LAND COURT OF QUEENSLAND

CITATION:	*Morris v Department of Natural Resources and Mines* [2003] QLC 0037
PARTIES:	Roma Janice Morris (applicant) v. Chief Executive, Department of Natural Resources and Mines (respondent)
FILE NO:	AV2002/0180
DIVISION:	Land Court of Queensland
PROCEEDING:	Appeal against annual valuation under the *Valuation of Land Act 1944*
DELIVERED ON:	28 May 2003
DELIVERED AT:	Brisbane
HEARD AT:	Brisbane
MEMBER	Mrs CAC MacDonald
ORDERS:	**(i) The appeal is allowed.** **(ii) The unimproved value of Lots 9 and 10 on RP 46719, Parish of Toombul, County of Stanley as at 1 October 2001 is determined at Nine Hundred and Sixty Thousand Dollars ($960,000).**
CATCHWORDS:	Valuation – Particular factors in valuation – Planning restrictions – Property within Demolition Control Precinct (DCP) – Possible limitations on development approval – Comparison with heritage restrictions – No market evidence to quantify effect – 5% allowance made. Valuation – Particular factors in valuation – Restrictions on use – Vegetation Protection Order (VPO) over large fig tree on property - Effect on development and amenity – Transfer of control of tree from owner to Council – No market evidence to quantify effect – Allowance 12% made on merits of case.

APPEARANCES:	Mr C Hughes SC for the appellant Ms R Trigge, Senior Legal Officer, Department of Natural Resources and Mines for the respondent
SOLICITORS:	Russell & Co for the applicant

Introduction

[1] This is an appeal against an annual valuation made by the Chief Executive, Department of Natural Resources and Mines, of land owned by the appellant. The property is described as Lots 9 and 10 on RP 46719, Parish of Toombul, County of Stanley, and has an area of 2,039 m². The land is located at 56 Windermere Road, Hamilton. The valuation appealed against was made on 1 October 2001 to take effect on 30 June 2002. After objection by the appellant, the value was determined at $1,035,000. The appellant contends for a value of $910,000.

The Property

[2] The property is situated on the corner of Windermere Road and Dennison Street, Hamilton, which is a highly regarded inner suburb of Brisbane. The property lies approximately 5 kilometres radially north-east of the Brisbane GPO and approximately 2.5 kilometres south of the Toombul Westfield Shopping Centre. The surrounding development is predominantly high quality, single detached residential dwellings with a mixture of character, post-war and contemporary design homes. The subject land is developed with a detached dwelling and a swimming pool, and is used for single unit residential purposes. It is designated as Low Density Residential Area in the Brisbane City Plan 2000 and is within a Demolition Control Precinct (DCP) under that Plan.

[3] Windermere Road is dual width with kerbside parking. It is sealed with bitumen and has concrete kerbs and channelling. It carries a reasonably high volume of traffic, consisting of local traffic and some heavy vehicular traffic. Dennison Street is a narrow bitumen sealed road with concrete kerbs and channelling. Good vehicle access is constructed to the subject land from this street. Traffic calming measures have been installed in some of the streets in the vicinity of the subject property which may have had the effect of increasing the volume of traffic on both Dennison Street and Windermere Road.

[4] Town water, sewerage, electricity, gas and telephone services are available to the site.

[5] The land comprises two allotments and is rectangular in shape. The house is built towards the southern end of the property, facing Windermere Road. The northern face of the house is approximately 30 metres from the northern boundary. The land is of medium

elevation and in its natural state, fell gradually from Windermere Road to the northern boundary. The land to the north of the house is about 845 m² in area and is improved with lawns and informal landscaping. A substantial White Fig tree is located close to the northern boundary. This tree, which is described in more detail later in this decision, is the subject of a Vegetation Protection Order (VPO) declared by the Brisbane City Council on 17 February 1997. There is a 2 metre wide easement in favour of the Brisbane City Council across the subject land adjacent to the northern boundary. It is not considered to have any material effect on the value of the property.

The Appeal

[6] The appellant relied on 12 grounds in her Notice of Appeal filed in this Court on 15 July 2002. At the hearing, two matters were identified as the principal issues in contention. These were:

1. The unimproved value of the land, assuming no Vegetation Protection Order was in place.
2. The effect of the Vegetation Protection Order on the unimproved value.

[7] At the hearing, Mr C Hughes of Senior Counsel appeared on behalf of the appellant and Ms R Trigge, a senior legal officer employed the Department of Natural Resources and Mines, appeared on behalf of the respondent.

