CASES CONCERNING THE DEVELOPMENT OF CLAIMS FOR DISTURBANCE UNDER THE JUST TERMS ACT AND A QUICK LOOK AT STATUTORY ORDERS

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Land Acquisition (Just Terms Compensation) Act 1991

s55 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) the disadvantage resulting from relocation,
(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.

S59 Loss Attributable to Disturbance

(1) 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 of a qualified valuer reasonably incurred by those persons in connection with the compulsory acquisition of the land (but not fees calculated by reference to the value, as assessed by the valuer, 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.

SNS Pty Ltd v Roads and Maritime Services [2018] NSWLEC 7

- RMS acquired land at Gardeners Road, Mascot for the purpose of WestConnex and M5 Project in August 2016
- Parent Parcel 4962m^2 Acquired land 1678m^2
- Various warehouse structures on land but unoccupied
- Part of Mascot Station Town Centre Precinct which is an area of urban renewal approximately 150m north of the station
- Characterised by multi-storey residential flat buildings and mixed-use buildings
- Land zoned B4 Mixed Use
- Highest and best use for parent parcel and residue land mixed use development containing commercial uses and high rise residential towers – 14 storeys

- At date of acquisition planning for development of site well advanced

February 2015	DA lodged for 14 storey mixed use including 190 apartments
July 2015	Amendment to DA reducing to 184 apartments
December 2015	Council assessment report to JRPP
December 2015	Further amended plans reducing to 144 apartments. Not sent to JRPP
December 2015	DA refused by JRPP
April 2016	Class 1 appeal commenced
April 2016	PAN issued
August 2016	Land acquired
August 2016	Leave granted in Class 1 proceedings to amend plans for 117 apartments on residue land
December 2016	Development consent granted by Court for residue land

- Also lengthy history of planning instruments identifying part of land for road widening reservation generally consistent with land acquired and RMS as acquisition authority

- Claim for Disturbance

(a)	Stamp Duty re: acquisition to replace land	
(b)	Costs of consultants re: preparation of Original DA and Amended DA wasted	$774,134
(c)	Costs re: Residue land consent	$478,877
(d)	Consultants whose expertise informed valuation of acquired land	$314,000
		$1,587,013

"341. The precise terms of s 59(1)(f) must be applied in the circumstances of this case. "Any other financial costs" is a wide term and includes loss per *Health Administration Corporation v George D Angus Pty Ltd* (2014) 88 NSWLR 752; [2014] NSWCA 352 at [61]. Any such costs or losses must be or might be reasonably incurred as a direct and natural consequence of the acquisition."

"342. Key to the determination of the claims made under s 59(1)(f) in this case is whether the claims relate to the actual use of the Acquired Land at the date of acquisition. … disturbance costs can only be awarded if they relate to the actual use of the Acquired Land at the date of acquisition so that costs relating to a potential future use would fall short of actual use and would not be claimable. SNS described the use at the date of acquisition as a development site for a large mixed use development. I agree with that description of the actual use."

Re: Stamp Duty

"345. Whether SNS should be regarded as in the business of land development with parcels of land as stock-in-trade arises in relation to the stamp duty claim. Actual use of land can include "land banking" for future development."

"346. …I accept that he is in the business of land development and that SNS is part of his portfolio of companies created to achieve that end. The stamp duty claim for replacement land is reasonable as the area acquired was substantial in the context of the MSTCP."

Re: Wasted costs of Original and Amended DA

"349. Knowledge of when the possibility of acquisition was known about by SNS and of the reservation of land for road widening is relevant to assessing this claim. The RMS' reservation over the Acquired Land was identified in the BBLEP in 2013. .....SNS was informed by RMS that it did not agree to reduce the area proposed widening Bourke Street to facilitate development of the Parent Parcel and made it clear that all new building or structures were to be erected clear of the land reserved for road widening unlimited in height or depth."

"350. … he was told by RMS' representatives that part of this land would be acquired. It therefore appears that SNS was aware that RMS would be likely to consider that it was a concurring authority before it submitted its Original DA in February 2015 and also that RMS may acquire the land at some stage. Its DA was unlikely to succeed yet it proceeded. These are not wasted costs in the sense …the applicant had no knowledge of the impending acquisition. This claim is not claimable under s 59(1)(f)."

Re: Costs of Residue Land consent

"351. Section 59(1)(f) relates to the actual use of the Acquired Land. The wasted DA costs relate to the Residue Land. In a very small number of cases …. expenditure on land other than the Acquired Land has been allowed where these are intimately connected with the actual use of the Acquired Land. … The Residue Land is a development site which does not rely on the Acquired Land in any way. They are not interdependent. . This claim is not claimable under s 59(1)(f)."

