

LAND COURT OF QUEENSLAND

CITATION: *Dux v Chief Executive, Department of Natural Resources and Water* [2009] QLC 0081

PARTIES: Dux Property Developments Pty Ltd
(appellant)
v.
Chief Executive, Department of Natural Resources and Water
(respondent)

FILE NO: AV2005/1347 & AV2006/0762

DIVISION: Land Court of Queensland

PROCEEDING: Application for declarations and appeals against annual valuation of land under the *Valuation of Land Act 1944*

DELIVERED ON: 10 June 2009

DELIVERED AT: Brisbane

HEARD AT: Brisbane

MEMBER: Mr RP Scott

ORDER: **The valuation of the subject land as at 1 October 2004 is determined in the amount of Seventeen Million Three Hundred and Fifty Thousand Dollars (\$17,350,000).**

CATCHWORDS: Valuation – residual valuation method – unsuitable unless ripe for development

Evidence – expert opinion – application of *Makita (Australia) Pty Ltd v Sprowles*

Valuation – principle – *Spencer v Commonwealth* – does not assume a sale conditional on development approval

Declarations – application for – no need to deal with given valuation conclusion

APPEARANCES: Mr R Anderson, instructed by Herbert Geer, for the appellant
Mr TW Quinn, assisted by Mr SP Fynes-Clinton, instructed by Crown Law, for the respondent

- [1] By an originating application the appellant sought declarations as to the invalidity of a series of the valuations issued in respect of land owned by the appellant (the subject land) valued by the respondent purportedly pursuant to the provisions of the *Valuation of Land Act 1944* as at a relevant date of 1 October 2004.
- [2] A valuation in the amount of \$9,000,000 was notified in an Annual Valuation Notice on 29 March 2005. An objection against that valuation was disallowed by notice on 30 August 2005. The appellant subsequently appealed against that valuation (appeal AV2005/1347) contending to a valuation of \$3,000,000. On the same day that the decision on objection issued (30 August 2005) and the land owner was advised that “*the value remains unaltered*” a further notice of valuation of the subject land as at 1 October 2004 was notified in the amount of \$30,000,000. That valuation was then objected to; that objection being allowed and notified on 4 July 2006 with the value being reduced to \$21,000,000 on the bases that:
- “*in comparison to similar properties, the applied value is not considered appropriate.*”
 - *the sales evidence provided supports a lower value.*”
- [3] A further notice of valuation dated 18 July 2006 in the amount of \$21,000,000 issued from the respondent with respect to the subject land as at the valuation date of 1 October 2004. The appellant objected against that valuation and following disallowance of that objection on 5 September 2006 appealed to this Court contending to a valuation of \$3,000,000. (Appeal AV2006/0762).
- [4] Interlocutory procedures concerning these appeals occupied a considerable period, one result of which was that an order was made by the Court on 15 November 2006. The question for consideration under the originating application being determined to be the “*lawfulness of the purported altered valuation of \$21,000,000 (the subject of appeal AV2006/0762) pursuant to s.28(1)(g) and (h) of the Valuation of Land Act*”. In addition the parties contested the two appeals. I will deal with that debate prior to returning to consider the originating application for declarations.
- [5] The appellant contends to a figure of \$3,000,000 whilst the respondent adduced evidence intended to support a valuation of \$21,000,000. In short, for the purposes of considering the matter of land value I need not direct my mind to the \$30,000,000 valuation nor the \$9,000,000 valuation. The grounds of appeal upon which the appellant relies were drawn in sufficiently broad terms to encompass all of the topics of debate which arose between the parties.

[6] The subject land comprises Lot 2 on SP 154829 having an area of 42.32 ha and is situated at 69 Coolgarra Avenue, Bongaree, Bribie Island. At the relevant date of valuation the land might generally be considered to have been unimproved except for some clearing and the inclusion of some small “finger” lakes. At that date the land was designated as being within the Residential A zone under the local area planning scheme for the shire of Caboolture and “existing township” under the Bribie Island State Land Allocation Plan of 13 July 1999. The land comprised 2.3377 ha of readily accessible development land above the Q100 flood line on the eastern side: land that would require council approval for fill in part. There was approximately 16.49 ha of accessible land below the Q100 flood line that may have been developable subject to council approval including filling the land to a depth averaging 1.5 metres on the eastern side. There was an area of 14.6823 ha of separated sound development land above the Q100 flood line on the western side requiring council approval to construct an access bridge across the land below the Q100 line. There was approximately 8.81 ha of balance land mostly non-developable low Dux Creek flood plain and drainage land.

[7] The following witnesses were called by the appellant:

- John McEvoy, registered valuer, provided valuation evidence.
- Timothy Connolly, town planner, gave planning evidence including that regarding various issues which the appellant suggested characterised as “very high risk” the achievement of planning permission and development of the land in accordance with option 3 (see para [8] below).
- Andrew Pezzutti, civil engineer, gave evidence concerning development costs utilised by Mr McEvoy in his residual cash flow analysis.
- Peter Hyland, company director,¹ gave evidence in support of his report “Analysis of Hypothetical Development Risk Weighting”.
- Douglas George Robertson, a director of the appellant, gave evidence concerning the subject land including an offer to purchase it.

The following witnesses were called by the respondent:

- Damien Jones, registered valuer, provided valuation evidence.
- Luceille Rita Yeomans, town planner, provided evidence relevant to town planning issues associated with the appeals.

¹ Member, Planning Institute of Australia; Certified Practising Planner; Member, Development Institute of Australia.

- Michael Alexander Eddie, civil engineer, gave evidence as to development costs and issues related to development of the subject land.

