[SUPREME COURT OF VICTORIA]

EQUITY TRUSTEES EXECUTORS AND AGENCY CO LTD AS TRUSTEE OF A SETTLEMENT DEED OF SIR WILLIAM HILL IRVINE DATED 5 MAY 1930 AND OTHERS v MELBOURNE AND METROPOLITAN BOARD OF WORKS

Gobbo J

24-25, 28 June, 9 August 1993

Town Planning — Compensation — Assessment — Valuation of land — Methods of — Highest and best use — Time for calculating — Confined to relevant date of refusal of town planning permit — Planning and Environment Act 1987 (Vic), ss 98, 99.

Town Planning — Compensation — Assessment — Valuation of land — Methods of — Pointe Gourde principle — Applicable under common law — Land Acquisition and Compensation Act 1986 (Vic), s 43 — Planning and Environment Act 1987 (Vic), s 98.

Town Planning — Compensation — Assessment — Factors in estimating — Solatium — On compensation "payable ... in respect of a residence" — Refers to whole claim for loss of residential land — Planning and Environment Act 1987 (Vic), s 100(1).

The *Planning and Environment Act* 1987 (Vic), s 98, provides for compensation to be paid to the owner of land who suffers loss as the consequence of land being reserved for a public purpose under a planning scheme; s 99 provides that the right to such compensation arises on refusal of a planning permit. Section 104 provides that compensation:

"... must not exceed the difference between —

(a) the value of the land at the date on which the liability to pay compensation first arose; and

(b) the value that the land would have had at the date if the land had not been affected by any circumstance set out in section 98(1) or (2) or 107."

Section 100 permits a claim for solatium; s 100(1) provides:

"The amount of compensation payable under section 98 in respect of a residence may be increased by an amount which is reasonable to compensate the claimant for any intangible and non-financial disadvantages arising from the circumstances which gave rise to the claim under section 98."

An application for compensation following refusal in September 1990 of a subdivisional application was made in respect of land re-zoned (in 1971) from rural to proposed public open space. If the land had not been reserved it would have been zoned special conservation.

Held: (1) The *Planning and Environment Act* 1987 does not, in terms, allow a claim for financial loss to be calculated by reference to an attribute of the land, as a constituent of highest and best use for valuation purposes, which may have been able to have been attained at an earlier point of time but not at the relevant date. It requires, that the land be considered with all its attributes, existing and potential, at the relevant moment for assessment of value, namely,

just prior to refusal. It is not open to the claimant, or for that matter the authority, to reach back in time to select an attribute albeit expressed as its then highest and best use, and then seek to apply this at the relevant date (which is the date of refusal) regardless of the highest and best use at that date.

Cape Developments Pty Ltd v City of South Barwon [1982] VR 1011; (1981) 49 LGRA 268, *City of Nunawading v Day* [1992] 1 VR 211, *Mario Piraino Pty Ltd v Roads Corporation* [1993] 1 VR 130; (1990) 76 LGRA 263 and *Studley Developments Pty Ltd v Department for Planning & Urban Growth* [1993] 1 VR 15; (1992) 76 LGRA 325, referred to.

(2) Section 43 of the *Land Acquisition and Compensation Act* 1986 (Vic), which contains the statutory formulation of the *Pointe Gourde* principle does not apply to claims under s 98 of the *Planning and Environment Act* 1987. The principle developed in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 and expanded in *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426; (1978) 37 LGRA 387 is however applicable as part of the common law.

(3) For the purposes of s 100(1) of the *Planning and Environment Act* the reference to compensation in respect of a residence should be treated as a phrase of classification relating to separate compensation claims for residences as opposed to compensation claims for vacant land, or industrial or commercial premises.

CLAIM FOR COMPENSATION

This was a claim for compensation for injurious affection under s 98 of the *Planning and Environment Act* 1987 (Vic), following refusal of a subdivisional application.

J L Sher QC and *G L Meehan*, for the claimants.

C J Canavan QC and *J T Delaney*, for the authority.

Judgment reserved

9 August 1993

GOBBO J.

The claim:

This is a claim under the *Planning and Environment Act* 1987 (Vic) for financial loss caused by a refusal of a planning permit. The subject land, known as Killeavy, consists of some 54.8 hectares of attractive land along the banks of the Yarra River in Research. The land was in two titles but was divided into three Crown allotments, namely allotments 7, 8 and 9. The long-established house and large garden is on allotment 8. The first-named claimant is the trustee of a settlement deed of Sir William Irvine dated 30 May 1930.

In 1971, the Melbourne and Metropolitan Board of Works which was the predecessor to the present authority — and which I will hereafter refer to it as "the Board" — was the planning authority for the metropolitan area. It exhibited a major amendment, Amendment 21 to the *Melbourne and Metropolitan Planning Scheme*. Part 4 of this amendment included proposals to change the planning status of much of the land adjoining the Yarra River, including the subject land. The amendment was that the subject land be altered from being zoned rural, its then zoning, to being reserved for public purposes, namely proposed public open space. The total area covered by the

reservation in Pt 4 was some 1,040 hectares (4 square miles) which was generally included in a rural zone in the planning scheme extending from Banksia Street, Bulleen to Warrandyte.

