

**Land and Environment Court  
New South Wales**

**Medium Neutral Citation:** **Bligh v Minister Administering Environmental Planning and Assessment Act [2011] NSWLEC 220**

**Hearing dates:** 31 October - 8 November 2011, 10 -11 November 2011

**Decision date:** 25 November 2011

**Jurisdiction:** Class 3

**Before:** Biscoe J

**Decision:** Compensation for disturbance loss under s 59(f) Land Acquisition (Just Terms Compensation Act) 1991 for value of business on retained land assumed to be extinguished by compulsory acquisition assessed at \$1,350,000.

**Catchwords:** COMPULSORY ACQUISITION:- compensation for disturbance loss under s 59(f) Land Acquisition (Just Terms Compensation) Act 1991 - assuming compulsory acquisition extinguishes business whether value of business compensable as disturbance loss under s 59(f) is current value to owner or market value at acquisition date - valuation method capitalisation of future maintainable earnings - determination of future maintainable earnings, capitalisation rate and years multiple.

**Legislation Cited:** Clean Waters Act 1970  
Land Acquisition (Just Terms compensation) Act 1991, ss, 55, 56, 59, 66,

**Cases Cited:** Commissioner of Highways v Shipp Bros Pty Ltd (1978) 19 SASR 215  
Commonwealth v Reeve (1949) 78 CLR 410  
Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111  
Eastaway v Commonwealth (1951) 84 CLR 328  
Hua v Hurstville City Council [2010] NSWLEC 61  
Leichhardt Council v Roads and Traffic Authority (NSW) [2006] NSWCA 353, 149 LGERA 439.

**Texts Cited:** ALRC Report No 14, Lands Acquisition and Compensation, (1980)  
Lonergan, The Valuation of Businesses, Shares and Other Equity (4th ed)  
Rost and Collins, Land Valuation and Compensation in Australia, (3rd ed 1984)

**Category:** Principal judgment

**Parties:** 31061-63/10  
Richard Bligh (Applicant)  
Minister administering the Environmental Planning and Assessment Act (Respondent)

31068/10  
Erolhold Pty Ltd trading as Bringelly Pork and Bacon Co (Applicant)  
Minister administering the Environmental Planning and Assessment Act (Respondent)

**Representation:** COUNSEL:  
Mr T Robertson SC and Mr M R Hall (Applicants)  
Ms S Duggan SC and Mr S Nash (Respondent)  
SOLICITORS:

## JUDGMENT

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## INTRODUCTION

- 1 These four related proceedings are objections under s 66 of the *Land Acquisition (Just Terms compensation) Act 1991* ( **Just Terms Act** ) to the compensation offered by the respondent Minister for the compulsory acquisition on 23 July 2010 of the rear part of three adjoining parcels of land at Leppington owned by the applicants Richard and David Bligh who are brothers. They own and control Erolhold Pty Ltd, the third applicant, which operated a meat processing, wholesaling and piggery business on the parent land. The acquired land was acquired for the purpose of the South West Rail Link.

- 2 The four proceedings are as follows:
  - (a) a claim by Richard and David Bligh for compensation for the acquisition of an area of land owned by them as tenants in common comprising 9,963 square metres at the rear of 171 Bringelly Road, Leppington, which was known prior to the acquisition as Lot 1 in DP 406057 ( **171** ).
  - (b) a claim for compensation for compensation by Richard Bligh for the acquisition of an area of his land comprising 1,141 square metres at the rear of 173 Bringelly Road, Leppington, which was known prior to the acquisition as Lot A in DP 394927 ( **173** ).
  - (c) a claim for compensation by David Bligh for the acquisition of an area of his land comprising 587.8 square metres at the rear of 177 Bringelly Road, Leppington, which was known prior to the acquisition as Lot X in DP 374721 ( **177** ).
  - (d) a claim by Erolhold trading as Bringelly Pork and Bacon Company for disturbance of its business conducted on the acquired and retained land as a result of the acquisition.
- 3 The parent land and the acquired land are shown in the plan in the annexure to this judgment.
- 4 Most of the parent land, including the whole of the resumed land, is informally leased by Richard Bligh and David Bligh to Erolhold. Erolhold operated a vertically integrated piggery, meat processing and wholesaling business on the parent land. Erolhold processes the carcasses of pigs it raises on the premises as well as carcasses of pigs purchased from outside suppliers. Some are sold as pigs for spits. The carcasses are processed into small goods and cured pork products of the highest quality.
- 5 The treated effluent waste water from the piggery on the retained land is spray irrigated on the resumed land and on the retained land. That and cattle grazing was the only purpose to which the resumed land was put.
- 6 As a result of the resumption, Erolhold's business will be extinguished unless an alternative waste water treatment system is introduced on the retained land.
- 7 The applicants' claims are for the market value of the resumed land under s 55(a) of the *Just Terms Act* and for disturbance loss under ss 55(d) and 59.
- 8 The main disturbance claim is by Erolhold under s 59(f) for either the cost of a new waste water treatment system on the retained land to enable its business to continue on the retained land; or, alternatively, the current value of the business to Erolhold on the basis that it is extinguished.
- 9 The respondent's competing contention concerning Erolhold's s 59(f) disturbance loss claim is that the resumption will extinguish its business and, on that basis, the quantum of its s 59(f) claim is the market value of the business as at the resumption date.
- 10 During the hearing, the parties' waste water experts produced a further joint report in which they agreed on a method of implementing a waste water disposal system on the retained land (Option 4 referred to at [ 30 (e)] below) which would allow the business to continue. This prompted the applicants to apply for an adjournment of the hearing to enable them to seek development consent for that system. The applicants perceived that under the planning laws there was only a limited time within which such consent might be granted. The respondent agreed to an adjournment provided that in the meantime the Court determined as a preliminary question the quantum of Erolhold's s 59(f) disturbance loss for the value of the business, on the assumption that the resumption would extinguish the business. The respondent contends that under s 59(f) the reasonableness of the cost of continuing the business with a new waste water system on the retained land should be assessed by comparing that cost with s 59(f) extinguishment compensation based on the value of the business.

- 11 In my view, while the value of the business may be compared in this way, the comparison is not necessarily decisive. Erolhold is seeking to continue its family business by relocating to the retained land, at a cost, the part of the business that was on the acquired land. Some latitude is available to the Court in approving as reasonable under s 59(f) the cost of relocating a family business, even if the cost substantially exceeds the value of the business on the alternative extinguishment basis: *Commissioner of Highways v Shipp Bros Pty Ltd* (1978) 19 SASR 215 at 222 (Wells J); *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at 126 - 127 (PC); *Hua v Hurstville City Council* [2010] NSWLEC 61 at [46] - 49] (Pain J).
- 12 If development consent is obtained, the applicants anticipate that the parties will agree to appoint an expert to determine the capital cost and operating cost and to be bound by the expert's decision, thus avoiding the need to litigate that quantum issue. However, I was told that if the respondent does not accept that those costs are reasonable, then it will be necessary to ask the Court to determine whether they are reasonable under s 59(f). I was also told that resolution of the preliminary issue coupled with the development consent which the applicant hopes to obtain, could lead to resolution of the entire proceedings. In the circumstances I considered it appropriate to accede to the parties' request that I order determination of the preliminary question and stand over the balance of the proceedings.
- 13 Consequently, by consent, I made an order at the hearing for determination of the following preliminary question concerning Erolhold's s 59(f) disturbance claim, which (as discussed with the parties at the time) is intended to permit the parties to put their competing s 59(f) valuation submissions referred to at [ 8 ] and [ 9 ] above.
- On the assumption that the effect of the resumption is that the current operations of the business will be extinguished, pursuant to s 59(f) of the Land Acquisition (Just Terms Compensation) Act 1991 what is the amount of the financial cost incurred or that might reasonably be incurred relating to the value of the business by reason of that extinguishment?
- 14 Thus, I am now proceeding to determine the preliminary issue.
- 15 In my opinion, under s 59(f) Erolhold is entitled to the current value of the business to it on the assumption that it is extinguished by the resumption. I determine that value in the amount of \$1,350,000. Accordingly, I answer the preliminary question: \$1,350,000.
- 16 I acknowledge the assistance of Acting Commissioner Miller.

