1 of 1 DOCUMENT: Unreported Judgments Land & Environment Court (NSW)

93 Paragraphs

DILLON, KEVIN v GOSFORD CITY COUNCIL - BC200804226

Land and Environment Court of New South Wales
Sheahan Jmiller Ac

30157 of 2007

10, 11 December 2007; 20 December 2007; 10, 11 March; 4 April (written Submissions), 6 June 2008

Dillon, Kevin and Anor v Gosford City Council [2008] NSWLEC 186

COMPULSORY ACQUISITION OF LAND; EASEMENTS -- 'Market value' -- loss attributable to 'disturbance' -- interpretation of the rights afforded under the easement compulsorily acquired -- levee bank construction, scour protection works.

(NSW) Land Acquisition (Just Terms Compensation) Act 1991 s 54, s 55, s 56, s 59

Blacktown City Counci v Fitzpatrick Investments [2001] NSWCA 259; *Cannon v Villars* (1878) 8 Ch D 415; *Fitzpatrick Investments Pty Ltd v Blacktown City Council (No2)* [2000] NSWLEC 139; *Marshall v Director General, Department of Transport* (2001) 205 CLR 603; *N Stephenson Pty Ltd v Roads and Traffic Authority of New South Wales* (1994) 83 LGERA 248; *Perpetual Trustee Company Ltd v Westfield Management Ltd* (2007) NSW Conv R 56-170 ; (2007) ANZ Conv R 103; *Roads &Traffic Authority of New South Wales v Peak* [2007] NSWCA 66; *Westfield Management Ltd v Perpetual Trustee Company Co Ltd* (2007) 81 ALJR 1887; *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2006] NSWSC 716

Sheahan Jmiller Ac.

[1] Mr and Mrs Dillon ("the Applicant") own the property at No3 Manns Rd, Narara (Lot 3, DP 775599) ("Lot 3"). In times of rain, water would run through their property, across Manns Rd, and into a nursery located on the other side of the road. By compulsory acquisition under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("*JTC* Act") in a notice dated 27 October 2006, Gosford City Council took an interest in the Dillon land for the purpose of an easement for a levee bank.

[2] These appeal proceedings were commenced in Class 3 of the court's jurisdiction on 27 February 2007, and concern an objection to the amount of compensation offered for that interest, and I acknowledge the assistance of Acting Commissioner Miller in the determination of it.

[3] The Amended Points of Claim list the claimed compensation as $375,108.00, made up of $145,000.00 for market value and $230,108.00 for loss attributable to disturbance. The disturbance claim may be broken down as follows:

- Removal and replacement of unsuitable fill $90,310

- Rectification and establishment of a vegetation screen

  at the front of the block $4,798

- Installation of scouring control measures to the creek $130,000
- Legal, valuation and ancillary costs before acquisition $5,000

[4] The Amended Points of Defence list the compensation for market value as $45,000, plus $5,000 for disturbance comprised solely of "*the applicant's reasonable legal and valuation fees ...* ". It is stated that the "*respondent ... is not liable to pay any further sum to the applicants as compensation for disturbance and relies on the terms of the easement in this regard*". Indeed, much turns on the construction of the easement.

[5] The Valuer General's determination of the value of the interest acquired (see "*Points of Assessment of Compensation*" filed 30 April 2007) is $100,000.00, comprising $85,000.00 for market value, and $15,000 for disturbance.

[6] Lot 3 in Deposited Plan 775599 is located at 3 Manns Rd, Narara within the local government area of Gosford City Council. It is 1.464ha in size and has two zonings. The northern end is zoned 2(a) Residential, and that is where the Dillon residence is built. The land to the south of the residence is zoned 9(a) Restricted Development (Flood Prone Land). The Western boundary of the subject property is the middle line of Old Narara Creek.

The Statutory Regime

[7] Part 3, Div 4 of the *JTC Act* deals with "*Determination of amount of compensation*". This appeal concerns the compensation for "*market value*" and "*disturbance*" which are considered "*[r]elevant matters to be considered in determining amount of compensation*" (s 55(a)&(d)). Section 55 of the *JTC Act* is in the following terms:

> 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.
>
> Market value*" and "*disturbance*" are given meaning by ss 56 & 59.*

[8] Section 56 of the *JTC Act*, dealing with "*market value*", is in the following terms:

(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

(b) any increase in the value of the land caused by the carrying out by the authority of the State, before the land is acquired, of improvements for the public purpose for which the land is to be acquired, and

(c) any increase in the value of the land caused by its use in a manner or for a purpose contrary to law.

(2) When assessing the market value of land for the purpose of paying compensation to a number of former owners of the land, the sum of the market values of each interest in the land must not (except with the approval of the Minister responsible for the authority of the State) exceed the market value of the land at the date of acquisition.

[9] Section 59 of the *JTC Act*, dealing with "*loss attributable to disturbance*" is in the following terms:

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.

The Evidence

[10] The court has had the benefit of engineering evidence from Messrs Boyden and Tilley (experts for the Applicant and Respondent respectively) who produced reports for the hearing (see *Exs A1*, *A2*, *R 1 and R 2*), and authored a joint-report dated 15 November 2007 (*Exs A3*). These experts gave concurrent oral evidence.

[11] The court also had the benefit of valuation evidence from Messrs Dupont and Jones (experts for the Applicant and Respondent respectively) who produced reports for the hearing (see *Exs A8 and R 3*), and authored a joint-report dated 4 December 2007 (*Ex R 4*). These experts also gave concurrent oral evidence.

[12] Mr Dillon gave lay evidence in the form of affidavit and oral evidence.

