Dispossessed business owners see a narrowing of just compensation

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Snapshot

- A recent Court of Appeal decision has narrowed the scope of compensation for many resumed businesses, notwithstanding a clear statutory obligation to 'justly compensate' them.
- There is now uncertainty about whether 'financial costs' include financial losses.
- Given the likelihood that many more claims for compensation will find their way to the courts as more public projects are rolled out across NSW, Parliament might consider clarifying the statutory promise of 'just compensation'.

When land on which a business is conducted is resumed for a public purpose, compensation for the owners of that business (typically under a lease) must be assessed under the *Land Acquisition (Just Terms Compensation) Act 1991* ('***Just Terms Act***'). A recent NSW Court of Appeal ('**CoA**') decision has narrowed the amount payable to such business owners notwithstanding a clear statutory obligation to 'justly compensate' them (ss (3)(1)(b) and 54(1)).

On 6 March 2019, a full bench of the CoA handed down judgment in *Roads and Maritime Services v United Petroleum Pty Ltd* [2019] NSWCA 41 ('***United***'). Although the Court's decision was unanimous the reasoning propounded in the four separate judgments was not uniform.

United was an appeal from the decision of Robson J in the Land and Environment Court on a claim for compensation for the compulsory acquisition of a leasehold interest in land (*United Petroleum Pty Limited v Roads and Maritime Services* [2018] NSWLEC 35 '***United LEC***'). The CoA dismissed United's claims under s 59(f) (now s 59(1)(f)) for loss of profits and additional post-acquisition rent in the amounts of approx. $1.9M and $83,000 respectively. In doing so, the CoA overturned settled principles established in *George D Angus Pty Ltd v Health Administration Corporation* [2013] NSWLEC 212 ('***George DA LEC***'), which was affirmed on appeal in *Health Administration Corporation v George D Angus Pty Ltd* [2014] NSWCA 352 ('***George DA***').

In the wake of *United*, business owners who had operated on resumed land will now find it more difficult to claim compensation for loss of future profits, particularly where their tenure was not adequately secured and relocation prospects are uncertain.

References in this article to s 59(a)-(f) are expressed as s 59(1)(a)-(f), adopting the current numbering of the *Just Terms Act*.

Background

Land owned by two companies related to United was resumed by Roads and Maritime Services ('**RMS**'). United operated a restaurant and service station on the land under an oral lease, terminable on one month's notice. The owners had separately agreed an amount of approximately $3M with RMS for the market value of the fee simple estate in the acquired land.

At first instance, Robson J determined that United's business could not be relocated and that its compensation should be assessed on an extinguishment basis as a 'loss of a stream of profits', disregarding its 'weak tenancy' (*United LEC* at [253]). The experts for both parties assessed United's loss by adopting the capitalised maintainable earning methodology, which involved an assessment of the average annual profit of the business multiplied by an appropriate discount rate for risk (*United LEC* at [256]).

Section 59(1)(f): the 'catch-all'

Section 59 of the *Just Terms Act* sets out six heads of compensation payable for disturbance loss. Paragraph (f) encompasses '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.'

Section 59(1)(f) is capable of 'wide application' if 'read in isolation' (*United* at [94]). In *Fitzpatrick Investments Pty Limited v Blacktown City Council (No.2)* [2000] NSWLEC 139 Lloyd J described s 59(1)(f) 'as a 'catch-all' provision', the meaning of which 'should not be read down'. Such an extensive construction was not endorsed at first instance by Preston CJ in *George DA LEC*, who cautioned that paragraph (f) did not 'catch all' financial costs but caught only such claims that fell squarely within the meaning of its terms (*George DA LEC* at [80]).

Relevantly, Preston CJ, and the CoA, determined in the *George DA* litigation that:

- the meaning of 'financial cost' in paragraph (f) included financial losses (*George DA LEC* at [100]); and
- its operation was not limited by reference to the term and circumstances of the acquired lease (*George DA* at [69]).

Constraining the 'catch-all' approach

For the separate reasons given in *United* by Basten JA (Macfarlan JA agreeing), Sackville AJA (Payne JA agreeing) and Preston CJ, the CoA has now overturned the construction of s 59(1)(f) adopted in *George DA,* materially reducing the scope of claims capable of falling within para (f).

The CoA criticised the earlier judicial over-reliance on the plain, dictionary meaning of the statutory language in para (f). The bench uniformly endorsed and approached the exercise of interpretation by reference to context and purpose.

