Land and Environment Court

New South Wales

Medium Neutral Citation:	**Willoughby City Council -v- Roads and Maritime Services [2014] NSWLEC 6**
Hearing dates:	18, 19, 20, 21, 22, 25, 26, 27, 28 November 2013
Decision date:	10 February 2014
Jurisdiction:	Class 3
Before:	Biscoe J
Decision:	Compensation determined in the sum of $12,746,000.
Catchwords:	COMPULSORY ACQUISITION - compensation for compulsory acquisition of council's open space passive recreation lands and easements utilised by acquiring authority for the Gore Hill Freeway and Lane Cove Tunnel - whether only nominal compensation payable to dispossessed council for bare legal interest in acquired lands held on trust for public charitable purposes - whether only the Attorney-General can bring proceedings and be awarded compensation for full fee simple value of such lands - whether only the Crown can bring proceedings and be awarded compensation for other acquired land subject to Crown grant reservation for public ways - whether the trusts and the reservation should be disregarded when assessing compensation as restrictions on the particular owner's use of the land - valuation by reference to comparable sales - whether certain open space lands or residential lands comparable and what adjustments should be made - whether dispossessed council in the market for residential land for open space for passive recreation - whether diminution in value of residual lands - interpretation and valuation of easements - whether mesne profits or damages for trespass recoverable as compensation re lost rental prior to acquisition date when acquiring authority was in possession.
Legislation Cited:	Charitable Trusts Act 1993 ss 5(1), 6

Conveyancing Act 1919 Schedule 4A
Crown Land Consolidation Act 1913 (NSW) s 37AAA
Land Acquisition (Just Terms Compensation) Act 1991 ss 3(1)(a)-(b), 4, 10(1)(a), 11, 12, 19, 20(1)(b), 33, 37, 41-42, 45-46, 54, 55(a)-f), 56(1), 57, 59(a)-(f), 66
Land and Environment Court Act 1979 ss 19(e), 24
Landlord and Tenant Act 1899 s 12
Limitation Act 1969 s 14(1)(b)
Local Government Act 1993 ss 26, 45(1), Schedule 7 cl 6(2)(b)Roads Act 1993
County of Cumberland Planning Scheme Ordinance
Willoughby Local Environmental Plan 1995

Cases Cited:

AMP Capital Investors Ltd v Transport Infrastructure Development Corp [2008] NSWCA 325, (2008) 163 LGERA 245
Attorney-General v Bishop of Worcester (1851) 9 Hare 328, (1851) 68 ER 530
Bathurst City Council v PWC Properties Pty Ltd [1998] HCA 59, (1998) 195 CLR 566
Besmaw Pty Ltd v Sydney Water Corporation [2001] NSWLEC 15, (2001) 113 LGERA 246
Blacktown Council v Roads and Traffic Authority of New South Wales [2006] NSWLEC 37 (2006) 144 LGERA 265
Broadway Pty Ltd v Lewis [2012] WASC 373
Caruana v Port-Macquarie-Hastings Council [2007] NSWLEC 109
Chief Executive, Department of Transport and Main Roads v The Young Men's Christian Association [2012] QCA 311, (2012) 191 LGERA 255
Chino Pty Ltd v Transport Infrastructure Development Corporation [2006] NSWLEC 768, (2006) 153 LGERA 136
Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531
Corrie v MacDermott [1914] HCA 38, (1914) 18 CLR 511
Electricity Commission of New South Wales v Arrow (1994) 85 LGERA 418
George D Angus Pty Limited v Health Administration Corporation [2013] NSWLEC 212
Hampton v BHP Billiton Minerals Pty Ltd (No 2) [2012] WASC 285
Jones v Williams (1837) 150 ER 781
Lamru Pty Ltd v Kation Pty Ltd (1998) 44 NSWLR 432

Leichhardt Council v Roads and Traffic Authority (NSW) [2006] NSWCA 353, (2006) 149 LGERA 439
Leichhardt Council v Roads and Traffic Authority of New South Wales (No 3) [2009] NSWLEC 3
MacDermott v Corrie [1913] HCA 27, (1913) 17 CLR 223
Marrickville Council v Sydney Water Corporation [2013] NSWLEC 222
Marshall v Director-General, Department of Transport [2001] HCA 37, (2001) 205 CLR 603
Matthews v SPI Electricity Pty Ltd [2013] VSC 575
Mayor Councillors and Citizens of the City of Brighton v Road Construction Authority [1986] VR 255, (1985) 59 LGRA 262
Metropolitan Petar v Mitreski [2001] NSWSC 976
Minister for Mineral Resources v Brantag Pty Ltd [1997] NSWCA 206, (1997) 8 BPR
Minister of State for the Interior v RT Co Pty Ltd (1962) 107 CLR 1
Penrith City Council v Sydney Water Corporation [2009] NSWLEC 2
Plenty v Dillon [1991] HCA 5, (1991) 171 CLR 635
Progressive Mailing House Pty Ltd v Tabali Pty Ltd [1985] HCA 14, (1985) 157 CLR 17
Roads & Traffic Authority v Peak [2007] NSWCA 66
Roads and Traffic Authority of New South Wales v Blacktown City Council [2007] NSWCA 20
Roads and Traffic Authority of New South Wales v Heawood [2002] NSWCA 99, (2002) 54 NSWLR 289
Save Little Manly Beach Foreshore Inc v Manly Council (No 2) [2013] NSWLEC 156
Sutherland Shire Council v Sydney Water Corporation [2008] NSWLEC 303
Sydney Sailors' Home v Sydney Cove Redevelopment Authority (1977) 36 LGRA 106
Sydney Water Corporation v Besmaw Pty Ltd [2002] NSWCA 147
Tempe Recreation Reserve Trust v Sydney Water Corporation [2013] NSWLEC 221
Tomasevic v Jovetic [2011] VSC 131
Uniting Church in Australia Property Trust (NSW) v Monsen [1978] 1 NSWLR 575
Wade v New South Wales Rutile Mining Co Pty Ltd (1969) 121 CLR 177
Yeshiva Properties No 1 Pty Ltd v Marshall [2005] NSWCA 23, (2005) 219 ALR 112

Texts Cited: Dal Pont, Law of Charity, [14.25]

	Heydon and Leeming, Jacobs' Law of Trusts in Australia, (7th ed) [1067]
Category:	Principal judgment
Parties:	Willoughby City Council (Applicant) Roads and Maritime Services (Respondent)
Representation:	COUNSEL: P J McEwen SC and N M Eastman (Applicant) R P L Lancaster SC and N Owens (Respondent) SOLICITORS: Pikes & Verekers (Applicant) Corrs Chambers Westgarth (Respondent)
File Number(s):	30990/11

JUDGMENT

INTRODUCTION

1 The Land and Environment Court is the judicial valuer in compensation claims for the compulsory acquisition of land under the *Land Acquisition (Just Terms Compensation) Act* 1991 (**Just Terms Act**): s 66 *Just Terms Act*; ss 19(e) and 24 *Land and Environment Court Act* 1979. It is a melancholy truth that in many such cases the parties, supported by their respective valuers, are far apart in their competing assessments. This case provides a striking example. The dispossessed applicant claims over $65 million. The respondent acquiring authority contends that the quantum is somewhere between about $2.1 million and $3.7 million.

2 For the reasons set out below, I determine the compensation to which the applicant is entitled at $12,746,000 as itemised in **Annexure 1** hereto, which also itemises the parties' competing contentions.

3 The applicant is Willoughby City Council (**Council**). The respondent is Roads and Maritime Services (**RMS**). On 24 June 2011, by notice in the Gazette under s 19 of the *Just Terms Act*, RMS compulsorily acquired public open space lands including easements from Council for the purposes of the *Roads Act 1993*, and utilised them for the Gore Hill Freeway or the Lane Cove Tunnel on Sydney's Lower North Shore. The proceedings are an objection by Council to RMS' statutory offer of compensation of $3,301,000 and are brought pursuant to s 66 of the *Just Terms Act*.

4 The acquired lands are known as Sites 1, 2, 3, 4.1, 4.2 and 5 and Easements E and F. At the date of acquisition, they were zoned public open space or similar or were unzoned under the *Willoughby Local Environmental Plan 1995*. Absent the public purpose, they would have had an underlying zoning of public open space. They were characterized as passive recreation open space and were bushland except for Site 3, which was a park. Except for Site 4.2, the acquired sites were partial acquisitions and therefore resulted in the creation of residue lands. Easement E is to drain water over Site 2 residue land. Easement F is for services over Site 3 residue land. Descriptions, title particulars and areas of the parent parcels, acquired lands and residue lands are set out in **Annexure 2** hereto.

5 The utilised public purpose is the corridor that accommodates part of an arterial road system providing east west connectivity generally between the Bradfield Highway and Lane Cove River, as depicted in relevant zoning maps since 1951; and was first identified in the public domain and formally applied to the land in 1951 in the County of Cumberland Planning Scheme Ordinance (**CCPSO**) (which later ceased to apply in the Willoughby local government area). The 2011 compulsory acquisition post-dated the carrying out of the public purpose, which commenced with construction of the Gore Hill Freeway between 1988 and 1992 and ended with completion of construction of the Lane Cove Tunnel in 2008. As at the date of acquisition:

(a) Sites 1, 3, 4.1, 4.2 and 5 were occupied by the Gore Hill Freeway;

(b) Site 2 was occupied by a sediment detention basin associated with the Lane Cove Tunnel; and

(c) RMS had exercised its rights under the two acquired easements to construct works associated with its right to install and maintain services (Site 3) and to drain water (Site 2).

6 As Annexure 1 shows, Council claims:

(a) the market value of the acquired lands under s 55(a) of the *Just Terms Act*;

(b) decrease in the value of residue lands under s 55(f);

(c) almost $33 million for being deprived by the acquisition of a common law cause of action for "mesne profits" or damages for trespass from 1988 to 2003 and from 2008 to 2011, when RMS was in possession without paying rent or compensation, as special value under ss 55(b) and 57 or alternatively as disturbance loss under ss 55(d) and 59(f). No claim is made for a period of four years and eleven months between 2003 and 2008 because for that period RMS compulsorily acquired leases from Council for which it paid compensation.

(d) a small amount for disturbance loss under ss 55(d) and 59(a) - (e).

7 As Annexure 1 also shows, the parties agree the market value of Site 3 ($10,000) and Site 5 ($55,000), the decrease in value of the Site 5 residue land ($180,243), and disturbance loss under s 55(d) and 59(a) - (e) ($12,228).

THE ISSUES

8 These are the main issues:

(a) Are the trusts for public charitable purposes over Sites 1 and 2 relevant to the identification of the interest acquired by RMS and the determination of compensation due to Council?

(b) Is the public ways reservation in the Crown grant in relation to Site 4.1 relevant to the identification of the interest acquired by RMS and the determination of compensation due to Council?

(c) On the comparable sales valuation methodology, are certain open space sales or residential sales reliable comparables and what are the appropriate adjustments?

(d) Did the acquisition cause Council to lose common law causes of action for mesne profits or damages for trespass prior to the date of acquisition? If so, is the loss compensable under ss 55(b) and 57 or alternatively under ss 55(d) and 59(f) of the *Just Terms Act*? If so, what is the quantum of the compensation?

THE JUST TERMS ACT

9 The *Just Terms Act* provides for compensation for the compulsory acquisition of land and includes the following provisions:

3 Objects of Act

(1) The objects of this Act are:

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

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

...

10 Statement of guaranteed acquisition at market value

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

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

...

54 Entitlement to just compensation

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

...

55 Relevant matters to be considered in determining amount of compensation

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

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

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

(c) any loss attributable to severance,

(d) any loss attributable to disturbance,

(e) solatium,

(f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

56 Market value

(1) In this Act:

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

(a) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired,

...

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.

10 Because of the issues concerning the effect of the trusts over Sites 1 and 2 and the Crown grant reservation over Site 4.1, regard should also be had to the following provisions of the *Just Terms Act*:

4 Definitions

interest in land means:

(a) a legal or equitable estate or interest in the land, or

(b) an easement, right, charge, power or privilege over, or in connection with, the land.

land includes any interest in land.

owner of land means any person who has an interest in the land.

public purpose means any purpose for which land may by law be acquired by compulsory process under this Act.

11 Notice of intention to acquire land by compulsory process

(1) An authority of the State may not acquire land by compulsory process unless the authority has given the owners of the land written notice of its intention to do so.

(2) The authority of the State is not prevented from acquiring the land by agreement after giving the proposed acquisition notice.

12 Owners to be given notice

(1) A proposed acquisition notice need only be given to all the owners of the land who:

(a) have a registered interest in the land, or

(b) are in lawful occupation of the land, or

(c) have, to the actual knowledge of the authority of the State, an interest in the land.

