LAND COURT OF QUEENSLAND

CITATION:	*Morris v Department of Natural Resources and Water* [2010] QLC 0021
PARTIES:	Roma Janice Morris (appellant) v. Chief Executive, Department of Natural Resources and Water (respondent)
FILE NOS:	AV2007/0071 and AV2008/0363
DIVISION:	Land Court of Queensland
PROCEEDING:	Appeal against annual valuation under *Valuation of Land Act 1944*
DELIVERED ON:	10 February 2010
DELIVERED AT:	Brisbane
HEARD AT:	Brisbane
MEMBER:	Mr PA Smith
ORDERS:	**As regards AV2007/0071:** **(i) The appeal is allowed.** **(ii) The unimproved value of Lots 9 and 10 on RP46719, Parish of Toombul, County of Stanley as at 1 October 2006 is determined at One Million Two Hundred and Forty Thousand Dollars ($1,240,000).** **As regards AV2008/0363:** **(iii) The appeal is allowed.** **(iv) The unimproved value of Lots 9 and 10 on RP46719, Parish of Toombul, County of Stanley as at 1 October 2007 is determined at One Million Three Hundred and Ten Thousand Dollars ($1,310,000).**
CATCHWORDS:	Valuation – Particular factors in valuation – Restrictions on use – Vegetation Protection Order (VPO) over large fig tree on property – Effect on development and amenity – whether land remained suitable for residential purposes – Allowance 25% made on merits of case Expert evidence – unreliable evidence – evidence of

	deceased expert – nature of evidence – expert conclusions consistent with non-expert evidence
APPEARANCES:	Mr AC Barlow for the appellant Mr WA Isdale for the respondent
SOLICITORS:	Crown Solicitor for the respondent

Introduction

[1] This decision relates to two appeals against annual valuations made by the Chief Executive, Department of Natural Resources and Water relating to land owned by the appellant. One appeal[1] relates to the valuation of 1 October 2006, whilst the other matter[2] relates to the valuation of 1 October 2007. Both appeals relate to the same property which is located at 56 Windermere Road, Hamilton. The subject land has a real property description of Lots 9 and 10 on RP46719, Parish of Toombul, County of Stanley, and has a total area of 2,039m².

[2] As regards the 1 October 2006 valuation, the value as determined by the Chief Executive is $1,300,000. The appellant contends for a value of $700,000. With respect to the 1 October 2007 valuation, the Chief Executive's valuation is $1,400,000, whilst the appellant contends for a value of $100,000.

Previous Appeals

[3] In addition to the two appeals currently under consideration, since 1998 there have been four other appeals made to the Land Court with respect to annual valuations relating to the subject land.[3] Two of these matters[4] have been subject to formal determinations by the Land Court.[5]

[4] The consistent feature in each of the appeals brought before the Land Court, including the two appeals currently under consideration, relate to the impact that the existence of a Vegetation Protection Order ("VPO") which exists over the subject land has on the unimproved value of the land. The VPO relates to a very large White Fig tree (Ficus Virens) located in relatively close proximity to the central part of the northern boundary of the subject land.

The property

[5] The subject land is situated at the corner of Windermere Road and Dennison Street, Hamilton. Hamilton is a highly desirable suburb in Brisbane, located approximately 5 km north-east of the Brisbane GPO. The subject land enjoys all the normal services of town

---

1 AV2007/0071.
2 AV2008/0363.
3 See AV1998/593; AV2002/0280; AV2003/0680; and AV2005/1734.
4 AV1998/593 and AV2002/0180.
5 See *Estate of LV Bressow (Deceased) v Chief Executive, Department of Natural Resources*, Land Court Brisbane 23 December 1999 and *Morris v Department of Natural Resources and Mines* [2003] QLC 0037.

water, sewerage, electricity, gas and telephone services. Both Windermere Road and Dennison Street are bitumen sealed roads with concrete kerb and channelling. Windermere Road is a relatively busy suburban road, whilst Dennison Street is narrow.

[6] Shopping and commercial facilities are located in Racecourse Road, approximately 550 m to the east of the subject land. The Centro Toombul Regional Shopping Centre is located approximately 2.5 km to the north of the subject land.

[7] The subject land is well serviced by public transport. Ascot train station is located approximately 700 m to the north of the property, and the subject also enjoys regular bus services in the area.

[8] Development in the area surrounding the subject land is predominately single detached residential in nature, comprising a mixture of quality character, post-war and contemporary design houses.

[9] The subject land comprises two separate allotments that together form a near rectangular shaped corner allotment with a north-easterly aspect. The land falls gradually from the Windermere Road frontage to the northern boundary, the total fall being approximately 5 m from the north-east corner to the south-west corner, an overall distance of approximately 75 m. Frontage to Windermere Road is 30 m, whilst the side frontage to Dennison Street is approximately 69 m. There is a 2 m wide drainage easement along the rear boundary held by the Brisbane City Council.