- [8] Mr McEvoy was provided with three optional scenarios for the development of the subject land the authors being THG Resource Strategists. Option 1 involved the development of 27 residential lots in total which involved the use of some fill but without impacting on the overland flow area. He concluded that that scenario was not economically viable, however relied on it in arriving at a \$3,000,000 value. Option 2 involved the development of 171 residential lots in total whilst option 3 proposed the development of 251 residential lots, 23 town house lots and a retirement village of 4.2 ha. Option 3, in Mr McEvoy's opinion, with which Mr Jones concurred, provided the basis for the most beneficial outcome to the owner of the development of the site.
- [9] In his valuation report Mr McEvoy said that the worst case scenario, on the assumption that development approval for option 3 was not obtained, would be development in accordance with option 1 of 27 lots. Based on sale 2 in the agreed list of sales which analysed to \$87,500.00 per proposed lot on a site which did not require fill, he concluded that a value of \$3,000,000 "*would likely only recover a purchaser's entry cost*". I understand that to mean a value of \$3,000,000 reflected the price that a purchaser would pay for the land on the assumption that it had no potential other than development in accordance with option 1 and, in that respect, a \$3,000,000 purchase price reflected a price approaching a no risk development. That figure appears to me to conveniently be the same as that contended for by the appellant in its notices of appeal which pre-dated Mr McEvoy's valuation.
- [10] Mr Jones adopted the approach of comparing the subject land with sales of other lightly improved or unimproved land and by references to those sales alone. Mr McEvoy, on the other hand, was of the opinion that no reliable valuation could be determined by reference to sales evidence alone. Whilst he provided a valuation based on sales evidence he also provided a valuation employing a residual valuation method, identified by him as a "*residual cash flow analysis*" employing the Estate Master Software. I will consider that residual valuation method first of all.
- [11] Although Mr McEvoy carried out his residual cash flow analysis using option 3 as the proposed development, he approached his overall valuation task on the footing that the risks of gaining development approval for such a development were such that the value of the land did not reflect any allowance for that potential use. He did this by first carrying out his residual cash flow analysis on the assumption that there were no risks associated

with gaining planning approval and developing the land; and in that exercise deduced a land value of \$10,500,000 or \$8,500,000 once application costs of \$2,000,000² were accounted for. In his residual cash flow analysis exercise he employed an Internal Rate of Return (IRR) of 15.12% having regard to what he perceived to be the level of return that a hypothetical prudent purchaser would expect and allow for in such a project. He expressly eschewed reliance on a profit and risk factor of the type a valuer would usually employ in a static hypothetical sub-division analysis.

[12] Next he introduced the doubt that he held as to the prospect of planning approval being given for the type of development assumed in his residual cash flow exercise and for the land being so developed and expressed the view that, on that basis, the land had a value of \$3,000,000. He said that it would be worth that amount without any prospect of development approval. He arrived at that value by reference to sales evidence. Interesting, whilst Mr McEvoy said that the highest and best use of the land was that described in option 3, his value of \$3,000,000 includes no element of potential for that use. I cannot understand why Mr McEvoy adopted option 3 for the purpose of his residual cash flow analysis in circumstances where it was his clear view that the prospect of gaining development approval for such a development was non-existent. He might equally have assumed development for a theme park or some other similarly fanciful use. He did not seriously consider option 2 and employed option 1 only to strike his minimum value of \$3,000,000 using sales evidence in circumstances where he said that direct comparison was unreliable.

[13] Why then was a residual cash flow analysis carried out at all? Indeed, if the expert's opinion is that the risk of gaining approval is such that the land should be valued on the assumption that development of the land would not occur then it should not, it must not, be valued by the employment of a residual value technique or method that assumes development is probable.

[14] In *Crompton v. Commission of Highways*,³ the Court said:

“Mr Taylor did not check his conclusion against a hypothetical subdivision into residential allotments, and it appeared clearly enough that he would have been wrong to do so because the land was not, strictly speaking, at the relevant time, ripe for subdivision: compare Turner v. Minister of Public Instruction (1956) 95 CLR. 245.”

² Supplied by the client – appellant.

³ (1973) 32 LGRA 8 at 20.

[15] A similar view was expressed in *Cienda Pty Ltd v. SA Urban Land Trust*⁴ in which the Court quoted from *Redeam v. SA Land Commission*⁵ where at 155 the Court recognised that the parties experts agreed that the land should be regarded as not ripe and ready subdivision at the date of valuation or within a short predictable time after that date. The valuers also agreed that “*it would not be correct to attempt to ascertain the value of the land upon the basis of its value in hypothetical subdivision.*” The Court went on to say that “*the rejection of that method of valuation, in the circumstance of this case, is plainly correct.*” The Court then said:

“The hypothetical subdivision of the land lies in the future with all the uncertainty that the future holds. In particular it would be quite unrealistic to speculate upon such factors as cost and risk which are so important in the valuation of land upon the footing that it is ripe and ready and available for subdivision” [my emphasis]

[16] Reference to “*such factors as cost and risk*” can be understood by reference to *Turner v Minister of Public Instruction*⁶ where at 264 Chief Justice Dixon said:

“To no small extent the ‘risk’ is of the estimate of the net proceeds of sub-divisional sale proving too low. The reason may be found in the estimate of the prices for blocks being too high, the sale of the blocks being too slow, the estimated costs attending sub-division and sale proving too low or in any or all of such causes. It is therefore evident that the degree of faith felt in the estimates, whether by the court or the hypothetical purchaser, must bear upon the fixing or allowance of the percentage.”

[17] The reference by the Court in *Redeam* to the need to “*speculate upon such factors as cost and risk*” can be understood from what was said in *Turner* as requiring an expert appreciation as at the date of valuation of all the relevant factors that might influence cost and risk on the assumption of an actual subdivision development taking place. That is the case whether the hypothetical exercise presented either in the static hypothetical subdivision method of valuation or in the more sophisticated discounted cash flow exercise. It is also the case in Mr McEvoy’s residual cash flow method in which, as I discussed below, he employed an amalgam of these two methods.

[18] In any residual value exercise the valuer is called upon to exercise his skills in ascertaining from the market the allowance that he ought to make for either profit and risk or IRR. In this case, apart from the type of matters referred to in *Turner* and *Redeam* that need to be considered, there are those suggested as relevant by the appellant.⁷ I cannot conceive of how the valuer could take into account the matters that are both relevant to the physical development and marketing of the land, separately provide for many of the

⁴ (1988) 66 LGRA 360 at 363-365.

⁵ (1977) 40 LGRA 151.

⁶ (1956) 95 CLR 245.

⁷ Risk topics discussed below.

same matters which he says in an application for subdivision would militate against development approval and finally settle on a suitable allowance for risk and profit or an IRR. Any residual value exercise is fraught with difficulty, but that difficulty approaches that of impossibility or at least unreliability where the valuer attempts what is, in effect, a hypothetical hypothetical analysis.

[19] In *Brewarrana Pty Ltd v. Commissioner of Highways*⁸ Wells J said at 181:

“... it was put, on the one hand, that, unless the land was ripe for immediate subdivision, the method could only lead to an erroneous valuation, and, on the other hand, that it was not essential that the land should be so characterised, but that it was enough that it should be suitable for subdivision, and that appropriate allowances should be made for such delays in realization as might be likely to occur. ... Plainly, a calculation based on a hypothetical subdivision will not be vitiated simply because some very slight delay might be experienced before realization could begin, but an inordinate delay of, say, several years could equally plainly, render the whole undertaking so speculative that a conclusion as to value would be wholly unreliable. In between those two extremes, the skilled valuer will have to decide at what stage the speculative element looms so large that the method becomes unsafe. His decision will depend on all the circumstances of each particular case.”