## STATUTORY CONTEXT

- 17 The *Just Terms Act* provides:

### "3 Objects of Act

(1) The objects of this Act are:

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

(b) to ensure compensation on just terms for the owners of land that is acquired by an authority of the State when the land is not available for public sale, and

...

### 10 Statement of guaranteed acquisition at market value

(1) When, on request by or on behalf of an owner or prospective purchaser of land, an authority of the State gives a person written notice to the effect that the land is affected by a proposal for acquisition by the authority, the notice must contain the following:

(a) a statement that the *Land Acquisition (Just Terms Compensation) Act* 1991 guarantees that, if and when the land is acquired by ( *insert name of authority* ) under that Act, the amount of compensation will not be less than market value (assessed under that Act) unaffected by the proposal,

...

### 54 Entitlement to just compensation

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

...

#### **55 Relevant matters to be considered in determining amount of compensation**

In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):

(a) the market value of the land on the date of its acquisition,

...

(d) any loss attributable to disturbance,

...

#### **56 Market value**

(1) In this Act:

*market value* of land at any time means the amount that would have been paid for the land if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer, disregarding (for the purpose of determining the amount that would have been paid):

...

#### **59 Loss attributable to disturbance**

In this Act:

*loss attributable to disturbance of land* means any of the following:

(a) legal costs reasonably incurred by the persons entitled to compensation in connection with the compulsory acquisition of the land,

(b) valuation fees reasonably incurred by those persons in connection with the compulsory acquisition of the land,

(c) financial costs reasonably incurred in connection with the relocation of those persons (including legal costs but not including stamp duty or mortgage costs),

(d) stamp duty costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the purchase of land for relocation (but not exceeding the amount that would be incurred for the purchase of land of equivalent value to the land compulsorily acquired),

(e) financial costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the discharge of a mortgage and the execution of a new mortgage resulting from the relocation (but not exceeding the amount that would be incurred if the new mortgage secured the repayment of the balance owing in respect of the discharged mortgage),

(f) any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition."

## **THE LAND**

- 18 Prior to the resumption, 171 was a rectangular parcel of land with a breadth of 46.63 metres and a depth of 511.42 metres. Its overall area was 2.3803 hectares. On 23 July 2010 the respondent compulsorily acquired the rear part of 171, being 9,963.2 square metres, leaving a residue of 1.384 hectares. The resumed land is now known as Lot 14 in DP 1227208 and the residue land as Lot 18 in the same deposited plan. Mr Richard Bligh lives on 171 in a detached single storey house on the residue part near the street frontage.
- 19 Prior to the resumption, 173 had an irregular shape. At the street frontage its width was 28.87 metres. Further from the street frontage its width increased to 59.35 metres. Its depth was 511.41 metres and its overall area 2.024 hectares. On 23 July 2010 the respondent compulsorily acquired the rear part of 173 being an area of 1.141 hectares. That left a residue of 8,831.4 square metres. The resumed land is now known as Lot 14 in DP 1227208 and the residue land as Lot 19 in the same deposited plan.
- 20 Prior to the resumption, 177 was a rectangular parcel of land with a width (and street frontage to Bringelly Road) of 30.48 metres and a depth of 331.93 metres. It has an area of 1.012 hectares. Mr David Bligh, his wife and two daughters live on 177 in a detached single storey house on the residue part near the road frontage. He has lived on the land for the whole of his life. On 23 July 2010 the respondent compulsorily acquired the rear part of 177, being an area of 587.8 square metres, leaving a residue of 9,530.3 square metres. The resumed land is now known as Lot 13 in DP 1127208 and the residue land as Lot 20 in the same deposited plan.
- 21 The result is that the three parcels of land, which have been farmed and operated together, have gone from being a relatively deep but narrow rectangle with improvements erected close to the road, and vacant

agricultural land used for irrigation and grazing at the rear, to being a truncated rectangle cut off almost behind the existing improvements, by a line which now dissects the aerobic pond. Other than that part of the aerobic pond, none of the improvements are on the resumed land.

## **EFFECT OF RESUMPTION**

- 22 Erolhold's business utilised its effluent treatment plant to spray irrigate the effluent produced by the pigs which are bred by the business. The treated effluent was spray irrigated over 171 and 173 including the resumed portions. The spray irrigation area is approximately 3 hectares.
- 23 As a result of the resumption, the business will not be able to operate the spray irrigation part of the effluent treatment plant as there will not be sufficient area available to spray irrigate the effluent within a safe distance from the dwellings on the retained land.
- 24 Being unable to operate the effluent treatment plant will result in the pig breeding aspect of the business ceasing to operate unless suitable alternative plant is introduced.
- 25 The effluent disposal system is an integral component of the business as it enables the herd to be bred and reared in isolation from major pig population areas.
- 26 The special location and proximity to Westmead Hospital, which is 50 minutes away, is why the business is a leading commercial supplier of cellular material for diabetes treatment. Accordingly, the loss of the land for use by the current effluent treatment plant will result in a loss of a valuable strategic market.
- 27 Loss of the ability to produce their own high quality, disease - free pigs also means the loss of a major ingredient for the business.
- 28 In February 2011 David Bligh had a meeting with Camden Council's Manager of Strategic Planning and Manager of Development, to discuss possible options available to continue operating the business. He was advised that when they cease breeding their own pigs they would cease being a rural industry, as defined, and therefore would be required to lodge a new development application with the Council for the meat processing plant.

## **SUMMARY OF VALUATIONS**

- 29 As regards Erolhold's business, there is an issue as to whether disturbance loss should be awarded on the basis that it will be extinguished by the resumption or on the basis that it will wholly or partly continue with a new waste water disposal system on the retained land.
- 30 In summary, on those alternative bases, the parties and their experts respectively contend for the following market value of the resumed land and disturbance loss:

### **(a) Market Value - Extinguishment of the business**

<b><i>Before and after method</i></b>					
<b>Party</b>	<b>Expert</b>	<b>Property</b>	<b>Before Value</b>	<b>After Value</b>	<b>Compensation for market value</b>
Applicants	Kent Wood	171 - 177	\$9,524,350	\$2,836,327	\$6,700,000
Respondent	Adrian Watt	171 - 177	\$2,886,000	\$1,932,000	\$954,000

**(b) Market Value - Continuation of the business**

<b><i>Piecemeal approach</i></b>						
<b>Party</b>	<b>Expert</b>	<b>Property</b>	<b>Area</b>	<b>Rate psm</b>		<b>Compensation for market value</b>
Applicants	Kent Wood	171 - 177	2.1961 ha	\$62		\$1,372,075
Respondent	Adrian Watt	171 - 177	10,961 sq m (unconstrained)	\$75	\$822,075	
			11,000 sq m (flood liable)	\$50	\$550,000	\$1,372,075

