Court of Appeal
Supreme Court
New South Wales

Amendment notes

Medium Neutral Citation:	**Tempe Recreation (D.500215 and D.1000502) Reserve Trust v Sydney Water Corporation [2014] NSWCA 437**
Hearing dates:	11 November 2014
Decision date:	19 December 2014
Before:	Basten JA at [1]; Emmett JA at [2]; Leeming JA at [27]
Decision:	1. Appeal dismissed. 2. Grant leave to Sydney Water to cross-appeal. 3. Allow the cross-appeal, set aside order 2 made on 24 December 2013 and the orders made on 20 March 2014, and in lieu thereof order that (1) Sydney Water pay the Trust's costs up to and including 13 February 2013, (2) no order as to costs for the balance of the proceedings, with the intention that the parties bear their own costs, (3) otherwise dismiss the notice of motion filed on 11 February 2014 (with no order as to the costs of that motion). 4. The Trust to pay Sydney Water's costs in this Court. *[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:

EASEMENTS - construction - whether permissible to have regard to the terms of other easements in same registered memorandum - relevance of structure of definitions - relevance of textual similarities - relevance of defined term itself

RESUMPTION AND ACQUISITION OF PROPERTY - easement acquired over land managed by reserve trust - determination of compensation - Crown Lands Act 1989 (NSW), s 106A

COSTS - offer of compromise - operation of rules and discretion in proceedings where "costs follow the event" is not the starting point

Legislation Cited:

Conveyancing Act 1919 (NSW), s 88B
Crown Lands Act 1989 (NSW), ss 78, 92, 95, 98, 100, 106A, Part 5
Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 55
Land and Environment Court Act 1979 (NSW), s 57
Real Property Act 1900 (NSW), ss 42, 80A
Sydney Water Act 1994 (NSW)
Uniform Civil Procedure Rules, rr 1.5, 20.26, 42.1, 42.15, Part 42 Division 3, Schedule 1

Cases Cited:

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99
Barangaroo Delivery Authority v Lend Lease (Millers Point) Pty Ltd [2014] NSWCA 279
Besmaw Pty Ltd v Sydney Water Corporation [2001] NSWLEC 15; 113 LGERA 246
Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd [2013] HCA 11; 247 CLR 149
Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38; [2009] 1 AC 1101
Dillon v Gosford City Council [2011] NSWCA 328; 184 LGERA 179
Fitzgerald v Masters (1956) 95 CLR 420
Hadley v Perks (1866) LR 1 QB 444
Hare v van Brugge [2013] NSWCA 74; 84 NSWLR 41
Horsell International Pty Ltd v Divetwo Pty Ltd [2013] NSWCA 368
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2014] NSWCA 323
Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Co Inc (1994) 181 CLR 404
Queensland Premier Mines v French [2007] HCA 53; 235 CLR 81

	Sertari Pty Ltd v Nirimba Developments Pty Ltd [2007] NSWCA 324; (2008) NSW ConvR 56-200 Smalley v Motor Accidents Authority of New South Wales [2013] NSWCA 318; 85 NSWLR 580 Streller v Albury City Council [2013] NSWCA 348; Aust Torts Reports 82-146 Sydney Water Corporation v Besmaw Pty Ltd [2002] NSWCA 147 Tovir Investments Pty Ltd v Waverley Council [2014] NSWCA 379 Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45; 233 CLR 528 Wilkie v Gordian Runoff Ltd [2005] HCA 17; 221 CLR 522
Texts Cited:	P Herzfeld, T Prince and S Tully, Interpretation and Use of Legal Sources - The Laws of Australia (Thomson Reuters 2013)
Category:	Principal judgment
Parties:	Tempe Recreation (D.500215 and D.1000502) Reserve Trust (Appellant) Sydney Water Corporation (Respondent)
Representation:	Counsel: A Galasso SC with M Seymour (Appellant) R Lancaster SC with N Zerial (Respondent) Solicitors: Marrickville Council (Appellant) King & Wood Mallesons (Respondent)
File Number(s):	2014/15779
Decision under appeal	[2013] NSWLEC 221
Citation:	
Date of Decision:	24 December 2014
Before:	Biscoe J
File Number(s):	2012/30915

JUDGMENT

1 **BASTEN JA**: I agree with the orders proposed by Leeming JA and with his reasons.

2 **EMMETT JA**: The principal question raised in this appeal is the construction of easements (**the Easements**) acquired by the respondent, Sydney Water Corporation (**Sydney Water**), over Crown land that is part of a reserve as defined in s 78 of the *Crown Lands Act 1989* (NSW) (**the Crown Lands Act**). The reserve consists of Lots 7021 and 7022 in Deposited Plan 1059864 (**the Tempe Reserve**). The Tempe Reserve contains soccer and rugby fields, cricket pitches, a public amenities block, a children's playground, a gazebo picnic area, an indoor recreation area, netball courts, and cycling and pedestrian paths, access roads and public car parks.

3 In the register maintained under the *Real Property Act 1900* (NSW), the State of New South Wales (**the State**) is shown as the registered proprietor of the Tempe Reserve. However, the appellant, Tempe Recreation (D.500215 and D.1000502) Reserve Trust (**Tempe Trust**), a corporation established as a reserve trust under s 92 of the Crown Lands Act, has been appointed as trustee of the Tempe Reserve under s 92. Under s 100(2), a reserve trust is not capable of alienating, charging, granting leases of or licences or easements in respect of, or in any way disposing of the whole or any part of the reserve, except in accordance with Part 5 of the Crown Lands Act. Further, revocation of the dedication or reservation of the whole or a part of a reserve divests the reserve trust of any estate in the land affected by the revocation. The provisions of s 100 have effect despite anything contained in s 42 of the *Real Property Act*.

4 The Easements were acquired by Sydney Water under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Land Acquisition Act**), by notice of compulsory acquisition in the Government Gazette on 2 December 2011. They are described in Deposited Plan 1155181, and were created upon registration of that plan by the operation of s 88B of the *Conveyancing Act 1919* (NSW). The terms of the Easements are described in Memorandum AG277407 registered under s 80A of the *Real Property Act* (**the Memorandum**).

5 Following the acquisition of the Easements by Sydney Water, Tempe Trust commenced proceedings against Sydney Water in the Land and Environment Court of New South Wales (**the LE Court**) for determination of the amount of compensation payable under the Land Acquisition Act. Tempe Trust claimed compensation in the sum of $1,790,000 or such other sum as may be determined by the LE Court. On 24 December 2013, for reasons published on that day, a judge of the LE Court determined that the compensation payable to Tempe Trust for the compulsory acquisition of the Easements is $106,000.

The primary judge ordered Sydney Water to pay the costs of Tempe Trust of the proceedings.

6 In its notice of appeal from the orders of the LE Court filed on 30 March 2014, Tempe Trust relies on six grounds. I have had the advantage of reading in draft form the proposed reasons of Leeming JA. I agree with his Honour's proposed reasons for concluding that none of the grounds succeeds and that the appeal should be dismissed. I also agree with his Honour's observations concerning the question of costs and with the orders proposed by his Honour. However, I wish to make some additional observations concerning the Memorandum.

