Land and Environment Court

New South Wales

Case Name:	G Capital Corporation Pty Limited v Transport for NSW; Gertos Holdings Pty Ltd v Transport for NSW; Marsden Developments Pty Ltd v Transport for NSW
Medium Neutral Citation:	[2021] NSWLEC 44
Hearing Date(s):	22, 23 and 26 February 2021
Date of Orders:	20 May 2021
Decision Date:	20 May 2021
Jurisdiction:	Class 3
Before:	Moore J
Decision:	See orders at [218] and [219]
Catchwords:	COMPULSORY ACQUISITION OF LAND - Valuer General determines market value of acquired land - acquired land subject of contract for sale -Valuer General apportions market value between vendor and contracted purchaser - contract to purchase contingent on simultaneous settlement of two other purchases by interests related to purchaser of the acquired land - deed between the three vendors and the three purchasers requiring that all purchases be settled at the same time - purchasers would have been unable to settle at the same time - determination of the value of the equitable estate of the purchaser of the acquired land - value of the equitable estate of the purchaser of the acquired land is “Nil” CROSS-CLAIM - Valuer General's apportionment of compensation for market value fails to account for necessity for simultaneous settlement of three purchases - acquiring authority pays compensation to purchaser for market value of equitable interest based on Valuer General's determination - acquiring authority

	cross-claims to recover amount paid for equitable interest as the market value of the equitable interest is “Nil” - no opposition from purchaser to acquiring authority's cross-claim - jurisdiction and power of Land and Environment Court to order repayment - purchaser ordered to repay acquiring authority the amount paid in reliance on the Valuer General's determination of the purchaser’s equitable interest in the acquired property COMPULSORY ACQUISITION OF LAND - claim for compensation of an equivalent payment to stamp duty for the value of a replacement property - three compulsory acquisitions by the acquiring authority - each acquired property part of a common set of business interests - claim for stamp duty equivalent payment based on s 59(1)(d) of the Land Acquisition (Just Terms Compensation) Act 1992 - claims founded on asserted possible relocation of business of holding land - earlier finding (undisturbed on appeal) that none of the dispossessed owning entities was undertaking any actual use of the relevant acquired land - consideration of whether compensation entitlement arose when no actual use of the acquired land - held that actual use of the acquired land a necessary prerequisite for the award of stamp duty equivalent compensation – stamp duty compensation claims rejected
Legislation Cited:	Federal Court Act 1976 (Cth), s 22 Land Acquisition (Just Terms Compensation) Act 1992, ss 42, 48(5) and (6), 55(1)(d), 59(1)(d) and 66 Land and Environment Court Act 1979, ss 16(1A), 22, 24 and 25
Cases Cited:	Alexandria Landfill Pty Ltd v Transport for NSW (2020) 243 LGERA 102; [2020] NSWCA 165 Bezzina Developers Pty Limited v Leichhardt Municipal Council [2006] NSWLEC 175 Blacktown Council v Fitzpatrick Investments [2001] NSWCA 259 Brock v Roads and Maritime Services (formerly Roads and Traffic Authority of NSW) [2012] NSWCA 404 Brock v Roads and Traffic Authority of New South Wales (No.2) [2012] NSWLEC 114

Fitzpatrick Investments Pty Limited v Blacktown City Council (No 2) [2000] NSWLEC 139
G. Suonaf Holdings Pty Ltd v Roads and Maritime Services [2016] NSWLEC 116
George D Angus Pty Limited v Health Administration Corporation [2013] NSWLEC 212
Gertos Holdings Pty Limited v Roads and Maritime Services; G Capital Corporation Pty Limited v Roads and Maritime Services; Marsden Developments v Roads and Maritime Services [2018] NSWLEC 166
Gertos Holdings Pty Limited v Roads and Maritime Services; G Capital Corporation Pty Limited v Roads and Maritime Services; Marsden Developments v Roads and Maritime Services [2018] NSWLEC 172
G Capital Corporation Pty Ltd; Gertos Holdings Pty Ltd; Marsden Developments Ltd v Roads and Maritime Services (2019) 243 LGERA 1; [2019] NSWLEC 12
G Capital Corporation Pty Ltd v Roads and Maritime Services [2019] NSWCA 234
G Capital Corporation Pty Ltd v Roads and Maritime Services [2020] HCASL 14
Haig v Minister Administering the National Parks & Wildlife Act (No 3) (1996) 90 LGERA 408
Health Administration Corporation v George D Angus Pty Ltd [2014] NSWCA 352
Home Care Services (NSW) v Albury City Council (2003) 136 LGERA 117; [2003] NSWLEC 214
Hope v Bathurst City Council (1980) 144 CLR 1; [1980] HCA 16
Hua and Anor v Hurstville City Council [2010] NSWLEC 61
Kern Corporation Ltd v Walter Reid Trading Pty Ltd (1987) 163 CLR 164; [1987] HCA 20
Kirela Pty Limited v The Minister administering the Environmental Planning and Assessment Act 1979 (No. 2) (2004) 132 LGERA 90; [2004] NSWLEC 68
McBaron v Roads and Traffic Authority of New South Wales (1995) 87 LGERA 238
McDonald v Roads & Traffic Authority of NSW (2009) 169 LGERA 352; [2009] NSWLEC 105