As at 1971 the scheme was so administered as to make land zoned rural capable of being subdivided into allotments of not less than 20 acres (8 hectares) in size. It should be noted that until 25 February 1969 the minimum size for land in a rural zone was 2 hectares. From 1 December 1971, Amendment 21 was placed on exhibition. The relevant part of this amendment was Pt 4. This was approved on 3 December 1975. Between 1971 and 1975 objections were considered and public hearings conducted. There then followed a report and ultimately Pt 4 of the amendment was adopted, with a number of modifications. One of the modifications made was that some of the land previously proposed to be reserved for public open space was removed from this status and was shown as zoned as special conservation. This was a new zone, neither existing nor proposed before the adoption of Amendment 21. It became part of the scheme in 1975. It was not, however, applied to the subject land which in 1975 became reserved for proposed public open space. The new special conservation zone was applied to two parcels of land in the vicinity of the subject land.

Between 1971 and 1990 no planning applications were made in respect of the subject land, whether for the purposes of founding a compensation claim or otherwise. Though the deed of settlement was not in evidence, it appears to have been accepted and I accept that Mrs Morrison was the life tenant under the deed of settlement which gave her a power of appointment from a class of beneficiaries, being the children and grandchildren of the settlor. Mrs Morrison continued to live in the house on the subject land until her death in 1990. The second, third and fourth-named claimants still reside in Killeavy.

On 7 June 1990, the first-named claimant applied for a permit to subdivide and develop the subject land, as a preliminary to lodging a claim for compensation, assuming there would be a refusal on the ground that the land was reserved for a public purpose. The actual application was to subdivide that part of lot 9 which was reserved as proposed public open space and erect a dwelling thereon, to subdivide lot 8 into two lots and erect a dwelling on one of these lots and to include a house on lot 7. At this time, the northern part of lot 9 was zoned landscape interest. The relevant responsible authority was then the Shire of Eltham which refused the application on 10 September 1990 on public purpose grounds but in somewhat ambiguous terms. There then followed an appeal which upheld the refusal, save that, by consent, it was directed that a permit issue for the subdivision of the northern part of lot 9 which are described as two lots, namely lot 9A and lot 9B. Lot 9A was not the subject of the reservation but was zoned landscape interest C. As lot 9A was some 8 hectares in size, it might suffice to be subdivided as a separate allotment and have a house erected upon it. Before the commencement of the hearing, the parties agreed that the compensation should be assessed as at the date of the refusal, 10 September 1990, and not the later date in 1991 of the dismissal of the appeal. It was said that the level of values was higher at the earlier date. The parties also agreed on the compensation payable upon certain common scenarios. The calculations were founded upon the value of the land at the relevant date, namely the refusal of permit on 10 September 1990 and before the refusal, assuming

that the land was not affected by the reservation. There was agreement as to the "after" value of the land that is not affected by the reservation. The dispute was as to the highest and best value of the land on a "before" basis, that is assuming it had not been reserved at the relevant date.

The three scenarios for this highest and best use were as follows. It was first assumed that the subject land could have been subdivided into five allotments, each of which could have a house erected on it. The second hypothesis was that the land could have been subdivided into four allotments, with similar development rights. The third scenario was that the land remained in three allotments, in respect of each of which a permit to erect a house could have been secured. The agreed calculations were as follows:

"*Assume highest and best use of three lots*

'Before' value	$1,372,500.00
'After' value	$ 500,000.00
Compensation	$ 872,500.00

Assume potential to subdivide with a highest and best use of four lots at the relevant date. No subdivision in place.

'Before' value	$1,446,500.00
'After' value	$ 500,000.00
Compensation	$ 946,500.00

Assume highest and best use five lot subdivision in existence at the relevant date

'Before' value	$1,710,000.00
'After' value	$ 500,000.00
Compensation	$1,210,000.00"

For the claimants, for whom Mr Sher QC and Mr Meehan appeared, it was argued that the highest and best use of the subject land was on their first basis, namely as five allotments, alternatively the second hypothesis of four allotments. For the Board, for whom Mr Canavan QC and Mr Delaney appeared, it was argued that only the third basis of three allotments, each capable of attracting a permit to erect a house, was appropriate.

Statutory basis for the claim:

Before turning to the rival arguments in more detail, it is convenient to set out the relevant statutory provisions.

Section 98 and s 99 of the *Planning and Environment Act* 1987 provides as follows:

"98.(1) The owner or occupier of any land may claim compensation from the planning authority for financial loss suffered as the natural, direct and reasonable consequence of —

(a) the land being reserved for a public purpose under a planning scheme; or

(b) the land being shown as reserved for a public purpose in a proposed amendment to a planning scheme of which notice has been published in the Government Gazette under section 19; or

(c) a declaration of the Minister under section 113 that the land is proposed to be reserved for a public purpose; or

(d) access to the land being restricted by the closure of a road by a planning scheme.

(2) The owner or occupier of any land may claim compensation from a responsible authority for financial loss suffered as the natural, direct and reasonable consequence of a refusal by the responsible authority to grant a permit to use or develop the land on the ground that the land is or will be needed for a public purpose.

(3) A person cannot claim compensation under sub-section (1) if —

(a) the planning authority has purchased or compulsorily acquired the land or part of the land; or

(b) a condition on the permit provides that compensation is not payable.

(4) The responsible authority must inform any person who asks it to do so of the person or body from whom the first-mentioned person may claim compensation under this Part.