**(c) Market value - Continuation of meat processing facility/extinguishment of piggery**

<b><i>Before and after method</i></b>					
<b>Party</b>	<b>Expert</b>	<b>Property</b>	<b>Before Value</b>	<b>After Value</b>	<b>Compensation for market value</b>
Respondent	Adrian Watt	171 - 177	\$4,987,500	\$3,285,127	\$1,702,373

**(d) Disturbance - Compensation for extinguishment of business**

<b>Party</b>	<b>Expert</b>		<b>Compensation for extinguishment of business</b>
Applicants	Phillip Edmonds	Option 1 - Assuming Erolhold holds an equitable lease and an assumed rent of \$150,000 per annum is paid	\$2,519,622
		Option 2 - Assuming Erolhold holds an equitable lease and pays no rent	\$3,757,122
		Option 3 - Assuming Erolhold is a licensee and pays no licence fee	\$385,000
Respondent	Paul Russell		\$385,000

**(e) Disturbance - compensation for continuation of business**

<b>Party</b>	<b>Expert</b>	<b>Waste Water Option</b>	<b>Compensation for continuation of business</b>
Applicant/Respondent (per supplementary joint report of Dr Patterson, Mr Bristow & Dr Bacon (dated 27 October 2011))		Option 1 - Modified Option 2 from Simmonds and Bristow supplementary report	\$7,914,233
		Option 2 - Modified Option 5 from Simmonds and Bristow supplementary report	\$7,197,985
		Option 3 - Existing Treatment System Modified, Effluent Storage and Offsite transfer of effluent from the aerobic pond	\$5,509,708
		Option 4 - Sophisticated treatment then irrigation of effluent on site	\$2,699,628

## **HISTORY OF THE LAND AND BUSINESS**

- 31 For almost 50 years the Bligh family have conducted a piggery on the land. Richard and David Bligh and several members of their families work in the business.
- 32 On 13 December 1978 the Council of the Municipality of Camden issued an approval for the erection of a pig shed on 171.
- 33 In 1981 Richard purchased 173 to increase the size of the business operations.
- 34 On 7 September 1983 the State Pollution Control Commission (now known as the NSW Department of Environment, Climate Change and Water) issued a licence under the *Clean Waters Act 1970* (NSW) to construct an effluent disposal system on 171 and 173.
- 35 On 28 September 1983 the council issued a building approval for the construction of an additional pig shed on 171.
- 36 On 6 May 1988 the council issued a development consent for the erection of another pig shed and rationalisation of the activities of the piggery on 171.

- 37 On 24 August 1989 the council issued a development consent for the erection of a weaner shed to rationalise the existing piggery activities on 171.
- 38 On 28 September 1992 the council issued a development consent for a meat processing plant on Lot 1.
- 39 On 1 November 1995 the council granted development consent for a farm machinery shed on 171.
- 40 On 23 September 1999 the council granted development consent for alterations and additions to the meat processing plant.
- 41 On 13 February 2001 a construction certificate was issued for alterations and additions to the meat processing plant.
- 42 In November 2007 an officer of the NSW Department of Planning and a property valuer for the Department inspected the property. They discussed with David Bligh a land swap between the (subsequently) resumed land and land next door. Subsequently, the applicants engaged Pacific Environmental to prepare a report on the costs involved in the transfer of the waste treatment plant to land the subject of the proposed land swap. The Department eventually decided not to pursue that process.

## **THE BUSINESS**

- 43 Erolhold's business on the land is a vertically integrated pork sales, packing and processing operation, along with related primary production activities and wholesale operations. The business has the following strands:
  - (a) a piggery, that is to say, an agricultural business in which pigs are bred and reared. The pigs are housed in four animal sheds on the retained land on 171 behind the meat processing plant. The animal sheds comprise (i) a farrowing shed where the piglets are born and stay with their mother for about four weeks; (ii) a weaner shed where the piglets stay from about four to ten weeks; (iii) a grower shed where they stay until they are of a size needed by a purchaser or the business up to about 20 weeks; and (iv) a sow and boar shed, which is for mating purposes;
  - (b) sale of piglets for medical uses including tissue transplants and medical and pharmaceutical research. This can include sale of adult pigs, although most such sales are of piglets, some at a day old;
  - (c) processing of the pigs reared on the site and slaughtered at a local abattoir, as well as pig carcasses purchased from outside, into pork, bacon and associated smallgoods. This occurs in a meat processing plant in a separate building on the retained land on 171. The meat processing plant includes cool rooms and smoking rooms;
  - (d) wholesaling of the products of that plant through a sales area at the front of the meat processing plant;
  - (e) breeding and sale of cattle. They were bred and grazed on the retained and acquired land. They are both sold as live cattle and "killed for rations", which is to say, slaughtered and returned for use within the meat processing plant;
  - (f) food tourism - the hosting of tours for people interested in observing the operation of farming, food production or food processing operations;
  - (g) an on - site water treatment plant for the effluent from the pigs reared on site. The plant includes a solids separator, anaerobic and aerobic treatment ponds and solids and processing facility. The treated effluent was spray irrigated to an area that occupies the rear unbuilt portions of at least 171 and 173;
  - (h) worm farming on the retained land. The solid waste from the on - site waste water treatment plant is used to cultivate worms. The resultant sales are of worms (for fishing bait), worm castings or

compost produced by the worms (to nurserymen) and fresh manure (to other worm farmers).

- 44 Sows are usually mated when they are about ten months old. A sow is pregnant for about 16 weeks and 3 days. On average, each sow produces 2.2 to 2.5 litters per annum. The average size of a litter is between 10 and 11 piglets. The mortality rate of piglets is about 2 to 3 per cent, which is much less than the industry standard of about 10 per cent and the cottage industry standard of about 30 per cent. On the evidence, the lower mortality rate for the business is due to its very high health status, compared with the rest of the industry, freedom from disease and good husbandry. In that regard, twice daily, under grated - floor flushing of the sheds is significant.
- 45 The business adheres to an internationally recognised comprehensive quality assurance system from the paddock to the plate. The company's policy is to produce animals and meat of the highest possible standard, to specifications dictated by its customers, in an economically sustainable way.
- 46 The food safety plan of the business adheres to a range of regulatory Acts, regulations and standards.
- 47 The pigs bred by the business were originally sourced from a Queensland supplier. They are from traditional breeds and are free from hormones, disease and infection. The source of the pigs bred by the business is recognised in Australia and internationally as being one of the highest health status herds.
- 48 The business utilises modern scientific methods and the following biosecurity measures to ensure and maintain the quality of the pig herd:
- (a) the use of superior animal genetics;
  - (b) regular health checks, including regular post mortem inspections, and herd monitoring by a specialist pig veterinary surgeon;
  - (c) strict quarantine procedures for staff and visitors. No live animals are introduced;
  - (d) insect and pest control programs;
  - (e) feed and farm inputs are sought from reputable or licensed suppliers only.
- 49 The business employs Richard and David Bligh (second generation farmers), and Timothy Bligh and Andrew Bligh (third generation). It also employs an apprentice butcher and, part - time, a number of other members of the Bligh family. David Bligh is the senior manager except for the animals, which Richard Bligh manages.
- 50 Due to the isolated location of the Land (from other piggeries) and the superior systems adopted by the business, there is a much lower potential for disease outbreak in the pigs. Pigs are considered high risk for the introduction of infections such as swine dysentery, enzootic pneumonia, pleuropneumonia, mange and in rarer cases bovine spongiform encephalopathy, which is commonly known as mad cow disease. The type of breed and the strict biosecurity adopted by the business therefore increases the value of the pigs produced by the business.
- 51 The pigs produced by the business are particularly valuable for use in medical testing as they are disease and hormone free. Approximately 250 piglets per annum are purchased by Westmead Hospital for use in diabetes research and treatment. In co - operation with Professor Hawthorne, they are developing the production models for the multiplication of pig pancreas cells for transplantation into humans.
- 52 The business supplies other medical and pharmaceutical users such as the Australian Defence Force, which purchase animals for surgical training purposes ie treatment and first aid of gunshot and explosion wounds.