7 The drafting of the Memorandum is not something of which the author should be particularly proud. It consists of four clauses and four schedules and states that it is for use in connection with "easements for a fresh water desalination pipeline on various lands constituting Crown land held by the State". Clause 1 deals with interpretation and defines terms used elsewhere in the Memorandum, including in the schedules, and for the purposes of any instrument or dealing incorporating any of the provisions of the Memorandum.

8 Each schedule to the Memorandum describes a different form of easement. Thus, Schedule 1 is to be used for a mounded or supported pipeline with no vehicle access, including associated fittings. Schedule 2 is to be used for a mounded pipeline with vehicle access, with no rights to Sydney Water above the surface of the mound. Schedule 3 is for use in connection with a micro-tunnelled pipeline. Schedule 4 is for use in connection with a trenched pipeline.

9 The structure of each schedule is the same, in that each contains three parts consisting of the following:

1. What Sydney Water **may do** in or on the Land;

2. What Sydney Water **must do** with respect to the Land;

3. What the Registered Proprietor **must not do** in or on the Land.

In Schedule 3, "Land" is replaced with "Land in Stratum".

10 **Land** is defined in cl 1 of the Memorandum as "the part of the Lot affected by the Easement for Water Supply Purposes". **Lot** is defined as "the lot burdened by the Easement for Water Supply Purposes", and **Easement for Water Supply Purposes** is defined as "the easement created by means of an instrument or dealing incorporating by reference any or all of the provisions" of the Memorandum. **Registered Proprietor** is defined as the registered proprietor of the Lot under the *Real Property Act* and the owner of any Lot, together with any agents, employees, contractors, tenants and licensees of the registered proprietor. **Land in Stratum** is defined as that part of the Lot within the stratum or strata specified in the Plan affected by the Easement for Water Supply Purposes. **Plan** is defined as the registered plan to which reference is made in the instrument or dealing incorporating by reference any or all of the provisions of the Memorandum.

11 The following definitions of various kinds of infrastructure are significant for the terms of easements to be created by reference to the Memorandum:

(1) **Water Supply Works**;

(2) **Works**;

(3) **Works (Trenched)**; and

(4) **Works (Mounded)**.

12 The definitions of the first three follow a similar structure. Each is defined as meaning "any infrastructure works used for water supply purposes ...". Each definition then specifies a different place of situation of the relevant infrastructure works. Thus, **Water Supply Works** are described as "situated in the Land in Stratum", **Works** are described as "situated upon, above or below the surface of the Land" and **Works (Trenched)** are described as "situated at, upon, on or below but not above the surface of the Land".

13 Each of those three kinds of infrastructure works is also defined to include:

> without limitation any pipelines, mains, scourlines, overflow pipes and distributary, reticulating and other ancillary works and associated fittings.

Further, each is also defined as including "signs providing notice, warnings, restrictions or information about" the Works, Water Supply Works or Works (Trenched), as the case may be.

14 Curiously, the term **Works (Mounded)** is defined in cl 1 of the Memorandum in language quite different from the language used to define the other three kinds of infrastructure works. Works (Mounded) is defined as follows:

> **[t]he** water supply pipeline used for water supply purposes situated within **the** mound which together are at, upon, above or below the surface of the Land, provided however the water supply pipeline is not above the surface of **the** mound and includes without limitation associated fittings for the water supply pipeline, including scourlines, overflow pipes and distributary, reticulating and other ancillary works provided however these are not above the surface of **the** mound, and includes signs providing notice, warnings, restrictions or information about the Works (Mounded). [emphasis added]

15 That is to say, whereas the definitions of Water Supply Works, Works and Works (Trenched) all refer to "**any** infrastructure works used for water supply purposes", without being limited to any particular infrastructure works, the definition of Works (Mounded) refers to **the** pipeline and **the** mound, suggesting a particular pipeline and a particular mound. It may be that the term Works (Mounded) was intended to be defined by reference to specific infrastructure works, on the basis that it was contemplated that the relevant infrastructure works would have been constructed and in place before the creation of the easement relating to Works (Mounded). However, one would have expected the same position to apply to the other kinds of infrastructure works as well. The difference may therefore be no more than the result of careless drafting.

16 However, when drafting Schedule 2, which specifies the terms for an easement relating to Works (Mounded), the author of the Memorandum departed from the notion of particular infrastructure works in relation to Works (Mounded). Thus, cl 1.1 of Schedule 2, which specifies the actions that Sydney Water may engage in from time to time and at any hour of the day or night, refers to "**any** Works (Mounded)". For example, cl 1.1.4 provides that Sydney Water may:

> place, erect, construct, examine, operate, maintain, alter, renew, replace and remove **any** Works (Mounded) in or on the Land.

The other paragraphs of cl 1.1 all refer to **any** Works (Mounded), apart from cl 1.1.7, which provides that Sydney Water may:

> discharge or drain water and any associated substance in any quantity from any of the fittings comprising **the** Works (Mounded) that are used for such discharge or drainage.

17 Clause 2 of Schedule 2, which specifies what Sydney Water must do with respect to the Land, refers to **any** Works (Mounded). On the other hand, cl 3, which provides what the Registered Proprietor must not do in or on the Land, refers to **the** Works (Mounded). In Schedule 4, which is for use in connection with the trenched pipeline, the use of the words "any" and "the" in relation to Works (Trenched) is consistent with the use of the words "any" and "the" in Schedule 2 in relation to Works (Mounded).

18 The inclusion, in the definitions of Water Supply Works, Works, Works (Trenched) and Works (Mounded), of the place of situation of those infrastructure works appears to be a further example of careless drafting, when one comes to consider the operation of the defined terms in the schedules. Thus, in the schedules, reference is again made to the place of situation of the relevant Water Supply Works, Works, Works (Trenched) or Works (Mounded).

19 Clause 1.1.5 of Schedule 2 provides that Sydney Water may "use any Works (Mounded) **in or on** the Land". Curiously, cl 1.1.6 provides that Sydney Water "may convey water ... in and through any Works (Mounded) **in** the Land". Clauses 1.1.4, 1.1.5 and 1.1.6 of Schedule 4 employ the same prepositions in relation to Works (Trenched).

20 For example, cl 1.1.4 of Schedule 4 provides that Sydney Water may:

> place, construct, examine, operate, maintain, alter, renew, replace and remove any Works (Trenched) **in or on** the Land.

If one inserts the defined term in that phrase, the result is as follows:

> place, construct, examine, operate, maintain, alter, renew replace and remove any [*any infrastructure works used for water supply purposes situated at, upon, on or below but not above the surface of the Land*] **in or on** the Land.

21 Thus, the use in the definitions of the prepositions concerning the place of situation of the relevant infrastructure works is inconsistent with the use of prepositions in the schedules. At least some of the prepositional phrases in the definitions in cl 1 of the Memorandum must therefore be regarded as otiose.