(2) If the proposed acquisition notice relates only to a particular interest in land, the notice need only be given to all such owners of that interest.

...

20 Effect of acquisition notice

(1) On the date of publication in the Gazette of an acquisition notice, the land described in the notice is, by force of this Act:

(a) vested in the authority of the State acquiring the land, and

(b) freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land.

33 Validity of compulsory acquisition

Once land has been acquired by compulsory process under this Act, the validity of the acquisition is not affected by:

(a) a failure to comply with any requirement of this Part relating to the giving of notice of the proposed acquisition, or

(b) a subsequent failure to comply with a requirement of this Act relating to the acquisition.

37 Right to compensation if land compulsorily acquired

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

41 Valuer-General to be given copy of claim for compensation

(1) An authority of the State must, as soon as practicable after receiving a claim for compensation in respect of a compulsory acquisition (or proposed compulsory acquisition), give the Valuer-General a copy of the claim.

(2) The Valuer-General may determine the amount of compensation to be offered to a former owner of land for a compulsory acquisition of the land:

(a) before or after the acquisition takes effect, and

(b) even though the former owner has not made a claim for the compensation.

42 Notice of compensation entitlement and offer of compensation

(1) An authority of the State which has compulsorily acquired land under this Act must, within 30 days after the publication of the acquisition notice, give the former owners of the land written notice of the compulsory acquisition, their entitlement to compensation and the amount of compensation offered (as determined by the Valuer-General).

(2) The compensation notice must be given to all former owners of the land who, immediately before the acquisition:

...

(c) had, to the actual knowledge of the authority of the State, an interest in the land which entitles them to compensation...

45 Deemed acceptance of offer of compensation

(1) If a person entitled to compensation under this Part does not, within 90 days after receiving a compensation notice:

(a) accept the amount of compensation offered by the authority of the State, or

(b) lodge with the Land and Environment Court an objection to the amount of compensation offered,

the offer of compensation is taken to have been accepted.

(2) Such an acceptance is subject to any decision of the Land and Environment Court on an objection lodged after the 90-day period.

(3) The authority of the State must, on such an acceptance taking effect, pay the amount of money concerned into a trust account kept under this Part and pay the money to the person entitled to it on receipt of a claim for compensation, deed of release and indemnity (duly completed) and any relevant documents of title.

46 Claim for compensation by person not offered compensation

(1) A person who has not been given a compensation notice may nevertheless lodge with an authority of the State a claim for compensation under this Part.

(2) If the authority of the State considers that the person is entitled to compensation, the authority is to give the person a compensation notice. Otherwise, the authority is to reject the claim by notice in writing given to the person.

> (3) A claim for compensation under this section is taken to have been rejected if the authority of the State has not dealt with the claim within 60 days after receiving the claim. However, the authority of the State is not precluded from giving the person a compensation notice after that time.

SITES 1 AND 2 AND THE TRUSTS

11 At the date of acquisition, Council held Sites 1 and 2 on trust for public purposes. They were charitable purposes because they were beneficial to the community: *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.

12 RMS submits that the interest in each of Sites 1 and 2 that it acquired from Council was only Council's bare legal title as trustee, which was worthless; and therefore no compensation is payable to Council for the market value of the beneficial interest in Sites 1 and 2 even though RMS acquired them freed from the trusts pursuant to s 20(1)(b) of the *Just Terms Act*. RMS submits that under the *Just Terms Act* where acquired land was held on trust for a charitable purpose, only the Attorney-General is entitled to bring proceedings and be paid compensation for the compulsory acquisition of the beneficial interest.

13 RMS' submissions may be considered against the background of the acquisition procedures that it invoked under the *Just Terms Act*. RMS made a s 42 offer of compensation to Council for the whole fee simple interest in Sites 1 and 2, not just for the legal interest of Council as trustee. Council made a statutory objection to that offer by commencing these proceedings. RMS first raised its Site 1 trust contention shortly before the hearing. RMS first raised its Site 2 trust contention at a late stage of the hearing upon late production by Council of documents evidencing the trust relating to Site 2.

14 During the hearing (as a result of discussion between bench and bar) RMS wrote to the Attorney-General, giving notice of its trust contentions and urgently seeking advice regarding the Attorney-General's position. The Attorney-General (by an officer) wrote a reply during the hearing advising that he disagreed that Council was not the appropriate party to claim compensation, and stating that Council had been notified of its obligation to apply the compensation to the beneficiaries of the trust and otherwise perform its obligations with respect to the trust. The letter also indicated that when the Court's decision is handed down, the Attorney-General would consider whether a cy-pres scheme or some other action will be required.

15 As regards Site 1, on 18 February 1959 Council executed a declaration of trust in which it declared that it held the Site 1 parent parcel:

> (which is to be transferred to it pursuant to the provisions of Clause 18(1) of the County of Cumberland Planning Scheme Ordinance) UPON TRUST for the following purposes and subject to the following conditions, namely:-

1. AS TO PART of the said land that is as to so much thereof as is required for a County road under the County of Cumberland Planning Scheme the Council will hold the same for that purpose AND will make the same available without cost to the Commissioner of Main Roads or any other body that may be the constructing authority for the County Road when required so to do by the said Commissioner or other body as aforesaid AND pending its requirement for a County road the Council shall not use or permit to be used such part of the said land for any purpose other than the purpose of a public park, public reserve or public recreation area.

2. AS TO THE RESIDUE of the said land the Council will hold the same for the purposes of a public park, public reserve or public recreation area and the Council will not use or permit to be used such residue of the land for any purpose other than the purpose of a public park, public reserve or public recreation area.

3. THE COUNCIL will not erect or permit to be erected on the said land or any part thereof any building without first obtaining the approval of The Cumberland County Council and will observe and comply with all conditions which The Cumberland County Council may impose in connection with any such approval.

16 About a week later, on 26 February 1959, the owner, Eliza Foster, as well as Cumberland County Council and Willoughby Council, executed a transfer of the Site 1 parent parcel to Willoughby Council for a consideration of 4,500 pounds paid by Cumberland County Council to the owner. The transfer stated that it was at the request and direction of Cumberland County Council pursuant to cl 18(1) of the CCPSO "for park and recreation purposes".

17 At the date of acquisition in 2011, the Site 2 parent parcel comprised Lot 32 in DP711190 and Lot 189 in DP1098977. In relation to Lot 32, on 14 April 1960 Council executed a Declaration of Trust in which it declared that it would hold what later became Lot 32 for the following purposes and subject to the following conditions.

1. THE COUNCIL will hold the said land for the purposes of a public park public reserve and public recreation area and the Council will not use or permit to be used the said land for any purpose other than the purpose of a public park public reserve or public recreation area.

2. THE COUNCIL will not erect or permit to be erected on the said land or on any part thereof any building without first obtaining the approval of The Cumberland County Council and will observe and comply with all conditions which The Cumberland County Council may impose in connection with any such approval.

18 On 9 August 1960 the owners of what later became Lot 32, together with Council and Cumberland County Council, executed a transfer of Lot 32 whereby in consideration of 5,500 pounds paid to the owners by Cumberland County Council, the owners of Site 2, at the direction of Cumberland County Council pursuant to cl 18(1) of the CCPSO, transferred Lot 32 to Willoughby Council "for park and recreation purposes".

19 In relation to Lot 189, on 17 August 1960 the owners of old system land that later became Lot 189, together with the Council and Cumberland County Council, executed a deed of conveyance which recited that the owners had agreed to sell that land to Cumberland County Council for five thousand five hundred pounds and that Cumberland County Council and Willoughby Council had agreed that the land (which was reserved under the CCPSO for the

purposes of parks and recreation areas) was to be conveyed to Willoughby Council pursuant to cl 18(1) of the CCPSO to be held by the "County [sic Willoughby] Council" upon the trusts and subject to the conditions thereafter expressed. Later in the deed, Willoughby Council declared that it would hold the land on the following conditions:

> (a) That the said Council will hold the said land for the purposes of a public park public reserve and public recreation area and that the said Council will not use or permit to be used the said land for any purpose other than the purpose of a public park, public reserve or public recreation area.
>
> (b) That the said Council will not erect or permit to be erected on the said land or any part thereof any building without first obtaining the approval of the County Council and will observe and comply with all conditions which the County Council may impose in connection with any such approval.

20 As noted, these documents record that the Sites 1 and 2 parent parcels were transferred to Council pursuant to cl 18(1) of the CCPSO. At that time Sites 1 and 2 were designated "County Road" under the CCPSO. Clauses 17 and 18(1) of the CCPSO provided:

> 17. The owner of any land reserved under Division 2 of this Part upon which the erection of any building or the carrying out of any work of a permanent character or the making of any permanent excavation is prohibited or the owner of any land so reserved on which the responsible authority has refused to approve of the erection of a building or the carrying out of any work of a permanent character or the making of any permanent excavation may, by notice in writing, require the responsible authority to acquire such land.
>
> Upon receipt of any such notice the responsible authority shall acquire the land to which the notice relates.
>
> 18.(1) The responsible authority may and upon such terms and conditions as may be agreed upon transfer any land which has been acquired by it in pursuance of clause 17 to the council or the statutory body concerned.

21 At the date of acquisition, Sites 1 and 2 were zoned 5(c) under the *Willoughby Local Environmental Plan 1995* and occurred within substantially the same corridor as the county road identified in the CCPSO.

22 Land such as Sites 1 and 2 vested in a council as at 1 July 1993 and "*subject to a trust for a public purpose*" are taken to be classified as "*community land*", which a council has no power to sell or otherwise dispose of: ss 26, 45(1) and cl 6(2)(b) Schedule 7 *Local Government Act* 1993; *Save Little Manly Beach Foreshore Inc v Manly Council (No 2)* [2013] NSWLEC 156 at [73] - [81] per Biscoe J. Land subject to a trust for a public purpose may include land transferred to a council pursuant to a condition of a development consent: *Bathurst City Council v PWC Properties Pty Ltd*[1998] HCA 59, (1998) 195 CLR 566 at [44], [48], [66]-[67]. Land compulsorily acquired for a public purpose under the *Just Terms Act* is subject to a trust for that public purpose: *Save Little Manly Beach (No 2)* at [79]. The declarations of trust relating to Sites 1 and 2 contain no power of sale or of other disposition. At general law, a trustee of land for a charitable purpose with no power of sale is obliged to use the land for the charitable purpose in perpetuity unless, in appropriate

circumstances, the trustee can obtain the approval of the Court to sell the land and apply the proceeds to some new charitable scheme cy-près; *Sydney Sailors' Home v Sydney Cove Redevelopment Authority* (1977) 36 LGRA 106 at 114 (NSWCA).

23 If RMS' submission at [12] above is correct, then it has acquired the valuable Sites 1 and 2, freed of the trusts by virtue of s 20(1)(b) of the *Just Terms Act*, for nothing unless the Attorney-General makes a claim for compensation.

24 In a statute whose overriding object is just compensation (as its very title indicates), it would be wrong to impute to the legislature an intention that no one is to be compensated for the market value of land held on trust for a public purpose (whether or not that result comes about by the application of s 20(1)(b)). RMS is careful to say that it makes no such submission. The entitlement to compensation for compulsory acquisition of property is an important right and hence provisions conferring such a right, like those in the *Just Terms Act*, are to be construed with all the generality that their words permit: *Marshall v Director- General Department of Transport* [2001] HCA 37, (2001) 205 CLR 603 at [38]; *Roads and Traffic Authority of New South Wales v Heywood* [2002] NSWCA 99, (2002) 54 NSWLR 289 at [20], [21]; *George D Angus Pty Limited v Health Administration Corporation* [2013] NSWLEC 212 at [100] per Preston CJ of LEC; *Tempe Recreation Reserve Trust v Sydney Water Corporation* [2013] NSWLEC 221 per Biscoe J. The specific *c*ompensation provisions of the *Just Terms Act* are subject to the general just terms override required by ss 3(1)(b) and 54(1).

25 Initially, RMS submitted that as s 56(1) defines market value for all interests in land and not just freeholds (*AMP Capital Investors Ltd v Transport Infrastructure Development Corp* [2008] NSWCA 325, (2008) 163 LGERA 245 at [84]), then in the case of a claim by a trustee it is only the trustee's bare legal interest that is relevant in the hypothetical transaction to which s 56(1) refers. On that approach, the beneficiaries of an ordinary trust must be the claimants for compensation, which would present large practical difficulties where there are numerous beneficiaries. It cannot work in the case of a discretionary trust where no one owns the beneficial interest until the trustee exercises its discretion: claims by potential discretionary beneficiaries, who may be numerous, for the loss of their spes are not within the contemplation of the *Just Terms Act*.

