley JA, made reference to the concept of "head start", as a factor relevant to the calculation of "special value"[193]. The essential complaint of Yates before the Court of Appeal was that "the trial judge having found that the land had special value to the appellant only awarded compensation for its market value …

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189 *Thellusson v Rendlesham* (1859) 7 HLC 429 at 430 [11 ER 172 at 173].

190 An expression used by Brennan J in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 224; cf *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 37; *Yates Property Corporations Pty Ltd v Boland* (1997) 145 ALR 169 at 215.

191 *Yates Property Corporation Pty Ltd v Darling Harbour Authority* (1991) 24 NSWLR 156 at 161 per Kirby P, 163 per Mahoney JA, 183-190 per Handley JA.

192 (1991) 24 NSWLR 156 at 185 per Handley JA.

193 *Yates Property Corporation Pty Ltd v Darling Harbour Authority* (1991) 24 NSWLR 156 at 188 per Handley JA.

[or] should have separately assessed compensation for loss of special value and had failed to give adequate reasons"[194].

158 It was common ground for all of the judges in the Court of Appeal, that Cripps J had erred in stating that "[n]o claim is made by Yates for abortive expenditure"[195]. All judges agreed that this slip required correction. However, the point of difference between the majority and the minority in the Court of Appeal turned on whether Cripps J had failed to give adequate reasons for his holding and whether this amounted to legal error authorising appellate intervention. This is certainly the way Mahoney JA understood the majority reasons[196]. It is consistent with the way those reasons are expressed by the majority[197]. This was what required the recalculation of the allowance for "special value" because of the doubts left by the reasons stated by Cripps J. It was the element of common ground in the opinions of the majority in the Court of Appeal. There was neither express nor implied concurrence in my reasons for the concept of "head start" appearing in Handley JA's reasons, assuming that concept to have been intended to be a new, different or specific component of "special value", something that I regard as far from obvious. It seems likely that Mahoney JA did not read it thus. Had his Honour done so, it might have been expected that he would have made explicit reference to the concept of "head start", which he did not. He confined his analysis, relevantly, to the concept of "special value", as did I.

159 When the matter was returned to Cripps J, it is clear enough that his Honour understood the holding of the Court of Appeal as one that he had failed to give adequate reasons (and sufficient differentiation) for whatever allowance he had initially made for "special value" of the subject land to Yates. With proper candour, in his reasons of 1 April 1992, Cripps J accepted that he had erred in this regard[198]. Accordingly, in that decision, elaborating his reasons of 19 March 1992 cited by Callinan J[199], he set out to express clearly the allowance which he made for "special value".

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194 (1992) 24 NSWLR 156 at 185 per Handley JA.

195 *Yates Property Corporation Pty Ltd v Darling Harbour Authority* (1990) 70 LGRA 187 at 196 per Cripps J.

196 (1991) 24 NSWLR 156 at 164.

197 (1991) 24 NSWLR 156 at 161-162 per Kirby P, 189 per Handley JA.

198 *Yates Property Corporation Pty Ltd v Darling Harbour Authority* unreported, Land and Environment Court of New South Wales, 1 April 1992 per Cripps J.

199 Per Callinan J at [233].

160 Before Handley JA's reasons in the 1991 decision, the phrase "head start" had not appeared as such in this realm of discourse in any judicial decision, legal text or valuation handbook to which Yates could point. In so far as it amounted to nothing more than the type of consideration taken into account in earlier authorities on "special value"[200] both at the trial, in the reasons of Cripps J and in the decision of the Court of Appeal, these matters were fully ventilated. They were not overlooked. Clearly, they were included in the advice given to Yates by the solicitors and the barrister, in the evidence of the expert valuers retained for Yates and in the case presented and submissions advanced in the Land and Environment Court.

161 In so far as Yates' claim was that the appellants had failed to call evidence and advance argument in support of the "head start" case, I agree with the reasons of Gleeson CJ for his conclusion that the primary judge was correct in rejecting the contention that the solicitors and the barrister were negligent in that regard. I also agree that a number of factual errors appear to have influenced the findings of the Full Federal Court. They misled that court into believing that it was authorised to reverse the conclusions of the primary judge.

162 All argument and evidence reasonably necessary to decide the "special value" issue, was properly and competently placed by the appellants before Cripps J. Far from being a glaringly obvious and separate head of "special value", the so-called "head start" which Yates claimed was fully encompassed within the claim for "special value" as proved. The negligence issue was therefore properly decided by the primary judge in favour of the appellants. There was no adequate basis to disturb her Honour's conclusions. It is unnecessary, therefore, to address separately either issues 4 or 5 (above). Nor is it necessary to consider issue 9 (statutory claims). Issue 10 reinforces the conclusion on issue 4 (negligence). It helps to explain how the Full Court reached its erroneous conclusion.

163 The result of this analysis is that, whilst not entitled to succeed on the claims for immunity which they severally advanced, the appellants are entitled to succeed on their contentions that the Full Court erred in disturbing the conclusions of the primary judge that no negligence was established against them. On that footing, the judgments entered in their favour by the primary judge should be restored.

Orders

164 I therefore agree in the orders proposed by Gleeson CJ.

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200 Such as *Ward v Housing Commission of New South Wales* (1951) 19 LGR (NSW) 77; *Kennedy Street Pty Ltd v The Minister* [1962] NSWR 1252; *Baringa Enterprises Pty Ltd v Manly Municipal Council* (1965) 15 LGRA 201 at 202; *Housing Commission of New South Wales v Falconer* [1981] 1 NSWLR 547.

165 HAYNE J. In August 1981, Yates Property Corporation Pty Limited ("YPC") agreed to buy land at Darling Harbour, Sydney, for $5.1 million. It settled that purchase on 30 December 1983. Six months later, YPC was told that it was likely that the land would be resumed and on 7 May 1985 the land was compulsorily acquired by the Darling Harbour Authority.

166 By order of the Land and Environment Court of New South Wales made on 1 May 1990, YPC was awarded $22,334,500 compensation[201]. YPC appealed against that award and on the case being remitted to the Land and Environment Court, the award was varied, on 1 April 1992, by increasing it by $217,443.78. YPC again appealed – against the varied award. This second appeal was compromised and it was agreed in November 1992 that a still further sum of $1,250,000 would be allowed as compensation.

167 YPC contends that it received too little compensation because the land was worth more to it than the sum of nearly $24 million it was paid as compensation. It says that it was deprived of the chance of obtaining proper compensation because of the negligence of its solicitors and of counsel retained by those solicitors. In 1993 it brought an action in the Federal Court against the solicitors and counsel. This action was dismissed by Branson J[202]. The Full Court of the Federal Court allowed appeals by YPC[203].

168 The present appeals are the sixth occasion that aspects of the claim for compensation by YPC have come before the courts. They are appeals brought by the solicitors and by junior counsel against the orders of the Full Court of the Federal Court. Each appeal should be allowed.

169 YPC sought, and the Land and Environment Court allowed as compensation, the amount which that Court determined was the amount of money "someone in [YPC's] position would have been prepared to have paid [for the land] sooner than lose it"[204]. YPC alleged in its actions in the Federal Court that its case in the Land and Environment Court was not put to its best advantage because evidence was not led (and arguments were not advanced) to show that, because YPC was able to start redeveloping the land in the way it proposed sooner than anyone else, the land was therefore worth more to it than it was to others.

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201 *Yates Property Corporation Pty Ltd v Darling Harbour Authority* (1990) 70 LGRA 187.

202 *Yates v Boland* (1997) 145 ALR 169.

203 *Yates Property Corporation v Boland* (1998) 85 FCR 84.

204 (1990) 70 LGRA 187 at 210.

170 Valuers called on behalf of YPC in the Land and Environment Court gave evidence of their opinions of the value of the land to YPC. One valuer, whom Branson J found to have been regarded as the principal valuer for YPC in the proceedings in the Land and Environment Court, based his opinion of the market value of the land on the hypothesis that a purchaser would begin to derive income from the redeveloped land six months after the notional sale of the land to it. The case that YPC contended in the Federal Court should have been put on its behalf was based on a different assumption: that a purchaser would have taken 20 months to develop the land before it started to derive income whereas Yates could have redeveloped the land in six months. But the case that was in fact presented in the Land and Environment Court was no less favourable to YPC in this regard than the case it now says should have been put. Moreover the case which YPC contended should have been put was found by Branson J to be factually flawed. It assumed that YPC had been ready to begin redevelopment immediately and that the markets would therefore have started producing income for YPC in six months' time. Branson J found as a fact that YPC had not been ready and able to start redeveloping the land immediately.

171 The factual premises for the allegations of negligence by counsel and solicitors were that YPC could have developed the land sooner than anyone else and that such a case was not advanced in the Land and Environment Court. Those premises were not established on the trial of the present proceedings in the Federal Court. The special capacity which YPC alleged it had to develop the land quickly was put before the Land and Environment Court by YPC's legal advisers and it was central to the valuation evidence which was tendered on behalf of YPC in that Court. No one could have developed the land sooner than that valuation evidence assumed. These are reasons enough to conclude that the appeal to the Full Court of the Federal Court should have been dismissed.

172 In addition, however, as Branson J found, the views which were held by senior and junior counsel who presented the case on behalf of YPC in the Land and Environment Court, and which underpinned the way in which they did so, "were views which it was reasonably open to barristers of their respective seniorities experienced in valuation law to hold"[205]. The Full Court held, in effect, that a legal principle, not previously mentioned in decided cases or reputable writings in the area, was so obvious that it was negligent of junior counsel and solicitors not to advance a case founded on this principle. This was the so-called "head start" element of value – that the property was more valuable to YPC than others because it had a head start over any other purchaser of the land. This was said to be, or to be an element of, the "special value" of the land to YPC.

173 It is neither necessary nor desirable to explore all of the decided cases relating to "special value" or to examine any tension between "special value" and "market

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205 (1997) 145 ALR 169 at 198.

value" (as that concept is described in *Spencer v The Commonwealth*[206]). For present purposes I am prepared to accept that the "value" that was to be assessed by the Land and Environment Court was the value of the land to YPC in the sense described by the Privy Council in *Pastoral Finance Association Ltd v The Minister*[207] – as "that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it". This view of valuation finds reflection in several decisions of this Court, albeit in contexts that in some cases may not be uninfluenced by the effect of s 51(xxxi) of the Constitution and the concept of "just terms"[208].

174 It is always necessary to bear well in mind three things: that the inquiry which was to be undertaken in the Land and Environment Court was one of valuation not calculation; that the inquiry was one of valuation not assessment of damages; and that it was an inquiry about which reasonable minds may well differ widely. Further, although it may often be convenient to apply labels or tags to describe particular processes of reasoning or kinds of evidence that bear upon the general question of valuation of a piece of land, it is usually unwise to elevate those labels to statements of principle. Doing so gives undue emphasis to the decisions in particular cases that are decisions owing more to the peculiar facts of the case than any general proposition of principle. Especially may this be so with cases such as *Kennedy Street Pty Ltd v The Minister*[209] and *Baringa Enterprises Pty Ltd v Manly Municipal Council*[210] about which so much has been said in the argument of this matter.

175 The "head start" which was said to give special value to YPC was a capacity to take advantage of approvals obtained by YPC and preliminary work which it had done for redeveloping the land as markets. All of the evidence advanced on behalf of YPC in the Land and Environment Court was directed to establishing a value for the land that assumed it would be redeveloped in this way and that, but for the resumption, YPC would have reaped the rewards of the redevelopment as soon as it could. To put a label on this contention – whether "head start" or "special

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206 (1907) 5 CLR 418.

207 [1914] AC 1083 at 1088.

208 *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358; *The Moreton Club v The Commonwealth* (1948) 77 CLR 253; *The Commonwealth v Reeve* (1949) 78 CLR 410; *The Commonwealth of Australia v Arklay* (1952) 87 CLR 159; *Turner v Minister of Public Instruction* (1956) 95 CLR 245; *G & R Wills & Co Ltd v Adelaide Corporation* (1962) 108 CLR 1.

209 [1963] NSWR 1252.

210 (1965) 15 LGRA 201.

value" – does not alter the fact that the contention *was* put. Nor does it reveal some principle of law which should have informed how counsel and solicitors presented the case. The contention was one of fact, not law. The relevant principle for which YPC has always contended (and which has been accepted at every stage of the litigation to determine the compensation to be allowed and the subsequent litigation which culminates in the present appeal) is that compensation should be assessed as the amount which YPC would have paid for the land sooner than lose it. The case called for the application of no other principle of the kind which was said to be described by the label "head start".

176 In these circumstances I need not consider the issues raised about the immunity principle established by the decision of this Court in *Giannarelli v Wraith*[211]. In particular, I need not consider the decision of the Court of Appeal of New South Wales in *Keefe v Marks*[212].

177 The appeals should be allowed and orders made as proposed by Gleeson CJ.

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211 (1988) 165 CLR 543.

212 (1989) 16 NSWLR 713.

178 CALLINAN J. These appeals from the Full Court of the Federal Court raise two questions: whether a firm of solicitors and counsel whom they instructed were guilty of negligence in the preparation and conduct of a claim for compensation in respect of a city property in Sydney that was resumed by a statutory authority; and, whether, if they were, they were entitled nonetheless to an immunity from liability to the dispossessed landowner that they represented. In order to dispose of these appeals it is necessary to review a long chain of events stretching back to August 1981 and to examine the reasons for judgment of two appellate courts, and two judges sitting at first instance on a total of three occasions. It is not without irony that the charge in negligence against the lawyers is in substance that they failed to present part of their client's case on an alternative basis, the foundation for which is, as will appear, not only unsound but also a matter upon which the various Justices who have to this point considered it, have themselves been far from unanimous.

Facts and earlier proceedings

179 One of the respondents, Yates Property Corporation Pty Ltd ("Yates"), bought two parcels of land at Darling Harbour in August 1981 for $5.1 million. The combined area of the parcels was 1.542 hectares. Yates wished to develop the land for use as a market. There was, already, nearby, another market, Paddy's Market, which the Full Federal Court held was likely to be relocated but which, in fact, as Cripps J explained in his reasons for judgment, would have been likely to continue trading and to offer competition for some time to any market that might have been established by Yates[213]. Yates was prepared, if necessary, to trade in competition with Paddy's Market although there were some grounds for hoping that the latter might in due course be removed from the Darling Harbour area.

180 Yates set out to obtain expressions of interest from potential stall holders in any market which it might develop. Some 40 or so prospective licensees made commitments to Yates by paying about $100,000 in total for licence fees for two months in advance. Those 40 stall holders represented only a small number of the stall holders who would need to make a binding commitment to ensure the viability of Yates' project. However some hundreds of other potential stall operators expressed interest in the market without making any commitments to take a licence of space in it.

181 On 3 June 1983 Yates applied for development approval for the purpose of providing retail markets in a steel-framed single storey building of 12,500 square metres to be erected on the land. The building was described in evidence before Branson J by a quantity surveyor, Mr Meredith, as a large shed with a number of

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213 *Yates Property Corporation Pty Ltd v Darling Harbour Authority* (1990) 70 LGRA 187 at 197, 202.

services in it. A further application for car parking and storage space was approved on 13 April 1984. Within two months, on 4 June 1984, Yates was notified by the Director of Public Works in New South Wales of the likelihood of the resumption of the land. There was no doubt that Yates was determined to do whatever it could to prevent the resumption. On 8 June 1984 the appellant solicitors who had been engaged to act for Yates delivered a brief to Mr Hemmings of Queen's Counsel to advise what steps might be available to Yates to defeat the proposed resumption. By this time the *Darling Harbour Authority Act* 1984 (NSW) had been passed[214]. The objects of the Authority which was created by that Act were to promote, encourage, facilitate, carry out and control development of land within a designated development area of which Yates' land formed part. Section 12 of that Act empowered the Authority to resume land for the purposes of the Act and made provision for the payment of compensation to be determined under the *Public Works Act* 1912 (NSW). Section 124 of that Act provided as follows:

> "For the purpose of ascertaining the purchase money or compensation to be paid, regard shall in every case be had not only to the value of the land to be purchased or taken, but also to the damage (if any) caused by the severing of the lands taken from other lands of the owner, or by the exercise of any statutory powers by the Constructing Authority otherwise injuriously affecting such other lands; and the same shall be assessed according to what is found to have been the value of such lands, estate or interest at the time notice was given, or notification published, as the case may be, and without the amount of the valuation notified to such claimant being binding in any way in relation to the assessment, and without reference to any alteration in such value arising from the establishment of railway or other public works upon or for which such land was resumed …"

182 Mr Hemmings conferred with the solicitors and Mr Yates, a principal of the company and offered a rather gloomy prognosis of any possibility of defeating the resumption. He also pointed out that in the event that the land were not resumed regulations governing its use might be so restrictive that Yates would be better off if it were resumed and compensation assessed on the basis of the uses by then notified as permissible by the Sydney City Council.

183 The consent which was granted by the Council was not an unqualified one. It was granted subject to a number of conditions.

184 On 20 July 1984 Yates obtained a building approval. Again conditions were imposed. Relevantly they were as follows:

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214 Commenced 28 September 1984.

"Compliance with the conditions of the approval granted by Council on 9th December, 1983 and 13th April 1984 ...

The hours and days during which building work may be carried out shall be restricted to between 7.30am and 5.00pm Mondays to Fridays and 7.30am and 3.00pm Saturdays with no work being carried out on Sundays.