- 53 The business is Sydney's largest supplier of whole pigs for spit roasts. Approximately 200 whole pigs are supplied each week in peak demand. These pigs are also used for traditional and religious events
- 54 Erolhold has the highest level meat processing licence which permits it to produce speciality fermented meats. Fermented meat products can only be produced from fresh meat. Fresh meat is required as it develops a particular flavour when properly fermented. Accordingly, the breeding of hormone free pigs, and operating a meat processing plant which is licensed to produce fermented meat products, enables it to produce handcrafted high end gourmet pork products such as fermented salami, prosciutto and pancetta which can be sold at higher prices.
- 55 Having diverse markets for speciality products also enables utilisation of the entire pig carcass. The business produces and sells whole carcasses through to individual pieces which people may wish to buy to make things like home made salami or sausages.
- 56 The pigs bred and reared on - site are better than organic because they are virtually disease and hormone free. This allows the business to develop a sustainable price structure for superior quality meats. Domestically, the potential for organic, and in their case better than organic, meat products is becoming increasingly popular among affluent and health conscious consumers.
- 57 The type of breed and strict biosecurity measures ensure a very high level of premium quality meat which also attracts food industry specialists and international visitors. The business was also recently part of the Sydney International Food Festival.
- 58 Prior to the resumption it had been a long term business goal to:
- (a) continue and increase production of the herd for medical purposes;
  - (b) increase marketing of handcrafted high quality products to both domestic and international markets;
  - (c) further develop the specialised niche market for "better than organic" pork products to generate greater demand and sale of speciality products and, in turn, larger profit;
  - (d) increase the number of gourmet food groups who tour the business so they can sample premium products and see the unique production system;
  - (e) continue and increase supply to farmers markets with unique sustainable products.

## **BUSINESS VALUATION**

- 59 On the assumption that the resumption will extinguish the business, it is common ground that loss of business value is compensable under s 59(f) of the Just Terms Act. However, the parties are divided as to the type of value and the date as at which it is to be assessed. The applicants submit that under s 59(f) Erolhold is entitled to the current value of the business to Erolhold. The respondent submits that under s 59(f) Erolhold is entitled to the market value of the business as at the acquisition date.
- 60 The business valuers, Mr Phillip Edmonds for the applicant and Mr Paul Russell for the respondent, both said in their joint report that they calculated "the value" of the business as at the resumption date. In their evidence generally, both gave the impression that they meant, and addressed, market value. It is difficult to discern a commitment by Mr Edmonds to determining the value of the business to its owner.
- 61 The valuers agreed that the appropriate method of valuing the business is by capitalisation of estimated future maintainable earnings per annum (**FME**). FME is the level of profits per annum which, on average, a business can expect to maintain in real terms, notwithstanding the vagaries of the

economic cycle. After adjustments, next year's profits, current year's profits, prior year's profits, or an average of the last few year's profits may be adopted as FME. The selection is a matter of judgment, depending on the circumstances. See Lonergan, *The Valuation of Businesses, Shares and Other Equity*, (4th ed) (which both experts cite) at 34 - 35. For example, in *Eastaway v The Commonwealth* (1951) 84 CLR 328 at 338 - 339 the plaintiff's experts averaged profits for five years, the defendant's experts averaged profits for three years, and the judge preferred the former and disagreed with the capitalisation rate of all experts.

- 62 Capitalisation converts FME into value using a years multiplier derived from an appropriate capitalisation rate. The capitalisation rate selected should be "the rate of profit [that] would be a fair return on capital invested in such a business, for the assumption is that a reasonable vendor would be willing to sell the business and a reasonable hypothetical purchaser would be willing to purchase it for a capital sum which would return this rate of profit": *Eastaway v Commonwealth* (1951) 84 CLR 328 at 340; Rost and Collins, *Land Valuation and Compensation in Australia*, (3rd ed 1984) 526 - 529. A years purchase multiplier may be derived by dividing 100 by the selected capitalisation rate. For example, if the selected capitalisation rate is 20 per cent, then the years purchase multiplier is 5 (100 divided by 20). The market value of the business is then calculated by multiplying FME (per annum) by 5.
- 63 Each valuer determined a range of values which significantly differ. The differences are because each adopted a different FME and a different years multiplier.
- 64 In determining FME, the valuers adjusted historical earnings before interest and tax (**EBIT**). EBIT is normally used in order to remove the costs of particular debt levels, depreciation and amortization costs that may not be appropriate to a future purchaser.
- 65 The valuers' main adjustments were substitution of notional rent (in fact Erolhold paid no rent) and notional wages for those actually paid. The valuers differed significantly as to the quantum of notional rent and wages.
- 66 My approach is as follows for the reasons hereafter stated:
- (a) I accept Mr Russell's adjusted historical EBITs; assess FME as the average of his adjusted EBITs for the three financial years 2008 to 2010; disagree with the earnings multiple of both valuers; and, on that basis, assess market value at the resumption date;
  - (b) in my opinion, under s 59(f) Erolhold is entitled to the current financial value of the business to Erolhold, which should be reflected in a premium over resumption date market value.

## **Basis of value**

- 67 It is common ground that the value of the business, if extinguished by the resumption, is recoverable as loss attributable to disturbance under s 59(f). In other words, it is common ground that the value of the business falls within the s 59(f) rubric of financial costs incurred, or that might reasonably be incurred, relating to the actual use of the land, as a direct and natural consequence of the acquisition.
- 68 However, as I have noted, the parties are divided as to the basis of that value. The applicants contend that under s 59(f) the value of the business to be assessed is its value to the owner. The respondent contends that under s 59(f) the value of the business to be assessed is its market value at the resumption date.
- 69 Before the *Just Terms Act*, the unifying concept of resumption legislation was "value to the owner". Under this rubric sat both the value of the acquired land at the acquisition date and loss attributable to disturbance. Market value of the acquired land was, in most cases, the way of computing its value to the owner. However, the unifying concept was commonly applied to increase the

amount of compensation over market value when the land had a positive special value to the owner. The unifying concept could also be applied to reduce the compensation when the land had a negative special value to the owner. See *Leichhardt Council v Roads and Traffic Authority (NSW)* [2006] NSWCA 353, 149 LGERA 439 at [24] - [32] per Spigelman CJ; ALRC Report No 14, *Lands Acquisition and Compensation*, (1980) Ch 9. An example of the application of the former unifying concept is found in *Eastaway v The Commonwealth* (1951) 84 CLR 328 at 338 where the High court held that the plaintiff was "entitled to the value of the land to it". Similarly, in *Commonwealth v Reeve* (1949) 78 CLR 410 at 428 Dixon J addressed the issue of compensation for a coffee shop business extinguished by a resumption, saying: "Ultimately what is to be found is the value to the owner of the interest taken. All the actual and potential advantages to the proprietor of the interest enter into that value to him...But it is the money equivalent to him found to be contained in the interest expropriated that must be assessed".