26 Ultimately, however, RMS accepts that under the *Just Terms Act* the trustee of an ordinary trust can claim compensation for the acquired beneficial interest in trust land and would hold the compensation on trust for the beneficiaries. I agree. In most circumstances trustees are the proper plaintiffs in any claim involving rights or property of the trust: *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at 436. In the *Just Terms Act,* "land" is defined to include an

"interest" in land, and "interest" is defined to include not only a legal or equitable estate in the land but also a right or power over, or in connection with, the land: s 4. A trustee of land has an "interest" in the land in that not only does it have an estate but it also has a right or power in connection with the land. An acquiring authority may know nothing of the existence of a trust: indeed, it is only obliged to give a proposed acquisition notice to a beneficiary with an unregistered interest who is not in possession if it has "actual knowledge" of the beneficiary's interest: s 12.

27 Nevertheless, RMS submits that the trustee of a charitable trust is in a different position from a trustee of an ordinary trust in that only the Attorney-General can bring proceedings relating to a charitable trust, including proceedings under the *Just Terms Act*. I do not accept the submission.

28 The rules relating to joinder of the Attorney-General are a procedural requirement peculiar to charitable trust proceedings.

29 A trust of land for a public purpose binds the land and controls what otherwise would have been the freedom of disposition enjoyed by the registered proprietor of an estate in fee simple. There are no beneficial owners of land held on trust for a public purpose. An analogy may be drawn with an executor of a testator's estate who, so long as the estate is unadministered, has full ownership of the testator's property, without distinction between legal and equitable interests. What matters is that the court will enforce the executor's duties of administration on application made for that purpose: *Commissioner of Stamp Duties (Qld) v Livingston* (1965) AC 696 (PC) at 707, 712. Similarly, in my opinion, in the case of a trust for a public purpose, the full ownership is vested in the trustee and there is no need to distinguish between legal and equitable interests, any more than there is for the property of a full beneficial owner. What matters is that the Supreme Court will control the trustee's use of property that comes to the trustee in that capacity, in a suit to enforce the trust or its due administration brought by the Attorney-General. In the case of an ordinary trust, the beneficiaries have standing to bring proceedings to enforce observance and due administration of the trust. In the case of a trust for a charitable purpose where there are no beneficiaries, that task falls to the Attorney-General (with or without a relator) on behalf of the Crown as parens patriae (parent of the country) and protector of all charitable trusts.

30 Importantly, no rule requires joinder of the Attorney-General in all proceedings involving a charity. It depends on the nature of the proceedings. At general law, the Attorney-General is not a necessary party in proceedings by a trustee of a charity to recover property to which the charity claims to be entitled or to protect property in which the charity claims to have an interest: Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, 7th ed (2006) Lexis Nexis Butterworths, [1067]; *Dal Pont, Law of Charity,* [14.25]. In my opinion,

proceedings for compensation under the *Just Terms Act* fall within that description. In the leading case of *Uniting Church in Australia Property Trust (NSW) v Monsen* [1978] 1 NSWLR 575, the plaintiff as trustee of a charitable trust brought proceedings claiming that the trust was entitled to property in certain names. The defendant unsuccessfully moved to set aside the summons, submitting that it was an action for the administration of a charitable trust which could only be brought by the Attorney-General as parens patriae of charitable trusts. The plaintiff successfully submitted that that was not the nature of the action, rather it was brought for the protection of trust property by persons with an interest in it: at 587. After an illuminating review of the authorities, Rath J concluded, at 591:

> It seems to me that the Attorney-General is not a necessary party in proceedings in which an existing charity, whether incorporated or not, is seeking to recover property to which it claims to be entitled, or to protect property in which it claims an actual or contingent interest. The plaintiffs in this case are asking the Court to make an order declaring their interest in certain names, and an order restraining the defendants from dealing with those names contrary to the interest so declared. In my opinion, such proceedings are plainly distinguishable from proceedings against trustees for the administration of a charitable trust, and it is not necessary that the Attorney-General should be a party, either as plaintiff or defendant. The Court has before it the parties who have an interest in litigating the issues involved. The Attorney-General would also have an interest, because as parens patriae he also is concerned that property the subject of a charitable trust is used for its proper purposes, but this is not a case in which his presence is required.

31 *Monsen* was followed in *Metropolitan Petar v Mitreski* [2001] NSWSC 976. Hamilton J said at [5] that it was always the case that a trustee of a charitable trust "might sue to enforce rights at law or recover property of the trust without the Attorney-General being party to the suit. This was made clear in the New South Wales context [in *Monsen*]". *Monsen* was approved by the NSW Court of Appeal in *Yeshiva Properties No 1 Pty Ltd v Marshall* [2005] NSWCA 23, (2005) 219 ALR 112. The plaintiffs included companies said to be trustees of a charitable trust. They brought proceedings to protect trust property, the cause of action being accessory liability of the respondent for breaches of fiduciary duty by directors of the plaintiffs. The Attorney-General had not authorised the proceedings. Bryson JA (Mason P and Beazley JA agreeing) said: "There was, before the enactment of the *Charitable Trusts Act* 1993, no difficulty about the standing of the trustee of a charitable trust to bring proceedings for the protection of the trust property: see for example observations in *Uniting Church Australia Property Trust (NSW) v Monsen*...at 588-9...it is doubtful whether the proceedings are charitable trust proceedings as defined in s 5(1)...the operation of s 6(1) does not appear to me to have any real importance".

32 In NSW, s 6 of the *Charitable Trusts Act* 1993 - on which RMS places no reliance -provides that "charitable trust proceedings" are not be commenced in the Supreme Court unless the Attorney-General has authorised the bringing of the proceedings or leave to do so is obtained from the Supreme Court. The

expression "charitable trust proceedings" is defined in s 5(1) to mean "proceedings in the Court brought, whether by any trustee of a charitable trust or by any other person, under the Court's statutory or general jurisdiction with respect to any breach or supposed breach of a charitable trust, or with respect to the administration of a charitable trust". These provisions were noted without comment in *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59, (1998) 195 CLR 566 at [39], [67]. In my opinion, the present proceedings are for the protection of trust property, they are not "charitable trust proceedings" as defined and, as *Yeshiva* indicates, proceedings for the protection of trust property do not require the authorisation of the Attorney-General under s 6.

33 *Monsen* was followed in *Tomasevic v Jovetic* [2011] VSC 131 at [10]. Pagone J observed that the necessity for the Attorney-General to be a party depends on the nature of the dispute and that one instance where the Attorney-General is required as a party is where there is a dispute between trustees, which was the situation in that case: at [6]. His Honour noted at [10] that that was a type of proceeding that Rath J in *Monsen* at 591 expressly said required the Attorney-General to be a party.

34 Two cases cited by RMS are distinguishable. One is *Attorney-General v Bishop of Worcester* (1851) 9 Hare 328, (1851) 68 ER 530. It concerned an issue between the trustees and the objects of a charitable scheme. It was in that context that the court said that the Attorney-General should be the plaintiff because he acted in such cases on behalf of the Crown as parens patriae, representing the objects of the charity: 68 ER at 546-7. The other case is *Chief Executive, Department of Transport and Main Roads v The Young Men's Christian Association* [2012] QCA 311, (2012) 191 LGERA 255. RMS cites it for the proposition that as the beneficial interest in charitable trust property is not owned by anyone, the trustee is only entitled to compensation for loss it suffered and not loss suffered by the charity. This case was decided under a different statutory scheme in Queensland. It was not concerned with assessment of market value but with whether the trustee could claim the cost of relocating or reinstating its operations to another site. It did not address the role of the Attorney General.

35 In the present case, I conclude that the Attorney-General is not a necessary party and that the trustee Council is competent to bring these proceedings for compensation for the full market value of Sites 1 and 2.

36 Any compensation awarded to Council will be impressed with the trust. Council and the Attorney-General should then consider whether there should be a cy-pres scheme. In that regard, s 11 of the *Charitable Trusts Act* provides: "A charitable trust places a trustee under a duty, if the case permits and requires the trust property or any part of it to be applied cy-pres, to secure its effective

use for charitable purposes by taking steps to enable it to be so applied". Sections 12 and 13 empower the Attorney-General to establish a scheme for the administration of any charitable trust.

37 A further reason, in my opinion, why the trustee Council is entitled to claim and receive compensation for the full market value of Sites 1 and 2 is that, in assessing compensation under the *Just Terms Act*, there should be no discount for a restriction that is peculiar to the owner, such as the legislative prohibition on the sale by a council of "community land", as distinct from restrictions that are of general application such as zoning restrictions; *Leichhardt Council v Roads and Traffic Authority* (NSW) [2006] NSWCA 353, (2006) 149 LGERA 439 at [32], [43], [44] per Spigelman CJ (Beazley, Bryson and Basten JJA and Campbell J agreeing); applied to a trust in *Sutherland Shire Council v Sydney Water Corporation* [2008] NSWLEC 303 at [68] per Sheahan J. In *Leichhardt* the Court of Appeal held that the contrary principle in *Corrie v MacDermott* [1914] HCA 38, (1914) 18 CLR 511 (Privy Council, affirming the decision of the High Court in *MacDermott v Corrie* [1913] HCA 27, (1913) 17 CLR 223), had no application under the *Just Terms Act* because it was decided under a different and earlier statutory resumption compensation scheme concerning "*value to the owner*", which does not exist under the *Just Terms Act*: at [23] - [32], [88]. Spigelman CJ held at [32]:

> In my opinion, once the idea of "value to the owner" is taken away as a unifying concept, as it has been, the foundation of the reasoning in *Corrie v MacDermott* has also been removed. There are, of course, restrictions on use, e.g. zoning, which affect all vendors and purchasers in the hypothetical sale. Where, however, a restriction affects *only* the person whose land has been acquired, in my opinion, the restriction is not a matter that must be applied when determining the market value.

38 The reasoning in *Leichhardt* may be summarised as follows. First, the context in which the statutory definition of market value in s 56(1) falls to be determined is: (a) the just compensation override in s 54; (b) the basic entitlement to "compensation" in s 37, which prima facie means recompense for loss; (c) the indication that one of the objects of the *Just Terms Act* is to ensure proper conduct on the part of acquiring authorities; and (d) the statutory guarantee in s 3(1)(a) (and, I would add, s 10(1)(a)) that compensation will not be less than the market value of the acquired land. Given the context, the Court would be slow to interpret the definition of market value in s 56(1) as permitting regard to be had to a matter which necessarily means that the owner will not receive market value - as would be the case if a restraint applicable only to the particular owner were to be taken into account: at [37] - [43]. Secondly, the critical textual indication is the express words of the s 56(1) definition of market value: "*if it had been sold*". Those words necessarily assume that the owner is legally entitled to sell the land: at [44]. Thirdly, in the view of Bryson JA, it would be very poor policy if a restriction on the power to sell land imposed for the purpose of keeping the land available to use in a

particular way worked to the advantage of a resuming authority by making it cheaper to acquire the land: at [89].

39 In *MacDermott v Corrie*, the High Court and, on further appeal, the Privy Council were concerned with the principles upon which compensation was to be assessed for land compulsorily acquired from trustees to whom it had been granted by the Crown by deed upon trust for a specified charitable purpose. The trustees had restricted powers of sale and lease: 17 CLR at 229. It was held that in ascertaining this value any restriction or other circumstance which diminishes the value of land in the hands of the trustee must be allowed for in arriving at the value because the value to be assessed is the value to the owner: 17 CLR at 235, 237. The idea of "value to the owner", as the Court of Appeal held in *Leichhardt*, is inapplicable under the *Just Terms Act* and, consequently, a restriction that affects only the person from whom land has been acquired does not affect market value. Such a restriction may be taken to include, for example, a restriction on alienation as well as a restriction on the power of lease since both those restrictions were present in *Macdermott*.