22 Four easements were acquired by the notice under the Land Acquisition Act in respect of four different parts of Tempe Reserve. The first was an easement as described in cll 1 to 4 and Schedule 3 of the Memorandum over that part of Tempe Reserve shown on DP 1155181 as "(A) Proposed Stratum Easement for Water Supply Purposes". The second was as described in cll 1 to 4 and Schedule 4 of the Memorandum over that part of Tempe Reserve shown on DP 1155181 as "(B) Proposed Easement for Water Supply Purposes ... (Trenched Easement)". The third is as described in cll 1 to 4 and Schedule 2 of the Memorandum over that part of Tempe Reserve shown on DP 1155181 as "(C) Proposed Easement for Water Supply Purposes ... (Mounded Trafficable & Road Crossing Easement)". The fourth is as described in cll 1 to 4 and Schedule 1 of the Memorandum over that part of Tempe Reserve shown on DP 1155181 as "(D) Proposed Easement for Water Supply Purposes ... (Supported Non-Trafficable Easement)".

23 The principal issue in the appeal was whether the easements shown on DP 1155181 as "(B)" and "(C)" would permit Sydney Water to build permanent infrastructure works above the ground level of Tempe Reserve. That requires an analysis of the true construction of Schedule 4 and Schedule 2 of the Memorandum in the light of the definitions contained in cl 1 of the Memorandum.

24 The rights created by easement (B) and easement (C) are specified in cl 1 of the Memorandum and in Schedule 4 and Schedule 2 respectively. Clause 1 of Schedule 4 specifies what Sydney Water may do in or on the Land by reference to Works (Trenched). Clause 1 of Schedule 2 specifies what Sydney Water may do in or on the Land by reference to Works (Mounded). The language of cl 1 of each of Schedule 4 and Schedule 2 is very similar. Nevertheless, because of the lack of symmetry between the definitions of Works (Trenched) and Works (Mounded), as examined above, their effect is obscured.

25 The analysis set out above demonstrates that it is difficult to draw nice distinctions on the basis of the use of particular words by the author of the Memorandum. One can but draw general conclusions as to the intention of the author, since subtle distinctions do not appear to have been in the author's mind. In those circumstances, it is plain enough that the intention of the author of the Memorandum was that neither easement (B) nor easement (C) would create any entitlement on the part of Sydney Water to construct any infrastructure works above the natural ground level of Tempe Reserve, as that level has been modified by the construction of the mound over the pipeline on the Land that is within the area of easement (C). The construction of the Easements contended for by Tempe Trust must therefore be rejected.

26 I therefore agree with the orders proposed by Leeming JA for the reasons that his Honour has given.

27 **LEEMING JA**: The appellant reserve trust challenges the determination of compensation for the acquisition of easements for a pipeline across Tempe Reserve. The pipeline has been laid, mostly underground. The principal issue was the construction of the easements, and in particular whether greater compensation should have been ordered because the respondent had the power, in the future, to cause much greater impact on the land, and correspondingly a much greater reduction in the public benefit of the open space. I have concluded, for reasons given below, that the construction held by the primary judge is correct, and that the appeal should be dismissed.

Background

28 By notice published in the Gazette on 2 December 2011 (**Acquisition Notice**), four easements were acquired by compulsory process under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Act**) for the purpose of the *Sydney Water Act 1994* (NSW). Those easements were located in Lots 7021 and 7022 in Deposited Plan 1059864. The registered proprietor of both lots was the State of NSW. By reason of notifications published in the Government Gazette in 1907 and 1931, the land was known as "Tempe Reserve".

29 The appellant is Tempe Recreation (D.500215 & D.1000502) Reserve Trust (**Trust**). Despite its name, the Trust is a corporation with distinct legal personality. The Trust is "charged with the care, control and management" of

Tempe Reserve: *Crown Lands Act 1989* (NSW), s 92(5). Section 95(1) of that Act empowers the Minister to appoint a council to manage the affairs of a reserve trust, which power has been exercised in the present case. In such a case, the trust has all the functions of the council in relation to public reserves: s 98(1).

30 Tempe Reserve is the southern portion of an area of public open space at the confluence of Cooks River and the Alexandra Canal, near Sydney Airport. In 2008, the respondent (**Sydney Water**) constructed a water supply pipeline from the desalination plant at Kurnell across Botany Bay to connect with the water supply at Erskineville. The pipeline traverses Tempe Reserve. After the construction of the pipeline had been completed, Sydney Water compulsorily acquired the easements, which, broadly speaking, run in a corridor close to the eastern boundary of Tempe Reserve, slightly set back from Alexandra Canal. There was no dispute that the primary judge accurately recorded the position at the time of acquisition at [22]:

> "(a) the pipeline had been constructed entirely below ground, except that the part of the pipeline traversing Easement C was entirely below a landscaped mound, and the part traversing Easement D was entirely below a backfilled area behind a retaining wall on sloping ground in the north-east corner of Tempe Reserve and separated from the rest of Tempe Reserve by the road to which I have referred.
>
> (b) the pipeline entered Tempe Reserve at the southern end from under the Cooks River, and exited onto the neighbouring land to the north owned by Marrickville Council, which it traversed above ground mostly parallel with and close to the Canal;
>
> (c) the only visible evidence of the pipeline on Tempe Reserve are a cluster of concrete slabs on or adjacent to Easement B and just north-east of the public carpark. They comprise three concrete slabs, about 2.5 square metres, with some valves, a scour and some smaller slabs nearby, and a small box at ground level."

The terms of the easements compulsorily acquired

31 Easements A, B, C and D are defined in the Acquisition Notice by reference to two other documents. First, each of Easements A, B, C and D is described in the Acquisition Notice as being "shown on DP1155181" as, respectively:

> "(A) Proposed stratum easement for water supply purp oses 6 wide (35.2m2)

(B) Proposed easement for water supply purposes 8 wide (trenched easement) (2143m2)

(C) Proposed easement for water supply purposes 9 wide (mounded trafficable & road crossing easement) (610.7m2)

(D) Proposed easement for water supply purposes 8 wide (supported non trafficable easement) (288.7m2)"

32 Secondly, each easement is said to be "more fully described in Clauses 1 to 4 inclusive and [one of the Schedules] of Memorandum AG277407". Clauses 1 to 4 of Memorandum AG277407 (**Registered Memorandum**) are addressed in more detail below. Easement B corresponds with Schedule 4, Easement C corresponds with Schedule 2, and Easement D with Schedule 1. Easement A is not relevant to this appeal.

33 Schedules 4, 2 and 1 in the registered memorandum each follow the same structure. Clause 1 identifies a series of actions which "Sydney Water may from time to time and at any hour of the day or night" do. In each case, Sydney Water is empowered to "place, construct, examine, operate, maintain, alter, renew, replace and remove [certain things] in or on the Land" (in Schedule 2 Sydney Water is also empowered to "erect"). In the case of Schedule 1 that clause applies to any "Works", in the case of Schedule 2, the clause applies to any "Works (Mounded)" and in the case of Schedule 4, to any "Works (Trenched)". In each case, the balance of the clause contains ancillary provisions (for example as to giving notice and exercising its rights reasonably).