	Melino v Roads and Maritime Services (2018) 98 NSWLR 625; [2018] NSWCA 251 Minister of State for Army v Parbury Henty & Co Pty Ltd (1945) 70 CLR 459 Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW (1998) 101 LGERA 30 Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd (1981) 148 CLR 457; [1981] HCA 7 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 Roads and Maritime Services v United Petroleum Pty Ltd (2019) 99 NSWLR 279; (2009) 236 LGERA 389; [2019] NSWCA 41 Roads & Traffic Authority of NSW v McDonald (2003) 175 LGERA 276; [2010] NSWCA 236 Rocco Fraietta v Roads and Maritime Services [2017] NSWLEC 11 SNS Pty Ltd v Roads and Maritime Services [2018] NSWLEC 7 Speter v Roads and Maritime Services [2016] NSWLEC 128 Taylor v The Owners of Strata Plan 11564 and Others (2014) 253 CLR 531; [2014] HCA 9
Texts Cited:	Land and Environment Court COVID-19 Pandemic Arrangements Policy
Category:	Principal judgment
Parties:	G Capital Pty Ltd (Applicant in Matter No 207357 of 2018) Gertos Holdings Pty Ltd (Applicant in Matter No 207345 of 2018) Marsden Developments Pty Ltd (Applicant in Matter No 207366 of 2018) Transport for NSW (First Respondent in all matters/ Cross-claimant in Matter No 207366 of 2018) Regency Capital Pty Ltd (Second Respondent in Matter No 207357 of 2018) London Capital Holdings Pty Ltd (Second Respondent in Matter No 207345 of 2018) Portman Securities Pty Ltd (Second Respondent/Cross Defendant in Matter No 207366 of 2018)

Representation:	Counsel: Mr P Tomasetti SC/Mr J Johnson and Mr T Poisel, barristers (Applicants in all matters) Mr R Lancaster SC/Mr M Astill, barrister (First Respondent in all matters/Cross-claimant in Matter No 207366 of 2018) Mr J Jordan, solicitor (Second Respondents in all matters/Cross-Defendant in Matter No 207366 of 2018) Solicitors: Ristevski & Associates (Applicants in all matters) Norton Rose (First Respondent in all matters/ Cross-claimant in Matter No 207366 of 2018) Jordan Djundja Lawyers (Second Respondents in all matters/Cross-Defendant in Matter No 207366 of 2018)
File Number(s):	207357, 207345 and 207366 of 2018
Publication Restriction:	No

TABLE OF CONTENTS

JUDGMENT

Introduction

1 On 9 February 2018, Transport for NSW (TfNSW), formerly known as Roads and Maritime Services, compulsorily acquired three properties in Camperdown for the purposes of an element of the WestConnex project. The addresses of those properties; their registered proprietorship as at the date of acquisition; and the matter number concerning that property are set out below:

(1) 160-162 Parramatta Road, Annandale was owned by G Capital Corporation Pty Ltd (Matter No 207357 of 2018); and

(2) 164 Parramatta Road, Annandale was owned by Gertos Holdings Pty Ltd (Matter No 207345 of 2018); and

(3) 166-172 Parramatta Road, Annandale was owned by Marsden Developments Pty Ltd (Matter No 207366 of 2018).

2 Each of the owning entities had, some 19 months earlier (on 28 June 2016), entered into a contract to sell the property owned by it. These contracts were due to be completed by no later than 28 June 2018. None of them had been completed as at the date of the compulsory acquisitions.

3 The three owning entities were related interests of Mr Gertos (the Gertos entities). The three separate entities which were to acquire Mr Gertos' properties were also related, being associated interests of Mr Pamboris (the Pamboris interests). As a consequence of the spatial relationship between the Gertos entities' sites (as can be seen from the addresses in the above list), in addition to the individual contracts for sale, a related deed was executed by all three vendor entities and all three purchaser entities. This deed provided that all three transactions were required to be completed in one line.

