Reported Decision:	175 LGERA 276

New South Wales
Court of Appeal

CITATION:	**Roads & Traffic Authority of NSW v McDonald [2010] NSWCA 236**
HEARING DATE(S):	23 June 2010
JUDGMENT DATE:	15 September 2010
JUDGMENT OF:	Giles JA at 1; Tobias JA at 2; Macfarlan JA at 146
DECISION:	(a) Appeal dismissed; (b) Cross-appeal allowed; (c) Set aside the assessment of compensation under the Land Acquisition (Just Terms Compensation) Act 1991 in the sum of $781,669 made by Biscoe J on 8 July 2009 and in lieu thereof substitute compensation in the amount of $844,241; (d) The appellant to pay the respondent's costs of the appeal and the cross-appeal.

CATCHWORDS:	ENVIRONMENT AND PLANNING – acquisition of land – compensation – valuation – loss attributable to disturbance – whether disputed costs would necessarily have been incurred in realising subdivision potential of acquired land – whether disputed costs involve double-dipping – whether unreasonable to allow costs attributable to payment of rent
LEGISLATION CITED:	Hastings Local Environmental Plan 2001 Land Acquisition (Just Terms Compensation) Act 1991 Land and Environment Court Act 1979
CATEGORY:	Principal judgment

CASES CITED:	AMP Capital Investors Ltd v Transport Infrastructure Development Corporation [2008] NSWCA 325; (2008) 163 LGERA 245 Commonwealth v Milledge (1953) 90 CLR 157 Gosford Shire Council v Green (1980) 48 LGERA 201 Horn v Sunderland Corporation [1941] 2 KB 26 Horton v Wyong Shire Council (No 2) [2005] NSWLEC 45 McDonald v Roads & Traffic Authority of New South Wales [2009] NSWLEC 105 Mir Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales [2006] NSWCA 314 Peter Croke Holdings Pty Ltd v Roads & Traffic Authority of New South Wales (1998) 101 LGERA 30 Roads & Traffic Authority of New South Wales v Collex Pty Ltd [2009] NSWCA 101; (2009) 165 LGERA 419 Roads & Traffic Authority of New South Wales v Muir Properties Pty Ltd [2005] NSWCA 460; (2005) 143 LGERA 192 Roads & Traffic Authority of New South Wales v Peak [2007] NSWCA 66 Serbian Cultural Club Inc & Serbian Cultural Club Limited v Roads & Traffic Authority of New South Wales [2007] NSWLEC 673 Sydney Water Corporation v Caruso [2009] NSWCA 391; (2009) 170 LGERA 298
PARTIES:	Roads & Traffic Authority of New South Wales Karen Denise McDonald
FILE NUMBER(S):	**CA** 2009/40372
COUNSEL:	A: P Tomasetti SC / S Nash R: J J Webster SC / M Seymour / M McMahon (Ms)

SOLICITORS:	A: Henry Davis York, Sydney R: Barraclough Jones & Associates, Tuncurry

LOWER COURT JURISDICTION:	Land & Environment Court
LOWER COURT FILE NUMBER(S):	L&E 2008/30033
LOWER COURT JUDICIAL OFFICER:	Biscoe J
LOWER COURT DATE OF DECISION:	8/7/09
LOWER COURT MEDIUM NEUTRAL CITATION:	McDonald v Roads & Traffic Authority of NSW [2009][NSWLEC 105

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 2009/298527
L&E 2008/30033

GILES JA
TOBIAS JA
MACFARLAN JA

Wednesday 15 September 2010

ROADS & TRAFFIC AUTHORITY OF NEW SOUTH WALES
v KAREN DENISE McDONALD

Judgment

1 GILES JA: I agree with Tobias JA.

2 TOBIAS JA: On 31 August 2007 the appellant, the Roads & Traffic Authority of New South Wales (the RTA), pursuant to provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (the *Just Terms Act*), compulsorily acquired part of the respondent's land (the acquired land) located at Kew in northern New South Wales for the purpose of upgrading the Pacific Highway. Pursuant to the *Just Terms Act*, the respondent was entitled to claim compensation for the acquisition of her land. On 8 July 2009 Biscoe J in the Land and Environment Court determined the compensation payable by the RTA to the respondent as follows:

> Market value of the acquired land (*Just Terms Act*, s 55(a)): $490,000
> Disturbance (*Just Terms Act*, s 59(c) or (f)): $269,846
> Solatium (*Just Terms Act*, s 55(e)): $ 21,823
> Total $781,669
>
> See *McDonald v Roads & Traffic Authority of New South Wales* [2009] NSWLEC 105.

3 The RTA does not challenge the primary judge's assessment of the market value of the acquired land or solatium but does challenge his assessment of compensation for disturbance. Any such challenge is confined by s 57(1) of the *Land and Environment Court Act 1979* to questions of law.

4 Although the primary judge upheld the respondent's claim for disturbance, he rejected one aspect of that claim which is the subject of a cross-appeal by the respondent.

5 The RTA contends that the primary judge made errors of valuation principle when determining the respondent's claim for disturbance; that they were errors of law and that they vitiated his decision because he failed to determine compensation in accordance with the *Just Terms Act*. Alternatively, if his Honour made no errors of valuation principle when determining the respondent's claim for disturbance, then his assessment of the amount of compensation for disturbance was incorrect as it increased the market value of the respondent's land remaining after acquisition (the residue land).

6 The RTA submitted that his Honour's decision had important ramifications and, in particular, the potential to impact upon the determination of compensation whenever part only of an owner's land is acquired and where, as a consequence, what is known as the "before" and "after" method of determining compensation is adopted by the Court. The RTA therefore accepted that the questions of principle involved in the present case transcended the dispute between the present parties and, as a

consequence, if successful it seeks only the restitution of any compensation paid by it to the respondent beyond her entitlement at law, but does not seek to recover the costs of the appeal.

THE RESPONDENT'S LAND

7 The respondent's land is located approximately 1.5km south of the village of Kew, between Taree and Port Macquarie. Prior to acquisition it comprised 6.608 hectares, being Lot 1 in DP 733145 (the parent land). The acquired land comprised the western portion of the parent land. It has an area of 1.614 hectares and is now Lot 19 in DP 1106207. The residue land has an area of 4.994 hectares and is now Lot 10 in DP 1106207.

8 The parent land was fairly regular in shape with a frontage along its western boundary of approximately 260m to Bethesda Road. It was bisected by easements for transmission lines and for railway purposes which extended from the north-west corner of that land to approximately the centre of its southern boundary: see the plan reproduced at [23] below. It was bounded on the north by an unformed Crown Road reserve extending along the whole of the northern boundary from Bethesda Road to Glenhaven Drive that serviced a rural residential development immediately to the north. About 200m of Glenhaven Drive, extending from its intersection with the Crown Road reserve, had not been formally constructed.

9 At the date of acquisition all relevant improvements were on the acquired land, the most significant being the respondent's residence and a large shed predominantly used in conjunction with a wholesale landscaping supply business (the landscape business) conducted by her partner and in which she apparently had an interest. No point was taken by the RTA with respect to the ownership or otherwise of the landscape business.

10 A disused quarry was located in the vicinity of the eastern boundary of the parent land a little to the south of the existing residence and shed. The landscape business was conducted within the old quarry. The respondent's residence was elevated and had appealing rural views from its ridge top position.

11 At the time of the acquisition, electricity, town water, telephone and a septic sewerage system were provided to the residence. Since the acquisition electricity and water supply services have been provided by the RTA to just inside the boundary of the residue land at its north-east corner. Telephone services have been provided to its south-west corner.

12 At the time of the acquisition there were three access points to the parent land. The first was off Bethesda Road about 50m from its intersection with the then existing alignment of the Pacific Highway and which provided access to the landscape business. The second was at the furthest formed extremity of Bethesda Road and provided access to the respondent's residence. The third was off Glenhaven Drive which, as I have indicated, was unmade for 200m from the boundary of the parent land although vehicle access was possible to the property boundary.

13 Notwithstanding the compulsory acquisition on 31 August 2007, the respondent remained in occupation of the residence on the acquired land pursuant to s 34 of the *Just Terms Act* until 31 January 2008 when she and her partner moved to a rented residence elsewhere pending construction of a replacement residence on the residue land. The original residence and shed on the acquired land were then demolished.

14 The RTA charged the respondent rent from the date of acquisition to the date she vacated the residence as permitted by s 34(3) of the *Just Terms Act*. As I have noted, the respondent proposed to construct a replacement residence and shed on the residue land subject to council approval. The costs of connecting services (water, power and telephone), of providing road access from the boundary of the residue land to the replacement residence and shed and a bushfire trail between the residence and the shed, as well as the rental costs incurred by the respondent since vacating the acquired land, formed the bulk of the respondent's claim for disturbance.

THE RELEVANT STATUTORY PROVISIONS

15 The following provisions of the *Just Terms Act* are relevant to the disposition of the appeal:

> **3 Objects of Act**
> (1) The objects of this Act are:
> ...
> (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,
>
> ...
> **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.
> (2) ...
> **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, and

...

59 Loss attributable to disturbance

In this Act:

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

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

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

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

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

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

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

...

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

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

(a) any financial advantage that would necessarily have been forgone in realising that potential, and

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

THE RELEVANT PLANNING EVIDENCE

16 Mr Peter Chapman gave expert planning evidence for the respondent and Mr Anthony Rowan for the RTA. At the date of acquisition the parent parcel was zoned 1(a1) Rural under the provisions of Hastings Local Environmental Plan 2001 (the LEP). The minimum lot size upon which a dwelling house could be erected in that zone was 40 hectares and land so zoned had limited uses.

17 In 1992 the Hastings Council (the Council) granted development consent (the 1992 consent) to a three lot subdivision of the parent land together with land immediately to its north which has since been rezoned and further subdivided into rural residential allotments known as the Glenhaven Estate. His Honour found (at [17]) that at the time of the 1992 consent, the parent land formed part of the proposed Glenhaven Estate which was separated from the parent land by the unmade Crown Road reserve. The Glenhaven Estate had been developed prior to the acquisition and included Glenhaven Drive that at the time of acquisition terminated at the intersection of that road and the Crown Road reserve.

18 On 29 June 2007, after the RTA had approached the respondent regarding its proposed acquisition of the acquired land, an application to modify the 1992 consent was lodged with the Council which proposed a realignment of the boundaries of the subdivision approved by that consent, such that a four lot subdivision was proposed, one of which comprised the acquired land.

19 On 9 July 2007 the modification application was amended and in July 2007 a plan was prepared showing a three lot subdivision which included the acquired land. The Council consented to that modified plan on 18 September 2007, shortly after the date of acquisition.

