

**Court of Appeal  
Supreme Court  
New South Wales**

**Medium Neutral  
Citation:**

**Health Administration Corporation v George D  
Angus Pty Ltd [2014] NSWCA 352**

**Hearing dates:**

8 September 2014

**Decision date:**

17 October 2014

**Before:**

Emmett JA at [1];  
Leeming JA at [13];  
Tobias AJA at [14]

**Decision:**

Appeal dismissed with costs.

*[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*

**Catchwords:**

COMPULSORY ACQUISITION - compensation for loss attributable to disturbance - application of Div 4 of Pt 3 of the Land Acquisition (Just Terms Compensation) Act 1991 - whether the primary judge erred in awarding compensation under s 59(f) for financial losses - whether "financial costs" referred to in s 59(f) includes "financial losses"

COMPULSORY ACQUISITION - compensation for loss attributable to disturbance - compulsory acquisition of a statutory tenancy at will - whether the nature of the interest compulsorily acquired is relevant to assessment of loss attributable to disturbance

**Legislation Cited:**

Conveyancing Act 1919 (NSW) s 127  
Land Acquisition (Just Terms Compensation) Act 1991 (NSW) Pt 3 Div 4, ss 4, 37, 54, 55, 56, 57, 59, 61  
Land and Environment Court Act 1979 (NSW) s 57  
Lands Acquisition Act 1906-1936 (Cth) s 28  
Public Works Act 1912 (NSW) s 124

**Cases Cited:**

Al Amanah College Inc v Minister for Education and Training (No 2) [2011] NSWLEC 254  
El Boustani v Minister administering Environmental Planning and Assessment Act 1979 [2014] NSWCA 33; (2014) 199 LGERA 198  
George D Angus Pty Ltd v Health Administration Corporation [2013] NSWLEC 212  
Horn v Sunderland Corporation [1941] 2 KB 26  
Housing Commission of New South Wales v Falconer [1981] 1 NSWLR 547  
Leichhardt Council v Roads and Traffic Authority (NSW) [2006] NSWCA 353; (2006) 149 LGERA 439  
Marshall v Director General, Department of Transport [2001] HCA 37; (2001) 205 CLR 603  
Pastoral Finance Association Ltd v The Minister [1914] AC 1083  
Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW (1998) 101 LGERA 30  
Roads and Traffic Authority of NSW v McDonald [2010] NSWCA 236; (2010) 79 NSWLR 155  
Samrein Pty Ltd v Metropolitan Water, Sewerage & Drainage Board (1982) 56 ALJR 678  
Sydney Water Corporation v Caruso [2009] NSWCA 391; (2009) 170 LGERA 298  
The Commonwealth v Milledge [1953] HCA 6; (1953) 90 CLR 157  
The Commonwealth v Reeve [1949] HCA 22; (1949) 78 CLR 410  
The Minister v The New South Wales Aerated Water and Confectionary Company Limited [1916] HCA 48; (1916) 22 CLR 56  
Thompson v The Council of the Municipality of Randwick [1950] HCA 33; (1950) 81 CLR 87  
Tolson v Roads and Maritime Services [2014] NSWCA 161  
Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority [2008] HCA 5; (2008) 233 CLR 259

**Texts Cited:**

Macquarie Dictionary (4th ed, 2005)

**Category:**

Principal judgment

**Parties:**

Health Administration Corporation (Appellant)  
George D Angus Pty Ltd (Respondent)

**Representation:**

Counsel:  
TS Hale SC / M Carpenter (Appellant)  
I Hemmings SC / SB Nash (Respondent)  
Solicitors:

Crown Solicitor's Office (Appellant)  
Elson Pow & Associates (Respondent)

**File Number(s):** 2013/382877  
**Decision under appeal** George D Angus Pty Limited v Health  
**Citation:** Administration Corporation [2013] NSWLEC 212  
**Date of Decision:** 20 December 2013  
**Before:** Preston CJ of LEC  
**File Number(s):** 2011/31234

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## HEADNOTE

### **[This headnote is not to be read as part of the judgment]**

The appellant compulsorily acquired a parcel of land that was occupied by the respondent pursuant to a statutory tenancy determinable at will. The respondent was a service company through which its sole director, Dr Angus, provided medical services. The owner of the land was a company whose sole director and shareholder was Dr Angus' wife, Mrs Angus. The respondent claimed compensation for loss attributable to disturbance in the nature of foregone income and/or profits as a consequence of relocation necessitated by the acquisition. The primary judge, Preston CJ of LEC, accepted that that loss was a financial cost reasonably incurred as a natural and direct consequence of the acquisition of the respondent's interest and compensable pursuant to Div 4 of Pt 3, and s 59(f) in particular, of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (the "Just Terms Act").

The appellant challenged the decision on the basis that the expression "financial costs" in s 59(f) meant only expenditure and did not include financial losses; any loss or potential loss of income could only be assessed as special value of the land under s 57 of the Just Terms Act; and, because the interest the appellant acquired from the respondent was a statutory tenancy determinable at will by one month's notice in writing, the respondent was only entitled to compensation for the loss of one month's income.

The Court held:

1. Prior to the commencement of the Just Terms Act, loss due to disturbance was not a separate head of compensation, as it now is under that Act. As a result, cases dealing with statutory language operating prior to the enactment of the Just Terms Act cannot be relied upon in construing of the provisions of the Just Terms Act entitling compensation for loss due to disturbance: [47]-[52]

*Leichhardt Council v Roads and Traffic Authority (NSW)* [2006] NSWCA 353; (2006) 149 LGERA 439; *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; (2008) 233 CLR 259; *Marshall v Director General, Department of Transport* [2001] HCA 37; (2001) 205 CLR 603; *El Boustani v Minister administering Environmental Planning and Assessment Act 1979* [2014] NSWCA 33; (2014) 199 LGERA 198; applied.

2. Loss of income and/or profits due to disturbance are not to be compensated as part of special value, as that head of compensation is now separately and differently defined in s 57 of the Just Terms Act: [53]-[60]

*Housing Commission of New South Wales v Falconer* [1981] 1 NSWLR 547; *Tolson v Roads and Maritime Services* [2014] NSWCA 161; applied.

*The Commonwealth v Milledge* [1953] HCA 6; (1953) 90 CLR 157; referred to.