Re: Consultants in compensation claim

"352. SNS is claiming the costs of the architect, quantity surveyor, town planner, geotechnical engineer, structural engineer, construction programming consultant and accountant who assisted in the assessment of compensation in addition to legal and valuation costs ….. The terms of s 59(1)(f) are wide and there is no statutory construction basis for construing them narrowly by reference to s 59(1)(b) and s 59(2)."

"353. … I have held that the actual use of the land is as a development site so that if I award these costs they do arise from the actual use of the land. Given the broad wording of s 59(1)(f) I consider these costs can be claimed under s 59(1)(f) as they relate to the actual use of the land and arise as a direct and natural consequence of the acquisition, subject to one further matter."

"354. The further caveat identified in s 59(1)(f) is that the cost incurred must be reasonable. …It is fair to describe the approach of SNS as somewhat "Rolls Royce" and I have expressed reservations earlier in the judgment as to the relevance of all of the expert evidence obtained in the context of the hypothetical parties I had to consider in the before and after approach to land valuation. In the context of a disturbance claim where the expenditure has been incurred and the evidence establishes that the expertise has been applied I will allow all of this claim for $314,000."

United Petroleum Pty Limited v Roads and Maritime Services [2018] NSWLEC 35

- RMS acquired land in August 2015 at Harwood for Pacific Highway Upgrade which was occupied by Applicant as tenant pursuant to informal oral lease and on which it operated a service station and restaurant business.
- United claimed for disturbance based on either costs of relocation (and short term loss of profit) or for permanent loss of profit.
- RMS says no compensation as already assessed and paid to owners of the land – a connected company- being total compensation of $3,114,540 though conceded United had an "interest" in the land.
- Relocation $3,100,000 to $2,000,000

  Short term profit loss $1,250,000 to $1,220,000
- Extinguishment (permanent loss of profit) $2,900,000

Can United make separate claim?

- Noted claim is for disturbance as opposed to owner's claim for market value
- Cited *Tolson v RMS [2014] NSWCA 161* noting what was said by Basten JA

  "219….. Disturbance covers legal costs, valuation fees, financial costs of relocation and other financial costs relating to the actual use of the land: s 59. Such costs are entirely separate from the value of the acquired land or the retained land. It is consistent with the legislative purpose of providing compensation for such amounts that they be allowed or disallowed in accordance with the specific statutory entitlements, without regard to the value of any land involved."
- As have separate interest, able to claim however only for losses attributable to disturbance

Are lost profits “costs reasonably incurred”?

- Held that “Profits foregone are capable of being assessed as financial costs” which are “reasonably incurred” pursuant to s 59(f)” and in doing so noted what was said by Preston CJ in *George D Angus Pty Ltd v Health Administration Corporation [2013] NSWLEC 212*:

  “230…..

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

Proper basis to assess disturbance

- Relocation or Extinguishment?
- United had been searching for alternate site for 2 years but various sites too expensive or rent too high, not zoned for purpose and didn't wish to commit until knew compensation to be paid
- Found that

"245. As a matter of principle, United is undoubtedly entitled to wait until it receives compensation before relocating its operations. However, that does not address the question of whether relocation is a realistic prospect in the circumstances."

"246. …I do not consider that it is reasonable for the Court to infer that the delay in United finding a replacement property is primarily a result of it waiting to find out what its budget might be as a consequence of these proceedings."

"248. In the circumstances, it is clear that the reason United has not relocated its Harwood Roadhouse operations is that it cannot relocate them. That is not to say that it will not find a suitable location, however given the experience, resources and expertise available to United, the fact that it has not and the fact that there is an alternative basis upon which to determine disturbance are matters that I find persuasive. While it is theoretically possible that a suitable site might become available, such a proposition is wholly speculative."

"249. Furthermore, the Court of Appeal held in *McDonald* that the requirement that disturbance costs under s 59 be "reasonably incurred" means that the incurring of the costs must be reasonable, not the costs themselves. On that understanding, it cannot be said that costs are reasonably incurred when there is only a remote chance that they will be incurred as is the case with the relocation options presented here."

Extinguishment assessed on loss of profit or goodwill?

- Considered actual loss suffered was a loss of stream of profit
- That was because “254 the Harwood Roadhouse was not operated by United as a standalone business; United had no intention of selling the business; the value of the business had a greater value to United “in use” than a hypothetical sale as a standalone rural petrol station; and if every site operated by United was valued on a “walk-in/walk-out” basis, the sum of the individual parts of the business would most likely be less than the value of the whole of the business.”

Weak tenancy relevant?