[20] By his own evidence, Mr McEvoy has said that the prospect of planning approval was so slight as to in effect *“render the whole undertaking so speculative that a conclusion as to value”* employing a residual value analysis exercise would be unreliable.

[21] That is not to say that something similar to a feasibility analysis cannot be carried out to demonstrate the reasonableness of a valuation figure adopted by the employment, for example, of a sales comparison method. For example in *Cienda* at 365 the Court referred to an exercise carried out by a valuer to attempt to ascertain whether the value placed upon the land by use of the direct comparison with sales method might be supported by a feasibility exercise similar in many respects to a hypothetical subdivision exercise. That is not, however, a valuation.

[22] A residual value analysis exercise, whether a DCF or static hypothetical subdivision, is intended to reflect the market as far as it can. The allowance for profit and risk or IRR should be referable to the market and to sales which, if available, should be analysed to reveal the appropriate allowance. Mr McEvoy did not ascertain his adopted IRR in this way because he considered that there was not sufficient suitable sales evidence. The point is, however, that any IRR or profit and risk allowance sourced from a sale would be one derived from a property considered ripe development with its own unique risk profile. No sale could, I suggest, be discovered with a risk profile such as that assumed by Mr McEvoy.

⁸ (1973)32 LGRA 170.

- [23] What the above reasoning points to is that a residual value analysis may be used in circumstances where the valuer is confident that he can, in the exercise, make allowance for all of the relevant factors as to outgoings and income as well as profitability and risk that he ought to. If he can not do that he cannot save the situation by employing a partial method then making an allowance for risk, or any other element for that matter, outside the four corners of the exercise carried out as Mr McEvoy did.
- [24] Counsel for the appellant referred me to the *De Ieso v. Commissioner of Highways*⁹ where an issue between the parties was whether a particular plan of development might be expected to be approved by the planning authority. I do not consider that authority to be of assistance in this matter as it was concerned with a quite different point being simply an illumination of the nature of the jurisdiction being exercised.
- [25] The attention of this Court is frequently drawn to the unsuitability to a residual valuation exercise as a means of arriving at a reliable valuation. As much was acknowledged by Counsel for the appellant. Authorities in which this issue is ventilated include *Heavey Lex No.64 Pty Ltd v Chief Executive, Department of Transport*¹⁰ and *Merivale Motel v. Brisbane Exposition and Southbank Redevelopment Authority*.¹¹ Notwithstanding those general observations there are some specific matters with respect to Mr McEvoy's residual cash flow exercise with which I have concerns. I have already mentioned that the IRR employed by him was not sourced from sales evidence.
- [26] Mr McEvoy appears in his exercise to have not discounted the cash flow but to have employed the costs as at the date of valuation, whenever those costs might be incurred, and maintained that nominal figure throughout the exercise. Similarly, there is no adjustment of the sale prices of lots to account for anticipated market changes in the value of land. I accept the evidence from Mr Jones that the method properly employed (using the Estate Master Software) takes account of the estimated changes in sale prices and development costs over the period of the project. See also *Albany v Commonwealth*¹²

“First, it should be noted that the rate per cent of discount for the future cash flow reflects the amount of profit and the degree of risk involved in the venture. In addition, the rate of discount must take account of the interest payable upon the amount outlaid in purchase of the lands. In the method of valuation based on the hypothetical subdivision which has been used in those cases where such a method of valuation has been found to be appropriate, specific provision is made for the interest on the purchase price of the land to be subdivided. Secondly, the estimate of incomings and outgoings in the projected number of years of development takes account of the estimated rise in the value of the land over the period and the estimated increase in development costs over that period.”

⁹ (1981) 27 SASR 248.

¹⁰ (1999) 20 QLCR 296 at 335 – 338.

¹¹ (1985) 10 QLCR 268.

¹² (1976) 60 LGRA 287 at 293-294.

- [27] It seems to me that the requirement for the adjustment of sale prices and development costs is an important element given that Mr McEvoy projects the development to be undertaken over a number of years to November 2012 from the relevant date in 2004. There may be a view that the adoption of particular changes in development costs and reselling prices over the period of the project involves the formation of an opinion by the valuer and that therefore these adjustments involve the introduction of an additional unreliable elements in the exercise. That is clearly so. However, the adoption of static costs and sale prices similarly involves the employment of an estimation and one at odds with the manner in which a DCF exercise is ordinarily carried out.
- [28] This is not to say that a valuer may not employ a method different from any previously in existence. What Mr McEvoy's method attempts to do is to employ a modified discounted cash flow but to select an IRR on the basis that the previously accepted DCF methodology has been employed. That alone points to the adopted IRR being unreliable. Apart from that, the evidence from Mr Hyland, to the extent that it may be accepted, indicates to me that the risk/profit profile adopted by Mr McEvoy might be appropriate in the case of a project with the development approval involving a significant degree of risk. (Exh.9 p.2)
- [29] I have formed the view on the evidence that Mr McEvoy's gross realisation of development lots is low, apparently influenced by old sales (2002 and 2003) in an otherwise buoyant market. Conversely, his rate of sale appears low and may be influenced by after date conditions.
- [30] Mr McEvoy employed a 100% debt funding in his residual cash flow exercise. Whilst this Court has adopted an approach, in the static hypothetical exercise, of calculating interest on the whole of the outstanding funds,¹³ that has been on the basis of lower than commercial interest rates: reflecting the opportunity cost of employed funds on the assumption of an alternative gilt edged investment. A long term bond rate has usually been employed. Mr McEvoy's assumption of debt funding at commercial rates has the effect of enlarging the interest component of his exercise. I would have thought that a more commercial approach would lie between the two approaches just discussed. That is, part debt and part owner employed funds would be indicated. That approach is supported

¹³ Though recognising that all funds are not outstanding through the whole project period.

by the Australian Property Institute Publication “*Valuation Principles and Practice*”.¹⁴ (Exh.33A)