[8] Evidence was given on behalf of the appellant by Mr J Walsh (an architect who lived for approximately 20 years in a house in Dennison Street to the north of the subject property), Mr M Kay (a town planning consultant), Mr G Morris (the appellant's husband) and Mr M Slater (a registered valuer).

[9] Evidence was given on behalf of the respondent by Mr L Hillhouse, who is employed as a Development Assessment Officer by the Brisbane City Council as an ecologist, and Ms J Manners who is a registered valuer employed by the Department of Natural Resources and Mines.

Valuation Methodology

[10] The respondent is required by s.13 of the *Valuation of Land Act 1944* (the Act) to determine the unimproved value of the land. Section 3 of the Act provides, in part, that:

> "**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."

[11] The subject land is improved land and therefore the valuation is to be made under s.3(1)(b).

[12] To determine the unimproved value of the land at the relevant date, the principles laid down in *Spencer v The Commonwealth of Australia* (1907) 5 CLR 418 are to be applied. For example, Isaacs J said at 441:

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

[13] It was acknowledged by both parties that because the subject property is used solely for a single dwelling house, s.17 of the Act applies. Section 17 provides that, in making a valuation of the unimproved value of land which is used solely for a single dwelling house, any enhancement in the value of the land because it has been subdivided or because it has a potential use for subdivisional purposes, is to be disregarded. The valuation is made, therefore, on the basis that the highest and best use of the land is for single unit residential purposes.

[14] Both parties' valuers approached the valuation in a similar manner, that is by determining the unimproved value of the land at the relevant date as if there were no Vegetation Protection Order in place, and then applying a discount to allow for the perceived adverse effect on the unimproved value of the land of the imposition of the Vegetation Protection Order. This was the approach adopted by this Court in an earlier appeal against the annual valuation of this property, *Estate of LV Bressow (Deceased) v Chief Executive, Department of Natural Resources* (AV98-593) (unreported, Land Court, 23 December 1999), and it is the approach that I propose to adopt. I have considered the decisions of

this Court concerning the effect of a Vegetation Protection Order, in *Augur Holdings Pty Ltd v Chief Executive, Department of Lands* (AV93-531) unreported 8 October 1993, *Shirley v Chief Executive, Department of Lands (1994) 15 QLCR 77, Mitchell v Chief Executive, Department of Lands* (V93-699 and V94-582) unreported 29 June 1995 and *Willsford Pty Ltd v Chief Executive, Department of Lands* (AV94-36 and V94-37) unreported 27 October 1995. There is nothing useful I can add to the discussion of these cases to be found in *Bressow* and I respectfully adopt those observations.

[15] Ms Manners relied on sales of unimproved land as her primary method of valuation to determine the unimproved value of the subject in the absence of the Vegetation Protection Order. Her valuation at that level was $1,150,000. Mr Slater, for the appellant, considered that there were no relevant sales on which he could rely. He therefore examined the relativity of the unimproved values of various properties in the neighbourhood of the subject land, by way of comparison with the unimproved value of the subject land, as determined by the respondent. He concluded that the lack of relativity demonstrated that the respondent's valuation was incorrect, and that the subject property should be revalued to reflect proper relativity. He determined the unimproved value, absent the Vegetation Protection Order, at $1,070,000.

[16] Mr Slater applied a discount of 15% to allow for the effect of the Vegetation Protection Order, and thus reached a value of $910,000 for the subject property. Ms Manners applied a discount of 10% to arrive at the value appealed against, being $1,035,000.

Valuation Evidence

Sales Evidence

[17] Ms Manners relied on the sale of two properties in support of her valuation of the subject, on the assumption that it is unaffected by the Vegetation Protection Order.

Sale No 1

[18] This property sold on 17 March 2001 for $1,900,000. The property is located at 64 Windermere Road, Hamilton some fifty metres east of the subject. It consists of two separately surveyed lots with a total area of 2,785 m². The property is designated as Low Density Residential Area in the Brisbane City Plan 2000 and is within a Demolition Control Precinct. Access to the front of the property is from Windermere Road and there is also rear access available via an easement from Mayfield Street. At the time of sale, the property was unimproved other than by clearing and fencing for which Ms Manners

allowed $50,000. She therefore analysed the sale price to $1,850,000 and applied the sale to reach an unimproved value of $1,650,000.

[19] Ms Manners described the subject, in comparison with the sale, as a smaller more regular shaped corner allotment with a slightly higher elevation. She considered the subject to be inferior to the sale because of the subject's smaller size.