Market Value

[13] The Applicant contends that the easement burdens the whole of Lot 3. The Respondent, on the other hand, contends that the easement burdens only area "E" as depicted in *Ex A5*. Valuers Dupont and Jones agree that if the Applicant's construction is correct the compensation for loss of market value of the subject property, on a "*before and after*" basis, should be $140,000, and if the Respondent's construction be correct the compensation should be $45,000 (Joint Valuers' Report, *Ex R 4 folio 16*; (Transcript (submissions) ("T(S)") T(S)20.12.07, p 22, L.26ff).

Construction of the Easement

[14] The court's attention now turns to the construction of the easement which appears in the New South Government Gazette No70 (25 May 2007), p 3028 (*Ex A6*). It incorporates by reference the diagram in *Ex A5* (the acquisition notice was originally published in the Government Gazette on 27 October 2006 but has been replaced by this later notice. It is agreed between the parties that the date of acquisition is 27 October 2006). The terms of the easement are as follows:

GOSFORD CITY COUNCIL

ERRATUM

This notice replaces a notice published in the Government Gazette *No 127 on 27 October 2006, page No 9171:*

LOCAL GOVERNMENT ACT 1993

LAND ACQUISITION (JUST TERMS

COMPENSATION)*ACT 1991*

Notice of Compulsory Acquisition of Land

GOSFORD City Council declares with the approval of Her Excellency the Governor, that the easement described in Schs 1 and 2 below, excluding any mines or deposits of minerals in the land, and excluding those interests described in Sch 3 below, are acquired by compulsory process in accordance with the provisions of the Land Acquisition (Just Terms Compensation) Act 1991 for the purpose of a Levee Bank.

Dated at Gosford this nineteenth day of July 2006.
P *WILSON,*

General Manager

_____

SCH 1

Interest in the land being an Easement for a Levee Bank

described on DP 1082242 as Proposed Easement and shown

as Plan of Proposed Easement for Support and Right of

Carriageway within Lot 3, DP 775599.

_____

SCH 2

1. *The body having the benefit of this easement may:*
   (a) *drain water from any natural source through*

   each lot burdened, but only within the site of this

   easement, and
   (b) *construct and maintain levee banks to control*

flood waters

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

entering the lot burdened, and

taking anything on to the lot burdened, and

using any existing line of pipes, and

carrying out work, such as constructing, placing, repairing or maintaining pipes, channels, ditches, levee banks, removal of obstructions to the flow of water and equipment.

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

(a) *ensure all work is done properly, and*

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

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

(d) *restore the lot burdened as nearly as practicable (except for the placement of the levee banks) to its former condition, and*

(e) *make good any collateral damage.*

_____

SCH 3

U7 20557 Easement for Sewerage Pipeline 5 *Wide and variable affecting part of the land above described as (Lot 3, DP 775599) shown so burdened in DP 647155 and by U668080 vested in Gosford City Council by Gaz 2.9.* 1994 Folio 5604. *[3244]*

The marking of the easement on Drawing 'DP 1082242 ... Proposed Easement' is in the following terms:

E" -- Proposed Easement for Support & Right of Carriageway variable width.

Submissions

[15] The Applicant outlines two general principles when interpreting the words of an easement, the first being to interpret the easement according to the words which it contains; and the second being that if the terms of the easement are ambiguous, or otherwise not perfectly clear, or circumstances have changed since the easement was granted, one is entitled to take into account the facts and circumstances that existed at the time the easement was granted.

[16] The Applicant points out that the easement was acquired 10 years after the levee bank was constructed and occupies nearly the whole of area "E", the inference being that the outline of area "E" was "*clearly intended to follow the extent of construction*" (T(S) 20.12.07, p 2, L.55ff). The wording of the easement and the physical state of the land at the time the easement was granted lead to the conclusion that the easement permits works outside of area "E". Reliance is placed on *Cannon v Villars* (1878) 8 Ch D 415 ("*Cannon*") to support the conclusion that the task of the easement's construction may "*be carried out in the light of the facts which existed at the time of the grant*" (Applicant's submissions, 10.12.07, para 1).

[17] The Respondent submits that "*nothing in this grant [of easement] authorises the entry otherwise on to lot 3 to widely roam upon it, take from it, use it, travel over it, do construction works on it, that work is to be confined solely to area E*" (T(S)20.12.07, p 16, L.29-32). The use of extrinsic materials is irrelevant to the construction of the easement and not permissible as an aid in construing the terms of the easement. Reliance is placed on the High Court's decision in *Westfield Management Ltd v Perpetual Trustee Ltd* (2007) 81 ALJR 1887 ("*Westfield*"), which considered *Cannon*. Counsel for the Applicant, Mr Ayling, concedes that *Westfield* confirms that extrinsic material going to the intentions and expectations of the parties is inadmissible. However, he submits that:

> the court doesn't say ... that other material relating to the physical state of the land at the time [the easement is granted] is irrelevant [and] that since the land was in a state upon which there was erected upon it a construction, a fact which was not an extrinsic fact but one of the basic facts about the easement itself, that fact enlightens and illuminates the task of construction". (T(S)20.12.07, p 24, L.49ff).

Mr Tomasetti, Counsel for the Respondent, maintains that this state of affairs is an extrinsic fact and, therefore, not permissible in aid of construction.

[18] Counsel for both sides paid meticulous attention to the words of the easement to support the construction they each placed on the easement. The Applicant submits that Sch 2 to the notice creates a suite of rights (conceivably even a second easement) in addition to that in Sch 1. The suite of rights permits works outside of area "E", ie on the whole of Lot 3 (Applicant's submissions, 10.12.07, para 4). This view is founded on a difference in wording between Schs 1 and 2 of the notice. Words of limitation appear in Sch 1 ("*Easement for a Levee Bank ... shown as Plan of Proposed Easement for Support and Right of Carriageway within Lot 3 ...* " ie., area "E"). However, Sch 2(1)(c) talks of rights of "*entering the lot burdened, and taking anything on to the lot burdened*", and in 2(c) and (d) the use of the words "*lot burdened*" when talking about damage and restoration. There "*is only one parcel which can be considered to be the lot burdened, and that is Lot 3.*" (Applicant's submissions, 10.12.07, para 5).