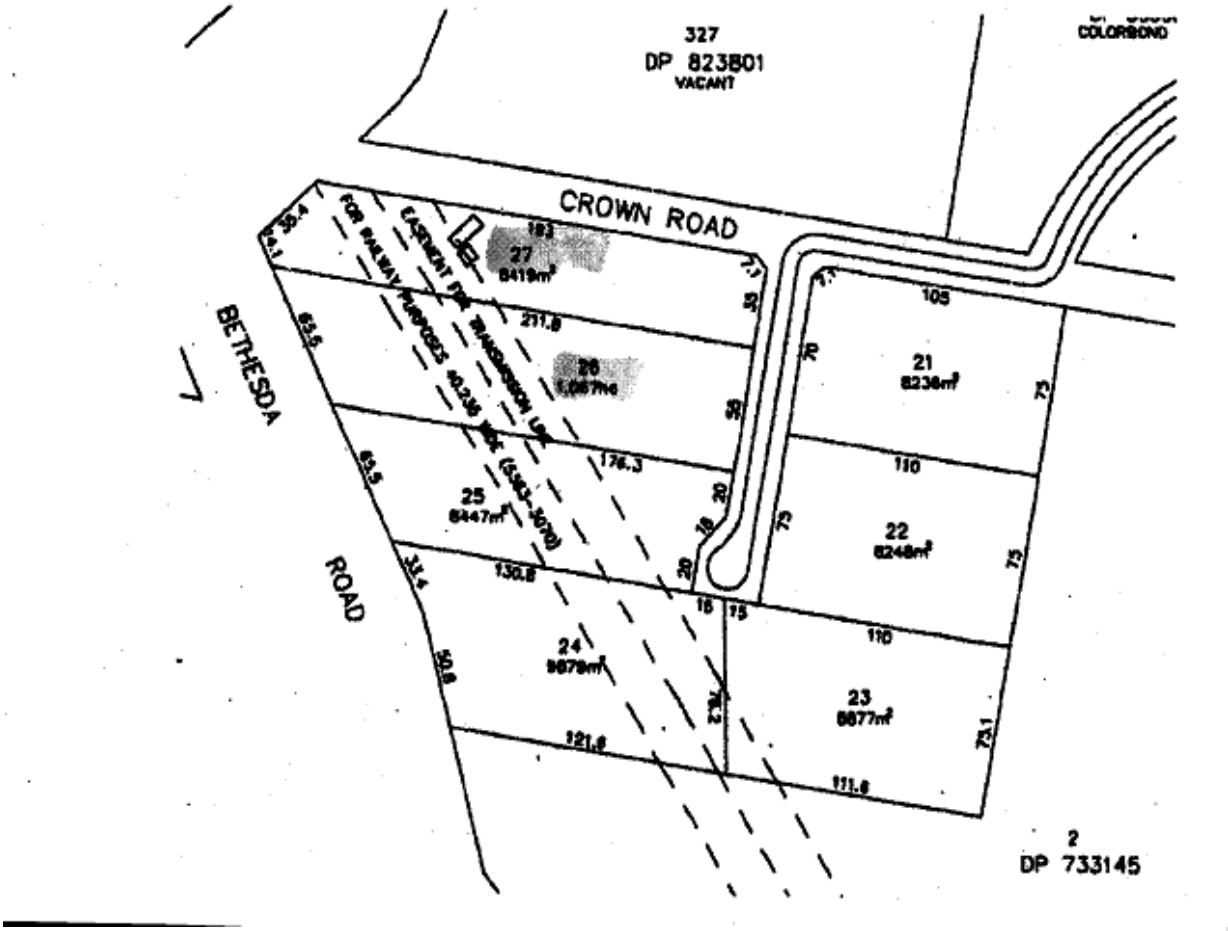
20 Meanwhile in 2006 an amendment to the LEP rezoned a parcel of land adjoining the parent land to its north which was owned by the Bunyah Local Aboriginal Land Council (the Bunyah land) and the land comprising the Glenhaven Estate immediately to the west of the Bunyah land as 1(r1) Rural Residential. That rezoning permitted subdivision into lot sizes greater than 8000m². The rezoning, apparently in error, omitted the parent land, which

remained zoned 1(a1) Rural.

21 On 6 July 2007 the respondent submitted a rezoning application to the Council requesting that the parent land be rezoned in line with that of the Glenhaven Estate. As part of that application she submitted an indicative seven lot subdivision plan that was permissible with consent if the rezoning was approved. On 4 September 2007, four days after the acquisition date, the Council wrote to the respondent stating that although the 1992 consent was still operative, it was prepared to extend the adjoining rural residential zoning to the parent land.

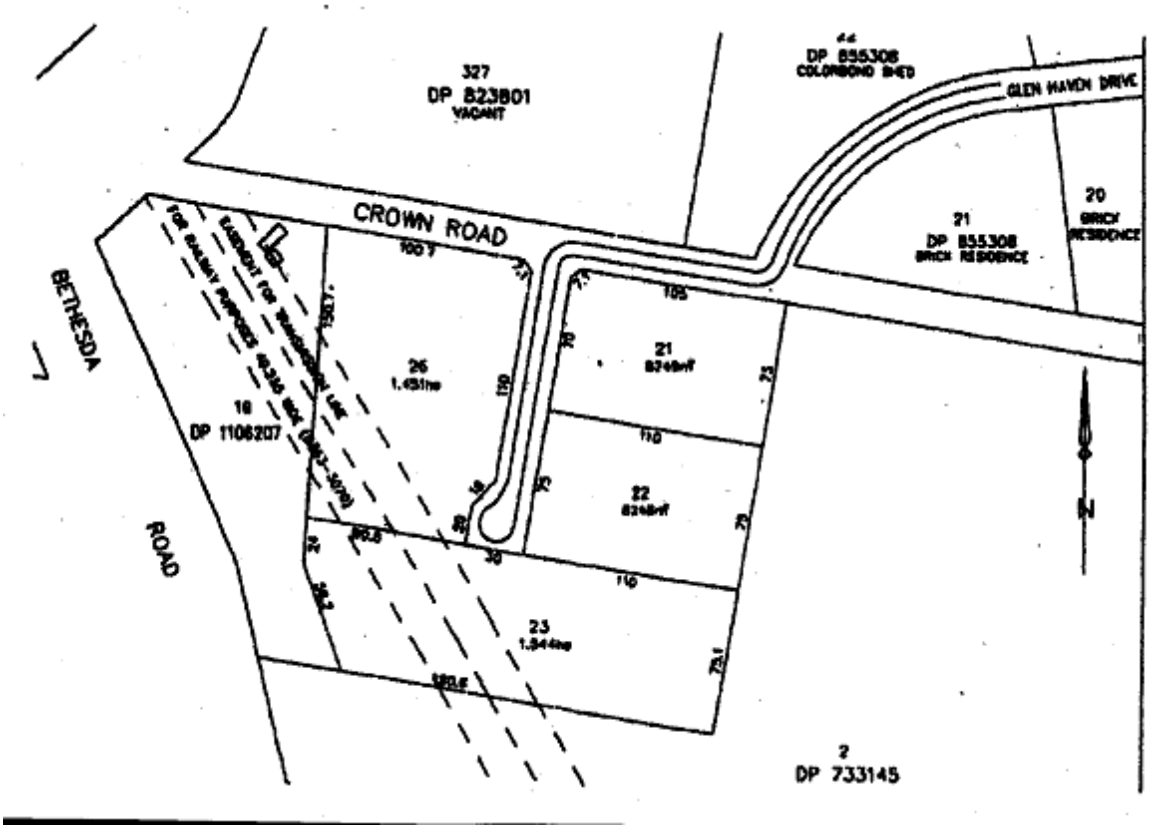
22 The primary judge relevantly found (at [26]) that as at the date of acquisition a prudent hypothetical purchaser of the parent land would have been given the advice which the respondent received from the Council on 4 September 2007 to the effect that the parent land would be rezoned 1(r1) Rural Residential.

23 The planners agreed, and his Honour accepted, that prior to acquisition the highest and best use of the parent land was its potential to be subdivided into seven rural residential allotments which would be serviced by an extension of Glenhaven Drive in an easterly direction along the unmade Crown Road reserve. The agreed plan of subdivision is reproduced below. It will be noted that the existing residence and shed is located within Lot 27 of the hypothetical subdivision. It was also common ground that the existing landscape business would fall within the adjoining Lot 26 of the hypothetical subdivision, generally to the south of the existing residence and shed.



24 The remaining five allotments would be vacant rural/residential home sites. Lot 27 (being the residence/shed lot) and Lot 26 (being the landscape business lot) were to have separate access to Bethesda Road as they had at the date of the compulsory acquisition. It was assumed that all seven allotments would be serviced with electricity and a reticulated water supply and would have tar-sealed road access as depicted on the plan, although they would not have a mains sewer. Some of the proposed lots, as the plan illustrates, would be impacted by the transmission-line and railway easements which traversed the parent land.

25 The planners further agreed, and his Honour accepted, that after acquisition of the acquired land, the residue land could be subdivided into four rural residential allotments, each of which would exceed the minimum of 8,000m² and which would be serviced by the same extension of Glenhaven Drive. That plan of subdivision is also reproduced below. The evidence established that it was the respondent's intention not to subdivide the residue land but to erect her replacement house within one of the potential allotments with the shed and external elements of the landscape business some distance from it but connected by a bushfire trail with formed gravel access as an extension of the road provided by the RTA to the south-western corner of Lot 23 and a similar access to the proposed residence from the north-east corner of Lot 21.



26 As I have indicated, the landscape business was conducted at the date of acquisition within the small disused quarry upon what would be Lot 26 of the hypothetical subdivision of the parent land. It comprised a levelled area including parking for four motor vehicles as well as five storage bays or bins for different landscape materials. The Council approved the use of the parent land for the landscape business on 25 May 2001 (the 2001 consent).

27 The area occupied by the landscape business was approximately 172m². Although there was said to be an endangered ecological community upon the parent land as well as bushfire issues, it was common ground that each of the allotments in the hypothetical subdivisions, including those affected by the existing electricity and railway easements, were of sufficient area to enable the location of an adequately sized residence as well as a sewerage disposal area. All of the allotments exceeded the minimum lot size of 8,000m² under the relevant zoning.

THE METHOD OF VALUATION ADOPTED BY THE PRIMARY JUDGE

28 Two expert valuers gave market valuation evidence, Mr Owen Allsopp for the respondent and Mr David Lunney for the RTA. Each adopted what is known as the " before" and " after" valuation method which was described by the primary judge at [37] of his reasons as being a method

> "whereby the market value of the acquired land is calculated by determining the market value of the parent land immediately before acquisition and subtracting the market value of the residue land immediately after acquisition. The before and after method is often adopted where only part of

the land is resumed."

29 At [39] his Honour noted that the valuers agreed, and he accepted, that:

> "(a) the primary method of valuing the parent land before acquisition should be on the basis of direct comparable sales evidence;
> (b) a hypothetical subdivision development should be adopted as a check valuation;
> (c) under both methods, allowance had to be made for delays to obtain development consent and to obtain rezoning to permit minimum residential lots of 8,000m² in a seven lot subdivision, as agreed by the planning experts;
> (d) it was virtually certain that the residue land would have the benefit of an entitlement to erect a replacement dwelling;
> (e) the value of the improvements on the acquired land was $160,000. Mr Lunney attributed $30,000 of this to services."

For present purposes only the findings referred to in sub-paragraph (d) and (e) above are relevant.

30 At [47] the primary judge accepted that the highest and best use of the parent land was as a seven lot rural residential subdivision subject to rezoning and development consent before acquisition. He also found (at [49]) that the highest and best use of the residue land was as a four lot rural residential subdivision subject to the same conditions. However he noted that:

- the valuers had agreed that the value of the residue land after acquisition was $300,000;

- Mr Allsopp had substantially qualified his agreement to the effect that that after value must be discounted if the Court rejected the items claimed by the respondent for disturbance loss in the nature of on-site infrastructure costs amounting to some $363,000 including the connection of services, access tracks, vegetation removal and wastewater facilities to be provided on the residue land.

31 Ultimately, the primary judge accepted Mr Allsopp's evidence that the parent land should be valued by direct comparison to a particular sale (the details of which are not presently relevant) resulting in a valuation of $830,000 (being seven lots at $118,573 per lot) to which he added $160,000 as the agreed value of the improvements on the acquired land. In this regard, Mr Lunney had originally valued those improvements at $130,000, being $100,000 for the residence, $15,000 for the shed and $15,000 for the roads and landscape pit (being part of the landscape business). However, he later agreed with Mr Allsopp that the value of the improvements was $160,000 which the primary judge accepted subject to an overall discount of 20%, giving a " before" valuation of $792,000 (in round figures).

32 It should be noted, and the RTA emphasised in its submissions, that at the date of acquisition the parent land (which included both the acquired land and the residue land) was zoned 1(a1) Rural, whereas for the purpose of determining compensation, it was valued in accordance with its rezoned potential to be subdivided into rural residential allotments. As at the date of acquisition the land had not in fact been subdivided so that it was valued as en globo land, but with the potential for subdivision.

33 It was the essence of the RTA's submission on the appeal that the adoption of the " before" and " after" method of valuation based on the parent land's potential for a higher and better use than that to which it was put as at the date of acquisition, resulted in there being no entitlement of the respondent to any loss attributable to disturbance pursuant to s 55(d) or as defined under s 59(c) and/or (f) of the Just Terms Act

THE PRIMARY JUDGE'S DETERMINATION OF DISTURBANCE LOSS

34 At [91] his Honour noted that the respondent claimed loss attributable to disturbance pursuant to s 55(d) of the Just Terms Act. Her claim largely comprised the cost of connection of services (water, electricity, telephone and road access) to a new residence to be constructed on the south-eastern part of the residue land away from the Pacific Highway and to a new shed to be constructed on the north-western part of that land close to the highway.