4 With respect to the third of the transactions listed above, it is convenient to refer to the relevant Gertos entity as Marsden Developments and that of the relevant Pamboris interest as Portman Securities.

5 The *Land Acquisition (Just Terms Compensation) Act 1992* (the Land Acquisition Act) provides the statutory framework pursuant to which owners of interests in land are to be compensated when that land is compulsorily acquired for a public purpose. The operation of provisions of the Land Acquisition Act, in the context of compulsory acquisition of these three properties and potential entitlements to consequent compensation of the Gertos entities and of the Pamboris interests, are the basis for these proceedings.

6 It is also appropriate to note that, in the matters before me dealt with by this decision, a cross-claim by TfNSW against one of the Pamboris interests (Portman Securities) also arises for consideration.

Earlier related proceedings

7 There have been five earlier proceedings arising out of the compulsory acquisition of the three properties owned by the Gertos entities. All three of

these current proceedings are ones arising from compensation applications by each of the Gertos entities pursuant to the Land Acquisition Act.

8 It is sufficient, at this point, to note, briefly, the nature of the earlier proceedings.

9 The first of the earlier proceedings was one setting down for determination separate questions said, at that time, potentially to be dispositive of the three Gertos entities' proceedings. That decision was *Gertos Holdings Pty Limited v Roads and Maritime Services; G Capital Corporation Pty Limited v Roads and Maritime Services; Marsden Developments v Roads and Maritime Services* [2018] NSWLEC 166 (*Gertos Holdings No 1*).

10 The second of the earlier proceedings - *Gertos Holdings Pty Limited v Roads and Maritime Services; G Capital Corporation Pty Limited v Roads and Maritime Services; Marsden Developments v Roads and Maritime Services* [2018] NSWLEC 172 (*Gertos Holdings No 2*) - concerned applications to set aside various Notices to Produce and Subpoenas. This decision plays no part in the present proceedings.

11 Following the decision in *Gertos Holdings No 1*, Pain J heard and determined the questions set down for separate determination. Her Honour's decision was published as *G Capital Corporation Pty Ltd; Gertos Holdings Pty Ltd; Marsden Developments Ltd v Roads and Maritime Services* (2019) 243 LGERA 1; [2019] NSWLEC 12. It is not necessary to traverse here the details of her Honour's decision.

12 However, it will later be necessary to set out, in full, the terms of a Statement of Agreed Facts (being a document agreed between the Gertos entities and TfNSW for the purposes of the matters with which I am here engaged). To the extent relevant for present purposes, the aspects of her Honour's decision engaged for consideration in this decision are set out in that Statement of Agreed Facts.

13 The Gertos entities, being dissatisfied with her Honour's decision, took proceedings in the Court of Appeal. The Gertos entities were unsuccessful in that appeal (*G Capital Corporation Pty Ltd v Roads and Maritime Services*

[2019] NSWCA 234). The Gertos entities unsuccessfully sought special leave to appeal to the High Court (*G Capital Corporation Pty Ltd v Roads and Maritime Services* [2020] HCASL 14).

14 Relevantly, the Court of Appeal did not disturb the findings made by Pain J in [90] of her Honour's decision (these findings being relevant for present purposes as can be seen from the terms of the later set out Statement of Agreed Facts). This is the only presently relevant outcome of those Court of Appeal proceedings.

The pleadings

Introduction

15 The relevant Gertos entity in each of the present proceedings filed Points of Claim, whilst TfNSW filed Points of Defence in response to each claim. It is unnecessary, for present purposes, to set out the detail of those pleadings.

16 However, on 19 February 2021, TfNSW filed a Notice of Motion seeking leave to bring a cross-claim against the nominated Pamboris acquiring entity (Portman Securities) in Matter No 207366 of 2018. Leave was granted to do so on 23 February 2021 (leave not being opposed by either the relevant Gertos entity or the relevant Pamboris interest).

TfNSW's cross-claim

17 TfNSW's cross-claim concerned the proposed (but uncompleted) sale of 166-172 Parramatta Road by Marsden Developments to Portman Securities. It is appropriate, at this point, to set out that cross-claim in full. It was in the following terms:

> 1 At all material times prior to the acquisition on 9 February 2018 by the First Respondent, the Applicant (Marsden) was the registered proprietor of the land comprised in Lot 1 in Deposited Plan 776389, being the whole of the land known as 166-172 Parramatta Road, Annandale (No.166-172).
>
> 2 On 28 June 2016, Marsden and the Second Respondent (Portman) entered into a contract for sale of land for No.166-172 with a purchase price of $6,000,000, on certain terms and conditions.
>
> 3 On 9 February 2018, Transport acquired No.166-172 for the purpose of the Roads Act 1993.