40 *Leichhardt* at [22] also considered *Sydney Sailors' Home v Sydney Cove Redevelopment Authority* (1977) 36 LGRA 106, where the NSW Court of Appeal, under an earlier "value to owner" statutory compensation regime, applied *Corrie v MacDermott*. In *Sydney Sailors' Home* the appellant had executed a declaration of trust to the effect that the land could only be sold with the consent of the Governor. It was held that the restriction affected the value of the land. That decision does not apply under the *Just Terms Act.*

41 In *Sutherland*, which is squarely in point, a declaration of trust required a council whose land had been compulsorily acquired to hold the land for a public park, public reserve or public recreation use only. Applying *Leichhardt* at [32], Sheahan J held that the trust restriction should not be taken into account when determining market value: at [68]. RMS submits that the decision in *Sutherland* is clearly wrong and should not be followed. RMS submits that the better analysis is that: (a) a trust does not relevantly restrict the owner's use of the land but rather defines the interest that the owner has in the land, and thus the interest that is acquired; (b) it is thus not a question of ignoring a personal restriction (as in *Leichhardt*) but rather identifying what has been acquired; and (c) the land for which compensation is determined is the interest in land held by the Council, which was a bare legal interest. I do not accept the submission. Section 56(1) defines market value for an interest in land as well as for the freehold in land: *AMP Capital Investors Ltd v Transport Infrastructure Development Corp* [2008] NSWCA 325, (2008) 163 LGERA 245 at [84] per Hodgson JA. The interest of a trustee of land held under a declaration of trust is "an estate in fee simple, but one which is subject to the trusts set out in the declaration of trust": *Sydney Sailors Home* at 115. in my opinion, the restriction arising from the existence of a trust, whether an

ordinary trust or a trust for a public purpose, is a species of restriction that applies only to the trustee owner, as referred to in *Leichhardt* at [32], and Sheahan J was right to so hold in *Sutherland*.

42 It is unnecessary to consider Council's submission that any effect of the trusts on market value should be disregarded under s 56(1)(a) of the *Just Terms Act*.

SITE 4.1 AND THE CROWN GRANT RESERVATION

43 On 25 February 1977 Site 4.1 was vested in Council by a Crown grant pursuant to s 37AAA of the *Crown Land Consolidation Act* 1913 (now repealed). The vesting was for the purpose of a "public reserve" within the meaning of the *Local Government Act 1919* (now repealed) and was subject to reservations and exceptions to the Crown, including the following:

> (ii) all such parts and so much of the land as may hereafter be required for public ways in over and through the same to be set out by His Excellency the Governor for the time being of the State of New South Wales or some person authorized in that respect with full power for Her Majesty, Her Heirs and Successors and for His Excellency the Governor as aforesaid authorized in that behalf to make and conduct all such public ways, and
>
> (iii) the right of full and free ingress, egress and regress into, out of, and upon those lands for the several purposes aforesaid or any of them.

44 For the purposes of the Crown grant, the subject road corridor is a "public way".

45 RMS submits that Council's interest in Site 4.1 was a fee simple subject to the reservations in the Crown grant, that it is the market value of that interest that must be determined, that interest has no or nominal value, and that only the Crown is entitled to bring proceedings for and be awarded compensation under the *Just Terms Act* for the full fee simple interest in the reserved land.

46 If RMS' submission is correct, such a future claim by the Crown is procedurally possible by dint of s 46 notwithstanding that RMS has not given a s 12 proposed acquisition notice nor a s 42 offer of compensation to the Crown to which the Crown under s 45 could object by commencing proceedings in this Court. Paradoxically, RMS' proposed acquisition notice to Council was not limited to a particular interest (see s 12(2)), and its s 42 offer to Council prior to commencement of the proceedings was for the full market value of Site 4.1. As observed earlier, if RMS' submission is correct, then it compulsorily acquired the valuable Site 4.1 freed of the reservation in the Crown grant, because of the operation of s 20(1)(b), and for nothing unless the Crown elects to claim compensation.

47 The public ways reservation in the Crown grant is not an exception from the grant (unlike minerals: *Wade v New South Wales Rutile Mining Co Pty Ltd*

(1969) 121 CLR 177 at 194; *Minister for Mineral Resources v Brantag Pty Ltd* [1997] NSWCA 206, per Mason P). Under the reservation there is a possibility, but no more, that Site 4.1 or part of it may be required by the Crown at some time in the future for public ways. If, as RMS submits, the Crown has a claim under the *Just Terms Act*, there might be more than ordinary difficulty in assessing the value of its alleged interest.

48 In my opinion , RMS' submission should not be accepted because of the principle in *Leichhardt* at [32] (quoted above at [37]) that: where a restriction affects only the person whose land has been acquired, the restriction is not to be applied when determining the market value. In my opinion, the public ways reservation in the Crown grant falls within this description and therefore should not be taken into account when determining market value.

49 It is unnecessary to consider Council's submission that s 56(1) (a) requires disregard of the effect on market value of the Crown grant reservation.

VALUATION

50 The parties' planning experts were Mr David Haskew for Council and Mr Anthony Rowan for RMS. In addition, Mr Jeff Ellis, Council's Property Development Manager, gave planning evidence. The parties' valuers were Mr Terry Dundas for Council and Mr Peter Dempsey for RMS.

51 As noted earlier, the parties agree the market value of Site 3 at $10,000 and Site 5 at $55,000, and the decrease in value of the Site 5 residue land at $180,244.

52 The valuers determined value by reference to comparable sales. They disagreed as to what sales are comparable. Mr Dundas relied on residential sales, none of which were acquired for open space. As shown in Annexure 1 hereto, they led him to adopt per square metre rates of $1,000 for Site 1 and residue Site 4.1 and residue Site 4.2; $900 for Site 2 and Easement E; and up to $1800 for Site 3 residue and Easement F. Mr Dempsey relied on open space sales. As shown in Annexure 1, they led him to adopt rates of between $130 per square metre and $175, and $17.50 for the easements. The valuers adjusted their comparable sales rates for the different character of the subject lands. However, Mr Dundas made no discount from his adjusted residential sales rate for the open space zoning of the subject lands. Open space land generally sells for a lower rate per square metre than the rate derived from residential sales (which are generally on a per lot basis) because the market acknowledges the different and lesser potential uses of the former.

53 In summary, Council submits that Mr Dundas' evidence ought be accepted because:

(a) Mr Dempsey's open space sales are not comparable. Alternatively, when properly adjusted (at least in the case of Tyneside) they support Mr Dundas' rate.

(b) In the absence of comparable open space sales in the locality, regard should be had to residential sales, to which an appropriate discount should be applied.

(c) The appropriate discount is nil because of the high demand for open space in the locality: *Leichhardt Council v Roads and Traffic Authority of New South Wales (No 3)* [2009] NSWLEC 3 at [34]. Alternatively, the discount should not exceed one third (as in *Sutherland Shire Council v Sydney Water Corporation* [2008] NSWLEC 303).

54 In summary, RMS submits that:

(a) Mr Dundas should not be accepted as an independent expert.

(b) There are serous difficulties with Mr Dundas' approach because of his extraordinary adjustments, the absence of a shortage of or demand for passive recreation open space, and other matters. His residential sales are unreliable.

(c) The evidence of Mr Dempsey should be preferred. The most comparable open space sale is the first sale of 12A Tyneside Avenue.

55 RMS submits that Mr Dundas should not be accepted as an independent expert because, it contends, he gave his evidence in a plainly partisan manner and did not approach the valuation exercise in an open-minded way. Rather, he had a pre-conception of what RMS ought to pay and constructed reasoning to justify his pre-determined value. In particular, RMS points to the fact that, despite huge adjustments, he derived a rate of $1,000 per square metre or thereabouts not only from his residential comparables but also from Mr Dempsey's open space comparable at 12A Tyneside Avenue. Lloyd J remarked in a compulsory acquisition compensation case (where, as it happens, RMS' valuer in the present case gave evidence) "it is a notorious fact that expert witnesses are inevitably biased, even if only subconsciously so, in favour of the party by whom they are engaged. This means that the Court must approach the expert evidence with a considerable degree of scepticism": *Penrith City Council v Sydney Water Corporation* [2009] NSWLEC 2 at [5]. I would put it less strongly that experts should search their consciences for bias, even unconscious bias, in their evidence, and that if it is detected by the Court they will lose or diminish the Court's confidence and trust. Mr Dundas

indicated that it was only a coincidence that he derived the same or similar rate value from each comparable. Taking into account the gravity of RMS' submission that he was not an independent expert, I am not satisfied that the submission has been made out.

56 The best evidence of the market value of compulsorily acquired open space land is comparable sales, with no compulsion to purchase, of other open space lands in the locality requiring very few adjustments: see, for example, *Penrith* at [7]. However, valuation of open space land under the *Just Terms Act* has often involved comparing sales of residentially zoned or used land, including where such residential land has been acquired by councils for open space purposes: *Roads & Traffic Authority of New South Wales v Blacktown City Council* [2007] NSWCA 20 at [40] - [44] per Spigelman CJ. Residential sales may be relevant where there are no reliable comparable sales of open space land, subject to a discount for the fact that the acquired land was zoned open space: ibid at [48]. For example, in *Sutherland Shire Council v Sydney Water Corporation* [2008] NSWLEC 303 Sheahan J determined the value of compulsorily acquired open space land by reference to a residential sale discounted by one third for the acquired land's open space zoning where there were no comparable sales of open space land in the locality. His Honour rejected the respondent's valuer's proposed discount of 90 percent and the applicant's valuer's proposed discount of 20 percent: at [96]. Where a dispossessed council has been active in buying residential land at residential values for open space purposes due to a shortage of needed open space land in the locality (as may be the case in inner city localities), then in assessing market value compensation there should be no discount from comparable residential sales for the fact that the acquired land was open space: *Leichhardt Council v Roads and Traffic Authority of New South Wales (No 3)* [2009] NSWLEC 3 at [22], [25], [33], [34] per Lloyd J; *Marrickville Council v Sydney Water Corporation* [2013] NSWLEC 222 at [14] - [16] per Biscoe J. In *Leichhardt (No 3)* Lloyd J said at [33]:

> The facts and circumstances of the present case are different from those in the *Sutherland* case. Unlike *Sutherland*, there is a severe shortage of open space in Leichhardt. Leichhardt Council is active in the market of acquiring land for the purpose of open space. That is, the council is a buyer of land in the market for open space, it accumulates open space, there is a shortage of open space in the municipality and the council pays residential values to obtain it. The hypothetical willing but not anxious seller, with the knowledge of the market, would be aware of the prices paid by the willing but not anxious buyer and would thus be unwilling to settle for less than a full residential value in the hypothetical sale.

57 In *Leichhardt (No 3)* Lloyd J followed and found particularly informative *Mayor Councillors and Citizens of the City of Brighton v Road Construction Authority* [1986] VR 255, (1985) 59 LGRA 262 per Gobbo J (also followed in *Blacktown Council v Roads and Traffic Authority of New South Wales* [2006] NSWLEC 37 (2006) 144 LGERA 265 at [72] - [84] 284). Gobbo J noted (VR at 257) that there was a deficiency of parkland in the municipality and, unlike other

municipalities which had been able to secure undeveloped lands more readily, the claimant had to find its parkland in a more settled and developed area; and that as a general rule it had paid market prices for land zoned and used for residential purposes. In *Leichhardt (No 3)* at [21] Lloyd J said the same observations may be made about Leichhardt Council.

Open space sales

58 Mr Dempsey referred to the following open space sales as comparables but essentially relied on the first sale of 12A Tyneside Avenue, on which RMS relies:

(a) 12A Tyneside Avenue, North Willoughby. This land is within the Willoughby local government area. It was zoned 6(d) Open Space Private Recreation under the Willoughby Local Environmental Plan 1995. It was (and continues to be) used for public tennis courts. It is surrounded by residential houses. It is accessible by two footways but is landlocked to vehicles. This is not entirely aberrant for there are other vehicular landlocked tennis courts in Willoughby at The Parapet, Castlecrag (although they are heritage listed and the land use is limited to tennis courts and parks) and in Haberfield, and there are other vehicular landlocked open space areas in Willoughby. There are two sales of the Tyneside land that Mr Dempsey analysed:

(i) Sale 1: from Willoughby District Tennis Co-Op to 74 Lawrence St Pty Ltd on 31 January 2012 for $700,000, reflecting a rate of $206 per square metre. Taking into account the value of the improvements on the land ($100,000), the rate is $176 per square metre. Mr Dempsey adjusted this rate for size and topography to derive rates per square metre for the subject lands of between $130 and $175.

(ii) Sale 2: from 74 Lawrence St Pty Ltd to Council on 12 July 2012 for $1,275,000. This sale reflects a rate of $375 per square metre. Taking into account the value of the improvements on the land ($100,000), and after adjustments to reflect the features of the acquired lands, Mr Dempsey derived a comparable rate of up to $345 per square metre for the subject lands. It appeared to Mr Dempsey that Sale 2 was politically motivated by agitation of local residents.

(b) Delhi Road, West North Ryde. This land is located in Ryde local government area, which adjoins the Willoughby local government area. At the date of sale in February 2011, the land was similarly zoned Public Recreation under the Ryde Local Environmental Plan 2010. The land was purchased by the adjoining landowner (a

crematorium) for $140,000, reflecting a land value rate of $38 per square metre, which Mr Dempsey adjusted to up to $50 per square metre for the subject lands.