[19] The Applicant places much reliance on the use of the plural in Sch 2(1)(b) referring to the construction and maintenance of "*levee banks*" to control flood waters, and in Sch 2(1)(c) referring to the carrying out of works including "*levee banks*", and in Sch 2(2)(d) when referring to restoring the lot burdened to its former condition except for the placement of the "*levee banks*". This compares with the description in Sch 1 as the easement being for a "*levee bank*" (obviously framed in the singular).

[20] The Applicant concludes that the differentiation between the use of the singular "*levee bank*" in Sch 1 and the plural "*levee banks*" in Sch 2 is deliberate -- "*a conclusion that the use of the plural was intentional is inescapable*" (Applicant's Submissions, 10.12.07, para 7(b)). The use of the plural "*levee banks*" coupled with the fact that area "E" encompasses the existing levee bank (and the fact that there is no room left in area "E" to construct a further levee bank, to honour the plural) leads to the conclusion that work is permitted over the whole of Lot 3 as long as it is to "*control flood waters*" (per Sch 2(1)(b)).

[21] The Respondent agrees that Lot 3 is the Lot burdened, but only within the site depicted as area "E". This is a way of reconciling the defining of the easement in Sch 1 and the reference in Sch 2 to "*lot burdened*". If the Council has the

rights set out in Sch 2 over all of Lot 3, then why has the area known as area "E" been carved out in *Ex A5* (T(S)20.12.07, p 18, L.9ff)? Mr Ayling submits that area "E" is the representation of the existing levee, constructed in 1995, which "*simply doesn't speak to Sch 2*" (T(S)20.12.07, p 27, L.37-38).

[22] The Respondent reconciles the use of the plural "*levee banks*" in Sch 2 and the singular "*levee bank*" in Sch 1 by submitting that "*the reference to the word 'banks' plural contemplates the position that a bank would be replaced by another bank in time and perhaps by another bank after that in time depending on the nature of the flooding which occurs along the Narara Creek*" (T(S)20.12.07, p 15, L.36ff). In this regard the construction of levee banks (plural) is contemplated but only within area "E". Further the Respondent submits that the reference to "*levee banks*" in Sch 2 may also contemplate the construction of two levee banks on area "E" if that design was considered appropriate (T(S)20.12.07, p 17, L.3ff).

Findings on the construction of the easement

[23] *Westfield* plainly stands for the proposition that evidence sought to establish the intention, contemplation or expectations of the parties to the grant of the easement is inadmissible to aid in the construction of that easement. This is agreed by both parties to the current appeal. However, I do not agree that it stands for the narrower proposition that evidence as to the physical state of the land at the time the easement was granted is irrelevant to the construction of that easement.

[24] The *Westfield* litigation involved the construction of an easement, right of carriageway, between the sites known as 'Glasshouse' and 'Skygarden' in the centre of Sydney. Westfield was the registered proprietor of the dominant tenement, and Perpetual Trustee was the registered proprietor of the servient tenement. The part of the litigation that concerns this court in this matter is the admission of extrinsic material.

[25] The Judge at first instance, Brereton J, allowed extensive evidence on the intention or contemplation of the parties to the grant of the easement (*Westfield Management Ltd v Perpetual Trustee Co Ltd* [2006] NSWSC 716). On appeal Hodgson JA (with whom Beazley JA and Tobias JA agreed -- *Perpetual Trustee Company Ltd v Westfield Management Ltd* (2007) NSW Conv R 56-170; (2007) ANZ Conv R 103); referred to Brereton J's decision at first instance (at [16]):

> The primary judge held that the meaning of the easement was to be ascertained by reference to its language, having regard to the circumstances in which the grant was made. He admitted evidence of these circumstances, including evidence of contemporaneous statements and actions of each party, as throwing light on the circumstances, the facts known to that party, the purposes of that party and the use of the dominant tenement which was then contemplated.

The court of Appeal disapproved of this view, holding (at [56]) that it:

> *was not relevant to the objective circumstances in the light of which the document was to be construed. This material concerned the subjective ideas of persons associated with the grantor, and communications between them. In my opinion, the subjective ideas and purposes of the grantor are irrelevant.*

[26] The High Court on appeal from the court of Appeal commented (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ at [35]) that:

> Hodgson JA [in the court of Appeal correctly] ... remarked that the decision of the primary judge appeared to be the product of an error in preparedness to look for the intention or contemplation of the parties to the grant of the Easement outside what was manifested by the terms of the grant.

[27] Further, upon reflection on the authorities, the High Court held at [45]:

> [N]one of the foregoing supports the admission in this case of evidence to establish the intention or contemplation of the parties to the grant of the Easement.

[28] In *Cannon* (cited by *Westfield* at [40]), Jessel MR (at 420-421) states:

> Prima facie the grant of a right of way is the grant of a right of a way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid and in determining whether it is a general right of way, or a right of way restricted to ...
>
> This statement is relied on by the Applicant in the present appeal to support the proposition that the physical state of the land at the time of the grant of the easement is admissible on the construction of it.

[29] The High Court distinguishes *Cannon*, inter alia, on the facts (at [41]):

> The situation with which the Australian courts were concerned in the above cases [one of which was *Cannon*] bore little resemblance to that in the present case, where the evidence goes to the intentions and expectations of the parties to the Instrument respecting the development of an area in the central business district of Sydney.
>
> *The penultimate para in* Westfield *(see para 27 above) is conclusive of this view.*

[30] The High Court does not displace the proposition the Applicant derives from *Cannon*. If the proposition that objective facts (such as the physical state of the land) which existed at the time the easement was granted can be called in aid of construction was good law before *Westfield*, it has not been changed by anything said in *Westfield*. Having said that, the physical state of the land at the time of the grant of the easement (an objective fact) cannot be used to establish the subjective intention, contemplation or expectations of the parties to that easement. That would be contrary to what *Westfield* does stand for.