…

The rights of the adjoining owners shall be maintained.

…

The proposed work shall be constructed in Type 1 construction in accordance with the requirements of Clause 16.7 of Ordinance No 70.

...

A total of 54 car spaces shall be provided on site in respect of the proposed retail stall market use."

185 To bring itself to this point Yates had made careful and thorough investigations of markets in other places and of the feasibility of a market on the subject land and its likely cost and returns. It had consulted and paid several experts who had prepared applications and plans and had performed other tasks preliminary to the construction of the building to house the stalls. The site had also been cleared. All of the work that was done was specific to the site.

186 After the building approval was obtained further advice was sought from Mr Hemmings QC which was given in conference on 19 September 1984. The solicitors made notes of the advice which concentrated largely upon ways in which compensation might be claimed and assessed. One possible basis for claiming compensation to which Mr Hemmings QC referred was by reference to the valuation of an income stream which the property when developed might generate. He provided a simple, theoretical example of a valuation of a business based upon its history of an annual, fairly stable income stream.

187 Mr Hemmings QC discussed the respective abilities of valuers who might be engaged to value the property and to give evidence on behalf of Yates if the matter went to court. Mr Hemmings QC suggested three men. He expressed some reservations about one of them because he thought that he might be too busy to give the matter the attention that it deserved but spoke well of the other two. He also expressed the opinion that "having two valuers would impress [the Valuer-General]". There is nothing in the note of this conference to suggest that the approaches ultimately adopted by the three valuers who were in fact engaged to, and did give evidence in the proceedings in the Land and Environment

Court were not competent valuers. Mr Hemmings QC did say however that a compensation court might be loath to act upon a valuation made upon the basis that a notional development undertaken on the land would have produced a certain annual income which, when capitalised, might be taken as a measure of the value of the property after allowance for construction, like costs and outgoings. The note records: "[The] variables in costs, time, etc, come into play which makes [the valuation] difficult to really determine, therefore Court decides on how much [an] owner [will] accept for selling potential, ie, no risk."

188 I interpolate here that most, it not all of the conferences were attended by Mr Yates whose evidence discloses that he was a sophisticated, energetic investor and property developer who kept himself closely involved in and informed on all matters relating to the claim for compensation, even after the respondent went into liquidation. Indeed, Mr Yates, and not the solicitors, actually engaged two of the valuers, Mr Parkinson in the first place and subsequently Mr Webster on Mr Parkinson's recommendation. The liquidator of Yates retained Mr Egan in July 1988 and in October 1989 the solicitors confirmed Mr Woodley's engagement on the instructions of the liquidator.

189 Just as Yates looked to a number of valuers for advice it did not confine itself to one barrister. Mr Tobias QC was briefed on 3 October 1984. He was asked some 14 questions many of which involved the canvassing of matters which had been the subject of advice by Mr Hemmings QC.

190 Before Mr Tobias QC provided answers to the 14 questions asked of him another meeting took place between the valuers and Mr Yates in Mr Hemmings' chambers on 8 October 1984. The notes reveal a concern, as did the questions asked of Mr Tobias QC, about the way in which property sales in the vicinity of the subject land might influence the value attributable to the land. This was a valid matter of concern for reasons which I will later discuss. One further, understandable matter of concern was the uncertainty of the position in which Yates found itself and consequential and other difficulties that it was experiencing in dealing with its financiers. The possibility of a claim for damages against the resuming authority, as well as for compensation was discussed and dismissed by Mr Hemmings QC. Mr Hemmings QC was directly asked which was the better position to argue on property valuation: "(a) income capitalised. (b) head lease or management's situation capitalised." Mr Hemmings QC is recorded as responding in this way:

> "Income capitalised is always regarded with suspicion. A great many assumptions – really depends on the operator – personalities come into it. I have always tried to shy away from it because they are so easy to criticise."

In this passage Mr Hemmings QC is giving Yates and the valuers the benefit of his experience. He cannot fairly be taken to be saying that a method of valuation that relies on capitalisation of income is an impermissible method of making a

valuation, or one which might not in some circumstances be the preferred method of valuation. At the time when he was expressing his opinions he was not making comparisons between different methods of making valuations based upon actual figures, and there was not before him any detailed information with respect to what might otherwise be achieved by reliance upon, for example, comparable sales. In response to a question from one of the valuers who attended this conference, Mr Parkinson, whether Yates would be entitled to compensation for its time and preparation "in putting the deal together and developing a concept" Mr Hemmings said: "You cannot have it both ways. If the land has value because of the development approval, you may not add on top of that what you spent reaching that position." Mr Parkinson later in the conference reiterated his suggestion that compensation might be payable in relation to these matters but Mr Hemmings again said that he thought it unlikely that any compensation would be payable in relation to them.

191 Mr Tobias QC provided his advice during a conference which was held on 7 November 1984. Notes taken by the appellant solicitors of this conference are available. It was attended by Mr Yates and yet another valuer, Mr Meredith, who was not called as a witness in the compensation case. Discussion about the use of comparable sales for the purpose of valuing the land took place. In substance, Mr Tobias QC advised, as had Mr Hemmings QC, of the effect of the application of the Pointe Gourde principle[215]. At one stage Mr Tobias QC said that the respondent would be entitled to any special value it could prove, confined, he thought, to any costs incurred in "getting your plans through the Council – Architects, Valuers, etc". This advice was inconsistent with the advice given by Mr Hemmings QC which I have already quoted and which was to the effect that if the dispossessed landowner were to be paid compensation on the basis of the potential of the land for development, the costs incurred in establishing or proving up that potential would not be reimbursable. Mr Tobias QC rejected any reliance upon "capitalised profit" whereas Mr Hemmings QC had pointed to the difficulties and uncertainties associated with a valuation made upon that basis without ruling it out entirely.

192 Later during the conference Mr Yates expressly asked Mr Tobias QC what "special value" involved. According to the minutes, Mr Tobias QC answered the question by saying:

> "Apart from operative expenditure the [property] have no special value because it is for a development. If the government resume it, it is vacant and that is the valuation you get. You do not get loss of future profit."

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215 See *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565.

193 Question 13 was, "At law which is the better position, to argue on property valuation: (a) income capitalised (b) head lease or management's situation capitalised."

194 Mr Tobias QC unequivocally answered that neither was available. He rejected the former because of the variables relating to rents, outgoings, capitalisation and rates. Unlike Mr Hemmings QC, Mr Tobias QC was of the view that Yates would be entitled to recoup its costs incurred in time, materials and the like associated with its investigation of the prospects of successfully developing the markets without referring to the possibility, indeed likelihood, that these would already have been accounted for in a valuation which gave effect to the potential of the land which the investigation demonstrated existed. Even allowing for the possibility that the notes of the conferences may not fully capture the sense of the exchanges between the participants, enough appears to show that the issues being discussed were complex and ones upon which experienced, senior counsel were expressing different opinions.

195 There were further conferences with Mr Hemmings QC, on 28 February 1985 and 28 November 1985. On the former occasion Yates' architect, as well as Mr Yates attended. Mr Yates displayed the same tenacity as he had earlier on the matter of capitalisation of profits. He emphasised, as the notes of the conference record, that the market operation was going to yield a net income of $4 million to $5 million a year and that was what Yates was "basically fighting for in this exercise". Mr Hemmings QC thought a claim on such a basis would be very difficult to make out, but agreed that the profits that would have been made could be taken into account in assessing value. He drew a distinction between a claim which had regard to these, and one which simply sought to recover (without discount or allowance for contingencies) the sum of the capitalised profits less capital costs and outgoings.

196 There was also much discussion during the conference, of the amount that should be claimed, and how its components might be identified. It was pointed out by Mr Hemmings QC that a subsequent variation of the claim was always possible, and that it would be better to claim lump sums without any dissections of them.

197 Time was also spent by Mr Hemmings QC in explaining that compensation for Yates' deteriorating financial position could not form any part of an assessment by the Court. When Mr Hemmings QC was again asked whether Yates could recoup the costs of and associated with the obtaining of the development approval, he said that the test was, in effect, whether the preparatory work was rendered abortive in the hands of the dispossessed owner, and, if it was, then its cost would be recoverable. He went on to say that if however the preparation were part and parcel of the work required to give the property special value then it would not be separately recoverable.

198 From time to time, so far as the notes disclose, reference was made to "special value". The context sometimes suggests that the word "special" was being used in the sense of "exceptional" or "unusual" or "extra" as opposed to any technical usage.

199 Later on, during the conference, there was some elaboration upon the meaning of special value. That Mr Hemmings QC may have been referring to special value in the sense suggested appears from his stated preference for the phrase "highest and best use of land". He did go on to say that a special value might be engrafted on to a valuation that reflected the highest and best use, if it were a value unique to the owner. Other topics such as reinstatement, Yates' deteriorating financial position, and the possibility of a settlement without litigation took up much of the time of this conference.

200 The evidence also shows that Mr Tamberlin QC, another experienced senior counsel, was engaged in or about early 1985 to provide a written opinion with respect to the resumption and compensation.

201 The resumption of the land occurred on 7 May 1985 and the last time that Mr Hemmings QC conferred with the solicitors and Mr Yates was on 28 November 1985. The notes on this occasion record that Mr Hemmings QC recommended that Yates list matters "of abortive expenditure or reinstatement or disturbance or special value, whatever they are". His reference to these items disjunctively reflects the difficulty that may sometimes arise in distinguishing between them. The last conference with Mr Hemmings QC was apparently held to enable Yates' advisors to be better informed as to Yates' legal rights and the tactics that should be adopted during any conference with representatives of the resuming authority and the Valuer-General. On this occasion Mr Hemmings QC expressly asked that a valuer give him an opinion as to what he thought claimable, so that he could advise whether he agreed with the valuer.

202 On 18 December 1985, the appellant barrister, Mr Webster, a former valuer and a junior counsel at the Sydney Bar who was experienced in compensation matters, was briefed. An application for compensation was prepared and filed in the Land and Environment Court on 2 January 1986. The claim was silent as to amount.

203 The fortunes of Yates continued to decline and a liquidator was appointed on 10 March 1986. Thereafter much time was taken up in discussions with the liquidator as to the way in which the claim for compensation would henceforth be conducted. The appellant solicitors were finally, on 13 January 1987, retained by the liquidator "to complete the co-ordination of the legal side of the valuation". Thereafter the appellant solicitors reported weekly to the liquidator. Beyond settling points of claim on 9 October 1987 Mr Hemmings QC seems to have had no further involvement in the case. The points of claim state what the issues will be, and, at the threshold refer to the determination of the highest and best use of

the subject land as an issue. The particulars provided did not however settle clearly upon any particular use although reference was made in them to "produce markets, and/or commercial development". It is not possible to gain from the points of claim any clear view of the line which its author would have taken had he been called upon to argue the case.

204 In place of Mr Hemmings QC who returned his brief, Mr O'Keefe, then a Queen's Counsel, was briefed to advise and appear on any trial of the compensation claim. Mr Parkinson, a valuer, completed the first version of his valuation report on 10 May 1989. This version was settled by Mr O'Keefe QC and Mr Webster. In the same month Mr Webster provided some oral advice to Mr Yates and the solicitors in relation to "disturbance and abortive costs". Mr Webster's evidence, which was accepted by the primary judge in the Federal Court, was that he gave advice in these terms:

> "The only claim you have for disturbance and abortive costs are any monies that can be claimed as being lost due to the resumption now rendered abortive and [which] do not in any way add to the market value of the land. If they are related in some way to the market value they cannot be claimed as this would be double dipping. If any of the costs relate to other projects and you are claiming that as a loss then that is not claimable. Your own impecuniosity cannot found a claim for disturbance costs. If any of the items expended are items which have contributed to the achievement of the building consent and development application they are also not claimable. I will leave to you (Schwaiger) the responsibility of assessing any disturbance or abortive costs."

205 Mr O'Keefe's involvement in the matter turned out to be short. Apart from settling an agreed statement of facts in July 1989 he took no further part in the matter and returned his brief in July 1989 when Mr Simos QC, as he then was, replaced him.

206 In about November 1989 Messrs Simos QC, and Webster again, advised in relation to abortive expenditure. Their advice was in substance the same as had earlier been given by Mr Webster and which I have quoted.

The first hearing in the Land and Environment Court

207 Throughout November 1989 and January 1990 Messrs Simos QC and Webster were almost exclusively involved in their working hours in preparing the case. They conferred at length with the three valuers who were to give evidence. The trial in the Land and Environment Court constituted by Cripps J commenced on 30 January 1990 and occupied 43 sitting days.

208 Before going to the judgment of Cripps J, which was reserved until 1 May 1990, I need only refer to two matters: the opinion expressed by

Mr Simos QC at the time that he was preparing for the hearing before Cripps J and some submissions that he made during it. Mr Simos QC's opinion was that at all times *Spencer's case*[216] contemplated that the vendor is to be taken to be either the dispossessed owner, or an hypothetical vendor in the position of the dispossessed owner who wishes to sell the land for the highest price: and that it must be hypothesised that the vendor will do everything it can to assist the hypothetical purchaser to develop the land immediately in accordance with existing planning approvals. During the hearing, in written submissions and orally, Mr Simos QC did, quite properly, notwithstanding the doubts that had been cast upon it and its inherent illogicality, refer to and explain the relevance of the decision of Hardie J in *Kennedy Street Pty Ltd v The Minister*[217] to the case he was presenting.

209 In his reasons for judgment, Cripps J, after setting out the statutory provisions governing the acquisition and the assessment of compensation, discussed the effect of that legislation which is in familiar terms requiring regard to be had, not only to the value of the land taken, but also to severance and injurious affection[218]. Neither of the latter was a loss sustained by the respondent here because the whole of the land was taken by the resuming authority.

210 Cripps J acknowledged that the potential the resumed land may have had for the dispossessed owner may be taken into account in assessing the value of the land to him. His Honour emphasised the phrase "value to the owner"[219].

211 At one stage Yates' intention was that the market have a life span of up to 10 years only. Consultants engaged by Yates had prepared a proposal for submission to the Sydney City Council for a different building to be constructed on the land after a decade. Accordingly there was also evidence before Cripps J as to the utility, cost and returns from such a building to be constructed after the expiration of that period. This was a factor which complicated the valuing of the land and was another of the many complexities confronting the valuers and the lawyers on both sides, as well of course, as Cripps J.

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

217 [1963] NSWR 1252.

218 *Public Works Act*, ss 101, 124.

219 (1990) 70 LGRA 187 at 190.

212 Six expert valuers were called in the case. Their valuations were over an extraordinarily wide range of $12.74 million to $75 million. It is convenient to quote the summary of them given by Cripps J[220].

> "On behalf of the Authority, Mr Weir assessed the value at $12.740 million, Mr Vaughan, valuer from the Valuer-General's Department, $16.75 million, and Mr Gilbert, $16.6 million. The valuers retained by the Authority based their valuations upon comparable sales. Although they assumed that the highest and best use of the site included a market none considered that that use relevantly gave the land any 'special value'. That is, none accepted that the land had a special value to the owner. Yates' principal submission was that the highest and best use of the subject land was for a market for an indefinite period. It also submitted, in the alternative, that the highest and best use of the land was for a market for ten years and thereafter commercial development with a 7-8:1 floor space ratio with no height restriction. As will be seen, one valuer called on behalf of Yates, Mr Woodley, assumed in one of his approaches a floor space ratio for a commercial building of 5:1 or 7:1 above a ground level market development having a floor space ratio of 1:1.
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> Three valuers were called on behalf of Yates. Mr Parkinson fixed compensation at $75 million. He added $22 million for what he described as 'special value' to what he described as the 'market value' of $53 million. Mr Woodley's valuation fluctuated between $33 million (which, I think, excluded 'special value to the owner') and $60.6 million which included it. Mr Egan fixed a land value based on comparable sales of $27 million. To this he added an additional $10.5 million or $10.8 million (depending upon assumptions he made) for 'special value'. Mr Parkinson said he fixed a 'primary market value' at $30.036 million.
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> It would seem to me that Mr Egan (with respect to his notion of 'special value'), Mr Woodley and Mr Parkinson have misunderstood their valuation function in the approaches they have taken in the present case. Mr Woodley does not appear to opine a land value for the cleared site because he assumed, conformably with his understanding of the law, that he was required to assume that the markets had been built and were operational.
>
> In my opinion, it is not appropriate for me to value the land on the assumption that markets were built on the subject site. The land was vacant and cleared as at May 1985. The land had potential for use for a market. Whether that potential gave the land added value to its owner is a matter I will deal with later. However, 'the value to the owner' principle does not require me to assume the markets were built and functioning. Mr Woodley attaches significance to the circumstance that in June 1984, the Authority

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220 (1990) 70 LGRA 187 at 195-197.

wrote to Yates informing it that the land was to be resumed. It was not resumed until May 1985. Mr Woodley believed he was required by law to assume that the markets were built and functioning because had Yates not been advised of the proposal to resume, it would have constructed the market and would have commenced trading well before May 1985. I do not think Mr Woodley really addressed the question he should have addressed, viz, what was the value to the owner of the land resumed in May 1985. On that day, the land was cleared and vacant with a development consent and (I think it can be said) building approval for a market. No claim is made by Yates for abortive expenditure. Its claim is that the land should be valued on the basis of its value to it bearing in mind its potential for market use.