34 In each case, cl 2 imposes obligations upon Sydney Water in relation to restoring and making good and remedying any damage on the land. In each case, cl 3 imposes prohibitions upon the registered proprietor in cl 3.1. In each case, the balance of cl 3 makes ancillary provisions for the registered proprietor to apply to do that which it was forbidden, for Sydney Water to consider and respond to such applications and to give approval, which must not unreasonably be withheld.

35 The parties drew attention to the prohibition in cl 3.1.4 in Schedule 2 (the schedule that is applicable to Easement C) that:

"The **Registered Proprietor** must not ... make by any means whatever any alteration to the surface levels of the **Land** as it exists from time to time, provided however, the **Registered Proprietor** may place, erect, construct and maintain roads and footpaths over the surface level of the **Land** as it exists from time to time if it does not require excavation or reduction in the surface level of the **Land**, including the surface level of the **Works (Mounded)**."

36 It will be seen that the substantive rights and obligations in each of Schedules 4, 2 and 1 of the Registered Memorandum are specified by reference to the defined terms, in particular, "Works (Trenched)", "Works (Mounded)" and "Works". It will also be seen that:

(5) Easement B, which is described in the Acquisition Notice as "Proposed easement for water supply purposes 8 wide (**trenched** easement) (2143m2)" picks up Schedule 4 of the Registered Memorandum, where the rights and obligations are defined by reference to "Works (**Trenched**)"; and

(6) Easement C, which is described in the Acquisition Notice as "Proposed easement for water supply purposes 9 wide (**mounded** trafficable & road crossing easement) (610.7m2)" picks up Schedule 2 of the Registered Memorandum, where the rights and obligations are defined by reference to "Works (**Mounded**)".

37 As will be seen below, the textual similarities emphasised above between the descriptions of Easements B and C in the Acquisition Notice, and the definitions used in the Registered Memorandum, is far from coincidental.

38 Clause 1 of the Registered Memorandum is headed "Interpretation". Clause 1.1 relevantly provides:

"In this memorandum and any instrument or dealing incorporating any or all of the provisions of this memorandum, unless the context otherwise requires:

...

Easement for Water Supply Purposes means the easement created by means of an instrument or dealing incorporating by reference any or all of the provisions of clauses 1, 2, 3, 4 and any of Schedules 1, 2, 3, or 4 of this memorandum with or without amendment.

...

Land means the part of the **Lot** affected by the **Easement for Water Supply Purposes**.

Land in Stratum means that part of the **Lot** within the stratum or strata specified in the **Plan** affected by the **Easement for Water Supply Purposes.**

Lot means the lot burdened by the **Easement for Water Supply Purposes**, whether or not the lot is under the *Real Property Act 1900.*

...

Plan means the registered plan to which reference is made in the instrument or dealing incorporating by reference any or all of the provisions of this memorandum with or without amendment.

...

Water Supply Works means any infrastructure used for water supply purposes situated in the **Land in Stratum** and includes without limitation any pipelines, mains, scourlines, overflow pipes and distributary, reticulating and other ancillary works and associated fittings, and includes signs providing notice, warnings, restrictions or information about the **Water Supply Works**.

Works means any infrastructure works used for water supply purposes situated upon, above or below the surface of the **Land** and includes without limitation any pipelines, mains, scourlines, overflow pipes and distributary, reticulating and other ancillary works and associated fittings, and includes signs providing notice, warnings, restrictions or information about the **Works**.

Works (Mounded) means the water supply pipeline used for water supply purposes situated within the mound which together are at, upon, above or below the surface of the **Land**, provided however the water supply pipeline is not above the surface of the mound and includes without limitation associated fittings for the water supply pipeline, including scourlines, overflow pipes and distributary, reticulating and other ancillary works provided however these are not above the surface of the mound, and includes signs providing notice, warnings, restrictions or information about the **Works (Mounded)**.

Works (Trenched) means any infrastructure works used for water supply purposes situated at, upon, on or below but not above the surface of the **Land** and includes without limitation any pipelines, mains, scourlines, overflow pipes and distributary, reticulating and other ancillary works and associated fittings, and includes signs providing notice, warnings, restrictions or information about the **Works (Trenched)**."

39 Clause 1.2 provides that, inter alia, "headings and explanatory notes are for convenience only and do not affect the interpretation of this memorandum" unless the context otherwise requires.

40 Clauses 2, 3 and 4 of the Registered Memorandum are headed "Ownership of Works", "Operation of sections 41 and 44 of the *Sydney Water Act 1994*" and "Release, variation or modification of this Instrument". Clause 2.1 provides that "The Water Supply Works, Works, Works (Mounded) and Works (Trenched) installed in or affixed to the Land are and remain at all times the

property of Sydney Water." Clauses 3 and 4 are not relevant.

The proceedings at first instance and on appeal

41 The easements were acquired compulsorily upon the gazettal of the Acquisition Notice on 2 December 2011. The State and Sydney Water reached agreement as to the compensation payable for the acquisition of an interest in land from the State. However, Sydney Water and the Trust were unable to reach agreement. The Trust commenced proceedings, in Class 3 of the jurisdiction of the Land and Environment Court, seeking compensation in the amount of $1,790,000. By the time of the hearing, the Trust's claim had increased to around $5,000,000, which was wholly disputed, save for $6,000 for disturbance.

42 The primary judge heard the proceedings over 6 days in December 2013 and delivered judgment, promptly, on 24 December 2013. He determined compensation in the amount of $106,000, and ordered Sydney Water to pay the Trust's costs. It is convenient to defer explaining his Honour's reasoning process until dealing with the grounds of appeal.

43 Sydney Water applied for a costs order in its favour, in light of an offer of compromise it had made some 10 months in advance of the hearing in the amount of $268,000. By a reserved judgment following a further oral hearing, the primary judge dismissed Sydney Water's application.

44 The Trust has appealed, as of right, from the determination of compensation in the amount of $106,000. In accordance with *Besmaw Pty Ltd v Sydney Water Corporation* [2001] NSWLEC 15; 113 LGERA 246, appeal dismissed [2002] NSWCA 147, the compensation payable was determined in accordance with the full extent of the rights conferred by the easements. This was common ground when the appeal was heard. Central to all save one of the grounds of this appeal is the proper construction of Easements B, C and D.

45 Grounds 1, 2 and 3 of the appeal were based on the proper construction of Easements B and C. Ground 4 complained that the primary judge erred in having recourse to extrinsic material in construing Easements B and C, the extrinsic material being (a) the terms of the other easements, notably Easement D, and (b) the works which had been undertaken at the date of the acquisition. Ground 5 was consequential; it alleged that by reason of the

errors of construction, the compensation had not properly been calculated. Ground 6 complained that the primary judge had failed to determine one aspect of the appellant's case. All those grounds fall within the limited scope of the appeal which lies to this Court pursuant to s 57(1) of the *Land and Environment Court Act 1979* (NSW), "on a question of law".

46 It is appropriate first to deal with ground 4, following which the proper construction of Easements B and C raised in grounds 1, 2 and 3 can be determined, and then to turn to the final ground - 6.