[20] Mr Slater said that because of the differences between the subject property and the sale he considered that it was very difficult to draw any meaningful comparisons between them for the purpose of determining the unimproved capital value of the subject land. He also considered the sale to be above market value. He did not rely on the sale for his valuation.

[21] A comparison of the two properties reveals that -

- The sale property is approximately one third larger than the subject. Mr Slater said that this difference in size had the effect that the two properties were in different markets.

- Both properties consist of two allotments. As noted above, the subdivision of the subject is to be ignored, under s.17 of the Act, in determining the unimproved value of the land. It was suggested to Ms Manners, in cross-examination, that the sale price of 64 Windermere Road would have been increased because the purchaser could use the two lots separately. Ms Manners said that her experience of valuing the properties in the area for the previous two years had caused her to form the opinion that there were a number of purchasers in the market looking for large lots to be used for single unit residential developments. The price such a purchaser is prepared to pay is higher than the price a commercial developer (who might wish to subdivide the land) is prepared to pay.

- The sale property has rear access via an easement. While the subject has access from Dennison Street as well as Windermere Road, Mr Slater saw the location of the subject as a disadvantage compared with the sale, because the corner location causes a loss of security and privacy to the subject. There may also be an increase in traffic noise from Dennison Street for the subject, as compared with the sale. Ms Manners disagreed that the corner location was a disadvantage

- Both properties are in a Demolition Control Precinct. Any application to build a house in such an area requires Brisbane City Council approval and conditions may be attached to such approvals. Both properties are similarly affected in this regard. In addition, Brisbane City Council approval is needed to demolish a house in a Demolition Control Precinct. Mr Kay said that it is becoming almost impossible to obtain an approval to demolish. Ms Manners said that her inquiries had lead her to believe that it was becoming an increasingly easy exercise to demolish homes in streets such as Windermere Road, where there is a mix of housing types in the area. In Mr Slater's opinion, the price paid for the sale property reflects the fact that because that land is vacant, there is one less planning hurdle to cross in order to redevelop the property.

- Mr Slater said that the sale property had a superior outlook to the north-east because the land to the north-east falls away, whereas that to the north-east of the subject is comparatively flat. Ms Manners disagreed with this.

[22] In my opinion, the differences between the properties are not such as to make the sale meaningless in determining the unimproved value of the subject. The proximity of the sale to the subject, and the timing of this sale, make the sale very relevant to this valuation and I consider that the differences between the two properties do not nullify this exercise. The differences can be dealt with by making appropriate adjustments.

[23] Ms Manners' valuation took into account the difference in size of the properties. I have accepted her opinion that there is a market for large vacant blocks of lands in the area, and that therefore, the fact that the sale property could be developed as two separate lots does not necessitate any adjustment as compared with the subject.

[24] Similarly as the size of both properties is well above the average residential lot, I have accepted Ms Manners' opinion, in the absence of any market evidence to the contrary, that the two properties do not sit in different markets and that adjustments can be made for the difference in size.

[25] I do not consider that the rear access to the sale is superior to that from Dennison Street to the subject, nor that the corner location of the subject is a significant disadvantage as compared with the sale. Further, I do not consider the north easterly aspect of the sale to be significantly superior to that of the subject.

[26] One matter which Ms Manners did not take into account is the potentially different impact on the subject, as compared with the sale, of the restrictions imposed by their location within a Demolition Control Precinct. This is discussed further below.

Sale No 2

[27] This property, which is situated at 11 Palm Avenue, Ascot, sold on 3 July 2001 for $1,210,000. The property is 1,265 m² in area and is situated within the Low Density Residential Area and a Demolition Control Precinct in the Brisbane City Plan. At the time of sale, the property was unimproved other than by clearing and fencing which Ms Manners valued at $10,000. She thus analysed the sale to $1,200,000 and applied an unimproved value of $1,080,000.

[28] Ms Manners described the sale property as a large, generally level, rectangular shaped parcel of land situated in a well regarded residential street with prominent character and contemporary dwellings. She considered that the subject property, which is located approximately 1 kilometre south of the sale, is superior to the sale because of the

subject's larger area (2,039 m² compared with 1,265 m²), elevation and location on a corner with an impressive street frontage to Windermere Road.

[29] Mr Slater did not rely on this sale because, he said, the differences in the properties were such as to make it extremely difficult to form any meaningful comparison. He identified a number of differences between the properties.