[10] The subject land is developed for residential purposes. It comprises a single dwelling and swimming pool. The house has been built towards the southern end of the property facing Windermere Road.

The Appeals

[11] The grounds of appeal with respect to the 1 October 2006 appeal are stated in a relatively simple form as follows:

> "The tree the subject of VPO VIC FIR04 continue(s) to grow with increasingly adverse effect/affect on the subject land by overhang; shade &/or root undermining; and inhibition of breeze &/or views."

[12] The grounds of appeal with respect to the 1 October 2007 appeal, whilst more detailed than those made for 1 October 2006, also relate directly to the impact of the White Fig tree on the value of the subject land. The grounds of appeal with respect to the 1 October 2007 appeal are as follows:

> "The valuation fails to take proper account of the following facts:
>
> (1) that the root system of the White Fig tree growing on the northern boundary of the subject property extends southwards at least as far as the southern extremity of the appellant's residence;
>
> (2) that this root system is continuing to grow laterally to the South, and to the eastern and western boundaries at the southern extremity of the subject land;

(3) that this tree (including the root system) is subject to a Vegetation Protection Order;
(4) that, at the time of the valuation, the extent of the root system was such as to render the introduction of a 'root barrier', as postulated by the Respondent, not lawfully possible;
(5) that any construction on the subject land, in its unimproved condition, is therefore not lawfully possible; and
(6) that the unimproved value of the subject land is therefore nugatory."

Relevant Legislative Provisions

[13] Pursuant to s.13 of the *Valuation of Land Act 1944* (the "VLA"), the respondent is required to determine the unimproved value of the land.

[14] Unimproved value is defined in s.3(1) of the VLA as follows:

> **"3.(1)** For the purposes of this Act –
> **'unimproved value'** of land means –
> (a) in relation to unimproved 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 bona fide seller would require; and
> (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 bona fide seller would require, assuming that, at the time as at which the value is required to be ascertained for the purposes of this Act, the improvements did not exist."

[15] As the subject land in this matter is improved, put simply, the task is to find the market value of the land on the assumption that none of the improvements are on the subject land. An assessment is then undertaken as to the highest and best use of that land.

[16] As then President Trickett said in *Fairfax v Department of Natural Resources and Mines* [2005] QLC 0011 at paragraphs 11 and 12:

> "The principles for determination of the 'market value' of land were established by the High Court in *Spencer v The Commonwealth* (1907) 5 CLR 418. In that case, the High Court found that the value of land is determined by the price that a willing but not over-anxious buyer would pay to a willing but not over-anxious seller, both of whom are aware of all the circumstances which might affect the value of the land, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding facilities, the then present demand for land and the likelihood of a rise or fall in the value of the property. (See Griffith CJ at 432 and Isaacs J at 441).
>
> It has been well established that the unimproved value of land is ascertained by reference to prices that have been paid for similar parcels of land. In *Waterhouse v The Valuer-General* (1927) 8 LGR (NSW) 137 at 139, Pike J said that:
>
> > 'Land in my opinion differs in no way from any other commodity. It certainly is more difficult to ascertain the market value of it but – as with other commodities – the best way to ascertain the market value is by finding what lands comparable to the subject land were bringing in the market on the relevant date – and that is evidenced by sales.'"

I respectfully agree with those observations.

Presumption of correctness of valuation

[17] I now turn to section 33 of the VLA, which states as follows:

> **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.

[18] This section was considered by the High Court in the case of *Brisbane City Council v The Valuer-General for the State of Queensland* 1977-78 140 CLR 41 where Justice Gibbs (as he then was) made the following observation at page 56:

> "In my opinion once it is shown that in making the valuation the Valuer-General acted upon a wrong principle, or made a serious error of fact, the presumption created by s. 13(7) is rebutted."

It should be noted that s. 33 of the VLA is in essentially the same terms as what was then s. 13(7) of the Act.

The Hearing

[19] Mr Barlow of Counsel appeared on behalf of the appellant at the hearing of the matter. The respondent was represented by Mr Isdale of Counsel.

[20] Evidence was given on behalf of the appellant by the appellant's husband, Mr Graeme Oriel Morris. The appellant did not rely on any valuation evidence. The appellant also relied at the hearing on an expert report by John Mulholland. Unfortunately, Mr Mulholland passed away prior to the matter being heard.

[21] The respondent relied on the evidence of an expert in arboriculture, Mr Jason-jay Fletcher, together with that of an expert valuer, Jennifer Robyn Manners. Ms Manners is employed by the respondent.