Mr Egan, Mr Woodley and Mr Parkinson in their application of the 'special value' principle have failed, in my opinion, to apply the correct method or to adopt the correct approach. Their understanding of the concept is, in my opinion, in each case in conflict with the decisions of the High Court and the Court of Appeal which make it clear that the 'special value', if any, cannot be assessed as they have sought to do. If the land has special value to the owner that circumstance must be taken into account in assessing compensation pursuant to the provisions of s 101 and s 124. The question is did the resumed land have special value to Yates and, if so, how should it be taken into account in assessing compensation.

There is, of course, no occasion to apply what is referred to as the 'reinstatement principle' for the purpose of assessing the compensation to be paid to Yates. At the resumption date, the Harbour Street property was vacant land. For reasons which I shall refer to in due course, although Mr Woodley does not describe his valuation by reference to the reinstatement principle, it seems to me that that is what in effect it is. His valuation is the reinstatement of a notional development. However that may be, I am of the opinion that the approach that I should take in the present case is the 'willing but not anxious sale': see *Spencer v Commonwealth of Australia*[221]. In my opinion, there was a market for the subject land and the most reliable method of compensating the applicant is to approach the matter in accordance with *Spencer's* case taking into account the special value, if any, the land had to Yates."

213 It is not difficult to see from this summary why Yates and those who advised it were anxious to find some method other than a method of valuation that depended simply upon comparable sales. The best that could be achieved upon that basis exclusively, if the valuers called by the resuming authority were correct,

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221 (1907) 5 CLR 418.

was $16.75 million only, and, if Mr Egan were correct, $27 million as against $75 million contended for by Mr Parkinson on another basis.

214 It is not easy to understand fully the basis of Mr Parkinson's valuation. He apparently assessed a market value of $53 million but added to it $22 million for what he described as "special value". In any event it is clear that he did turn his mind to special value and did take into account the full potential of the site calculated by reference to the notional earning power of a completed development. Mr Egan thought himself able to advance a land value of $27 million based upon comparable sales. There is no satisfactory explanation why his value on this basis should be so much greater than the maximum of $16.75 million on the same basis advanced by one of the valuers called by the resuming authority.

215 There is one sentence in the reasons which I have set out of Cripps J of particular importance which should be emphasised[222]:

> "No claim is made by Yates for abortive expenditure. Its claim is that the land should be valued on the basis of its value to it bearing in mind its potential for market use."

This sentence reflects the effect of the advice which was given by Messrs Simos QC and Webster. It is not inconsistent with the conservative opinions which were given from time to time by Mr Hemmings QC.

216 Earlier I suggested that on occasions here, and elsewhere, there may have been non-technical usage by professional advisors and perhaps others of the term "special value". The reasons of Cripps J[223] and other judges in other cases show this to be so. The former quoted passages from a number of cases including *The Commonwealth v Reeve*[224]. There Latham CJ said that "if the land has some special value by reason of *a potential use*, that is a matter to be taken into account in assessing compensation"[225]. Clearly there Latham CJ was not using "special value" in any technical sense.

217 Cripps J referred to a submission by Mr Simos QC that it should be assumed that the buildings for the market had been erected and that the markets were operational[226]. Mr Simos QC was no doubt pitching his client's case as high as he

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222 (1990) 70 LGRA 187 at 196.

223 (1990) 70 LGRA 187 at 197-198.

224 (1949) 78 CLR 410.

225 (1949) 78 CLR 410 at 420 (emphasis added).

226 (1990) 70 LGRA 187 at 201.

could at that point. But Cripps J was entitled to find, and did find, that although compensation should have regard to the potential for such a use it should not be assumed that the use was actually in existence.

218 In essence I take his Honour to be saying that there were uncertainties and contingencies to which he was bound to have regard, including the possibility of continuing competition from Paddy's Market, the restricted operating hours of the market imposed by the conditions of the building approval, uncertainties regarding the availability of car parking on nearby land and the number of stalls which might be permitted (896 or 1,000). Furthermore, as his Honour said, there were doubts about precisely how many stall holders would have entered into binding licence agreements and what the balance would actually have turned out to be between outgoings and rentals.

219 His Honour's conclusion on all of these matters was that a prudent purchaser would have considered that there was some potential for a successful market and that there was a possibility that such a market would be highly successful. Such a purchaser would also be aware that there was a risk of failure and a high risk that the markets would not function at anything like the level of profits forecast[227]:

> "Yates had to compete with Paddys. Although Paddys future may have been uncertain, the stall holders had demonstrated that they had sufficient political clout to keep Paddys in the area at least in the short-term."

220 His Honour then went on to reject a submission by the Authority that it was a relevant factor that Yates might have had only slight prospects of obtaining finance to undertake the market venture.

221 Cripps J criticised in some detail some of the methods adopted by the respondent's valuers and the amounts derived as a result of them. He thought all of the valuations were flawed in some way. There was evidence before his Honour which entitled him to conclude, as he did, that the income streams assumed by the valuers, particularly Mr Parkinson, were excessive. His Honour said this[228]:

> "As will be seen, I have fixed compensation by reference to a rate per square metre derived from comparable sales. In arriving at my conclusion, I have had regard to relevant comparable sales and to what I find to be the special value of the land to Yates. Yates had available a large area of land which had the potential for use as a market. … It presented Yates with an opportunity to establish a profitable market of the type proposed. It is true that in part the opportunity available to Yates was the result of the

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227 (1990) 70 LGRA 187 at 204-205.

228 (1990) 70 LGRA 187 at 210.

entrepreneurial skills of Mr Yates. … I can make no allowance in favour of Yates for this".

222 There may perhaps be a contradiction in what his Honour said, because, in holding that he should have regard to the potential that the land had for use as a market he had already, in a relevant sense, given credit for the entrepreneurial skills of Mr Yates on behalf of the respondent, for, it was only because of those skills that the potential was able to be demonstrated. The apparent contradiction may perhaps be explicable on the basis that the expression "special value" was being used by his Honour in the same non-technical sense as Latham CJ used it in *Reeve*[229] in the passage I have quoted. I also remark in passing, that Cripps J in the course of his reasons referred to *Kennedy Street* which had been the subject of submissions by both parties.

223 In the result his Honour fixed compensation in the total sum of $22,334,500, and, as he had made clear, did so by looking in the first instance at comparable sales but making adjustments for the potential that the site had for a market.

The appeal to the Court of Appeal of New South Wales

224 Both the resuming authority and the respondent appealed to the Court of Appeal. It was accepted by both parties that Cripps J had overlooked that a claim had been properly made for $217,443.78 and that to that extent the appeal had to succeed. One ground of appeal was that his Honour had failed to give sufficient reasons for his judgment. Although the majority rejected this it was part of their reasoning that one matter remained to be determined and that was Yates' entitlement to compensation for special value. On this issue Kirby P and Handley JA were of the view that it should have been. Mahoney JA, the other member of the Court, dissented. The principal judgment for the majority was written by Handley JA. In the course of his reasons, his Honour coined the novel term "head start". He said this[230]:

> "The existence of the appellant's work etc may have given the appellant an advantage or head start over other purchasers in the development of markets on this land. The judge made no finding to that effect. If such an advantage or head start did exist it would generally be worth money to a developer in the position of the owner. Hence it would generally give rise to some special value. These issues raise questions of fact."

225 Accordingly his Honour was of the view that the case should be remitted to Cripps J to give further consideration to the issues of special value and abortive

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229 (1949) 78 CLR 410.

230 (1991) 24 NSWLR 156 at 188.

expenditure. His Honour added that the effect of the order of the Court of Appeal was not that the trial should necessarily be reopened to enable the parties to lead further evidence.

226 Kirby P who was in substantial agreement with Handley JA said that Cripps J erred in dealing with the claim for special value which should now be recalculated[231]. But his Honour added that that recalculation should avoid double-counting of abortive expenditure to which Yates might be entitled.

227 His Honour then discussed special value in terms with which I would in general agree except that I do not think that instances of special value are necessarily confined to situations of actual usage at the relevant date[232]:

> "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 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".

228 Mahoney JA was of a different opinion from the majority. His Honour stated that the matters which were said to go to a special value related to the land itself, these being, its size and location, and the steps which had been taken by the respondent to bring into existence the use that it proposed to make of the land[233]. He said[234]:

> "Three things may be said about what the judge did: that a conclusion that, in such a context as this, land has special value to the owner is a conclusion of fact; that the facts which the learned judge found warranted the conclusion that the land had a special value to Yates; and that the special value in question was one going to the value of the land itself and not to, as it has been described, a collateral matter."

His Honour concluded therefore that there was no error on the part of Cripps J in the way in which he had dealt with these matters.

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231 (1991) 24 NSWLR 156 at 162.

232 (1991) 24 NSWLR 156 at 162 (footnote omitted).

233 (1991) 24 NSWLR 156 at 170.

234 (1991) 24 NSWLR 156 at 168.

229 On 1 August 1991 an application by the respondent for special leave to appeal to the High Court was filed and was subsequently discontinued.

The second hearing in the Land and Environment Court

230 When the matter came back before Cripps J on remitter from the Court of Appeal the respondent, represented by Messrs Simos QC and Webster, applied to reopen the respondent's case and adduce further evidence.

231 The nature of this further evidence is outlined in written submissions made on behalf of Yates by the appellant barrister and Mr Simos QC. One head of claim was for "special value arising from [Yates'] work in relation to the land by way of ascertainment of stall holder's interest and the collection of prepayment of rents and the like".

232 There was another head of claim for "special value arising from the advantage or headstart (which [Yates] had) over other purchasers in the development of markets on the land". What were then set out in the written submission were items which might more appropriately, it seems to me, have been characterised as "disturbance" or perhaps "reinstatement" costs. The contention was that compensation should be paid in respect of delay in finding an alternative site, holding and related costs to Yates during that period of delay, elimination of risk and costs associated with the acquisition of another site.

233 In ex tempore reasons of 19 March 1992 Cripps J rejected the application to adduce evidence.

> "This matter was listed before me today for the purpose of determining whether or not I should allow additional evidence to be adduced prior to hearing further submissions concerning what compensation I would award following the majority decision of the Court of Appeal in this matter.
>
> I have determined that I will not receive further evidence in the proceedings. Mr Webster on behalf of Yates has asked me to – he has outlined the nature of that evidence which is included in his submission. He has asked me to defer determining this matter until some affidavit or some document could be put on further, identifying or enlarging upon that matter. As he has made plain, the additional evidence he wishes to call arises out of what might be a claim for special value, if I can use those terms still, under the doctrine annunciated and adopted by the Court of Appeal in Kennedy Street.
>
> The reason why I am not permitting further evidence to be given in this matter concerns the important need to terminate litigation if that can be done fairly and as quickly as possible. This litigation has been wallowing through the judicial system now since about 1985. As Mr Justice [Handley] pointed out in his judgement that the appeal that was allowed on an issue of special value

and associated issue of aborted expenditure which I am told now has been resolved, although the details of that may be relevant to the question of what is special value, these were relatively minor issues in the context of the whole proceedings and the totality of issues that were litigated before the trial judge.

What emerges from Mr Webster's submissions is this. It is clear when one looks at the way the matter proceeded before me and what took almost all of the time in the Court of Appeal or at least a great part of the time in the Court of Appeal was whether or not one of the three I think or at least two valuations of Yates' valuers should be adopted. And in those circumstances, as Mr Webster has conceded, the sort of material that he would now be concerned with on the issue of special value would not loom large and perhaps not a lot of attention was paid to it. Nonetheless, that was the way the trial was conducted and it was conducted upon a basis that even if that were wrong, there was still a special value component within the meaning of Kennedy Street. So I am not persuaded that Yates has not had all the opportunity it needs to put all evidence before the court. Nothing in the Court of Appeal decision persuades me that the Court of Appeal is of the opinion I cannot determine this matter without further evidence. On the contrary, the suggestion being made by Mr Justice [Handley] is that nothing that has been stated in this requires me as he said to, I think the words are, reopen the case or have further evidence adduced. It does not necessarily reopen the trial and entitle the parties to lead further evidence. Obviously of course the trial will be reopened because I … heard further submissions by the parties as to what I ought to do. But I do not think a case has been made out as to why I should allow further evidence. This litigation will never finish – well perhaps that is wrong, but in all the circumstances I think it is desirable that this matter proceed to a conclusion as expeditiously as possible and I am not persuaded that fairness to the Yates Corporation requires that the case be reopened, because everything that has been put before the court on the previous – on the previous occasion it had the opportunity to put everything before the court that was relevant to determination. That is my decision."

234 His Honour subsequently heard argument in relation to "abortive expenditure" and gave reasons on 1 April 1992 why he would not increase his award on the basis of a claim under this head. It had been argued that the respondent was entitled to an amount of money to compensate it for the cost and delay of putting itself into the position "in respect of an alternative site as it was in respect of the resumed site", a claim, as some of the cases and texts put it, on a reinstatement basis[235].

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235 Hyam, *The Law Affecting Valuation of Land in Australia*, 2nd ed (1995) at 212-221; *Birmingham Corporation v West Midland Baptist (Trust) Association* [1970] AC 874 at 894.

235 After argument his Honour said that he would indicate that he had already fixed a special value component of the compensation in the sum of approximately $500,000 being the amount of money over and above the "market value" a person in the position of the respondent would have paid sooner than not obtain the land because of the special value the land had to the respondent by reason of the work done and expenditure incurred by Yates and referred to in the decision of Handley JA. The compensation fixed as a result of the addition then of the sum of $217,443.78 (which it was agreed had been overlooked) became $22,551,944.

The respondent settles a second appeal commenced in the Court of Appeal

236 The respondent was not satisfied with this result and again appealed to the Court of Appeal. The retainers of all of the appellants and Mr Simos QC were then withdrawn.

237 However the respondent still succeeded in obtaining an advantageous settlement of the appeal. The resuming authority for its own reasons was prepared to pay a further $1.25 million to the respondent. It is important to notice that this amount was not paid, as seems to have been assumed by the Full Federal Court, to the respondent as compensation for the work done and expenditure incurred in bringing the site "to a state where it was capable of immediate implementation". The circumstances in which the payment was negotiated and the items making it up are set out in the affidavits of Mr Simos QC whose evidence Branson J at first instance unreservedly accepted. The sum of $1.25 million (the settlement sum) was a sum paid on account of legal expenses, interest and stamp duty that the respondent would have incurred in relation to the acquisition of an alternative site. That was in substance a payment by way of reinstatement and was in no way calculated by reference to the value of any so-called "head start".

The claim in professional negligence in the Federal Court

238 The respondent next commenced proceedings in the Federal Court against the appellants and Mr Simos QC. The claim against each of them was framed in negligence, deceptive conduct contrary to s 52 of the *Trade Practices Act* 1974 (Cth) and breaches of the analogue of that provision in the *Fair Trading Act* 1987 (NSW). Neither deceptive conduct nor breach of the *Fair Trading Act* was pursued in the Full Federal Court and it is not entirely clear how vigorously the former was ultimately litigated at the trial in the Federal Court at first instance.

239 At the outset of the trial in the Federal Court questions were raised as to the jurisdiction of the Court. The questions were what was the jurisdictional basis of the federal claim for breach of s 52 of the *Trade Practices Act* as none of the appellants were corporations, and whether as solicitors and barristers they were engaged in trade and commerce. The bases pointed to in this case having regard to the facts identified by the respondent to establish them, appear at best slight. So far as the solicitors were concerned it was said that the *Trade Practices Act* applied

because they had posted or sent by facsimile transmission[236] two letters of advice, in September 1985 and July 1986, which contained advice that was deceptive because, among other things, they contained no reference to some advice which had been given by Mr Hemmings QC and Mr Tobias QC, and they sent letters weekly to Yates which similarly were silent as to relevant advice. All that could be pointed to in respect of the appellant barrister was that he settled one letter, in July 1986, which he provided to the solicitors who in turn sent it either by post or facsimile transmission. As to the other matter, whether the appellants were engaged in conduct in trade or commerce, counsel for the respondent quite properly conceded in this Court that that question was an even more controversial one[237]. No doubt the respondent was anxious to find and pursue if possible statutory claims to which any immunity of lawyers in negligence suits might not provide an answer. These matters need not however be explored now because no ground of appeal either to the Full Federal Court or this Court raises any jurisdictional point.

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236 Section 6(3) of the *Trade Practices Act* provides:

> "In addition to the effect that this Act, other than Parts IIIA and X, has as provided by subsection (2), the provisions of Part IVA and of Divisions 1, 1A and 1AA of Part V have, by force of this subsection, the effect they would have if:
>
> (a) those provisions (other than section 55) were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast; and
>
> (b) a reference in those provisions to a corporation included a reference to a person not being a corporation."

237 See for example *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 603-604 per Mason CJ, Deane, Dawson and Gaudron JJ:

> "[I]t is plain that s 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities. What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character."

240 It is necessary to refer to some of the matters which were alleged against the appellants in the pleadings in the Federal Court. After setting out a number of factual matters, including that the respondent would have been able to borrow sufficient money to undertake the development of the proposed market on the land, it alleged that by reason of this and other matters it was in a superior position at the resumption date to any other prospective purchaser of the land wishing to build markets on it. Particulars of this allegation were given, which, in substance were that it would be necessary for any other person, including a prospective purchaser, to repeat all of the steps taken by the respondent, such as the obtaining of the planning and building approvals, the securing of finance and the ascertainment of potential stall holders. The particulars also alleged that, unlike any other owner, the respondent would not have to pay or outlay on the market value of the land, as at the resumption date, holding costs during the period of placing itself in a position to establish the markets, and was also relieved of any uncertainty arising from any future changes to building regulations and conditions of consent. Other matters were alleged in the particulars such as possible increases in building costs and changes in car parking requirements which would not apply to Yates.