- The two properties are located in different suburbs. In Mr Slater's opinion, Ascot is generally regarded as a more desirable address. Ms Manners said that her experience was that a purchaser would not necessarily pay a premium for Ascot as compared with Hamilton and Clayfield.

- Mr Slater considered that Palm Avenue is regarded as a particularly desirable address. Ms Manners said that Palm Avenue is probably a quieter street but both streets are comprised of substantial residences. In her opinion, while Palm Avenue had a reputation in the past, there was nothing particularly special about Palm Avenue given that there are a number of prestigious homes in many streets in Ascot, Hamilton and Clayfield.

- The subject is considerably larger than the sale.

- Mr Slater said that the Palm Avenue property is a north-facing block, gently sloping towards the east, with an aspect to Moreton Bay. The land is reasonably at grade with the road but rises slightly above the road to the rear. By comparison, the subject falls away from the road. Ms Manners said that the subject has a higher elevation.

[30] Once again, while the sale property is not perfectly comparable with the subject, I am of the opinion that it should not be disregarded as meaningless in determining the unimproved value of the subject at the relevant date. Adjustments can and should be made to allow for the differences in the properties.

[31] Ms Manners valued the subject at $1,150,000 as compared with the analysed value of the sale at $1,080,000. She concluded that the subject was superior to the sale because of the subject's elevation and larger area. As with Sale 1, Ms Manners did not take into account the impact on Palm Avenue, as compared with the subject, of the restrictions imposed by the inclusion of each property within the Demolition Control Precinct. Otherwise I have accepted her opinion as to the comparison between the properties.

Relativity

[32] As indicated above, Mr Slater, for the appellant, did not rely on any sales in support of his valuation because he considered that none of the available sales properties were sufficiently comparable with the subject to enable them to be used for the purposes of this valuation.

[33] In the absence of comparable sales, Mr Slater's valuation was based on the premise that the unimproved capital value of the subject, without considering the effects of the Vegetation Protection Order, lacked proper relativity with the unimproved value of other properties in the vicinity of the subject. Mr Slater also questioned whether the relativities in Palm Avenue, the location of Ms Manners' second sale, had been properly struck.

[34] It is clear from the authorities that the best basis for assessing the unimproved value of land is the use of sales of vacant or lightly improved parcels of land (*Fischer v The Valuer-General* (1983) 9 QLCR 44 at 46; *Barnwell v The Valuer-General* (1989) 13 QLCR 13 at 17; *Grahn v Valuer-General* (1992) 14 QLCR 327 at 328). It was also held in *Fischer* (at 46) that while maintenance of correct relativity is of considerable importance for rating valuations, the principle of relativity should not be preferred to the exclusion of relevant, if not ideal, sales evidence.

[35] The appellant did not take issue with these principles. Rather, the submission was that there were no relevant sales and that valuations made for the purposes of the Act, of comparable lands, should have proper relativity (see *Grahn* at 328).

[36] The unimproved valuation for 64 Windermere Road (the respondent's Sale No. 1) as at 1 October 2001 was fixed at $1,650,000. The appellant said that this represented a 43% increase on the unimproved value as at 1 October 2000. This was significantly out of line with the increases in the unimproved values applied to a number of other properties in Windermere Road in the same year. Over a number of previous years, the increases in the values of these properties had been roughly similar. The comparative history of the valuations of all these properties is set out in Exhibit 15. The appellant submitted that this indicated that the unimproved value of 64 Windermere Road was questionable. In this context, the evidence was that the 2001 valuation of 64 Windermere Road had been increased from $1,300,000 to $1,650,000 approximately a week prior to the hearing of this matter, and it was, therefore, possible that, as at the date of hearing, the new valuation might be subject to the process of objection and appeal. The valuation was altered, apparently, to correct a computer generated error. Ms Manners said that it had always been her intention that the valuation should issue at $1,650,000.

[37] It is the case that the increase in the 2001 unimproved value of 64 Windermere Road is significantly higher than that of the other properties referred to in Exhibit 15 but this does not of itself demonstrate that the unimproved valuation of that property is incorrect. The unimproved value was determined by the respondent following an analysis of the sale of that property. Moreover, while it is correct that, at the time of the hearing, there was still a possibility that the amended valuation of 64 Windermere Road might be subject to

objection and appeal, s.33 of the Act deems that valuation to be correct until proved otherwise. Similarly the evidence did not establish that the increase in the unimproved value of 64 Windermere Road was wrongly applied to any of the properties, including the subject, identified in Exhibit 15.