4 On 22 June 2018, the Valuer General determined compensation payable to Portman as a consequence of the acquisition of No.166-172 in the amount of $7,926,000, which was comprised of:

a. Market value - section 55(a) - $7,915,000

b. Disturbance - section 55(d) - $11,000

Particulars

i. Notice of determination dated 22 June 2018.

ii. Report titled "Determination of Compensation" prepared with respect to "Portman Securities Pty Ltd (equitable interest holder)" by Pamboris Adlington of Walsh & Monaghan.

4 On 22 June 2018, in accordance with its statutory obligations pursuant to section 42 of the Land Acquisition (Just Terms Compensation) Act 1991, Transport issued a compensation notice to Portman and offered to pay compensation in the amount of $7,926,000 in accordance with the Valuer General's determination.

Particulars

i. Letter from K Durie to James Jordan dated 22 June 2018.

5 On or around 6 August 2018, Portman accepted Transport's offer of compensation and executed a deed of release and indemnity in favour of Transport.

Particulars

i. Letter from James Jordan to Charisse Miranda dated 7 August 2018.

ii. Deed of release and indemnity signed by Mario Pamboris as sole director/secretary of Portman on 6 August 2018.

iii. Direction as to payment signed by Mario Pamboris as sole director/secretary of Portman on 27 July 2018.

6 On or around 13 August 2018, Transport paid to Portman:

a. compensation in the amount of $7,926,000; and

b. statutory interest in the amount of $107,663.31.

Particulars

i. Letter from K Durie to James Jordan dated 14 August 2018.

7 Transport is on notice in these proceedings that Marsden contends that:

a. this Court should proceed to determine the nature of the estate or interest of Portman and the amount of compensation (if any) to which Portman is entitled; and

b. Marsden is entitled to the whole of the amount of the market value of No. 166-172 on the date of acquisition, or in the alternative that Marsden is entitled to the whole of the amount of the market value less the amount of $50,000 paid to Marsden by Portman as a deposit under the contract for sale referred to in paragraph 2 above.

> 8 If, on the hearing of Marsden's notice of motion filed 14 May 2020 or otherwise in the proceedings, the Court determines that Portman's entitlement to compensation for market value is less than $7,915,000, Transport seeks a declaration as to the amount of compensation to which Portman is entitled and an order pursuant to section 48(5) of the Land Acquisition (Just Terms Compensation) Act 1991 that Portman must repay to Transport an amount being:
>
> a. the difference between the amount of Portman's entitlement (if any) as so determined and the sum of $7,915,000; and
>
> b. the proportion of statutory interest previously paid that is attributable to that difference,
>
> within 28 days of the date of the order.

18 As can be seen from the above pleading, the effect of the cross-claim is that TfNSW seeks the recovery from Portman Securities of the difference between the amount paid to Portman Securities of $7,915,000 plus statutory interest as paid and the amount (if any) that I determine is Portman Securities' actual market value compensation entitlement (plus statutory interest) in the Marsden Developments proceedings. In addition to determining the compensation claims by the Gertos entities, this decision therefore also determines TfNSW's cross-claim against Portman Securities. Any such recovery by TfNSW is authorised by s 48(6) of the Land Acquisition Act (set out later).

The relevant statutory provisions

Introduction

19 The existence of the uncompleted contracts between the Gertos entities and the Pamboris interests as at the date of the three compulsory acquisitions by TfNSW renders consideration of compensation matters pursuant to the Land Acquisition Act more complex than would ordinarily be the case when land is compulsorily acquired for a public purpose. Resulting from this, it will be necessary not only to consider relevant provisions of the Land Acquisition Act, but also four provisions of the *Land and Environment Court Act 1979* (the Court Act). The relevant statutory provisions are set out below.

The Land Acquisition Act

20 The four relevant provisions of the Land Acquisition Act engaged by these proceedings are:

48 Advance payments of compensation etc

(1) ...

(2) …

(3) …

(4) …

(5) Any advance or other payment of compensation to a person not entitled to the compensation must be repaid to the authority of the State that made the payment.

(6) Any amount due to an authority of the State under this section may be recovered as a debt in any court of competent jurisdiction.