99. A right to compensation and the liability of a planning authority or responsible authority to pay compensation arises —

(a) under section 98(1)(a), (b) or (c) after —

(i) the responsible authority has refused to grant a permit for the use or development of the land on the ground that it is or may be required for a public purpose; or

(ii) the Administrative Appeals Tribunal directs that a permit must not be granted on the ground that the land is or may be required for a public purpose; or

(iii) the responsible authority —

(A) fails to grant a permit within the period prescribed for the purposes of section 79; or

(B) grants a permit subject to any condition which is not acceptable to the applicant —

and the Administrative Appeals Tribunal disallows any appeal against the failure or condition on the ground that the land is or may be required for a public purpose; or

(b) under section 98(1)(a), (b) or (c), on the sale of the land concerned under section 106; or

(c) under section 98(1)(d), on the coming into operation of the relevant provision of the planning scheme; or

(d) under section 98(2), on the refusal of the permit."

Also material are s 104 and s 105 of the same Act which read:

"104. The compensation payable for financial loss under section 98 must not exceed the difference between:

(a) the value of the land at the date on which the liability to pay compensation first arose; and

(b) the value that the land would have had at the date if the land had not been affected by any circumstance set out in section 98(1) or (2) or 107.

105. Parts 10 and 11 and section 37 of the Land Acquisition and Compensation Act 1986, with any necessary changes, apply to the determination of compensation under this Part as if the claim were a claim under section 37 of that Act."

In *Mario Piraino Pty Ltd v Roads Corporation* [1993] 1 VR 130; (1990) 76 LGRA 263, this Court decided that s 105 imported no more than the procedural machinery of the *Land Acquisition and Compensation Act* 1986 (Vic).

The evidence as to highest and best use:

Each side called experienced town planners who had provided affidavits setting out their evidence. Both valuers said that as at the date of refusal of permit, if the subject land had not been reserved, it would have been zoned special conservation. It was common ground that as such, it could not have been further subdivided into five allotments at the relevant date. The relevant provisions of the *Shire of Eltham Planning Scheme* at that date with respect to land zoned special conservation were as follows:

"110. SPECIAL CONSERVATION ZONE

Planning Scheme Map: Marked CN2

Purpose

To restrict development to that existing at the time of application of the zone to any land in order to preserve the opportunity for the future use of the land to be determined by the responsible authority.

110-1 Use of land

110-1.1 Permit not required — Section 1

USE	CONDITION
Bee Keeping	
Movable Dwelling Unit	
Passive Recreation	
Dual Occupancy	The second dwelling must form part of or be added to an existing detached house on a site of at least 1 ha.

110-1.2 Permit required — Section 2

USE	CONDITION
Afforestation	
Agriculture	
Detached House	
Home Occupation	
Minor Sports Ground	
Minor Utility Installation	
Occupational Store	
Radio Mast	
Road	

110-1.3 Prohibited — Section 3

USE
Any uses not in Sections 1 or 2

110-2 Subdivision

A permit is required to subdivide land.

An application must be referred to a referral authority listed in Clause 102-1.

A permit may only be granted if either:

- A lot created is to be vested in a public authority or Council.
- Existing lot boundaries are realigned and no additional lots are created."

Neither expert suggested that if the land had been zoned special conservation, a five allotment plan of subdivision would have been open. Neither expert gave evidence that at the relevant date the subject land as a whole, would have been zoned in any other category, such as rural or landscape interest. The absence of rural was not surprising since by 1990 that zone had virtually ceased to be used, but the absence of any such proposition as to landscape interest from the claimants' expert report was significant, for that was the zoning of the land to the north of the subject land. Under landscape interest zoning, the subject land could have attracted a permit for a subdivision into five allotments. The evidence of both experts was such that only one finding was really open, namely that the underlying zoning of the land at the relevant date was special conservation. I find this to be the underlying zoning of the land and I further find that a permit for five lots was clearly not open upon such zoning of the subject land at the relevant date.

The question which the Court has to address is, what was the highest and best use of the subject land at the relevant date. This is often referred to in summary terms as the before value. Though the experts' evidence was not the sole source of evidence, it was the most significant. That evidence clearly established, in my view, that at the relevant date the highest and best use of the subject land was not for subdivision into five allotments, each capable of having a house erected on it.

But there were several arguments put as to why the Court should not give effect to the evidence that special conservation was the underlying zoning in 1990 and why the land should not be valued on that basis. The first of these arguments depended on a novel and interesting proposition, supported by evidence from the claimants' expert, that the land should be valued as if it possessed, in effect, a permit for a five lot subdivision, secured in the period before 1975 whilst it was still zoned rural. This may be described as the inchoate 1975 permit.

The inchoate 1975 permit:

The essence of this argument was that the highest and best use should be founded on the basis that the owner of the subject land had applied for and secured a permit to subdivide the land before more restrictive controls had been imposed and before the reservation had been finally placed on the land in 1975. It was argued that it was not to the point that no permit had in fact been applied for. It was said that the matter was to be judged hypothetically by the test of what a prudent owner would have done.

The *Planning and Environment Act* 1987 does not, in terms, allow a claim for financial loss to be calculated by reference to an attribute of the land, as a constituent of highest and best use for valuation purposes, which may have been able to have been attained at an earlier point of time but not at the relevant date. It requires, in my view, that the land be considered with all its

attributes, existing and potential, at the relevant moment for assessment of value, namely just prior to refusal. It is not open to the claimant, or for that matter the authority, to reach back in time to select an attribute albeit expressed as its then highest and best use, and then seek to apply this at the relevant date regardless of the highest and best use at that date. This principle is inherent in the series of decisions of this Court where, though this argument was not addressed, it was clear that the date of refusal was the relevant date: see *Cape Developments Pty Ltd v City of South Barwon* [1982] VR 1011; (1981) 49 LGRA 268; *City of Nunawading v Day* [1992] 1 VR 211; *Mario Piraino Pty Ltd v Roads Corporation*; *Studley Developments Pty Ltd v Department for Planning & Urban Growth* [1993] 1 VR 15; (1992) 76 LGRA 325.