[31] Turning now to the terms of the easement. The "*notice*" informs the public as to the nature of the interest taken. It talks of the "*easement described in Schs 1 and 2 below*". The use of the word "*easement*" (in the singular) is important;

the "*easement*" being found in Schs 1 and 2. Much is made by the Applicant of the word "*are*" (ie "*the easement described in Schs 1 and 2 ...**are** acquired by compulsory process*" (emphasis added)) appearing in the chapeau (as the Applicant's Counsel refers to it). Due regard must be had to Sch 1 and 2 in an endeavour to see if that use of the word "*are"* is deliberate, as the Applicant contends, and what significance that has.

[32] Schedule 1 describes the interest in the land as being for an "*Easement for a Levee Bank described on DP 1082242*" (*Ex A5* -- which is incorporated by reference) as "*Proposed easement for support and right of carriageway variable width*". The area this proposed easement covers is depicted as "E". Words of some importance in Sch 1 are "*within Lot 3, DP 775599*", which differentiates Lot 3, as a whole, from area "E".

[33] Schedule 2 has to be read in conjunction with Sch 1. This is logical on its face, but is given support by the notice itself which states "*the easement described in Schs 1 and 2 below ...*". Schedule 2 commences with the words "*[t]he body having the benefit of this easement ...*". The words of importance are "*this easement*", the easement being the Support and Right of Carriageway as outlined in Sch 1, which gets its location from what the plan so describes (ie area "E").

[34] The powers of the "*body having the benefit of*" the easement are set out in Sch 2. The Applicant submits that the reference to the "*lot burdened*" is an indication that the easement permits works to be undertaken outside of area "E", over the whole lot burdened (Applicant's Submissions, 10.12.07, paras 6-10). I do not think that is so. The lot burdened is Lot 3. Lot 3 is subject to an easement, defined in Sch 1 by reference to the incorporated plan as area "E".

[35] What the easement provides in Sch 2(1) is that levee banks may be constructed (and subsequently maintained) "***but only** within the site of this easement*" (emphasis added), which we know from Sch 1 is area "E", in order to "*drain water from any natural source through each lot burdened*", the purpose being "*to control flood waters*". Schedule 2(1)(a) and (b) are read together, with the words of great importance being "*but only*". The construction and maintenance of "*levee banks to control flood* waters" is a right given to the "*body having the benefit of this easement ... but only within the site of this easement*". This much is clear on the face of the words used. When Sch 2(1)(a) and (b) are read in conjunction with the entire wording of the easement it is clear that water running across Lot 3, be it creek or rain water, may be re-directed via a levee bank(s) constructed on area "E", presumably to stop Manns Rd being flooded.

[36] The Applicant places reliance on the word "*drain*" to infer that this work itself is something different to that of constructing a levee bank which is a flood mitigation device. The Respondent submits that a levee bank can serve to drain water away from Lot 3, and I agree. Draining water is not necessarily something different from flood mitigation. When read in conjunction with the whole notice, the word "*drain*" does not infer that other works are permitted outside of area "E".

[37] Subparagraph 1(c) of Sch 2 sets out the incidental powers, ie to "*do anything reasonably necessary for that purpose*". These are the powers which are necessary for carrying out the work proposed in 1(a) and (b), that purpose being to drain water from the lot by way of whatever work is done within area "E", ie the construction and maintenance of levee bank(s). The first two powers in (c), "*entering the lot burdened, and taking anything on to the lot burdened ...*", have emphasised the words "*lot burdened*". This is deliberate, and gives the body having the benefit of the easement the right to enter the lot, outside of area "E", carry anything thereover (including tools, machinery and materials) to reach area "E". It is conceivable that these tools, machinery and materials may be left on Lot 3, outside of area "E", in order to fulfil the purpose for which the easement was acquired, namely the construction and maintenance of levee banks. A very important limitation applies, in that the entering and taking onto the lot must be "*reasonably necessary*" for the carrying out of the purpose of the easement by the beneficiary of the easement. The power is not unlimited, as it must be "*reasonable*".

[38] The remainder of the incidental powers in 1(c) do not include the reference to the "*lot burdened*". Again this is deliberate. It means that those incidental powers are confined to the words of limitation set out in that clause, "*for that purpose*", that purpose being the construction of a levee bank described in Sch 1, limited by that area designated on the

incorporated plan (area "E"). This interpretation is entirely consistent when the notice is read in full.

[39] Schedule 2(2) provides consequential protection to the owners and occupiers of Lot 3, as it sets out the things by which the beneficiary of the easement must abide, like ensuring the work is done properly, with little inconvenience, little damage, leaving the lot burdened in the condition that it was found (except for levee banks -- the purpose for which the easement was taken) and making good any collateral damage. Again the words "*lot burdened*" are used. Those words make perfect sense in this context, as they are used to describe the lot to which the easement applies -- the lot burdened.

[40] In practice, if it is reasonably necessary to take tools, machinery and materials across Lot 3 to reach area "E", or to store them on Lot 3 whilst construction or maintenance of the levee bank(s) in area "E" is occurring, it must be done with the protection of the interests of the owner and occupier in mind, as set out in cl 2. The requirement for reasonableness in cl 1(c) dovetails into the requirement to "*cause as little inconvenience as practicable*", found in 2(b), meaning that the right to enter and take anything onto the lot is not an unlimited right.