35 As I have indicated, the respondent relied for those claims upon s 59(c) and/or (f) of the Just Terms Act which, for convenience, I repeat:

> " **59 Loss attributable to disturbance**
>
> In this Act :
> **loss attributable to disturbance** of land means any of the following:
> ...
> (c) financial costs reasonably incurred in connection with the relocation of those persons ...,
> ...
> (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."

36 The respondent quantified her total disturbance claim at $426,295 which the primary judge reduced, relevantly, to $269,846. The RTA accepted disturbance loss of only $22,058. As recorded by the primary judge at [93] of his reasons, the RTA submitted that the disputed items of disturbance were not claimable at law because

> "(a) they do not come within the definition of ' loss attributable to disturbance' in s 59(c) or (f);
> (b) if Mr Allsopp's valuation approach is adopted, s 61(b) of the Just Terms Act precludes their recovery;

(c) in any event, they are double-dipping because they are included in the valuers' before and after method of assessing the market value of the land."

37 Again, for convenience, I set out the relevant provisions of s 61 upon which the RTA relied:

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

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

(a) ...

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

(a) The primary judge's consideration of s 59(c) and (f)

38 At [94] his Honour, in my view correctly, noted that the market value of land referred to in s 55(a) and any loss attributable to disturbance referred to in s 55(d), were separate components of compensation. The former is assessed in accordance with the hypothetical exercise required by the definition of "market value" in, relevantly, s 56(1)(a). The latter is assessed

"by reference to the actual costs and fees specified in s 59, which are qualified by a reasonableness requirement and subject to the limitations on the recovery of loss in s 61".

As it is relevant to the cross-appeal, I would interpose that that requirement is related to the **incurring** of those costs and fees. In other words, the reasonableness constraint governs the incurring of the costs rather than the costs themselves. However, I accept that, for example, exorbitant costs could not be said to be "reasonably incurred".

39 At [105] of his reasons his Honour noted the RTA's submission that the disputed disturbance items did not fall within either s 59(c) or (f) of the Just Terms Act. However, at [106] he said:

"The disputed disturbance items all flow from the necessity for the [respondent] to relocate from the acquired land as a result of the acquisition."

This is a finding of fact not open to challenge.

40 The primary judge then considered the meaning of the word "relocation" in s 59(c). He rejected the RTA's submission that that provision was concerned to capture only those costs that had already been incurred by the respondent prior to the date of trial and did not capture those costs yet to be incurred. There was no particular challenge as to whether those costs were in fact relocation costs but only as to whether they had been "incurred" within the meaning of s 59(c). It was argued that the terms used

in s 59(c) should be contrasted with those used in s 59(d), (e) and (f) which refer to costs " reasonably incurred (or that might reasonably be incurred)" so that it was only the costs referred to in sub-paragraphs (d), (e) and (f) that had not been incurred prior to trial which were recoverable.

41 The primary judge acknowledged that the RTA's construction was a possible one, noting that it would be difficult to construe the word " might" appearing in those sub-paragraphs as including future costs where it was certain that they would be incurred. At [114] he posited an alternative construction to the effect that the reference to costs and fees " reasonably incurred" meant " whenever incurred" (i.e. in the past or in the future) as determined on the balance of probabilities and that the reference to costs " that might reasonably be incurred" referred to future costs where the chance of them being incurred was less than on the balance of probabilities.

42 At [117] adopting what he referred to as a purposive construction, his Honour held that costs " incurred" in s 59(a), (b) and (c) referred to costs whenever incurred as determined on the balance of probabilities and that the expanded " might ... be incurred" in the other sub-paragraphs referred to costs where it was less than probable that they would be incurred. Accordingly, his Honour was satisfied (at [118]) that to the extent that they had not already been incurred, the disputed costs would be incurred by the respondent, this being a finding of fact also not open to challenge.

43 The primary judge's conclusion with respect to the disturbance issue was encapsulated by him at [119] of his reasons in the following terms:

> " In my opinion, to the extent that they were reasonably incurred, the disputed disturbance costs fall within s 59(c) as financial costs in connection with the relocation of the applicant, or fall within s 59(f) as financial costs reasonably incurred, or that might reasonably be incurred, relating to the actual use of the acquired land, as a direct and natural consequence of the acquisition. The parent land was the applicant's home. It is a direct and natural consequence of the acquisition that she would continue to live in her large backyard, that is, on the residue land, and relocate her house and shed there. Prior to acquisition the use of the residence and shed were an intimate part of the actual use of the acquired land and the residue land, and the actual use of the residue land was so intimately connected with the actual use of the acquired land that the use of each was dependent on use of the other. Consequently, the disputed costs, insofar as they relate to expenditure on the residue land, relate to the actual use of the acquired land within the meaning of s 59(f)."

The foregoing paragraph contains a number of findings of fact that were not, and could not be, the subject of challenge.

44 Relevantly, his Honour found that the parent land contained the respondent's home and business. The effect of the acquisition was that it was necessary for the respondent to relocate herself by constructing a new residence on the residue land. As she had received compensation that included the value of the improvements on the acquired land, she was only entitled to recover the costs associated with the relocation of her residence to the residue land and not the cost of its construction. She had already been compensated for that. But she had not been compensated for the costs of providing access to the new residence from the boundary of the residue land or for the extension of electricity, telephone and water supply services to that residence as well as other incidental and consequential costs pertaining to her proposed relocation.

45 It was probably unnecessary for his Honour to find (as he did at [119] of his reasons extracted at [43] above) that prior to acquisition, the use of the residence and shed were an intimate part of the actual use of both the acquired land and the residue land. This finding was based upon the decision of this Court in Roads & Traffic Authority of New South Wales v Peak[2007] NSWCA 66 at [71] where in a joint judgment Beazley JA and myself expressed the view that

> "if the actual use of the residue land is so intimately connected with the actual use of the acquired land so that use of the one is dependant on use of the other, then that is sufficient to bring it within s 59(f)."

I shall return to that authority at [61] below.

46 In any event, in my view his Honour was correct in his interpretation of s 59(c). The words in that subparagraph are financial costs " reasonably incurred" and not financial costs which " have been reasonably incurred" so as to give such costs a temporal limitation as to their recovery. However, the RTA did not challenge his Honour's construction of s 59(c) and therefore it is unnecessary to say anything further about it.

(b) The primary judge's consideration of s 61(b)

47 Both before the primary judge and on the appeal, the RTA essentially relied upon two propositions. The first was that the disturbance costs claimed and allowed by his Honour ran foul of s 61(b) of the Just Terms Act The second was that even if that was not so, those costs had been taken into account by the adoption of the " before" and " after" method of valuation so that a separate award of those costs would involve double-dipping.

48 At [122] his Honour recorded the RTA's submission that if the market value of the acquired land as part of the parent land was assessed on the basis that it had the potential to be used as part of a seven lot rural residential subdivision, then s 61(b) operated to exclude the contested disturbance items. At [123] he observed that that provision precluded a claim for disturbance costs to the extent that it was inconsistent with a claim for market value based on the potential use of the land for otherwise

the respondent would be unjustly compensated. Thus, he said that

> "…s 61(b) precludes compensation for financial loss based on the existing use if that use would necessarily be terminated in realising that potential".

49 The primary judge then referred to a number of authorities that reflected the principle encapsulated in s 61(b) including its genesis in the decision of the English Court of Appeal in *Horn v Sunderland Corporation* [1941] 2 KB 26 at 35 per Greene MR. At [125] he noted that the conclusion reached in *Horn* was explained in the joint judgment of Dixon CJ and Kitto J in *Commonwealth v Milledge* (1953) 90 CLR 157 at 165 in the following terms:

> "The conclusion reached was that when land was being used for agricultural purposes is ripe for building, and compensation for its compulsory acquisition is fixed on the basis of its value as building land, compensation for disturbance of the agricultural business should only be awarded to the extent (if any) that the value of the land for agricultural purposes together with the compensation for disturbance exceeds the compensation payable on the basis of the land being building land."

50 In *Peter Croke Holdings Pty Ltd v Roads & Traffic Authority of New South Wales* (1998) 101 LGERA 30 at 44, Bignold J considered that the apparent affect of s 61(b) was

> "… to deny recovery of compensation for disturbance loss where a claim to such compensation is inconsistent with another claim to compensation based upon the market value of the land, where that value is assessed on the basis of a potential higher use of the land than the existing use and where the realisation of that potential necessarily terminates (or postulates the termination of) that existing use."

51 A number of other authorities were cited by his Honour illustrating the application of the principle encapsulated in s 61(b) as to the recovery or otherwise of disturbance loss. To take one recent example, in *Serbian Cultural Club Inc & Serbian Cultural Club Limited v Roads & Traffic Authority of New South Wales* [2007] NSWLEC 673, Jagot J considered a disturbance claim in circumstances where the current use of the land compulsorily acquired was for the purpose of a club whereas its highest and best use upon which it was valued was for the purpose of residential subdivision and development. Only part of the club's land was acquired, the club building being located on the retained land.

52 At [123] of her reasons her Honour noted that the purpose of residential subdivision and development, which determined the market value of the land acquired, was other than that for which the land was currently zoned. It followed that compensation was not payable in respect of any financial advantage that would necessarily have been foregone or any financial loss that would necessarily have been incurred in realising that potential. The existing club use of the acquired land would necessarily have to be

terminated in order to realise its potential for residential subdivision and development.

53 Accordingly, losses relating to the alleged lack of viability of the club itself due to the acquisition were rejected for those losses, if proved, would have been incurred in any event. In other words, the valuation of the acquired land based on its residential use which, to be realised, necessitated the cessation of its existing club use, was inconsistent with a claim for loss of profitability of the club use on the retained land which loss would be incurred in any event if the residential use of the acquired land was implemented.

54 The primary judge's conclusions on this issue were as follows:

> "135. In the present case, the [respondent's] disturbance costs were or are to be incurred because her existing residential and business use of the acquired land was terminated by the resumption.
> 136. The question under s 61(b) is whether any of these disturbance costs would necessarily have been incurred in realising the seven lot subdivision potential of the acquired land on which Mr Allsopp's market value was assessed. In my opinion, the answer is no. In Mr Allsopp's assessment, which I accept, the existing residential use continues on one lot in the subdivision and the business continues on another lot. Thus the [respondent] would not have to move off the land to realise the subdivision potential. Consequently, in my opinion, s 61(b) is not engaged."

55 As I understand the penultimate sentence of [136] of his Honour's reasons, he found as fact that the respondent would not be required to move off the parent land in order for its subdivision potential into seven rural residential allotments to be realised. Accordingly, it would not be necessary for the residential and business uses to terminate in order for that potential to be realised or, to put the matter another way, there was no inconsistency between continuing to use the parent land for its existing residential and business uses on the one hand and subdividing it into seven rural residential allotments on the other. What caused the existing actual use of the parent land to terminate was its acquisition, not its potential for subdivision into rural residential allotments. That is why the disturbance claim succeeded.

(c) The primary judge's consideration of the issue of double-dipping

56 At [137] of his reasons the primary judge recorded the RTA's submission, which was repeated on the appeal, that the disputed disturbance claims involved double-dipping as they had been captured in the valuers' adoption of the "before" and "after" method of valuation. This was because:

● Mr Allsopp (the respondent's valuer) had included in the "before" value of the parent land an amount of $160,000 for the value of the existing improvements, but in his agreed "after" value of the residue land of $300,000 no such amount was included because there were no improvements on that land. It was submitted that the "after" value had been discounted because it took into account the expected costs of providing services such as power, water and sewerage. A number of decisions were referred to in support of this proposition including two of this Court, namely, Peak at [83] and [87]; Mir Bros Unit Constructions Pty Ltd v Roads & Traffic Authority of New South Wales [2006] NSWCA 314 at [32] and [46];

● To allow the contested disturbance cost would be akin to recognising the principle of reinstatement which was nowhere to be found in the Just Terms Act with the consequence that the respondent would be doubly compensated if she was also to be allowed the claimed disturbance costs.

57 At [138] his Honour encapsulated the RTA's submissions in the following terms:

> "In essence, the RTA's submission is that the contentious disturbance costs are double-dipping because they reinstate on the residue land services that were on the acquired land for which the [respondent] has been compensated in the assessment of market value, or because they will add to the value of the residue land."