- [31] Development costs employed by Mr McEvoy in his residual cash flow exercise were sourced from Andrew Pezzutti. Mr Pezzutti and his firm had been involved with the proposed development of the subject land for some time at the date the estimates were made and, on that basis, would generally be thought reliable. Whilst there was some challenge to those estimates by Mr Eddie for the respondent, that challenge was confined to a few points. Mr Pezzutti allowed fill in his estimate at a cost of \$25/cubic metre, but accepted that \$10/cubic metre might reasonably be adopted. If one employs Mr Pezzutti’s volumes the adjustment in construction costs come to about \$2,850,000: an amount of some significance in a residual cash flow exercise. I observe that that amount might be enlarged further or ever reduced dependent upon the final lake design incorporated in the proposed development.
- [32] Mr Pezzutti assessed a timing and sequence of staging of the development such that many large costs occurred early in the proposed development project. Mr Pezzutti accepted that changes to the staging sequence of development (which was apparently provided by the client rather than the engineer) was reasonably open. Whilst it was suggested by Mr Pezzutti that marketing considerations might justify the staging sequence relied upon by him there was no evidence from the appellant to that effect even though Mr Robertson was called to give evidence. It is clear to me that the adoption of a staging plan which deferred high costs until later stages would, all other things being constant in Mr McEvoy’s exercise, lead to a higher land value.
- [33] Mr Eddie for the Chief Executive challenged the level of professional fees relied upon by Mr McEvoy and also the substantial contingency allowance item of \$2,890,000 in Mr Pezzutti report. Neither of these points nor Mr Eddie’s suggestion that staging could be rearranged was taken up by the appellant.
- [34] I accept the submission for the appellant that in a hypothetical exercise such as that provided by Mr McEvoy one would usually anticipate variations in the various components of costs, value and income. It was submitted for the appellant that such variations might go up or down and whilst I accept that to obviously be the case, I can only rely on the evidence placed before me which in this case indicates the probability that the costs could be reduced substantially and that selling prices might be increased. All of that evidence points to the prospect of a higher land value being revealed if Mr

¹⁴ First edition at p.166.

McEvoy's residual cash flow exercise were adjusted to take those matters into account but was otherwise left in tact.

[35] Evidence was lead through Peter Hyland who was put forward as an expert in the field of development feasibility and market economics for the property industry. Mr Hyland, who was not relied on as a planner, provided a document entitled "*Analysis of hypothetical development risk weighting*" which purported to support the level of risk and profit for an option 3 development which had led Mr McEvoy to adopt an IRR of 15.12% in his residual value analysis. I have two difficulties with Mr Hyland's evidence.

[36] First, whilst I accept that Mr Hyland may be called upon to assist and advise would-be developers in the financial planning and analysis of development projects, that does not lead to a conclusion that his opinions are reflective of transactions that take place in the market. He did not demonstrate by reference to sales evidence that his opinions were founded in market transactions that might reflect the principles found in *Spencer v Commonwealth*.¹⁵

[37] Second, I am of the view that the opinions expressed by Mr Hyland do not fall within the legal framework of what is required to permit expert opinion evidence to be admitted. I accept that the identification of profit and risk and IRR allowances is, as Counsel for the appellant put it "*beyond ordinary understanding*", but it seems clear to me that the type of expert who would supply the understanding is a valuer. In exhibit 33A (p.166) the Australian Property Institute says, correctly in my view that "*sales are analysed to derive an indicated IRR*". Sales are analysed by valuers. The legal requirements which need to be met in order that expert opinion evidence be admissible are summarised by Haydon JA, as he then was, in *Makita (Australia) Pty Ltd v Sprowles*.¹⁶ In summary, they provide:

- There must be field of specialised knowledge which permits reliable conclusions to be drawn from identified facts in a way not usually the province of the ordinary persons in the street;
- The witness must have by specified training, study or experience become an expert in the identified field of specialised knowledge or a relevant part of it;
- The expert opinion given must have been based upon that particular expert knowledge;
- The relevant opinion must be based on facts proven in admissible evidence;
- The facts must form a proper foundation for the opinion said to be drawn from them;

¹⁵ (1907) 5 CLR 418.

¹⁶ [2001] 52 NSW LR 705 at 743-744.

- The identified expert must explain how they applied specialised knowledge to the identified facts in order to reach the relevant expert opinion. This would involve usually the explanation of a methodology, including reasoning.

[38] Mr Hyland failed to establish in his evidence that a field of specialised knowledge by which a range of qualitatively identified development risks can be reliably and consistently identified exists in which relevant experts are trained and practice. No authorities were referred to identifying this field of specialised knowledge nor was there any evidence other than in assertions made through Mr Hyland that such a field of specialised knowledge existed nor that anyone other than Mr Hyland was part of the membership of that field of expertise. In addition, Mr Hyland failed to demonstrate the methodology and reasoning giving rise to his conclusions such that the Court could understand and adopt that methodology; apply it to the evidence and draw its own conclusions.

[39] Finally, I conclude that the residual value analysis provided by Mr McEvoy does not provide for a suitable foundation for determining a value of the subject land. That is, it falls short of proving that the land has any particular value. I was not supplied with evidence relating to the various defects that I have identified which would permit me to undertake a modified exercise.

[40] In his comparison with sales Mr McEvoy concluded a value of \$8,500,000 to \$12,500,000 assuming certainty that a development approval could be attained. He drew that conclusion by placing reliance on sales 4 and 5 in particular,¹⁷ deducing a rate of \$200,000 to \$300,000/ha for the total area of the subject property. Each of sales 4 and sale 5 had a preliminary development approval in place at the time of sale. This therefore gave these properties and any intending purchaser the certainty of development approval that Mr McEvoy considered absent from the subject property.

[41] Mr Jones proceeded on the assumption that the type of sale envisaged in s.3(1)(b) of the Act was one which, in the circumstances of the case was conditional upon a development approval becoming available before settlement of the contract of sale was required. It seems to be common ground between the parties that sales of land such as the subject where a purchaser might generally purchase for the purpose of development (and where there is no development approval in place for the land) usually involved a contract being subject to a development approval condition. Such a condition might be said to be usual or normal in the relevant market. On that basis it was suggested for the respondent that

¹⁷ See below at [70] and following.

the language of s.3(1)(b) accommodated a valuation being carried out on the basis of such a condition. Section 3(1)(b) provides:

- (1) For the purpose of this Act-
unimproved value of the land means-
 - (b) in relation to improved land – the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bone fide seller would require, assuming that, at the time at which the value is required to be ascertained for the purposes of this Act, the improvements did not exist. **(My added emphasis)**

[42] As I understand the submission for the respondent, the emphasised words in the statutory provision were relied upon as indicating that a contract subject to a development approval condition might be properly characterised as being one with a “reasonable ... condition” particularly given that sales of land such as the subject property are generally transacted by way of contract subject to such a condition. Indeed, Mr McEvoy made it clear that such land would not sell unless such a condition was included.