[41] Much is made of the use of the plural when referring to "*levee banks*" in Sch 2 (see para [20] above). The Applicant asks the court to infer that because the existing levee bank was in existence when the easement was taken, and the fact that that levee bank occupies most of area "E", then it is permissible to carry out work outside of area "E" over the whole of Lot 3. The physical state of the land is an objective fact in the factual matrix which may aid construction, in the case of ambiguity. However, it is quite another thing to use the existing physical state of the land at the time of the granting of the easement to interpret the intention of the parties. If the argument were phrased in terms of the Council, when it set out the boundaries of the easement as area "E", knowing that there was an existing levee that filled most of area "E", having **intended, contemplated or expected** that works would be undertaken outside of area "E", this would involve an impermissible use of an objective fact. Knowledge of the physical state of the land is one thing. Using that information to infer the intention, contemplation or expectation of the parties at the time the easement was entered into is another thing. This would involve the movement from permissible to impermissible use of evidence in the light of *Westfield.*

[42] I do not believe that the existence of the levee bank in area "E" at the time of the grant of the easement is being relied on by the Applicant in any inadmissible way, in the light of what I have said in the preceding paragraph. However, it does not help the Applicant's case. There is nothing inconsistent between the grant of an easement affecting area "E" and the fact that the levee bank already existed in that area. The grant of an easement sets out the rights between the parties, not only at the time of the grant of the easement but for the life of the easement. I agree with the Respondent's submission that the easement contemplates the possibility of more than one levee bank, but only within area "E" (T(S)20.12.07, p 17, L.3ff). Over time the levee bank may be reconstructed, or even two banks may be constructed in the area, if that might be thought more appropriate or efficient. This reconciles the use of the singular in Sch 1 and the plural in Sch 2.

Conclusion on Market Value

[43] I conclude that the works permitted in the easement for a levee bank (set out in para [14]) are confined to area "E" depicted in *Ex A5* on Lot 3, DP 775599. Therefore, the claim for market value is determined as $45,000 (per para [13]).

Disturbance Claims

(a) Installation of scouring control measures to the creek (s 59(f))

[44] The Western boundary of the subject property is the middle line of Old Narara Creek (sometimes referred to as the Eastern or Niagara Park Branch of the Narara Creek) being a non-tidal stream (above Manns Rd) to which the *ad medium filum aquae* rule applies.

[45] A short distance upstream of the subject property, water in the Old Narara Creek has been diverted to flow into a larger and deeper creek known as the Narara Creek. Below this point of redirection the Old Narara Creek is described as an unconfined alluvial stream and resembles a channel carrying an intermittent and minor base flow, generally well below its capacity, except during major storm events.

[46] Extending across the subject property and generally parallel to the Old Narara Creek, in its northern section, is a depression variously described as a flood runner or an ephemeral stream. The source of flow is either a breakout of the Old Narara Creek, upstream of the subject property, and/or water arising from a different catchment. For this reason the Old Narara Creek may, at a particular time, carry a low volume of water while the ephemeral stream may be in flood. No doubt, the reverse could apply, but it is the former situation which is of importance as the ephemeral stream is at a height above that of the banks of the Old Narara Creek.

[47] Much evidence has been tendered in these proceedings demonstrating the awareness by Council of flooding issues within this area. Such evidence includes the 'NSW Government Floodplain Development Manual' (December 1986) (*Ex A9*), the 'Lower Narara Creek Floodplain Management Plan' (prepared by Kinhills for Gosford Council and dated September 1991) (*Ex A10*), and a Kinhill review of this plan (prepared for Council in December 1993) (*Ex A11*). The levee bank that was constructed on Lot 3 is part of the design to control flood waters, envisaged in the Management Plan of September 1991. Channel works and scour protection works were also proposed in an area which appears to encompass part of Lot 3 (see *Ex A10, p 37, Fig NC.6*). All of this work has not been completed, possibly due to Council budgetary constraints. This material, being extrinsic material, could not be called in aid to demonstrate the Council's intentions, contemplation or expectations when acquiring the easement affecting Lot 3 (see para 23-30, 41-42 for the interpretation of the easement in light of *Westfield*).

[48] The effect of the levee has been to contain floodwaters from the Old Narara Creek and water in the ephemeral stream (which waters previously flowed across Manns Rd and re-entered the Old Narara Creek below the culvert on this road) within the subject property so that these waters are discharged via the Old Narara Creek through the Manns Rd culvert.

[49] On the 8th and 9th of June 2007 the most significant flood event since completion of the levee occurred. It was described as a one in 10 year episode. On that occasion the water level in the Old Narara Creek was below its banks while the ephemeral stream carried a significant body of water, which was diverted by the levee towards the Old Narara Creek, and then cascaded down the near vertical banks causing scouring or slumping of the Creek in an area opposite the middle of the northern section of the levee, as seen on the DVD tendered in evidence and shown to the court (*Ex A7*).

[50] One of the features of an unconfined alluvial stream is that, over time, as erosion takes place, the actual position of the stream moves. Where the velocity and volume of water in a stream remain unchanged, this movement must be regarded as a natural occurrence.

[51] The diversion of a significant quantity of water from the ephemeral stream, consequent upon construction of the levee, into the Old Narara Creek, has made changes in that Creek which may not be regarded as a natural occurrence, raising the question of the need for remedial work.

[52] Mr Tilley, the engineer relied upon by the Council, expressed the view that, with the exception of some remedial work to the toe of the levee, at its southern end (estimated to cost $5,000), no such work was required. He came to this conclusion based on modelling of both flood levels and velocity in pre and post levee flood situations for 5 year, 20 year and 100 year episodes, taking into account the work undertaken by the Council, prior to the construction of the levee, in constructing the Manns Rd culvert and widening and re-grading of the channel downstream of it. He allowed for the fact that, over time, the vegetation in and along the channel downstream of Manns Rd will grow back to the pre-works extent. His calculations showed very small reductions in flood levels in all situations, while velocity was reduced in 13 of 15 simulations and increased marginally in the other 2.