3. The correct construction of s 59(f) of the Just Terms Act is that the expression "financial costs" includes financial losses and is not limited to expenditure: [61]-[63]

*Sydney Water Corporation v Caruso* [2009] NSWCA 391; (2009) 170 LGERA 298; *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW* (1998) 101 LGERA 30; applied

4. The terms of the interest compulsorily acquired are relevant to the assessment of market value of the interest at the time of acquisition, but not to the assessment of any loss attributable to post-acquisition disturbance: [69]-[71], [73]

## JUDGMENT

- EMMETT JA:** This appeal is concerned with the construction of provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Acquisition Act**). The appellant, Health Administration Corporation (**the Corporation**), compulsorily acquired a parcel of land situated in Wagga Wagga (**the Land**), which was owned by Benantra Pty Ltd (**Benantra**). The respondent, George D Angus Pty Ltd (**the Tenant**), occupied the Land under a tenancy agreement with Benantra. The Tenant made a claim for compensation under the Acquisition Act. On 20 December 2013, the Land and Environment Court determined that the compensation payable to the Tenant in respect of the compulsory acquisition of the Land is \$1,555,817.22. The Land and Environment Court ordered that payment of the compensation be made within 56 days. The Corporation now appeals to this Court from the orders of the Land and Environment Court.
- At the time of the acquisition, Dr George Angus was the sole director of the

Tenant. His wife, Mrs Wendy Angus, was the sole director and shareholder of Benantra. Dr Angus and Mrs Angus each held one half of the shares in the Tenant.

- 3 The Tenant provided gynaecological and obstetric services from premises on the Land. The Tenant was, in effect, a service company for Dr Angus, who provided the gynaecological and obstetric services for which the Tenant billed patients. The Tenant paid Dr Angus a salary and employed Mrs Angus as an office manager.
- 4 The Land was advantageously located in physical proximity to Wagga Wagga Base Hospital and Calvary Hospital. That allowed Dr Angus a five minute walk to each hospital to attend obstetric patients. That attribute of the Land was of special advantage to Dr Angus and the Tenant.
- 5 Following the acquisition, the Tenant relocated its practice to another location in Wagga Wagga (**the Peter Street Property**). It incurred financial costs in connection with that relocation. The location of the Peter Street Property was physically more distant from Wagga Wagga Base Hospital and Calvary Hospital than the Land. Because of that distance, Dr Angus considered that the risk for obstetric patients was unacceptable. Therefore, following the relocation to the Peter Street Property, he ceased providing obstetric services for the Tenant, restricting himself to providing gynaecological services. That resulted in a decline in the income and profitability of the Tenant's business. The Tenant, through Dr Angus, provided gynaecological services at the Peter Street Property from 23 September 2011, following the relocation, to 14 June 2013, when the practice ceased. The Tenant then commenced a new practice in Newcastle, where the Tenant again provided obstetric services.
- 6 Section 37 of the Acquisition Act provides that an owner of an interest in land that is divested or extinguished by a notice of compulsory acquisition is entitled to be paid compensation in accordance with the Acquisition Act by the relevant authority that acquired the land. Under s 4, **interest** in land means, relevantly, a legal or equitable estate or interest in the land or a right or privilege over, or in connection with, the land. **Land** includes any interest in land. These definitions therefore clearly include a leasehold interest.
- 7 Under s 54(1), the amount of compensation to which a person is entitled is such amount as, having regard to all relevant matters under Part 3 of the Acquisition Act, will justly compensate the person for the acquisition of the land. Section 55 of the Acquisition Act provides that, in determining the amount of compensation to which a person is entitled, regard must be had to the following matters only:
  - the market value of the land on the date of its acquisition;
  - any special value of the land on the date of its acquisition;

- any loss attributable to severance;
- any loss attributable to disturbance;
- solatium;
- any increase or decrease in the value of any other land which adjoins or is severed from the acquired land.

8 Under s 59, **loss attributable to disturbance** means:

- legal costs reasonably incurred in connection with the compulsory acquisition;
- valuation fees reasonably incurred in connection with the compulsory acquisition;
- financial costs reasonably incurred in connection with the relocation;
- stamp duty costs reasonably incurred (or that might be reasonably incurred) in connection with the purchase of land for relocation;
- financial costs reasonably incurred (or that might be reasonably incurred) in connection with the discharge of a mortgage resulting from the relocation;
- any other financial costs reasonably incurred (or that might be reasonably incurred) relating to the actual use of the land, as a direct and natural consequence of the acquisition.

Item (f) is of critical importance for present purposes.

9 Under s 56 of the Acquisition Act, **market value** 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. Under s 57, **special value** of land means the financial value of any advantage, in addition to market value, to the person entitled to the compensation that is incidental to the person's use of the land. Section 61 provides that if the market value of land is assessed on the basis that the land had potential to be used for a purpose other than that for which it is currently used, compensation is not payable in respect of:

- any financial advantage that would necessarily have been foregone in realising that potential; and,
- any financial loss that would necessarily have been incurred in realising that potential.

The inter-relationship between s 61 and s 59 is of some significance to the question raised by the Corporation.

- 10 The Land and Environment Court determined the amount of compensation as follows:
- Financial costs reasonably incurred in connection with the relocation of the practice from the Land to the Peter Street Property, under s 59(c): \$16,129.22 plus interest;
  - The financial costs reasonably incurred relating to the actual use of the Land, as a direct and natural consequence of the acquisition, under s 59(f): \$1,539,688 plus interest.

The second item is in dispute.

- 11 In its notice of appeal, the Corporation relies on the following grounds:
- The primary judge erred in his construction and application of s 55(a) and s 59(f) of the Acquisition Act in holding that the Tenant's claim for lost income was compensable under s 59(f);
  - Having found that the Tenant's interest in the land that had been compulsorily acquired was a statutory tenancy at will created by s 127 of the *Conveyancing Act 1919* (NSW) determinable by one month's notice in writing expiring at any time, the primary judge erred, first, in not determining compensation for loss attributable to disturbance pursuant to s 55(a) and s 59(f) as being compensation for those financial costs incurred as a direct and natural consequence of the termination of the Tenant's interest without first being given one month's notice, and, second, in taking into account the fact that, but for the compulsory acquisition, Benantra would not have determined the tenancy.

12 I have had the advantage of reading in draft form the proposed reasons of Tobias AJA for concluding that the appeal should be dismissed. I agree with Tobias AJA, for the reasons given by his Honour, that each of the grounds raised by the Corporation should be rejected. It follows that the appeal should be dismissed with costs.

13 **LEEMING JA:** I agree with Tobias AJA.