[43] Useful reference might be made at this point to the judgement of Isaacs J in *Spencer v the Commonwealth*:¹⁸

“To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.”

What was said by His Honour and the other Members of the High Court on that occasion is often referred to as the *Spencer* test of value. *Spencer* involved the subject of compensation for the resumption of land, however the test of value enunciated there by the High Court has been held to apply equally to statutory valuations.¹⁹

[44] It seems to me that both the statutory provision and the expression of principle in *Spencer* proceed on the footing that a sale is assumed to have taken place as at the date of valuation. In other words, what ever bargaining might have occurred between the parties leading to the finalisation of the transaction, the value of the land is taken to be that achieved by the sale of the land as at the date of valuation, not a sale which eventually takes place upon the satisfaction of a condition subsequent such as one requiring development approval. One of the “*circumstances which might affect*” the value of the

¹⁸ (1907) 5 CLR 418 at 441.

¹⁹ See for example *Stubberfield v The Valuer-General* [1989] 12 QLCR 328 at 330 and *Martin v Commissioner of Land Tax* [1965] 12 LGRA 142 at 146.

subject land (prejudicially in this case) would be the fact that it does not yet enjoy a development approval for an option 3 development which both parties thought to be the most appropriate type of development for the subject land. It is clear to me that the absence of that development approval has a depreciating affect on the value the land would have if development for option 3 had been given. Were it otherwise, Mr Jones would not have required a contract to be subject to such a condition, and transactions in the market place would not require the inclusion of such a condition.

[45] The primary task in a matter such as this is to value the land at the relevant date as it stood at that time, and to include the value of any potential for any use higher than the use at that date. The nature of the transaction envisaged in the Act and described in *Spencer* is one that assumes that time is available to market the property, to attract buyers and for buyers to investigate the circumstances of the land before deciding to buy it. Otherwise how could the purchaser be “*perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially*”? It seems to me that the type of transaction envisaged in the Act which refers to “reasonable conditions”, would assume the payment of the deposit; a condition permitting the purchaser to enter the land; would allow for reasonable enquires to be made and time for that to take place; and provide for a time and date for settlement, amongst other conditions. That is, it would assume those things that facilitate the conclusion of the hypothetical sale.

[46] But it does not assume the inclusion of a condition of contract which has the effect, for example, of removing any element of risk attached to the land for a potential use or for development for a higher use as at the date of valuation. I say that notwithstanding that contracts for the sale of land such as the subject would invariably be subject to a development approval condition. Clearly, the reasons such conditions are included is because the obtaining of development approval constitutes a risk and the vendor seeks a price on the assumption that the risk is removed while the purchaser will not pay a price based on an assumption that a development approval may be obtained risk free.

[47] My reasoning above is supported I think in the judgement of Wells J in *Crouch v Minister of Works*:²⁰

“Moloney’s inquiries, which left him in a state, so I judge, of some bewilderment, led him finally to acknowledge that he believed his hypothetical plan would probably be approved; he manifestly – and, I find, justifiably – entertained reservations on the subject. Laffer took a rather different approach; he assumed that the hypothetical purchaser – developer would buy subject to the condition, which he could invoke, that if the proposed plan of subdivision was

²⁰ (1976) 36 LGRA 254.

not approved he could rescind the sale. It seems to me that to incorporate that condition into the hypothetical sale between willing but not anxious buyer and seller is to brush aside the problem and not the grapple with it. The test formulated in *Spencer's case* clearly predicated a straight-out sale, and any uncertainty that may arise over the postulated use for the land ought, in my opinion, to be reflected in the price and not absorbed by some exotic condition.”²¹

“In my judgement, therefore, a correct application of the *Spencer's case* test implies that, if the valuer is proceeding on the basis of a hypothetical subdivision contemplated by the willing, but not anxious, buyer and seller alike, the risk that approval of the subdivision would have been refused must be taken into account in determining the bargain price, and cannot be eliminated by attributing to the valuer the liberty to treat as certain that which, in truth and indeed, would have been no more than probable.”²²

[48] At the risk of over-egging the pudding I will refer to something on this topic that I wrote in *Hall and Hedge v Chief Executive, Department of Transport*:²³

“Let me return now to the *Spencer* decision. Taking Their Honours’ judgments as a whole, *Spencer* provides a normative formulation which must guide the intellectual process, irrespective of the presence of some factual inconveniences. For example, if no buyer is possible then one must be presumed (*Liverpool City Council*); and if a willing buyer is actually identified, his price cannot, by itself, dispose of the matter (*Spencer* per Griffith CJ). By the same token, the identification of a party such as the Stockland Trust Group, who would not buy the land at any price, is not determinative. This is not to say that the normative formulation must be applied irrespective of discernible facts, but that such facts cannot be relied upon to erode the theoretical basis of the formulation. Thus it is not appropriate to assume the presence of knowledge which would not ordinarily be available at the relevant date (*Edinburgh Pty Ltd*); nor to dispose of difficult factual matters by devices not contemplated in the formulation (*Crouch*).” [at 305-306]

[49] My reasoning is not, in my view, inconsistent with the reasoning found in an authority referred to by Counsel for the respondent: *Multiplex 240 Queen Street Landowner Pty Ltd v Chief Executive, Department of Natural Resources, Mines and Water*.²⁴

[50] The issues in this case, insofar as the unimproved value of the land is concerned, resolve down to a question of whether Mr McEvoy is right in adopting his land value of \$3,000,000 (or some other figure that I could settle on) on the assumption that the level of risk in obtaining development approval for an option 3 development was such that the land had no potential for that development; or whether some other value is indicated based on the evidence as to risk placed before me. Clearly, it is my view that Mr Jones’ valuation at \$21,000,000, on the assumption made by him that the sale would be conditional upon development approval, would be too high assuming for the moment that the valuation evidence in the form of sales comparison would otherwise support that valuation figure. I will therefore now consider the question of the risk associated with obtaining a development approval.

²¹ At 260.

²² At 261.

²³ [1998] 18 QLCR 284.

²⁴ [2007] QLC 0010.

[51] Evidence as to planning risk came from Mr Connolly and Mr McEvoy for the appellant. Mr McEvoy did not rely on Mr Connolly in his report, but formed his own view as to the risk that prevailed. Mr McEvoy did not have the benefit of any of the expert reports relating to the subject land²⁵ in the hands of the appellant before the relevant date of valuation. There are two elements to risks identified by Mr McEvoy and relied upon by him in the manner of which he has concluded his valuation. There is physical risk such as in developing below the Q100 flood line and planning risk in the sense of gaining development approval in relation to the option 3 land use proposal. The second element of risk incorporates the first.