(c) 13-15 Julian Street, Mosman. This land is located in the Mosman local government area. At the date of sale in December 2005, it was zoned 5(a) Community Uses - Sewerage under Mosman LEP 1998 and was used for a combination of open space, stormwater and sewerage purposes. On 16 December 2005, it was purchased from Mosman Council by Sydney Water Corporation for $875,000, reflecting a land value rate of $200 per square metre. Having regard to the staged settlement over two to three years, Mr Dempsey adopted a land value rate of $171 per square metre, which he adjusted to up to $205 per square metre for the subject lands.

59 In my opinion, the Delhi Road and Julian Street sales are not reliable comparables. The Delhi Road property is the site of an unmade former road and was purchased to promote access, not open space. It is impaired by three easements, which combined affect virtually all the land. Two of the easements (above ground for gas and electricity and below ground for water) could negate access. The sale price carried a $20,000 credit from another transaction. The contracted area was increased by 50 percent with no adjustment to the sale price. Its deduced value of $38 per square metre suggests it has no role to play in comparison to the subject lands. The Julian Street property was not put on the open market; rather the sale was between two government bodies on the basis of an offer by Sydney Water to sell at a 2002 valuation by the Valuer-General (the sale was in December 2008). The front filled portion was contaminated. It is cut in half by an above ground sewer pipe traversing the land in a north/south direction. It is subject to two easements, one for the main sewer line, another for access along the northern boundary. A large council drain extends the length of the land in an east/west direction. The first portion was filled to a substantial height by Sydney Water using material from construction sites. This is the only level part of the site. The steep remaining land is virtually unusable. Council has constructed a storm water quality device adjacent to the sewer pipe accessed by a bitumen driveway and built above the council stormwater pipe. The construction of this device was the purpose of the acquisition.

60 The Tyneside land was on the market for a decade prior to the sale. In 2009 Council was advised that the owner would accept a minimum of $1.7 million (excluding GST). Council obtained valuation advice at $1.6 million. Council authorised its General Manager to negotiate its purchase. At some point, 74 Lawrence Street Pty Ltd entered into option agreements to purchase the Tyneside land for $700,000 with an uplift of $100,000 if approval for a childcare centre was obtained within two years, $75,000 within three years

and $50,000 within four years; and an uplift of $50,000 if approval for residential seniors living was obtained within three years. The company spent around $200,000 on fees associated with the uses assumed in the options. When the Draft Willoughby Local Environmental Plan was exhibited, which allowed child minding centres in the relevant zone, the company took the risk that it would be gazetted and development consent of a childcare centre obtained, by purchasing the Tyneside land for $700,000 in January 2012. It seems that the company agreed in some way with the owner of a property adjoining a pedestrian access to purchase land to enable vehicular access.

61 In 2012, neighbours petitioned Council objecting to the proposed rezoning. Against the recommendation of its General Manager, Council resolved to negotiate the purchase with the company, which at some point in negotiations suggested the Valuer-General's assessed land value of $1.65 million. On 12 July 2012, Council resolved to accept the company's offer of $1.275 million.

62 RMS points to Mr Ellis' acceptance in cross-examination of the proposition that in his view Council was a very anxious purchaser. However, Mr Ellis explained that that it was because of the amount of effort and interest of councillors who wanted to secure the land. He rejected the suggestion in cross-examination that in his view Council had paid well above market price, explaining that was not so compared with the valuation advice Council had received. The valuation advice of $1.6 million and the Valuer-General's assessment of $1.65 million are not evidence of value for the purpose of assessing compensation in these proceedings, but Council's knowledge of them is strong evidence of Council's state of mind, in particular that it did not think it was paying more than market value. I do not accept that Council was an anxious purchaser in any sense that diminishes the reliability of Sale 2 as a comparable.

63 The Tyneside sales not perfect comparables. Criticisms by Council which may be accepted include that the Tyneside land was on the market for sale for a decade; it is zoned private, not public, open space; it is landlocked to vehicular access; it is essentially the back yard of the adjoining 18-20 cottages; and obtaining development consent to change its use to some other permissible open space use may be difficult due to matters such as noise, parking and security.

64 I do not accept Council's criticism that if the Tyneside sale is analysed to reflect its residential potential its price doubled. The basis of the criticism is Mr Dundas' evidence that its residential potential would depend upon purchasing an adjoining residential property (for say $1.5 million) and constructing vehicular access (for $100,000). I accept RMS' submission that there is no reason to reflect its residential potential. RMS relies on the sale because it is open space land and demonstrates that the market treats open space land differently to residential land. The purpose of the hypothetical transaction is to

put the land to its use as open space.

65 I do not accept Council's submission that the Tyneside sale is out of line with Council's approach to open space purchases and the price it pays, such as with the following:

(a) Deepwater Road, Castle Cove. This was a purchase in 1990 by Council of land zoned residential. Although it was purchased for use as open space by being incorporated into the adjacent golf course, Mr Ellis admitted that additional open space was not required in this location, and thus that this purchase is not really relevant when considering demand for open space. The possibility was contemplated that this land would be swapped, in the sense that other land on the golf course would later be rezoned residential and sold, to offset the purchase.

(b) Edinburgh Road, Castlecrag. This was initiated by the owners exercising their right to require the land to be purchased from them. The purchases were expressly on the basis that the adverse open space zoning was to be disregarded and the land was to be valued as if it were zoned residential.

(c) Sailors Bay Road, Northbridge. This was the purchase of a building for use as a library. Whatever the motivation of Council in making the purchase, it was neither open space land nor acquired in order to be used as open space land.

66 Council submits that the Tyneside sale is out of line with the December 1990 purchase of the parent Site 5 parcel by Council for $450,000, equating to $582 per square metre. I am not satisfied that this is so. Although zoned open space, the purchase price for Site 5 was on the basis of medium density residential development (discounted for the time required to hold the site until it became available to develop) and its amalgamation with adjoining lands to create a larger development site.

67 Council submits that the Tyneside sale was out of line with sales of public open space in the metropolitan area determined by this Court in other cases. I reject the submission. Those decisions concerned open space land with different features at different time in different local government areas.

68 In my view, Tyneside Sale 2 is a reasonably reliable comparable and more reliable than Sale 1. This is because:

(a) The Tyneside land is within the Willoughby local government area and so is in the same market as the acquired lands.

(b) The Tyneside land was sold around the date of acquisition. Sale 1 occurred approximately 6 months after the date of acquisition and

Sale 2 occurred approximately 13 months after the date of acquisition.

(c) The Tyneside land was (and still is) used for open space purposes.

(d) Sale 1 in my view is of little assistance because the buyer appears to have been a developer undertaking a risk that the land would be rezoned and development consent obtained for a childcare centre, a use not shared with the subject lands.

(e) I do not accept the submission that Sale 2 should be dismissed or marginalised because it came about following political "agitation". In purchasing the Tyneside land, Council responded to community representations, but that is what democratically elected bodies should or reasonably may do. As discussed above, I do not accept that Council was an anxious buyer such that it thought it was paying more than market value in Sale 2.

69 In calculating comparable rates from Tyneside Sale 2, both valuers deducted from the Sale 2 price of $1,275,000 an amount of $100,000 for improvements. Mr Dempsey thereby derived a rate of $345 per square metre. Mr Dundas made a further adjustment by deducting the area of the pedestrian pathways from the total area to derive a rate of $370 per square metre for the usable area of the site. On the evidence before me, I am prepared to accept Mr Dundas' derived rate of $370 per square metre.

70 Mr Dundas increased the rate to $873 per square metre by adding the cost of purchasing an adjoining property (say $1.5 million) and constructing a driveway ($100,000). As indicated earlier, I do not agree with this adjustment. I agree with Mr Dundas that the rate should be increased to account for the greater use potential of the subject land: I assess the increase at one third (less than his suggested 40 percent). That shows a rate of $500 (rounded). I agree with him that the rate should then be decreased for Sites 1 and 4 for their larger size. I assess the decrease at 20 percent (he suggested 25 percent): this shows a rate of $400. Thus, the comparable rate is $500 per square metre for Site 2 and residue and Site 3 residue and Easements E and F, and $400 per square metre for Sites 1 and 4 and their residues.

Residential sales

71 Mr Dundas relied on one comparable sale of residential land for each of the contentious subject lands:

(a) In the case of Site 1 and residue and Site 3 residue and Easement E, his comparable sale was 23-25 Garland Road, Naremburn, situated less than a kilometre away. In the case of Site 1, he made four

adjustments totalling nearly 50 percent to reduce the sale rate of $1,971 to $1,000 per square metre.

(b) In the case of Site 4 and residue, his comparable sale was 158-162 Hampden Road Artarmon, which is situated approximately one kilometre to the north. He made three adjustments for Site 4 totalling over 60 percent to reduce the sale rate of $2,673 to $1000 per square metre.

(c) In the case of Site 2 and Easement E, his comparable sale was the Bailey Avenue, Lane Cove, which is situated approximately 1.5 kilometres to the east.

72 Mr Dundas also referred to sales of other residential land to other councils for open space purposes not directly comparable to the acquired land, in order to demonstrate that other councils have paid residential values to acquire land for open space in other old, densely developed residential areas. They included: Lots 183 and 184 DP 200636 Deepwater Road Castle Cove; 27-31 Bruce Avenue, Killara; 364 Birrell Street, Tamarama; and 1 Bondi Road, Bondi Junction.

73 Mr Dundas' rationale in adopting residential sales as comparables was based on town planner Mr Haskew's evidence that whilst, overall, Willoughby is well served with open space, there is a localised shortfall within Naremburn and Artarmon; there is a severe undersupply of active recreation opportunities and a strong community demand for quality urban parks in some suburbs; and Council recognises that the cost of acquiring new open space is too high. Mr Dundas therefore considered that any open space land at Artarmon and Naremburn, particularly large areas that could accommodate quality urban parks, would be highly prized by the local community and therefore the Council. In my view, this rationale should not be accepted for the reasons that follow.

74 The parties agree and I accept that three descriptions apply to the characterisation of the recreational nature of open space land in the Willoughby local government area:

(a) *no recreation*: open space land that is generally inaccessible and serves no formal or active function. It may, or may not, be in a vegetated or bushland condition.

(b) *passive recreation*: open space land that has limited accessibility, primarily for pedestrians, used for informal recreation purposes, such as walking, sitting, small local parks, playgrounds and BBQS. It may also include "no recreation" areas.

(c) *active recreation*: open space land that has good accessibility, providing formal recreation purposes, and may or may not include buildings / formalised facilities, and may also include areas of passive recreation and no recreation.

75 The subject lands were passive recreation.

76 Local markets for open space land are generally dominated by the relevant local council and the Department of Planning. In the case of the subject lands, Willoughby Council is the most obvious hypothetical purchaser.

77 The parties agree and I accept that:

(a) there is a demand within the Willoughby local government area for additional active open space (although I note the evidence that since 1975 it has not been looking for sporting fields);

(b) there is a quantum surplus of passive recreation and no recreation open space in the Willoughby local government area;

(c) Council has not demonstrably added to the total area of open space land in its ownership since 1985, with 425 hectares in 1985 and 424 hectares in 2009;

(d) in relation to the provision of active recreation facilities, Council has focused on the embellishment and improvement of existing active recreation open space.

78 Mr Haskew and Mr Rowan agreed and I accept that there is demand within the Willoughby local government area for additional active recreation space. They did not agree that there was demand for passive recreation open space. Mr Ellis said it had a reasonable supply of passive recreation open space.

79 Although Mr Ellis and Mr Rowan agreed that Council was active in obtaining additional open space (as demonstrated by Mr Ellis' examples) and Mr Dundas placed reliance on their agreement, Mr Dempsey, whose evidence on this point I accept, concluded that Council was not an active participant in the market to acquire comparable open space land: he was unable to identify any buyers of comparable open space land at or close to residential values. In oral evidence Mr Dundas agreed that Council was not interested in accumulating such land.

80 Council submits, however, that the following three aspects of the evidence show that it was active in the market for recreational land of the subject type.

81 The first aspect on which Council relies comprises certain provisions of Council's three open space policies: the City of Willoughby Open Space Plan Final Report 1996, Willoughby City Council Recreation and Open Space Issues Paper - Final Report 2009, and its Open Space and Recreation Plan 2010. The 1996 Policy states that Willoughby has 147 open space areas covering about 424 hectares and that it has a proportionately high percentage of regional open space compared with other local government areas. The policies show that 69.7 percent of Willoughby's open space is bushland, 87 percent of the open space is difficult to access. Council relies on the fact that the policies state that Artarmon and Naremburn, where the subject lands except Site 2 are located, contain 4 percent and 5 percent respectively of the total open space. I do not find those percentages for Artarmon and Naremburn to be of much significance. The total open space is spread across 12 suburbs and the average is only a little over 8 percent. Further, a large amount of the total open space is foreshore space and the like which are not found in Artarmon or Naremburn. It is the absolute open space that is important. The evidence shows that Artarmon has 15.31 hectares and Naremburn 20.74 hectares. There is no evidence from any witness that these absolute areas constitute a deficiency in passive recreation open space in those suburbs.