47 Finally, Sydney Water Corporation seeks leave to appeal from the primary judge's order that it pay the Trust's costs, notwithstanding that it had made an offer of compromise of $268,000. The challenge to the discretion as to costs only arises if the Trust fails in its appeal, and will be addressed at the end of these reasons.

Ground 4: Improper recourse to extrinsic materials?

48 The Trust submitted that the principal error was for the primary judge to use extrinsic material, "being the terms of other interests" in construing the particular Easements B and C. As it put in writing:

> "Just as matters extrinsic to the terms of the easement are irrelevant to construction, so too must be the terms of other easements. ... In construing Easements B and C the Primary Judge utilised Easement D ... In doing so the Primary Judge erroneously relied upon matters extrinsic to the terms of the easements for the purpose of their construction."

49 In oral submissions, the Trust accepted the logical consequence of this submission, which was that it was impermissible to construe Easement B by reference to Easement C and indeed that it was therefore erroneous to construe the definitions of "Works (Mounded)" by reference to the definition of "Works (Trenched)", even though they appear in consecutive paragraphs on the same page of the same memorandum registered pursuant to s 80A of the *Real Property Act 1900* (NSW).

50 This submission was put as attractively as could be, but may readily be seen to be unsupported by authority and contrary to basic principle. The Trust relied upon *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45; 233 CLR 528, *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53; 235 CLR 81 and *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd*[2013] HCA 11; 247 CLR 149. In the last decision, Hayne, Crennan, Kiefel and Bell JJ repeated what had been said in *Westfield Management Ltd v Perpetual Trustee Company Ltd* at [5]:

> "Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens system to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question."

51 Precisely the same point was made in the third decision relied upon, *Queensland Premier Mines Pty Ltd v French* at [14]:

> "One of the fundamental purposes of the Torrens system ... is to give effect to an important public policy. That policy is that the land title register should be sufficient of itself to inform those concerned about the nature and extent of any outstanding interest in relation to the land."

52 Yet the Trust's submission asserts that there is error in having regard to parts of the self-same document which someone consulting the register would unavoidably read if asked to investigate the title of the subject land.

53 It is axiomatic that an Act is to be read as a whole: see *Smalley v Motor Accidents Authority of New South Wales* [2013] NSWCA 318; 85 NSWLR 580 at [43]-[46]. The same principle applies to all other legal documents: see for example the contract considered in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109 and the insurance policy considered in *Wilkie v Gordian Runoff Ltd*[2005] HCA 17; 221 CLR 522 at [16]. The principle is, rightly, said to be a "universal rule of construction" in P Herzfeld, T Prince and S Tully, *Interpretation and Use of Legal Sources - The Laws of Australia*, Thomson Reuters 2013, p 504. Mr Prince writes that the principle:

> "requires effect to be given to each provision of the document having regard to the others, and reflects a presumption that the various provisions were intended to operate together to achieve a specific purpose or purposes."

54 The effect of doing so may be to depart from the natural and ordinary meaning

of the words of one provision, where it is necessary to do so to avoid absurdity or inconsistency with the rest of the instrument. Thus in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* at [109], Gibbs J said:

> "Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another."

55 In *Fitzgerald v Masters* (1956) 95 CLR 420 at 437, McTiernan, Webb and Taylor JJ said:

> "It is trite law that an instrument must be construed as a whole. Indeed it is the only method by which inconsistencies of expression may be reconciled and it is in this natural and common sense approach to problems of construction that justification is to be found for the rejection of repugnant words, the transposition of words and the supplying of omitted words. ... Many illustrations may be given of the circumstances in which these processes have been followed but to do so would add nothing to the rule that the intention of the parties is to be ascertained from the instrument as a whole and that this intention when ascertained will govern its construction."

56 It is, "of course", "trite" (to use the language of Gibbs J and McTiernan, Webb and Taylor JJ) that the meaning of language turns on its context, and that in determining the legal meaning of language in a legal instrument, the law requires regard to be had to the immediate context, being the whole of the instrument.

57 Nothing in *Westfield Management*, *Queensland Premier Mines*, nor *Castle Constructions* detracts from the basal requirement that an instrument is to be read as a whole. To take any other approach, on the facts of this appeal, would be particularly problematic. For it is perfectly plain that there is a relationship between the critical definitions in the registered instrument, as anticipated above by the variation in descriptions in the Acquisition Notice (especially, between "trenched easement" and "mounded trafficable & road crossing easement") and the corresponding terms in the Registered Memorandum ("Works (Trenched)" and "Works (Mounded)"). Central to the questions of construction in this appeal are the words "situated at, upon, on or below but not above the surface of the Land" and "situated within the mound which together are at, upon, above or below the surface of the Land" in the definitions of those terms; there are (many) other relationships between the definitions as well. As will be seen below, those differences in the language are self-evidently deliberate. The differences in language are apt to convey

differences in the legal meaning, in accordance with ordinary principles of construction. It would be quite wrong to fail to have regard to them.

58 It is unnecessary to pause to consider the slightly hybrid nature of the terms of an easement in a memorandum registered pursuant to s 80A of the *Real Property Act* and given force pursuant to the unilateral exercise of a compulsive power to acquire an interest in land. Whether or not the document be regarded as "public" or "private" or some hybrid of the two, the same principles of construction apply. It is to be read as a whole. This ground of appeal must be dismissed.

Grounds 1 and 2: Error in construing Easements B and C as being limited to works that do not project, or do not substantially project, above the ground?

59 Easements B and C were stated in the Acquisition Notice to be "more fully described in" Schedules 4 and 2 respectively, which deal with the rights and obligations in respect of "Works (Trenched)" and "Works (Mounded)".

60 The Trust maintained that both Easements B and C permitted works to be placed "on" and "upon" the surface of the land. The words of confinement "[but] not above" precluded works suspended above the ground (such as a pipe resting upon concrete supports), but did not prevent works on or upon the ground. Further, the Trust submitted, in the case of Easement C dealing with "Works (Mounded)", that there was nothing to prevent Sydney Water from making the mound higher than it was.

61 The primary judge held at [51] that:

> "in context, the words 'at', 'on' or 'upon' are substantially interchangeable and are reinforced by the words 'but not above' to indicate that there is to be no substantial projection above the surface."

The primary judge was correct so to conclude.

62 Registered Memorandum AG277407 is to be construed as a whole. It comprises four Schedules, in each of which terms defined in cl 1 are applied. The four schedules describe different kinds of easements, although in many respects the rights and liabilities associated with each easement are similar. Each Schedule commenced with an explanatory note, but in accordance with cl 1.2, Sydney Water placed no reliance on the notes, and I pass over them.

63 Different language in a legal document ordinarily conveys different meaning. In Schedules which appear in the same instrument, which form part of a series of contiguous acquisitions for the same purpose - making provision for a pipeline from the desalination plant at Kurnell to inner Sydney - and which are structurally and textually very similar, textual differences are especially significant. As Blackburn J said in *Hadley v Perks* (1866) LR 1 QB 444 at 457:

> "It has been a general rule for drawing deeds and other legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning ..."