14 **TOBIAS AJA:** Between September 1998 and July 2011 the respondent, as the service company of Dr George Angus, conducted an obstetric and gynaecological medical practice in premises at 10 Yabtree Street, Wagga Wagga (**the Yabtree Street land**). At all material times the registered proprietor of the Yabtree Street land was Benantra Pty Ltd (**Benantra**) the sole director and shareholder of which was Mrs Wendy Angus, the wife of Dr Angus. The sole director of the respondent was Dr Angus and he and Mrs Angus each held 50 per cent of the shares in that company.

15 On 22 July 2011 the appellant, a state authority authorised to acquire land by compulsory process, compulsorily acquired the Yabtree Street land. A claim for compensation was made by Benantra which was ultimately settled. A claim for compensation was also made by the respondent. Although there was a dispute before the primary judge (Preston CJ of LEC) as to whether the

respondent had an interest in the Yabtree Street land that would entitle it to be paid compensation pursuant to s 37 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Just Terms Act**), that issue was resolved by the Land and Environment Court in favour of the respondent on the basis that that interest was "at least" a statutory tenancy created by s 127(1) of the *Conveyancing Act 1919* (NSW) "determinable at the will of either of the parties by one month's notice in writing expiring at any time".

- 16 Due to the limited interest of the respondent in the Yabtree Street land, it had no relevant market value and none was claimed. Accordingly, the respondent's claim for compensation was limited to losses attributable to disturbance within the meaning of ss 55(d) and 59 of the Just Terms Act. Two categories of disturbance loss were claimed. The first were the financial costs incurred by the respondent in relocating its medical practice on 23 September 2011 to premises leased by it at 90 Peter Street, Wagga Wagga (**the Peter Street land**) and which were agreed at the sum of \$16,129.22. Some further relocation costs were claimed from when Dr Angus relocated his practice from the Peter Street land to Newcastle on 5 July 2013 and a claim for loss of profits was also made in respect of that move, but those claims were rejected and were not the subject of challenge.
- 17 The second category of loss which formed the essence of the dispute on the appeal, was a claim for loss of foregone income and/or profits from the respondent's practice as a consequence of the necessity to relocate that practice to the Peter Street land. The primary judge accepted that claim and assessed the amount of compensation relating to it in the amount of \$1,539,688 plus interest: *George D Angus Pty Ltd v Health Administration Corporation* [2013] NSWLEC 212. From that decision the appellant appeals to this Court pursuant to s 57(1) of the *Land and Environment Court Act 1979* (NSW) (**the Court Act**). Such an appeal is limited to a decision of the Land and Environment Court on a question of law. Accordingly, the appellant confines its challenge to the entitlement of the respondent to any compensation based on a claim for loss of income and/or profits. It does not and cannot challenge the amount of that claim as assessed as it involved only questions of fact. For the reasons which follow, in my view the appellant's challenge should be rejected and its appeal dismissed with costs.

## **SOME BACKGROUND FACTS**

- 18 As noted above, the respondent was, in effect, Dr Angus' service company. Dr Angus provided gynaecological and obstetric services from the Yabtree Street land and his patients were billed by the respondent. It paid a salary to Dr Angus and employed Mrs Angus as the office manager.

- 19 The Yabtree Street land was advantageously located in physical proximity to the Wagga Wagga Base Hospital (**the Base Hospital**) as well as Calvary Hospital. Relevantly, the advantage was that it allowed Dr Angus to travel by foot to each hospital to attend obstetric patients within five minutes of being called. This was said to be an attribute of the Yabtree Street land of special advantage to Dr Angus and, therefore, the respondent.
- 20 The Peter Street land to which the practice was relocated after the compulsory acquisition of the Yabtree Street land was located more distant from the Base Hospital and Calvary Hospital than the Yabtree Street land. Dr Angus considered that the travel time (by car) from the Peter Street land would be greater than five minutes increasing the risk to his obstetric patients to a level that Dr Angus deemed unacceptable. He therefore ceased providing obstetric services through the respondent from the Peter Street Land, instead restricting himself to providing gynaecological services. The provision of only gynaecological services, rather than both gynaecological and obstetric services, caused a decline in the income and consequent profitability of the respondent's practice.
- 21 The respondent, through Dr Angus, provided gynaecological services from the Peter Street land from 23 September 2011 (when the practice was relocated) until 14 June 2013 (when the respondent closed the practice). On 5 July 2013 the respondent relocated its practice from Wagga Wagga to new premises in Newcastle where the respondent, through Dr Angus, recommenced practising obstetrics. In so doing the respondent again incurred financial costs in connection with this relocation.
- 22 The respondent, through Dr Angus, thus reversed the services it provided in Newcastle from those it had provided from the Peter Street land in that Dr Angus now provided only obstetric services in Newcastle and not gynaecological services. The respondent contended that its future income and/or profitability from the provision of only obstetric services, and not gynaecological services, in Newcastle would be less than the income and profitability that it would have earned if it had been able to continue to providing both services from the Yabtree Street land.
- 23 As I have noted above, the respondent claimed compensation both with respect to the relocation costs from the Yabtree Street land to the Peter Street land and from the latter to Newcastle. It would appear that the appellant conceded the former but not the latter. The primary judge rejected the latter claim and no cross-appeal has been filed with respect to it.
- 24 As to the claim for loss of income and/or profits, I have already indicated that the primary judge accepted that claim for the period from when the respondent vacated the Yabtree Street land to when it vacated the Peter

Street land. His Honour rejected the claim for loss of income and/or profits with respect to the respondent's alleged inability to provide gynaecological services in Newcastle. Again no cross-appeal has been filed with respect to that determination.

## **THE RELEVANT STATUTORY PROVISIONS OF THE JUST TERMS ACT**

25 As already noted, the respondents claimed for loss of income and/or profits as a consequence of the compulsory acquisition of the Yabtree Street land was based on s 55(d) of the Just Terms Act as being a "loss attributable to disturbance". Accordingly, the statutory provisions relevant to the issues on the appeal are ss 54, 55, 57, 59 and 61. They are contained in Div 4 of Pt 3 of the Just Claims Act and relevantly provide as follows:

### **"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,

(b) any special value of the land to the person on the date of its acquisition,

...

(d) any loss attributable to disturbance,

...

### **57 Special value**

In this Act:

***special value*** of land means the financial value of any advantage, in addition to market value, to the person entitled to compensation which is incidental to the person's use of the land.

...

### **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.

...

### **61 Special provision relating to market value assessed on potential of land**

If the market value of land is assessed on the basis that the land had potential to be used for a purpose other than that for which it is currently used, compensation is not payable in respect of:

...