[52] The items of risk included in Mr McEvoy's valuation and upon which he relied in placing a value of \$3,000,000 on the subject land were fewer than those identified by Mr Connolly. I think it important, before I consider individual items said by the appellant as being relevant to risk, to refer to the broad opinions of the planners regarding development approval for an option 3 development. In Mr Connolly's²⁶ examination in chief he said that, as at the date of valuation, one would envisage that it would take 12-24 months to resolve the various issues to gain development approval. Ms Yeomans on the other hand ventured 8-12 months whilst it transpired that the approval was given on 5 April 2007²⁷ – two and a half years after the date of valuation. Mr Connolly was a consultant to the appellant for the purpose of the proposed development. I summarise his overall evidence as being to the effect that in that role he entertained and expressed concerns about risk issues confronting the project but at no stage suggested that the project was doomed or had a high risk of failure. Ms Yeomans said that approval for option 1 was "*a strong likelihood*" and for option 3 she resisted using the term "*high degree of certainty*" of an approval but suggested the use of the word similar to the word "*high*". I understood the evidence from the planners to indicate a level of confidence in the option 3 proposal receiving planning approval.

[53] Notwithstanding the relative level of confidence in both Mr Connolly and Ms Yeomans, if I could summarise the previous paragraph in that way, reference to the various elements of risk is not inappropriate. That is because the application of the hypothetical prudent purchaser / vendor test requires a view being formed as to the level of risk that the purchaser would perceive both with respect to the preferred planning outcome and the

²⁵ For example, acid sulphate, fauna.

²⁶ T.21.

²⁷ Applied for in May 2005.

physical aspects of the development. I will deal with the items of risk from a broad perspective, then will consider that issue in the context of the sales evidence.

[54] Before I come to that, I should refer to some evidence from Mr McEvoy to the effect that the highest and best use of the subject land is as represented in the option 3 plans. It was submitted for the respondent that in view of that evidence there was really no issue as to planning approval. I do not accept that submission. All that happened, in my view, was that Mr McEvoy's use of the term "highest and best use" was infelicitous.

[55] In his valuation, Mr McEvoy identified a number of risks emanating from the "overlays" found in the planning scheme. These include acid sulphate soils, bushfire hazard, catchment protection and nature conservation. In submissions, Counsel for the appellant identified the significant risks as being: the Q100 flood line, the wetland²⁸ aspect in relation to flora and fauna, acid sulphate soils and "process risks" identified by Mr Connolly. Whilst Mr McEvoy did not take process risks into account in his valuation and whilst there is some disconnect between the elements of risk that he identified and those that emerge from the evidence particularly that of Mr Connolly, I do not see that I am confined to consider only those referred to by Mr McEvoy. My task in this appeal is not that of identifying the correctness or otherwise of Mr McEvoy's valuation but in exercising the jurisdiction provided for in s.66 of the Act and having regard to the fact that in this matter the Chief Executive elected to lead evidence therefore threw the matter of valuation open.²⁹ Section 66 provides:

66 Order of court

Upon an appeal under section 55 the Land Court or, upon the rehearing of any such appeal, the Land Appeal Court may—

- (a) affirm the valuation appealed against; or
- (b) reduce or increase the amount of that valuation to the extent necessary in its opinion to determine the same correctly under, subject to, and in accordance with this Act;

and, subject to section 70, make such order as it deems fit with respect to the payment of costs.

[56] The Q100 flood line divides the subject land in such a way that the large area to the west can only be developed if there is, in effect an access "bridge" constructed over the low lying land. There is a requirement for the construction of a lake and there is a need to fill low lying land. There is no doubt in my mind that the existence of the flood line raises the issues of fill, lake construction and disturbance that would exercise the mind of a hypothetical prudent purchaser. The issue therefore needs to be addressed and in so doing there may be some impact on the project design / proposal. Nevertheless the low lying

²⁸ This term is not employed in a technical sense.

²⁹ *State Government Insurance Office v Valuer-General* (1981) 7 QLCR 171 at 193-194.

nature of the land would not have been unknown at the time the land was designated Residential A under the planning scheme. The evidence, especially that of Mr Eddie, leads me to the view that there would be a high probability that development in accordance with the option 3 plan would be achievable, notwithstanding the Q100 flood line.

- [57] Insofar as drainage is concerned - some drainage design work had been carried out prior to the relevant date of valuation. No issue of increasing flood levels of the down stream property had been identified. The Department of Natural Resources had given its consent to an increase in the magnitude of 1 or 2 centimetres for 2 year to 100 year events.³⁰ Whilst in such a low lying environment one would naturally be concerned as to the need for drainage, the evidence points to drainage being a manageable issue though not one without a level of input, frustration and design ingenuity.
- [58] As there is a wetland area within the subject land, issues of flora and fauna may be thought to exist. There were however, a number of studies carried out prior to the relevant date resulting in exhibit 32 dated September 2004.³¹ As I read the conclusions to that assessment there ought to be no significant alteration to the characteristics of the habitat of the acid frog that occurs to the east and north-east of the site. No other species appears to have been considered to potentially be at risk. The subject land had previously been cleared and it seems to me that re treatment of any standing timber would not be assessable in development under the *Integrated Planning Act* in force at the relevant date.
- [59] An investigation in 1998³² concluded that “*potential acid sulphate soils have been identified on the site and these will have to be avoided or treated if disturbed.*”³³ Mr McEvoy said that the cost and time to complete a development with acid sulphate soils “*is dramatically higher*” than that in the case of land without that character. The evidence does not, however, support that conclusion upon which Mr McEvoy apparently relied in forming his appreciation of the level of risk associated with the subject land. Whilst there was acknowledgement in the evidence of Mr Connolly and Mr Eddie (and in the State Planning Policy with respect the acid sulphate soils³⁴) that the existence of such soils can give rise to substantial costs, the best evidence as to the significance of acid sulphate soils in the subject land came from Mr Pezzutti. Mr Pezzutti who was put forth by the appellant as having an intimate acquaintance with the subject land included an

³⁰ Exh.19 p.3.

³¹ Amphibian assessment by James Warren and Associates Pty Ltd Environmental Consultants.

³² Exh.48.

³³ P.21.

³⁴ Exh.43.

allowance of \$200,000 in his cost estimates for acid sulphate soil treatment. That level of estimate is broadly consistent with the cost estimate of \$235,000 mentioned in the 1998 soil investigation report obtained by the appellant.³⁵ Mr Eddie said that the treatment of acid sulphate soils was generally a “*routine*” requirement in a development of the type such as that proposed in option 3 for the subject land. It seems to me that that is a reasonable appreciation of the level of risk posed.