- 70 The *Just Terms Act* has taken away "value to the owner" as a unifying concept. Now, s 55 exhaustively specifies the matters to which regard must be had when determining compensation, subject to the just compensation override in ss 3(1)(b) and 54(1), the guaranteed minimum compensation of market value of the acquired land in ss 3(1)(a) and 10(1)(a), the market value disregard in s 56 and the market value limitation in s 61.
- 71 The only context in which the *Just Terms Act* expressly employs the concept of "market value" is in relation to the acquired land: ss 3(1)(a), 55(a), 56, 61. It requires the market value of the acquired land to be determined as at the date of its compulsory acquisition. Apart from market value, the only context in which the *Act* expressly employs the concept of "value" is in relation to "special value" of the acquired land to the owner, and any increase or decrease in the "value" of any other adjoining or severed land of the owner: ss 55(b) and (f), 57.
- 72 In contrast, s 55(d) is concerned with "loss" attributable to disturbance, which is defined in s 59 by reference to various "costs" and "fees". Neither s 55(d) nor s 59 expressly refer to "market value" or "value". Relevantly, s 59(f) is concerned with certain "financial costs".
- 73 The *Just Terms Act* deconstructs the former unifying concept of value to the owner by expressly anchoring compensation for the value of the acquired land to market value, at the acquisition date. However, it takes no such step in relation to disturbance loss. In my view, in the area of disturbance loss, the concept of value to the owner, where applicable, has survived, as suggested by the use of the words "loss", "costs" and "fees" in ss 55(d) and 59. Thus, where disturbance loss is referable to the value of a business extinguished by a resumption and compensable under s 59(f) - as is common ground in the present case - that value is the value to the owner, which may be more than the market value.
- 74 Market value is concerned with the hypothetical, whereas disturbance loss is concerned with the actual market value.
- 75 Market value is a concept referable to a hypothetical sale between notional parties, as at the acquisition date, to which the dispossessed owner is merely an onlooker.
- 76 Loss attributable to disturbance, comprising the costs (and fees) referred to in s 59, is concerned with the actual loss or costs to a resumption victim, which are usually incurred after the acquisition date. Non - financial loss, such as for emotional damage, is not recoverable. This is emphasised, for example, in s 59(f) by its reference to "financial" costs incurred or that might be incurred.
- 77 In the case of a business extinguished by a resumption falling within s 59(f), the inquiry is into the actual financial costs to the business owner. The actual financial costs to the business owner cannot be limited to the hypothetical market value between notional parties at the resumption date if the business

has an additional financial value to the owner. For convenience, that additional financial value may be called "special value". By "special value" I mean any advantage to the person entitled to compensation which is incidental to the person's operation of the business. That meaning corresponds with the meaning of "special value" of land in s 57. The recoverability of such special value as disturbance under s 59(f) is consistent with the concept of disturbance identified in *Commonwealth v Milledge* (1953) 90 CLR 157 at 164 per Dixon CJ and Kitto J:

"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..."

- 78 Market value plus special value may, for convenience, be described as value to the owner. That is the value for which the applicants contend.
- 79 As noted earlier, the parties' business valuers both stated in their joint report that they determined the "value" of the business as at the resumption date. Both gave the impression that they were addressing market value. Both took the conventional approach to determining the market value of a business by capitalising FME (as at the resumption date). The applicants in closing submissions suggested that there was the odd consideration here and there by its business valuer which fell into the "value to owner" bucket rather than the "market value" bucket. That is difficult to see. In any event, he did not quantify anything as a financial increment to market value. Thus, the special value of the business to the owner, additional to market value, was not quantified (nor specifically addressed) by the experts. However, in proceedings of this type the Court is the judicial valuer and is not restricted to their approach.
- 80 I propose, first, to follow the route taken by the parties' business valuers and determine the market value of the business as at the resumption date. I will then consider whether the business has a special value to its owner, which commands a premium over market value.

## **Future maintainable earnings**

- 81 In making his valuation assessment, Mr Edmonds inspected the business and spoke to its senior people. Mr Russell did not although he directed many written inquiries through the solicitors: his analysis was limited to a forensic accounting process. To that extent, Mr Edmonds had an advantage.
- 82 Mr Edmonds determined alternative values for the business on the following alternative scenarios :
- (a) \$2,519,622 on the assumption that Erolhold pays rent or a licence fee of \$150,000 per annum. Here his estimated FME is \$277,000 per annum and his years multiplier is 8.25;
  - (b) \$3,757,122 on the assumption that Erolhold pays no rent or licence fee. Here his estimated FME is \$427,000 per annum (reached by adding back the \$150,00 to the \$277,000) and his multiplier is 8.25.
- 83 Mr Edmonds' alternative FME represent his projection of EBIT for the year ended 30 June 2011. He indicated that his projected 2011 financial year revenue was an increase of 15 per cent; and his projected 2011 financial year EBIT was an increase of 13 per cent, over his adjusted 2010 financial year results.
- 84 In determining FME, Mr Edmonds had regard to (a) the financial statement for the financial year ended 30 June 2010; (b) a forecast made after discussion with Mr Bligh and (it seems) Mr Bligh's accountant that trading income would increase by 11 per cent in 2011 to \$1,725,903 (the business intended to expand pig production to meet the demand for pigs for medical use); (c) the trading income of \$1,077,572 stated in the financial statement for the six months to 31 December 2010; and (d) it seems, the trend in growth in trading income, gross profit and EBIT from 2006. On the basis of the six months revenue to 31 December 2010, Mr Edmonds anticipated that the revenue

increase to 30 June 2011 would be much higher than 11 per cent. He considered that in fact a much higher revenue growth than 15 per cent could be anticipated having regard to anticipated population growth, the economic recovery and other matters. He disregarded the results for the 2006 and 2007 financial years apart from noting the trend in a graph, considering them to be affected by trading abnormalities.