(b) any financial loss that would necessarily have been incurred in realising that potential."

## **THE ISSUES ON THE APPEAL**

26 The primary judge held that the respondent was, by virtue of s 59(f) of the Just Terms Act, entitled to claim loss of income and/or profits incurred as a result of the respondent, through Dr Angus, having to abandon its obstetric practice when it moved to the Peter Street land essentially on the basis that the reference in that provision to "financial costs" included "financial losses". Accordingly, the first and primary issue advanced by the appellant on the appeal was whether, on the proper construction of s 59(f), the claim for lost or foregone income was compensable, it contending first, that s 59(f) is confined

to financial expenditure reasonably incurred, and does not include financial losses; and, secondly, that any loss or potential loss of income could only be assessed as special value under s 57.

- 27 The primary judge also rejected a submission by the appellant that even if s 59(f) applied to financial losses as well as financial expenditure, as the interest of the respondent in the Yabtree Street land was only "a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time", any compensation for loss attributable to disturbance pursuant to s 55(d) and s 59(f) could only be that incurred as a direct and natural consequence of the termination of the respondent's interest without the security of first having been given one month's notice in writing. In other words, as the respondent's interest in the Yabtree Street land could be terminated on one month's notice, it followed that it was only entitled, if at all, to loss of income for a maximum period of one month. Accordingly the second issue advanced by the appellant was that the primary judge erred when he found that but for the compulsory acquisition of the Yabtree Street land, the respondent's statutory tenancy would not have been determined due to the relationship between Dr and Mrs Angus on the one hand and Benantra and the respondent on the other as a consequence whereof the tenancy would have continued indefinitely but for its compulsory acquisition.

## **THE FIRST ISSUE: THE PROPER CONSTRUCTION OF S 59(F)**

### **The primary judge's decision**

- 28 At the outset I should note that the appellant accepted that if the expression "financial costs" in s 59(f) included losses as well as expenditure reasonably incurred, it was not contended that the other requirements of s 59(f) were not established, namely, that the losses claimed related to the actual use of the Yabtree Street land and were a direct and natural consequence of its acquisition. The only issue was whether the expression "financial costs" in s 59(f) included "financial losses".
- 29 The primary judge dealt with this issue at [82]-[102] of his reasons. He commenced his discussion by reference to the appellant's submissions based on the manner in which loss of income and/or profits had been accommodated by judicial authority prior to the enactment of the Just Terms Act. In this respect the appellant submitted before the primary judge, and repeated before this Court, that s 59(f) did not include loss of foregone profits from a business that ceases to operate upon acquisition of the land upon which the business was carried out for four reasons.

- 30 First, prior to the Just Terms Act, the loss suffered by the dispossessed owner by reason of disturbance of a business by the compulsory acquisition of the land on which the business was conducted was not itself a separate head of compensation but was only compensable as part of, and insofar as it affected, the value to the owner of the acquired land: *The Commonwealth v Reeve* [1949] HCA 22; (1949) 78 CLR 410. There is nothing in the text of the Just Terms Act or in the language of s 59 which would suggest that any radical departure was intended from the pre-Just Terms Act position so as to compensate a dispossessed owner for any loss of profits by capitalising business losses (although no such capitalisation was proposed in the present case) and adding them to the market value of the acquired land.
- 31 Secondly, each of sub-pars (a)-(e) of s 59 refer only to "costs" in the sense of expenditure reasonably incurred or which might reasonably be incurred by the person entitled to compensation whereas s 59(f) is a "catch-all" provision intended to pick up other financial costs that have been or might be incurred but that do not fall within the preceding sub-paragraphs. As the reference to "costs" in those sub-paragraphs related only to expenditure, so also should the word "costs" in sub-para (f) be similarly constrained.
- 32 Thirdly, the requirement that financial costs be reasonably incurred necessitated a voluntary decision be made to incur those costs and it was only the costs the subject of such a decision which were compensable provided the decision was reasonable. On the other hand, a loss of profits incurred as a consequence of the acquisition was not dependent on a voluntary decision by the person entitled to compensation. I interpolate that there is serious doubt as to whether that argument could have any application to the costs referred to in sub-para (e) (being costs reasonably incurred, or that might be reasonably incurred, in connection with the discharge of a mortgage and execution of a new mortgage as a result of relocation): in fact the appellant ultimately conceded as much.
- 33 Fourthly, the decision of Bignold J in *Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW* (1998) 101 LGERA 30, where his Honour held that business losses were recoverable as financial costs under s 59(f), was wrongly decided as were those first instance decisions of the Land and Environment Court which have since followed *Peter Croke*.
- 34 The primary judge then recorded (at [88]) the submission of the respondent that "financial costs" in s 59(f) were not restricted to expenditures and could include financial losses. Five reasons were advanced which I summarise as follows:
- (1) First, the words "financial costs" in s 59(f) should be construed with all the generalities that the words permit and should not be construed on the basis

that the right to compensation is subject to limitations or qualifications not found in the statute.

(2) Secondly, the word "costs" and "financial costs", not being defined in the Just Terms Act, bear their natural and ordinary meaning. The word "cost" is defined in the Macquarie Dictionary (4th ed, 2005) to include, as a noun, "1. the price paid to acquire, produce, accomplish, or maintain anything; 2. a sacrifice, loss or penalty". Further, Biscoe J in *Al Amanah College Inc v Minister for Education and Training (No 2)* [2011] NSWLEC 254 at [53] observed that the ordinary meaning of "cost" includes not only the price paid to acquire property or services but also a "sacrifice, loss or penalty", citing the Macquarie Dictionary definition.

(3) Thirdly, the respondent relied on a number of judicial decisions in which it was held that there was no relevant difference between the use of the word "costs" in four of the sub-paragraphs of s 59 and the use of the word "loss" in s 61. Thus in *Sydney Water Corporation v Caruso* [2009] NSWCA 391; (2009) 170 LGERA 298 at [186] I observed, with the agreement of Sackville AJA:

"In expressing the above opinion [relating to the relationship between s 61 and s 59], I have not lost sight of the change in language between s 59 and s 61 in that the former in sub-paragraphs (c), (d), (e) and (f) refers to 'costs' reasonably incurred whereas s 61(b) refers to the incurring of financial 'loss'. However, I agree with Pain J in *Costantino [Costantino and Maric v Roads and Traffic Authority (NSW)]* [2006] NSWLEC 248] that there is no relevant difference between the use of the word 'costs' in four of the sub-paragraphs of s 59 and the use of the word 'loss' in s 61. Her Honour's construction is supported by the opening words of s 59, which provides that 'loss attributable to disturbance' means, amongst other things, the incurring of financial costs, or stamp duty costs."