It was sought to accommodate this principle by arguing that the Court was obliged to exclude the effect of the scheme of acquisition, or by analogy here, the public purpose proposal, in ascertaining highest and best use. This was a legitimate principle recognised and adopted by this Court in the above decisions: see especially the *Studley Developments* case (at 20; 330) where the before and after method of assessment of loss is described.

But this principle does not permit a claimant to go back in time and select a potential which the land may then have had, regardless of later events. Even though, as a matter of chronology, a public purpose proposal is then advanced, this does not mean that the proposal has caused other loss of an attribute. To take a mundane example, a landowner may seek to explain the poor condition of his land by reference to the fact that it was not worth his while improving his land when it was about to be acquired, but he cannot sustain an argument that his land would otherwise have been considerably improved if there had not been any acquisition proposal and that his land should be so valued for purposes of assessment of compensation.

If there were any doubt about the importance of linking the highest and best use to the relevant date and not to the date of the commencement of the public purpose proposal or the commencement of the scheme of acquisition, the matter is put beyond doubt by the terms of s 104 which provides:

> "The compensation payable for financial loss under section 98 must not exceed the difference between:
>
> (a) the value of the land at the date on which the liability to pay compensation first arose; and
>
> (b) the value that the land would have had at the date if the land had not been affected by any circumstance set out in section 98(1) or (2) or 107."

I am unable to see how this section can be given full effect if the before value of the land is tied to a point of time almost twenty years before the time of assessment presented in this section. It may be said that some attempt could be made to accommodate this section and s 98 and s 99 of the Act by using the level of values prevailing at the date of refusal but by measuring the attributes and the loss of attributes by reference to a different point of time. But there is no warrant for doing this in the face of s 104.

It may also be sought to sustain the argument by contending that but for the public purpose proposal, the land would have had a certain attribute, namely potential for subdivision into five allotments as at September 1990. But this does not assist the claimants in this argument, which postulates that

the land should be treated in 1990 as if it had a permit for a five lot subdivision secured sometime between 1971 and 1975. Or, to put it another way, but for the reservation the land would have had such a permit. The "but for" approach is entirely legitimate but there is no basis in principle or in the face of the legislation for taking one's stand in judging potential, and so loss, other than at the date of refusal. Taking such a stand, it is the potential of the land at that time that must be measured, upon the conventional basis that there was not and had not been in place the public purpose reservation scheme.

It is desirable, in the event of an appeal, that I also make my findings on the issue of fact.

The issue of fact was, whether the owner would have secured a permit for a five lot subdivision had it applied before adoption of Amendment 21, Pt 4 in December 1975. It was common ground that during the period from 1971 to 1975, it was open to the responsible authority, as a matter of power, to give a permit for a five lot subdivision. Mr Barlow, the town planner called for the claimants, said the owner could have secured such a permit on appeal. He submitted that, though as a matter of good planning and practice, the responsible authority would not undermine the proposed amendments by giving permits which ran counter to the amendments during the period up to adoption, it would still give permits which were not inconsistent with the amendment. The proposition was not expressly tied to the amendment, as it affected the subject land, namely a reservation for a public purpose, namely, proposed public open space. Later, it was described as postulating an amendment imposing more restrictive controls. Reliance was placed on a list of reported decisions of the Town Planning Appeals Tribunal, the predecessor to the Administrative Appeal Tribunal. This list showed that in a total of thirty-one reported cases, between 1972 and 1978, twenty had secured a permit and eleven had failed to secure a permit. Each decision in that list had a short summary beside it. Most of the cases were concerned with applications to subdivide into lot sizes smaller than the minimum in the particular zone proposed in the amendment. It was said that though the tribunal began by being resolute in its refusal to give permits that ran counter to the amendment, after some years it became more lenient, affected, it was said, by the consideration that an owner should not be held up for years from a development which was not going to do violence to the proposed amendment. Four of the cases related to Amendment 21, the remainder to Amendment 3. None appears to have been related to Amendment 21, Pt 4.

Mr Whitney, the town planner called for the Board, did not agree and argued that at best it was entirely speculative what a tribunal would have decided. He did concede under cross-examination that he could not exclude the possibility that a tribunal might have given a permit to subdivide in 1975.

It was not clear whether the claimants' proposition was founded on the land being proposed to be reserved for public open space. If it was, then I am satisfied that a tribunal would not have given a permit at any time for a five lot subdivision, carrying with it the right to erect four additional houses. Such a permit would, in my view, have been on its face wholly inconsistent with a reservation for public open space. It is significant that none of the decisions relied upon appear to have related to land reserved for a public purpose. The proposition was a very bold one and required cogent evidence

of the practice of responsible authorities and planning tribunals. There was no evidence at all as to what the responsible authorities at first instance decided, other than that which can be inferred from the fact that there were the appeals reported. Nor was there a specific decision pointed to, of a permit granted in respect of reserved land. Much less was there any reliance on any statement of principle from the tribunal relevant to this case and the reasons for the decisions were not referred to.