[22] A view was undertaken at the subject land in the presence of the parties. Given the conflicting evidence regarding the size and impact of the White Fig tree, the view was of considerable assistance to the Court.

Expert Report of Mr John Mulholland

[23] The appellant, through her witness, Mr Morris, sought to tender an expert report by Mr John Mulholland. Mr Isdale for the respondent objected to the tendering of the report. The principal aspect of Mr Isdale's objection was that the respondent was prejudiced by not being able to cross-examine Mr Mulholland. Mr Morris gave evidence that, but for his unfortunate death, Mr Mulholland would have been called by the appellant to give evidence. The expert report by Mr Mulholland was provided to the respondent by the appellant some considerable time prior to the hearing of the matter, and the respondent's expert, Mr Fletcher, referred substantially to Mr Mulholland's report in his expert report.

[24] After hearing from Counsel for the parties, I ruled that the expert report of Mr Mulholland was admissible in the circumstances of the case at hand but that issues of weight that the

Court should give to Mr Mulholland's report would be the subject of submissions by Counsel at the conclusion of the hearing. Due to the importance of Mr Mulholland's report as a basis for my findings and conclusions with respect to the appeals currently before me, I consider it appropriate to incorporate into these reasons my reasons for allowing Mr Mulholland's report into evidence. Those reasons, taken from pages 9 to 10 of the transcript, were as follows:

> "Counsel for the appellant seeks to tender a report prepared by an expert Mr John Mulholland. There is some difficulty with this report from a technical sense in that there were orders of the court that the report was to be filed and served. It is not in dispute between the parties that the report is in the possession of the respondent and it would seem the report has at least been intended to be filed in the court and may very well have been. In this regard I note that the membership of the person handling the case in the court has changed as has the relevant officers in support so it may be that the report is simply misplaced, so I make no adverse finding against the appellant with respect to the issue of filing of the report because in the circumstances of the case, save for not having seen the report prior to the hearing today, it is of no consequence.
>
> The situation is that by evidence provided by Mr Morris today it has been detailed that Mr Mulholland has unfortunately passed away subsequent to preparation of his report. Mr Morris has further given evidence that he fully intended to call Mr Mulholland to give evidence and would have but for his untimely death. Mr Isdale for the respondent objects to the receipt of the report into evidence on one ground which is that the respondent is denied the opportunity to cross-examine Mr Mulholland. This is certainly the case and Mr Isdale gets support for his submission from the case of *Cupo v. Chief Executive, Department of Natural Resources* [2009] QLC 16. I note in that case that Member Jones was confronted with a different circumstance in that the appellant in that case did not intend to call the person who had apparently made an expert report and had not provided a copy of that report to the respondent. In the case at hand I particularly note that the respondent's expert has prepared their report in a responsive manner, at least in part, to the report prepared by Mr Mulholland. Neither counsel has taken me to the authorities that exist on receipt of evidence from persons are subsequently deceased. However, I am aware from my general recollection of those precedents that there are numerous occasions where reports and evidence and affidavits have been received into evidence by the courts in circumstances such as we have here. Further, I take into account the provisions of the *Land Court Act* that the court is not bound by the rules of evidence but is to act in accordance with principles of equity and good conscience for achieving justice in the matter. In light of the different circumstances in this case compared to those in *Cupo's* case I am prepared to accept the report into evidence, but I also take account of Mr Isdale's submissions that the weight that the court will have in considering that report will indeed be somewhat less than would normally be given to an expert report given the circumstances of Mr Mulholland not being available to give evidence. I will hear from counsel at the end of the hearing as to the respective weight that I should give to that report in light of Mr Morris's evidence and the other evidence to be received."

[25] The expert report of Mr John Mulholland was subsequently tendered as Exhibit 3 in the proceedings.

Valuation Evidence

[26] As already indicated, the appellant did not rely upon any expert valuation evidence. The respondent relied upon the expert valuation evidence of Ms Manners.

[27] Ms Manners provided the Court with a separate valuation report for each appeal.[6] Save for relatively crucial evidence relating to the impact of the White Fig tree on the respective

[6] Exh. 10 is Ms Manners' report with respect to the 1 October 2006 valuation, while exh. 11 is Ms Manners' report with respect to the 1 October 2007 valuation.

valuations for the subject property, Ms Manners' evidence is substantially unchallenged. Apart from certain aspects of Ms Manners' evidence relating to the impact of the White Fig tree on her respective valuations, I found Ms Manners to be a highly skilled, impressive expert witness. Leaving aside the issue of the White Fig tree, I accept Ms Manners' evidence and, in particular, the respective sales evidence she has provided to the Court. Having accepted the bulk of Ms Manners' evidence, I now turn to a more detailed examination of her evidence insofar as it relates to the White Fig tree and its VPO.