[53] Mr Boyden, the engineer relied upon by the Applicant, gave evidence that substantial works were required to maintain the integrity of the Old Narara Creek following construction of the levee, which will cause local scour of the Creek bank, and of the adjacent flood plain at the various points where water re-enters the Creek. Mr Boyden did not undertake any modelling exercises and, amongst other things, had regard to the movement of water in the June 2007 flood and the effect on the Creek banks and adjoining land. Mr Boyden prepared two proposals, the first was estimated to cost $350,000, and the second $130,000, both estimates being inclusive of GST.

[54] The report of Mr Dupont, Valuer for the Applicant, stated: "*However, when taking into account the overall value of the property, the current and continued use of the area most likely affected, ie extreme southern flood prone land, any expenditure towards the top end of the quoted prices would be uneconomic*." Mr Jones, Valuer for the Council, in response to a question put to him in cross examination, said that it would be "*quite unreasonable*" for someone to contemplate carrying out expensive creek scouring works in the circumstances of this case (presumably because the current and permitted uses of the land, and the scour protection works would have nil or nominal effect on market value) (T11.12.07, p 18, L25).

[55] In their joint report the valuers agreed "*that this report does not address all items of disturbance, and [we] understand that the parties intend to make further submissions in relation to all disturbance items at a later date*" (*Ex R 4*, fol 3). It was for this reason that their "*before and after*" valuations addressed only compensation under sub ss 55(a), (c) and (f) of the *JTC Act*. It is clear that it was their intention that the question of compensation relating to possible engineering works would be determined by the court as disturbance under s 59 of that Act.

[56] Mr Dillon agreed that the works proposed by Mr Boyden, at an estimated cost of $130,000, would have a nil or nominal effect on the value of the subject property. However, Mr Dillon considered it important to undertake the works for four reasons: the subject property was his home; he was keen to preserve the rain forest at the southern end of the property where his cattle congregate in hot weather; the maintenance of fencing; and to preserve trees that are growing on the land. Notwithstanding those intentions Mr Dillon had not, previously, taken any steps to lodge an application to obtain the requisite approvals.

[57] During the course of the hearing Mr Dillon lodged an application with the Council and with the State Department of Water and Energy, for approval to carry out works on and adjacent to the banks of the Old Narara Creek opposite the levee bank, with similar works to be carried out to the bank of the creek upstream of the Manns Rd culvert and the area north of that section along the meandering section of the Creek. The costs of the works, as shown on the application, was $120,000, but a quotation obtained subsequently was in the sum of $134,827. Both figures are inclusive of GST. The necessary approvals have not yet been obtained (*Ex A23*).

[58] The Respondent submits that the scour protection works are not recoverable under s 59(f) for the following reasons:

i. "*'the land' in that phrase [s 59(f)] is a reference to the land acquired. It doesn't refer to the whole of the land of the owner and that needs to be borne in mind clearly.*" (T10.03.08, p 60, L34);
ii. the need or potential need for the scour works is a result of the carrying out of the public purpose rather than the "*direct and natural consequence of the acquisition*";
iii. the costs of the scour protection works could not be said to be "*reasonably*" incurred.

[59] Dealing with the first submission of the Respondent (see para [58(i)]), the court of Appeal in *Roads & Traffic Authority of New South Wales v Peak* [2007] NSWCA 66 ("*Peak*"), held at [71] (per Beazley and Tobias JJA):

> In our view, 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).

[60] The court of Appeal was dealing with the actual use of the acquired land by the dispossessed owner, not the acquiring authority. This is plain from the court's preceding discussion of the relevant authorities (see *Peak* at [56]ff). However, I do not believe that the decision has limited such actual use to only the dispossessed owner, especially in the light of *N Stephenson Pty Ltd v Roads and Traffic Authority of New South Wales* (1994) 83 LGERA 248. In that case, when talking about "*actual use*" under s 59(f), Talbot J stated (at 261):

> I am not attracted to the narrow meaning which Mr Hemmings attributed to the words 'the actual use of the land'. His contention was that the use referred to is the use of the acquired land by the authority. I am satisfied that the expression refers only to the land acquired.
>
> However, it is capable of relating to the use by the former owner as well as to the public purpose use. In my opinion it is applicable to the pre-existing use of the land by the dispossessed owner and to the use of the land by the authority after it has been acquired.
>
> There may be costs which do not fall within s 59(a) to s 59(e) although they are costs incurred as a consequence of the disturbance to the actual use of the land by the dispossessed owner. Costs relating to the actual use of the land by the acquiring authority are most likely to be incurred where only part of the land is acquired. It is capable of both interpretations and should be applied in that way.

[61] I respectfully agree with His Honour's reasoning in this regard. In my opinion, the actual use of the residue land, and more particularly that part of the Old Narara Creek frontage, where works are proposed by Mr Boyden and Mr Dillon, is so intimately connected with the actual use of the acquired land that the use of one is dependent on the other, such as to bring it within s 59(f).

[62] This is so for three reasons. Firstly, the very reason for the construction of the levee was to prevent the escape of waters across Manns Rd, thereby increasing the volume of water in the Old Narara Creek. Secondly, the increased volume of water carried by the Creek must increase the potential for erosion beyond that which must be normally expected in a meandering stream. Thirdly, the diverted waters enter the Creek in such a way that they cascade down the near vertical banks, generally opposite the levee bank, causing, or certainly increasing, the risk of erosion of those banks.

[63] Dealing now with the contention raised by the respondent that the need for scour protection work is a result of the public purpose rather than the acquisition itself (see para [58(ii)]), the purpose of the *JTC Act*, as compensatory legislation, is to justly compensate dispossessed owners. Section 54(1) states:

> 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.

> The relevant matters to be considered in determining the amount of compensation are set out in s 55. One such matter is compensation for disturbance, dealt with by s 59.