(4) Fourthly, there are a number of decisions of the Land and Environment Court which have held that "financial costs" in s 59(f) is not limited to pecuniary expenditure but can also comprise financial losses, such as business losses. Reference was made to *Peter Croke* and a number of other single instance decisions.

(5) Fifthly, the words "reasonably incurred" did not mandate a decision being made to incur financial costs and hence do not lend support to a construction of "costs" as being restricted to expenditures and not including losses. To "incur" a cost or loss means to "suffer" the cost or loss. Reliance was placed on the Macquarie Dictionary definition of the verb "incur" as "1. to run or fall into (some consequence, usually undesirable or injurious)"; and "2. to become liable or subject to through one's own action; bring upon oneself."

35 At [99] of his reasons the primary judge agreed with the respondent's construction of the words "financial costs" in s 59(f) for the five reasons it had advanced. Further, his Honour rejected the appellant's argument that the language of s 59(f) was to be construed by reference to the judicial gloss upon

the formulations of the value of land and the special value of the land to the owner in earlier legislation, including the characterisation of "value to the owner", or to earlier decisions that disturbance was not a separate head of compensation but was only compensable as part of compensation for the special value of the land to the owner. His Honour considered that the Just Terms Act adopted a different approach to the earlier legislation and the decisions thereon. Section 55 of the Just Terms Act provided an exhaustive list of the matters to be considered in determining the amount of compensation and separately defined "special value" and "loss attributable to disturbance". Accordingly, the different legislative provisions contained in the Just Terms Act were not to be construed on the basis that the right to compensation given was subject to limitations or qualifications not found in the terms of the Act.

36 His Honour's conclusions on this issue were contained in the following paragraphs of his reasons:

"[100] The natural and ordinary meanings of the words 'financial costs' and 'reasonably incurred' in s 59(f) permit a construction that allows compensation for not only financial expenses which the person entitled to compensation by their actions incurs, but also financial losses which the person suffers as a consequence of the acquisition. If a narrower meaning were to be selected, there would be a limitation on or impairment of the entitlement to compensation for the acquisition of land. The entitlement to compensation is an important right and hence s 59(f) should be construed with all the generality its words permit.

[101] The context of s 59 of the Act does not demand a narrow construction of financial costs so as to only include expenses and not also apply to losses. Even if the particular costs and fees referred to in paragraphs (a)-(e) of s 59 were to be construed as being restricted to expenses (which is not clear), that does not mean that 'any other financial costs' in s 59(f) must be so restricted. Paragraph (f) is intended to catch financial costs not caught by the other paragraphs in s 59. There is nothing in the language of paragraph (f), or of the other paragraphs of s 59, which demands such a narrow construction." (Citations omitted.)

## **The appellant's submissions**

37 The appellant's submissions did not differ in essence with those that were rejected by the primary judge. It submitted that the expression "financial costs reasonably incurred" in s 59(f) was a composite phrase which carried with it the connotation of a voluntary decision to incur the cost or the liability for it. It thus involved an expenditure provided it was reasonable. The ordinary meaning of "financial costs reasonably incurred", did not encompass income or profits lost or foregone by a person as a consequence of events beyond his or her control. Reliance was placed upon what I said, with the agreement of Giles and Macfarlan JJA, in *Roads and Traffic Authority of NSW v McDonald* [2010] NSWCA 236; (2010) 79 NSWLR 155 at [38]. In that passage I placed emphasis upon the word "incurred" noting that

"the reasonableness constraint governs the incurring of the costs rather than the costs themselves".

However, in *McDonald* I was dealing with a quite different issue to that the subject of the present appeal. The issue in *McDonald* was whether certain disturbance costs would have been the inevitable result of realising the potential of the part of the owner's land that had been compulsorily acquired. I do not find anything in the passage relied upon which assists in the determination of the issue of construction in the present case.

- 38 The appellant then submitted, as it had before the primary judge, that as the "financial costs" referred to in s 59(a)-(e) all related to expenditures, it followed that the same phrase in s 59(f), "financial costs", was intended also to refer only to expenditures. It should not be supposed that in s 59(f) the same phrase was intended to have a broader meaning and a different character to the "financial costs" referred to in the earlier sub-paragraphs of the section. Further, s 59(f) was narrower in its application than the earlier sub-paragraphs which refer to financial costs reasonably incurred "in connection" with the compulsory acquisition whereas s 59(f) referred to such costs reasonably incurred "as a direct and natural consequence of the acquisition".
- 39 Further support for the appellant's construction, so it was contended, was to be found in s 57 which was broad enough to provide compensation for lost or foregone profits under the rubric of "special value". If the acquired land had the advantage of consents and improvements necessary for the conduct of the owner's business from that land and as a consequence of the acquisition the owner would suffer a loss of profits arising from the delay in obtaining the necessary consents and constructing those improvements on alternative land, then the acquired land would have a special value to that owner where those advantages were not otherwise captured by the market value of the land: see s 61. It was submitted that in such a case the owner would be compensated under s 57 by valuing those lost advantages. This would be consistent with the pre-Just Terms Act authorities to which I turn.
- 40 The relevant statutory right to compensation in those authorities is to be found in s 124 of the *Public Works Act 1912* (NSW) (and its Commonwealth counterpart, s 28 of the *Lands Acquisition Act 1906-1936* (Cth)). That section provided that for the purpose of ascertaining the compensation to be paid, regard was to be had, relevantly, to "the value of the land to be purchased or taken" as well as to "damage (if any) caused by the severing of the lands taken from other lands of the owner". There was no separate provision for the recovery of compensation for disturbance or, as far as the text of the section was concerned, for special value. Each of those elements of compensation were held to be recoverable as a gloss upon the statutory language.

41 Thus in *Reeve Latham CJ* (at 419-420) referred to the decision of the Privy Council in *Pastoral Finance Association Ltd v The Minister* [1914] AC 1083 at 1087 where it was held that appellants were:

"clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested'. But their Lordships went on to explain in the following words that the value of the land to the appellants did not include the value of the business profits which they expected to make from the use of the land: - '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.'" (Citations omitted.)