- 85 Mr Edmonds stated that there was a four year average growth rate in trading revenue of 15 per cent, spoke of the anticipated continuation of the 15 per cent average growth after 30 June 2010, and consequently projected a 15 per cent growth in trading revenue for the 2011 financial year over the 2010 financial year. If his reference to a four year average refers to the financial years 2007 to 2010 using 30 June 2007 as the base, then in fact the average growth rate is 12 per cent. If he is using 30 June 2006 as the base from which to measure growth for the four years thereafter, the average growth rate is 18 per cent. However, trading revenue for the year ended 30 June 2006 was very low compared with all later years and, for reasons stated below, I do not think that year should be taken into account.
- 86 Mr Russell assessed the market value of the business as at the resumption date in the range of \$281,070 to \$393,498. He did so on the basis of FME of \$112,428 per annum, and years earnings multipliers of 2.5 and 3.5. This FME is the average of EBIT for the five years ended 30 June 2006 to 30 June 2010. He adopted the financial statements for those years, after adjustments, notwithstanding that he considered they contained numerous errors and inconsistencies.
- 87 Mr Russell did not take into account the financial statements for the six months to 31 December 2010 because he had the following concerns about them:
- (a) the financial performance indicated is significantly different in terms of sales values, gross profit percentage and expenses;
  - (b) they are not for a full period and are not comparable to full year results for reasons of year end accounting adjustments and seasonality;
  - (c) the level of trading recorded is disproportionate to previous trading levels and the expected behaviour of a small good manufacturer according to the IBIS World report attached to his report. The trading results require explanation and significant review;
  - (d) opening and closing stock amounts of \$90,000 exactly do not appear to be correct and require explanation and review;
  - (e) numerous expenses such as superannuation, motor vehicle expenses and accountancy fees are completely omitted.
- 88 I consider that there is weight in those concerns. Although they do not all directly affect trading revenue, which is all that Mr Edmonds appears to have used the 31 December 2010 financial statement for, they tend to cast a pall over the reliability of that financial statement as a whole. Overall, there is sufficient doubt as to its reliability that I think it would be inadvisable to rely on it for the purpose of determining FME.
- 89 At the hearing, Mr Russell conceded that, following information that had come out in evidence in relation to the sale of the entire pig herd in 2005 (see [ 94 ] - [ 98 ] below), of which he had been previously unaware, the 2006 financial year might need to be disregarded. On that basis, he assessed FME as \$166,382 being the average adjusted EBIT for the four years 30 June 2007 to 30 June 2010. Applying multiples of 2.5 and 3.5 he derived market value in the range of \$415,955 to \$582,338 as at the resumption date.
- 90 As an alternative, Mr Russell assessed FME at \$215,730 being the average adjusted EBIT for the three years ended 30 June 2008 to 30 June 2010. On that basis, applying multiples of 2.5 and 3.5, he derived market values in the range of \$539,324 to \$755,055 as at the resumption date. Mr Russell did not adopt the three year average because of what he described as significant and unexplained changes to the trading of Erolhold for the financial year 2008

onwards, the volatile nature of earnings from primary production, and errors and inconsistencies in the financial statements.

- 91 The trading results varied significantly in and after the 2008 financial year. Mr Russell noted that in the 2008 financial year the likelihood of the resumption of the land became apparent and considered that trading results in and after that financial year were at odds with the expectation of performance for businesses in the pig farming and smallgood manufacturing businesses published in the June 2011 report prepared by IBIS World entitled "Bacon, Ham and Smallgood Manufacturing". According to that report, the bacon, ham and smallgood manufacturing industry in Australia has had a recent history of low profitability and sluggish revenue growth. However, it notes that revenue is expected to grow by 3 per cent for the 2010 - 2011 years. If Mr Russell was raising a question whether the applicants manipulated trading results from 2008 in order to enhance resumption compensation, I am not satisfied that the evidence bears this out.
- 92 Mr Russell assumed that the business had the same average future growth potential as the industries in which it operated (the pig farm industry and the ham, bacon and smallgood manufacturing industry). He said that he valued the business as at the resumption date on the basis of what was there, not what it might become.
- 93 The records of Erolhold's business operations are incomplete and contain many apparent errors and inconsistencies, as detailed in Mr Russell's report and as noted in oral evidence. To give but one example, the 2010 financial statements contain an item "Natural Increase - pigs quantity 306". The evidence indicates that on average each sow has 25 piglets per annum. Thus, 306 represents only 12 sows, very much less than one would expect. However, there is a handwritten note which Mr David Bligh said that he gave to the accountant who prepared the financial statements, which stated that 2,633 pigs were born in that financial year. That number equates to about 105 sows, which is more like the number of sows that were in residence at that time. Why this was not reflected in the financial statement is not disclosed by the evidence.
- 94 In my view, it is preferable to assess FME without regard to the results for the financial years 2006 and 2007. This is because of the flow - on effect of events in 2005, which were neither normal nor cyclical, as discussed below.
- 95 In 2005 there was a major event. All existing pigs were sold or slaughtered, and the pig sheds stood empty for 3 months. There was a consequential delay in the accounts returning to normal. The new pigs arrived in late March 2005. The new pigs, described as a "nucleus of herd", did not immediately constitute a full breeding herd. They included gilts (young sows not yet of breeding age) as well as sows, and the boars were of varying ages and sizes, so that all could not be put immediately to work. From that low base Mr Bligh set out to build the herd back up to 150 breeding sows and 10 to 15 boars. Delay is inherent in that process. A sow is only in season every 21 days and she may not be in condition to mate; for example if she has recently raised a large litter. There will not always be a boar suited to mate with her. Mr David Bligh's evidence was that it took two to three years to recover from the restocking exercise.
- 96 The absence of the two principals of the business is also relevant, although Mr David Bligh placed less emphasis on it than on the restocking. Mr David Bligh was away between April and July 2005. Mr Richard Bligh was away for a shorter period and a bit later, in the 2006 financial year.
- 97 Mr Edmonds' description of the business in that period as "not focussed on short term profit" is justified. As the applicants put it, both the pigs and the owners were being renewed or refreshed.
- 98 The effects of the 2005 restocking are also reflected in the under - performance of the business in 2007. The breeding program had earlier had to recommence from a standing start, and only got underway a couple of months after the new pigs arrived. The breeding program did not have a multiplier

effect for some time. Mr Bligh agreed that the effect had worked itself out by 2008 but not by 2007. A half - concession that he made was on the basis that the cross - examiner's figures were correct (which is not established), and was confined to the breeding program having been re - established. He made clear that that did not mean meat production was back to normal. He said: "It's another 4 to 6 months before they can get to the factory and the prosciuttos may be another ten to twelve months after that." He rejected the proposition that 2007 was back to normal.

99 This evidence should be weighed against the fact that the slaughter fees remained relatively constant from 2006, suggesting in Mr Russell's view that there was not a significant reduction in number going into the manufacturing process from the piggery (leaving out of account medical use pigs). Mr Russell said in his earlier written evidence, that the reported slaughter fees for the 2006 financial year appear excessive: they appear to include fodder, which is not otherwise accounted for.

100 In my view, the weight of the evidence favours the conclusion that the 2006 financial year results were affected by the abnormal events of 2005 and should be excluded from consideration in assessment of FME.

101 Turning to the 2007 financial year, the net profit for that year was very low compared with the following three financial years even though sales were not. This abnormality, whatever the cause, is so large as to make it imprudent, in my view, to give weight to the 2007 financial year results when determining FME.

102 I have concluded that FME should be calculated as the average of the adjusted EBIT for the three financial years 2008, 2009 and 2010.

103 The difference between the valuers' respective EBITs is mainly attributable to their different assessments of notional wages and notional rent, to which I now turn.

## **Wages**

104 The business employs David Bligh full time plus overtime, Andrew and Timothy Bligh full time, Richard Bligh part time, an apprentice butcher full time, and up to about four casual employees.

105 In valuing businesses, it is common practice to adjust for either excessive or inadequate owners' remuneration if the owners have chosen to pay themselves out of line with industry expectations.

106 Mr Edwards and Mr Russell both assessed notional wages and superannuation (at the statutory 9 per cent rate) and substituted them for actual wages and superannuation.

107 Mr Edmonds' notional wages figure for the 2010 year was \$173,360 based on the highest state award rates for employees in the piggery and bacon factory industries, adding 25 per cent in the case of David Bligh for overtime and management responsibilities. To this he added \$20,000 for superannuation. His notional wages were close to the actual wages shown in the accounts. But I do not attach much significance to that because the actual superannuation contributions were very large, suggesting considerable salary sacrifice.