58 At [139] to [143] of his reasons the primary judge referred to passages from the following decisions of this Court: Gosford Shire Council v Green (1980) 48 LGERA 201 at 208; AMP Capital Investors Ltd v Transport Infrastructure Development Corporation [2008] NSWCA 325; (2008) 163 LGERA 245 at [65]; Roads & Traffic Authority of New South Wales v Collex Pty Ltd [2009] NSWCA 101; (2009) 165 LGERA 419 at [101] to [103]; Roads & Traffic Authority of New South Wales v Muir Properties Pty Ltd [2005] NSWCA 460; (2005) 143 LGERA 192 at [103] to [104]; Mir Bros Unit Constructions at [32] to [67].

59 At [144] he noted that all these authorities accepted that the "before" and "after" method of valuation captured s 55(a) market value, s 55(c) severance and s 55(f) increase or decrease in the value of residue land (sometimes still called "injurious affection"). Importantly, he observed at [145] that they were not authority for the proposition that the "before" and "after" method captured, or necessarily captured, s 55(d) loss attributable to disturbance. This is perhaps not surprising for, as his Honour noted, this head of compensation, like solatium (s 55(e)), is concerned not with value as at the date of acquisition but with costs incurred or hurt suffered after or as a result of the acquisition.

60 Further, his Honour noted that the recovery of disturbance costs was governed by the highly prescriptive regime in ss 59 and 61. If a disturbance

cost answers a description in s 59, it is recoverable unless it is excluded by s 61 or is double-dipping. Although not referred to in the Just Terms Act, double-dipping of disturbance costs is implicitly excluded by the just compensation override in s 54 and by the requirement of s 55 that one amount of compensation be determined having "regard" only to the heads of compensation prescribed in that provision.

61 This is not to say that in some cases disturbance costs may not be captured by adoption of the "before" and "after" method. At [147] of his reasons, his Honour referred to a joint judgment of Beazley JA and myself in Peakat [84], [87] and [101]. It is appropriate to set out the relevant parts of those paragraphs commencing, however, with [83], and including [86]:

> "83 Had the valuers approached the 'before' and 'after' valuation in the more conventional way, then the 'after' value, on her Honour's findings, would have needed to reflect the necessity to relocate the residence 300 metres from the new highway as the appellant required. The costs of that relocation (now claimed under the heading of disturbance) would have resulted in a lower value of the residue land in the 'after' situation.
> 84 In other words, due to the injurious affection of the residue land by reason of the carrying out or the proposal to carry out the public purpose for which the acquired land was acquired, a hypothetical purchaser of the residue land would have discounted the price he or she would pay for that land due to the impact of the new highway on the residence rendering it uninhabitable and thus necessitating the construction of a new dwelling 300 metres removed from the highway boundary. That discount would directly reflect the extra costs involved in providing the very same services and facilities which the respondents now claim under s 59(f).
> ...
> 86 It is equally wrong for the appellant to submit that to now allow the same costs as disturbance under s 59(f) as might have been taken into account under s 55(f), will result in an increase in the value of the residue land which will involve double-dipping or double-counting. This is not so. There would only be double dipping if injurious affection resulted in the 'after' value of the residue land being reduced so that the differential between the 'before' value of the whole property and the 'after' value of the residue land increased and then disturbance in respect of the same costs as were reflected in the injurious affection of the residue land were awarded in addition.
> 87 It thus follows that the trial judge erred when at [89] she accepted the appellant's submission that it would be a case of 'double dipping' to allow as disturbance the cost of

> improvements to the residue land caused by the necessity to relocate the residence which had been rendered uninhabitable because those costs had been reflected in the loss of value of the residue land which had been incorporated into the assessment of the value of the improvements (presumably the residence) under s 55. No such loss of value of the residue land had been so incorporated. This error was more than an error of fact: it was an error of valuation principle.
>
> ...
>
> 101 ... If a person is required to relocate because of the injurious affection caused by the acquisition and, in doing so, incurs costs that are not otherwise reflected in the 'before' and 'after' valuation, then that claim can be made under s 59(c). It does not matter in that instance that the relocation is from one part of the residue land to another. Provided the connection with the acquired land is sufficiently established, then such costs would be claimable."

62 The point sought to be made in Peakand, particularly in [83] and [87], was that there would only be double-dipping in that case if the costs of relocating the residence 300m from the new highway, which was claimed as disturbance, had been taken into account in the "after" valuation. This would result in a lower value being attributed to the retained land in that situation and, as a consequence, a greater differential between the "before" and "after" values. In such a case, those relocation costs would be captured by the adoption of the "before" and "after" method.

63 Thus at [148] his Honour said:

> "Where the before and after method captures the decreased value of the residue land, a disturbance claim under s 59(f) would be double-dipping **to the extent of the capture** ." (Emphasis added)

64 At [155] his Honour found that only $30,000, being the value of the services on the acquired land, had been captured in the "before" and "after" method insofar as the "before" valuation of the parent land had been increased by the value of those improvements. However, as the primary judge pointed out at [154] of his reasons, in the present case only part of the respondent's land was acquired and she was left with the residue land to which she wished to move her residence and business but which was not habitable or useable unless she incurred the costs of providing services to any relocated residence or business. Accordingly, on the issue of double-dipping his Honour concluded:

> "157. The [respondent] cannot begin to live on the residue land without incurring costs now in dispute, yet will not be compensated in market value by the RTA for the equivalent of those costs except to the extent of $30,000. In other words, the market value of the services on the acquired land

> reflects only $30,000 of the disturbance costs for equivalent services on the residue land.
> 158. It would be double-dipping, I think, to allow that $30,000 for the market value of services in the before value of the parent land so that the differential between the before value of the parent land and the after value of the residue land increased, and then in addition allow disturbance costs in the same amount in respect of equivalent services on the residue land."

65 The RTA had also submitted that there was a form of double-dipping because the expenditure on the services upon the residue land in respect of which a claim for disturbance was made, would increase the value of that land beyond its true value and thus constitute double-dipping. The primary judge rejected this submission at [159]. In particular, having accepted that the residue land should be valued on the basis of its potential as a four lot rural residential subdivision, he observed that the disturbance costs relating to the provision of services on that land in order to serve the respondent's residence and landscaping business did not relate to, and therefore would not add value to, that potential. For instance, the proposed access road to the new residence would not add value to the residue land as that road would not be in the same position as the road necessary to provide access to the four lots of the subdivision: see the plan reproduced at [25] above.

66 His Honour therefore found that this was

> "not a case where, for example, s 55(f) loss of value of residue land has been incorporated into the before and after valuation method. In such a situation (which does not arise in the present case), there would be double-dipping if s 55(f) loss of value of residue land resulted in the after value of the residue land being reduced so that the differential between the before value of the parent land and the after value of the residue land increased, and the disturbance in respect of the same costs as were reflected in the loss of value in the residue land were awarded in addition: Peakat [86]."

THE PARTIES' SUBMISSIONS ON THE APPEAL

67 At paragraph 22 of its written submissions on the appeal, the RTA submitted that central to its case was the respondent's evidence, not disputed by the RTA and accepted by the primary judge, that she proposed, in time, to build a replacement residence and shed on the residue land. The respondent had tendered a plan showing her proposed future development. It was submitted that that plan was entirely inconsistent with the seven lot rural residential subdivision and the four lot rural residential subdivision upon which the respondent based her claim for compensation by applying the "before" and "after" method of valuation.

68 Prima facie, however, this submission seems to challenge the finding of fact that the primary judge made in favour of the respondent at [136] of his

reasons and which I have extracted at [54] above. His Honour there found that the respondent's existing residential use, including the shed, could continue on one of the proposed lots of the seven lot subdivision of the parent land (relevantly Lot 27 – see the plan reproduced at [23] above) and the existing landscape business (which comprised material bins for separating landscaping materials) could continue on the adjoining lot in that subdivision (relevantly Lot 26). Accordingly, those uses would not need to terminate for the parent land to realise its potential as a seven lot rural residential subdivision. Being findings of fact, they were beyond challenge.

69 The RTA sought to counter that difficulty in two ways. The first involved the contention in its written submissions that for the purpose of determining both the "before" and "after" valuation it was necessary to assume a sale by the respondent to a developer who would seek to realise the potential by subdividing the land into the relevant number of allotments and then selling them.

70 However, the flaw in this argument (leaving aside the effect of s 61(b)) is that any such sale is hypothetical in the sense that the market value of any parcel of land is determined by the amount that would be paid for the land by a willing but not anxious seller to a willing but not anxious buyer: see the opening words of the definition of "market value" in s 56(1) extracted at [15] above. But it does not follow that having determined the "before" value of the parent land, one is required to assume for the purpose of determining the loss to the respondent attributable to disturbance that she has actually sold the parent land and thereby abandoned her current use of it at the time of its acquisition.

71 The second counter argument was founded on paragraphs 11 and 12 of the joint report of the town planning experts dated 25 March 2009 and which became Exhibit L. Those paragraphs were in the following terms:

> "11. In the event of the implementation of the current 3 lot subdivision approval under DA 92/0040 we agree that the Council would be more than likely to seek cessation of the business on the grounds of residential amenity of the future lots.
>
> 12. In the event of the implementation of a subdivision following rezoning, we agree that Council would seek cessation of the business on the grounds of residential amenity of the future lots, and that the business is likely to be prohibited in the new zone (assuming the same permissibility of use as currently exists in zone 1(r1) under the Hastings LEP 2001)."

72 The RTA submitted that this agreement between the planners, which was not referred to by the primary judge and therefore not necessarily accepted by him, mandated a finding that the potential of the parent land for subdivision into seven rural residential allotments would only be consented to by the Council if the landscape business ceased. However, we are dealing here with an existing business that was permissible within the applicable

zone and which, even if prohibited if the land was rezoned, would have existing use rights. In this respect, it is to be remembered that the landscape business was the subject of the 2001 consent: see [26] above. Further, the statement in paragraph 12 runs counter to his Honour's finding of fact at [136] to which reference has already been made.

73 Whether or not, as the RTA submitted, his Honour overlooked paragraph 12 of Exhibit L, he nevertheless made a finding at [136] of his reasons that the subdivision potential of the parent land and, inferentially, the residue land, could be realised without the respondent having to terminate either her residential or landscape business use whether on one or more of the proposed allotments of the subdivision.

74 Although the RTA submitted that his Honour was bound to accept the planning experts' agreement, given the finding of fact to which I have referred, in my opinion it is not open to the RTA to assert an inconsistency between the respondent's business use of her land on the one hand, and the realisation of its potential as a rural residential subdivision on the other. I shall return to this submission at [98] and [99] below.

75 Nevertheless, the RTA's submissions based on its grounds of appeal may be summarised in greater detail as follows:

> (a) The " before" and " after" method of valuation assumes a hypothetical sale in both situations and that sale contemplates vacant possession being given at settlement. Accordingly, the respondent is assumed to have moved from her property to new premises;
>
> (b) The trial judge fell into an error of valuation principle at [136] of his reasons when he assessed disturbance costs on the basis that the respondent would:
>
> - continue her residential use on one lot of the hypothetical subdivision of the residue land;
> - continue the landscape business use on another lot of that subdivision; and
> - not have to move off the residue land to realise its four lot rural residential subdivision potential.
>
> (c) The respondent could not continue in notional possession of either the parent land or the residue land; nor could she be guaranteed ownership or possession of a new lot in the subdivision of the residue land and, a fortiori, the landscape business use could not continue on another lot in that subdivision of the residue land. In any event the landscape business would be damaging to the amenity of the residential neighbourhood: see Exhibit L;

(d) The finding of the primary judge at [136] may have been a finding of fact but it also involved an error in the application of the adopted "before" and "after" valuation method which assumed that both the parent land and the residue land would each be sold as an en globo parcel but would then be rezoned, subdivided and sold. It followed that to enable that potential to be realised, the current use of the land as a single residential home site and landscaping business would necessarily be terminated;

(e) Although s 59(c) entitled the respondent to compensation for the financial costs reasonably incurred in connection with her relocation, as compensation was assessed on the assumption that the parent parcel was sold for subdivision and development, it must also be assumed for the purposes of s 61(b) that the respondent would have had to relocate from the land in any event for that potential to be realised;

(f) In the language of s 61(b), the removal costs would have been a financial loss necessarily incurred in realising the potential that the land had to be used for a purpose other than that for which it was in fact used at the date of acquisition;

(g) In any event, any such compensation for disturbance would have necessarily added value to the market value of the residue land and should, therefore, be denied for that reason alone;

(h) Further, and alternatively, this was a classic case of double-dipping. The agreed value of the residue land was $300,000 which was assigned to that land on an "as is – where is" basis at the date of both the acquisition and trial. This meant that the residue land was valued as undeveloped land although serviced with road access from the Pacific Highway and serviced to the boundary with electricity, water and telephone;

(i) A "reality check" (see Collex Pty Ltd at [231] per Hodgson JA) confirms that the residue land could not possibly be worth only $300,000 following the expenditure of $269,846 upon it for the type of improvements in respect of which the primary judge awarded disturbance costs. Accordingly, the respondent was overcompensated. Although it does not necessarily follow that adoption of the "before" and "after" method includes items for what could otherwise be claimed as disturbance costs, nevertheless the present was a classic case of double-dipping as there was an award of compensation for existing improvements on the acquired land and then an allowance of further compensation for the cost of reinstating the equivalent features or some of them in improvements on the residue land.