[38] The appellant also sought to criticise the use of Sales Nos 1 and 2 by the respondent because they were identified in the Basis for Valuation for the Hamilton area as support sales, not basic sales. Basic sales are those on which the valuation for an area are based. It appears that those sales which are applied at 90% to 100% of their sale price are regarded by the respondent as basic sales, and those which are below 90% are regarded as support sales. Sale No. 1 was applied at 89.19% and Sale No. 2 was applied at 89.65%. These percentages are so close to 90% that I do not consider that there is any significant conclusion that can be drawn from the fact that they are below 90%.

[39] There is a difference in the unimproved value of the subject ($1,150,000 before the effect of the Vegetation Protection Order is applied) as compared with two properties in Windermere Road to the west of the subject – Lots 6 and 7 on RP 33587 and Lots 8 and 9 on RP 33587. Each of those properties is 2,024 m² in area and has an unimproved value of $1,100,000. Mr Slater surmised that the higher value attributed to the subject was because of the perceived advantages enjoyed by the subject as a corner site. In Mr Slater's opinion, such advantages are illusory. In his opinion, the subject is adversely affected by its corner location because of loss of security and privacy. In any event, he pointed out, no such premium had been added to the properties at the northern end of Dennison Street, each of which is valued at the same amount as its adjoining, non-corner lot. Ms Manners did not concede that the difference in value between the subject and the two properties to the west, was attributable to the corner location of the subject, although she did consider that the corner location was an advantage because it allowed good access to the subject, other than from Windermere Road.

[40] The evidence did not reveal why the subject has a higher unimproved value than the two properties to the west, which are a similar size to the subject. There was evidence (Exhibit 20) that in 1997, the subject and each of those properties were valued at $650,000. However, it should be remembered that the subject's valuation of $650,000 at that time took into account the effects of the Vegetation Protection Order. The unimproved value, prior to the discount applied for the effects of the Vegetation Protection Order, was $700,000 (see the decision in *Estate of LV Bressow (Decd) v Chief Executive, Department of Natural Resources*). Thus there was a difference of $50,000 in the value of the subject, absent the Vegetation Protection Order, and the two properties in

question at that time, and the valuation in issue maintains that difference. Since there was no evidence before the Court as to the attributes of the two properties, other than their areas, I am not in a position to conclude that the valuation of the subject is incorrect as compared with the valuation of those two properties.

[41] Mr Slater also compared the unimproved values of the subject with properties at 61 Windermere Road (1,113 m²) and 14 and 18 Mayfield Street (1,292 m² and 2,016 m² respectively). The conclusion he drew from this exercise was that there was a discrepancy between the value of the subject and the value of 61 Windermere Road. This is because if those two sites are compared on a value per square metre basis the additional land in the subject (that is, the difference between the area of the subject and that of 61 Windermere Road) is valued at $578 per square metre. If a similar exercise is carried out in relation to the Mayfield Street properties and 61 Windermere Road, the additional land in the larger of the Mayfield Street properties is worth $262 per square metre.

[42] I am not prepared to conclude, from this exercise, that the valuation of the subject is obviously wrong. As Mr Slater acknowledged, residential properties are not usually valued per square metre, but on a site basis. There was no evidence before the Court as to the attributes of any of these properties (other than the subject) and a comparison on the basis of size alone may be totally misleading.

[43] As Mr Slater pointed out, there also appears to be some discrepancy between the unimproved value of the respondent's Sale No. 2 (11 Palm Avenue) and at least one other property in that street, 17 Palm Avenue. However, the unimproved value of 11 Palm Avenue was determined from analysis of the sale. The sale was also applied to determine the unimproved value of 9 Palm Avenue, and again I cannot conclude that the unimproved value of 11 Palm Avenue is incorrect.

[44] One other matter should be mentioned. There is a substantial difference between the unimproved value of Sale No. 2 (1,265 m²) which is $1,080,000 and that of 61 Windermere Road (1,113 m²) fixed at $670,000. It was suggested by Counsel for the appellant that this might establish that Palm Avenue is a much superior street to Windermere Road. Ms Manners did not accept that and commented that the unimproved value of 61 Windermere Road appeared to be low. I am not prepared to conclude, on that evidence alone, that this establishes the superiority of Palm Avenue over Windermere Road.

Conclusion re Valuation Evidence

[45] My conclusion is that the two sales relied on by Ms Manners can be applied, with adjustments, to determine the unimproved value of the subject. Ms Manners has made most of the necessary adjustments and, with one qualification, I have accepted her valuation, leaving aside the effect of the Vegetation Protection Order. The outstanding matter is the effect of the inclusion of the properties in the DCP.