- “287. In assessing disturbance, the clear effect of the authority binding on this Court is that the “actual use” of land is not confined to a narrow analysis of legal instruments. In accordance with Preston J’s analysis in *George D Angus*, the Court, in assessing a disturbance claim, must decide whether the party has a relevant interest in the land, but where it is a leasehold interest, the strength of the tenancy is irrelevant.”
- “288. Therefore, it is not appropriate to take into account the fact that United had only a weak tenancy in the calculation for loss of profits. As such, I do not factor in a discount for weak tenancy as part of the maintainable capitalised earnings calculation.”
- Was a statutory tenancy at will (s 217 of Conveyancing Act) and there was a unity of interest between the landowner and tenant that made termination at will highly unlikely.

Moloney v Roads and Maritime Services (No. 2)]2017] NSWLEC 68

- RMS acquired part of 2 farms (on separate lots) owned by Moloney for Pacific Highway at Tyndale
- Both farms used to grow sugar cane
- One farm reduced from 40ha to 31ha
- Other farm reduced from 83ha to 74ha with new highway bisecting it so that 2 separate portions of 21ha and 53ha. Also new highway now only 115m away from main dwelling
- Claimed under s 59(1)(f):

  (a) Replacement Dwelling $850,000

  (b) Loss of future profits on acquired land $150,000

Replacement Dwelling?

- Moved 20 years ago to dwelling (from main road) due to safety and amenity reasons. Use of residue land was for home so they could farm acquired land. Intention to move to a replacement dwelling was a direct and natural consequence of acquisition of land so that have a buffer again from noise as had created when moved 20 years ago.
- Acoustic experts agreed to impact of traffic noise was considerable and whilst treatment of dwelling assists internal amenity nothing can be done to remedy outdoor acoustic environment

- Was noted that in undertaking assessment of market value of acquired land the before and after method was applied and that:

  "268. The main dwelling on the Applicants' residue land was valued as an improvement in the assessment of market value. Loss of value as a result of the public purpose in the "after" scenario was compensated for in the "before and after" method on the basis of assumptions attributed to the hypothetical vendor and purchaser as set out above in pars 76-84 above. In *Peak* the impact of the public purpose rendered the dwelling on the residue land uninhabitable. The assumption of the hypothetical parties in this case is that the dwelling is not uninhabitable but there will be substantial impact on amenity."

- Concluded

  "270. Arguably the Applicants' claim for the cost of building a replacement dwelling as a disbursement under s 59(1)(f) overlaps with the loss in value of the main dwelling already accounted for in the "before and after" approach. To claim the costs of building a replacement dwelling on the residue land could be regarded as "double dipping". "Double dipping" is implicitly excluded by the just compensation override in s 54 and the requirement of s 55 that an amount of compensation must be determined only in relation to heads of compensation prescribed in s 55"

- Was however noted that on the facts of this matter:

  "306. …I consider the Applicants' intention to move to a replacement dwelling is a direct and natural consequence of the acquisition and that costs of establishing a new building may be reasonably incurred with the important qualification that the Applicants' full disbursement claim is not available. The acquisition can be considered the causal factor in the Applicants' intention to move and is the proximate cause as a matter of common sense ....The Applicants' claim (as amended by me) might reasonably be incurred given the amenity and noise impacts of the new highway on the main dwelling. For the reasons already given in relation to "double dipping" the building cost of a replacement dwelling is not recoverable."

Snowy Monaro Regional Council v Cmunt [2017] NSWLEC 95

- Mr and Mrs Cmunt own and occupy land at Berridale from which Council received many complaints between 2013 and 2015 of noise from barking dogs.
- On 23/6/2015 sent notice of intention and then on 7/8/2015 sent a Prevention Notice under s96 of the Protection of the Environment Operations Act 1997 ("POEO Act")
- The Prevention Notice recited that: the Snowy River Shire Council reasonably suspects that an activity (the keeping of dogs) has been or is being carried on in an environmentally unsatisfactory manner at the property; the Council has received a large number of complaints from multiple complainants since 2013 about offensive noise being emitted from the property; the offensive noise comprises the sound of dogs barking, growling, whining, whimpering, howling and yelping; Council officers have inspected the property on 4 February, 11 May and 25 May 2015 and on each occasion observed dogs making noise of those kinds and on 11 May 2015 observed dogs barking for an hour; and the Council was of the view that a noise pollution event has occurred and is likely to continue to occur unless preventative steps are taken.

- The Prevention Notice directed Mr and Mrs Cmunt to take preventative action as follows:

  "1. Not keep more than [2] two dogs at the Premises at any one time.

  2. Construct a solid fence not less than 1.8 meters high around the rear yard to block the dogs' view into adjoining properties.

  3. Construct a solid gate (adjacent to the east facing wall) to block the dogs' view of Kiparra Drive.

  4. Provide adequate food and drinking water for the dogs.

  5. Construct one or more sheds (**the Shed**) to accommodate the dogs which:

  a. enables each dog to be housed in a separate enclosure from which it cannot see any other dog.