82 Council also relies on cl 4.5.3 of its 1996 policy, which lists the criteria for whether Council should consider acquiring private lands for open space purposes:

> 4.5.3 There are occasions when council should acquire private land for open space purposes. These cases should be assessed on a site by site basis and therefore have not been detailed in the strategies presented in Chapter 6. However, some basic principles should apply in the assessment of a parcel of land for open space acquisition. They are that the land should be considered for acquisition if it:
>
> - Improves public access to larger areas of open space
> - Is a critical link between two pieces of open space
> - Forms part of a continuous foreshore area
> - Contains known rare and threatened species.
> - Contributes to a high visual quality landscape or has significant natural elements such as rocks, waterfalls, etc.
> - Is in an area deficient in open space
>
> However, acquisition of land should be considered only if other methods of protection, such as State Environmental Planning Policy No 19 or the Development Control Plan covering areas adjacent bushland, do not apply.

83 Mr Haskew agreed that if none of the criteria in cl 4.5.3 are met, then the Council probably would not even consider a purchase (subject to price and its financial capacity). Of those criteria, Council relies on the first, second and last. As to the first criterion "*Improves public access to larger areas of open space*", I have difficulty in seeing how it was satisfied so far as concerns the subject lands. As to the second criterion "*Is a critical link between two pieces of open space*", there is a link in the sense that one can walk or otherwise traverse between one area of open space and another, going across the Sites

that were acquired. The question is whether that is a "critical" link. RMS submits that "critical" link might take the form of, for example, providing the only means of access between two areas of open space, or for some reason of ecological preservation. Whether or not the criterion is quite so limited, I am not satisfied that the Council would have seriously considered that the link between the Sites fell within this criterion. The last criterion, "*Is in an area deficient in open space*", is not satisfied in my view. As at the date of acquisition, Council had a surplus of passive recreation open space and there is no suggestion that it had in mind any passive recreation open space acquisitions.

84 The second aspect of the evidence on which Council relies is Mr Ellis' evidence that he had been dealing with "demand" for active and passive open space. His examples included walking tracks, jogging tracks, indoor recreation facilities, children's' playgrounds within parks, picnic and barbeque areas, and community gardens. In my view, substantially as RMS submits, demand is there used in the sense of expectations or hopes of the community, not actual demand by Council for the purchase of passive recreation open space.

85 The third aspect of the evidence on which Council relies it describes as its open space purchases and development of open space. Council refers to Mr Ellis' evidence that he had been involved in six types of Council open space initiatives and his example of each. In my view, their circumstances are so different as not to support the proposition that there is a demand by Council for the purchase of passive open space. The following might warrant more particular comment:

(a) The first initiative was described as pursuing opportunities to purchase privately owned open space. The example given was the Club Willoughby site at Penshurst Street and Crabbes Avenue, Willoughby. The Club made offers to Council but there is no evidence of what, if anything, Council was prepared to pay.

(b) The second initiative was described as pursuing opportunities to purchase land adjacent to existing open space. The example given was Deepwater Road, Castle Cove, which was purchased by Council for open space at residential value from Castle Cove Country Club. The sale price shows a rate per square metre (useable area) of $895. This site comprises two residentially zoned lots that are undeveloped and visually integrated into the setting and appearance of the adjacent golf course. The lots rely upon battle-axe access to Deepwater Road, and are situated on the edge of the golf course. Of the examples given by Mr Ellis, this is Council's only purchase of residential land to be used for open space purposes. However, Mr Ellis conceded that Council did not require additional open space in

this area, it acquired these lots to provide greater flexibility in future master planning and as a potential land swap for more suitable land elsewhere on the course being rezoned for residential use, and that therefore it is irrelevant when considering demand for open space.

(c) The third initiative was described as relocating community facilities to free up open space. The example was 258 Sailors Bay Road, Northbridge. This was the purchase of a building, which enabled the relocation of Northbridge Library from Northbridge Oval in the short term. This enabled the old premises to be used for before and after school care and, it is said, in the evenings and weekends by sporting groups using the all weather playing surface at Northbridge oval. The latter appears to allow the freeing up of active, not passive, recreation space.

86 I find, as RMS submits, that at the date of acquisition in 2011 there was a surplus of passive recreation open space land in the Willoughby local government area including in the suburbs of Artarmon and Waverton where most of the acquired lands are located; Council, as a hypothetical purchaser, was not in the market for acquiring additional passive recreation open space or residential land for passive recreation open space; and there was no demonstrated demand for passive recreation open space from any other class of hypothetical purchaser.

87 A final observation may be made on the demand issue. RMS submits that in determining hypothetical demand, a critical factor is the means or resources of hypothetical purchasers to purchase land at the prices identified by Mr Dundas and that Mr Dundas' failure to take this into account presents a particular difficulty with his approach. I do not accept the submission. In my view, the market value test under s 56(1) of the *Just Terms Act* requires an assumption that there is at least one willing but not anxious buyer with the means or resources to pay market value. Even where there is only one possible hypothetical buyer of a property, it does not mean that it is necessary to assume that there is only one nominal bid at a hypothetical auction: *Mayor Councillors and Citizens of the City of Brighton v Road Construction Authority* [1986] VR 255 at 262, (1985) 59 LGRA 262 at 271.

88 Mr Dempsey was of the view and I accept that if the rationale for Mr Dundas' residential comparable sales were to be assumed, then Mr Dundas should also have made downward adjustments for the following superior features of those residential lands:

(a) Residential zoning, use potential and development approval. Mr Dundas sales are subdivided residential land, fully services with good access on kerbed and guttered streets in an established urban environment. Surrounding development is predominantly within an

established urban environment being fully serviced and subdivided, whereas the acquired lands are part of a large area of timbered, uncleared, passive recreation land. The highest and best use potential of Mr Dundas' residential sales are significantly greater than for the subject lands.

(b) Level topography. Mr Dundas' sales are level residential land whereas the subject lands are partly generally level but mostly moderate to steep rocky land.

(c) Smaller size. Mr Dundas' sales are relatively small parcels which separately only allow passive open space.

(d) Greater market demand. There is likely to be greater market demand for Mr Dundas' residential use sites than for the acquired lands.

89 I consider that Mr Dundas' residential comparables are of little assistance given the comparability of the Tyneside open space Sale 2 that I favour; the large downward adjustments that he made and the further significant downward adjustments that would have to be made to them for additional factors identified by Mr Dempsey; and the absence of demonstrated demand by Council for residential land for passive recreation open space in the locality.

Conclusion as to rates and market value of acquired land

90 In the circumstances, I propose to adopt the rates derived from Tyneside Sale 2 set out above at [70]: $500 per square metre for Site 2 and Site 3 residue and Easements E and F, and $400 per square metre for Sites 1 and 4 and their residues. To determine their market value, I have applied these rates, respectively, to their areas as set out in Annexure 1 hereto (I address the easements later).

Decrease in value of residue land

91 The parties agree that there has been a decrease in the value of the Site 5 residue land by reason of the carrying out of the public purpose in the amount of $180,243. This is due to a loss of amenity associated with proposed medium density residential development of the residue land.

92 It is Mr Dempsey's opinion that, given the passive open space use of the residue of the other Sites, there has been no reduction in their value arising from noise and loss of amenity associated with the carrying out of the public purpose.

93 As to the Site 1 residue, in relation to the residue south of the freeway Mr Dundas, in his "before" valuation applied the rate of $1,000 per square metre (discussed above at [71]). In relation to the residue north of the freeway, he made a further adjustment to account for the relatively steeper slope of that portion to determine a "before" valuation of $500 per square metre. He considered that the carrying out of the public purpose reduced the value of the former by 60 percent and the latter by 25 percent.

94 I consider that my Site 1 rate of $400 per square metre should be applied to the residue south of the freeway, and that a rate of $200 per square metre should be applied to the residue north of the freeway to account for the relatively steeper slope. My estimate of the degree of injurious affection to the former is 40 percent and to the latter 20 percent. My consequential valuation is $647,040 set out in Annexure 1 hereto.

95 I turn to the decrease in value of the Site 3 residue. Fleming Park comprised the Site 3 parent land. Its area was approximately 3,000 square metres. The resumed portions of Fleming Park were:

(a) Lot 23, a stratum lot of 202 square metres above Lot 16.

(b) Lot 24, a stratum lot comprising -

(i) Six square portions of land (6 x 6 m each) totalling 216 square metres (for pylons to support the freeway);

(ii) The stratum lot of 1,376 square metres above Lot 17.

(c) Easement F over parts of Lots 16 and 17.

96 Mr Dempsey allowed $5,000 for the decrease in value of Lots 16 and 17 caused by (a) and (b) above.

97 Leaving aside Easement F which I address later, Mr Dundas' assessment of the decrease in the value of the residue of Site 3 had the following components totalling $2,925,000 (as summarised in Annexure 1 hereto):

(a) The impact of the freeway on the area of Lot 17 below the freeway. This portion has an area of 1,376 square metres. Mr Dempsey in effect treated it as resumed, ie that the value had been reduced to a nominal sum due to the impact of the Lot 24 stratum above it. He relied on the Garland Road sale (as adjusted) to derive a rate of $1,800 per square metre. This gave him a value of $2,475,000 (he seems to have rounded the precise figure of $2,476,800).

(b) The impact of the freeway on the remaining areas of Lots 16 and 17 totalling approximately 1,000 square metres. To allow for the impact of the freeway on those areas, he allowed a 25 percent reduction on the adjusted rate of $1,800 per square metre from his Garland Road

sale, to give a value of $450,000.

98 Mr Dundas stated that the injurious affection was due to the following matters (I leave aside for the moment the effect of Easement F):

(a) the noise and lack of sunlight caused by the construction of the freeway overhead. RMS submits that the noise is minor, the site remains light and airy, and the freeway overhead provides advantages of shelter from rain and shade from the sun. Having visited the location, my assessment is that the noise from the freeway is more than minor, that the lack of sunlight is significant, and that to call it "light and airy" is inapt;

(b) the interruption of the lot by the six concrete columns. RMS submits that the columns do not deprive the site of the utility as open space. It is true that the site can still be used for some open space purposes as the existence of the bicycle and pedestrian path shows, but I accept that open space utility is substantially hampered;

(c) the construction of a bicycle and pedestrian path through the area. I do not see why that contributes to loss of value.

99 Overall, in my assessment, the presence of a freeway above, supported by columns, is oppressive and has had a seriously injurious effect on this small park. However, I do not think that it has rendered any part of the residue valueless. I assess the reduction in value of the area of 1,376 square metres below the freeway at 75 percent and of the remaining area of 1,000 square metres at 25 percent. Applying my previously adopted Site 3 rate of $500 per square metre, my valuation assessment is $641,000 as set out in Annexure 1 hereto.

100 I turn to the decrease in value of the Site 4.1 residue. The area is 3,275 square metres. Mr Dundas estimated the reduction in value at 75 percent. My estimate is 50 percent. Applying my previously adopted Site 4 rate of $400 per square metre, my valuation assessment is $655,000 as set out in Annexure 1 hereto.

The acquired easements

101 The rights taken away by an easement must be measured by the terms of the instrument. In *Besmaw Pty Ltd v Sydney Water Corporation* [2001] NSWLEC 15, (2001) 113 LGERA 246 at [55]-[56] Sheahan J said:

> It is not what the dominant owner actually takes, but what the dominant owner is allowed by the terms of the instrument, which calls up the key access issue in this case.

> The rights taken away from the landowner must be measured, not by what the acquiring authority at any given time might plan to do, or what its policies are, or what assurances or understandings may be given or communicated about the way its rights may be exercised, but by what its enabling instrument allows it to do.

Upheld on appeal *Sydney Water Corporation v Besmaw Pty Ltd*[2002] NSWCA 147; cited *Roads & Traffic Authority v Peak* [2007] NSWCA 66 at [63] - [65]; applied *Chino Pty Ltd v Transport Infrastructure Development Corporation* [2006] NSWLEC 768, (2006) 153 LGERA 136 at [87].

