

VALUATIONS

CASE NOTE



Cushman & Wakefield Valuations have a dedicated Government, Legal & Corporate team specialising in compulsory acquisition, S88K easement acquisition and general real property litigation matters. We are pleased to continue our ongoing series of valuation case notes with our summary of the recent decision of the NSW Land & Environment Court in *Roads and Maritime Services v United Petroleum Pty Ltd*.

Roads and Maritime Services v United Petroleum Pty Ltd [2019] NSW CA 41

Before

Basten JA, Macfarlan JA, Payne JA, Sackville AJA, Preston CJ

Key Issues

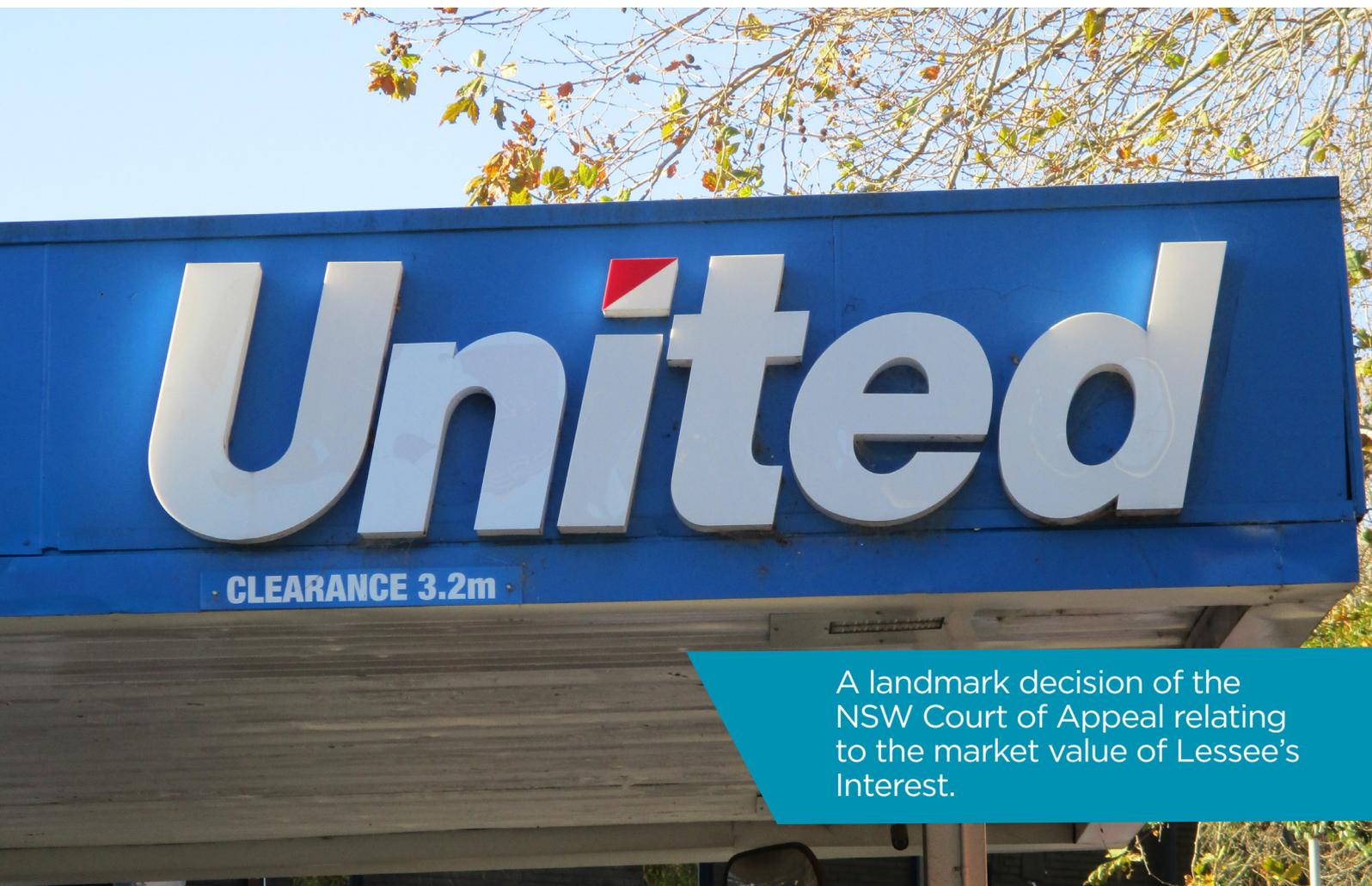
Land Acquisition (Just Terms Compensation) Act, 1991.