241 The pleading also took up a claim by the respondent that it had intended to create a public unit trust to purchase 50 per cent of the equity in the markets on their completion, and that the respondent should have been compensated for the financial disadvantages flowing from its inability to realise its scheme for the creation of such a trust. This, together with other claims said to relate to the "head start" were asserted to have been lost to the respondent by reason of the conduct of the appellants. The pleading, among other things, contended that the barristers failed to have regard to, or were unaware of, two decisions in New South Wales, *Kennedy Street Pty Ltd v The Minister*[238] and *Baringa Enterprises Pty Ltd v Manly Municipal Council*[239] whose application, it was said, was called for, so as to entitle the respondent to a "special value" not accounted for in the awards made by Cripps J.

242 Evidence called by the respondent in the Federal Court included evidence from Mr Hart, a property consultant, who said that the respondent would have had an advantage of 20 months over any other owner of the land in deriving income from a market on the site. However none of the matters said to give rise to this temporal advantage which he claimed could be translated into financial advantage (as well they might be if they really existed) were in truth likely to be unavailable to a purchaser of the land or unable to be exploited by such a purchaser in any development of it. There would be every reason why a prudent vendor would transmit all relevant materials to the purchaser in order not only to induce a purchaser to buy but also to induce him or her to pay a price which had regard to

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238 [1963] NSWR 1252.

239 (1965) 15 LGRA 201.

them. It is not difficult to see why her Honour obviously did not consider this evidence to be persuasive.

243 Branson J in the Federal Court made important findings of fact only one of which (relating to the respondent's financial capacity) was inconsistent with the findings of Cripps J in the Land and Environment Court.

244 Her Honour repeated in detail the steps which were taken by the respondent to investigate the feasibility of, and to obtain a planning approval for a retail market with numerous stall holders on the subject land. Before her Honour, the respondent's financial capacity at the material times to undertake the development was an issue which assumed much more significance than it did before Cripps J, and this probably explains why on this issue her Honour's conclusion differed from that of Cripps J who had found that on the balance of probabilities funds would have been available to the respondent in 1984 and 1985 for the markets[240]. Her Honour expressly held that the respondent did not at that date have the financial capacity to erect the markets immediately. As she pointed out, Cripps J had not been concerned with the issue of the so-called "head start" when his Honour discussed the respondent's financial capacity to undertake the development.

245 Branson J did not think it possible on the evidence before her to reach a conclusion as to precisely how long a period might have been involved in the securing of finance but she was satisfied that it would have been a period of some months at least.

246 Another issue, of either no, or limited significance in the proceedings before Cripps J had to be determined by Branson J and that was whether the respondent would in fact have been likely to realise a plan that it was developing for the establishment of a public unit trust to hold either wholly or in part Yates' investment in the market, and the additional financial benefits (if any) that might flow to the respondent if such a trust had been created. On this issue the respondent again failed for reasons which are explained by her Honour and which do not need repetition here although it is relevant to note that she formed an adverse view of the reliability of the evidence of Mr Yates.

247 Notwithstanding that the respondent company was in liquidation for many years and whilst the proceedings in the Land and Environment Court were conducted, the liquidator allowed Mr Yates to play a role in the preparation of the case and the giving of instructions for its conduct. Branson J found that Mr Yates attended a major proportion of the conferences with counsel concerning the matter and received copies of their written advices. He was a contributory of the

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240 (1990) 70 LGRA 187 at 205.

company. The company in fact came out of liquidation as a result of an order of Brownie J in the Supreme Court of New South Wales on 24 April 1992.

248 In her discussion of the case as it had been conducted in the Land and Environment Court, Branson J said that Mr Yates was meticulous in ensuring that each of the valuers was familiar with the work that had been done by or on behalf of the respondent to advance its proposal for a market on the land. After outlining the contents of the valuations of the valuers called by the respondent in the proceedings before the Land and Environment Court her Honour drew attention to the fact that one of them, Mr Parkinson "indicated that his calculations allowed six months to get the building up and the markets running"[241], and in consequence his valuation contemplated the deferral of the receipt of rents from the development for that period. On the other hand, as her Honour pointed out, another of the valuers, Mr Woodley had expressed his opinion that it was appropriate for the purpose of assessing compensation to assume that the approved first stage of development would have been in operation at the date of resumption had it not been for prior action taken by the resuming authority.

249 Branson J then discussed the two cases of *Kennedy Street Pty Ltd* and *Baringa Enterprises Pty Ltd* which had been much relied upon by the respondent. Her Honour was of the opinion that the evidence of Mr Simos QC provided a complete answer to the submissions based upon these cases and the other submissions of the respondent. The particular evidence to which her Honour referred was given in an affidavit by Mr Simos QC in these terms:

> "1. At the time of preparation for the original proceedings it was, and still is, my view that there was no basis, having regard to the particular facts of the case, upon which it would have been hypothesised in the original proceedings that the hypothetical purchaser in the position of the owner had a headstart in developing the land as compared with the ordinary hypothetical purchaser. That is because it was and still is my view that *Spencer's Case* required it to be hypothesised that the vendor is either the dispossessed owner or a hypothetical vendor in the position of the dispossessed owner who wishes to sell the land for the highest price obtainable and that, to that end, the dispossessed owner or the hypothetical vendor in the position of the dispossessed owner must be hypothesised to do everything it can to assist the hypothetical purchaser to be in a position to develop the land immediately in accordance with the existing BA and DA (which reflects its highest and best use), and therefore will include in the subject matter of the sale, or otherwise make available to the hypothetical purchase, in connection with the sale, all information and other material which the dispossessed owner or the hypothetical vendor in the position of the dispossessed owner

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241 *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 at 185-186.

might have, which might be of advantage to the hypothetical purchaser in enabling it to develop the land immediately and otherwise to maximise the value to it of the land, thereby increasing the price it would be prepared to pay for it. This would include all information and other material which might assist the hypothetical purchaser to develop the land in accordance with the building approval immediately, it being borne in mind that *Spencer's Case* requires it to be hypothesised that the hypothetical purchaser is a purchaser who is purchasing the land for the purpose of exploiting its highest and best use (that is, purchasing it 'for the most advantageous [purpose] for which it was [adapted]': per Isaacs J at 441 in *Spencer's Case*) and who therefore must be hypothesised to be a hypothetical purchaser who is buying the land with a view to its immediate development in accordance with the existing building approval (which was held to be the land's highest and best use). Moreover, as Isaacs J held in *Spencer's Case* (at 441):

> '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 …'

2. In this connection it was, and still is, my view that *Spencer's Case* required it to be hypothesised that the dispossessed owner or the hypothetical vendor in the position of the dispossessed owner, would make available to the hypothetical purchaser, inter alia, details of all work done by YPC, in relation to the land, including the names and addresses of the 718 persons who each paid $50 to register their interest in the proposed new market, as well as the names and addresses of those 40 persons who pre-paid rent, as well as doing everything else in the power of the dispossessed owner, or the hypothetical vendor in the position of the dispossessed owner, to maximise the value of the land to the hypothetical purchase, including, for example, assisting in securing for the hypothetical purchaser, the benefit of the proposed building contract for the construction of the market which YPC was negotiating."

250 Her Honour accepted that the views expressed by Mr Simos QC were to some extent in conflict with the approach taken by Handley JA in the Court of Appeal. Her Honour did not think it necessary to resolve this conflict because the issue before her was whether the appellants were negligent in forming the views which they did and in expressing them as they did. In considering this issue her Honour referred to expert evidence which had been called on both sides. She said that it was recognised on all sides that valuation law can be a matter of some complexity. Her Honour referred to some observations which had been made by Kirby P in the

Court of Appeal[242] to this effect. In the end her Honour held that, having regard principally to the expert evidence, but attaching weight also to her own reading of the authorities, no negligence had been established against any of the appellants and Mr Simos QC in connexion with the alleged head start claim of the respondent.

251 Her Honour dealt with another complaint that had been made by the respondent, that Mr Yates should have been called to give evidence, by holding that there were valid reasons to support the decision of the appellants not to call him in the compensation proceedings. Some other complaints which were made by the respondent were similarly dismissed by Branson J and need not be repeated here. Nor is it necessary to discuss another claim of the respondent, belatedly formulated, which her Honour dismissed, that there had been a breach of fiduciary duty on the part of the appellants and Mr Simos QC.

252 It was strictly unnecessary therefore for her Honour to consider the application of *Giannarelli v Wraith*[243] but she did nonetheless do so, and would have found that that case applied to entitle the appellant barrister and Mr Simos QC to immunity, because, on a realistic analysis their conduct related either to work done in court, or to work done out of court which led to decisions affecting the conduct of the compensation proceedings in court. Her Honour gave the appellant solicitors' position separate consideration but held that in the circumstances they too would have been entitled to an immunity for the same reason if they had been negligent.

The Full Federal Court

253 From that judgment the respondent appealed to the Full Court of the Federal Court (Drummond, Sundberg and Finkelstein JJ). Mr Simos QC was not a party to the appeal. The main grounds of appeal were as follows:

> "3. The learned trial judge erred in failing to find that the approaches of valuers Messrs Egan, Parkinson and Woodley were contrary to fundamental principle in that their valuations had the effect of valuation of the property on the assumption that the markets had been built and were operating as a going concern as at the Resumption Date.
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> 4. The learned trial judge erred in failing to find that the approaches to valuation taken by Messrs Egan, Parkinson and Woodley in their evidence to the Land & Environment Court in substance amounted to

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242 (1991) 24 NSWLR 156 at 159.

243 (1988) 165 CLR 543.

an impermissible attempt to apply the reinstatement principle of valuation.

…

6. The learned trial judge erred in failing to find that the valuation approach to market value and special value presented to the Land & Environment Court on behalf of the appellant, insofar as it was based upon capitalisation of income to be received from markets yet to be established on the resumed land was an approach which involved considerable risk of rejection by reason of difficulties of proof of establishing the net income to be received and/or amounted to an impermissible use of the capitalisation of income method of valuation.

…

Particulars of Risk Factors

The valuation approaches were novel and/or involved the risk of rejection on the grounds of being contrary to accepted legal principle in that they –

(i) involved or were based on an impermissible use of the reinstatement principle;

(ii) involved or were based on capitalisation of income streams in circumstances where such approach was inappropriate;

…

(iv) involved or were based on assessment of value of the land in its developed state and not in the state in which it was at the date of resumption.

The valuation approaches involved difficulties of proof and/or involved the further risk of rejection by reason of the fact that they:

(i) involved or were based on estimates of income which would have been derived had the markets been constructed and there had been no resumption;

(ii) involved or were based on inadequate allowance for risk and/or profit.

8. The learned trial judge erred in failing to find that all of the respondents or any one or more of them was negligent in failing to advise that a

claim for special value ought to be made on the basis of the relationship which existed between the appellant and the resumed land and in particular the value to the appellant of the knowledge which it had gained with respect to the development and use of the site as a retail market and car park such knowledge giving advantage to the appellant by reason of savings in holding costs, avoidance of escalation in building costs and avoidance of risk if it were not dispossessed of the site. (The value of knowledge acquired giving rise to savings and the avoidance of risk is hereinafter called '*the head start concept*'.)

9. The learned trial judge erred in placing reliance and/or placing undue reliance on expert evidence or the absence of expert evidence (as the case may be) on the following issues:-

   (i) The negligence of the respondents in failing to advise and pursue a claim for special value based on the head start concept.

   …

   In each case the issue was a matter of law for the Court.

…

15. The learned trial judge erred in holding that in the circumstances the second and third respondents were respectively entitled to immunity from liability in negligence.

…

17. The learned trial judge erred in holding that advocate's immunity applied to claims made pursuant to section 42 of the Fair Trading Act 1987 (NSW) and section 52 of the Trade Practices Act 1974 (Cth).

18. The learned trial judge erred in holding that advocate's immunity exists in law. On the hearing of this appeal the appellant will concede that the learned trial judge was constrained to follow *Giannarelli v Wraith*[244] and will not pursue this ground of appeal beyond reserving the right to argue in the High Court of Australia that *Giannarelli v Wraith* was incorrectly decided or should no longer be followed.

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244 (1988) 165 CLR 543.

21. The learned trial judge erred in determining the issue of when the appellant would have had construction finance available to it when such issue was contested before and determined by Cripps J in the Land & Environment Court and the claim was for damages for loss of a chance including the chance that such finding would have been made.

…

23. The learned trial judge erred in failing to award damages to the appellant on the basis of the loss of a chance to receive greater compensation (than was in fact awarded in relation to special value) assessed in accordance with the head start concept and assessed on the evidence of savings in holding costs, savings in connection with escalated building costs, and avoidance of risk called by the appellant in this action."

254 After broadly sketching some of the facts and referring to the earlier proceedings their Honours stated that it was not necessary to express any opinion whether the Court of Appeal was correct in its finding that the approach taken by the valuers was contrary to law. They noted that Mr Hemmings QC had advised on the risks associated with the approaches which were adopted by the respondent's valuers and said that it appeared that his advice was not passed on to the solicitors or junior counsel. Their Honours made no reference to the fact that, as the notes of the various conferences with Mr Hemmings QC show, Mr Yates was present at them and must have been fully conversant with the advices tendered from time to time by Mr Hemmings QC. Nor did they refer to what Mr Hemmings QC had said regarding the possible use of projected earnings for valuation purposes of a site ripe for redevelopment as this one was. Their Honours did however refer to two Canadian decisions, *The City of Halifax v S Cunard & Co Ltd*[245] and *Municipality of Metropolitan Toronto v Loblaw Groceterias Co Ltd*[246], which they thought provided support for the approach taken by the valuers in arriving at their value of the resumed land as a vacant site. They discussed a number of other cases and then referred to the advice of the Privy Council delivered by Lord Moulton in *Pastoral Finance Association Ltd v The Minister*[247]:

> "The appellants were clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested. The land was their property and, on being dispossessed of it, the appellants were entitled to receive as compensation the value of the land to them whatever that might be."

255 The Full Federal Court said that the measure of compensation must take account of the peculiar value to the owner of the property compulsorily acquired and that the peculiar value to the owner is commonly referred to by the shorthand expression "special value". The Full Federal Court acknowledged that, as

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245 [1975] 1 SCR 458.

246 [1972] SCR 600.

247 [1914] AC 1083 at 1087.

Dixon CJ had said in *Turner v Minister of Public Instruction*[248], the value of land is necessarily affected by all the advantages it possessed which might be a matter of future, or even contingent enjoyment. Their Honours then discussed the concept of special value further. They said this[249]:

> "Land will have special value if it has some special suitability for a business or an activity carried on or to be carried on by the owner. That special suitability need not arise from any physical or legal attribute of the land[250]. While it may arise from some physical or legal attribute it can also arise from some use made or to be made of the land. *However, the special suitability must be peculiar to the dispossessed owner*[251]. The reason why the special suitability must be peculiar to the dispossessed owner is that if it is not peculiar to him then the advantage should be reflected in the market price of the land, it being a requirement that the market price be ascertained by reference to its highest and best use". (emphasis added)

256 A little later the Full Court said this[252]:

> "There will be many cases where the dispossessed owner is well advanced in the planning of and preparation for the realisation of the potentiality of the resumed land to the point where that potential use is imminent. Further, the dispossessed owner may have incurred considerable expenditure in reaching that point. In principle there is no reason why the dispossessed owner should not be compensated for the planning and preparation that has resulted in the imminent realisation of the potentiality of the resumed land. Prime facie it should be assumed that this planning and preparation is of economic value to the dispossessed owner and should be the subject of compensation as a consequence of the compulsory acquisition of his land."

Next the Full Federal Court accepted that if the planning and preparation could be of advantage to an hypothetical purchaser of the land using it in the same general way as the owner then it should be included in the market value of the land[253].

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248 (1956) 95 CLR 245 at 268.

249 (1998) 85 FCR 84 at 95.

250 *Housing Commission of New South Wales v Falconer* [1981] 1 NSWLR 547 at 573.

251 *Arkaba Holdings Ltd v Commissioner of Highways* [1970] SASR 94 at 100.

252 (1998) 85 FCR 84 at 95.

253 (1998) 85 FCR 84 at 95.

> "[S]o long as double recovery is avoided it will usually be of no practical consequence whether the dispossessed owner recovers his compensation as market value or as special value provided he does in fact receive compensation for the advantage resulting from bringing a proposal to a state of imminent development."

257 The Full Court thought it necessary to make some observations about the manner in which the parties had conducted their case before Branson J. Their Honours said that it seemed to them that the parties lost sight of the real issue that required determination. Further to this observation the Full Federal Court said that it was apparent that both sides proceeded on the assumption that if the respondent were in a position to develop the market immediately by reason of the work undertaken before resumption, that resulted in an advantage that was of economic value and for which it was entitled to receive compensation. It was said that the difference between the parties was that the respondent submitted that the economic value of the advantageous position formed part of the special value of the land and the appellants asserted that it should form part of the market value of the land. The Full Federal Court thought that the unfounded assumption made by the respondent was that if its advantageous position was not compensable as special value it was not otherwise compensable; the unfounded assumption of the appellants was that the Land and Environment Court was in a position to assess that advantageous position as part of the market value of the land. The Full Federal Court held that this latter assumption was unfounded because no evidence "had been led to properly identify or quantify the economic value of being in a position to immediately commence the development of a market"[254].