[60] The evidence was that Council preferred access to any development on the subject land to be via Village Avenue, whereas the appellant preferred access via Coolgarra Avenue. The location of the access was clearly an issue which existed as at the date of valuation but as appears from exhibit 21, the provision of suitable access to the subject land did not pose an insoluble problem notwithstanding the difficulties identified by Mr Roberston in exhibit 10. The overall development could not be frustrated by the Council insisting on the use of Village Avenue.

[61] Mr McEvoy mentioned a “*bushfire hazard*” as comprising a risk associated with the development of the subject land. Fire breaks separating the subject land from the adjoining national park were observed during inspection. There was no evidence that these fire breaks were inadequate nor that the need to manage bushfire risk would militate against the development either physically or in gaining development approval.

[62] Mr Connolly described various “*process risks*”; that is, those associated with the process of obtaining approvals from the various authorities and agencies involved in dealing with an application for approval to develop the land in accordance with option 3. As I understand it the development of the subject for residential development was virtually “*as of right*” in land use terms requiring only subdivision and works approvals. Option 3 does not, however, comprise a mere Residential A land use, but includes other usages. It is an Impact Accessible Development and therefore, as a matter of definition, involves the need to deal with a number of hurdles or risks in gaining approval. Mr Connolly, however, pointed out that all projects must deal with process risks and appeared to me, in his evidence, to not suggest that such risks would derail an application for an option 3 development.

[63] It transpires that a land use approval for option 3 was applied for in May 2005 and obtained in April 2007. Expert evidence before me indicates that development in the form of option 3 was consistent with the planning scheme at the relevant date and the 2005 *Integrated Planning Act* planning scheme that had been notified at the relevant date.

³⁵ Exh.48.

[64] My overall view of the topic of planning and development risk in relation to the subject land is that it would not be appropriate to treat the risk as being non-existent, which was the approach employed by Mr Jones in his valuation in which he assumed a contract subject to development approval. On the other hand, I see no basis for Mr McEvoy's conclusion that the level of risk in the case of a proposed option 3 development was so high that a hypothetical prudent purchaser would pay nothing for any potential in the land beyond a development along the lines of option 1. I think that the broad summary of risk put forward by Mr Connolly and Ms Yeomans as included in [52] above can reasonably be relied upon. I would summarise that evidence is indicating that the prospect of a development in accordance with option 3 was sufficiently probable that a price would be established on the basis of a "top down" rather than a "bottom up" approach. In other words, the value would be arrived at by allowing a discount for risk rather than in striking a value for a lower use and adding some allowance for potential.

[65] In his valuation (Exh.13 p.8) Mr Jones apportioned the value of the subject land as follows:

Apportionment :

6 ha	Primary Englobo	@ \$1,000,000 = \$ 6,000,000
24 ha	Secondary Englobo	@ \$ 500,000 = \$12,000,000
<u>12.52 ha</u>	Balance Englobo	@ <u>\$ 250,000</u> = <u>\$ 3,130,000</u>
TOTAL 42.52 ha		@ \$ 496,942 \$21,130,000

Adopt \$21,000,000

[66] That apportionment reflected his valuation of \$500,000/ha for the total 42.52 ha of the subject land. In submissions for the Respondent, the approach that was suggested was to employ option 3 as representing the highest and best use and allow a net area of 38.57 ha after deducting an area for the proposed lake. That method appears to me to be an eminently reasonable one though it needs to take in to account the varying quality of the subject land. On the basis of that area Mr Jones valuation calculates to \$544,465/ha. Counsel for the appellant raised in submissions the idea of calculating the value of the subject land based on the 35.5 ha identified by Mr McEvoy as the developable area rather than 38.57 ha comprising the subject land minus the lake area proposed in option 3. The area of 35.5 ha excludes the park area in option 3 and on that basis should not be employed, in my view, as park area requirements are an integral part of a subdivision development.

- [67] There was a total of twelve sales referred to by the two valuers, and they appear in numbered order in the joint valuers report. For the purpose of these reasons I employ the numbering in that document. As a result of the conference between the two valuers three sales were identified as being the most relevant. Sale 1 was at Village Avenue, Bongaree, adjoining the subject property. Sales 4 and sale 5 were at Redondo Street, Ningi, part of the “*Sandstone Lakes*” development on the mainland to the west of the subject. In company with Counsel, supported by the valuers, I inspected these and other sale properties as well as the subject land. These inspections assisted me in my appreciation of the evidence.
- [68] Sale 1 took place in November 2003 and involved a sale of 16.05 ha at a price of \$20,625,000 (GST Exclusive \$18,750,000). It appears that the respondent and the owner of the sale property were able to settle the statutory valuation of the property as at 1 October 2004 in the amount of \$11,000,000 representing \$685,358/ha. That figure was arrived at following a preliminary conference managed by the Court. Approximately 12 ha, or 75% of the sale 1 land, is considered sound for development after filling, with the balance being Dux Creek floodplain. If the applied unimproved value of \$11,000,000 is allocated to the developable area the figure represents \$916,667/ha. Mr Jones focused on the unimproved valuation of \$11,000,000 settled between the Chief Executive and that land owner as being the significant figure that could be employed in comparing that sale property with the subject. Mr McEvoy thought that figure to be too high. Both Mr McEvoy and Mr Jones agreed that the sale at \$18,750,000 represented an over market transaction that did not fully recognise the development issues on the land. Despite those development issues, the sale property is superior to the subject.
- [69] Notwithstanding Mr Jones’ reliance on the \$11,000,000 figure applying to sale 1, the respondent drew my attention to the losing tender which came in at \$13,600,000. The land had been openly marketed for tender with full documentation and contract disclosure. That losing tender was, however, subject to development approval and the extent of premium in that tender price, on account of that factor, needs to be taken in to account. The next three tenders in line, excluding one “*tender*” marked “*letter only*”, fell into the range of \$6,000,000 to \$8,000,000 which on an area of 12 ha of development land calculates to \$500,000 to \$666,000/ha. Those tenders I think provide a more reliable indication of the prevailing market appreciation of the value of the sale 1 property as it stood at the date of offer: more reliable than the losing tender and the applied valuation which represents a compromise figure between two litigants, both of whom can return to

the arena in a later year. Contrasted with the losing tender of \$13,600,000 these tenders also provide a rough indication of the level of premium that might apply to a development approval, at least with respect to that sale land.