[28] Both Ms Manners' reports contain the following statements regarding the impact of the White Fig tree's root system on the subject property:[7]

> "For the purposes of this valuation it is estimated that the most likely area of root infestation is the northern half of the site. Approximately 1200m² of the site is substantially improved with a large brick residence, a swimming pool, retaining walls, paving/paths, garden beds and fencing. This area appears to be for the most part unaffected by the root system of the tree.
>
> In 2003 the Land Court accepted an area of 850m² as having limited use because of the root system and reduced the value by 12%. The current consideration for the impact of the VPO on the unimproved value of the land is in the order of 20%, effectively a $350,000 reduction.
>
> The greater allowance acknowledges the potential for the root system to impact on a larger area than previously accepted. It also recognizes the Local Law change. Trees protected under the VPO Individual Tree category of the *Natural Asset Local Law* 2003 cannot generally be interfered with without a permit. Exemptions that were originally applicable under the former VPO ordinance have been replaced by the exemptions under the Local Law.
>
> For the purposes of this valuation it is assumed that a prudent purchaser would consider the cost of preventing root damage to a proposed structure on the unimproved site. The work would require negotiation and consultation with The Brisbane City Council. The consideration of $350,000 allows more than the cost of the installing a root barrier, the cost of which is estimated to be $10,000 at the most."

[29] Ms Manners also gave significant evidence as to the impact of the White Fig tree during her cross-examination by Mr Barlow as follows:[8]

> "… My question really to you is surely the impediment relates to the size of the root infestation, it must do?—I don't think it does absolutely.
>
> It must have some effect on it surely, you've allowed for it?—The previous court decisions have allocated a certain area that's unimpeded and an area that is affected by the root zone I think they refer to it as in the previous report. We haven't got any conclusive evidence of where the actual roots are. There's been no formal survey undertaken of where the roots might be. The 20% consideration is greater than has been previously allowed. I think within that 20% is some consideration for the root growth, the continued probably root growth. The roots will surface and I don't imagine that that necessarily gives us the indication of where the entire extent of the root zone might be. That consideration of 20% I think is sufficient.
>
> So it's your evidence that even if this property was completely infested with roots it would still have a value as residential block?—Yes.
>
> What would that value be?—The value that I have on it now, 1.3 for the October '06 and 1.4 for the October '07.

---

7 At pages 8 and 9 of exhs. 10 and 11.
8 At transcript p.51 and p.52.

> In effect what you're saying is that the next time the valuation is done it will just have its ordinary increase due to the fluctuations in the market?—Yes.
>
> It appears that you are saying, correct me if I'm wrong, that the maximum you will ever allow for this VPO is 20%?—That's right.
>
> In 10 years time you'll look at this block even if there is evidence that suggests that the roots are much more extensive than they are now and you will say 20%?—That's right.
>
> How can you justify that if you don't mind my asking?-- 20% is an allowance that's also been made on other protected properties, State heritage listed properties and council heritage listed properties, I think the greatest consideration that they've made in those particular circumstances has been 20%. I only draw a loose parallel between that and the Vegetation Protection Order. To my mind and perhaps the mind of a purchaser I don't think the impact of the Vegetation Protection Order is as arduous or as difficult to comply with as what the State heritage legislation might be.
>
> Has the court been wrong in your opinion to allow an incremental approach to this, it's gone from 7 to 12 to 20?—No, not wrong.
>
> Sorry, you are saying it is wrong though for it to go any higher than --?—I think 20% is monetary-wise a fairly considerable allowance for the impact of the Vegetation Protection Order and I can't see, I may well be proved wrong, but I can't see a case for increasing year after year until the land is worthless. I see that that wouldn't really be an appropriate way to progress the valuation."

[30] Before leaving Ms Manners' evidence, it is appropriate to refer to one sale in each of her valuation reports. In each report, the relevant sales are both sale 1 and relate to an improved property located at 26-30 Queens Road, Hamilton. The first sale of this improved property occurred on 21 January 2006. The property had a sale price of $1,600,000, from which sum Ms Manners deducted $130,000 for improvements being the dwelling and fencing, resulting in an analysed sales price of $1,470,000. The unimproved value of the property as at 1 October 2006 was $1,400,000. The property resold on 30 September 2007 for the sum of $2,850,000 (GST component $259,090). Following the deduction of $130,000 for the improvements, Ms Manners arrived at an analysed sale price of $2,460,909. The property had an applied unimproved value as at 1 October 2007 of $1,450,000.