42 The Chief Justice then observed (at 420):

"Loss suffered by the owner by reason of disturbance of his business by a compulsory acquisition is not itself (**apart from special statutory provision**) an element in compensation, but it would affect the price which an owner would be prepared to take if he were willing to sell and might, in a particular case, produce the result that the purchaser would pay more than would otherwise be the case. If so, the loss due to such disturbance, though not recoverable as such as part of compensation, would be 'one of the elements going to build up the purchase price to which the owner was fairly entitled in all the circumstances of the case'." (Emphasis added, citations omitted.)

43 To the same effect, in *The Commonwealth v Milledge* [1953] HCA 6; (1953) 90 CLR 157 at 164 Dixon CJ and Kitto J observed:

"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. But a prudent purchaser in the position of the owner would not increase his price 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."

44 Finally, in *Housing Commission of New South Wales v Falconer*[1981] 1 NSWLR 547, Glass JA at 563 stated the proposition that the compensation recoverable could also extend to consequential losses suffered over and above the market value of the land such as costs of removal, loss of profits, etc. Such losses were described as claims for disturbance. The principle of compensation includes such losses in the compensation assessed together with the market value of the land because otherwise the owner would not be fully compensated.

45 To similar effect Mahoney JA in the same case observed (at 573):

"It is upon the basis of the 'value to the owner' principle that amounts variously described for 'disturbance' and the like have been awarded. Thus the court has taken into account, as part of the special value of land to the owner or occupier, the costs which he would incur in moving to other equivalent premises, the loss of trade or production involved during the period of the move, and the cost of setting up in the new premises."

I need not stay to discuss the possible differences between the treatment of disturbance in *Falconer*, which had its genesis in *Horn v Sunderland Corporation* [1941] 2 KB 26 at 49, and in *Reeve*.

46 The essence of the appellant's submissions as I comprehend them is that first, in accordance with the judicial glosses placed upon statutory language operating pre-Just Terms Act, losses due to disturbance were to be regarded as part of the value of the land to the owner or, in other words, special value; secondly, those losses are not recoverable under s 59(f) because the expression "financial costs" does not include "financial losses" and this is so notwithstanding that losses, as well as expenditure, can both be "incurred"; thirdly, in any event the losses for disturbance now claimed by the respondent, to the extent that the losses are due to the foregone opportunity to derive income from the use of the land, are recoverable as special value pursuant to s 57 of the Just Terms Act.

## **The appellant's submissions should be rejected**

47 In my view the appellant's submissions are contrary to authority. Whereas prior to the commencement of the Just Terms Act, it was true that loss due to disturbance was not a separate head of compensation, it now is. As Spigelman CJ, with whom Beazley, Bryson and Basten JJA as well as Campbell J agreed, observed in *Leichhardt Council v Roads and Traffic Authority (NSW)* [2006] NSWCA 353; (2006) 149 LGERA 439 at [29], whereas in the prior case law under s 124 of the *Public Works Act*, the relevant formulation was "value of the land", that is not the formulation that falls to be interpreted under the Just Terms Act. His Honour then remarked:

"It is always dangerous to characterise a statutory provision and then to apply the formulation in the characterisation, rather than to apply the words of the statute. Under the [Just Terms Act], the characterisation 'value to the owner' is not applicable. **The earlier case law must be treated with care.**" (Emphasis added.)

48 In *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; (2008) 233 CLR 259 Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ at [31] also referred to the caution required in construing modern Australian legislation by reference to "principles" derived from judicial decisions construing different legislation in different jurisdictions. Reference was then made to the following passage in the judgment of McHugh J in *Marshall v Director General, Department of Transport* [2001] HCA 37; (2001) 205 CLR 603 at [62]:

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

49 Again, at [35] of *Walker Corporation* their Honours observed that one result of the complexity of modern land use regulation, as the terms of the Just Terms Act show, is more comprehensively drawn legislation dealing with compulsory acquisition and it is to this that primary regard must be given. In my view these statements in *Walker Corporation* are completely at odds with the appellant's reliance on the earlier authorities on which it relies in order to confine the construction of s 59(f) to expenditure and not losses.

50 It is also useful to add the following observation of Gaudron J in *Marshall* at [38]:

"Although the rule that legislative provisions are to be construed according to their natural and ordinary meaning is a rule of general application, it is particularly important that it be given its full effect when, to do otherwise, would limit or impair individual rights, particularly property rights. The right to compensation for injurious affection following upon the resumption of land is an important right of that kind and statutory provisions conferring such a right should be construed with all the generality that their words permit. Certainly, such provisions should not be construed on the basis that the right to compensation is subject to limitations or qualifications which are not found in the terms of the statute."

51 Hayne J at [67] specifically agreed with the observations of Gaudron J about the importance of construing legislation according to its natural and ordinary meaning where to do otherwise would limit or impair individual rights.

52 Finally, reference should be made to the decision of this Court in *El Boustani v Minister administering Environmental Planning and Assessment Act 1979* [2014] NSWCA 33; (2014) 199 LGERA 198. That case was heard by Beazley P,

Gleeson JA and Preston CJ of LEC. Beazley P and Gleeson JA agreed with Preston CJ in LEC. That appeal was heard on 12 November 2013 and his Honour delivered judgment in the present case on 16 December 2013. Judgment in *El Boustani* was given on 28 February 2014. Understandably, Preston CJ in LEC's judgment in *El Boustani* is consistent with what his Honour had said in his judgment in the present case. In particular, at [75] of *El Boustani* his Honour remarked that the terms of s 55 and ss 56-60 of the Just Terms Act should not be assumed to have reproduced or attempted to have reproduced an understanding of "principles" derived by way of judicial gloss upon the spare terms of different, though similar, provisions of earlier legislation, citing *Walker Corporation* at [47]. Nor should the Court, in construing the statutory provisions of Div 4 of Pt 3 of the Just Terms Act, slavishly follow decisions of another jurisdiction in respect of similar or identical legislation, citing *Marshall* at [62] and *Walker Corporation* at [31].

53 Further, at [76]-[77] of *El Boustani* his Honour, after referring to the concept of "value to the owner" as a unifying concept which encompassed market value, special value, disturbance and severance, observed that loss attributable to disturbance was not, under the legislation considered in the earlier cases, separately compensable but was included within the concept of special value. This was because those decisions were assessing the value to the owner of the land and such value was to be assessed taking into consideration the loss of the business that the owner conducted on the land or the loss of trade or production involved during the period of relocation of the business to other premises: *Falconer* at 572-573.