- [70] Sale 5 at Redondo Street, Ningi, took place in September 2003, in which 69.45 ha was sold for \$9,000,000. That land was sold with preliminary development approval for 310 Lots. The useable area is 32.6 ha, which calculates to \$276,073/ha based on the sale price. It was suggested in submissions by the Respondent (Para 49) that this sale is of “*doubtful utility*” on the basis that the price was apparently struck in mid 2002 after which the market had been improving. That submission was not based on expert evidence led before me and tested by cross-examination, but rather by reference to a valuation from an author who was not called.
- [71] I think it useful to consider sale 4 together with sale 5 as this sale took place in December 2003, and involved the sale of 68.866 ha at a price of \$14,905,000. Sale 4 has become part of the “*Sandstone Lakes*” development; the sale land having a preliminary development approval of 271 lots at the time of sale. The useable land area is calculated to 30 ha which reflects \$496,833/ha for the useable component of the site calculated on the sale price. The unusable part of the site comprises Wallum Swamp whilst the developable area requires what the two valuers describe as “*only average earthworks*”. The statutory valuation of the sale 4 land is \$13,700,000 as at October 2004, that figure equating to \$456,667/ha.
- [72] The sale 4 land was considered by both valuers to be inferior to the subject property in terms of location and expected lot yields. This sale land has proximity to a visible land fill site and there is a power line, though not a large one, which traverses part of the sale land.
- [73] Both of the valuers were content to apply sale 4 on the basis of its statutory valuation of \$456,667/ha. The adjoining sale 5 supports that sale as being a relevant market transaction particularly when one has regard to the fact that the sale 5 transaction took place at an earlier date in an improving market and that it required considerable filling of approximately 1.5 metres and substantial drainage. I think it useful therefore to employ these transactions which indicate to me that the Chief Executive’s valuation of the subject property is too high, particularly when one takes in to account that both sales 4 and 5 enjoyed preliminary development approval. I have already referred to the indication given by sale 1 that a development approval is a feature which appears to attract substantial value in the vicinity of the subject property.

- [74] I do not accept Mr Jones' contention that the sale 1 transaction, together with sales 2 and 3, indicate Englobo premiums in the order of double the mainland Caboolture Shire sites. This is because: first, the reliance he placed on sale 1 was on the basis of its statutory valuation not on any analysis of the overall transaction including the tendering process; second because sale 2 comprises an area of 5,096 m² only and sale 3 has 2.847 ha only. I must however accept the evidence of both valuers that the location of the subject land on Bribie Island as a factor gives it a superiority over the "*Sandstone Lake*" sales, all other things being equal. Having regard to that factor and discounting the application of sales 4 and 5 to the subject having regard to the preliminary approval for development and my appreciation of the planning and development risks confronting the subject, I conclude that the value of the subject property is substantially less than \$500,000/ha overall. I conclude that the valuation having regard to these factors and the comparisons provided by the valuers ought to be \$17,350,000. Mr McEvoy's evidence of a value range of \$8,500,000 to \$12,500,000 on the assumption of certainty as to development approval cannot be reconciled with the evidence, particularly the comparisons between the sale properties and the subject.
- [75] Sale 2 at Arcadia Avenue Woorim (Bribie Island) took place in July 2003, involved the sale of 5096 m² from the State of Queensland at a price of \$1,050,000. Sale 3 at Second Avenue, Woorim occurred in October 2003 and involved the sale of the Bribie Island Caravan Park having an area of 2.847 ha at a price of \$4,600,000.
- [76] Sale 2 is, in minor topographic terms, somewhat elevated with the subject land, but is substantially smaller and lies within a recognised development area. Sale 3 on the other hand is complicated by the fact that there was an operating caravan park at the time of sale and the manner in which the sale ought to be analysed was a matter of debate within the two valuers. Mr Jones suggested that the mobile homes on the site comprised an encumbrance given their protection under the *Mobile Homes Act* and that that feature offset the business use which ought to be viewed as a holding proposition only. I think that too simplistic an analysis of the sale without further detail.
- [77] The balance of the sales (6 -12 inclusive) were all mainland sales representing a range of values which, in summary, I see as supporting the level of value revealed by sales 4 and 5 assisted to the extent that I have identified with sale 1.
- [78] There was evidence of an "*offer to purchase*" the subject land in 2005 in the amount of \$24,000,000. Mr Robertson gave evidence concerning this offer which on the one hand appeared in the appellant's records to have been treated seriously, and on the other, to

have been treated as “*some fluffery. It’s a joke*”, according to Mr Robertson. The evidence from Mr Robertson as to his personal conclusion as to the veracity or seriousness of the offer was not satisfactory, it being shown to have been wrong in some respects³⁶ or not seriously considered.³⁷ The best I can say about the offer is that it was not accepted for reasons that the evidence does not suitably reveal and it was conditioned in favour of the purchaser such that its utility as a basis for valuation is not accepted. I formed the view that the sales evidence provided by the valuers in particular sales 1, 4 and 5 and reference to the market environment provided by the other sales transactions provides a suitable basis for identifying that the valuation placed upon a subject land by the Chief Executive is too high. In those circumstances an offer higher again than the Chief Executive’s valuation is of no assistance. Nevertheless, the offer does serve to illustrate that a value of \$3,000,000 is unrealistically low.

[79] I return to consider the Originating Application seeking declarations. The effect of the declarations sought would be to say that the valuation of \$21,000,000 did not validly issue. The effect of such declarations would be that the valuation which is deemed to be correct pursuant to s 33 of the *Valuation of Land Act* would be the first valuation in the amount of \$9,000,000, the \$30,000,000 figure already having been abandoned by the Chief Executive following objection. Section 33 provides:

33 Status of valuation

Any and every valuation, or alteration of the valuation, of any land made, or purporting to be made, under this Act by the chief executive shall be deemed to be correct until proved otherwise upon objection or appeal or until altered or further altered.

[80] In circumstances where both the Appellant and the Chief Executive have led evidence there is a requirement that the Court determine “*the amount of (the) valuation ... correctly under ... the Act*” (Section 66). I formed the view on the evidence that the value of the subject land ought to be determined in the amount of \$17,350,000. Accordingly, the value has been proven on appeal to be different from the valuation that would otherwise gain the protection of s 33. In the circumstances no benefit flows from my considering the merits of the application for declarations.

³⁶ Regarding the firm of solicitors (T.87 L.35).

³⁷ For example T.195 L. 14.

Order

The valuation of the subject land as at 1 October 2004 is determined in the amount of Seventeen Million Three Hundred and Fifty Thousand Dollars (\$17,350,000).

**RP SCOTT
MEMBER OF THE LAND COURT**