[31] The common feature between the subject and the sale property is that both properties are subject to a VPO. However, with respect to the sale property, although the tree, the subject of the VPO, was in existence at the time of the sale on 21 January 2006, the tree was subsequently illegally removed. The owner and contractor were fined and a requirement was imposed to plant an advanced fig tree in the location of the removed tree. There has been no compliance with this requirement to date. According to Ms Manners' report, the previous owner still has the responsibility for complying with the requirement to plant an advanced fig tree.[9]

[9] See exh. 11 p.13.

[32] Clearly, the first sale of 21 January 2006 of the Queens Road property has some relevance as the property at the time of sale was subject to a VPO tree which remained in existence. However, the only relevant evidence before me with respect to that VPO tree is that it had a canopy of 350m².[10] There is no evidence before me as to the actual impact of the VPO tree on the subject property. However, even without such evidence, the sale remains good evidence of the impact of a VPO with a tree intact on a relevant sale.

[33] The resale on 30 September 2007 is of little assistance in my view in this regard as, although the property remains subject to a VPO, at that time and continuing, the actual tree the subject of the VPO does not exist. Accordingly, as a matter of fact, the actual impact that a tree the subject of the VPO had respectively on the subject and the sale property must be significantly different.

[34] Insofar as the 2007 sale is concerned, as a matter of fact there was no actual impact by a tree, either by its trunk, canopy or root system, on the subject property as at 1 October 2007, although of course the actual VPO remained in existence and a requirement on the previous owner also remained.

Evidence of Mr Morris

[35] As indicated, the appellant relied upon evidence given by her husband, Mr Morris. Mr Morris gave his evidence clearly and articulately. I note that Mr Morris is a retired solicitor who, during his life time, has made a significant contribution to the legal profession in this State. This is relevant because it is abundantly clear that Mr Morris understands, perhaps better than most witnesses, his obligations in providing evidence to the Court. I was impressed by Mr Morris' evidence and accept in its totality the truthfulness of all his evidence before the Court.

[36] It is Mr Morris' evidence that he has been familiar with the property, including the tree in question, since about 1949. The subject property was the residential home of Mr Morris' wife, who grew up at the property. For about the last 21 years, Mr and Mrs Morris have made the subject property their permanent home.[11]

[37] Mr Morris' evidence is in stark contrast to the evidence of Mr Fletcher. Mr Morris is strongly of the view that the White Fig tree continues to grow. His evidence is perhaps best summed up by the following evidence given during cross-examination:[12]

> "Mr Morris, the report from Mr Fletcher is to the effect that the tree has decreased in size having reached maturity and it's commenced arresting its growth potential. That's on p.16. Do you disagree with that or not able to disagree?—I disagree utterly.
>
> That's based on your observations?—Daily.

---

10 See exh. 10 p.12.
11 See transcript p.4.
12 See transcript p.26.

> Observations which haven't been backed up by any measurements that have actually been taken?—I suppose that's a fair comment."

[38] Mr Morris also gave evidence that the diameter of the White Fig tree is, in his view, about 3.5m.[13] Significantly, Mr Morris also gave evidence regarding tree root samples taken by him from diggings occurring in Dennison Street outside of his property. Mr Morris' evidence is that, at the time of collecting the tree roots, they had a white exudate coming from them.[14] Mr Morris' evidence goes on to explain that he showed the tree roots to Mr Mulholland and explained to Mr Mulholland the nature of the white exudate coming from the roots.

[39] Mr Morris considers that the size of the canopy of the White Fig tree has increased in size from 2003 until 2009 in the order of some 5 or 10%.[15] In Mr Morris' words, the tree trunk "is growing vigorously"[16] and that the growth patterns of the tree do not appear to have been adversely affected by drought.

[40] Exhibit 5 in this matter is a plan of the subject property and surrounding streets and properties. On exhibit 5 Mr Morris placed an X to indicate where he obtained the tree roots from. The tree roots were found less than 10m from Windermere Road and on the other side of Dennison Street from Mrs Morris' property. Mr Morris produced photographic evidence of his obtaining of the tree roots during a time of construction works in Dennison Street.[17] Mr Morris, for completeness, also tendered the actual tree roots to the Court.

[41] By way of general observation, I also note and take into account Mr Morris' evidence relating to his endeavours to identify trees referred to in Mr Fletcher's report at locations away from the subject property. I note and accept Mr Morris' evidence that he was unable to locate any trees that matched the descriptions given by Mr Fletcher. The reasons for Mr Morris' failure to find such trees will become evident when I turn to examine Mr Fletcher's evidence in detail.

Expert evidence of Jason-jay Fletcher

[42] Mr Fletcher gave expert evidence on behalf of the respondent. He provided the Court with a significant report which was marked as Exhibit 9. I note and accept Mr Fletcher's educational qualifications in arboriculture, and I also note and accept his post graduate experience in working in the field of arboriculture. I also note that Mr Fletcher is finalising a paper for his Ph.D.