258 It is relevant to refer to another passage in the judgment of the Full Federal Court. Their Honours said that the work undertaken and knowledge acquired here would be taken into account in determining the market value of the land if they could be of advantage to any hypothetical purchaser, but that if the hypothetical purchaser were willing to pay a higher price for the land in order to obtain, for example, plans and the services of a builder engaged by the hypothetical vendor the purchaser would be paying a price for the plans (and the introduction of the builder) in addition to paying for the land[255].

259 Their Honours thought that both *Kennedy Street* and *Baringa* were applicable, correctly decided and that their application here would have meant that the respondent would have been entitled to recover in the Land and Environment Court a component for special value based upon the so-called "head start" principle. They did not think that they could quantify the value of this and ordered that the case be remitted to a judge of the Federal Court for assessment of damages.

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254 (1998) 85 FCR 84 at 98.

255 (1998) 85 FCR 84 at 99.

In discussing *Kennedy Street* and *Baringa* as they did at some length, their Honours omitted any reference to the fact that the barristers had made detailed submissions in respect of the former at least and Cripps J had considered its possible application and that of *Pastoral Finance* upon which, to some extent it depended, in his reasons for judgment following the first hearing. They also reached a different conclusion on the application of *Giannarelli v Wraith* from that of the primary judge and held that the appellants were not entitled to any immunity from suit for their negligence, which, the Court said, lay in the lawyers' failure to advise in respect of and present a case claiming compensation by way of special value for the "head start".

260 I also mention that the Full Federal Court decided without hearing him, indeed without any notice to him, and notwithstanding that he was not party to the appeal (and contrary to the order in his favour by Branson J) that Mr Simos QC should be held to be disentitled to his costs of the trial[256]. As justification for this their Honours cited *Ritter v Godfrey*[257]. That order is the subject of a separate appeal by Mr Simos QC to this Court.

The appeal to the High Court

261 Against that decision the appellants appealed to this Court.

262 The appellant barrister advanced numerous grounds of appeal, some only of which need be stated.

> "2. The Full Court erred in treating as an aspect of special value and/or market value the 'head start' or 'time related' advantage, which [Yates] claimed to have by virtue of work undertaken by it in the nature of preparation for the development of the land.
>
> 3. The Full Court erred in failing to hold that the award of compensation made in favour of Yates in the Land and Environment Court had taken into account any aspect of Yates' entitlement to compensation properly falling within the Full Court's concept of special value and/or enhanced market value by reason of 'head start' or 'time related' advantage.
>
> 4. The Full Court erred in the view it took that the ratio decidendi of [*Spencer's case*] was limited to the 'nature and quality of the land'.
>
> 5. The Full Court was error:

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256 (1998) 85 FCR 84 at 114.

257 [1920] 2 KB 47 at 60-61.

(a) in the view which it took of the entitlement to compensation contemplated by the decisions such as *Kennedy Street Pty Limited v The Minister*[258];

…

6. The Full Court erred:

(a) in finding that Yates was in a position where it could commence its development of the market almost immediately, in circumstances where the trial Judge had found that Yates did not have the financial capacity then to do so; and

…

(d) in holding that loss resulted from not advancing such a case.

7. The Full Court erred in failing to consider whether the opinion held by the appellant, namely, that Spencer's case properly understood had the consequence that special value based on a 'head start' was not available as a matter of law, was an opinion capable of being held by a barrister acting competently in the preparation and presentation of a claim for compensation.

8. In finding that the appellant was negligent, the Full Court erred as follows:

(a) in not taking into account the absence of any advice or opinion expressed by any of the senior counsel or expert valuers retained on behalf of Yates as to the existence of any entitlement to compensation of the kind held by the Full Court not to have been awarded to Yates by the Land and Environment Court;

…

(c) in failing to pay any or any sufficient regard to the expert testimony adduced at the trial to the effect that the views adopted by the appellant for the purposes of his engagement in the preparation and presentation of Yates' claim for compensation could reasonably have been held by junior counsel who practiced in valuation law at that time, and that Yates adduced no expert testimony to the contrary;

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258 [1963] NSWR 1252.

(d) in finding that at one stage Mr Yates enquired of the appellant whether any special value might be attributed to the resumed land on the basis that Yates had an advantage over a hypothetical purchaser because of the advanced state of the proposed development … when no evidence to such effect was before the trial judge.

(e) in finding that the appellant had not considered *Kennedy Street Pty Limited v The Minister*[259] and *Baringa Enterprises Pty Limited v Manly Municipal Council*[260] when assisting with the preparation and presentation of the compensation proceedings before Cripps CJ.

…

11. The Full Court erred in failing to recognise, as was the fact, that Yates in the compensation proceedings before Cripps CJ lead evidence as to the alleged state of readiness of Yates to proceed with the development of the site (albeit not for the purpose of assessing a 'head start' related advantage) which evidence was taken into account by Cripps CJ in assessing special value.

…

13. The Full Court erred in holding that the appellant's alleged negligent conduct was not subject to immunity from suit, by reason of:

(a) the complex nature of claims in law for special value and the relationship with such claims with market value, particularly those involved in the proceedings before the Land and Environment Court;

(b) the practice in resumption compensation cases as to the preparation and presentation of valuations of expert valuation witnesses, and the role of counsel thereto, particularly in the circumstances of the subject proceedings for compensation".

263 The appellants also annexed two lists to their notices of appeal, one of 12 findings of fact made by the Full Federal Court which, it was argued, were inconsistent with the evidence, and the other, which, it was submitted was a catalogue of findings made by the primary judge, Branson J which the Full Federal

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259 [1963] NSWR 1252.

260 (1965) 15 LGRA 201.

Court ignored, or effectively and without any good reason expressly or impliedly contradicted. I will deal with these matters later but for present purposes it is enough to say that the arguments and submissions in relation to most of them are substantially correct.

264 Before dealing specifically with particular matters raised by the grounds of appeal there are some matters bearing upon the outcome of this appeal which require discussion.

Statutory compensation

265 All statutes authorising resumptions in Australia effectively require that the relevant compensation court calculate the value of resumed property as if it were sold on the date of its acquisition by the resuming authority[261]. Necessarily, the exercise to be undertaken by the valuers and lawyers representing the parties and the court in finding the likely price on such a notional sale is a highly artificial one, involving many uncertainties and matters of judgment upon which professional and lay minds may and frequently differ, as the varying judgments and different reasoning so far in this case dramatically demonstrate. The exercise undertaken in the courtroom is not only highly artificial but also entirely theoretical and divorced from the sentiment and emotion which can play a part in a decision to buy or sell, even occasionally a decision by a successful investor or business person. Sometimes some people very effectively, and perhaps without being able to offer rational reasons for doing so, will intuitively make successful investments in property. Others may rely entirely upon detailed economic investigations and projections. Corporations proposing to make investments in land or other property would certainly be expected by their shareholders and financiers to make feasibility studies which involved such investigations and projections.

266 In Australia it has long been accepted that the various statements made by Justices of this Court in *Spencer's case*[262] correctly formulated the principles to be applied in compensation courts. The most frequently quoted statement is that of Griffith CJ[263].

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261 *Lands Acquisition Act* 1989 (Cth), s 55(2); *Lands Acquisition Act* 1994 (ACT), s 46; *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW), s 56; *Acquisition of Land Act* 1967 (Q), s 20(2); *Land Acquisition Act* 1969 (SA), s 25(1)(c); *Land Acquisition Act* 1993 (Tas), s 27; *Land Acquisition and Compensation Act* 1986 (Vic), s 41(1)(a); *Land Acquisition and Public Works Act* 1902 (WA), s 63(a).

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

263 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 432.

> "In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, *ie*, whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?' … The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together."

267 I would emphasise the important phrase in his Honour's judgment "persons conversant with the subject". The formula suggested by Griffith CJ contemplates a prudent purchaser and one who would make a point of informing himself or herself of all of the relevant attributes and advantages that the property enjoyed so as to make that purchaser "conversant" with the subject, meaning thereby not just the land in its existing state but also any profitable uses to which it might be put.

268 Isaacs J put the matter even more strongly. His Honour said that the hypothetical parties should be regarded as not anxious to trade and as being[264]:

> "perfectly acquainted with the land, and cognizant 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".

269 The comprehensive language used by Isaacs J is clearly capable of embracing matters with which perhaps courts of today have become more familiar, such as the value of highly restrictive or very advantageous planning approvals, the changing value of money over time and opportunity cost. So too computerisation has in modern times enabled the testing of financial projections to different sensitivities, of time, interest rates, changing values of money, different occupancy rates and other contingencies both favourable and unfavourable relatively easily and inexpensively.

270 Engrafted upon the propositions in *Spencer's case* are several other principles which are frequently applied and which I take to be sound in law. Each deserves some separate consideration.

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264 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 441.

Highest and best use

271 It is now settled, and for good reason, that a dispossessed landowner should be compensated for the value of his or her land on the basis of its highest and best use. In current times, except in the case of non-controversial uses such as perhaps a single dwelling in a residential zone or a corner shop on a site zoned for that purpose, many uses, and most commercial ones require the prior approval of vigilant planning authorities, compliance with often stringent planning controls and the need to meet and refute objections by objectors, including commercial, competitive objectors in political, administrative and legal forums. These may not be the only hurdles that a developer has to leap. It is now a well established planning principle that a planning authority may take into account the likelihood that a particular development will cause blight to other existing developments[265] and the related consideration that before an approval may be granted an applicant for it demonstrate a need for the proposed development. Many other considerations may be relevant. A developer may also need to show for example that the development can be undertaken without intrusion upon, or nuisance to, or indeed in some cases even inconvenience to adjoining owners and others.

272 An intending prudent developer of a project such as the respondent here had in mind would inevitably require investigations, studies, plans and information of the kind to which I have referred and which would necessarily involve the services of professionals such as town planners, engineers and others, not only perhaps to obtain, or enhance the chances of obtaining, planning approval but also to place itself in a position to satisfy financiers if it has to borrow to complete the development, and prospective tenants or licensees that a tenancy or a licence in it would be an obligation worth incurring.

273 I mention these matters simply to show that there was nothing remarkable, or indeed, to use the word which I think has been variously used in these proceedings so far, "special" about what the respondent did before the resumption. What it did it would have had to have done to gain planning and building approvals, and to attract licensees. In short what was done was necessarily done to demonstrate that the highest and best use of the resumed land was its development as a market. Had what the respondent done not been done, then it would be unlikely that any purchaser would pay a price which included a component for the by now demonstrable, realisable, potential of the property for its highest and best use as a market. And a purchaser would have been in as good a position to take advantage of the site in its cleared state as the respondent. None of this is in disparagement of the respondent's efforts. But their site-specific nature meant that Yates would have no interest in withholding their fruits from a purchaser and every reason to provide them to "talk up" the price of the land.

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265 *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675.

274 Any vendor who failed to capitalise on this work by not extolling to a purchaser its consequential, demonstrable, realisable potential would be highly imprudent. And any reasonable purchaser would expect, and know that the price would reflect this potential. It is not a case of the purchaser's buying, as it were, the plans and the work done in respect of proving up the potential as one of the examples given by the Full Federal Court would suggest. It is merely that, to use the language of Griffith CJ in *Spencer's case*, each party to the transaction should be regarded as being fully conversant, or as Isaacs J said, perfectly acquainted with the subject, that is to say the subject land with all of its potential. It follows that the more work, the more proving up that is done by the vendor before the sale, the more any uncertainty as to the realisation of the potential will be reduced, and the higher the price will be. This fundamental concept the Full Federal Court touched upon in the passages I have quoted but failed to apply. What was described as special value by the Full Federal Court and by Handley JA in the Court of Appeal of New South Wales as the "head start" advantage was no more than an element of the highest and best use of the land and a factor to be taken into account in assessing its value on that basis. A purchaser who made himself or herself conversant or perfectly acquainted with the property in the way in which he or she should be taken to do so as contemplated by this Court in *Spencer's case* would have been in no inferior position to exploit the planning and building approvals, the clearing work that had been done and the investigation of the demand for licences than the respondent.

275 This is in essence how Mr Simos QC and Mr Webster both said they regarded the situation and which Branson J held to be a reasonable view of it. It was also consistent with much of what Mahoney JA said in his dissenting judgment in the Court of Appeal[266]. Branson J was right in this regard and the Full Federal Court therefore fell into error in taking the view that what the respondent had done gave rise to any special value. In short, in my opinion the approach adopted to the case by the lawyers was the appropriate one and such as to offer the best prospects to the respondent. And if I should be wrong about this, the approach on any view was an available one, and such that no lawyer exercising a professional judgment could be regarded as negligent in adopting.

Relationship between the valuers and the lawyers and their respective roles

276 The approach of the Full Federal Court was coloured by a misapprehension as to the relationship between the experts called in this case and the lawyers. Most professional experts do encounter and have to deal from time to time with matters of law, or mixed facts and law. Engineers and architects may be called upon to construe building codes and building and engineering standards. But apart perhaps from town planners who almost daily will be called upon to construe long and complex planning instruments there would be few non-legal disciplines requiring

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266 (1991) 24 NSWLR 156 at 168.

knowledge and consideration of legal principles to the extent that a valuer must in his or her ordinary practice. As I observed in *The Commonwealth v Western Australia*[267], the Privy Council in *Melwood Units Pty Ltd v Commissioner of Main Roads*[268] referred to valuation principles and principles of law as if they were interchangeable. Questions of law, fact and opinion do not always readily and neatly divide themselves into discrete matters in valuation cases and practice.

277 It should also be firmly kept in mind that valuation practice, like legal practice, cannot be an exact science. Both require the exercise of judgments and the forming of opinions, often on matters in respect of which certitude is impossible and uncertainty highly likely.

278 In *Kelly v London Transport Executive*[269] Lord Denning MR said that solicitors and counsel must not "settle" the evidence of medical experts as they did in *Whitehouse v Jordan*. In the latter case Lord Wilberforce said[270]:

> "[E]xpert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation."

279 What the Master of the Rolls categorically said in *Kelly*, in my opinion, goes too far. But in any event the passage from *Whitehouse v Jordan* quoted does not support as far-reaching a proposition as that propounded by Lord Denning. For the legal advisors to make suggestions is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt. I do not doubt that counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might appropriately or more accurately state the propositions that the expert would advance, and which particular method of valuation might be more likely to appeal to a tribunal or court, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions. However it is the valuer who has to give the evidence and who must make the final decision as to the form that his or her valuation will take. It will be the valuer and not the legal advisors who is under oath in the witness box and bound to state his or her opinions honestly and the facts accurately. The lawyers are not a valuer's or indeed any experts' keepers. The Full Federal Court failed to recognise the different roles of the valuers and the appellants in this case and treated the appellants as if they

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267 (1999) 73 ALJR 345 at 401; 160 ALR 638 at 715.

268 [1979] AC 426 at 435, 437.

269 [1982] 2 All ER 842 at 851; [1982] 1 WLR 1055 at 1064-1065.

270 [1981] 1 All ER 267 at 276; [1981] 1 WLR 246 at 256-257.

were almost exclusively or exclusively the final arbiters of the way in which the property should be valued. And although the Full Federal Court held that the appellant solicitors were not entitled in this case to shelter behind the barristers and to delegate responsibility to them, it failed to look carefully at the different relationships involved. In a functionally divided profession as in New South Wales, the barristers do not engage the valuers. Nor for that matter do the solicitors necessarily do so. Here the respondent was actively and closely involved in these matters. There were times when the reasons of the Full Court implied, indeed even assumed that the lawyers especially the barristers were personally responsible for the engagement of the valuers and the valuers' opinions. Moreover it is not as if Branson J made any findings that the appellants overbore the valuers and Yates or insisted that the valuers adopt methods of valuation that were impermissible or inferior to some other method. For these reasons also the appeals to this Court would have to succeed.

Methods of valuation

280 In one important matter the approach of the Full Federal Court is to be preferred to that of the Court of Appeal of New South Wales, although recourse to North American authority[271], if relevant, was not necessary to make good that approach, as local experience is to a similar effect. The approach of the Court of Appeal would seem to exclude altogether the possibility of a sound valuation based upon, or having regard to the profits that the property if developed might yield. There is no legal principle that purports to, or could close for all times the categories of methods of valuation which might be acceptable in a particular case. Rodbertus[272] observed that in its early stage almost every civilization was marked by two factors, agriculture and slavery. These, Seligman wrote, lead to a fundamental distinction between ancient and modern economic theory[273]. The former was a simple one, and, taken with a general community knowledge of the productivity of land and the fact that valuations were usually required only for the purpose of levying taxation, meant that early valuations were simple and relatively unsophisticated exercises. Valuation practice is, however, like legal practice an evolving discipline.

281 As time has passed different types of businesses, different uses to which property may be put, changing financial markets, and more sophisticated and

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271 *The City of Halifax v S Cunard & Co Ltd* [1975] 1 SCR 458; *Municipality of Metropolitan Toronto v Loblaw Groceterias Co Ltd* [1972] SCR 600.

272 From "Untersuchungen auf dem Gebiete der Nationalökonomie des klassischen Alterthums", in Hildebrand's *Jahrbücher für Nationalökonomie und Statistik*, iv, p 343 et seq, quoted in Seligman, *Essays in Taxation*, 10th ed (rev) (1931) at 11.