102 Compensation for the compulsory acquisition of an easement should reflect the diminution in value of the claimant's property by dint of the easement, which depends upon the nature of the restriction imposed by the easement: *Penrith City Council v Sydney Water Corporation* [2009] NSWLEC 2 at [28] - [29] per Lloyd J. On the before and after approach, the market value test may be applied by asking what a willing but not anxious buyer would pay for the land without the easement and then asking what that buyer would pay for the land burdened by the easement: *Electricity Commission of New South Wales v Arrow* (1994) 85 LGERA 418 at 421 per Handley JA. In *Penrith* the Court accepted that in addition to the obvious blot on title, the respective shape and size of the easements effectively sterilised not only the land within the easements but also other land between the easements: at [35]. In respect of an acquired easement of carriageway, the Court depreciated the market value of the impacted land by 50 percent. In respect of two easements for sewerage purposes (apportioning the interest between the easements and existing pipeline and statutory rights), the Court depreciated the market value of the impacted land by 25 percent based on the easement restrictions: at [37].

103 In assessing the market value of the acquired easements, Mr Dempsey opined that their terms result in minimal loss of amenity and use potential of the lands they burden. Mr Dempsey concluded that the acquired easements are a blot on title and applied a 10 percent reduction in the value of the burdened lands to derive the market value of the acquired easements.

Easement E to drain water over Site 2 residue

104 Mr Dundas assessed the value of Easement E at $144,000. Mr Dempsey assessed it at $2,345.

105 Easement E is 8.4 metres wide, between 14.09 and 17.82 metres in length, and covers an area of 134 square metres. Easement E is designed to carry water from the detention pond constructed on Site 2 to the Lane Cove River. It extends from the western side of the pond, across the Site 2 residue land Lot 50, to the high water mark of the Lane Cove River. Under its terms, the dominant tenement owner has the right to (a) drain water across and through the residue land, (b) have drainage pipes beneath or upon its surface, and (c)

to enter and remain upon the servient tenement. The surface of the residue land over which Easement E passes is rubble or rock. The terms of Easement E are as follows (as provided in Schedule 4A of the *Conveyancing Act* 1919):

> Full and free right for the body in whose favour this easement is created, and every person authorised by it, from time to time and at all times to drain water (whether rain, storm, spring, soakage, or seepage water) in any quantities across and through the land herein indicated as the servient tenement, together with the right to use, for the purposes of the easement, any line of pipes already laid within the servient tenement for the purpose of draining water or any pipe or pipes in replacement or in substitution therefore and where no such line of pipes exists, to lay, place and maintain a line of pipes of sufficient internal diameter beneath or upon the surface of the servient tenement and together with the right for the body in whose favour this easement is created and every person authorised by it, with any tools, implements, or machinery, necessary for the purpose, to enter upon the servient tenement and to remain there for any reasonable time for the purpose of laying, inspecting, cleansing, repairing, maintaining, or renewing such pipe line or any part thereof and for any of the aforesaid purposes to open the soil of the servient tenement to such extent as may be necessary provided that the body in whose favour this easement is created and the persons authorised by it will take all reasonable precautions to ensure as little disturbance as possible to the surface of the servient tenement and will restore that surface as early as practicable to its original condition.

106 Mr Dundas considered that these rights, particularly the right to lay pipes "upon the surface" of the land or construct an overflow channel upon the surface, would severely impact on the use of the land affected by the easement, as well the small triangular adjoining area to the south to which access would be impaired or denied: the total area affected is approximately 200 square metres. The land affected adjoins Site 2 and Mr Dundas opined that it also has a market value of $900 per square metre. He considered that the value of the affected land has been reduced by 80 percent. He concluded that the market value of Easement E was $144,000 calculated as follows: 200 m2 x $900 / m2 x 0.8 = $144,000.

107 Mr Dempsey valued Easement E on the basis that it is only to allow any overflow to discharge over the surface of the residue, and that this would involve a low maintenance construction requiring minimal intrusion on the residue. He allowed 10 percent of the value of the land impacted by the easement, as follows: 134m2 X $17.50/m2 = $2345. I do not think that Mr Dempsey took into account what Easement E allows.

108 Mr Dundas took into account what easement E allows. I accept Mr Dundas' analysis of the area affected (200m2) and his reduction in value of 80 percent. I propose to apply my Site 2 rate of $500 per square metre to arrive at the following value of Easement E: 200m2 x $500/m2 x 0.8 = $80,000.

Easement F for services over Site 3 residue

109 Mr Dundas assessed the value of Easement F at $790,000. Mr Dempsey assessed it at $20,799.

110 Easement F is an easement over the Site 3 residue land and is for services including supply of gas, electricity, telephone and television and discharge of fluid wastes. It is in the following terms:

1. The body having the benefit of this easement may:

(a) provide domestic services supplied by that body through each lot burdened but only within the site of this easement, and

(b) do anything reasonably necessary for that purpose, including:

- entering the lot burdened, and
- taking anything on to the lot burdened, and
- carrying out work, such as constructing, placing, repairing or maintaining pipes, poles, wires, cables, conduits, structures and equipment.

2. In exercising those powers, the body having the benefit of this easement must:

(a) ensure all work is done properly, and

(b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and

(c) cause as little damage as is practicable to the lot burdened and any improvement on it, and

(d) restore the lot burdened as nearly as is practicable to its former condition, and

(e) make good any collateral damage.

3. For the purpose of this easement, ***domestic services*** includes supply of water, gas, electricity, telephone and television and discharge of sewage, sullage, and other fluid wastes.

111 The land affected by Easement F is part of Lots 16 and 17 DP 1146960. Mr Dundas estimated the decrease in value of the affected areas as follows:

Lot 17: 400m^2 x $1,800 x 0.8	= $576,000
Lot 16: 267.1m^2 x $1,000 x 0.8	= $214,000
TOTAL	$790,000

112 Mr Dempsey allowed 10 percent of the value of the land impacted for the blot on title as follows: 1,188m^2 X $17.50/m^2 = $20,799.

113 I have previously assessed the injurious affection to the Site 3 residue from the impact of the freeway and the supporting columns. It is necessary to be careful here to avoid double dipping when assessing compensation for the effect of this easement. My assessment is that any additional reduction in value arising from Easement F is a relatively modest 10 percent. Adopting Mr Dundas' area and applying my previously adopted Site 3 rate of $500 per square metre, my valuation is: 667.1m2 x $100/m2 x 0.1 = $33,355.

Summary

114 In summary, my valuation assessment, before considering the mesne profits claim, is as set out in Annexure 1 hereto.

MESNE PROFITS

115 Council claims almost $33 million for being deprived by the acquisition of a cause of action against RMS for mesne profits between 1998 and 2003 and between 2008 and 2011. RMS occupied the subject lands from 1988, when construction of the Gore Hill Freeway commenced, until the 2011 date of acquisition. RMS did not pay for its occupation between 1988 and in 2011 except for a period between 2003 and 2008. In respect of the latter period, in 2003 under the *Just Terms Act* its predecessor compulsorily acquired the following leases from Council for terms of (generally) four years and eleven months, with the amount of compensation determined by the Valuer-General:

(a) On 8 August 2003 in respect of Sites 2 and 5. The lease terminated on 8 July 2008. The amount of compensation paid to Council was $209,865.

(b) On 24 October 2003, in respect of Sites 1, 3, 4.2 and part of Site 4.1. The lease terminated on 24 September 2008. The amount of compensation paid to Council was $606,100.

(c) On 5 December 2003 in respect of a small part of Site 4.1. The lease terminated on 5 November 2008. The amount of compensation paid to Council was $7,500.

116 The period between 1998 and 2011 not covered by the leases is the basis of the Council's mesne profits claim. It is less than clear, but the evidence suggests that the probable reason why leases were acquired in 2003 was that more Council land was then required in connection with the forthcoming construction of the Lane Cove Tunnel and widening of the freeway, which galvanised RMS' predecessor into acquiring leases of the further land and the land already occupied compulsorily. It put off for years the payment of the much larger amount required as compensation when the lands were compulsorily acquired.

117 In summary, Council submits that:

(a) with the exception of the period of the leases, RMS' occupation of the land prior to the 2011 date of acquisition was unlawful and it was thereby trespassing;

(b) this gave rise to a cause of action in trespass for damages for lost rental in the form of mesne profits;

(c) Council was deprived by the acquisition of its cause of action because it is a requirement of the cause of action that the claimant first physically retake possession, but by reason of the acquisition Council lost its ability to physically retake possession;

(d) the cause of action is not statute barred because it has not yet accrued due to the inability of Council to retake possession because of the compulsory acquisition;

(e) the claim is compensable as special value under ss 55(b) and 57 or alternatively the catch-all provision in ss 55(d) and 59(f) of the *Just Terms Act*;

(f) the claim should be valued as the rental value of the sites at 6 percent of the land capitalised for the term of the lease at 10 percent (as proposed by Mr Dundas), This amounts to $28 million from 1988 to 2003, and $4,962,000 from 2008 to 2011. Alternatively, it should be assessed having regard to the compensation in the leases between 2003 and 2008.

118 In summary, RMS submits that:

(a) there was never, even arguably, any trespass because Council impliedly consented. Further, in relation to Site 4.1 there was no trespass by reason of the reservation in the Crown grant;

(b) if there was a trespass, the acquisition did not deprive Council of the ability to sue in trespass;

(c) if the first two points are wrong, the inability to sue for trespass is not compensable under ss 55(b) and (d) and s 57 or s 59(f) of the *Just Terms Act*;

(d) if the first three points are wrong, Council has failed to adduce probative evidence of the value of the cause of action of which it has been deprived. Mr Dempsey thought that nominal rent was all that could be reasonably anticipated for renting passive recreation land due to the fact that no market for such land exists in Willoughby local government area.

119 "Mesne profits" are the damages which a lessor is entitled to receive due to the tort of trespass of the lessee in remaining in possession following termination of the lease: *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* [1985] HCA 14, (1985) 157 CLR 17 at 39. Therefore Council's claim in respect of the period prior to the leases is not in respect of mesne profits but is for damages for trespass. However, the label is not significant because mesne

profits are damages for trespass (arising from a particular relationship of lessor and lessee) and the usual measure of damages is the market rent which the trespasser should have paid for the period of its occupation: *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at 438-441 per Cohen J.

Consent

120 Consent to occupy land is the antithesis of trespass. RMS submits that Council, by its absence of objection, impliedly consented to RMS' occupation of the land. Council submits that it did not consent to RMS' occupation. Council relies in particular on the existence of the leases as an acknowledgement by RMS of a lack of a right to occupy without paying compensation.

121 The onus is on RMS to justify its entry and occupation by proving Council's consent to its occupation: *Plenty v Dillon* [1991] HCA 5, (1991) 171 CLR 635 at 647. There Gaudron and McHugh J said (omitting most citations):

> The policy of the law is to protect the possession of property and the privacy and security of its occupier. A person who enters the property of another must justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises....Consent to an entry is implied if the person enters for a lawful purpose. In *Robson v Hallett* Lord Parker C.J. said:
>
> > the occupier of any dwelling-house gives implied licence to any member of the public coming on his lawful business to come through the gate, up the steps, and knock on the door of the house.

122 Consent to enter or occupy land may be implied from the absence of objection but only if the landowner understood the purpose of the entry or occupation: *Matthews v SPI Electricity Pty Ltd* [2013] VSC 575 at [131], [136] - [138] per Forrest J.

123 In relation to the period prior to the 2003 leases, in my view the evidence establishes that Council clearly understood the purpose of RMS' entry onto and activities on its land. First, Council officer Mr Ellis said in cross-examination:

(a) Council was well aware of such occupation and use as occurred between 1988 and 1992 in respect of construction of the Gore Hill Freeway.

(b) There is no document, despite a comprehensive search having been undertaken, recording any written or oral assertion by Council that Council did not agree to the use and occupation of the land at any time in the period after 1988.

(c) There is no document, despite a comprehensive search having been undertaken, recording any written or oral assertion that RMS or its predecessors were trespassing.

(d) There is no document, despite a comprehensive search having been undertaken, recording any written or oral assertion that RMS or its predecessors were required to pay rent or an occupation fee or damages.

(e) Council never sought legal advice on the topic of a potential claim against RMS or its predecessors for damages in respect of trespass or occupation fees or rental said to be due to the Council by reason of the RMS' construction of the Gore Hill Freeway and the presence of the road on the land.

124 Secondly, documents in evidence confirm that:

(a) Council encouraged the construction of the Gore Hill Freeway.

(b) Council was fully aware of the proposals concerning roads to be constructed.

(c) Where Council wished to impose particular conditions upon the use of its lands, it did so.

(d) Council never sought payment of rent or any other amount for the use of its land. Rather, it sought to negotiate a "land swap" whereby it would receive land held by RMS or its predecessor in return for its land that had been used for the construction of the freeway (with a monetary adjustment to the extent the exchanged lands were of unequal value).