---

13 See transcript p.26.
14 See transcript p.10.
15 See transcript p.11.
16 See transcript p.11.
17 See Exh.7.

[43] However, in almost a decade of service as a Member of the Judiciary in Queensland, I have heard many experts in various fields give evidence. Prior to my judicial appointment, I spent a number of decades practising Law. I make these comments to demonstrate that understanding and hearing expert evidence has been part and parcel of my legal career for many years. Throughout all those years, I can say without any shadow of a doubt that I have never before encountered any expert evidence of a nature of that provided to the Court by Mr Fletcher. Mr Fletcher was not arrogant with his evidence. Mr Fletcher was not obnoxious towards the parties or the Court. Mr Fletcher was not rude, obstructive, or evasive in answering questions. I have no doubt that Mr Fletcher understood fully his obligations as an expert before the Court and honestly expressed his expert opinions to the Court. That said, however, Mr Fletcher's evidence was fundamentally, fatally flawed.

[44] On page 3 of his report, Mr Fletcher refers to the White Fig tree as having a trunk diameter of 12m. Mr Fletcher gave oral evidence before the Court. His evidence followed that of Mr Morris, and Mr Fletcher was in Court and heard Mr Morris' evidence, specifically Mr Morris' direct challenge that the diameter of the tree in question was no where near 12m in diameter. Despite hearing the evidence of Mr Morris and despite numerous opportunities for him to correct his report, Mr Fletcher doggedly during evidence-in-chief maintained that the diameter of the White Fig tree is 12m.[18] Mr Fletcher explained his manner of measuring the trunk diameter by using a "DBH tape" which is a 'diameter at breast height' tape.[19]

[45] Put simply, and perhaps at its highest, Mr Fletcher's unswerving evidence was that he used the measuring tape correctly; it gave him a reading of 12m as the diameter of the relevant tree; he had 13 years experience in using the DBH tape; and the reading of the tape was correct and the diameter of the tree was 12m.

[46] Not surprisingly, the issue of the diameter of the tree was subject to rigorous cross-examination of Mr Fletcher by Mr Barlow. Mr Barlow pointed out to Mr Fletcher the difference between circumference and diameter, which Mr Fletcher clearly understood.[20] When asked if the Court would view a trunk diameter of 12m when viewing the property, Mr Fletcher was forthright in his reply, stating "absolutely".[21] Even after Mr Barlow took Mr Fletcher to the length of the hearing room which he estimated at about 12m,[22] and although Mr Fletcher conceded that the diameter of the tree in question was not as big as the length of the Court room, nor indeed anywhere near that big, he nonetheless did not fall from his

---

18 See transcript p.28-30.
19 See transcript p.29.
20 See transcript p.37.
21 See transcript p.36.
22 See transcript p.37.

expert view that the diameter of the tree was 12m. I will let Mr Fletcher's evidence speak for itself:[23]

> "I'm saying to you now that roughly 12 metres extends from that wall to that wall, the length of the room, roughly, not to the nearest centimetre or anything like that, it's a very rough guess?—It is not that big.
>
> Not anywhere near that big is it?—No.
>
> Might it be that you have confused circumference with diameter?—I just do what the tape tells me. I make a measurement and that's what the tape presents itself. I don't argue, it's an industry tape which is sold as a diameter at breast height tape.
>
> Despite enumerating your credentials, your degrees, before the court this morning you don't make use your own mind to sort of estimate whether what the tape is telling you is correct or incorrect?—I've been using the tape for 13 years and it's always been correct in my eyes.
>
> But we're not going to see a tree it seems for that length when we go up there this afternoon are we?—No."

[47] In my view, Mr Fletcher was the only person present in Court who failed to see the proverbial 'elephant in the room'. One does not need to be an expert, nor to have a degree in mathematics, to accept that the diameter of the tree cannot be, and is not, 12m, but is more likely of a diameter of approximately 3.5m, and that the measurement which Mr Fletcher has provided equates, at least roughly or perhaps exactly, to the circumference of the tree and not the diameter. The simple mathematical equation of $2\pi r$ shows the folly in Mr Fletcher's evidence, which tragically, as indicated, was evident to all present in the hearing room except for Mr Fletcher.