It may be, however, that the proposition was founded on a more modest approach which assumed a proposed move to more restrictive control zonings but not including a reservation for a public purpose. There are difficulties about this approach, for it seeks a finding of fact as to what a tribunal would have done when an essential ingredient of fact is missing, namely what was the proposed more restrictive zoning which the tribunal would have had to consider if it was not a reservation but a zoning? The expert evidence never really addressed this. This was not surprising, for it would have been speculation heaped upon hypothesis.

At one point, in final addresses, I was invited to choose some hypothesis such as a proposed special conservation zone or a proposed landscape interest zone. Even if that course had been properly open to me, on the state of the evidence, I would not have been satisfied that a tribunal would have granted a five lot subdivision and development permit.

The de facto reservation argument:

It was argued, as an alternative to the submissions just considered, that if the land was to be treated as having special conservation as its underlying zoning then that zoning itself must be ignored. It was not clear, in that event, what was to be chosen as the underlying zoning. The argument was that the special conservation zone was essentially a de facto form of reservation for a public purpose. It was said, that to all intents and purposes the special conservation zone and the present reservation were the same in effect. The restrictions in a special conservation zone were so severe that there were indeed less restrictions or more potential for development to reserved land. It was argued, that where land was in effect so zoned as to make it indistinguishable from a reservation, then the land should be treated as reserved. There was an alternative argument put, relying upon the *Pointe Gourde* principle, that is, the principle affirmed in *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 and its statutory implementation. This, it was said, required that a special conservation zone be seen as a step in the scheme or process of acquisition which had to be ignored.

Where a planning authority is empowered to create zones or to reserve land for public purposes, it would arguably be an abuse of the power granted to the planning authority for it to create a zone which was a reservation by subterfuge. Such a course would be analogous to an exercise of power, not for the specified purpose but for an ulterior object. An illustration of how the courts will restrain such an acquisition may be seen in *Werribee Shire Council v Kerr* (1928) 42 CLR 1; see also *Criterion Theatres Ltd v Sydney Municipal Council* (1925) 35 CLR 555.

If a conservation zone were created that was a reservation by subterfuge, or more particularly deprived the owner of all beneficial use of the land but by the device of a zoning description set out to deny the owner any right to

compensation, then there is no reason in principle why an owner may not be able to attack such action as an abuse of power, which he could seek to set aside by declaratory proceedings. That would not necessarily ground a claim for compensation however, even though in the case of an acquisition it would, as in *Kerr's* case, enable the acquisition to be restrained.

The decision in *Van der Meyden v Melbourne and Metropolitan Board of Works* [1980] VR 255; (1979) 45 LGRA 233 was founded on an interpretation of the planning ordinance and I do not interpret that decision as excluding a challenge founded on an abuse of power. The present case is not founded on an abuse of power. Rather it is based on an argument that when addressing the issue of underlying zoning, a zone that is a de facto reservation must be ignored. I have some difficulty in a court making such a finding about a zoning such as special conservation which actually covers many other parcels of land. It would be odd if the court could make such a finding without the relevant planning authority and possibly other interested landowners having an opportunity to be heard.

These difficulties can be set to one side, however, for I am satisfied that it cannot properly be said here that the special conservation zone was in substance the same as the reservation for proposed public open space. There was a clear difference between the two. Under that zoning, though no further subdivision was permitted, it was open to the responsible authority to grant a permit to erect a house on each of the three existing allotments. Under the reservation, no right to erect a house on each allotment was properly open. The evidence did not warrant a finding that there could be a house development permit on land reserved for proposed public open space. There is the world of difference between land on which one can build a house and land where such a right is denied.

Much reliance was placed in argument on the text of the report which first suggested the creation of the special conservation zone. That report included references to the zone having a transitional role and to the fact that there was an economic advantage for the Board in a reduced exposure to compensation. These factors are important but they are not decisive when set against the critical fact that the new zone was more beneficial in use terms to the owner than a reservation. This, no doubt, explains why the zone was described as having been created at the request of landowners affected by the proposed reservation.

The alternative argument for treating the special conservation zone as inoperative was that this zone was a step in the acquisition process and so was to be excluded by recourse to the *Pointe Gourde* principle. Particular reliance was placed on the decision of the Privy Council in *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426; (1978) 37 LGRA 387. There, their Lordships applied the converse of the *Pointe Gourde* decision and held that where a scheme of acquisition contained a freeway reservation which had the effect of depressing the value of the balance of the owner's land such detrimental effect had to be excluded in the assessment of compensation. This was so even though the claimant had purchased with presumed knowledge of the freeway project. By analogous reasoning, it was said, the special conservation zone had to be treated as a step in the acquisition process. As its existence, as opposed to some more benevolent form of zoning, adversely affected the highest and best use, then it had to be excluded.

The statutory implementation of the expanded *Pointe Gourde* principle is to be found in s 43(1)(a) of the *Land Acquisition and Compensation Act* 1986. This provides:

> "(1) In assessing compensation, the following matters must be disregarded:
>
> (a) Any increase or decrease in the market value of the interest in land which is acquired arising from the carrying out, or the proposal to carry out, the purpose for which the interest was acquired."

In addition there is s 43(1)(d):

> "(1) In assessing compensation, the following matters must be disregarded:
>
> ...
>
> (d) In a case where the land in which the acquired interest subsists is reserved for a public purpose in a planning instrument, any restrictions upon the use or development of that land which are imposed by, or are a consequence of, the reservation."