Effect of DCP Restrictions

[46] The question is whether a prudent purchaser, in comparing the sale properties with the subject, would take into account the need to seek approval to demolish the existing improvements on the subject, if it were proposed to redevelop the subject land. No such approval is required to develop the sales properties because they were, effectively, unimproved at the date of sale. There was no market evidence given at the hearing to provide a definitive answer to that question. Mr Slater said that in his opinion the price paid for the property at 64 Windermere Road reflected the fact that because the land is vacant, there is one less planning hurdle to cross in order to redevelop the property.

[47] Although the subject property is to be valued, pursuant to s.3(1)(b) of the Act, on the assumption that, at the date of valuation, the improvements did not exist, this does not mean that any planning or development controls on the land are to be ignored. The Land Appeal Court held in *Queensland Club v The Valuer-General* (1991) 13 QLCR 207, that although the valuer is required to assume that the improvements never existed, the land is to be valued in its existing environment within its relevant town planning zone. Any statutory restrictions (or advantages) attaching to the use of the land, which have an effect on the value of the land, are to be taken into account. It follows that the valuation in this case must recognize that the subject property is located within a DCP.

[48] In *Roberts v Chief Executive, Department of Natural Resources* (1998) 19 QLCR 186, the Land Appeal Court was faced with a situation which is similar to this issue. *Roberts* was a case dealing with the effect, on the unimproved value of the land, of the inclusion of a residential property in the heritage register under the *Queensland Heritage Act 1992*. The Court rejected a valuer's opinion (which was not supported by market evidence) that the value of the land had not been adversely affected by the listing. The Court said (at 192):

> "We are not able to accept, however, that there is logic in the opinion that two hypothetically directly comparable residential properties, located in the same environment, one with a heritage listing, and the restrictions on freedom of use and private enjoyment which that entails, would be seen as equally desirable in the market place as the other, which could be used and privately enjoyed free of bureaucratic interference and direction."

[49] By analogy, I consider that it is logical that the prudent purchaser, faced with comparable properties located in a DCP, one of which is vacant and the other developed, would prefer the vacant land to the other. As Mr Kay said, there is one less planning hurdle to cross for the vacant land, should the purchaser wish to redevelop the property. I consider, therefore, that a deduction should be made to allow for the adverse impact of the demolition restrictions on the subject, as compared with both the sales.

[50] Ideally, the amount of that deduction should be ascertained in the market. In this case, there is no market evidence as to the increased impact of the demolition restrictions on the value of the subject land as compared with the sales.

[51] The Court in *Roberts* held (at 189) that the absence of sales evidence did not preclude the Court from making an assessment of the adverse impact of the heritage restrictions and concluded, in relation to a heritage listed residential property developed to its full potential, that the effect of the heritage listing on the land value was more than nominal, but fell within the lower spectrum. A discount of 10% was allowed.

[52] In this case, the restrictions imposed on the subject are substantially less than those considered by the Land Appeal Court in *Roberts*. In the circumstances, therefore, I consider that a deduction of 5% is sufficient to allow for the adverse effect of the demolition restrictions.

Effect of the Vegetation Protection Order

[53] The second major issue in contention was the appropriate discount to be applied to the unimproved value of the subject land to allow for the adverse effect of the Vegetation Protection Order on the value of the land.

[54] In the previous decision of this Court concerning this land, *Estate of Bressow (Decd) v Chief Executive, Department of Natural Resources*, the learned Member, Dr NG Divett, held (at 19) that it was appropriate to reduce the unimproved value of the land, to allow for the impact of the Vegetation Protection Order.

[55] The learned Member observed (at 16) that the Vegetation Protection Order could be seen either as an advantage or a disadvantage to a prudent owner. However, because the Vegetation Protection Order shifts control of the fig tree from the owner of the land to the Council, he considered that it must be seen as lessening the rights of the owner over the fig tree.

[56] There was no evidence before the Court in that case as to how the market place valued the impact of the Vegetation Protection Order. The learned Member considered previous decisions of this Court relating to the impact of a Vegetation Protection Order, and those

that deal with the effects of heritage listing and came to the conclusion (at 19) that each matter needs to be assessed on its individual merits. He then proceeded to consider the merits of the case before him. The matters the learned Member took into account were identified (at 19) as follows:

> "It is clear that the VPO covers a very large tree with an expanded root structure, in the northern part of the subject land, where overshadowing could cause some loss of amenity. The subject land is in a locality where lifestyle considerations may dictate selective use of major personal recreational facilities such as a tennis court or swimming pool. The nature of the White Fig tree is such that nuisance by bats and their habits could be a problem."