108 Mr Russell's notional wages figure for the 2010 year was \$242,000 for the four male Blighs. Mr Russell substituted notional wages for the four male Blighs based on average weekly earnings inclusive of superannuation for adult males in the manufacturing industry as published by the Australian Bureau of Statistics. His rationale was that the male Blighs' activities were not restricted to pig farming and smallgoods manufacturing.

109 It is striking that the wages Mr Edmonds notionally attributes to David and Richard Bligh for the 2010 financial year are respectively only \$44,421 and \$27,000, compared with the other two male Blighs of \$30,581.20. They seem too low given their responsibilities and the substantial nature and trading

results of the business. Moreover, as I have noted, the very large superannuation in fact paid by Erolhold suggests large salary sacrifice. Overall, Mr Russell's notional wages and superannuation seem more realistic and I adopt them.

## **Rent**

- 110 Erolhold did not in fact pay rent, although it paid rates and taxes.
- 111 Mr Edmonds did not explain the basis on which he put forward a notional rent of \$150,000 on one of his alternative scenarios: see [ 82 ] above.
- 112 Mr Russell's notional rent was \$5,200 in the 2009 and 2010 financial years and \$4,680 in the 2006, 2007 and 2008 financial years.
- 113 In closing submissions, the applicants suggested that notwithstanding the agreed preliminary issue, it would be open to the Court not to make a decision about the value of the business under s 59(f) but to come up with alternative valuations on the basis of alternative rentals of \$150,000 and \$5,200 until, later in the proceedings, the Court determines the highest and best use of the resumed land in the context of determining the market value of the resumed land, as that may affect the market value of the resumed land.
- 114 I do not propose to follow that course. In the first place, a consent order has been made to the effect that under s 59(f) the value of the business be determined as a preliminary issue. Secondly, there is not a shred of evidence to support Mr Edmonds' notional rent of \$150,000. It appears to have been plucked out of the air. Indeed, in oral evidence Mr Edmonds agreed to exclude his \$150,000 because he could not support it. and he agreed \$5,200 was the appropriate rent if the land is treated as agricultural land. Thirdly, Mr Russell's notional rental is in accordance with rental advice received from the respondent's land valuer, which was attached to his first report, for unimproved rural land with connection to town water. That advice had regard to comparable rental evidence.
- 115 A rental of \$5,200 per annum for unimproved rural land does not assign a value to the business improvements on the land. However, Mr Russell allowed as an expense the actual rates and taxes paid which, for example, were \$48,671 in the 2010 financial year. Thus, in substance, Mr Russell's notional rent can be viewed as totalling \$53,671 in the 2010 financial year (\$5,200 plus \$48,671). In the absence of other evidence, I am prepared to treat that total sum as the notional rent for the land with its business improvements in the 2010 financial year, and to treat corresponding total sums in the earlier financial years in the same way.

## **Conclusion re FME**

- 116 Mr Russell's second supplementary report shows adjusted EBIT for the 2008, 2009 and 2010 financial years of \$192,432, \$191,678 and \$263,081 respectively. The average is \$215,730. In my opinion, that is the FME (per annum) of the business.

## **The years purchase multiplier.**

- 117 Having assessed FME, the next stage in the valuation process is to determine the capitalisation rate to be applied to the FME. In business valuations, as opposed to real estate valuations, a years purchase multiplier derived from the capitalisation rate is customarily used.
- 118 The years multiplier reflects the perceived risks and the rate of return an investor requires in view of that risk. The selection of an appropriate multiplier is essentially a matter of judgment based on an examination of relevant benchmarks, if any exist. In the case of listed companies, the earnings multiples of similar companies listed on the Australian Stock Exchange (**ASX**) and multiples that can be inferred from transactions involving similar companies (if any) provide benchmarks. In the case of private unlisted

companies, earnings multiples of listed companies in similar industries may have limited usefulness unless the difference between them is significant (as it often is). In such cases, the selection of the multiple will necessarily be based on subjective evaluation as well as objective factors.

- 119 Mr Edmond's earnings multiplier was 8.75. Mr Russell's earning multipliers were 2.5 and 3.5 to derive a range.
- 120 Mr Edmonds' multiplier equates to a capitalisation rate of 12.1 per cent per annum. He commented that this represents a risk free rate of 5 per cent per annum and margin for risk minus growth potential of 7.1 per cent per annum.
- 121 Mr Edmonds said, "A capitalisation rate of 12.1 per cent (multiple of 8.25) reflects the high upside of profit potential due both to the unexploited marketing potential, the excess capacity of the business, the anticipated continuation of the 15 per cent average growth rate, the anticipated population growth in the businesses catchment and the low risk associated with high barriers to the entry of competition."
- 122 It seems that the margin for risk he adopted is about 22 per cent, as 22 per cent less 15 per cent equals 7 per cent. This was not explored in evidence.
- 123 Mr Edmonds' report shows that he projected that turnover from the year ending 30 June 2010 to 30 June 2011 would increase by 15 per cent while growth in earnings, following adjustments that he has made, would be 13 per cent.
- 124 I am not satisfied that the turnover of the business has grown or can be anticipated to grow at an average rate of 15 per cent. On my analysis, turnover increased over the three - year period from 30 June 2007 to 30 June 2010 by 36.45 per cent indicating an average growth of 12.15 per cent per annum. However, the increase in turnover in the year to 30 June 2010 was only 4.48 per cent, which figure would have been of particular interest to a prospective purchaser. Increases in turnover are not necessarily represented in increased earnings.
- 125 Mr Edmonds further stated, "A capitalisation rate of more than 20 per cent may be appropriate for a business that has a need to amortise its goodwill and or leasehold improvements due to a limited term of occupancy of premises. That is not the case with this business and therefore a capitalisation rate of less than 20 per cent is appropriate. The Business has the right to occupy the premises in perpetuity so there is no need to amortise goodwill and provision for replacement of the buildings, plant and equipment is much less than would be required were these values to be amortised over any leasehold term."
- 126 Mr Edmonds tested the conclusion that a multiplier of 8.25 is appropriate by analysing the price/earnings ratios of companies listed on the ASX in the farming/agricultural and food processing sectors from January to September 2011.
- 127 Starting from a price/earnings ratio and making an allowance for company tax of 30 per cent and a discount for liquidity, also 30 per cent, he calculated a years purchase multiplier of 10.49. However, he considers that his analysis supports the adoption of 8.25 years purchase multiplier.
- 128 In my opinion, a further allowance needs to be made, in addition to liquidity, for the fact that an investment in a company listed on the stock exchange is, for the vast majority of investors, a passive one with no responsibilities. Reliance is placed on directors and management to deal with business opportunities and difficulties and to maximise profits. While the hypothetical purchaser of the Erolhold business may employ a manager and would, no doubt, take an active interest, perhaps even on a day - to - day basis, in the affairs of the this well - established business, the ability to manage business risks and maximise opportunities must be substantially less than in a public company, which by definition is many times larger, with greater depth of management expertise.

129 A joint report was prepared by Mr Edmonds and Mr Russell. Mr Edmonds did not respond to the criticisms therein of his analysis of public company price/earnings ratios. In the face of that lack of response, I do not think that Mr Edmonds' conclusions can be applied with confidence to the subject business.

130 Mr Russell adopted a different approach. He explained that he researched multiples published quarterly in the BizExchange Index Report for businesses in the food manufacturing sector with a turnover of between \$1 and \$5 million. He chose the food manufacturing sector rather than the farming sector as it was his view that the business operated by Erolhold achieved its reported trading surpluses from that aspect of its trading and not from growing pigs.