76 In its written submissions in reply the RTA in effect repeated its submissions in chief. Its contentions are conveniently encapsulated in paragraphs 24 and 49 of those written submissions in the following terms:

> "24. The Respondent submits that there is no principle demanding an assumption that the Respondent had ceased to use the land and vacated it in the circumstances of this case. The Appellant submits there is such a principle because one has to assume a sale of the land in deriving the market value of the land in the 'before' and 'after' scenarios. The Respondent, in the circumstances of this case, cannot claim the market value of the land acquired on the basis that the highest and best use of the parent parcel and residue land was as en globo land sold for rezoning and subdivision and then claim financial costs (viz. disturbance loss) of building roads and other infrastructure on the residue parcel so that she could continue to use the residue land as a single rural home site and landscape supply business. To say that the Respondent would use one of the lots in the subdivision as a house site and a second lot for the landscape supplies business does not resolve the inconsistency.
>
> ...
>
> 49. The error of law of the trial judge was to conclude that the existing residential use continued on one lot in the subdivision whilst the business continued on another lot. The Respondent submits that his Honour's finding in [136] was a finding of fact and is beyond challenge. There are several answers to this submission:
>
> a. The assessment of 'market value' in s56 of the Act assumed a sale of the parent parcel and of the residue land to the market place as an en globo parcel to be rezoned and then subdivided.
> b. Secondly, it was not possible to sell the land and realise its higher potential whilst still continuing to live on part of the land and operate the landscape business as the land had to be rezoned and then subdivided. It was not open to the Respondent to maintain or for the Court to conclude that the Respondent could continue to live on the residue land on one lot and operate a landscape supplies business on another lot.
> c. Thirdly, the disturbance losses in Items 8-20 of the Table [at [95] of his Honour's reasons] are each inconsistent with physical layout and improvements of the four lot subdivision in the 'after' scenario.
> d. Fourthly, his Honour overlooked or ignored the

agreement of the town planners [in paragraph 12 of Exhibit L] that the landscape supplies business would have to cease with the rezoning of the land to residential use. This agreement of the town planners was not disputed between the parties and was binding upon the Respondent and the trial judge. Mr Allsopp was a valuer not a town planner and was not in a position to contradict this agreement. In other words, the evidence was all one-way in respect of this issue and his Honour was bound to observe it.
e. Section 61(b) precludes the award of disturbance loss for the reasons stated above.
f. To award these losses results in over compensation contrary to s54."

77 I will need to refer below to the RTA's oral submissions on the appeal as in some critical respects they differed from its written submissions.

78 The respondent's written submissions may be summarised as follows:

(a) The " before" and " after" methodology does not necessarily take into account all or any disturbance costs as defined in s 59: Mir Bros Unit Constructions at [71] per Spigelman CJ with whom Handley JA and myself relevantly agreed;

(b) The adoption of the " before" and " after" valuation method can only result in a denial of disturbance costs if either s 61(b) applies or there is double-dipping;

(c) In the present case the primary judge at [136] found, as a matter of fact, that the subdivision potential of the parent land could be realised without the respondent incurring any financial loss constituted by having to terminate the use of that land for its existing residential and/or business purposes;

(d) Once the market value of the acquired land was determined, albeit using the " before" and " after" method, and leaving aside the question of double-dipping, there is no valuation principle which requires that for the purpose of determining the respondent's claim for disturbance costs, it must be assumed that she has terminated her use of the premises as a residence and for the landscape business and vacated not only the acquired land but also the residue land;

(e) The question of whether any particular item is claimable as a loss attributable to disturbance is one of fact depending upon the facts and circumstances of the case. The only appropriate limitation imposed is whether the claimed item falls within the terms of s 59(c) or (f) or is otherwise caught by s 61(b).

79 In oral submissions the respondent submitted that:

(a) Section 59(f) relates to disturbance costs with respect to the use of the acquired and not the residue land: Peakat [66];

(b) The reference in the chapeau of s 61 to " the market value of land" is, relevantly, a reference to the market value of the acquired land as it is its potential to be used for a purpose other than that for which it is currently used which is relevant to the operation of that provision;

(c) This construction should be adopted notwithstanding that ss 55 to 61 sometimes use the expression " land", " the land" and " acquired land";

(d) Accordingly, the issue that arises under s 61(b) is whether any financial loss would necessarily be incurred by the respondent in realising the potential of the parent land (which included the acquired land);

(e) The primary judge answered that question at [136] of his reasons in the negative upon the basis that the respondent would not have to terminate her use of her residence which would be on one of the lots in the potential seven lot subdivision or of the landscape business which was either on that lot or on the adjoining lot, in order to realise that potential. In other words, in a hypothetical situation, the actual use of the parts of the parent land as a residence and for the landscape business, could continue to be undertaken by the hypothetical purchaser of that land without prejudicing the subdivision of that land into seven rural residential allotments. That hypothetical purchaser would acquire the land paying for its potential as a seven lot subdivision including its existing residential and landscape business uses on adjoining lots. That this is so is reflected in the fact that the value of the parent land included $160,000 for improvements which would not have added value to that land if the realisation of its potential as a seven lot rural residential subdivision necessitated the termination of those uses at the date of acquisition;

(f) The correct question which the primary judge asked himself for the purposes of s 61(b) was whether the claimed disturbance costs would necessarily, in the sense of in any event, have been incurred in realising the potential of the parent land to be subdivided into seven lots. As the primary judge answered that question in the negative, then s 61(b) was not engaged;

(g) No authority exists for the proposition that because the

disturbance costs involved capital improvements to the residue land, the fact that those improvements may (but not necessarily) add value to that land, disentitles the respondent to claim those costs;

(h) In any event, his Honour was conscious of the issue of double-dipping, which was why he deducted $30,000, being the value of the equivalent improvements on the acquired land, from the disturbance costs which were to be incurred with respect to the residue land. Thus the fact that the disturbance costs were determined coincidentally at an amount equivalent (approximately) to the value of the residue land is irrelevant and does not involve any question of double-dipping or of overcompensation. His Honour recognised this at [157] which is extracted at [64] above;

(i) It is not denied by the RTA that the respondent would incur the disturbance costs allowed by the primary judge but on its case she would be required to pay those costs out of the market value of the acquired land, leaving her far worse off than had that land not been compulsorily acquired;

(j) The adoption of the " before" and " after" valuation method is for the purpose of determining primarily the market value of the acquired land when only part of an owner's land is acquired. The method is not intended to determine the market value of the residue land as such although it is valued but only for the purpose of capturing in a single valuation exercise any increase or decrease in value of that land for the purpose of s 55(f) or loss attributable to severance pursuant to s 55(c). It is a fictional exercise with the consequence that the RTA could only succeed on its argument if s 61(b) is construed as applicable to the residue land as well as the acquired land;

(k) Once it is determined that s 61(b) is directed to the market value of the acquired land, then the only issue is whether the potential of that land, which is adopted for the purpose of determining that value, can only be realised by the termination of the current use of that land;

(l) As the primary judge made a finding of fact in the negative with respect to that question, it follows that no relevant question of law arises which can be the subject of challenge in this Court.

80 I turn now to the RTA's oral submissions on the appeal insofar as they were not a repetition of its written submissions. The central contention made by the RTA, which went beyond those stated in its written submissions, was that the primary judge had asked himself the wrong question at [136] of his reasons and thus had made an error of law.

81 I repeat for convenience the question his Honour there asked himself:

> "The question under s 61(b) is whether any of these disturbance costs would necessarily have been incurred in realising the seven lot subdivision potential of the acquired land on which Mr Allsopp's market value was assessed. In my opinion, the answer is no. In Mr Allsopp's assessment, which I accept, the existing residential use continues on one lot in the subdivision and the business continues on another lot. Thus the applicant would not have to move off the land to realise the subdivision potential. Consequently, in my opinion, s 61(b) is not engaged."

82 It is difficult to escape the observation that by framing the question in the manner he adopted, his Honour was not doing anything more than restating the terms of s 61(b) in the form of a question. However, the RTA submitted that:

> (a) the question contained an ambiguity with the consequence that the negative answer his Honour gave to the question was also ambiguous; however I interpose that the primary judge posed the question in terms of a seven lot subdivision whereas the RTA wrongly attributed to him the same question as to a four lot subdivision. It then correctly acknowledged that the claimed disturbance costs had nothing to do with the four lot subdivision of the residue land. Hence the ambiguity remains a mystery;
>
> (b) ultimately, the right question that his Honour ought to have asked himself at [136] was:
>
> > "Whether the costs would be necessarily incurred in realising the potential … and if [the respondent] had incurred this cost and then done the four lot subdivision [of the residue land], she would have incurred that loss in any event. That is fatal, that cuts across her claim."

83 With respect, I find the so-called right question confusing. It commences by repeating the provisions of s 61(b) and in this respect is no different to the question posed by his Honour in the first sentence of [136]. But it then changes tack. His Honour asked himself what to me appears clearly to be the right question with respect to the realisation of a seven lot subdivision. The RTA then seems to assert that the right question should relate to the four lot subdivision of the residue land and submits that had the respondent carried out that subdivision, then the costs incurred by her in relocating her residence and business to that land would have been wasted "in any event".

84 A number of other overlapping and not necessarily consistent oral submissions were made which can be summarised thus:

> (a) The question which arises under s 61(b) is whether the claimed

disturbance costs expended (or to be expended) on the residue land by the respondent would not have been incurred in realising the potential of the **acquired** land (my emphasis); I would interpolate that this appears to me to be the very question asked by the primary judge and which he answered in the negative;

(b) Those costs are not recoverable due to s 61(b) if they are wasted and/or do not add value to the residue land;

(c) Section 61(b) applies to the residue land as well as the acquired land where the " before" and " after" valuation method is employed;

(d) The point of the appeal is that because the disturbance costs expended or to be expended by the respondent on the residue land would not add value to that land if its four lot subdivision potential were to be realised they were irrecoverable as being barred by s 61(b);

(e) In order to avoid overcompensation and/or double-dipping, if the disturbance costs are to be allowed, they must be added to the " after" value of the residue land so that the compensation payable to the respondent would be the " before" value of the parent land less the " after" value of the residue land including the disturbance costs, that is, as land improved by the expenditure thereon of the disturbance costs. This last submission is a nonsense as the " before " and " after" method of valuation is determined as at the date of acquisition and before any disturbance costs are expended on the residue land;

(f) In any event, under both the " before" and " after" scenarios, the existing residence and landscape business on that part of the parent land which comprised the acquired land and their relocation to the residue land both had to terminate as being inconsistent with the realisation of the rural residential subdivision potential of both the parent land and the residue land;

(g) As the " before" and " after" method of valuation involves a hypothetical sale of the parent land in the first scenario and the residue land in the second, it follows that the respondent could not continue to have her residence or landscape business on either if the rural residential subdivision potential of each was to be realised. In other words those uses would necessarily need to cease;

(h) The proposition that the recovery of the disturbance costs depended on whether in order to realise the potential of the acquired land as part of a seven lot rural residential subdivision it was

necessary for the existing residential and landscape business uses to cease, was denied by the RTA as being the correct question for the purpose of s 61(b).