  6. Keep both dogs in the Shed except when being exercised.

  7. When dogs are in the Shed, keep each dog in a separate enclosure from which it cannot see the other dog.

  8. Not allow dogs to be outside the Shed except between the hours of 9am and 4pm."

- "1. Implement measure 4 immediately after the commencement of operation of the Notice; and

  2. Implement the remaining measures within 8 (eight) weeks from the commencement of the operation of the notice (**that being 2 October 2015**)"

- S96 of the POEO Act provides:

(1) Application of section This section applies when the appropriate regulatory authority reasonably suspects that an activity has been or is being carried on in an environmentally unsatisfactory manner at any premises or by any person (otherwise than at premises).

(2) Prevention notices The appropriate regulatory authority may, by notice in writing, do either or both of the following:

(a) direct the occupier of the premises,

(b) direct the person carrying on the activity (whether or not at premises),

to take such action, as is specified in the notice and within such period (if any) as is specified in the notice, to ensure that the activity is carried on in future in an environmentally satisfactory manner.

(3) Examples The action to be taken may (without limitation) include any of the following:

(a) installing, repairing, altering, replacing, maintaining or operating control equipment or other plant,

(b) modifying, or carrying out any work on, plant,

(c) ceasing to use plant or altering the way plant is used,

(d) ceasing to carry on or not commencing to carry on an activity,

(e) carrying on an activity in a particular manner,

(f) carrying on an activity only during particular times,

(g) monitoring, sampling or analysing any pollution or otherwise ascertaining the nature and extent of pollution or the risk of pollution,

(h) action with respect to the transportation, collection, reception, re-use, recovery, recycling, processing, storage or disposal of any waste or other substance,

(i) preparing and carrying out a plan of action to control, prevent or minimise pollution or waste,

(j) reviewing the carrying out of an activity.

(3A) Water pollution considerations The appropriate regulatory authority, when determining the action to be specified in a notice relating to an activity that causes, is likely to cause or has caused water pollution, must consider:

(a) the environmental values of water affected by the activity, and

(b) the practical measures that could be taken to restore or maintain those environmental values, and

(c) if the appropriate regulatory authority is not the EPA—any guidelines issued by the EPA to the authority relating to the exercise of functions under this section.

(4) Occupier's duty If the occupier who is given a notice is not the person carrying on the activity, the notice is taken to require the occupier to take all available steps to cause the action to be taken.

(5) Reports A prevention notice may require the person to whom the notice is given to furnish reports to the appropriate regulatory authority regarding progress on carrying out the action required to be taken by the notice.

- Contrary to Mrs Cmunt's assertion, it was not necessary for the Council to establish that Mr and Mrs Cmunt own the dogs kept at the property or that they be the registered owners of the dogs. The Prevention Notice was addressed to Mr and Mrs Cmunt as the occupiers of the property at which an activity (the keeping of dogs) has been or is being carried out in an environmentally unacceptable manner (being that offensive noise by the dogs is being emitted from the property). The Prevention Notice required Mr and Mrs Cmunt to take the preventative action of not keeping more than two dogs at the property at any one time. Mr and Mrs Cmunt had, as the occupiers of the property, the control and capacity to take this preventative action to ensure that no more than two dogs were kept at the property at any one time. Their control and capacity to take preventative action did not depend on their ownership of the dogs.
- It was also not necessary for the Council to establish what was the breed of dogs being kept by Mr and Mrs Cmunt at the property. A number of Council officers and the Police officer thought that many of the dogs appeared to be Rottweilers or a Rottweiler-Kelpie Cross. Mrs Cmunt disputes that she and her husband have Rottweiler dogs. However, the breed of dog being kept at the property is irrelevant. The Prevention Notice is not limited to Rottweiler dogs or any other breed of dogs. The Prevention Notice prevents the keeping of more than two dogs of any breed or kind whatsoever at the property at any one time. It matters not, therefore, whether the dogs observed at the property by the Council officers and the Police officer were Rottweilers or a Rottweiler-Kelpie Cross or any other breed or kind of dog. What matters is that more than two dogs were observed at the property on the occasions observed by the officers.

- The Prevention Notice was not invalid as suggested by Mrs Cmunt. There was no statutory basis under the POEO Act for the Council to issue a notice of intention to give a prevention notice prior to giving a prevention notice. The Council chose to write a letter to Mr and Mrs Cmunt giving them notice of its intention to give a prevention notice, but it was not obliged under the POEO Act to do so. Hence, there can be no legal consequence if there was any difference between the letter giving notice and the Prevention Notice. In any event, I do not find that there are any material differences between the letter giving notice and the Prevention Notice.