54 After referring to *Milledge* and other earlier authorities, his Honour concluded that:

"[85] ... the Act did not implement this concept of the value to the owner. The Act adopted an exhaustive statutory list of matters to be considered in determining the amount of compensation instead of the vague concept of 'value to the owner' .... Section 55 of the Act requires that separate consideration be given to each of its sub-paragraphs and to each of the definitions in ss 56-60 of the Act. The concept of 'value to the owner' has no operative function. As a consequence, prior case law that characterised a statutory formulation of 'value of the land' as being 'value to the owner' must be treated with care. Neither the formulation nor the characterisation is applicable to the statutory provisions in the Act.

[86] The Act adopted a different approach in at least three ways: first, it separated the concepts of 'market value', 'special value' and 'loss attributable to disturbance'; secondly, it introduced a new formulation of 'special value' (that in s 57); and thirdly, it exhaustively defined 'loss attributable to disturbance' (in s 59) separately from 'special value'. Hence, earlier case law on special value and disturbance must be treated with care." (Citations omitted.)

- 55 *El Boustani* in my view mandates rejection of the appellant's submission that loss of income and/or profits due to disturbance can be compensated for as part of "special value" as now separately and differently defined in s 57. The formulation in s 57 would not, in my view, permit the recovery of disturbance losses in the manner adopted by the primary judge in the present case. The relevant advantage to which s 57 refers must, to be recoverable, be determined as a "financial value" in addition to market value. However, as the earlier authorities demonstrate, special value to the owner cannot be assessed by capitalising the savings and additional profits which the business would probably have earned but for its destruction by the acquisition of the land upon which it was carried out and then adding the resultant figure to the market value of the acquired land.
- 56 Putting capitalisation of foregone projects aside, under s 57 the "financial value" of the relevant advantage would not, in my view, result in the recovery of the foregone income which was the subject of his Honour's finding in the present case. That is why that foregone or lost income and/or profits, if it is to be compensated for at all, can only be compensated if it falls within s 59(f). Given that it was the clear intent of the Just Terms Act that disturbance losses should be recoverable as a separate head of compensation, and taking note of the provisions of s 54, it cannot be the case that disturbance losses which under the prior law were recoverable as special value should no longer be recoverable because of a narrow construction of the expression "financial costs" in s 59(f).
- 57 What I have expressed above finds support in the decision of this Court in *Tolson v Roads and Maritime Services* [2014] NSWCA 161. In that case Basten JA (at [83]) relevantly observed:

"Losses attributable to disturbance ... fall into a different category from changes in the value of land. ... Disturbance covers legal costs, valuation fees, financial costs of relocation and other financial costs relating to the actual use of the land: s 59. Such costs are entirely separate from the value of the acquired land .... It is consistent with the legislative purpose of providing compensation for such amounts that they be allowed or disallowed in accordance with the specific statutory entitlements, without regard to the value of any land involved."

- 58 Similarly, at [114] Preston CJ of LEC remarked:

"Loss attributable to disturbance is a financial loss but it too is of a different nature to the market value or special value of the acquired land, loss attributable to severance, or the decrease or increase in the value of other land of the person. Loss attributable to disturbance includes legal costs and valuation fees in connection with the compulsory acquisition of the acquired land, financial costs in connection with relocation from the acquired land, stamp duty costs in connection with the purchase of land for relocation, financial costs in connection with the discharge of a mortgage over the acquired land and execution of a new mortgage resulting from the relocation, and any other financial costs as a direct and natural consequence of the acquisition (s 59). These financial costs **and losses** are of a different nature to the market value or special value of the acquired land, loss attributable to severance, or the decrease or increase in the value of other land of the person." (Emphasis added.)

59 Beazley P, who was in agreement with Basten JA, noted (at [10]) that the matters included in s 55(d) as specified or defined in s 59 are of a different nature from the valuation outcome to which s 55(a) and s 55(c) and (f), if applicable, are directed. Her Honour continued at [11]:

"In the present case, the disturbance costs that have been allowed are relevantly modest. Nonetheless, they involved actual outgoings which the Court determined were reasonably incurred. In other cases the sums may not be as modest. There is unlikely to be just compensation where a person has reasonably incurred expenses as permitted by statute where those monies are irrecoverable other than by being reflected in an unrealized increase in the value of the retained land. Whilst an increase in the value of land may have a longer term benefit to the person on sale, the impact of such expenses upon a person whose land has been compulsorily acquired is upon the person's liquid assets at the time of acquisition. That could be a serious financial burden in a particular case, even where the expenses are modest. These considerations underscore what Basten JA has said, namely, that expenses identified in s 55(d) are of a different nature from changes in the value of the land itself."

60 It should not be assumed that in the passage cited in the preceding paragraph her Honour was seeking to confine the expression "financial costs" in s 59(f) as excluding "financial losses". What her Honour was doing was emphasising, as had Basten JA, that losses attributable to disturbance were not to be determined as part of the value of the land acquired. By parity of reasoning, disturbance losses are separated from the determination of "special value" in accordance with the terms of s 57. There is no overlap between the two. That this is so can be demonstrated by the fact that, like market value, special value as defined is to be determined as at the date of acquisition whereas losses attributable to disturbance arise, by virtue of their very nature, post-acquisition.

61 I have referred above (at [34(3)]) to my view in *Caruso* that there is no relevant difference between the use of the word "costs" in s 59(f) and the word "loss" in s 61(b). Bignold J in *Peter Croke* held that the effect of s 61(b) is that where it otherwise applies, disturbance costs and losses which would reasonably have been incurred in realising the potential in question, cease to be recoverable. That decision was approved by this Court in *Caruso*. The point is

that once one accepts that s 61(b) has the effect of negating any claim for any loss attributable to disturbance (other than the costs referred to in s 59(a) and (b), not being costs which would have been incurred in realising the potential of the land, it necessarily follows that "costs" in s 59(f) includes "losses" for if it were otherwise then s 61(b) would have no effect on such losses which would remain recoverable and would have little, if any, work to do.

- 62 Finally, contrary to the submission of the appellant, the primary judge's construction of s 59(f) does not involve compensating an owner for business losses or foregone profits by capitalising them. That is not how the primary judge assessed the respondent's losses under this head and it would have been inappropriate for him to have assessed them otherwise than in the manner he adopted by estimating income and subtracting estimated expenditure for the relevant period.
- 63 It follows from the foregoing that I would reject the appellant's submissions on the first issue including its contention that *Peter Croke* and the decisions which have followed it were wrongly decided. Given that the pre-Just Terms Act authorities relied upon by the appellant permitted the recovery of disturbance losses such as loss of trade or production during the period of relocation, it would be odd in the extreme if such losses could no longer be recovered because no expenditure was involved. In my view the primary judge was correct in finding that the respondent was entitled to recover compensation for the lost or foregone net income it sustained as a direct and natural consequence of the acquisition of its interest in the Yabtree Street land.