64 The basal textual difference between each Schedule is that each deals with a different defined term: "Works", "Works (Mounded)", "Water Supply Works" and "Works (Trenched)". Water Supply Works are referable to works which are situated in the Land in Stratum, and so are not defined by reference to any surface. The remaining three, which are referable to the surface of the Land, are remarkably similar. It may assist to reproduce them below, removing the emphasis given to defined terms in the original, and replacing it with emphasis which points to what in each is different:

> "**Works** means **any infrastructure works** used for water supply purposes situated **upon, above or below** the surface of the Land and includes without limitation any pipelines, mains, scourlines, overflow pipes and distributary, reticulating and other ancillary works and associated fittings, and includes signs providing notice, warnings, restrictions or information about the Works.
>
> **Works (Mounded)** means **the water supply pipeline** used for water supply purposes situated **within the mound which together are at, upon, above or below the surface of the Land, provided however the water supply pipeline is not above the surface of the mound** and includes without limitation associated fittings for the water supply pipeline, including scourlines, overflow pipes and distributary, reticulating and other ancillary works **provided however these are not above the surface of the mound**, and includes signs providing notice, warnings, restrictions or information about the Works (Mounded).

> **Works (Trenched)** means **any infrastructure works** used for water supply purposes situated **at, upon, on or below but not above** the surface of the Land and includes without limitation any pipelines, mains, scourlines, overflow pipes and distributary, reticulating and other ancillary works and associated fittings, and includes signs providing notice, warnings, restrictions or information about the Works (Trenched)."

65 The different physical limitations upon each definition (and therefore, upon the rights and liabilities in the Schedule when read with the defined term) may readily be appreciated:

(7) "Works" may be upon, above, or below the surface of the Land.

(8) "Works (Trenched)" may be at, upon, on or below but not above the surface of the Land.

(9) "Works (Mounded)" must be within "the mound". The mound (containing the Works (Mounded)) must be at, upon, above or below the surface of the Land.

66 Compare and contrast, "Works" and "Works (Trenched)". Given the elaborateness of the definitions and their substantial similarity, it must be the case that a deliberate distinction is drawn between the generality of "upon, above or below" and "at, upon, on or below but not above" to define, in each case, the relationship between the works and surface of the Land.

67 The natural distinction between the collocations of prepositions is that Works may extend above the Land's surface, but "Works (Trenched)" may not. It may be accepted that the words "at", "upon" and "on" are capable of bearing a ranges of meanings in connection with the surface of Land. What matters however is not the range of individual meanings which those prepositions may bear in various contexts, but instead the particular meaning which they bear, when considered as a whole, in *this* context. Two things are decisive here. The first is that the potentially general prepositions "at", "upon" and "on" are accompanied by a negative limitation upon their scope, by the words "not above". The second is that the question of what if the works are partly above and partly below the surface of the Land is readily answered in this context: that is dealt with by "Works (Mounded)".

68 Compare now "Works (Mounded)" and "Works (Trenched)". The same words of limitation "not above" are used in each, but in the former, the Works

(Mounded) must not extend above the surface of the *mound*, as opposed to not extending above the surface of the *Land*.

69 In other respects, putting to one side that "Works (Trenched)" is a broader term (any infrastructure works) while "Works (Mounded)" is confined to the water supply pipeline, substantially the same prepositions are used in the same way: "at, upon, on or below but not above the surface of the Land" and "at, upon, above or below ... [but] not above the surface of the mound". (For completeness, I note that because Works (Mounded) contemplates a mound whose surface is higher than the surface of the Land, the latter also includes "above the surface of the land" but this is plainly limited by "not above the surface of the mound". The inclusion of that additional prepositional phrase does not detract from the similarity in both definitions of the expression "at, upon, below but not above").

70 The similarity in the collocations of prepositions is striking. I accept one definition includes "upon" and "on" while the other merely includes "on", but that does not materially detract from the otherwise close resemblance. Such similar language in the same document should ordinarily be given the same legal meaning.

71 All this makes sense when the relationships between the definitions are considered. Works (Trenched) are wholly below the surface of the land. Works (Mounded) are wholly below the surface of the mound, and are wholly within the mound, although they may be above the surface of the Land. Works may, in contradistinction, be above the surface of the Land. Those terms reflect, obviously enough, the different forms of easement appropriate for the various stages of the same pipeline.

72 Further, the foregoing is confirmed by the labels used on the deposited plan to which reference is made in the Acquisition Notice: "trenched easement" and "mounded trafficable & road crossing easement".

73 So far, I have put to one side the meaning-laden defined terms themselves: "Works", "Works (Mounded)" and "Works (Trenched)". It is not necessary to rely upon them in order to resolve these grounds. However, as Lord Hoffmann said in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101 at [17]:

> "The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition."

74 As noted in *Barangaroo Delivery Authority v Lend Lease (Millers Point) Pty Ltd* [2014] NSWCA 279 at [11], criticism has been expressed of this mode of reasoning in a statutory context in *Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Company Inc* (1994) 181 CLR 404 at 419, but it seems wholly artificial to exclude from the analysis the evocative language which the acquiring authority chose to describe four types of easements contained in the one instrument, created for the purpose of a single pipeline. As Basten JA said in *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379 at [20], it seems unlikely that the mode of reasoning in *Chartbrook* was intended to be universally rejected. In any event, reliance on the defined term has recently been placed by this Court in *Streller v Albury City Council* [2013] NSWCA 348; Aust Torts Reports 82-146 at [43]; *Horsell International Pty Ltd v Divetwo Pty Ltd* [2013] NSWCA 368 at [159] and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2014] NSWCA 323 at [39], [47] and [103].

75 Those terms confirm what may be derived from the differing use of the collocations of prepositions and the labels used in the deposited plan. On the one hand, works that are *trenched* are buried in a trench below the surface of the ground. On the other hand, if the works extend above the original surface of the ground, but the surface has itself been raised so as to cover them, they are *mounded*. If they are physically above the (possibly altered) surface of the land, then they are neither trenched nor mounded.

76 The Trust acknowledged, properly, that the words "but not above" should be construed so as to perform some work. The proffered solution, that Works (Trenched) did not include works suspended above the ground, is unattractive when seen in a context which includes distinctly worded definitions of Works, Works (Mounded) and Works (Trenched).

77 The primary judge also referred to, but did not give dispositive weight to, the facts that the pipeline had been constructed at the time the easements were acquired, and that it was below the surface of the Land in the area of Easement A and D, and in a mound in the area of Easement C. The general rule is that materials outside the Torrens register may not be used in construing registered instruments such as an easement, but that does not rule out reliance on evidence of the physical characteristics of the land: *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324; (2008) NSW ConvR 56-200 at [15]; *Hare v van Brugge* [2013] NSWCA 74; 84 NSWLR 41 at [16]-

[18]. As the primary judge observed, the physical features of the land, and the fact that the pipeline was constructed before the easement was acquired, merely confirm the conclusion reached from the language. It is not necessary to take the analysis any further. These grounds of appeal must be dismissed. So too must ground 4 to the extent that it complains of the primary judge having regard to the physical works.