By s 105 of the *Planning and Environment Act* 1987, only Pts 10 and Pt 11 and s 37 of the former Act are incorporated. Save where otherwise expressly indicated, it is only the procedural and not the substantive provisions of the *Land Acquisition and Compensation Act* 1986 which are made applicable to claims for financial loss under s 98 of the *Planning and Environment Act* 1987.

I am accordingly of the view that s 43 of the *Land Acquisition and Compensation Act* 1986 does not apply. I conclude however that the principle developed in the *Pointe Gourde* case and expanded in the *Melwood* case is none the less applicable as part of the common law.

These decisions do not, in my opinion, suffice to establish the proposition in this case that the special conservation zone was a step in the acquisition or a like process. It is true that this proposed zone was, at one point, described in the report on the objection hearings as a transition zone. But, interpreted in its context, this did not mean a step towards certain acquisition but a transitional zone, in place rather than in time, between land definitely committed for acquisition for public open space and land clearly committed for development. Even if this interpretation is not adopted, I am of the opinion that the special conservation zone, with its acknowledged right to secure house developments on each allotment, such developments being permanent and in no sense temporary or qualified as to time or cost, is not a step in a scheme to bring about ultimate acquisition for public open space.

It follows that the claimants' claim for an assessment of loss founded on the five lot plan of subdivision must fail.

The four lot plan of subdivision claim:

The claimants contended, in the alternative to a claim based on a five lot subdivision, that the before value should be based on the owner being able, in the absence of the reservation, to secure a permit for a four lot plan of subdivision, again with a right to have a house on each lot. Understandably heavy reliance was placed on the fact that at the appeal, there was by consent a direction that a permit issue to subdivide lot 9 into two allotments.

Some analysis is necessary of the title, planning and other characteristics of lot 9. There were two certificates of title covering the subject land, being

lots 7, 8 and 9. Lot 9 was covered by certificate of title, vol 3721, fol 116. It was expressly conceded that each of lots 7, 8 and 9 would have been able to secure its own separate title.

Lot 9 consisted of 19:171 hectares of land. In December 1975 after Amendment 21, Pt 4 was adopted, some 4.7 hectares of the northern portion of lot 9 remained zoned rural, the balance being reserved for proposed public open space. This portion was a triangle which obtruded into the rural zone beyond the band of reserved land adjoining the River Yarra. In 1978 this triangle of land was re-zoned "landscape interest". In June 1980 the landscape interest zone was extended southwards so as to increase the area zoned landscape interest by some 3.45 hectares. This brought about the minimum lot size necessary for a separate lot in such zone. In 1986 this zoning was altered to landscape interest "C" and, in February 1988, this zoning and the reservation of the balance of the subject land became part of the *Eltham Planning Scheme*.

It was urged on behalf of the Board that I should assume that the increase in the portion of lot 9 zoned landscape interest only occurred because of the reservation and that accordingly I should, on the basis of the *Pointe Gourde* principle, disregard this as analogous to a step in the scheme of acquisition. I have some reservation as to whether this falls within that principle but even assuming it did, I am not satisfied that the re-zoning in fact only came about because of the reservation. The evidence did not support such a finding, for it was equally, if not more probable that in 1980, the re-zoning of the northern half of lot 9 would still have occurred, even if the subject land had not been reserved but had been zoned special conservation. It was logical that the zoning boundary be such as to be compatible with the neighbouring zoning. It was also logical for the planning authorities to permit the landscape interest portion of lot 9 to be increased so as to enable that portion to be a meaningful size rather than leaving it as an irrelevant area.

In September 1990 the first-named claimant applied, inter alia, to subdivide lot 9 into two allotments. At the appeal, even though the reservation stood, the tribunal directed that the responsible authority issue a permit for the subdivision of lot 9. Such a permit in due course was issued by the Shire of Eltham on 5 August 1992. The tribunal's direction was made by consent following negotiations between the parties, namely the owner, the Board and the responsible authority.

On behalf of the Board it was argued that the subdivision of lot 9 should be treated as solely due to the presence of the reservation and that it should be disregarded as, in effect, a windfall due only to reservation. I am asked to find this essentially as a matter of inference as the tribunal did not offer any reasons in support of the direction. In these circumstances I cannot find that the subdivision in fact only came about because of the reservation. In one sense, it is an artificial exercise to speculate as to what this tribunal intended since it is probable that the tribunal gave effect to the absence of opposition, if not express consent of the two authorities. In my opinion the proper approach is to ask what would a tribunal — or indeed the responsible authority — have decided at the relevant date, assuming the balance of lot 9 and the rest of the subject land in lots 7 and 8 was not reserved but was zoned special conservation.

On this approach, the evidence indicates that for planning purposes the northern portion of lot 9 was treated as different in character to the

remainder of the subject land, otherwise it would have been logical to have included the whole of lot 9 in the reservation. It is to be noted that the northern boundary of lot 9 was a road and not simply adjoining land. The same reasoning is applicable if the special conservation zone is treated as appropriate to the land adjoining the river, whilst landscape interest is a zone which was not employed for such especially sensitive land. I also note that in 1980 the re-zoning of part of lot 9 occurred and resulted in the portion zoned landscape interest being increased to the minimum size necessary to qualify it for subdivision off as a separate lot.