125 Thirdly, the attitude of Council was recorded by an officer of the Roads and Traffic Authority (RMS' predecessor) in 2007 in an internal memorandum:

> It is understood that at the time of planning and construction of the Gore Hill Freeway, being approximately 20 years ago, Willoughby Council allowed the RTA, in the spirit of cooperation, to enter onto Council's land and construct the Freeway. To date the RTA has not been required to pay rental for its use of Council's land.

Although this is not a Council document, I accept that the officer's understanding was accurate.

126 Accordingly, in relation to the period from 1988 to 2003 when the leases were entered into, I am of the opinion that Council impliedly consented to RMS' occupation and therefore RMS was not a trespasser. Therefore the claim in respect of that period must fail.

127 The period from the 2008 termination of the leases until the 2011 acquisition is governed by different considerations. Under the intervening leases, Council was entitled to rent in the form of compensation under the *Just Terms Act*, the specific authority to RMS to occupy the land was expressly limited in time to the terms of the leases, and there is no room for implication of authority to occupy the land thereafter without payment of compensation. The evidence

does not otherwise establish that Council impliedly consented to RMS thereafter remaining in possession without payment of rent or compensation. RMS' 2011 statutory offer of compensation for the compulsory acquisition of the land made no allowance for mesne profits or for the payment of rent for that period. Later in 2011 Council objected to the offer by commencing these proceedings, in which a claim for mesne profits was advanced. If RMS is advancing a consent defence in relation to this period, I reject it.

Site 4.1 and the Crown grant reservation

128 RMS submits in relation to Site 4.1 that there was no trespass by reason of the reservation in the Crown grant discussed above at [43], which conferred on RMS the right to make and conduct public roads and be given the right to full and free ingress, egress and regress into, out of and upon those lands for that purpose. As I have rejected the claim in relation to the 1988-2003 period, the submission only requires consideration in relation to the 2008-2011 period. I do not accept the submission. RMS did not purport to exercise any right under that reservation. On the contrary, RMS proceeded instead under the *Just Terms Act* by compulsorily acquiring leases for which it paid compensation, and then continuing in possession before compulsorily acquiring the land.

Whether the acquisition deprived Council of the cause of action

129 Council submits that it is a requirement of a cause of action for mesne profits or trespass that the plaintiff physically take possession of the land before the cause of action accrues, and that the acquisition deprived Council of the ability to do so. RMS submits that the requirement is that the plaintiff be in physical occupation immediately prior to the trespass; that the lessor can combine an action in trespass with a claim in possession and, once possession is ordered, the Court will deem the lessor to have been in possession since the moment is right arose; and that in relation to the 1988 - 2003 period the Council was in physical occupation immediately before the commencement of that period. In relation to the 2008-2011 period, it makes the submission that I address below at [135].

130 Historically, at common law a claimant has to show it had physical possession immediately prior to the trespass; it was not sufficient that it merely had a legal right to possession. At common law, where a former tenant trespasses by continuing in possession after termination of the lease, the lessor, who has a legal right to possession but not physical possession, could bring proceedings for and obtain an order for possession, then physically re-enter pursuant to the order, and then bring separate proceedings for mesne profits. The Court would deploy a legal fiction known as "trespass by relation" to

deem the lessor to have been in physical possession since the moment its right to possession arose and thereby to backdate the award of mesne profits to that moment: *Minister of State for the Interior v RT Co Pty Ltd*(1962) 107 CLR 1 at 6; *Hampton v BHP Billiton Minerals Pty Ltd (No 2)*[2012] WASC 285 at [270] - [273], [300], [309] per Edelman J; *Broadway Pty Ltd v Lewis*[2012] WASC 373 at [124], [136] per Pritchard J. In the latter case Pritchard J summarised the common law principles as follows:

> [124] The principles applicable to a claim for mesne profits for trespass were discussed in some detail by Edelman J in *Hampton v BHP Billiton Minerals Pty Ltd (No 2)* and I gratefully adopt his Honour's detailed exposition of the relevant authorities. As his Honour explained, in order to bring a claim for mesne profits at common law, a landlord first had to re-enter the land (usually as a result of an action for ejectment) before suing for mesne profits for the tenant's trespass on the land. By a legal fiction, the trespass would then be deemed to have occurred from the time when the landlord was first entitled to possession (rather than from the time when the landlord regained possession). This legal fiction was known as the doctrine of trespass by relation. At common law, therefore, a landlord faced with a tenant who refused to vacate the premises following the termination of a tenancy had to commence two proceedings: first to recover possession, and then to pursue damages for the trespass (that is, the mesne profits).
>
> ...
>
> [136] ...At the time that judgment is obtained for an order for recovery of possession, a plaintiff does not have a complete cause of action for mesne profits. As Edelman J explained in Hampton, a claim for mesne profits is a claim for damages for trespass, and in order to establish an action for trespass, it is necessary for a plaintiff to have been in physical possession of the land, and for the defendant to have interfered with that possession. Accordingly, the cause of action for trespass is not complete until such time as the plaintiff obtains physical possession of the premises (ordinarily pursuant to an order for possession). This much is clear from the authorities referred to by Taylor J in *Minister of State for the Interior v RT Co Pty Ltd* in the passage set out above, particularly *Dunlop v Macedo* and *Ebbels v Rewell*. Because the cause of action is not complete at the point that judgment is given on an action for possession, but only after that judgment is executed by the landlord's re-entry, the action for mesne profits cannot be pursued in the same proceedings as the action for possession.

131 However, in NSW there is an alternative and simpler procedure under s 12 of the *Landlord and Tenant Act* 1899, which provides for recovery of mesne profits in proceedings for possession:

> **12 Recovery of mesne profits in proceedings for possession**
>
> (1) Where, in proceedings in the Supreme Court by a landlord, a claim for mesne profits is joined with a claim for possession of land, and the entitlement of the landlord to possession of the whole or of any part of the land is established, the landlord, notwithstanding that he or she has not recovered possession of the whole of or that part of the land, may:
>
> (a) unless the proceedings are tried with a jury, have judgment for mesne profits up to the time of delivery of possession of the land for which he or she obtains judgment for possession, and
>
> (b) if the proceedings are tried with a jury, have judgment for mesne profits up to the time of the verdict of the jury.
>
> (2) A judgment for possession and for mesne profits under this section shall not bar any such landlord from bringing proceedings for mesne profits which shall accrue from the time up to which mesne profits are included in the judgment down to the day of delivery of possession of the land for which judgment for possession is obtained.

132 Thus, by s 12 a claim for mesne profits may be included with a claim for

possession and, if the claimant is held to be entitled to possession, judgment may be entered for mesne profits from the moment the right to possession arose up to the time of delivery of possession of the land. The quantum of damages in the nature of mesne profits may be assessed when the claim for possession is determined, or by a subsequent hearing limited to assessment.

133 As Council was in physical possession of the land prior to the commencement of the alleged trespass from 1988 to 2003 (when the leases were entered into), in my opinion it cannot be said that the 2011 acquisition deprived Council of any cause of action for trespass in relation to that period. It follows that any cause of action for trespass it may have had against RMS arising out of activities between 1988 and 2003 accrued at the time of the conduct alleged to constitute the trespass. Any such cause of action became statute barred in 2009 at the latest: s 14(1)(b) *Limitation Act* 1969.

134 In relation to the period between the 2008 termination of the leases and the 2011 date of compulsory acquisition, in my opinion the acquisition did deprive Council of the ability to recover mesne profits because it could no longer lawfully enter into physical possession nor succeed in a claim for possession.

135 I do not accept RMS' two submissions in relation to the latter period. The first submission is that RMS' activities on the land did not deprive Council of possession because in the case of vacant and unenclosed land which is not being cultivated there is little which can be done on the land to indicate possession, and that the activities of Council were sufficient to constitute possession. In my view, the utilisation by RMS of the land for the freeway and tunnel makes this submission untenable. The second submission is that the Council need only have been in possession of some part of the land upon which it now claims the respondent has trespassed: *Jones v Williams* (1837) 150 ER 781, and that Council was in possession of at least part of the properties from which the acquired properties derived. I do not accept that that case is authority for the proposition for which RMS cites it. The case was concerned with the admissibility of evidence in an action for trespass by the plaintiff claiming the whole bed of a river between his land and the defendant's land, where the defendant contended that each was entitled to the middle of the river. It was held that evidence was admissible for the plaintiff of acts of ownership exercised by the plaintiff on the defendant's side of the river. In any event, Council was not in physical possession of any part of the land the subject of the leases.

Whether loss compensable in these proceedings

136 Council submits, and RMS disputes, that the loss of the mesne profits claim is compensable under ss 55(b) and 57 or alternatively s 55(d) and 59(f) of the *Just Terms Act*, which it is convenient to repeat:

> **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):
>
> ...
>
> (b) any special value of the land to the person on the date of its acquisition,
>
> ...
>
> (d) (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:
>
> ...
>
> (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.

137 As I have earlier rejected the claim in relation to the period from 1988 to 2003, it is only necessary to consider whether the claim from 2008 to 2011 is compensable in these proceedings.

138 In my opinion, the claim in respect of the 2008-2011 period falls within s 59(f) as a financial loss, relating to the actual use of the land, suffered as a direct and natural consequence of the acquisition. "Financial costs reasonably incurred" in s 59(f) include financial losses suffered as a consequence of the acquisition: *George D Angus Pty Limited v Health Administration Corporation* [2013] NSWLEC 212 at [95], [100] - [102] (and the cases there cited). Pre-acquisition rental losses and other pre-acquisition losses or costs suffered in other circumstances have been held to be recoverable under s 59(f): *Caruana v Port-Macquarie-Hastings Council* [2007] NSWLEC 109 at [39] - [52] per Biscoe J (and the cases there cited). In *George D Angus* Preston CJ of LEC, with whom I respectfully agree, said:

[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: *Marshall v Director-General, Department of Transport* at [38], [67] and Roads and Traffic Authority of NSW v Heawood at [20], [21].

[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 paras (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 para (f), or of the other paragraphs of s 59, which demands such a narrow construction.

[102] A construction that "financial costs" includes "financial losses" has been accepted in the earlier judicial decisions on s 59 referred to above. I do not find these decisions to be clearly wrong; to the contrary, I agree with them.

Quantum of compensation

139 As noted above at [119], the usual measure of mesne profits is the market rent which the trespasser should have paid for the period of its occupation. It will not depend on whether the plaintiff would have been able or willing to let the premises to someone else during the relevant period: *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at 439.

140 RMS submits that Council has failed to adduce probative evidence of the compensation for the value of the cause of action. I do not accept the submission. The rental compensation under the 2003 leases is highly probative evidence. It was based on valuations by the Valuer-General under the *Just Terms Act.* I consider this to be stronger evidence, and a sounder basis for assessing compensation, than Mr Dundas' approach of assessing rental on the assumption of 6 percent of land value and assuming rental is paid yearly in advance and invested at compound interest of 6 percent per annum for the period. His rental percentage did not specifically have regard to rental comparable properties and he relied on the percentage return found appropriate in other cases; but those cases concerned different land in different localities and were decided in a different context. His assumption is dubious and there is no evidence to support his assessment of the investment return (which greatly magnifies his numbers). Indeed, he conceded that he did not have the experience to say whether half or twice his proposed rate of return could have been obtained. Mr Dempsey disagreed with his approach.

141 Adopting the rental compensation in the leases, which were for terms of four years and eleven months, I arrive at the following assessment of compensation (rounded) for the mesne profits claim from the date of termination of each lease in 2008 to the 2011 date of acquisition of the land:

(a) Re Sites 2 and 5, the compensation under the lease from 8 August 2003 to 8 July 2008 was $209,865 (equivalent to $42,684 per annum). Extrapolating this for 2.95 years to 24 June 2011 yields $125,917.

(b) Re Sites 1, 3 and 4.2, the compensation under the lease from 24 October 2003 to 24 September 2008 was $606,100 (equivalent to $123,274 per annum). Extrapolating this for 2.75 years to 24 June 2011 yields $339,005.

(c) Re Site 4.1, the compensation under the lease from 5 December 2003 to 5 November 2008 was $7,500 (equivalent to $1,525 per annum). Extrapolating this for 2.75 years to 24 June 2011 yields $4,193.

142 The total of the above is $469,115.

ORDERS

143 I have determined compensation in the total sum of $12,746,000 as itemised in Annexure 1 hereto. Lest there be any arithmetical errors in my numerous calculations, I will grant liberty to apply under the slip rule within seven days to correct them.

144 The orders of the Court are as follows:

(1) Determination of compensation in the amount of $12,746,000.

(2) Liberty to apply within seven days to correct any arithmetical error in the calculations of compensation, by letter to Biscoe J's Associate specifying the proposed correction.

(3) The respondent is to pay the applicant's costs.

(4) The exhibits may be returned.

ANNEXURE 1

ANNEXURE 2

Decision last updated: 11 February 2014