LAND LAW – compulsory acquisition – compensation – interest in land acquired terminable on one month's notice – claim for loss attributable to disturbance – termination of business – claim for loss of ongoing business profits – *HAC v George D Angus* not followed.

LAND LAW – compulsory acquisition – compensation – loss attributable to disturbance – claim for additional rental paid to acquiring authority for period between compulsory acquisition and vacant possession.

Decision

Appeal allowed. Costs payable by United for appeal.

A photograph of a large blue sign with the word "United" in white, 3D block letters. The sign is mounted on a wooden structure. Below the main sign, there is a smaller white sign with the text "CLEARANCE 3.2m". The background shows some trees with autumn-colored leaves and a clear blue sky.

United

CLEARANCE 3.2m

A landmark decision of the NSW Court of Appeal relating to the market value of Lessee's Interest.

Matter

In August 2015 Roads and Maritime Services (*RMS*) compulsorily acquired the Harwood Roadhouse for the Pacific Highway upgrade between Woolgoolga and Ballina.

The land was owned by two special purpose companies and leased to a third, related company, United Petroleum Pty Ltd (*United*), which operated the service station and restaurant business. The lease to United was an oral agreement terminable with one month's notice.

The landowners were offered and accepted compensation in excess of \$3M for the freehold.

In the Land & Environment Court decision of 27 April 2018, United was awarded (a) \$2 million as the capitalised sum for the loss of the business and (b) \$83,000 for the additional rental paid to the acquiring authority for continuing possession in the period between compulsory acquisition and vacant possession.

RMS appealed the decision claiming United's compensation should be nil.

Decision in Brief

Loss of Profits

As United had nominal tenure, no claim was made for market value. As United's interest had no market value it should not be compensated for the loss of future profits as a result of the limited value of the interest held.

The decision in *HAC v George D Angus* is set aside in so far as it allowed the loss of future profits to be claimed under s.59(f). The primary Judge in *HAC v George D Angus*, Preston CJ, agreed at 123 in this appeal that his earlier decision was wrong.

Additional Rental Paid Post Acquisition

As the rental claimed was between the acquisition and the date the lessee vacated the premises, the period of occupation was determined to be a direct and natural consequence of the decision of the tenant to stay in occupation at the agreed fee (and not as a direct and natural consequence of the acquisition). Further, the cost was a direct and natural consequence of the acquisition of the freehold interest, not the lessee's interest. The lessee was therefore not entitled to compensation for the additional rental paid to RMS.

Key Comments

Disturbance - Section 59 (f) of the Just Terms Act - 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.

In the original judgement before, Robson J, it was found that the compulsory acquisition terminated the business operated on the land. There was no relocation. Adopted the reasoning in *HAC v George D Angus*, Robson J determined compensation by the capitalisation of lost profits.

In this Appeal the distinction between market value and disturbance as applied to United's interest was discussed.

Basten JA

At 20 "The point of distinction between disturbance and market value may be readily explained, both in relation to land used and operated for commercial purposes by the owner and land the subject of a lease where the lessee uses the land for commercial purposes. Assuming in each case that the actual use is the best economic use available, the market value of the land may be calculated by capitalising net maintainable earnings at an appropriate discount rate. (this was the exercise undertaken by the valuers in the present case). Where the land is put to a commercial use by the lessee, "the lessee would be entitled to an amount to represent the value of the lease to him for the balance of the term ... as his share of the full value of the land", as explained by *Williams J in Geita Sebea v The Territory of Papua*. In that case the lessee was the government and hence the value of the lease was deducted from the compensation payable by the acquiring authority to the owner".