[57] The learned Member went on to hold (at 20,21) that:

> "If I also compare the fully usable area of the Houghton's Sale 3 (1,610 m²), I find that parcel was applied at an unimproved value of $675,000, due in part to a natural spring upon the land. I believe the area of the subject land that is not physically impacted by the presence of the fig tree, would be about 1,500 m². On that basis, such a slightly smaller area could provide the appellant free and unencumbered rights to develop the lifestyle ancillary uses in keeping with the locality, but would be seen as slightly inferior due to its smaller size. In the special circumstances of this matter, I will therefore allow a $50,000 deduction (7%) for the negative impact of the VPO upon the estimated unimproved value … ."

[58] I understand that a 7% deduction has been applied in each of the annual valuations of the appellant's land following the decision in *Bressow*. That discount was also applied, initially, to the annual valuation in issue in this case, but was raised to 10% following objection by the appellant. The appellant seeks a discount of 15%, primarily on the basis that the area of land adversely affected by the tree is now substantially greater than the area found to be impacted by the learned Member in *Bressow*.

The Tree

[59] The tree which is the subject of the Vegetation Protection Order is a *ficus virens*, commonly known as a white fig tree. The Vegetation Protection Order was imposed on 17 February 1997, by the Brisbane City Council. The stated reason for the imposition of the Order was that the tree has outstanding amenity value to the area. Prior to the imposition of the Order, a report was prepared by Mr Hillhouse following a site visit on 20 January 1997. The tree is described in the report as having a width of 35 metres and a height of 25 metres. Mr Hillhouse said that the tree displays outstanding form with a very large buttressed trunk with deep recesses. The tree is located on Lots 9 and 10 on RP 46719, (that is the subject land) with the canopy and roots spreading to surrounding land. The area of the subject beneath the tree is landscaped informally.

[60] Evidence was given by Mr Walsh and Mr Morris, and photographs were tendered, which establish that there is serious root intrusion throughout the northern garden of the property, right up to the house. A substantial lump of root with a diameter of 90 mm was tendered as evidence (Exhibit 12). Mr Morris said that this was typical of the roots found below the concrete apron on the northern side of the house, in February 2002. The roots have penetrated and blocked the sewerage drain from time to time. They also extend beyond the boundaries of the subject property to the north, as described by Mr Walsh, and to the properties to the east of the northern side of the subject, and at least onto the footpath along the western boundary of the subject.

[61] Mr Slater estimated, and I accept, that the root system affects approximately 850 square metres of the appellant's property. This is considerably more than the area of 500 square metres which the learned Member in *Bressow* found to have been impacted by the roots. It appears that the tree has grown in the interim period. There was no real measure of the size of the increase although there was evidence that the canopy is now some six metres wider than in 1997. It may be that the extent of the root intrusion was not completely measured in *Bressow*. In any event, I am satisfied that as at the date of valuation, the roots affected about 850 square metres of the property The balance of the land unaffected by the root system is, therefore, approximately 1,200 square metres.

[62] The tree has a significant impact on the use that may be made of a substantial part of the property. Effectively, it appears that the appellant is limited to the current use of the northern portion of the property, that is, as an open garden area. It may be that small structures, such as a child's playhouse or a barbecue could be built in that area. No sizeable structure would be approved as the foundations would damage the tree's root system. Thus the appellant could not construct a new swimming pool there. Mr Hillhouse suggested that a tennis court, with a waffle slab, or something that allowed air to move underneath, could be built in this area, but I have accepted Mr Walsh's evidence that modern tennis courts are normally constructed with a concrete slab, which would probably kill the tree. Moreover, it is unlikely that anyone would wish to construct a tennis court under a white fig tree given the annual leaf fall and other matter which falls from the tree. In the prestigious area in which the subject property is located, limitations of this nature will, in my opinion, impact adversely on the price that a prudent purchaser would be willing to pay for the land.

[63] The tree impacts on the property in other, less severe ways. The tree is located on the north-eastern side of the subject. Its canopy interferes with the sunlight on the northern side of the property which is undesirable in winter. Similarly, the tree interferes with the

prevailing north-easterly breeze, which is a disadvantage in summer. There is also some interference with views to the north-east of the house. The tree is deciduous so that there is an annual leaf fall, lasting for at least 3 weeks, and longer with seasonal variation, with consequent leaf litter to be dealt with. Calyces and fruit also fall from the tree. The tree is visited annually, when it is in fruit, by large numbers of fructiferous bats with adverse consequences, which were graphically described by Mr Walsh, as to noise and droppings. No doubt there are many large trees in Brisbane which create similar problems. The appellant's tree is, however, covered by a Vegetation Protection Order and therefore her ability to manage those problems is restricted.