Ground 3: Error in construing the reference in Easement C to the mound as limited to natural processes?

78 The Trust submitted that the primary judge erred in construing a reference in cl 3 of Schedule 2 to the surface levels of the Land "as it exists from time to time" to be confined to natural processes such as erosion. It submitted that "Easement C contemplates a change to the surface of the mound, consistent with the construction that the mound was able to be amended by the dominant tenement". I do not agree.

79 First, this aspect of the reasoning of the primary judge was, expressly, non-dispositive. His Honour was dealing with the question whether "the mound" in Schedule 2 was the feature on the Land at the time when the easement was acquired. Immediately before the reasoning which is challenged by this ground of appeal, his Honour said that "the issue is of no real significance", and indicated that if it had to be decided, then he preferred Sydney Water's Construction. That approach was one that was appropriate for him to take.

80 Secondly, the words in cl 3.1.4 on which the Trust fastens are words which impose a prohibition upon the owner of the servient tenement from making alterations to the surface levels of the ground. It does not follow from that prohibition that the owner of the dominant tenement has power to alter the surface levels of the Land, and I see no sound support for the submission that such a power is conferred by implication.

81 Thirdly, the words in cl 3.1.4 which follow are confirmatory of the issue. They permit the owner of the servient tenement to "place, erect, construct and maintain roads and footpaths over the surface level of the Land as it exists from time to time if it does not require excavation or reduction in the surface leave of the Land, including the surface level of the Works (Mounded)". The express power of the servient owner to landscape the surface of the mound,

or to build a road over it, sits ill with a power on the part of the dominant owner to alter the surface of the mound.

82 The Trust also submitted that an inability on the part of the dominant owner to alter the surface of the mound was inconsistent with the express ability to maintain and alter the works located within the mound. The answer to this submission is, as Sydney Water contended, the conclusion does not follow from the premise. The mound can be maintained and reinstated (to reflect its current size, shape, height and location) even if what is underneath it has been altered.

83 This ground should be dismissed.

Ground 6: failure to determine compensation in accordance with s 106A(3)(a)?

84 It was common ground that s 106A of the *Crown Lands Act 1989* (NSW) displaced the operation of s 55 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). Section 106A(3) and (4) are as follows:

> "(3) Despite section 55 of the *Land Acquisition (Just Terms Compensation) Act 1991*, in determining the amount of compensation, if any, payable to a reserve trust, regard is to be had to the following matters only (as assessed in accordance with this section):
>
> (a) the value to the reserve trust of any improvements (including structures) erected or carried out by the trust on the land being acquired or vested, or over which the easement is vested, on the date the land is acquired,
>
> (b) the amount of any loss attributable to the reduction in public benefit from any loss of public open space that arises from the acquisition or vesting of the land,
>
> (c) the amount of any reduction in the value to the trust, as at the date the land is acquired or vests, or the easement vests, of any other improvements (including structures) erected or carried out by the trust on other land that is caused by the land acquired being severed from other land of the trust,
>
> (d) the cost to the trust of acquiring additional land having environmental benefits that are comparable to the land being acquired or vested,
>
> (e) any loss attributable to disturbance (within the meaning of section 59 of that Act), other than loss arising from the termination of a lease or licence over the whole or part of the land being acquired.

(4) For the purposes of a determination of an amount of compensation:

(a) the Crown is taken to be the holder in fee simple of the land being acquired or vested, or over which the easement is vested, and

(b) section 56 (2) of the *Land Acquisition (Just Terms Compensation) Act 1991* applies as if the value of improvements (including structures) erected or carried out by the trust on the land is the market value of the trust's interest in the land."

85 The Trust's submission turned on some gazebos, barbeque areas and paths which it had erected on Easement B, before the pipeline was constructed. Sydney Water removed those improvements, and after filling the trench in which the pipeline lay, replaced them with the gazebos and playground structures which are presently visible. The Trust pleaded a claim, by reference to a quantity surveyor's report, as follows:

"the whole of the playground, turf and shrubs, concrete paths, gazebos, beach seats & tables, soft landscaping and equipment (BBQ unit) $1,061,276, or alternatively $679,109"

There were further, alternative claims for $670,850 and $422,877.

86 It was said that the primary judge did not address any of those claims for compensation pursuant to s 106A(3)(a), and that therefore there had been a constructive failure to exercise jurisdiction which fell within the scope of an appeal on a question of law.

87 A sufficient answer to this ground is that there was no error in the approach taken by the primary judge having regard to the way in which the Trust ran its case at trial. Understandably, the Trust's main claim, for some $5,000,000 was based on its construction of the easements. Very properly, the Trust expressly acknowledged in its closing written submissions:

"that there cannot be double dipping; thus if under s 106A(3)(b) the value of improvements is included as reflecting the loss attributable to the reduction in public benefit, it cannot also be awarded under s 106A(3)(a) and/or (c)."

The submissions continued:

> "The alternative position, if the Trust's primary construction argument fails, is that there will still be a loss of public benefits though not from a structure that severs the site, but rather in a smaller way by placement of things like concrete pads or other infrastructure at, or flush with, the surface of the land.
>
> ...
>
> The compensation for possible inconveniences or loss of space if such infrastructure is put on the surface of the land can be described, as Mr Dundas did in the Joint Report ... as a 'blot' on the Trust's estate and valued at $100,000.Whilst he describes it as a 'blot on title', and that label may not be appropriate to the circumstances of the Crown Lands Act, he was addressing a case at that time advanced by the respondent as not concerned with the Crown Lands Act. The same sentiment though, albeit by a different label, applies to the concept of a loss attributable to a loss of public benefit."

88 The primary judge accepted this alternative submission advanced by the Trust at [69]:

> "In my view, there is or will potentially be a realistic reduction in public benefit from all such works. Assessing the extent of the reduction in public benefit or the attributable loss in this scenario is incapable of mathematical precision. No particular approach has been suggested by either party. Mr Dundas suggested $100,000 for a 'blot on title'. I have observed earlier at [36] that that is an inappropriate description to apply to a reserve trust's loss under s 106A(3)(b) because the Crown owns the land. However, putting aside that label, his evaluation is in point. The best analogy may be general damages in other areas of the law. Approaching it in that way, bearing in mind that the easements are in perpetuity, and doing the best I can, I assess the loss at $100,000 under s 106A(3)(b)."

89 There can be no constructive failure to exercise jurisdiction when a plaintiff advances a case in the alternative, and the court rejects the primary case but finds in favour of the alternative case.

90 That makes it unnecessary to address the construction of s 106A. However, I would add that I share the evident concern on the part of the primary judge as to the validity of the course adopted by his Honour. It must be borne in mind that the Reserve Trust does not in fact own the land. Valuation by reference to a "blot on title" is inappropriate where the interest is that of a person with merely care, control and management of the land. True it is that s 100 of the *Crown Lands Act 1989* (NSW) deems the Trust to have an estate in fee simple in the land, but I favour the view expressed by the presiding judge during the hearing (and embraced by Sydney Water) that s 106A(4) is a later, specific provision which displaces any operation s 100 might otherwise have. That in turn makes reliance, even if only by analogy, on the Trust's valuer's reasoning problematic, to say the least. However, there being no cross-appeal, it is neither necessary nor appropriate to say anything more about the operation of these sections.