At 21 " There was no authority relied upon by United which involved compensation for the acquisition of land used for commercial purposes in which some additional amount had been relied upon on account of "disturbance" to reflect the loss of a commercial business operation being conducted on the land. Rather, the capacity of the land to support a profitable commercial operation has always been understood to be reflected in the market value of the land, which is compensable as such. Furthermore, the market value of an interest in land is limited to the value of the legal interest vested in the claimant which was terminated by the compulsory acquisition ..."

At 22 "United did not seek to deny the proposition that its leasehold, terminable at will by the lessor, had no market value. Rather, it sought to avoid the conclusion that the land had no commercial value for it by claiming the full commercial value of the business operation undertaken by it on the land. However, as a matter of principle that which may be best described as the basis of calculation of market value of an interest in land cannot be re-characterised as a form of consequential loss, known as disturbance, so as to be fully recoverable, in the circumstances where the interest in land is so attenuated as not to enjoy any relevant market value".

At 47 " The error in this passage lies in reading "any other financial costs...relating to the actual use of the land" as equivalent to the loss of any profit which might flow from the continued operation of the business on the basis that the business would have continued for an indeterminate period regardless of the absence of any secure interest in land...."

Key Comments

(Cont'd)

At 48. "This approach was erroneous because it sought to read the relevant words in par (f) out of their statutory context. As already noted, adopting a purposive or contextual approach supports the conclusion that the costs associated with the termination of the actual use of the land are properly limited to such costs as those of relocation of the business to other premises.

At 53 "This approach is also consistent with the carefully calibrated paragraphs of s.59. For example, it would not be consistent with the statutory scheme to allow a prior owner which had relocated its business to nearby premises to recover limited costs of relocation, but to allow a prior owner which had been unable to find alternative premises to recover the lost profits of the business which was terminated in circumstances where its interest in land had no market value.

Section 34 of the Just terms Act – Former owner's right to occupy land until compensation paid etc – United's claim for additional rental paid post acquisition.

Basten JA

At 63 "It is not necessary to consider whether McDonald was correctly decided on its facts; it is sufficient to note that it provides no authority for the proposition that the occupation fee under s.34 is recoverable attributable to the disturbance of the land pursuant to s.59(f). It is true that the fees paid by United related to the actual use of the land at the date of acquisition, in that they were a condition of the tenant continuing that use."

At 64 "However, the cost to United was the direct and natural consequence of the acquisition, not of the tenant's interest, but of the fee simple estate. Section 59(f) should be understood to refer to costs incurred as a direct and natural consequence of the acquisition of the claimant's interest in land. Furthermore, even if the provision covered consequences to a tenant of the acquisition of its landlord's interests in the land, the cost, although causally related to the event, was a direct and natural consequence of the decision of the tenant to stay in occupation for the agreed occupation fee. This conclusion is consistent with the inference to be drawn from s34(4)."

Costs

At 69 "It is not uncommon for a public authority which stands to benefit on an appeal from the resolution of a principle having general application, and which requires leave to appeal, to be required as a condition of leave to pay the costs of the other party in any event. However, in the present case, leave was not required and it was not open to impose such a condition. Further, the respondent was an arm of a large business operation pursuing its commercial interests, with access to appropriate legal advice. There is no sufficient reason why the usual principle should not apply, namely that costs follow the event."

Impact

1. A tenant's interest needs to have a market value in order to claim disturbance under s.59(f).

Loss of future profits is not a valid claim for "any other financial costs" as Disturbance under Sec 59(f) of the Act.

2. The decision in *HAC v George D Angus* is set aside in so far as it allowed the loss of future profits to be claimed under s.59(f).

The primary Judge in *HAC v George D Angus*, Preston CJ, agreed that the construction of s 59(f) of the Just Terms Act should be revisited and revised and considered that a different construction is to be preferred.

Should you have any queries regarding this recent decision or wish to discuss compulsory acquisition or litigation matters involving real property, please feel free to contact our Government, Legal and Corporate team below.

In addition to this Case Note, Cushman & Wakefield Valuations look forward to providing updates from our wider team as we expand nationally over 2019.



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