[64] The effect of the Vegetation Protection Order is that it is highly unlikely that the Brisbane City Council would consent to an application to remove or destroy the tree. Similarly, the Council would not approve the construction of any structure which might significantly damage the root system. That does not mean, however, that the appellant cannot touch the tree at all. I have accepted Mr Hillhouse's evidence that the appellant could limit the damage caused by the tree's extensive root system by applying to the Brisbane City Council for permission to trim the roots, or to use less expensive technologies such as water lancing or the installation of root barriers, or to undertake other ameliorating work. I also find that the appellant could prune the canopy of the tree to the extent that it might intrude within 6 metres of the house, without making an application to the Council. Similarly it is not necessary for the appellant to apply to the Council for permission to remove deadwood or to ameliorate dangerous conditions resulting from the tree.

[65] It is clear however, that although the appellant has not lost total control over the tree, the effect of the Vegetation Protection Order is that, in relation to the very significant issues of removal, and control of roots and canopy, the appellant has lost significant control over the tree. These are matters that would be taken into account by the hypothetical prudent purchaser.

[66] It should also be remembered that the tree is a very fine specimen which would be attractive to many purchasers. There was some evidence that an attractive tree may be seen as an asset, and that a Vegetation Protection Order is not necessarily a detriment. Evidence was given by Ms Manners of the sale of a property at 7 Hadfield Street Windsor. There is a large weeping fig inside the front boundary of the land which is preserved by a condition attached to the Brisbane City Council development approval for the property. Ms Manners said that the developers regarded the tree as an asset that added about $20,000 to the value of the land. The subsequent purchaser also regarded the tree as an asset and said that she did not consider that a Vegetation Protection Order, (which

she had been wrongly informed was in place over the tree), would be a detriment to the value of the property. A house had been constructed on the land in such a way as to preserve the tree.

[67] While it may be that an attractive tree may be seen as an asset by some purchasers, and that, perhaps, such a purchaser would not regard a Vegetation Protection Order as a detriment, the authorities indicate that each case is to be considered on its merits. In this case the evidence was such that I consider that a reasonable purchaser would regard the Vegetation Protection Order as a detriment. It is to be noted that, as in *Bressow*, there was no evidence given in this case as to how the market place determines the value of that detriment.

[68] The question that is to be determined is the value of the impact that the Vegetation Protection Order would have on the prudent purchaser, assuming the land to be unimproved at the time of purchase. The effect of s.17 of the Act is that any impact of the tree on potential subdivision of the land is to be ignored for the purposes of this valuation. The purchaser would be faced with the prospect of limited use of approximately 42.5% of the land, because of the extensive root system. Substantial structures such as a house, a swimming pool and a tennis court would have to be confined to the balance area of 1,200 square metres. It is likely that expensive barriers would be needed to prevent the roots damaging the proposed structures. Such work would require negotiation with and the prior approval of the Brisbane City Council. Similarly the purchaser would, from time to time, need to obtain Brisbane City Council approval to control the roots and trim the canopy. The tree interferes with the purchaser's ability to take full advantage of the north eastern aspect of the land. On the other hand, the 850 square metres is not rendered totally useless as it can be used as an attractive garden area to compliment the house.

Conclusions

[69] The respondent has allowed 10% for the impact of the Vegetation Protection Order. This is somewhat conservative given my findings as to the extent of the impact of the tree, and as compared with the 7% allowance made in *Bressow*, where the impact was found to be considerably less than I have determined. I consider that an allowance of 12% more appropriately reflects the current disadvantages flowing from the Vegetation Protection Order.

Unimproved value (leaving aside the effect of the DCP Restrictions and the VPO)	$1,150,000
Less 5% for effect of DCP Restrictions	$57,500
	$1,092,500
Less 12% for effect of VPO	$131,100
	$961,400
Rounded to	$960,000

Orders

[70] (i) The appeal is allowed.

(ii) The unimproved value of Lots 9 and 10 on RP 46719, Parish of Toombul, County of Stanley, as at 1 October 2001, is determined at Nine Hundred and Sixty Thousand Dollars ($960,000).

MEMBER OF THE LAND COURT