[48] Mr Fletcher's evidence in this regard cannot be accepted as just a simple mistake. It should have been evident to him at the time of writing his report that a tree with a diameter of 12m would be surprising to say the least. If the reference to 12m as a diameter in his report failed to get his attention, then Mr Morris' detailed evidence as to the diameter of both the tree in question and other trees referred to by Mr Fletcher as observed by Mr Morris should have immediately caused Mr Fletcher to correct his obvious and clear mistake. He not only failed to correct that mistake during evidence-in-chief before Mr Isdale, but he was absolute in his categorical denial of Mr Morris' evidence and the acceptance of his position that the diameter of the tree was 12m. Such is the nature of Mr Fletcher's evidence with respect to the diameter of the tree that I am unwilling to rely upon any of the evidence Mr Fletcher provided to the Court. I make this ruling with some reluctance, as I have no doubt from the general demeanour in the witness box and experience and otherwise clear professionalism of Mr Fletcher that he would seem to be diligent in performing his duties as an arboriculturist for the Brisbane City Council. I should also add that, in general terms, the remainder of Mr

[23] At p.37.

Fletcher's evidence, save for his reference to the tree roots exhibited by Mr Morris and his criticisms of Mr Mulholland's report, do not have any great impact on the outcome of these appeals in any event.

[49] As regards the identification of the tree roots tendered in evidence by Mr Morris, I specifically reject the evidence of Mr Fletcher that the tree roots are not from a White Fig. I accept absolutely the evidence of Mr Morris that the tree roots had a white exudate coming from them, together with the evidence as contained in the report of Mr Mulholland that the tree roots are from a White Fig tree.

Analysis of the Report of Mr Mulholland

[50] I have dealt earlier in this decision in some detail with the manner in which the report of Mr Mulholland came into evidence, and the unfortunate fact that Mr Mulholland died prior to the matter proceeding to hearing and accordingly was not able to be cross-examined on his report.

[51] I note that Mr Mulholland's report takes the form of a sworn affidavit. I further note Mr Mulholland's qualifications as set out in his report, that being Dip. T., Dip. Hort/Arb, M. Arbor. A. (UK), H.M.A. (Qld), Independent Consulting Arborist. I also note that Mr Mulholland signed a declaration setting out his understanding of his duty to the Court and the instructions that he received from Mr Morris. Despite the disadvantage that the respondent has had in not being able to cross-examine Mr Mulholland, I nevertheless find all of the evidence contained in Mr Mulholland's report to be consistent with the evidence of Mr Morris, which I accept, and which evidence was subject to cross-examination. I also find the evidence of Mr Mulholland to be preferable to that of Mr Fletcher.

[52] There are some points of significance which flow from these findings. I note in particular paragraphs 6 and 8 of Mr Mulholland's report which are in the following terms:

> "6 In my experience roots of most fig species, commonly extend for some considerable distance beyond the drip line of the tree's canopy. It is also my experience that fig tree roots will, on sloping land tend to extend to a greater degree on the uphill side of the specimen as is evident in the present case. I understand that Dennison Street was probably not sealed until the 1940's. Mr Morris has informed me (and I have no reason to doubt him) that Mrs Morris well remembers as a child in about 1939 the subject tree being even then large enough for her and other children to play among its buttress roots (bole) and climb its limbs and there is a strong likelihood that its root system even then extended out into parts of Dennison Street.
>
> Given the size (50 millimetre +) diameter of the tree root sections A B. C. & D. I am of the opinion that the roots are of sufficient size to cause the upheaval of the road surface in the areas as described above. Fig trees are well-known to have extensive aggressive root systems and the literature warns that they are commonly known to disrupt and cause major damage to structures and services including upheaval of pathways and road surfaces.
>
> …
>
> 8. During my visit I concluded that any tree roots from other specimens nearby were unlikely to be responsible for the disruption of the road surface. Since the yellow gas inlet pipe at 6 Dennison Street is nearly 60 metres from the trunk of the white fig specimen, it is my opinion

> that the strong, aggressive root system of the mature white fig specimen has invaded at least 60% of Mr & Mrs Morris's property.
>
> It is likely that if the property was devoid of its improvements such as the home, garages, swimming pool, terraces etc but retained the tree (and the relevant vegetation protection order), it would be predictable that the roots from the specimen would have invaded a much greater area of the land, possibly 80% or more."

Analysis

[53] In light of my findings referred to above, I now turn to the key question, which is of course the appropriate unimproved value of the subject property as at 1 October 2006 and 1 October 2007.

[54] There is one aspect of the case for the appellant as put by Mr Barlow, particularly with respect to the valuation as at 1 October 2007, which can be quickly dealt with.

[55] Mr Barlow argues that the extent of the growth of the tree is such that, over time, looking at the land in its hypothetical unimproved state with the tree in existence but the improvements removed, the position would eventually be reached where the subject land would no longer be suitable for residential use and could, effectively, only be used as parkland.