It was argued on behalf of the Board that there was no power to subdivide lot 9 under the *Eltham Planning Scheme.* Subdivision was the division of an existing lot into two or more lots. On the assumption that the southern portion was special conservation, the subdivision of lot 9 would effectively create a new allotment of land in a special conservation zone. This was prohibited by the scheme which in cl 110 permitted subdivision in such a zone only if "a lot created is to be vested in a public authority or council". It was this power and only this power, it was said which explained how the eventual subdivision of lot 9 was able to be achieved.

I have come to the conclusion that the argument is well founded. There was no other power shown to enable a subdivision of lot 9 to occur. Mr Sher submitted that there was no real subdivision of lot 9 but only a recognition of the separate identity of two areas of land. This unfortunately does not mean that a subdivision in law of lot 9 was capable of being effected, other than as explained. As to power, Mr Sher submitted that cl 7-5.2 of the scheme pointed to the general criteria that could sustain a power to subdivide.

Clause 7-5.2 provided:

> "A permit is required to subdivide land.
>
> Before deciding on an application the responsible authority must consider:
>
> - The element objectives, performance criteria and performance measures for all elements of the Code.
> - Any local structure plan that has been adopted by the responsible authority.
>
> In granting a permit, the responsible authority must not include requirements or conditions which conflict with or are more restrictive than the performance measures for the mandatory elements of the Code as set out in Clause 7-5.3."

In my opinion the above clause does not provide a power to subdivide but simply lays down considerations which must be addressed in the exercise of the power.

The difficulty therefore still remains that on the assumption that part of lot 9 was zoned special conservation, then there was no power under the scheme to subdivide.

Finally, Mr Sher pointed to the fact that a permit was directed to be issued, though without reference to power and submitted that this was not explicable by resort to the power to create a lot to be vested in a public authority. He submitted that there was only a reservation and not a vesting in respect of part of lot 9. This may be literally true but the clause does not require that the lot be vested upon subdivision. It refers to the creation of a lot which is "to be vested". No time is specified for the vesting and I am reluctant to read the provisions in any highly technical sense. Moreover, if I

do so, it might mean that what appears to be a beneficial subdivision might on such a rigid approach be illegal.

I was also urged by Mr Sher to ignore the assumption that part of lot 9 was special conservation on the basis that that zone was a de facto reservation. I cannot accept that submission for the reasons I have already given.

It follows that the claim for an assessment based on a four lot plan of subdivision as the "Before" value must fail. The result is that the amount of compensation on the principal part of the claim being loss through reduction in value, is $872,500.

Claim for solatium:

Three of the beneficiaries under the settlement have made a claim for solatium under s 100 of the *Planning and Environment Act* 1987. This provides:

> "(1) The amount of compensation payable under section 98 in respect of a residence may be increased by an amount which is reasonable to compensate the claimant for any intangible and non-financial disadvantages arising from the circumstances which gave rise to the claim under section 98.
>
> (2) The amount paid under this section must not exceed 10 per cent of the amount of compensation which would have been payable except for this section.
>
> (3) All relevant circumstances must be taken into account in assessing the amount payable under this section including —
>
> (a) the interest of the claimant in the residence;
> (b) the length of time during which the claimant has occupied the residence;
> (c) the age of the claimant;
> (d) the number, age and circumstances of any other people living with the claimant;
> (e) the amount of compensation payable arising from a sale of the residence compared with the value of the land at the date of the sale."

This provision regulates the recovery of compensation for non-financial disadvantages, which is usually described as solatium, where no acquisition has taken place.

The solatium provisions applicable to an acquisition, which are to be found in s 44 of the *Land Acquisition and Compensation Act* 1986, calculate solatium by reference to the market value of the land. Here the award is tied to the amount of compensation payable. It is not clear what this means but it was common ground that this should be calculated by reference to the compensation for the land loss. There was a difference between the parties as to what was the value of the land for this purpose. Mr Canavan submitted that as the compensation was described as being in respect of a residence, the maximum of 10 per cent had to be linked to the compensation in respect of the residence alone. On this basis, it was said the total compensation for the house was about $60,000 and the maximum was 10 per cent of that sum.

I have come to the conclusion that this argument should be rejected. It is true that the Act refers to a residence but it does not relate the 10 per cent maximum in the way suggested. The reference to compensation in respect of

a residence should be treated as a phrase of classification so as to separate compensation for residences as opposed to compensation for vacant land or for industrial or commercial premises. I do not accept that where there is an integrated property which can fairly be described as house and garden and other land on the same title, it is appropriate to value the house alone as though one were valuing various separate improvements on a property. This is not a valuation exercise; rather it is an addition to compensation otherwise payable for a house and its surrounding land. Here the remaining land formed part of one integrated property which was centred on the house. The remaining land was essentially an extended garden and park surrounding the house and none of this land had any other function. It is true that the house was on lot 8 which with lot 7 was on a separate title with lot 7, to lot 9. But the evidence did not suggest that the land changed in character on the adjoining lots or that it was not lived in and used as one single residential property. It is not decisive that the claimants put forward a claim for compensation based on a highest and best use which involves separate development and sale of the parcels of land. The compensation is still in respect of the residence, albeit that the highest and best use is postulated for the land. On this basis, the amount of compensation "in respect of the residence" giving these words a liberal interpretation, is $872,500. It may of course be relevant in some cases that the highest and best use can only be achieved by demolition of the house and therefore an obligatory vacating of the house. That would obviously be a relevant circumstance within s 100(3) but it would not mean that the compensation was not "in respect of a residence".