[64] Lloyd J when discussing s 59 in *Fitzpatrick Investments Pty Ltd v Blacktown City Council (No 2)* [2000] NSWLEC 139 ("*Fitzpatrick*") stated at [20]:

> Paragraph (f) of s 59 is wider than the preceding paragraphs. It is a "catch-all" provision ... [as such] the words "any other financial costs" should not, in my opinion, be read down. This does not mean, however, that this para opens the flood-gates. The costs must be "reasonably incurred" and must relate to the actual use of the land, as a direct and natural consequence of the acquisition".

His Honour's decision was confirmed by the court of Appeal in *Blacktown City Council v Fitzpatrick Investments* [2001] NSWCA 259.

[65] Gaudron J in *Marshall v Director General, Department of Transport* (2001) 205 CLR 603, when dealing with Queensland legislation which, although different from the *JTC Act*, made some comments of general application to the interpretation of any compensation legislation (at [38]):

> Although the rule that legislative provisions are to be construed according to their natural and ordinary meaning is a rule of general application, it is particularly important that it be given its full effect when, to do otherwise, would limit or impair individual rights, particularly property rights. The right to compensation for injurious affection following upon the resumption of land is an important right of that kind and statutory provisions conferring such a right should be construed with all the generality that their words permit. Certainly, such provisions should not be construed on the basis that the right to compensation is subject to limitations or qualifications which are not found in the terms of the statute.

[66] The case presently at hand is unique in several ways. Firstly, the scouring to the creek and the adjacent land does not impact on the value of the property, as the current and permitted uses do not involve the intensive use of every centimetre in that area. The scour protection work is protective and will not affect the market value (see para [70] below).

[67] The second unique feature is the fact that the acquisition crystallised the rights of the respective parties concerning a public purpose which had occurred 10 years earlier. The levee bank filled most of area "E" which I have found to be the area in which the easement is confined. The compensation entitlements of the Applicant under the *JTC Act* arose only upon acquisition. In this unique circumstance I am satisfied that the acquisition cannot be considered as if totally divorced from the public purpose, and to deny compensation under s 59(f) would be to do injustice to the Applicant.

[68] I find support for my conclusion from the comments of Talbot J in *Stephenson* at 264:

> Section 59(f) has been included in the Act to ensure that a dispossessed owner is not out of pocket for any costs that are incurred Re-establishing a use of land elsewhere or dealing with the actual impacts from the public purpose use.

[69] I find that the need for the scour protection work to the creek and the surrounding area is a direct and natural consequence of the acquisition of the easement. As I said previously, the easement was taken over the pre-existing levee which re-directs water across lot 3 in increased volumes and causes the scouring (see para 53 above for the engineering evidence).

[70] Dealing now with the reasonableness of the scour protection works (see para [58(iii)]), the valuation experts agree that those works would have nil or negligible impact on market value. Mr Dillon himself believes that the works proposed by Mr Boyden would have a nil or nominal effect on the value of the subject property; indeed during cross examination he admitted that it made no commercial sense, but rather was for the protection of his property (T11.12.07, p 84, L11ff).

[71] The Applicant submits that it would be reasonable to incur the expense required to implement Mr Boyden's proposal regarding the scour protection works. Mr Ayling submits that "*reasonableness*" in s 59(f) is not linked with

market value, and gives several examples of "*over-capitalisation*", such as the building of a tennis court or swimming pool which although increasing the enjoyment of the owners does not increase market value. On the other hand, the Respondent submits that it is not "*reasonable*" to incur those expenses on the scour protection works and that Council should not have to pay to stabilise something that was never stable.

[72] I agree with the Applicant's submission that reasonableness is not limited to market value. Works may be reasonably undertaken, and expense so incurred, without any increase in market value. Reasonableness is to be assessed with an independent mind, having regard to the circumstances of the case.

[73] I am satisfied that the works proposed by Mr Boyden and Mr Dillon extend beyond what is required or necessary to address the consequences of the increased flow of floodwaters in and into the Old Narara Creek following the construction of the levee. Accordingly, only a proportion of the cost of the works can properly be claimed as compensation arising from the acquisition (see *Fitzpatrick*). That sum can be calculated only when the works have actually been completed and the appropriate proportion of the final cost determined. For this reason I propose to follow what Lloyd J did in *Fitzpatrick*, and grant leave to Mr and Mrs Dillon to apply to the court when the works have been completed, if the issue cannot be satisfactorily negotiated with the Council, so that compensation for disturbance under s 59(f) can be assessed.

(b) Removal and replacement of unsuitable fill (s 59(f))

[74] Following a rain event during construction of the levee, it became apparent that water which, in the past, would have flowed across Manns Rd, was collecting in a low-lying area immediately upstream of the levee. Mr Dillon and Mr Simpson, the Council engineer responsible for the levee works, agreed that this low-lying area should be filled and a small dam constructed nearby.

[75] The work was carried out in late 1995 and completed in one day and, in due course, it grassed over. There is no suggestion that water continued to collect in this area, so the stated and agreed objective was satisfied. However, some years later, Mr Dillon discovered that the fill Simpson used contained bitumen, concrete and rubble, which was then covered by soil, but only to a depth ranging from 50 to 100mm.

[76] The Applicant seeks compensation for rectifying this problem, and submits that it:

> is perfectly obvious that the necessity for this work is brought about by the construction of the levee, which impounded the water which previously ran off to Manns Rd and gave rise to the necessity to fill the depression and replace it with a substitute watering point. There can be no doubt that the work was not done by the council to a satisfactory standard". *(Applicant's submissions, 7.03.08, para 32).*

The collecting of the water in the low lying area is claimed to be a direct and natural consequence of the acquisition, and if "*it was necessary [and] reasonable for the council to fix the problem it must be reasonable and necessary for any part of the job that it began but didn't properly finish, to be finished. It's all part of the same course of action*" (T11.03.08, p 38, L38ff).