THE RTA'S SUBMISSIONS SHOULD BE REJECTED

85 The essence of the RTA's attack upon the primary judge's reasoning is centred on his findings in [136] of his reasons to the effect that:

> (a) The highest and best use of the parent land was its potential for a seven lot rural residential subdivision;
>
> (b) Such a subdivision could be effected without requiring the removal of the existing residential use on the proposed Lot 27 or the landscape business on the proposed Lot 26;
>
> (c) Accordingly, to realise the subdivision potential of the parent land those uses could remain;
>
> (d) Therefore, no financial loss would necessarily have been incurred in realising the potential of the parent land to be subdivided into seven rural residential allotments.

86 Although at [136] his Honour posed the question raised by s 61(b) in terms of disturbance costs that he found were or would be reasonably incurred by the respondent in relocating to the residue land, it is to be observed that that provision does not relate to disturbance costs as such. Rather, it refers to any financial loss that would necessarily have been incurred in realising the relevant potential of the acquired land for a purpose other than that for which it was used at the date of acquisition.

87 The financial loss of which the sub-section speaks is, relevantly in a case such as the present, the loss that would necessarily be incurred by having to abandon or terminate the residential use on Lot 27 and the landscape business use on Lot 26. In effect his Honour found that each of those uses could remain without prejudicing the realisation of the potential of the parent land to be subdivided into seven rural residential allotments in accordance with the plan reproduced at [23] above. That was a finding of fact that in my view is not open to challenge.

88 It must be remembered that the "before" and "after" approach to the determination of compensation is not a valuation principle which is dictated by the Just Terms ActIt is a convenient and accepted valuation method applicable where only part of a parcel of land is compulsorily acquired in order to determine the market value of the acquired land for the purposes of s 55(a). It is also used to calculate any loss attributable to severance (such as where the land acquired bisects the original parcel) and any increase or decrease in the value of that part of the original parcel which is not acquired by reason of the carrying out of, or the proposal to carry out, the public purpose which was the objective of the compulsory acquisition. Attributable

disturbance would rarely, if ever, be captured by the adoption of the "before" and "after" method of valuation. The reason for this is that loss attributable to disturbance relates to losses or costs incurred post-acquisition and as a "direct and natural consequence of the acquisition" see s 59(f). Whether those costs are expended upon the residue land (where only part of a parcel is compulsorily acquired) or on a different parcel of land (where the whole of the parcel is acquired) simply matters not.

89 The assertion at paragraph 24 of the RTA's submissions in reply (recorded at [76] above) fails to appreciate that the valuation of the residue land for its highest and best use is only for the purposes of determining the market value of the acquired land and, in a case not involving severance, to capture any detriment or betterment of the residue land. Once one understands the purpose of adopting the "before" and "after" methodology, it will be understandably appreciated that that exercise has nothing to do with the disturbance costs expended on the residue land irrespective of what potential use is attributed to it for the purpose of applying that method in order to determine the compensation payable for the purpose of s 55(a), (c) and (f). Even accepting that there would be no added value to that land by the expenditure of the disturbance costs if it be the case, as the RTA submits, that those costs would be wasted and/or that the landscape business would need to cease in the event that the residue land was developed as a four lot rural residential subdivision, those facts are simply irrelevant.

90 In my opinion, s 61(b) only applies to the determination of the market value of the acquired land as part of the parent land and then only if the realisation of the potential of that land to be subdivided into seven rural residential allotments required the cessation of the use of the residence and shed upon the proposed Lot 27 and the cessation of the landscape business on the proposed Lot 26. Whether such termination or cessation is necessary in order to realise the relevant potential of the parent land is a question of fact. That fact, having been determined by the primary judge contrary to the RTA, cannot be erected into a question of law.

91 Again I emphasise that s 61(b) is not as such directed to loss attributable to disturbance within the meaning of s 59 although if it does apply it may have the effect of denying any such loss. As I have observed, if the potential of the parent land to be subdivided into seven rural residential allotments can only be realised if the existing residential and business uses were required to cease, then and only then, would the respondent be barred from recovering compensation for costs attributable to the relocation of uses which would be required to cease in any event. But that is not the present case.

92 However, as I have indicated above, s 61(b) may deny a claim for disturbance costs under s 59. In Sydney Water Corporation v Carusi [2009] NSWCA 391; (2009) 170 LGERA 298 I discussed, with the agreement of Allsop P and Sackville AJA, the effect of ss 59 and 61 at [164] to [187]. In the

course of so doing I adopted the reasoning of the primary judge in the present case at [94], [123], [124], [125] and [126]. The RTA did not suggest that his Honour had erred with respect to the contents of those paragraphs. At [184] I expressed the view that s 61 dealt with the consequence of the assessment of compensation under s 55 (other than s 55(a)) where the market value of the acquired land has been determined pursuant to s 56(1) in accordance with its highest and best use and that use exceeds the market value of the land upon the basis of its actual use as at the date of acquisition. I noted that s 61(b) could deny a claim for loss attributable to disturbance pursuant to ss 55(d) and 59. I relevantly continued in the following terms:

> "185 Of course, it does not necessarily follow that if s 61 applies it trumps each of the sub-paragraphs of s 59. Relevantly to the present case, it only denies compensation for disturbance where the relevant costs in respect of which a claim is made under s 59 would necessarily have been incurred in realising the potential to which s 61(b) refers. Thus, s 61 would not prevent a claim for disturbance under ss 59(a) and (b). But where stamp duty is incurred by persons entitled to compensation in connection with the purchase of land for relocation where that relocation is necessary to enable the potential to which s 61 refers to be realised, then in my view s 61 denies a claim under s 59(d).
>
> …
>
> 187 Although, as the respondents submit, s 61 refers only to the assessment of the market value of land on the basis of its potential to be used for a purpose other than that for which it is currently used, paragraphs (a) and (b) in my view are not directed to that assessment. In particular, it seems to me that paragraph (b) is directly related to financial losses which might otherwise fall within s 59 and which would necessarily be incurred in realising the potential of the land upon the basis on which its market value has been assessed.

93 Accordingly, the issue for determination by the primary judge in the present case was whether the disturbance costs awarded by him would necessarily have been incurred in realising the subdivision potential of the acquired land as part of the parent land and adopted for the purpose of assessing its market value. His Honour answered that question in the negative and, as I have said, that finding was one of fact.

94 In this regard the use in s 61(b) of the word "necessarily" requires a finding for the sub-section to be engaged that the relocation costs claimed by the respondent would have been inevitably incurred if the potential to subdivide the parent land into seven rural residential allotments was to be realised or implemented. In this context, it is appropriate to respond in more detail to sub-paragraphs (b), (c) and (d) of paragraph 49 of the RTA's written submissions in reply, which I have extracted at [76] above.

95 Sub-paragraph (b) involves an assertion that it was not open to the primary judge to make the finding he did at [136]. However, the RTA's submission (which was repeated in its oral submissions) is flawed as it focussed upon the assumed development of the residue land as a four lot rural residential subdivision rather than upon the acquired land as part of the parent land and its potential as a seven lot rural residential subdivision.

96 In any event, it was not suggested, and we were not referred to any evidence that supported the proposition, that the market value which the primary judge attributed to the parent land in the " before" valuation was necessarily dependant upon the cessation of the use of the existing residence and the carrying on of the landscape business.

97 Sub-paragraph (c) has the same flaw as sub-paragraph (b) in that it focuses on the assumed redevelopment of the residue land rather than the parent land. In any event the submission assumes a factual finding which the primary judge did not make. In fact his finding was to the opposite effect.

98 Sub-paragraph (d) is based on paragraph 12 of Exhibit L. The submission that the agreement of the town planners was binding upon the primary judge was not supported by any authority. In my view his Honour was not bound by that agreement. Even if he was, paragraph 12 does not lead to the conclusion that in order to realise the potential of the parent land to be subdivided into seven rural residential allotments, it would be necessary (as distinct from desirable) that the landscape business cease.

99 Although the town planners agreed that the Council would seek the cessation of that business on the ground that its continuance would effect adversely the residential amenity of the future lots, it was open to the primary judge to take a different view given the location of that business within an area of only 171.25m² in a small disused quarry which had been levelled, had its own dedicated access to Bethesda Road and comprised no more than a levelled carpark area and several bins for separating landscape materials. Furthermore, the Council had approved the wholesale landscape supply use in its 2001 consent with the consequence that even if upon rezoning that use were to be prohibited, it would still enjoy existing use rights. In these circumstances it was not an error of law for the primary judge to have implicitly declined to give any particular weight to paragraph 12 of Exhibit L.

100 The RTA nevertheless submitted that his Honour erred in law given that the disturbance costs which he awarded included items of a capital nature that added value to the residue land. This was the opposite of its submission that those costs were not recoverable because they did not add value to a four lot subdivision of the residue land. But even if they did, in my opinion it is irrelevant. No authority was cited by the RTA to support the proposition for which it contended. True it is, as the RTA submitted, that the residue land was valued in the " after" scenario upon the basis of its then physical state, but that was the proper course for the valuers and his Honour to

adopt. There are many first instance decisions where disturbance costs of a capital nature have been allowed and which would, or at least may, have added value to the land upon which they were located. But that did not disqualify the recoverability of those costs.

101 The difference in the present case, according to the RTA, is that these costs were expended on the residue land making it more valuable in the hands of the respondent. However, this is not necessarily so in that such costs may have been wasted to the extent to which they would not add value to the residue land, as the RTA submitted, if its potential for subdivision into four rural residential allotments was ever realised. In fact the existence of unnecessary capital works may in fact have decreased its value based on that potential rather than added to it.

102 However, whether or not expenditure of the disturbance costs or any of them would have added value to the residue land has no bearing upon the entitlement of the respondent to recover the same pursuant to ss 55(d) and 59 where otherwise s 61(b) is not engaged.

103 In summary, the RTA's foundational submissions, and my response to them, are as follows:

> (a) Section 61(b) applied to the residue land as it was valued in the " after" scenario for its highest and best use as a four lot rural residential subdivision; this proposition involves a misconstruction of that provision which only applies to the acquired land;
>
> (b) The disturbance costs claimed by the respondent related to the relocation of the residential and landscape business uses from the acquired land (as it had been taken from her) to the residue land but added no value to that land when valued in the " after" scenario as a four lot subdivision with the consequence that that potential use would not be realised without those uses ceasing. This proposition:
>
> - involves a misconception of the purpose of the " before" and " after" method of determining compensation when only part of an owner's land is compulsorily acquired;
> - assumes, wrongly, a hypothetical sale of the residue land whereas the only sale required by law to be assumed is that of the acquired land;
> - fails to appreciate that it is the resuming authority that benefits from an increased " after" value of the residue land due to a higher and better use than its actual use as the differential between the " before" value and the " after" value which determines the amount of compensation payable thereby decreases;
> - fails to appreciate that disturbance costs are incurred after and as a consequence of the acquisition and, therefore, cannot be taken into account in determining market value unless s 61(b) applies;

- is an impermissible challenge to the primary judge's finding that s 61(b) was not engaged as the assumed potential of the parent land could be realised without the impugned uses ceasing.

104 Finally, it is necessary to deal with the RTA's argument based on double-dipping. It was submitted that Mr Allsopp in his valuation made it clear that the "after" value of the residue land did not include the services and other improvements for which disturbance loss was claimed and awarded. He said, illogically according to the RTA, that because the "after" value did not include such items and because the "before" valuation included the benefit of such items, that double-dipping did not occur. It was submitted that for precisely that reason double-dipping did occur.

105 Reliance was placed by the RTA upon the following passage in Peakat [86]:

> "It is equally wrong for the appellant to submit that to now allow the same costs as disturbance under s 59(f) as might have been taken into account under s 55(f), will result in an increase in the value of the residue land which will involve double-dipping or double-counting. This is not so. There would only be double dipping if injurious affection resulted in the 'after' value of the residue land being **reduced** so that the differential between the 'before' value of the whole property and the 'after' value of the residue land increased and then disturbance in respect of the same costs as were reflected in the injurious affection of the residue land were awarded in addition." (Emphasis added)

106 The following further passage at [101] was also relied upon:

> "If a person is required to relocate because of the injurious affection caused by the acquisition and, in doing so, incurs costs that are not otherwise reflected in the 'before' and 'after' valuation, then that claim can be made under s 59(c)."

107 The present case is not involved with injurious affection within the meaning of s 55(f). I therefore have some difficulty in applying the passages in Peakupon which the RTA relies to a case such as the present.

108 Nevertheless, the primary judge acknowledged (at [158]) the RTA's submission that the contentious disturbance costs involved double-dipping because they reinstated upon the residue land services that were on the acquired land for which the respondent had been compensated in the assessment of the market value of the parent land.