## **THE SECOND ISSUE: WAS THE RESPONDENT ONLY ENTITLED TO ONE MONTH'S LOSS OF INCOME?**

### **The primary judge's reasons**

- 64 The primary judge at [157] of his reasons rejected the appellant's contention that because the respondent only had a lease determinable on one month's notice, the only business loss it could reasonably incur was a loss of one month's profits. His Honour considered (at [158]) that the appellant had used inappropriate reference points for the comparison. The reasonableness of the respondent incurring financial losses was not to be assessed by reference to the position it would have been in had Benantra given one month's notice to determine the tenancy. That would assume no acquisition. It is a situation over which the respondent would have no control and in any event would be

an artificial and highly unlikely event as Benantra would not have acted to determine the respondent's tenancy.

65 In this respect his Honour found (at [125]), when identifying the respondent's interest in the Yabtree Street land, that subject to the respondent paying rent in the sum agreed between the parties, the respondent was given exclusive possession of the Yabtree Street land on which to conduct its medical practice for an indefinite period being so long as the respondent wished to conduct its practice on that land. That was in the interests of both parties including Dr and Mrs Angus. Had there been no acquisition, there was no reason to believe that the tenancy would not have continued for at least the following two years (being the period which the primary judge considered to be reasonable for the respondent to have incurred the losses which it claimed under s 59(f)).

## **The appellant's submissions**

66 The appellant's submission to this Court, which was also advanced at trial and rejected, was that the only loss recoverable by the respondent under s 59(f) as a direct and natural consequence of the acquisition was that constituted by its being deprived of the security of one month's notice of termination of its tenancy. In this respect it was submitted that it would have been open to the appellant to compulsorily acquire only Benantra's interest in the Yabtree Street land, (that is, the reversion of the tenancy), leaving the respondent's interest unaffected. The appellant could then have given the respondent one month's notice of the termination of its tenancy at the expiry of which the respondent's interest in the land would have ceased. It would then have been required to vacate the premises and relocate without having any entitlement to claim compensation.

67 In support of this contention reliance was placed by the appellant upon the decision of the High Court in *The Minister v The New South Wales Aerated Water and Confectionary Company Limited* [1916] HCA 48; (1916) 22 CLR 56, a case where the relevant interest acquired was a lease for a specified term without an option for renewal. It was argued in that case that because of the personal relationship between the lessor and lessee, the jury assessing compensation was entitled to take into consideration as arising from that fact any probability that the lessor would have granted the lessee a fresh lease. It was held that in those circumstances the personal relationship between the parties was irrelevant.

## **The appellant's submission should be rejected**

- 68 In my view the decision in *Aerated Water* does not assist the appellant. That was a case where the relevant lease was to expire at the end of a fixed term. Any grant of a new lease was dependent upon the personal relationship between the parties continuing. In the present case the tenancy at will found by the primary judge would continue indefinitely unless and until Benantra, as lessor, took the decision to give one month's notice in writing and there was no reason to assume that it would give such a notice so long as Dr Angus wished to practise from the Yabtree Street land. On the other hand in *Aerated Waters* there was no reason to assume or contemplate that the lessor would grant the lessee whose interest was compulsorily acquired, a new lease on the expiry of the term of the existing lease. In any event, the issue in *Aerated Waters* was the market value of the interest compulsorily acquired. In the present case the Court is concerned with post-acquisition disturbance losses. The issues are quite different.
- 69 The appellant's argument proceeds on the assumption that the terms and limitations of the respondent's interest in the Yabtree Street land govern, as a matter of law, the question of whether the respondent reasonably incurred a loss of income and/or profits as a direct and natural consequence of the acquisition. Herein lies the fallacy of its contention. Those terms and limitations were relevant to the assessment of the market value of the interest acquired but not to the assessment of any loss attributable to post-acquisition disturbance.
- 70 In the present case, as the respondent's tenancy was terminable on one month's written notice, it had no market value. But the fact that it was compulsorily acquired thereby converted the relevant interest into an entitlement to claim compensation in accordance with, relevantly, Div 4 of Pt 3 of the Just Terms Act: see s 37. That acquisition gave rise to loss attributable to disturbance where that loss related to the actual use of the land and was reasonably incurred as a direct and natural consequence of the acquisition. That consequence was triggered by the compulsory extinguishment of an interest in the land as defined: the nature of that interest mattered not for the purpose of s 59(f). Its work was done when it was acquired and its only relevance was its influence on its market value as at the date of acquisition.
- 71 In other words, the respondent's disturbance losses were triggered by the extinguishment of its interest in the Yabtree Street land but were not referable to it. On the contrary, those losses were referable to the actual use of the land as a direct and natural consequence of its acquisition.
- 72 For completeness I would observe that the example suggested by the appellant of it acquiring only Benantra's reversion in the Yabtree Street land rather than the fee simple so as to avoid having to pay compensation in respect of the termination of the respondent's interest, may well constitute an abuse of the

appellant's power of acquisition upon the basis that no attempt would have been made to acquire only the reversion if it had not been desired to avoid paying compensation to the respondent: see *Thompson v The Council of the Municipality of Randwick* [1950] HCA 33; (1950) 81 CLR 87 at 105-106; *Samrein Pty Ltd v Metropolitan Water, Sewerage & Drainage Board*(1982) 56 ALJR 678 at 679.

73 In summary the appellant's argument is that the respondent only had 30 days security of tenure beyond which its position was uncertain. Accordingly, the only losses which it reasonably incurred as a direct and natural consequence of the acquisition were those referable to the period in respect of which its tenure was secure. The primary judge determined that the respondent's tenure was secure for as long as it wished to carry on an obstetrics and gynaecological practice upon the Yabtree Street land and that it was reasonable for it to recover its losses for a period of two years. These were findings of fact. Unless the appellant can demonstrate an error of law on the part of the primary judge in making those findings, they are incapable of challenge. In my view no such error has been demonstrated. Accordingly the appellant's submission on the second issue should be rejected.

## CONCLUSION

74 In my view the two issues which the appellant has sought to advance in this Court should be determined in favour of the respondent. It follows that no relevant error of law on the part of the primary judge has been demonstrated. I would therefore propose that the appeal be dismissed with costs.

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Decision last updated: 17 October 2014