In the present case this does not apply but it is a relevant circumstance that the highest and best use would involve sale of the land in three parcels. I also find that on the evidence none of the claimants could have gone on living in the house without selling off some, at least, of the land, even if there had been no reservation. The award under s 100 should reflect these matters and will mean a reduced percentage. An alternative approach is to consider the compensation with respect to lot 8 but not include the compensation in respect of lots 7 and 9. On this basis the compensation which would have been payable, affected by the relevant circumstance as to the necessary sale of lots 7 and 9, is the difference between the before and after value of lot 9, namely $265,000 to which the 10 per cent maximum applies.

All three claimants had a long family connection with the subject land and all, I accept, had a strong and genuine attachment to a beautiful and picturesque property. All had grown up on the property and one had spent almost her entire life there. These links extended over very many years. I accept that each suffered anxiety and frustration because of the decision of the authorities to take the property at some indeterminate date in the future.

At the same time, I take into account the fact that the uncertainty was in part due to the apparent desire of the life tenant to remain on the land during her lifetime. This may explain why the trustees did not bring on the claim for compensation until after her death. It was urged on behalf of the Board that the claimants were subject to uncertainty in any event until her death for until she exercised her power of appointment, the three claimants could not know who was entitled to share in the estate. But there is a difference in character between this kind of uncertainty as between family members and the situation of being dependent for certainty on more or less

impersonal public authorities and their attendant bureaucracies. I therefore do not accept that I should put all the uncertainty to one side as either self-imposed or as due to the terms of the settlement. At the same time these are significant matters which cannot be ignored, as also it must be recognised that there is a risk if not a likelihood that the settlement and the existence of seven beneficiaries would in any event have ultimately compelled a sale of the property. But this, of course, would have been at a time, more or less, of their own choosing.

I have concluded that doing the best I can to take into account all relevant circumstances, including those expressly listed in s 100(3), I should add the sum of $30,000 as additional compensation. I have adopted the first approach of taking into account the whole property but a very similar but slightly lower figure would have resulted from the alternative approach of looking only at the house lot. I apportion this sum of $30,000 as to $15,000 in favour of Anne Virginia Morrison and $7,500 each to Beatrice Somerville Morrison and Askin Wanliss Morrison.

Replacement expenses:

There was also a claim for expenses relating to purchase of alternative housing, such expenses being the stamp duty and legal expenses in respect of a replacement property.

It has been recognised in a number of cases that in principle this category of expense is capable of recovery as financial loss within s 98 of the Act: see *Mario Piraino Pty Ltd v Roads Corporation; Roads Corporation v Melbourne Estates and Finance Co Pty Ltd* (1993) 79 LGERA 1. But as was pointed out in *Piraino's* case the claimant needs to demonstrate that the item claimed is the natural direct and reasonable consequence of the refusal of permit or the reservation for a public purpose. This does not mean that the expense must have been actually incurred by the time of the hearing but the Court must be able to find that the replacement expenses have been, or are going to be, incurred. It will be difficult to find that a future possible expense is a direct and natural consequence within s 98. It will also be difficult to find that any such expense is a consequence of the reservation if there is nothing to prevent a claimant remaining on the land indefinitely.

In the present case, the evidence was extremely meagre on this matter of demonstrated loss. Miss Virginia Morrison said her preference was to continue living at the property. Miss Beatrice Morrison has lived at Killeavy since 1980 but did not clearly indicate that she would continue to live there, assuming this is possible. Mr Askin Morrison also lives at Killeavy and said he planned to move closer to town and closer to his golf club. He was not sure whether he would stay at the house if it were possible to retain the house and sell off the balance of the land.

There are three critical difficulties in this claim. There is no evidence which establishes that the claimants cannot go on living at the property indefinitely. Secondly, in so far as a sale may be necessary because some of the seven beneficiaries wish to secure their share, this is not the consequence of the reservation and would have occurred in any event. Finally, there was no evidence that any steps had been taken by anyone to secure a replacement house or houses or even to inspect a house or houses.

In these circumstances this claim is clearly not sustainable and must fail.

Legal expenses of the tribunal appeal:

This claim was resisted by the Board for two reasons. It was said first of all that the claimants have now tied their claim to refusal of permit in September 1990 rather than the tribunal decision in July 1991. As this meant a higher level of land values at the earlier date, the claimants, it was said, should not be able to secure the costs of the appeal and of pursuing a date which is now not material. Secondly, it was argued that the appeal was unnecessary as the council refusal sufficed to establish an entitlement to compensation.

I see the force of an argument that an appeal after a refusal is not a direct and reasonable consequence of the operation of the reservation. But the refusal in this case, though it sufficed as a refusal within s 98, was certainly ambiguous and it was a reasonable course for the claimants to pursue the matter to appeal in the circumstances.

The claim for legal expenses relating to the appeal will therefore be allowed.

As the remaining items were conceded by counsel for the Board, I propose to make an award of compensation as follows:

1. Land value loss	$872,500.00
2. Holding costs	—
• Interest (to be calculated under the Supreme Court Act from the date of referral)	
• Rates	3,770.55
3. Legal and professional costs relating to the appeal	8,888.38
4. Executive time	1,120.00
5. Legal expenses in preparing claim	3,250.00
6. Valuation expenses	5,978.00
7. Solatium	30,000.00
8. Expenses for alternative property	Nil
Proposed award, other than interest	$925,506.93

Award of compensation made

Solicitors for the claimants: *Dunhill Madden Butler.*

Solicitors for the authority: *Mallesons Stephen Jacques.*

NJH