273 *Essays in Taxation*, 10th ed (rev) (1931) at 11.

different methods of obtaining financial information and applying financial criteria call for flexibility, resourcefulness and different methods of making valuations. Two typical examples should suffice. Large "drive-in" shopping malls containing discount department stores, speciality shops, municipal libraries, restaurants, cafés, department stores, large supermarkets and numerous picture theatres were unknown when *Spencer's case* was decided. To value one, either when fully developed or in prospect, requires that the closest consideration be given to the income stream that such an establishment could be expected to generate and for how long it might do so. Similarly sophisticated techniques may be involved in the valuation of large city buildings or sites approved for their erection taking account of incentives offered to tenants and the incidence of tax payable by both parties. Often the owner of land which has been approved for a development will not undertake the development but will sell it to an investor or developer. The point is that the land with the approval attached to it becomes the prize and it would be unthinkable that the price for the prize would not be fixed in such a way as to reflect the return that the development when completed would yield. There is no reason to suppose that the price for the site of an approved but as yet undeveloped market should be very differently calculated.

282 It is not as if the valuation of a notional capital asset by reference to its expected income generating capacity is by any means a novel concept in the courts. Daily, courts in this country and elsewhere value what has been described as something in the nature of a capital asset, a person's capacity to earn income, by reference to his or her likely earnings over a period in the future taking account, subject to discount for contingencies, of that person's as yet unrealised but realisable prospects in life[274].

283 Wells J recognised the availability of different methods of valuation in *Bronzel v State Planning Authority*[275]:

> "… I am not disposed to reject any method of valuation adopted by either valuer on the ground that it is not worth considering; it seems to me that if *Spencer's* case … is to keep its practical worth in this jurisdiction, this Court should be slow to reject any method that, in expert hands, is capable of yielding a result within bounds that are not unreasonable. The limitations of every method must, of course, always be kept clearly in mind. I am of the opinion that the approach likely to result in the most direct and reliable resolution of the outstanding differences between the valuations is to

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274 *Parker v The Commonwealth* (1965) 112 CLR 295 at 308-311 per Windeyer J; *Husher v Husher* (1999) 73 ALJR 1414; 165 ALR 384.

275 (1979) 44 LGRA 34 at 38.

consider the particular features of each valuation that are capable of yielding to adverse criticism."

284 It is unlikely that in 1907 courts would have encountered a discounted cash flow method of valuation, another method which looks to, among other things, nett proceeds receivable in the future from a development not as yet undertaken. Its availability was acknowledged by Jacobs J in this Court in *Albany v The Commonwealth*[276].

285 If a court is prepared to entertain, as this Court did in *Eastaway v The Commonwealth*[277], a claim for compensation on the basis of increased hypothetical profits from a proposed modernisation and enlargement of the claimant's business, there is no reason why a claim based upon the likely nett returns from a proposed but as yet unconstructed development should not similarly be entertained.

286 This Court itself has in any event clearly accepted what has been described as the hypothetical development method of valuation[278]. The method was described by Starke J in *Australian Provincial Assurance Association Ltd v Commissioner of Land Tax*[279]:

> "In the present case the valuation has been made on what has been variously described as the hypothetical building or development basis. The parties agree that the building upon the land does not return the rental that might reasonably be expected from it. So the rental from that building is discarded, and it is assumed that the land is vacant. The erection of a new building on the land is envisaged, providing office accommodation, which is the best method of obtaining the advantages that the land possesses. Accordingly a building is planned to obtain the full benefit of those advantages. Its cost is estimated, the gross annual rentals or receipts from it are estimated, and from these rentals or receipts are deducted various annual outgoings and interest charges which are also estimated to obtain the net receipts. The capital value of the land is then ascertained by capitalising the net receipts at some given rate of interest, and in this case, I may add, the parties were content to work upon a 4½ per cent basis. The unimproved value of the land is then deduced by deducting from the capital value so obtained

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276 (1976) 12 ALR 201 at 207.

277 (1951) 84 CLR 328 at 340-341.

278 *Australian Provincial Assurance Association Ltd v Commissioner of Land Tax* [1942] ALR 156; *Dymock's Book Arcade v Federal Commissioner of Taxation of the Commonwealth of Australia* (1937) 4 *The Valuer* 403 at 406 per McTiernan J.

279 [1942] ALR 156 at 158.

the cost of the erection of the building. Adopting this method of ascertaining the unimproved value of the assessed land, I find as a fact that its unimproved value on the 30th June, 1939, was the sum of $76,154."

287 The method is neither novel nor especially difficult, and, as with all methods requires the making of value judgments.

288 In *Turner v Minister of Public Instruction*[280] all the members of the Court (Dixon CJ, Williams, Fullagar, Kitto and Taylor JJ) accepted the appropriateness of a like method in the case of resumed subdivisible, but as yet unsubdivided land.

289 It is therefore quite impossible to say that valuers and lawyers preparing a compensation case were negligent simply because they were in favour of advancing what was in fact an already well accepted method, the hypothetical development method of valuation. It is plainly an available method in an appropriate case and a familiar one to those who have practised in this area.

290 It was not necessary therefore to look for foreign authority on this point but it is right, as the Full Federal Court suggested, that there are Canadian cases which contemplate the method of valuation adopted by the respondent's valuers in this case. In Canada the method of valuation is apparently called the land residual method[281].

291 The valuers called by the respondent were not in error to adopt the methods that they did here. Nor were the appellants in any way negligent in not advising them to adopt some different method. The error, if any, that was made by the valuers was to misdescribe, in the circumstances of this case, any component of their valuation as special value either to the owner or otherwise. It may be however, as I have suggested, that they were not using "special value" as a term of art of the kind, as Kirby P pointed out it should be[282] but merely acknowledging that the method that they were using was an unusual or indeed, as they thought, a rather special one.

Disturbance and special value to the owner

292 I group these two topics together because although they are separate they are related concepts. The special value of land is its value to the owner over and above

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280 (1956) 95 CLR 245.

281 *The City of Halifax v S Cunard & Co Ltd* [1975] 1 SCR 458 at 463-464 per Spence J; *Municipality of Metropolitan Toronto v Loblaw Groceterias Co Ltd* [1972] SCR 600 at 604-605, 616 per Spence J, 622-623 per Hall J.

282 (1991) 24 NSWLR 156 at 162.

its market value. It arises in circumstances in which there is a conjunction of some special factor relating to the land and a capacity on the part of the owner exclusively or perhaps almost exclusively to exploit it. None of the examples given by the Full Federal Court are true examples of special value. There will in practice be few cases in which a property does have a special value for a particular owner. Obviously neither sentiment nor a long attachment to it will suffice. The special quality must be a quality that has an economic significance to the owner. A possible case would be one in which, for example, a blacksmith operates a forge in the vicinity of a racetrack on land zoned for residential purposes as a protected non-conforming use, the right to which might be lost on a transfer of ownership or an interruption of the protected use[283]. Such a property will have a special value for its blacksmith owner, and perhaps another blacksmith who might be able to comply with the relevant requirements to enable him to continue the use but to no one else.

293 The Australian Law Reform Commission report *Lands Acquisition and Compensation*, with some slight adaptations goes some way towards correctly defining special value as "that additional economic advantage which the owner obtains, by reasons of his ownership … and which is not reflected in the market value"[284]. The example which I have given answers this description. What Handley JA in the Court of Appeal regarded as special value in this case does not.

294 Disturbance was discussed not entirely unambiguously by Dixon CJ and Kitto J in *The Commonwealth v Milledge*. In doing so their Honours adopted language that was used by the Privy Council in *Pastoral Finance Association Ltd v The Minister* [285] in referring to special value[286]:

> "[I]t must always be remembered that disturbance is not a separate subject of compensation. Its relevance to the assessment of the amount which will compensate the former owner for the loss of his land lies in the fact that the compensation must include not only the amount which any prudent purchaser would find it worth his while to give for the land, *but also any additional amount which a prudent purchaser in the position of the owner, that is to say with a business such as the owner's already established on the land, would find it worth his while to pay sooner than fail to obtain the land*. But a prudent purchaser in the position of the owner would not increase his price

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283 See for example s 79C of the *Environmental Planning and Assessment Act* 1979 (NSW).

284 Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14, (1980), par 239.

285 [1914] AC 1083.

286 (1953) 90 CLR 157 at 164.

> on account of the special advantage he would get by not having to move his business, unless the amount he would have been prepared to pay apart from that special advantage was the value of the land considered as a site for that kind of business. Disturbance, in other words, is relevant only to the assessment of the difference between, on the one hand, the value of the land to a hypothetical purchaser for the kind of use to which the owner was putting it at the date of resumption and, on the other hand, the value of the land to the actual owner himself for the precise use to which he was putting it at that date."[287]

By contrast the Australian Law Reform Commission report defines, correctly in my opinion, disturbance as "cover[ing] economic losses which result naturally, reasonably and directly from acquisition. It may include such items as removal expenses, costs of necessary replacement of furniture and fittings, legal and other costs of purchasing [an alternative site] and loss of local goodwill." [288] Some of these items may however also fall under the head of valuation previously referred to as reinstatement[289].

295 I would merely add that compensation for disturbance may not be available if the claims for it are too remote[290] as I think the settlement sum may well have been here.

296 In most Australian jurisdictions each of disturbance and special value is a separate statutory head of compensation[291].

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287 Emphasis added. For similar statements of this principle, see also *Emerald Quarry Industries Pty Ltd v Commissioner of Highways (SA)* (1979) 142 CLR 351 at 366 per Mason J; *Universal Sands & Minerals Pty Ltd v The Commonwealth* (1980) 30 ALR 637 at 640.

288 Australian Law Reform Commission, *Lands Acquisition and Compensation*, Report No 14, (1980), par 241.

289 See also *Horn v Sunderland Corporation* [1941] 2 KB 26 and *Dell Holdings Ltd v Toronto Area Transit Operating Authority* (1995) 22 OR (3d) 733.

290 See Jacobs, *The Law of Resumption and Compensation in Australia* (1998), pars 22.7.2 and 22.8.

291 *Lands Acquisition Act* 1989 (Cth), s 55(2)(c), *Lands Acquisition Act* 1994 (ACT), s 45(2)(c) allow compensation for "loss, injury or damage" suffered as a result of the acquisition.

297 Whilst it must be accepted that there will be cases in which the distinction between special value and disturbance and perhaps "reinstatement"[292] may not be clearly drawn, no difficulty in that regard arises in this case because, for the reason which I have discussed, a claim for special value in the sense in which it is properly used as a term of art was not available in this case[293]. In *T & P Holdings Ltd v Municipality of Metropolitan Toronto*[294] Aylesworth JA recognised, and I agree, that proof of special value will often be difficult to substantiate.

Head start principle

298 In my opinion there is no such principle as a head start principle in the law of valuation. It may owe its coinage by Handley JA to a misconceived importation from the law of the obligation of confidence, of a principle akin to the springboard principle by which the duration of the equitable obligation of confidence is fixed[295]. But that principle has nothing to say about the materials with which the respondent's efforts had rewarded it in this case and which it was very much in its interests to make available to any purchaser. It may be that in some cases a particular developer may possess some very unusual advantage that might enable him or her to undertake some development more quickly than an hypothetical purchaser acquiring the site. An example of such a situation might be one in which the developer is both developer and builder, and has particular plant and equipment on site which might otherwise be idle and which he or she would be able to utilize immediately in constructing the development at marginal cost. The developer's equipment, the developer's occupation of buildings, its location on the land, and the suitability of the land for its utilization all combine in such a case to give the land a special value to that developer. However that is not this situation. The formula which *Spencer's case* prescribes, of fully conversant parties and a prudent vendor seeking to maximise price (by getting a premium for his or her own efforts and expenditures in getting to the point of selling the land approved and ripe for development) negatives the possibility of any "head start" advantage in this case.

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292 For a discussion of "reinstatement" and the circumstances in which as a separate basis for compensation it may be available, see Hope JA in *Housing Commission of New South Wales v Falconer* [1981] 1 NSWLR 547 at 553-554.

293 *Arkaba Holdings Ltd v Commissioner of Highways* [1970] SASR 94.

294 (1972) 1 LCR 340 (Court of Appeal of Ontario).

295 *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1967] RPC 375 at 391 and see Gurry, *Breach of Confidence* (1984) at 245 et seq. See also the discussion of "head start" in the field of fiduciary relations in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 110-112 per Mason J.

Serious error of fact or process

299 In this case, in which there were critical issues of fact to be decided, the Full Federal Court made a number of factual findings for which there was no, or no sufficient evidentiary basis, and also, without any explanation for doing so, findings which were both explicitly and implicitly in conflict with those of Branson J. If a court (at first instance or on appeal) makes a serious error or errors of fact in a case of this kind, in which numerous facts are in controversy, or decides to pursue an issue or issues different from those the parties raise, or otherwise fails to proceed fairly or in accordance with proper process, an appeal court hearing an appeal from a decision flawed in one or more of those ways should not be too ready to preserve other parts of the decision, which, if taken in isolation may not necessarily appear to be wrong. Any attempt at surgical excision by an appellate court of clear and relevant factual error, or error of process, to leave other controversial factual findings intact will usually be unsatisfactory and unconvincing, and not such as to attract the confidence of the public and the losing litigant.

300 Errors of the kind I have described were matters of concern in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)*[296]. And a further example is provided in the joint judgment of McHugh, Kirby and Callinan JJ in *Walsh v Law Society of New South Wales*[297].

> "In particular, there was no justification for adverse findings, or comments (if that they be), concerning Mr Walsh's sisters. Powell JA misdirected himself, in our respectful opinion, in stating that the sisters 'were prepared so to act as to obtain an improper advantage for themselves' and in criticising the sisters on the basis that they were not revealed 'in any favourable light' for their action in dividing the personal assets of their mother with Mr Walsh. They were not parties and were not before the Court. The Court was not called upon by any of the issues before it on any of the complaints to hear and determine the propriety of their conduct". (footnotes omitted)

301 In this case there were several errors of fact and in defining the real issues. However their number makes it unnecessary to identify any one of them for the purpose of determining the appeals on the basis of it alone.

Basis for payment of the settlement sum of $1.25 million

302 It will be recalled that after Cripps J refused to increase the compensation (apart from allowing the agreed additional amount which had been overlooked)

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296 (1999) 73 ALJR 306 at [93] per Kirby J, [153] per Callinan J; 160 ALR 588.

297 (1999) 73 ALJR 1138 at [68]; 164 ALR 405.

the respondent appealed again to the Court of Appeal. Before the hearing the resuming authority settled the appeal by paying $1.25 million to the respondent. The way in which the Full Federal Court dealt with this payment is a further instance of factual error by that Court. Their Honours said that the settlement sum was wholly attributable to special value, as compensation for the advantage to Yates of the work and expenditure incurred in bringing the proposed market to a state in which it was capable of immediate implementation, that is, as compensation for special value under the so-called "head start" principle. That is simply not so. The uncontradicted evidence of Mr Simos QC was that it represented a payment in respect of legal expenses, and interest and stamp duty that would have been incurred in relation to the purchase of an alternative site. It had nothing to do with the so-called "head start". In truth, these items if they represented anything reimbursable at all may have been regarded as aspects of disturbance or perhaps reinstatement costs. They are certainly not matters going to special value. It may also be that the respondent was fortunate to receive a payment of this amount for these items. It may well have been arguable that the claims for them were too remote[298]. They have an appearance of remoteness because every investment, whether following an involuntary transfer or resumption, or a sale in the ordinary course, made by an investor or business person, if such a person decides to embark upon the same sort of investment, will involve the payment of charges and costs associated with it. It is understandable however that the resuming authority might have paid money over and above its strict obligation to do so to this tenacious respondent in the interests of bringing this prolonged and no doubt distracting litigation to finality and in order to save further legal costs.

Expenditure by the respondent

303 There is this further matter of importance to which reference should be made.

304 The respondent bought the site in August 1981 for $5.1 million. Thereafter it expended $217,443.78 and a further questionable amount of $2.7 million making a total of $8,017,443.78 over a period of about 45 months. Nonetheless Yates and its advisors were ultimately able to achieve total compensation payments to the respondent in the sum of approximately $24 million made up of $22,334,500 compensation originally assessed by Cripps J, $217,443.78 initially overlooked and added by his Honour by consent, and the settlement sum of $1.25 million paid on the settlement of the second appeal to the Court of Appeal. No one would suggest that expenditure is necessarily equivalent to value. It will often be more, and sometimes it will be less, but it may on occasions be a guide to value when the expenditure has been made in the relatively recent past. Such an outlay here of approximately $8 million for a total return of approximately $24 million does not

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298 See Jacobs, *The Law of Resumption and Compensation in Australia* (1998), pars 22.7.2 and 22.8.

immediately strike one as the product of glaringly negligent conduct. I use the word "glaringly" because the Full Federal Court took the view that what the appellants had done or failed to do was *obviously* negligent.

305 The result that was achieved would have been unlikely to have been achieved by an exclusive method of comparing sales of like pieces of land, a summation method or any of the other simpler methods of valuation which are sometimes used. To achieve it must have called for a degree of ingenuity on the part of the respondent's advisors and that ingenuity is reflected in the methods of valuation actually adopted, fraught as they may have been with the difficulties to which Mr Hemmings QC alluded in his early advices. Heavily discounted as any numbers based upon hypothetical cash streams which might be generated by the development when completed may have been, the total amount awarded must nonetheless in part at least have been derived from the valuations presented on the generally uniform basis that they were by the three valuers called on the behalf of the respondent. And it is difficult to see how any other methods could have been nearly as productive as the one adopted.