91 Accordingly, the Trust's appeal must be dismissed, and I turn to the question of costs.

Sydney Water's application for leave to appeal against costs

92 Sydney Water made what turns out to have been a generous offer of compromise, in the amount of $268,000. It did so on 13 February 2013, some ten months before the hearing. The offer was open for acceptance for 28 days, and was expressed to be made in accordance with r 20.26 of the Uniform Civil Procedure Rules.

93 Not all of the Uniform Civil Procedure Rules apply in the exercise of Class 3 jurisdiction by the Land and Environment Court. In particular, the "costs follow the event" starting point in r 42.1 does not apply. However, as the primary judge observed, the rules in Division 3 of Part 42, which relate to offers of compromise, are made applicable to proceedings for compensation: see r 1.5 and Schedule 1 of the rules.

94 Under the regime prescribed by r 42.15, a defendant who makes an offer of compromise which is more favourable than a judgment later obtained by the plaintiff is prima facie entitled to a special costs regime: costs in favour of the plaintiff until and including the day the offer was made, and indemnity costs in favour of the defendant from the day after the offer was made.

95 The primary judge proceeded on the basis that the offer of compromise complied with the rules. However, his Honour considered that r 42.15 was not engaged. His Honour said this (at [10]):

> "It is true that the amount of the determination was less than the amount of the offer. However, fundamentally the case concerned the interpretation of an easement unilaterally drafted and imposed by [Sydney Water] over almost the entire length of Tempe Reserve. The main question was whether or not the easement permitted [Sydney Water] to place a large water pipeline above the surface of Tempe Reserve. If so, then the public enjoyment of Tempe Reserve would be greatly diminished and the compensation payable to [the Trust] could well have been millions of dollars (as [the Trust] contended). [Sydney Water] contended for nil compensation on the interpretation that I adopted. If [the Trust] had accepted the offer it would have received $268,000 but without resolution of the interpretation question. In contrast, under my decision [the Trust] is entitled to $106,000 plus the antecedent findings that [Sydney Water's] rights under the easement do not permit works above the surface of Tempe Reserve. That result is, in my view, much more valuable than the mere dollar amount offered by [Sydney Water]."

96 Alternatively, his Honour considered that he would exercise the discretion to "[order] otherwise" in favour of the Trust, for four reasons. The first was that applicants whose land has been acquired should in general receive costs in their favour where the applicant has acted reasonably in pursuing the proceedings and has not conducted them in a manner which gives rise to unnecessary delay or expense: at [20]. The second was that it was reasonable for the dispute as to the construction of the easements be resolved by the litigation. The third was that Sydney Water had changed its case shortly prior to the trial. The fourth was that s 106A had not previously been considered.

97 Sydney Water sought leave to challenge both aspects of his Honour's reasoning. The grounds, particularly the first ground, raise questions of general importance in compensation proceedings in the Land and Environment Court, and warrant a grant of leave.

98 I respectfully disagree with the approach taken by the primary judge on the operation of the rules. True it is that the Court's decision determined the construction of the easements. However, the issue in the litigation was whether compensation was payable in the amount of $5,000,000 as the Trust contended, or $6,000 as Sydney Water contended. At all times, it was plain that that issue would in large measure turn on the question of construction. The fact that the Trust has the advantages of (a) certainty as to the meaning of the easements and (b) confirmation that Sydney Water's rights under those easements are much more limited than *the Trust* had contended for the purposes of determining compensation, are not separate advantages to displace the operation of the rules. Those advantages are collateral consequences of the Trust's failure on the ultimate issue: the compensation it was entitled to. Further, it is to be borne in mind that the provisions of the rules as to offers of compromise are specifically made applicable to compensation proceedings in Class 3 of the court's jurisdiction, and are

intended to encourage the compromise of contests which, notoriously, can be long and expensive. His Honour's construction does not promote that purpose. Indeed, it undermines that purpose.

99 In truth, the $268,000 offered by Sydney Water many months in advance of the six day hearing was "more favourable", within the meaning of r 42.15, than the $106,000 judgment ultimately obtained by the Trust.

100 Turning to the alternative basis of his Honour's reasons, Sydney Water submitted that the first and principal of the four bases was a near verbatim restatement of the applicable test as stated in *Dillon v Gosford City Council* [2011] NSWCA 328; 184 LGERA 179 at [70] for a favourable costs order *where there had been no offer of compromise.* Sydney Water submitted, with respect correctly, that that could not be the test to "[order] otherwise" under r 42.15.

101 Sydney Water also pointed to what it said were other errors in the matters informing the exercise of discretion. But it is not necessary to take the matter any further. There is shown to be vitiating error in the exercise of the costs discretion by the primary judge. The order as to costs should be set aside.

102 Rule 42.15 applies. However, I consider that the Court should otherwise order. There was no challenge to the factual finding by the primary judge that the Trust had conducted the litigation reasonably, and I proceed on that basis.

103 There is a difficulty in applying offers of compromise to compensation proceedings in Class 3 of the jurisdiction of the Land and Environment Court. The ordinary rule that costs follow the event, which underlies the making and acceptance of offers of compromise in most proceedings, does not apply. Instead, an applicant will have been dispossessed of an interest in land, and ordinarily, if he, she or it acts reasonably, is entitled to a favourable costs order. Because the starting point is different, it is necessary to consider whether a different approach ought to be taken to effectuate the purpose of an offer of compromise. For it would distort the ordinary operation of offers of compromise to permit the acquiring authority to make a low offer of compromise and cause the applicant to have to run the risk of a large adverse costs order, especially where as here there was essentially a binary issue as to construction.

104 In my view, the appropriate way to give force to the evident purpose of an offer of compromise, in a jurisdiction where the dispossessed plaintiff who

litigates reasonably is ordinarily entitled to costs, is in the present case for the Trust to obtain its costs of the proceedings up to and including 13 February 2013, but that there be no order thereafter, with the intention that the parties bear their own costs.

Orders

105 Accordingly, I propose these orders:

1. Appeal dismissed.

2. Grant leave to Sydney Water to cross-appeal.

3. Allow the cross-appeal, set aside order 2 made on 24 December 2013 and the orders made on 20 March 2014, and in lieu thereof order that (1) Sydney Water pay the Trust's costs up to and including 13 February 2013, (2) no order as to costs for the balance of the proceedings, with the intention that the parties bear their own costs, (3) otherwise dismiss the notice of motion filed on 11 February 2014 (with no order as to the costs of that motion).

4. The Trust to pay Sydney Water's costs in this Court.

****

Amendments

13 August 2015 - [50] and [74] - citations of authorities corrected.
[53] - "of" deleted and "or" inserted in last line of quote.
[63] - "their" deleted and "the" inserted in last line of quote.
[96] - "the" inserted before "applicant" in second sentence.

Decision last updated: 13 August 2015