[56] Mr Isdale strongly rejects this contention. Mr Isdale relied specifically on the provisions of s.3(4) of the VLA which provides as follows:

> (4) Notwithstanding anything contained in this section, in determining the unimproved value of any land it shall be assumed that—
> (a) the land may be used, or may continue to be used, for any purpose for which it was being used, or for which it could be used, at the date to which the valuation relates; and
> (b) such improvements may be continued or made on the land as may be required in order to enable the land to continue to be so used;
>
> but nothing in this subsection prevents regard being had, in determining that value, to any other purpose for which the land may be used on the assumption that any improvements referred to in subsection (1) had not been made.

[57] Mr Isdale's submissions as to the impact of s.3(4) of the VLA in this case are clearly correct. It is a legislative requirement that the land in question be valued in a notionally unimproved state and on the basis that the use to which such land was put before the improvements were hypothetically removed would continue into the future. In short, s.3(4) requires the Court to take into account that the land is to be considered at the valuation date as being notionally unimproved but ***capable*** at law of having a house put on it. In *Kent Street Pty Ltd & Ors v Department of Natural Resources and Mines*[24], the Land Appeal Court explained the operation of the various elements of s.3 of the VLA, including, specifically, s.3(4)[25]. I respectfully adopt the reasoning of the Land Appeal Court.

[24] [2008] QLAC 0221
[25] See paragraphs [59 – [61]

[58] It follows that the appellant's grounds of appeal 5 and 6 as set out in the notice of appeal with respect to the 1 October 2007 valuation must fail. This, however, does not dispose of all aspects of the appeals.

[59] As set out above, I accept the evidence of Mr Mulholland and Mr Morris that the tree, the subject of the VPO, on the subject land is indeed a very large tree and that the root system from that tree extends extensively in a southerly, uphill direction from the tree towards both Dennison Street and Windermere Road. I also accept that the tree roots in question are both invasive and destructive. I also accept that a very significant, although not readily scientifically assessable, area of the subject land is subject to tree root inundation. I also accept that the extent of the tree root inundation on the subject land is greater than that as found to be the case as at 1 October 2001.

[60] For the purposes of determining the respective unimproved valuations of the subject property as at 1 October 2006 and 1 October 2007, and taking into account all of the evidence before me, and in particular the evidence of Mr Morris and Mr Mulholland, and in order to provide some degree of certainty as between the parties with respect to an ongoing issue which has been the subject, as indicated, of numerous appeals before the Land Court, I am prepared to accept that the tree the subject of the VPO has in fact caused the greatest impact to the subject land, given the constraints and hypothetical analysis that the VLA requires the Court to undertake, that the said tree can in fact make. Furthermore, I take into account that a hypothetical purchaser is likely to make some allowance for the difficulties and risks to residential construction posed by the existence of the tree[26].

[61] It is in this one area that I find the evidence compels me to depart, in only a relevantly minor manner, from the conclusions reached by Ms Manners. Mrs Manners herself considered that the impact of the VPO on the unimproved valuation had increased from 12% as previously assessed by the Court to 20%. In my view, Ms Manners has failed to appreciate in its entirety the intrusive nature of the tree to the property as a whole, and the difficulties and risks to residential construction posed by the existence of the tree and the VPO.

[62] In my view, taking into account the severe intrusive nature of the tree and its roots to the property as a whole as referred to in the evidence of Mr Morris and Mr Mulholland, an appropriate discount for the VPO in this particular case is 25%.

Conclusion

[63] Accepting the evidence of Ms Manners as to the unimproved value of the subject property as at 1 October 2006 excluding the impact of the VPO in the sum of $1,650,000 and

[26] *Chief Executive, Department of Natural Resources and Mines v. Kent Street P/L* [2009] QCA 399 per Lyons J @ paragraphs [105] – [110]

applying a discount for the VPO of 25%, this results in a reduction of $412,500 leaving an unimproved value of $1,237,500 which, for the purposes of the unimproved valuation as at 1 October 2006, I will round to $1,240,000.

[64] As regards the valuation effective 1 October 2007, and again accepting Ms Manners unimproved value excluding the VPO in the sum of $1,750,000, and again applying a discount for the VPO of 25% which equates to the sum of $437,500, I find the unimproved value of the subject land as at 1 October 2007 to be $1,312,500, which I round down to $1,310,000.

Orders

As regards AV2007/0071:

(i) The appeal is allowed.

(ii) The unimproved value of Lots 9 and 10 on RP46719, Parish of Toombul, County of Stanley as at 1 October 2006 is determined at One Million Two Hundred and Forty Thousand Dollars ($1,240,000).

As regards AV2008/0363:

(iii) The appeal is allowed.

(iv) The unimproved value of Lots 9 and 10 on RP46719, Parish of Toombul, County of Stanley as at 1 October 2007 is determined at One Million Three Hundred and Ten Thousand Dollars ($1,310,000).

PA SMITH
MEMBER OF THE LAND COURT