[77] The Respondent submits that "*the removal of fill has nothing to do with the acquisition of the land*". It is *"not a financial cost reasonably incurred relating to the actual use of the land acquired as a direct and natural consequence of the acquisition*" (T11.03.08, p 8, L10ff). Rather, the disagreement over the suitability of the fill is a civil dispute, "*unrelated to the just terms legislation which is all about compensation for the compulsory acquisition ...*" (T11.03.08, p 9, L34).

[78] There is substantial disparity between the evidence of Mr Dillon and that of Mr Simpson as to the area that was

filled; Mr Dillon, and the quote on which the claim is based, refers to an area of 900 square metres, while Mr Simpson states that the area filled was 12 square metres.

[79] It appears that there was no agreement as to the specification of the fill material, but Mr Simpson states the fill he used was "*soil*". The only information on this subject was Mr Simpson's uncontradicted evidence, concerning a conversation, in late 1995, in which Mr Dillon allegedly said words to the general effect:

> I am still concerned about the spoil which has been left on my property. I would like the depression around the Melaleuca Forest filled to make that area of my property level and to have a pond excavated nearby. I will do you a deal. If you fill the depression near the Melaleucas and dig the pond I will be satisfied with any of the earth defects left on the balance of the property.

[80] The fact that the fill that was placed by Council has had the desired effect of stopping the ponding in front of the levee bank, combined with the lack of specificity of fill material in the agreement reached by Mr Dillon and Council, through Mr Simpson, leads me to conclude that any costs incurred or likely to be incurred in respect of removal of the fill cannot be said to be reasonably incurred and so claimable as a consequence of the acquisition. The claim under this head must, therefore, fail.

(c) Rectification and establishment of a vegetation screen at the front of the block (landscaping) (s 59(f))

[81] This claim relates to costs actually incurred in replanting the levee bank (including on the Manns Rd side) after the failure of the screen planting provided by the Council. Included in this claim is the cost of irrigation works Mr Dillon undertook on/for the levee bank.

[82] Prior to construction of the levee bank the Manns Rd frontage was not landscaped. Nevertheless, there was a mixture of privet, camphor laurel, gum trees and native vegetation, in a strip 1 to 2m wide, intertwined through a post and wire fence, which provided a visual screen to the subject property.

[83] The Council accepted responsibility, as part of its works, for landscaping that part of the levee which slopes towards Manns Rd. The initial planting was vandalised and a number of the replacement plants died. The Council agreed to replant the area with smaller and less noticeable trees and engaged the nursery, on the opposite side of Manns Rd, to maintain the plantings for six months to ensure their survival. However, a number of those plants subsequently died.

[84] Mr and Mrs Dillon responded (having become dissatisfied with the Council's inaction over a period of years), in or about the years 2004 and 2005, by purchasing replacement plants, installing a watering system and purchasing a substantial quantity of mulch.

[85] The Applicant submits that the costs that are claimed in relation to the landscaping are simply those of rectifying the landscape work that the Council did on the levee. It is put that "*if it was reasonable for the council to carry out the work in the first place then it would have been reasonable and just as reasonable for Mr Dillon to wish to ensure that the work was done properly*" (T11.03.08, p 37, L14ff). The landscaping is related to the "*actual use*" of the land, and the financial cost of that landscaping is a direct and natural consequence of the acquisition.

[86] The Respondent contends that the landscaping works have "*improved the value of the land by improving the physical circumstances that existed on the land prior to the acquisition*", and that the irrigation expenses incurred by Mr Dillon were "*voluntarily incurred so as the improve the water supply to the landscaping over Lot 3 generally and which had the effect no doubt of improving the value of his property in at least an equivalent amount*" (Respondent's submissions, 14.12.07, p 9-10).

[87] I acknowledge that the works and planting undertaken by Mr Dillon must have, to some degree, improved the landscaping beyond that undertaken by the Council, but no evidence was adduced, nor was it possible for me to ascertain, on the site view, the quantum of that improvement, compared with what would have been the result without Mr Dillon's intervention. However, I am satisfied that the combined effect of the landscaping and the levee bank has resulted in a very effective visual screen, with acoustic benefits, the added value of which, to the subject property, when compared with the pre-acquisition situation, substantially exceeds the identified costs incurred by Mr Dillon. For this reason these expenses were not "*reasonably incurred*" by the Applicant. Compensation, as claimed, under this head must, therefore, be refused.

(d) Legal, valuation and ancillary costs before acquisition

[88] The parties have agreed that the compensation under this head of consideration is $5,000.

Compensation Summary

[89] Accordingly, I have come to the following conclusions regarding the claimed compensation:

(a) The claim based on the loss in Market value is determined in the amount of $45,000.
(b) The disturbance claim in respect of the removal and replacement of unsuitable fill is declined.
(c) The disturbance claim in respect of the rectification and establishment of a vegetation screen at the front of the block is declined.
(d) The disturbance claim in respect of the installation of scouring control measures to the creek is allowed, but the quantum is not determined, as the appropriate quantum can be assessed only after those works have been completed.
(e) The disturbance claim based on legal, valuation and ancillary costs associated with the acquisition is determined in the amount of $5,000.

[90] The parties are directed to bring in short minutes of order to reflect these reasons.

[91] Leave is granted to Mr and Mrs Dillon to apply to the court when approved scour protection works have been completed so that compensation for disturbance under s 59(f) can then be assessed, if it cannot be agreed with the Council.

[92] The question of costs is reserved.

[93] All the exhibits may be returned, except *Ex A13* and *Ex A14*.

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Solicitors for the : *R E S P O N D E N T*

Solicitors for the : *Mr P Tomasetti SC*

Solicitors for the : *Storey & Gough*