The duty of care

306 Litigants will frequently be disappointed by the outcome of litigation. The legal process cannot guarantee perfect outcomes. People's expectations will often exceed their entitlements. Whether a duty of care has been duly fulfilled cannot be decided just by looking at the outcome of the efforts of a professional person. Cases will be lost, and regrettably patients will not be cured notwithstanding that their lawyers and doctors have been diligent and careful.

307 The nature and scope of the duty of lawyers to exercise reasonable care, particularly when litigation is in prospect or being, must be assessed in the knowledge that litigation always involves some uncertainties. Matters for judgment, for example, whether to examine or cross-examine in a certain way, how precisely to respond to a question from the Bench, whether to object or not to object to a question, and how to frame a particular submission, in practice arise momentarily. No matter how comprehensive a judge's reasons may be, it will practically never be possible for him or her to set out all of the matters that have impressed or failed to impress the court.

308 This was a difficult and complex case. How it was conducted depended upon many factors. The first was the obvious and inherent difficulty of establishing compensation in anything like the amount for which the respondent was hoping and contending, more than $70 million if one of its valuers were to be accepted. A nice judgment had to be exercised upon the question whether the claim should be presented on a single basis or upon an alternative, and if any, what alternative basis. A decision had to be made whether, as somewhat unusually occurred here, three or some fewer number of valuers should be called: was there a risk that other valuers or indeed other bases of valuation put in the alternative might contradict or

weaken the force of valuations derived from the method adopted? These are the sorts of decisions which had to be made in this case and Mr Yates' involvement in them seems to have been considerable. As Branson J correctly found, there is no reason to suppose however, that any of them were made negligently by the lawyers here.

309 In determining whether, in giving an opinion or advice on the conduct of a case, lawyers have been negligent it will not necessarily be a proper basis for criticism that they have recommended or acquiesced in an approach which might have seemed to some to be novel in law or one upon which minds might differ. So too, as counsel for the respondent submitted, regard has to be had to what the law might reasonably be perceived to be at the time that the conduct in question occurred.

310 In the last 20 years it is possible to point to many changes in legal thinking in and as a result of decisions of this Court[299]. There are also a number of decisions of this Court on important matters in which different Justices have taken diametrically opposed views[300]. All of this is to highlight the increased difficulty which lawyers face in making decisions as to the way in which to conduct some complex cases and to advise their clients.

311 There is no doubt that Branson J sought to apply the correct test in this case and in my opinion did apply it correctly. There is another important policy consideration which may eventually turn out to be of relevance in any discourse about professionals and other service providers performing vital work and that is the one adverted to by McHugh J in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*[301] in discussing the conduct of auditors and their possible liability for large sums of money to indeterminate classes of people.

> "First, whether or not imposing a duty in favour of third parties will deter auditors from being careless, extending liability will probably reduce the supply of their services. Courts often assume[302] that insurance against

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299 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See also the discussion by Brennan J of presumptions as to the state of the law from time to time in *Giannarelli v Wraith* (1988) 165 CLR 543 at 583-586.

300 *Wik Peoples v Queensland* (1996) 187 CLR 1; *Gould v Brown* (1998) 193 CLR 346; *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839; 163 ALR 270.

301 (1997) 188 CLR 241 at 282-283.

302 cf *Rusch Factors Inc v Levin* 284 F Supp 85 at 91 (1968); *Rosenblum v Adler* 461 A 2d 138 at 151-152 (1983).

> extended tort liability is readily obtainable and that the increased cost of an extension of liability can be spread among clients by the payment of additional premiums for insurance. But insurance in this field may not be as readily obtainable as courts assume. Insurers are reluctant to insure against risks which are difficult to quantify, as they usually are when the number and amount of the claims arising from the risk are difficult to estimate. …
>
> Extending the liability of auditors for negligent misstatements may also reduce the demand for their services. Even when insurance is obtainable, increasing fees to pay for the cost of additional insurance may result in a reduction of demand for audit services in cases where the law does not require regular audits. Experience in the United States suggests that some of the smaller accounting firms may be forced out of business[303]. …
>
> Second, no examination of the public interest should overlook the effect of an extension of auditor's liability on the administration of the court system."

312 I emphasise that his Honour's remarks were made in the unique context of a claim in negligence for pure economic loss by an indeterminate group of people but their application as a matter of policy beyond that may arguably need to be considered if unduly high standards come to be imposed upon professional and other service providers who are required in their callings to exercise value judgments on a daily basis.

Factual errors in the Full Federal Court

313 In their judgment their Honours said that the government of New South Wales had announced before the resumption that Paddy's Market would be relocated[304]. This is to misstate the true position which was the subject of very careful consideration and explicit evidence before Cripps J, who, in some detail explained why Paddy's Market would be likely to remain a real competitor to the respondent's development so far as was known at the time of the resumption[305]. Branson J in her judgment quoted from Mr Woodley's valuation report facts which do not appear to have been in dispute: that Paddy's Market was only later (than the resumption) sold; and that it either was developed, or was to be developed in such a way as to incorporate new markets. There was no evidence to any different effect to support the Full Court's finding to the contrary. There was therefore no reason

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303 See Siliciano, "Negligent Accounting and the Limits of Instrumental Tort Reform", (1988) 86 *Michigan Law Review* 1929 at 1971.

304 (1998) 85 FCR 84 at 87.

305 (1990) 70 LGRA 187 at 197.

why the Full Federal Court should have taken a different view of this factual matter from that of Cripps J and Mr Woodley's evidence.

314 The Full Federal Court held that the respondent was in a position by 20 July 1984 to enable it to commence its development of the market almost immediately[306]. That finding overlooks that it would take some time for the respondent to find and obtain binding commitments from its other 800 or so licence holders, and for the development to yield income when it was completed, and it also overlooks explicit findings made by Branson J, on a consideration of all of the evidence, including that of Mr Yates whom she thought an unsatisfactory witness that finance would not be available for a number of months to enable the respondent to commence the work.

315 It was also held by the Full Federal Court that the respondent had carried out work which would enable it to construct a market on the land more quickly than any hypothetical purchaser[307]. I have already explained why this was not so.

316 The Full Federal Court said that the appellants had accepted that it was obvious that the respondent was entitled to be compensated for the advantageous position it was in at the date of the resumption[308]. A related finding was that Mr Simos QC had given evidence that it was obvious that the respondent was entitled to be compensated for the work done in bringing the proposed development to a stage at which it could proceed immediately. These findings misstate the effect of the evidence of the appellants and Mr Simos QC. As the evidence of Mr Simos QC shows, what he and the appellants were saying was that that compensation should be, and was reflected in an hypothetical price based upon the potential that the land had, and the time within which that potential could be realised by an (that is, any) owner of the land.

317 Another finding of the Full Federal Court was that the advanced state of the development should be reflected in the value of the land but that the case was not being prepared on that basis[309]. Because the Full Federal Court misunderstood the nature of the exercise being carried out by the valuers and the proper application of *Spencer's case* this was simply not so. Furthermore, the development could not be regarded as being in an advanced state. Much had no doubt been done to enable the potential to be realised but much more needed to be done including the

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306 (1998) 85 FCR 84 at 87.

307 (1998) 85 FCR 84 at 96.

308 (1998) 85 FCR 84 at 107.

309 (1998) 85 FCR 84 at 112.

attraction of and commitment by a further 800 or more stall holders, and the actual construction of the works.

318 All of these are factual errors going to important matters and would of themselves require that the appeals be upheld.

319 But they do not stand alone. Important factual findings of Branson J which her Honour was entitled to make were inexplicably either ignored or put aside. Some of them overlap matters to which I have already referred. It is unnecessary to repeat all of these but some of the more important ones are the following.

320 Her Honour discussed Mr Yates' attitude to and capacity to influence the evidence to be called before Cripps J. She made this finding[310]:

> "[O]nce satisfied, as I find [the liquidator] was, that there was no reasonable likelihood of the creditors not being paid in full from the fruits of the compensation claim, he would, I find, have given considerable weight to the views of Mr Yates. I find that Mr Yates would have been strongly resistant to the idea of abandoning the approach to the valuation of the subject land adopted by Mr Parkinson."

321 Her Honour gave careful attention to Yates' financial capacity. Her finding was in these terms[311]:

> "I am not satisfied that as at the date of resumption of the subject land (ie 7 May 1985) [Yates] had confirmed finance available to it to allow it to proceed promptly with the erection of the markets. Indeed, I find positively that it did not as at that date have the financial capacity immediately to erect the markets."

322 The next finding to which I would refer was of great importance[312]:

> "In my view, it would be a rare case in which it could be said that a prudent purchaser who would not repeat the steps previously taken by the vendor could not reasonably be hypothesised. I do not regard the subject land in 1985 as such a case."

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310 (1997) 145 ALR 169 at 199.

311 (1997) 145 ALR 169 at 174.

312 (1997) 145 ALR 169 at 201.

323 It is difficult to understand why the Full Court attached no weight to a finding in the following terms[313]:

> "The evidence before me shows that Mr Yates was meticulous in ensuring that each of the valuers was familiar with the work that had been done by or on behalf of [Yates] to advance its proposal".

324 This finding underlines again the role, indeed the effective control perhaps that Mr Yates was exercising over the valuation methods. It is also indicative of Mr Yates' likely understanding of the use to which the valuers were putting the work that Yates had done on the project. The last of the factual errors of the Full Court related to the critical issue of judgment. Her Honour had made a finding in these terms[314]:

> "The special value claims which [the valuers] respectively identified were based on premises inconsistent with such claims and, if accepted, had the apparent potential to lead to higher levels of compensation to [Yates] than the head start claim now identified by [Yates]."

325 In short a choice was made to pursue a particular, and it was thought, more promising line of attack than a claim for what Handley JA would come to describe as a "head start", a choice which, in view of her Honour's other findings was one to which the respondent in all likelihood assented. The Full Court was not entitled to ignore or make findings in contradiction of her Honour's finding on this matter.

326 The next matter is one of omission on the part of the Full Court. As I have said the Full Court took the view that the conduct of the appellants was obviously negligent, and that this was so because any competent practitioner in the field would have been aware of the "head start" principle giving rise to an item of separate compensable, special value. Even if it were to be accepted (contrary to what was the actual position) that this was part of the law of valuation at the time of the relevant conduct, the Court should have taken into account that its existence must have been very obscure for it was not apparent to the authors of the major texts and competent practitioners in the field.

327 No textbook as at 1990 had cited *Kennedy Street* or *Baringa* as examples of the application of a head start principle[315]. No judge before Handley JA in *Yates*

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313 (1997) 145 ALR 169 at 183.

314 (1997) 145 ALR 169 at 198.

315 See Hyam, *The Law Affecting the Valuation of Land in Australia* (1983) at 147-149; Brown, *Land Acquisition*, 2nd ed (1983) at 192, 193.

had cited *Kennedy Street* or *Baringa* as authority for the proposition referred to by the Full Court.

328 Before the appellants' retainer, Queen's Counsel were retained by Yates to advise in relation to its entitlement to compensation and never advised that a claim for "head start" should be made. Mr Hemmings QC was briefed on 8 June 1984 to advise Yates in relation to the resumption proceedings and continued to do so from time to time until late 1987. Mr Tobias QC was briefed to advise and gave advice in conference on 7 November 1984. Mr Tamberlin QC gave advice in writing to Yates in or about early 1985. Mr O'Keefe QC was retained in January 1988 on behalf of Yates until about mid-1989. And none of Messrs Parkinson, Woodley and Egan who were regarded as foremost in their field as valuers purported to assert an entitlement to special value based on any notion of a head start.

329 The Full Court had no regard to these matters. They may or may not have been decisive but they were relevant and important as showing that the principle that was said to be obvious, the "head start" principle was not obvious to a body of well qualified and experienced text writers and practitioners. The Full Court should have considered them and dealt with them. The Court's failure to do so is another reason why the appeals must be upheld.

Errors of law

330 It was said by their Honours in the Full Federal Court that the work done and knowledge acquired by the dispossessed owner were not connected with the character or quality of the land and that it therefore had a special value to the respondent[316]. The knowledge acquired by the respondent was connected with the character and quality of the land. That knowledge (and the approvals to which it led) and its application to the land gave the land the character or quality of making it developable for a market which could be constructed upon it and in respect of which a number of licensees had made commitments.

Should *Kennedy Street* and *Baringa* be applied?

331 Something should be said about the two cases upon which the Full Federal Court relied and which it thought applicable to the situation here. The first is *Kennedy Street Pty Ltd v The Minister*[317] a decision of Hardie J in the Land and Valuation Court of New South Wales.

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316 (1998) 85 FCR 84 at 98.

317 [1963] NSWR 1252.

332 The business of the plaintiff company there was the acquiring, subdividing and selling of land. After agreeing to purchase a parcel of land for £18,000, paying a deposit of £1,800 upon it, preparing a survey plan, applying to the local council for and obtaining an approval in principle upon conditions and undertaking some other work with a view to the implementation of the approval, the plaintiff was notified that the land would be resumed. The plaintiff claimed compensation in the sum of £18,638. The resuming authority served upon the plaintiff a notice valuing the claim at £18,000 "freehold value – including all interests". A similar notice was also issued to the unpaid vendor and no attempt was made at that stage to value the respective interests of the plaintiff and the vendor. Shortly before the hearing the defendant gave a formal notice of valuation to the plaintiff in the sum of £4,000 in respect of the plaintiff's interest as purchaser under the contract.

333 The plaintiff claimed at the hearing that compensation for its estate or interest should be assessed at between £10,000 and £12,000, or, alternatively, on the basis of a special value to the plaintiff of between £13,000 and £15,000.

334 Hardie J held that the market value of the land should be determined at £19,500 and that in the circumstances the land did have some special value for the plaintiff who, were it the purchaser, would have paid an additional sum of £2,500 over and above its market value.

335 Hardie J said that the matters that caused him to make a finding of special value in favour of the plaintiff were that the plaintiff had given close and careful consideration to the problems associated with the proposed subdivision; it had paid stamp duty to acquire it; it had also paid survey fees and engineering fees, and the council fee in relation to the subdivision application. His Honour went on to say[318]:

> "The knowledge and experience acquired [by one of the principals of the plaintiff] and the time spent by him in examining the land and taking the steps appropriate to ensure an expeditious approval of the subdivision were, in the event that happened, of no value to the company."

336 To regard these matters as ones entitling the plaintiff to an allowance for special value is to ignore or misunderstand the formulation in *Spencer's case* of the principles to be applied in assessing compensation. A vendor armed with the relevant materials, an approval and information which might enable a property to be profitably subdivided would be foolish not to seek and to insist upon obtaining full value for the land or any estate or interest in it having regard to those matters, from any purchaser. And a prudent purchaser would need to be prepared to pay a price accordingly as the utilization of those materials would enable that purchaser to realise the highest and best use of the property. Everything the plaintiff had in its possession in *Kennedy Street* was, as is the situation in this appeal, readily

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318 [1963] NSWR 1252 at 1256.

transmissible to, and of value to any purchaser coming into possession of the property.

337 In *Kennedy Street* Hardie J went on to say that the resumption deprived the plaintiff of a profitable venture and that the plaintiff's profit-earning potential was diminished. One factor, his Honour said, that was operating in diminution of the potential was the length of time that might be required by the plaintiff to re-equip itself for this type of business. He thought it relevant that the plaintiff, instead of taking steps to acquire other subdivisible land for sale took a position with another company which kept him fully occupied in the next few months. Only then was other property purchased by another private company of which he was the principal. His Honour said that on the somewhat meagre evidence before him he had formed the opinion that a period of some two or three months should be allowed and in some way compensated for in the assessment of compensation under the heading of special value.

338 This was to overlook that the plaintiff's business was to sell property. To be offset against any possible delay in finding a replacement property would have to be, but was not taken into account by the trial judge, the advantage of an early, accelerated (notional) sale by the plaintiff on the resumption date, the profit accruing on the small outlay of £1,800 and other expenses, and the elimination of the risks of actively undertaking the subdivision. What Hardie J did was to misunderstand *Spencer's case*. The land which was resumed was not acquired for subdivision and sale over an indefinite or infinite period. It was acquired for sale and its subdivision would be undertaken only to achieve that end. Its subdivision and sale would have constituted one project which would have required time for its completion. When that land was sold it would have been a matter for the plaintiff whether it wished to embark upon another such project. If it did it would have to find another parcel of land and undertake another separate project. The location and the acquisition of another piece of land would no doubt have taken some time, whether the subject land had been resumed, or sold in subdivision in the ordinary course, and were matters that were quite irrelevant to the resumption. This is an entirely different situation from the one that the Privy Council considered in *Pastoral Finance*[319].

339 Properly analysed *Kennedy Street* can be seen to be not a case to be applied or followed. On any view it states no principles of any relevance to this case.

340 *Baringa Enterprises Pty Ltd v Manly Municipal Council*[320] is another decision of Hardie J. In that case his Honour again assessed compensation by including a component for special value based upon what he thought to be a better

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319 [1914] AC 1083.

320 (1965) 15 LGRA 201.

chance that the plaintiff would have had of obtaining a renewed building approval and successfully undertaking a development than would a purchaser at the time of the resumption.