131 However, the BizExchange Index Report used by Mr Russell does not include a section devoted solely to food manufacturing. That report covers the manufacturing industry, which is said to include prefabricated building manufacturing, furniture manufacturing and, on the advice of the chairman of BizExchange Pty Limited, food manufacturers. However, Mr Russell was unaware of the make up, by industry, of the number of businesses surveyed. He concluded that a reasonable multiplier range is between 2.5 and 3.5. I am not persuaded that this is a reliable multiplier applicable to the business of Erolhold.

132 Having regard to the critical importance of the multiplier in the valuation of the business, the quantum of evidence was surprisingly limited and lacking in persuasion. It is against this background that I turn to a close examination of the formula, if I can describe it as such, used by Mr Edmonds. The margin for risk adopted by Mr Edmonds was 22 per cent.

133 The key question then becomes what, if any, allowance should be made for anticipated growth in earnings of the business beyond the year ending 30 June 2010. On the basis that earnings from the business are static, the yield required would be 27 per cent indicating a multiplier of 3.7. I consider that a prospective purchaser would not factor any growth in earnings as part of the deliberations concerning FME, which impacts upon selection of the appropriate multiplier.

134 The business does enjoy some particular advantages but could not be classed as unique. It is well established, not aggressively managed, benefits from its proximity to Westmead Hospital and an onsite wholesale outlet. In addition, there are significant barriers to the establishment of a similar vertically integrated business in the Sydney Metropolitan Area.

135 Doing the best I can with the evidence before me and having regard to all the matters set out above, I have come to the conclusion that a capitalisation rate of 27 per cent (3.7 years purchase), as could be concluded from Mr Edmonds' evidence, is too high. In my opinion, a rate of 20 per cent being 5 years purchase is more appropriate.

## **Conclusion re market value**

136 Accordingly, I determine the market value of the Erolhold business to be \$1,078,650 ( $\$215,730 \times 5$ ) as at the resumption date, 23 July 2010. The assets of the business included in this valuation are the pigs and plant required for, and used within, the piggery and the meat processing activities. Stock held for sale in the meat processing building is not included in this valuation.

## **Special value**

137 I turn to consider whether, under s 59(f), there should be added any special value of the business to Erolhold: see [ 67 ] - [ 80 ] above.

138 In my opinion, the business has a special value, meaning a financial advantage to Erolhold, by reason of the fact that David and Richard Bligh are its only shareholders and directors and its principal employees.

139 In coming to that conclusion, I have had regard to the following;

- (a) Both men are employed by the company.
- (b) As employees and directors, they are able to determine their salary and what funds they or the company will pay into their respective superannuation funds and, in that way, take advantage of benefits available to them.
- (c) Other members of the Bligh family are employed in the business. The business records show that substantial payments are made by the business to their respective superannuation funds representing an advantage to those persons, which will reflect favourably on David and Richard Bligh.
- (d) It is reasonable to expect that the four other Bligh family members will have a greater sense of loyalty to the business, indicating that staff turnover can be expected to be very low. In addition, because of the family connection, they can be regarded as more trustworthy and prepared to do anything reasonably possible to promote the business and enhance its profitability, including attending to after hours duties when necessary.
- (e) Richard Bligh lives at 171 Bringelly Road immediately adjacent to the processing plant, while David Bligh lives at 177 Bringelly Road in a comparatively new home directly opposite the processing plant and within 40 metres of same. By residing on site both men are able to provide after hours security and by being in contact with each other they can ensure that one of them is on the premises at all times. For this reason, engagement of outside security personnel is not required. No expenditure on security personnel is recorded in any of the financial statements.
- (f) Convenience to work, especially when after hours activities are necessary and the ability to return home during the day, for whatever reason, has to be regarded as an advantage.
- (g) If the business were sold, the brothers would lose control over the activities of the business which may, impact upon their lifestyle and enjoyment of their homes. The business conducted by them has a very good record of low or minimal impact on adjacent properties, which may not continue in different ownership.
- (h) Holidays by the brothers can be managed to ensure that there is always one on site at any time. This occurred some years ago when extended leave was taken by each brother at separate times.
- (i) The brothers are at an age when they may not be contemplating seeking employment when the business was sold and may, because of their very specialised experience, find it hard to obtain meaningful and rewarding work. The benefits of being able to remain as employees of Erolhold and manage their own affairs through superannuation payments must be regarded as an advantage.
- (j) It appears inevitable that rezoning of the land for residential purposes will occur at some, at this stage, indefinite date. Obviously, a hypothetical purchaser of the business at market value would require a lease of some years. Agreeing on the term of lease may impact upon the ability of the brothers to take advantage of the zoning change and, at worst, may involve them in making a payment to the purchaser of the business to terminate the lease at a date largely beyond their control. Therefore, there is an advantage to them in running the business through Erolhold on their own land, which has a financial value over and above the market value of the business.

140 The quantification of the financial advantage is a matter of judgment and is difficult to assess. I have come to the conclusion that having regard to the market value of the business, which I have already determined, the financial advantage should be assessed at 25 per cent of market value.

## CONCLUSION

141 By adding that 25 per cent to the resumption date market value of \$1,078,650, I determine that the s 59(f) compensation for the assumed extinguishment of Erolhold's business is \$1,348,312, say \$1,350,000.

142 Accordingly, my answer to the preliminary question set out at [13] above is: \$1,350,000.

Planning Report

*Bligh v The Minister Administering the EPA Act*

Land & Environment Court No: 31061/62/R3/68 of 2011

177/173/171

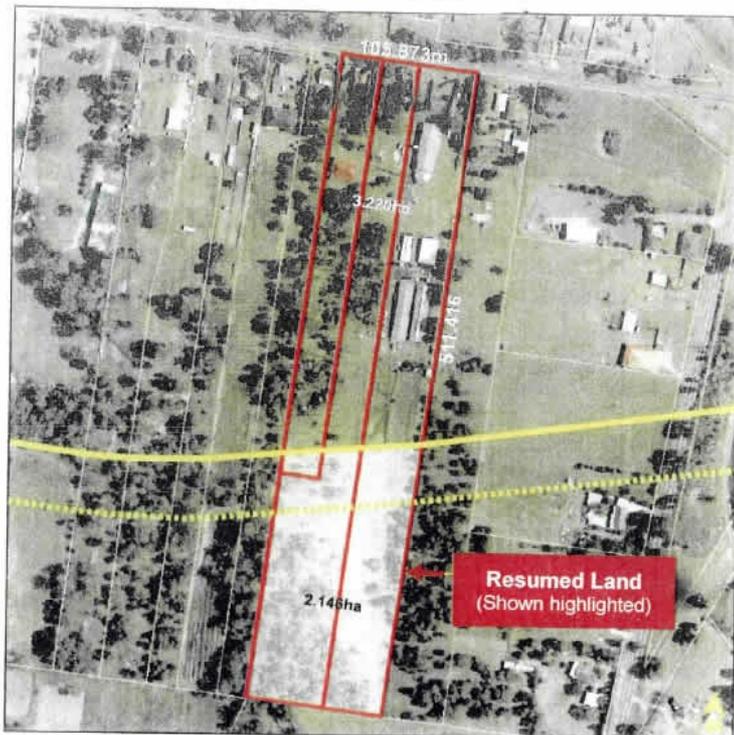


Figure 16: Aerial Photograph of Parent Sites (Approximately depicting the SWRL Corridor and Resumed Land)

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Decision last updated: 01 December 2011