109 That submission was accepted by the primary judge to the extent to which allowance had been made in the "before" valuation of the parent land for the services which, as a consequence of the compulsory acquisition, had to be reinstated upon the residue land to enable the respondent to relocate. Those services were valued by agreement at $30,000 – but that was the extent of the double-dipping. As his Honour reduced the disturbance costs

by that amount, there was no relevant error of law upon which the RTA could rely.

110 It follows in my view that each of the RTA's contentions on the appeal should be rejected and the appeal dismissed with costs.

THE APPEAL WITH RESPECT TO THE CROSS-CLAIM

111 The respondent claimed the sum of $62,571.60 being the quantum of rental paid by her with respect to the leasing of a residence for 36 months whilst waiting to rebuild her residence on the residue land. There was no challenge to the quantum as such.

112 At [120] of his reasons, the primary judge appears to have disallowed the claim for rental on three grounds. The first is that a claim for rent for the period after the respondent had vacated the acquired land did not fall within either s 59(c) or (f). The second was that the terms of s 34(3) indicated an intention that post-acquisition rental was not compensable. The third was that it would be unreasonable to allow the costs attributable to the payment of rent for the reasons referred to by Talbot J in Horton v Wyong Shire Council (No 2) [2005] NSWLEC 45 at [19]. The respondent challenged the correctness of each of these grounds.

113 In its submissions, the RTA did not seek to uphold the first of the grounds apparently relied upon by the primary judge in rejecting the rental claim. Talbot J in Horton accepted (at [18]) that such a claim fell within s 59(c), although ultimately he rejected it on the basis that it was not reasonable that the claimants in that case be reimbursed for the rental payments that they were required to make after they vacated the acquired land and pending the acquisition by them of an alternative residence.

114 In my view there may be some question as to whether in truth the financial costs representing rental paid or payable pending relocation from one residence to a new residence is a cost incurred in connection with that relocation within the meaning of s 59(c). But even if it does not fall within that provision, in my view it clearly falls within the terms of s 59(f) as being a cost incurred as a direct and natural consequence of the acquisition and which related to the actual use of the land, namely, for the purpose of a residence. Accordingly, I would reject the first ground upon which his Honour relied to deny the respondent's rental claim.

115 Section 34 of the Just Terms Act provides as follows:

> **34 Former owner's right to occupy land until compensation paid etc**
>
> (1) A person who was in lawful occupation of land immediately before it was compulsorily acquired under this Act and to whom compensation is payable under this Act is entitled to remain in occupation until:
>
> (a) the compensation is duly paid to the person, or
>
> (b) the authority of the State makes (in accordance with any other provision of this Act) an advance

payment of not less than 90 per cent of the amount of compensation offered by the authority, or

(c) the authority of the State makes (in accordance with any other provision of this Act) a payment into the trust account kept under Part 3 of not less than 90 per cent of the amount of compensation offered by the authority,

whichever first occurs.

(2) Any such person is entitled to remain in occupation of any building that is the person's principal place of residence, or the person's place of business, for 3 months after it is compulsorily acquired, even though the person has ceased to be entitled to remain in occupation under subsection (1). However, if the Minister responsible for the authority of the State is satisfied that the authority requires immediate vacant possession of land, the authority is entitled to immediate vacant possession even though the 3-month period has not expired.

(3) The terms on which a person remains in occupation of land that has been compulsorily acquired under this Act are, in the absence of agreement, such reasonable terms as are determined by the authority of the State (including terms as to the rental to be paid and the restrictions on the use of the land). The Residential Tenancies Act 1987 does not apply to that continued occupation.

(4) Any such unpaid rent or other money due to the authority of the State may be set off against the compensation payable under this Act.

116 Section 34(3) falls within Part 2 of the Just Terms Act which is headed "**Acquisition of land by compulsory process**". In contrast, s 59 falls within Part 3, which is headed "**Compensation for acquisition of land**". Further, s 34(3) empowers the relevant authority of the State to charge a rental where the dispossessed owner remains in occupation of the land that has been compulsorily acquired under the Act. It neither deals nor purports to deal with the assessment of compensation, which is confined to Part 3 of the Just Terms Act

117 Quite clearly, rental paid pursuant to s 34(3) would not be recoverable under s 59(c) as that provision proceeds on the basis that the dispossessed owner remains in occupation of the acquired land with the consequence that that person has yet to relocate. It is no doubt for that reason that in the present case the respondent only sought to claim rent paid or payable by her subsequent to her vacating the residence upon the acquired land. I would therefore reject the second ground apparently relied upon by the primary judge in rejecting the rental claim.

118 The third ground relied upon by his Honour raises a more difficult issue. In Horton the whole of the claimants' land was compulsorily acquired,

having constituted the claimants' home for many years. They were ultimately required to vacate by the resuming authority (being the council) and as a consequence were required to rent premises pending the acquisition of an alternative home. The amount claimed was $32,400 being the cost of renting temporary premises at the rate of $400 per week.

119 As I have noted, Talbot J accepted at [18] that the claim arose under s 59(c) of the *Just Terms Act*. However, he rejected the claim for the following reasons:

> "19 Whilever Mr and Mrs Horton reside in the rented premises they do not incur the inherent costs and overheads, such as rates and maintenance, associated with ownership of property. Furthermore, interest may be earned on the balance of the advance payment they have available for investment from time to time and statutory interest will be received on the compensation still outstanding, pending final determination of the claim. Arguably they could be saving on a commitment to interest on future borrowings. Interest has been saved on the mortgage debt repaid out of the advance payment. On balance in the circumstances it is not reasonable that they receive a separate payment of compensation to reimburse the rent payments made pending acquisition of an alternative property."

120 The approach adopted by the primary judge with respect to the third basis of rejection at [120] of his reasons was stated in the following terms:

> "A s 59(c) claim for rent pending acquisition of an alternative property was disallowed in *Horton* at [19] on the different basis that it was unreasonable to allow it for … reasons, **which would equally apply in the present case** ". (Emphasis added)

121 The RTA submitted that his Honour's statement that the reasons of Talbot J in *Horton* applied equally to the present case was a finding of fact that was not open to challenge. I am not sure that that is so in the sense that it is a finding of fact that the respondent's rental claim was, as a matter of merit, unreasonable. It is possible that his Honour was merely asserting that the factors to which Talbot J referred in *Horton* in the passage cited would be equally applicable to the present case although it would be a matter of determining the extent to which each of the items referred to by Talbot J had any particular relevance to the facts of the present case with which the primary judge did not deal.

122 However, there is a more fundamental issue and that is whether Talbot J's approach to the claim for rent disclosed legal error. His Honour seems to have taken the view that for the reasons set out at [19] of his judgment, it would be unreasonable in the circumstances to reimburse Mr and Mrs Horton as a " separate payment of compensation" for rent payments they had made pending acquisition of an alternative property. But whether or not the reimbursement of such rent was " reasonable" may not be the correct

approach to the issue posed by ss 55(d), 59(c) and, for that matter, 59(f).

123 As neither party, in their written or oral submissions on the appeal, raised the issue as to the correctness of Talbot J's approach in *Horton*, they were invited to provide further written submissions on the point. Each took advantage of that invitation.

124 The respondent's submissions may be summarised as follows:

> (a) Notwithstanding that Talbot J rejected Mr and Mrs Horton's claim for rent, he nevertheless accepted that it was a direct and natural consequence of the compulsory acquisition of their home that they would reasonably vacate the premises within a shorter time than might be needed to find an alternative permanent resident and, further, that it was reasonable for them to
>
> > "move into temporary accommodation to enable them in the meantime to gain a proper understanding of their ultimate financial position before making a commitment and also sufficient time to search for, negotiate and settle on the purchase of [their] new house."
>
> (b) His Honour therefore allowed the sum of $2,000 being the amount Mr Horton deposed to as the approximate quote he had received from removalists including estimated associated costs;
>
> (c) In terms of the elements of s 59(c), there was a financial cost that Talbot J found had been incurred in connection with their relocation. However, his Honour denied this part of the claim finding (at [19]) that
>
> > "[o]n balance in the circumstances it is not reasonable that they receive a **separate payment of compensation** to reimburse the rent payments made pending acquisition of an alternative property." (Emphasis added in submission)
>
> (d) The ultimate finding of his Honour was that it was not reasonable to award the claim for rent as "*a separate payment of compensation*". That finding focussed on the *reasonableness* of the *claim* rather than, as required by s 59(c), to ask whether the rent was "*reasonably incurred*";
>
> (e) As Talbot J proceeded to find (at [22]) that the temporary relocation of Mr and Mrs Horton was reasonable, the denial of an award of rent at [19] is explicable only on the basis that his Honour must have asked himself the wrong question: that is, he appears to have considered that his power to award compensation for this item of disturbance depended upon Mr and Mrs Horton satisfying him that

it was reasonable for them to be so compensated given that they were "relieved" by the acquisition of the burdens of land ownership. However, the Just Terms Act does not prescribe such a test;

(f) By concentrating on [19] of Talbot J's reasons in Horton, the primary judge in the present case focussed upon the reasonableness of the financial cost (being the rent paid and/or payable by the respondent as an item of compensation) rather than focussing on the requirement of s 59(c) which calls for an enquiry into the circumstances in which the cost was incurred and whether such incurrence was reasonable.

125 The RTA's response may be summarised thus:

(a) At [18] of his reasons Talbot J noted that s 59(c) allowed

> "for '**financial costs reasonably incurred in connection with the relocation**' of the persons entitled to compensation as loss attributable to disturbance." (Emphasis added in submission)

(b) It is apparent from the emphasised words that his Honour was expressly mindful of the language of s 59(c);

(c) At [20], when deciding whether reimbursement of the costs of a second removal was reasonable, his Honour concluded that

> "[i]n those circumstances the costs, when incurred, will be **financial costs reasonably incurred**." (Emphasis added in submission)

Once again, his Honour faithfully recited the text of the sub-paragraph;

(d) His Honour refused to award the claim for rent on the basis that it would not be just. This was in accordance with the overriding entitlement of a person from whom land has been compulsorily acquired to receive compensation on "just terms" (see s 3(1)(b)) being an amount that "will justly compensate the person for the acquisition" (see s 54(1));

(e) Whilst his Honour did not use the word "just" at [19] of his reasons, he used an equivalent formulation of words when he said:

> "On balance in the circumstances it is not reasonable that they receive a separate payment of compensation to reimburse the rent payments made pending acquisition of an alternative property."

(f) It followed that given his Honour's findings that Mr and Mrs Horton had been relieved from the inherent costs and overheads of

property ownership whilst renting; had received an advance payment of compensation which had paid off their mortgage and saved the ongoing cost of interest; and would receive statutory interest on the balance of the advance payment, it would not be " reasonable" (i.e. just) that they receive a separate payment of compensation to reimburse them for the rent payments made pending acquisition by them of an alternative property;

(g) This finding was one of fact and was, therefore, not open to challenge;

(h) Attention was also directed to [16] of Talbot J's reasons where he noted that Mr and Mrs Horton's claim was that it was reasonable for them to be reimbursed for rent paid pending acquisition of an alternative property as well as to be indemnified for the costs of removal from the temporary accommodation to their new and alternative place of residence. Accordingly, his Honour was doing no more than answering Mr and Mrs Horton's claim in the manner in which it was advanced before him;

(i) If it be correct, and it was submitted that it was, that his Honour was required only to award " just" compensation, then there could be no error of law in his asking the question whether it would be " reasonable" to award compensation for rental payments. It is reading too much into the judgment to find that his Honour's use of the word " reasonable" involved an error of law;

(j) Although it is true that the word " reasonably" governs the word " incurred", a cost must not only be " reasonably incurred" but also have first, a causal nexus to the acquisition; and, second, the quantum must be acceptable. These are separate questions to that of whether the financial cost is " reasonably incurred", a phrase which focuses on the conduct of the dispossessed person. The questions of nexus and quantum are objective considerations divorced entirely from the issue of whether the conduct of the claimant in incurring the costs is reasonable;

(k) Notwithstanding that a cost may be " reasonably incurred" within the meaning of s 59(c), if the quantum of the cost is not reasonable, an award of compensation which included it would not be just compensation. This was the approach that Talbot J adopted and it does not disclose error;

(l) Furthermore, the Court must always be vigilant in ensuring that a dispossessed owner is not overcompensated by what has been termed " double-dipping". The claimants in *Horton* were paid compensation for the market value of the land which was acquired

and which included the value of their home erected on that land. As his Honour found at [19], the compensation monies they received enabled them to relieve themselves of various obligations. In these circumstances, to receive additional compensation for the rent payable for a temporary residence was to be overcompensated. In this respect, dispossessed owners are not permitted to profit from a compulsory acquisition. They are to be justly compensated and no more;

(m) While Mr and Mrs Horton may have acted reasonably in renting before buying a replacement property, that did not mean that they were necessarily entitled to recover the rent as compensation. That entitlement depended upon whether in the circumstances it was just and reasonable to include such rental.