Basten JA identified contextual constraints applying to para (f):

- a 'temporal' constraint fixing the compensation payable by reference to the term of the acquired interest;
- a 'physical' constraint limiting compensable financial costs to only those relating to the actual use of the physical land at the time of the acquisition;
- a 'causal' constraint requiring the claimed costs to be a 'direct and natural consequence' of the 'acquisition', as distinct from the public purpose; and
- a 'semantic' constraint on the meaning of the words 'any other' such that this phrase qualifies the meaning of 'financial costs' as an exclusive category of costs separate to, but informed and limited by, those allowed under ss 59(1)(a)-(e). Therefore, section 59(1)(f) does not include claims for those categories of costs already covered by ss 59(1)(a)-(e) nor should the meaning of 'any other' be taken to allow claims for **all** other costs not described in those preceding paragraphs (*United* at [10]-[14]).

His Honour determined, relevantly, that the acquisition of United's interest did not **cause** the termination of the business but only the loss of revenue. Such loss, being a loss of opportunity to continue to use the land, was not a 'financial cost' compensable under para (f). When read in context, s 59(1)(c) and (f) demonstrate 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' (*United* at [48]).

Sackville AJA considered that United's 'financial costs' 'incurred as a direct and natural result of the acquisition *of the tenancy at will'* (emphasis added) were limited to its secured tenure of one month. His Honour held that it was not enough to simply demonstrate that the claimed costs would not have been incurred by the claimant 'but for' the acquisition, concluding that '[t]he inquiry needs to go further' (*United* at [119]). In this case, the Court had to have regard to United's tenure.

Preston CJ, sitting as a Judge of Appeal, synthesised his reconsideration of para (f) against a summary of appellate cases that had previously considered it. He identified two principal matters that apply to further restrict its meaning. His Honour considered that on the termination of a use of land by the acquisition, the costs arising from the loss of opportunity to continue that use were not costs relating to the land's 'actual use'. Further, the words 'direct and natural consequence' demand a 'direct relationship, between the acquisition and the incurring of the financial costs'. Insofar as that relationship is interposed by a 'third variable or action', the costs fail the requisite causal standard. Preston CJ therefore agreed with Sackville AJA that United's claim should be limited to only the loss of one month's profits (*United* at [156]-[161]).

Uncertainty regarding financial losses

In dicta, the majority, (Preston CJ dissenting) expressed doubt that 'financial costs' in s 59(1)(f) included financial losses. RMS did not challenge the decision in *El Boustani v Minister for Administering the Environmental Planning and Assessment Act 1979* [2014] NSWCA 33, where compensation for loss of profits was awarded as part of a relocation claim under s 59(1)(c). In particular, Sackville AJA (Payne JA agreeing) noted the meaning of financial costs should be limited to claims for 'actual outgoings or liabilities incurred or to be incurred by the relevant person' (*United* at [92]). Until this question is resolved in an appropriate case, claims for financial losses remain compensable under s 59(1)(c) or (f).

Rent claim

The CoA determined that United's claim for rent paid to RMS, insofar as it exceeded what it paid under its acquired lease, was not compensable under s 59(1)(f) because it was United's decision, not a direct result of the acquisition, to continue to occupy the land.

Observations

The different approaches of the judges do not allow for an easy statement of principle that might be readily applied in advising acquiring authorities or affected business owners. This may give rise to less constructive negotiations and increased litigation.

In addition to the majority's doubt that 'financial costs' include financial losses, other complexities arising from the decision are:

i. Basten JA and Payne JA observed that the market value of the acquired land included the capacity of that land to generate a profit in the future. That may be theoretically correct in circumstances where the land is owner-occupied, but it is distinguishable from (more common) situations where land is subject to separate uses as between landlord and tenant.

ii. While Preston CJ and Sackville AJA considered a claim for loss of profits might be available subject to the tenure of the acquired lease, Basten JA held that no claim for loss of profits was compensable under s 59(1)(f). It remains to be seen how the courts will assess a similar claim in circumstances where the claimant had the benefit of a long-term registered lease.

iii. The comments of Preston CJ may be taken to apply equally to bar compensation for stamp duty costs by 'land bankers' to the extent that those costs are incurred after the termination of the 'actual use' of the acquired land as a 'land bank'.

Conclusion

Given the likelihood that many more claims for compensation will find their way to the Courts as more public projects are rolled out across NSW, Parliament might consider another review of the *Just Terms Act* to make clearer the statutory promise of 'just compensation'. **LSJ**