341 By the time of the resumption, worthless structures that had been on the land had been demolished and approval in principle had been obtained from the planning authority for the construction of a substantial building to contain shops and flats. Plans had been prepared by architects who had called and received tenders for the construction of the building. The plaintiff had also sought unsuccessfully to obtain finance to construct the building. At that stage it was contemplating the possibility of a less ambitious development because the approved one had proved to be beyond its financial capacity.

342 His Honour said[321] the test to be applied in determining special value is that laid down by the Privy Council in *Pastoral Finance Association Ltd v The Minister*[322]. Again his Honour thought that because of the information that the plaintiff had at the date of resumption it would have had a better chance of obtaining the fresh building approval which it would have been necessary for it to obtain because the earlier, more ample building approval could not be implemented. His Honour thought that the plaintiff's information and the approval it could not utilize were matters that should sound in special value. His Honour said[323]:

> "Looking at the matter from all aspects and bearing in mind the plaintiff's substantial expenditure on the project over and above the cost of the land, some of which gave the land an added value in its hands, and some of which was not reflected in added value, I am of the opinion that … a prudent purchaser in the position of the plaintiff company would have been prepared to pay for the subject property a sum of £8,500 over and above its market value".

343 On this occasion his Honour acknowledged in effect that some at least of what had been done by the plaintiff would be of utility and value to a purchaser. But his Honour made no attempt to explain what in fact would have been of utility and what would not have been of utility to a purchaser. His Honour's statement of the facts does not reveal why a fully conversant purchaser could not, and would not have been put in possession of all of the information and advantages that the plaintiff was said to have. And indeed there is much in the statement of the facts to suggest that the plaintiff had expended money that not only would a purchaser

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321 (1965) 15 LGRA 201 at 205.

322 [1914] AC 1083.

323 (1965) 15 LGRA 201 at 205.

have been unable to recoup, but also the plaintiff should have been taken to have thrown away because of supervening events quite unrelated to the resumption, such as credit restrictions imposed by the government, changes in the policy of the planning authority, the plaintiff's inability to obtain finance and a consequential need to contemplate a significantly scaled-down project. Nor did his Honour explain why the highest and best use might not have been for the construction of a building that had been approved and was beyond the dispossessed landowner's means. If that were the highest and best use there would have been no need for a notional purchaser to seek an approval for a smaller building.

344 *Baringa* too is a highly questionable decision and on no view can have any valid application to this case.

345 The evidence that the appellants sought to lead on behalf of the respondent when the compensation case was remitted to Cripps J by the Court of Appeal for further consideration was designed in part to exploit the reasoning of Hardie J in *Kennedy Street* and *Baringa*. This was understandable because of the way in which the Court of Appeal had dealt with the appeal. Indeed the Court of Appeal had effectively forced this course upon the parties. The attempt to lead the evidence failed for the reason that Cripps J was satisfied that all allowance that could have been made for special value had been made. Additional reasons why it could not avail the respondent were that *Kennedy Street* and *Baringa* had no application and such of the claims as were embraced by the evidence and were not covered by value assessed by reference to highest and best use, were probably too remote.

346 *Kennedy Street* and *Baringa* received some passing reference by Mahoney JA in the Court of Appeal of New South Wales in *Housing Commission of New South Wales v Falconer*[324]. His Honour was the only member of that Court (Hope and Mahoney JJA; Glass JA dissenting) who referred to them and the case cannot be taken to be, as was submitted by the respondent, an endorsement of them.

347 *Kennedy Street* has been referred to in numerous other cases. Walsh J in *Rosenbaum v Minister for Public Works*[325] thought it might require reconsideration. It was applied in *Chapman v The Minister*[326], but the reasoning in that decision is itself unconvincing, particularly that of Jacobs and Asprey JJA[327] where their Honours allowed some special value in respect of the incorporation of a company for the purposes of carrying through the proposed subdivision by the

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324 [1981] 1 NSWLR 547 at 573.

325 (1964) 82 WN (Pt 2) (NSW) 220 at 229.

326 [1966] 2 NSWR 65.

327 [1966] 2 NSWR 65 at 78.

dispossessed landowner. Barber J in *Altona Estate Pty Ltd v Shire of Altona*[328] declined to follow it. Hardie J himself distinguished it in *Parkes Development Pty Ltd v Burwood Municipal Council*[329]. In Queensland Mr Dodds, a member of the Land Court in that State in *Consolidated Development Pty Ltd v Commissioner of Main Roads*[330] after referring to *Pastoral Finance* applied *Kennedy Street*[331], and in *Yarn Traders Pty Ltd v Melbourne and Metropolitan Board of Works*[332] Starke J stated that whether special value existed was a question of fact, without expressing any disapproval of *Kennedy Street* to which he referred. In *Arkaba Holdings Ltd v Commissioner of Highways* Bray CJ[333] voiced doubt about its correctness whilst in Tasmania in *Fisher v The Minister*[334] Nettlefold J accepted its application there. Cripps J applied *Kennedy Street* in *Wimpey Construction UK Ltd v The Minister*[335] but the facts before his Honour may have justified the inclusion in the compensation of a component for special value without reference to *Kennedy Street*. In *Polegato v Griffith City Council*[336] Stein J referred to *Kennedy Street* with approval. The last case in the line appears to be *Nahum v Roads and Traffic Authority of New South Wales*[337], in which, in my view, Bignold J correctly held that *Kennedy Street* did not establish any principle of valuation law.

348 *Kennedy Street* was not, in my opinion, correctly decided and it should no longer be applied.

349 In reaching the conclusions that Hardie J did in the two cases his Honour thought that he was applying *Pastoral Finance*[338]. Unlike the plaintiffs in *Kennedy*

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328 (1968) 20 *The Valuer* 63 at 69.

329 (1968) 16 LGRA 6 at 12.

330 (1968) 35 QCLLR 109.

331 (1968) 35 QCLLR 109 at 129.

332 [1970] VR 427.

333 [1970] SASR 94 at 102-103.

334 (1980) 38 LGRA 412.

335 (1983) 53 LGRA 75.

336 (1988) 64 LGRA 265.

337 Unreported, Land and Environment Court of New South Wales, 2 November 1990 at 6.

338 [1914] AC 1083.

Street and *Baringa*, the appellant in *Pastoral Finance* had been carrying on its business at the one location for many years and intended to continue in that business indefinitely either there or elsewhere. It found that its activities were expanding beyond the capacity of the existing site to accommodate them. It acquired a very suitable site on Darling Harbour and procured plans and estimates for buildings adapted to its needs there. Before the new premises could be constructed notice of resumption was given.

350 What was accepted by all parties in *Pastoral Finance* was that the resumed site had a special suitability for the use to which the appellant proposed to put it. The case was tried at first instance by a judge sitting with a jury who returned a verdict for £23,550 with a rider, added of their own accord, that they valued the land at £9,950. His Honour entered judgment for £23,550. The Full Court of New South Wales on appeal reduced the verdict to £9,950.

351 The Privy Council was of the opinion that the appellant was entitled to receive compensation based on the value of the land to it. Their Lordships, unlike the Full Court of New South Wales, thought it irrelevant that the appellant's premises had not been constructed by the date of the resumption. But they had great difficulty in arriving at the meaning of the rider volunteered by the jury. All they could say was that it was a figure at which the jury had arrived with regard to some matter the nature of which could not be ascertained from the language used by the jury.

352 Their Lordships said this[339]:

> "It would appear that the evidence of prospective savings and additional profits given at the trial was put forward in support of a claim that the capitalized value of the increase in the profits of the business due to them should be added to the market value of the land".

353 Their Lordships did not think that such a claim could properly be made notwithstanding that the respondent had accepted its availability. It was because the respondent had not urged to the contrary that their Lordships advised that the appeal should be allowed, and the judgment entered at first instance be restored. In these circumstances it is difficult to see how *Pastoral Finance* can be regarded as a complete exposition of the law relating to special value, or as a case which holds that the possibility that the owner might make certain profits from the land but for the resumption is to be treated as irrelevant. So to regard it would be to cast doubt on the availability of the hypothetical building method and also the discounted cash flow method of valuation in any circumstance, and upon the

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339 [1914] AC 1083 at 1088.

correctness of *Eastaway v The Commonwealth*[340], *Australian Provincial*[341] and *Dymocks* [342] and the established practice in compensation courts in this country to receive and act upon such matters. As to the latter their Lordships did accept that savings and additional profits are relevant matters in the assessment of compensation, just as they would be if the dispossessed owner were purchasing the land: the availability of these savings and profits would guide such a person in determining the price which he should pay for it. The case is no more than an authority for this, and for the proposition that one way of testing whether there is "special value" is to ask what the dispossessed owner would pay if he or she were the hypothetical purchaser. This is not the only way of defining or calculating special value and their Lordships do not suggest it is.

354 There is another respect in which *Pastoral Finance* may need explanation. The concept of a price that a dispossessed owner would pay over and above the market price (if he or she were the purchaser) rather than lose the land may not be an entirely reliable guide to what the special value to the dispossessed owner is. In theory all that the notional purchaser need pay is a dollar more than the next available purchaser (without a special interest in the matter) would pay. In the highly artificial construct that the law requires in resumption cases, the formulation of the Privy Council in *Pastoral Finance* may only become workable if the dispossessed owner as notional investor be regarded as having a right to bid or fix a price which included special value. Another way of viewing the formulation of the Privy Council in *Pastoral Finance* is to regard it as a means of ascertaining the value of the property to the owner[343]. Part of the difficulty arises from a need or desire to ensure that an owner is compensated for the loss of value of the property *to the owner*, a value which may not always be the same as the value which the unqualified application of *Spencer's case*, an exchange value or sale in the marketplace, would yield. Sometimes such a need will involve a calculation of what might properly be called special value. The requirement, and I would regard it as a requirement now long accepted by the courts, of the various statutes providing for compensation on resumption, that an owner be paid the value to him or her, may mean that in some cases the direct and exclusive operation of *Spencer's case* may not be possible. No doubt that case will cover most situations because although it assumes a willing vendor (the dispossessed owner) it does not contemplate one who would lightly relinquish a property which had a particular value to him or her for less than that value. Speaking of the provisions of the *Lands*

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340 (1951) 84 CLR 328.

341 *Australian Provincial Assurance Association Ltd v Commissioner of Land Tax* [1942] ALR 156.

342 *Dymock's Book Arcade v Federal Commissioner of Taxation of the Commonwealth of Australia* (1937) 4 *The Valuer* 403.

343 *Horn v Sunderland Corporation* [1941] 2 KB 26.

Acquisition Act 1906-1936 (Cth) Dixon J in *The Moreton Club v The Commonwealth*[344] said: "It must, however, be steadily borne in mind that compensation depends upon the value to the owner dispossessed."

355 It should also be pointed out that in Spencer itself, Isaacs J noted that the "claim for compensation was solely for the value of the land itself, and did not include any claim for damage otherwise"[345]. This was a reference to s 19 of the *Property for Public Purposes Acquisition Act* 1901 (Cth) which permitted the inclusion of claims for damage caused by severance from other land of the claimant, and by the exercise of any statutory powers otherwise injuriously affecting that other land.

356 I would respectfully agree with what Dixon J said in *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd*[346]:

> "[T]here is some difference of purpose in valuing property for revenue cases and in compensation cases. In the second the purpose is to ensure that the person to be compensated is given a full money equivalent of his loss, while in the first it is to ascertain what money value is plainly contained in the asset so as to afford a proper measure of liability to tax. While this difference cannot change the test of value, it is not without effect upon a court's attitude in the application of the test. In a case of compensation doubts are resolved in favour of a more liberal estimate, in a revenue case, of a more conservative estimate."

357 There are two other respects in which the Full Federal Court fell into error. Let it be assumed for present purposes that there was such a principle as a head start principle and that it gave some special value to the respondent. When the matter came back before Cripps J on remitter from the Court of Appeal his Honour said this:

> "When I determined the case, I took into account expressions of interest etc referred to by Handley JA in his judgment … Thus, I have done that which the Court of Appeal said I was entitled to do. I also had regard to the size of the land and its location. As I understand the Court of Appeal, those attributes go to 'market value' and not to 'special value'. I took into account the size of the land and its location, amongst other matters, in determining what was the 'value to the owner'. That is, these matters were taken into

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344 (1948) 77 CLR 253 at 257.

345 (1907) 5 CLR 418 at 438.

346 (1947) 74 CLR 358 at 373-374.

> account in deciding what a person in the position of Yates would have paid for the site sooner than not obtain it. I did not, however, take it into account twice. I accept that I did not adequately disclose my reasons in the judgment."

A little later his Honour went on to say that in an endeavour to put an end to the litigation, he would indicate that he would fix (and did fix) the sum of approximately $35 per square metre on the Harbour Street property as the:

> "'special value' component of the compensation. That amounted to approximately $500,000 being the amount of money over and above the 'market value' a person in the position of Yates would have paid sooner than not obtain the land because of the special value the land had to Yates by reason of the work done and expenditure incurred and referred to in the decision of Handley JA."

358 As I have already said this was an item which appropriately in this case should have been treated as a component of a sale price on the basis of highest and best use of the land. However his Honour chose to treat it as a component of special value. He had therefore already done precisely what the majority in the Court of Appeal had held should be done. There was not the slightest reason to suppose that his Honour had not therefore allowed special value. The Full Court was not sitting on appeal from Cripps J. There was no appeal heard from Cripps J on this second occasion and the compromise which was effected of the appeal that was actually filed but not decided, was, as I have already explained, effected having regard to matters which had no connexion with special value properly so called. The Full Court effectively ignored what his Honour Cripps J had done and misunderstood the basis of the settlement of the second appeal to the Court of Appeal.

359 I have previously mentioned the passage in the reasons of the Full Court in which their Honours say that the parties lost sight of the real issue between them[347]. I do not think that they did. It is not for a court to invent, or find issues which the parties have not invited it to decide or which it is unnecessary for a court to decide. What Barwick CJ said in *Ratten v The Queen*[348] in the context of a criminal trial is no less true of a civil trial:

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347 (1998) 85 FCR 84 at 97.

348 (1974) 131 CLR 510 at 517. See also *Whitehorn v The Queen* (1983) 152 CLR 657 at 682 per Dawson J.

> "Each [of the protagonists] is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked".

Lawyers' immunity

360 It only remains to refer to the way in which the Full Court dealt with the appellants' submissions that they were in any event entitled to rely upon the decision of this Court in *Giannarelli v Wraith*[349]. That can be done briefly.

361 As Branson J held at first instance, that case was applicable. In doing so her Honour was impressed, as I am, by a statement of Gleeson CJ in *Keefe v Marks*[350] in which his Honour stated that:

> "action or inaction prior to the commencement of the hearing it concerns [is] a matter ... intimately connected with the work ultimately done in Court, that is to say, the presentation of [the case] and any consequential relief to which [a party] was also entitled [and]"

attracted the immunity of which Mason CJ in *Giannarelli* said[351]:

> "[T]he common law has for a very long time recognized that the barrister is not subject to … a general duty of care. The immunity ... is supported by powerful authority, ancient and modern, in England, Scotland and Ireland[352]."

362 As Mason CJ also pointed out[353]: "[T]he exception which the law creates is not to benefit counsel but to protect the administration of justice."

363 *Giannarelli* is a recent decision of this Court. It is based on sound policy and legal grounds. No occasion arises for its reconsideration now. It would be applicable here as Branson J held. The Full Court seems to have assumed that simply because the work the lawyers did was done over a long period of time, that in some way divorced it from work done closer in time to the hearing even though

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349 (1988) 165 CLR 543.

350 (1989) 16 NSWLR 713 at 719.

351 (1988) 165 CLR 543 at 555.

352 *Rondel v Worsley* [1969] 1 AC 191; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198.

353 (1988) 165 CLR 543 at 557.

the former answered the description of work intimately connected with the forthcoming trial.

364 The respondent's case against the lawyers purported to be not only in negligence but also in deceptive conduct and breach of the *Fair Trading Act*. Subsequently a further claim for breach of fiduciary duty was somewhat unconvincingly articulated. All were rejected by Branson J. The last three as I have earlier suggested probably owed their assertion in this case to a perception that the immunity might only apply to a claim in negligence. Such a perception is not well founded.

365 In *MacRae v Stevens*[354], Beazley JA, with whom Meagher JA and Priestley JA agreed, said that collateral challenges designed to circumvent *Giannarelli* must fail. Accordingly in this case had any of the causes of action other than negligence in fact been made out against the appellant barrister they too would not have succeeded because the immunity as a matter of public policy would extend to him, and a proper construction of the two statutes involved dictates no different a result.

366 Because the solicitors were not negligent or in breach of the *Trade Practices Act* (assuming it applied to them) or the *Fair Trading Act* it is unnecessary to consider whether they too were entitled to immunity in the circumstances; or the other point argued by the solicitor appellants, that in terms they limited their obligations under their retainer[355].

367 These appeals must be allowed. The judgment of the primary judge (with one exception) should be restored and the respondent should pay the appellants' costs of the application for special leave and of this appeal. The exception is this. Branson J made an order that Mr Yates personally be liable for the appellants' costs on an indemnity basis. Mr Yates appealed against this order. It was unnecessary for the Full Court to deal with this appeal because the appeal to the Full Court succeeded. The appeal by Mr Yates with respect to this order should be remitted to the Full Court of the Federal Court for further argument and decision.

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354 [1996] Aust Torts Rep ¶81-405.

355 *Astley v Austrust Ltd* (1999) 73 ALJR 403 at 423 per Gleeson CJ, McHugh, Gummow and Hayne JJ; 161 ALR 155 at 181-182.