126 In my opinion, the respondent's submissions should be accepted and those of the RTA rejected. At [106] of his reasons, the primary judge found as a fact that the disputed disturbance items all flowed from the necessity of the respondent to relocate from the acquired land as a result of the acquisition. There is nothing in his Honour's findings to suggest that it was not necessary as a direct and natural consequence of the acquisition and the requirement of the RTA that the respondent vacate her residence upon the acquired land, that she rent alternative premises until she was able to construct a new residence upon the residue land.

127 In this context, loss attributable to disturbance is by virtue of s 55 a separate head of compensation to which a dispossessed owner is entitled where the relevant loss has been " reasonably incurred". In *Horton* Talbot J accepted that the financial costs of renting alternative premises fell within the terms of s 59(c). Furthermore, the approach that his Honour took at [19] of his reasons seems to be at odds with that which he took at [20] and [22] where he said:

> "20. I nevertheless take a different approach to the claim for payment of removalist expenses to be incurred on a second move. Mr and Mrs Horton managed to minimise the cost of the first removal to the temporary rental accommodation by enlisting the assistance of their two children and by hiring a Pantec truck and trailer at a nominal cost. I believe it is reasonable for them to be reimbursed for the actual cost of the second move. It is a cost they will incur solely as a consequence of the necessity to relocate, following the compulsory acquisition and the pressure from the Council to make the property available for the public purpose. In those circumstances the costs, when incurred, will be financial costs reasonably incurred.
> ...
> 22. The land was used as a permanent residence. A

> direct and natural consequence of the acquisition was the need to vacate the premises within a shorter time than that which might generally be regarded as reasonable for finding an alternative permanent residence. I consider it reasonable that the applicants saw fit to move into temporary accommodation to enable them in the meantime to gain a proper understanding of their ultimate financial position before making a commitment and also sufficient time to search for, negotiate and settle on the purchase of the new house. I propose to allow the sum of $2,000 being the amount Mr Horton deposes to as the approximate quotes he has received from a removalist, including estimated associated costs."

128 There was no suggestion in the present case that it was not a direct and natural consequence of the acquisition that the respondent needed to vacate her existing residence and to rent alternative premises until such time as she could relocate her residence onto the residue land. It was not suggested that she had unnecessarily delayed in doing so which would, if it had been the case, have justified a finding that the rental incurred by her was not, at least in part, reasonable in terms of the period during which it was incurred.

129 Furthermore, Talbot J accepted in the paragraphs of his reasons set out at [127] above, that Mr and Mrs Horton should be reimbursed the costs of their removal from their acquired residence to temporary accommodation for the purpose of enabling them to gain a proper understanding of their ultimate financial position before making a commitment to negotiate and settle on the purchase of a new home. Accordingly, his Honour accepted that their removal costs from their existing residence to their temporary residence was one incurred solely as a consequence of the necessity to relocate following the compulsory acquisition and was, therefore, a financial cost " reasonably incurred".

130 In these circumstances, it is difficult to understand the legal basis upon which his Honour rejected Mr and Mrs Horton's claim for rental paid by them with respect to the temporary accommodation which his Honour found they were entitled to incur in order to relocate. Provided the payment of rent was a cost " reasonably incurred" within the meaning of either s 59(c) or (f) (and it is not suggested in the present case that it was not), then they were entitled to be compensated for what was a loss attributable to the disturbance caused by the acquisition.

131 Although the RTA submitted that the claimed cost must not only be " reasonably incurred", but also have a causal nexus to the acquisition and, further, that the quantum must be acceptable, once it was determined (as the primary judge did) that the payment of rental by the respondent was a financial cost incurred in connection with her relocation or otherwise related

to the actual use of the acquired land as a direct and natural consequence of the acquisition, it followed that the causal nexus was established. The quantum must only be acceptable in the sense that the incurring of the relevant cost must be reasonable. It thus follows that once a claim falls within either s 59(c) or (f), there are no further requirements to be met before the claim is payable.

132 I would also reject the RTA's submission that notwithstanding that the claim for rental was incurred within the meaning of s 59(c) or (f) and was otherwise reasonable, that it was open to the primary judge to reject the claim upon the basis that it would overcompensate the respondent. Given that loss attributable to disturbance is a separate head of compensation, and provided the rental cost has been reasonably incurred, it is difficult to see how it could be asserted that any compensation that accords with s 59(c) or (f) could be regarded as other than just.

133 In this respect two matters need to be kept in mind. The first is that s 3(1)(b) of the *Just Terms Act*, which provides that one of the objects of the Act is " to ensure compensation on just terms for the owners of land that is acquired", focuses on ensuring just terms for the dispossessed owners rather than for the acquiring authority.

134 The second is that s 54(1) focuses on the amount of compensation to which a person is entitled under Part 3 " having regard to all relevant matters under this Part" which will justly compensate that person for the acquisition of their land. The emphasised words require just compensation to be assessed having regard to those matters including, relevantly to the present case, loss attributable to disturbance.

135 Accordingly, in my respectful opinion, it is not open to the court assessing such compensation to stray outside the " relevant matters under" Part 3. In particular, subject to any question of double-dipping (which relevantly means that the claimant is compensated twice for the same loss), it was not open to Talbot J in *Horton* or the primary judge in the present case to, in effect, set-off against financial costs which otherwise met the requirements of s 59(c) or (f), what I would regard as matters not recognised as " relevant matters under" Part 3. Section 61(b) would be a relevant matter which, had the RTA been successful in its appeal in establishing that that provision was engaged, would have had the effect of denying the respondent's claim for disturbance loss. But that is far different from Talbot J's and the primary judge's reliance on matters falling outside the provisions of Part 3.

136 Furthermore, Talbot J was in error in taking into account statutory interest as, in effect, offsetting disturbance loss in the form of rental. Such interest is payable pursuant to s 49(1) of the *Just Terms Act*. How this statutory entitlement can be used to deny, whether in whole or in part, compensation for loss attributable to disturbance defies explanation.

137 Returning to [19] of Talbot J's reasons in *Horton*, it is to be noted that his Honour did not actually carry out a set-off exercise as such. He did no

more than assume, without finding, that interest "may" be earned on the balance of an advance payment of compensation (which the acquiring authority is empowered to make pursuant to s 48 of the Just Terms Act).

138 Further, his Honour did no more than regard it as "arguable" that Mr and Mrs Horton "could" be saving on a commitment to interest on future borrowings. To the extent that the primary judge adopted the same assumptions without making an express finding, he was in error. To deny an otherwise proven claim to disturbance under s 59(c) or (f) in this manner is incapable of being assessed as "just" within the meaning of s 3(1)(b) or s 54(1). The RTA's submission to the contrary is without merit.

139 In essence the approach of Talbot J at [19] of *Horton* which, with respect, I regard as legally erroneous, seems to have been as follows: where land is compulsorily acquired upon which is located the residence of the dispossessed owner, that owner is not entitled as a matter of principle to claim as a loss attributable to disturbance the amount paid or payable as rent with respect to their occupation of temporary premises pending relocation to a permanent residence because that rent, although reasonably incurred, is off-set by various savings unintentionally achieved by the dispossessed owner as a consequence of the acquisition. Those savings would include the usual costs of owning property such as rates, charges and insurance as well as interest payable under any mortgage charged upon the acquired property which would be paid off (or at least reduced) to the extent of any advance payment of compensation (if made) by the acquiring authority.

140 To the extent to which this generalised approach was, as a matter of principle, adopted by the primary judge, he also erred in law. The approach was legally wrong because it was inconsistent with, and failed to accord with, the exclusive statutory regime contained in Part 3 of the Just Terms Act which details the only bases upon which compensation is to be assessed.

141 Of course, it may be that Talbot J was purporting to only make findings of fact at [19] of *Horton*. But if he was, they were not authorised by Part 3 of the Just Terms Act. However, as I have attempted to illustrate at [137] and [138] above, his Honour seems to have made assumptions rather than findings of fact. In simply applying what Talbot J said at [19] of *Horton* to deny the respondent her rental claim as a loss attributable to disturbance in the present case, the primary judge made the same error. As the facts of *Horton* were obviously different from the facts of the instant case, even if the set-off approach of Talbot J was permissible, it behoved the primary judge to carry out that exercise with some precision for otherwise the respondent may have been denied just compensation. His failure to do so constituted legal error although it may be explained by the fact that his Honour considered that the respondent's rental claim was in any event denied by s 34(3) of the Just Terms Act.

142 Finally, as to the RTA's submission with respect to double-dipping, it

only applies, as its submissions acknowledge, where compensation is awarded twice for the same loss. Accordingly, the RTA's contention that the facts found by Talbot J at [19] of *Horton*, if applied to the present case, involve double-dipping in that the earning of interest, statutory or otherwise, or the saving of costs of ownership is the same as having to pay rent, cannot be sustained.

143 In summary, I am of the following views:

> (a) As was acknowledged by the RTA, in each of s 59(c) and (f), the word "reasonably" governs the word "incurred" and not the expression "financial costs". The issue that arises under each subparagraph is whether the relevant costs are "reasonably incurred": it is not a question as to whether those costs are reasonable in themselves; nor does the *Just Terms Act* contemplate some overarching test of reasonableness in respect of compensation otherwise properly assessed having regard to "all relevant matters" in Part 3;
>
> (b) Given that it was not in dispute that upon vacating the residence on the acquired land when required by the RTA the respondent had no option but to rent premises pending the construction of her new residence upon the residue land, the only relevant question was whether the incurring of the financial costs in the form of rent was itself reasonable. The incurring of rent may not have been reasonable if, for instance, the respondent already owned an alternative residence which she and her partner could have occupied pending the construction of her new residence upon the residue land or if she had rented an expensive penthouse overlooking Sydney Harbour at an exorbitant rent. In such cases it could legitimately be said that the rent claimed was not "reasonably incurred";
>
> (c) The factors to which Talbot J referred in *Horton* could not as a matter of law bear upon the reasonableness of the respondent incurring the rent claimed as a consequence of leasing temporary premises in which to reside having been forced out of her home by the compulsory acquisition;
>
> (d) Accordingly, the primary judge erred in relying upon Talbot J's approach to the question of the rental claim in that case and applying it to the present case. His Honour seems to have applied a general test of reasonableness that does not accord with either the plain text of s 59(c) or (f) or the statutory objective of ensuring just compensation for the separate head of loss attributable to disturbance.

144 It follows that the primary judge was in error in rejecting the respondent's rental claim as a consequence whereof the cross-appeal should be allowed. I note in this regard that it was not suggested that the

amount of rental claimed was incorrect or that it had not been "reasonably incurred" in the relevant sense. Furthermore, the RTA did not submit that if its submissions were rejected the issue presently under consideration should be remitted to the Land and Environment Court for further consideration. Accordingly, there is no impediment to the amount of compensation awarded by the primary judge being increased by this Court by the amount of the rental claimed in the sum of $62,571.60.

CONCLUSION

145 For the foregoing reasons, in my opinion the RTA has failed in its challenge to the primary judge's award of disturbance costs in the sum of $269,846. Further, the respondent has in my opinion succeeded in establishing a loss attributable to disturbance constituted by its rental claim of $62,571.60. I would therefore propose the following orders:

(a) Appeal dismissed;

(b) Cross-appeal allowed;

(c) Set aside the assessment of compensation under the Land Acquisition (Just Terms Compensation) Act 1991 in the sum of $781,669 made by Biscoe J on 8 July 2009 and in lieu thereof substitute compensation in the amount of $844,241;

(d) The appellant to pay the respondent's costs of the appeal and the cross-appeal.

146 MACFARLAN JA: I agree with Tobias JA.

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