55 Relevant matters to be considered in determining amount of compensation

In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division)—

(a) the market value of the land on the date of its acquisition,

(b) …,

(c) …,

(d) any loss attributable to disturbance,

(e) …,

(f) …

59 Loss attributable to disturbance

(1) In this Act—

loss attributable to disturbance of land means any of the following—

(a) legal costs reasonably incurred by the persons entitled to compensation in connection with the compulsory acquisition of the land,

(b) …,

(c) financial costs reasonably incurred in connection with the relocation of those persons (including legal costs but not including stamp duty or mortgage costs),

(d) stamp duty costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the purchase of land for relocation (but not exceeding the amount that would be incurred for the purchase of land of equivalent value to the land compulsorily acquired),

(e) …,

(f) any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition.

66 Objection against amount of compensation offered

(1) A person who has claimed compensation under this Part may, within 90 days after receiving a compensation notice, lodge with the Land and Environment Court an objection to the amount of compensation offered by the authority of the State.

(2) If any such objection is duly lodged, the Land and Environment Court is to hear and dispose of the person's claim for compensation.

(3) …

(4) …

The Court Act

21 Four provisions of the Court Act require consideration. The first is that which establishes the jurisdictional foundation enabling me to address the totality of the issues engaged for determination in these proceeding. That provision, s 16(1A), is in the following terms:

16 Jurisdiction of the Court generally

(1) ...

(1A) The Court also has jurisdiction to hear and dispose of any matter not falling within its jurisdiction under any other provision of this Act or under any other Act, being a matter that is ancillary to a matter that falls within its jurisdiction under any other provision of this Act or under any other Act.

(2) ...

22 The above provision, having established the jurisdictional basis for addressing all matters in these proceedings, renders it then appropriate to set out the terms of s 22 of the Court Act, it being the provision that establishes the broad scope of the powers able to be utilised in the resolution of these proceedings. The terms of this section are:

22 Determination of matter completely and finally

The Court shall, in every matter before the Court, grant either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by that party in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all

multiplicity of proceedings concerning any of those matters may be avoided.

23 Finally, the functions of the Court that I am to carry out for the purposes of these proceedings are set out by ss 24 and 25 of the Court Act working together. These provisions make it clear that I am to determine what is the interest of each relevant Gertos entity and each relevant Pamboris interest with respect to each of the three properties earlier noted as comprising the Gertos entities and such interest as might exist for each of the Pamboris interests as a proposed purchaser of the relevant Gertos entity's interest. These provisions are in the following terms:

> **24 Claim for compensation in compulsory acquisition cases**
>
> (1) If—
>
> (a) a claim is made for compensation because of the compulsory acquisition of land in accordance with the Land Acquisition (Just Terms Compensation) Act 1991, Division 2 of Part 12 of the Roads Act 1993 or any other Act, and (b) no agreement is reached between the claimant and the authority required to pay the compensation,
>
> the claim is (subject to any such Act) to be heard and disposed of by the Court and not otherwise.
>
> (2) The Court shall, for the purpose of determining any such claim, give effect to any relevant provisions of any Acts that prescribe a basis for, or matters to be considered in, the assessment of compensation.
>
> (3) (Repealed)
>
> **25 Determination of estate, interest and amount**
>
> (1) In hearing and disposing of any claim referred to in section 24, the Court shall have jurisdiction to determine the nature of the estate or interest of the claimant in the subject land and the amount of compensation (if any) to which the claimant is entitled.
>
> (2) In the exercise of its jurisdiction under subsection (1), the Court may order that any other person who claims to have had or who may have had an interest in the subject land at the date of acquisition or taking be joined as a party to the proceedings and may then proceed to determine the nature of the estate or interest of that person and the amount of compensation (if any) to which the person is entitled.
>
> (3) (Repealed)

Representation

24 The Gertos entities were represented by Mr P Tomasetti SC and Mr J Johnson and Mr T Poisel, barristers. TfNSW was represented by Mr R Lancaster SC and Mr M Astill, barrister. The Pamboris interests were represented by

Mr James Jordan, solicitor. Helpful written submissions were provided for the Gertos entities and TfNSW.

The hearings

Introduction

25 The hearings were held, as a consequence of the COVID-19 pandemic, using Microsoft Teams software, without the necessity for any physical attendance in the courtroom. These hearings were conducted in accordance with the Court's then operating COVID-19 Pandemic Arrangements Policy.

26 The hearing was conducted in two phases. The first concerned market value matters, whilst the second related to a claim by each Gertos entity for payment of a stamp duty equivalent amount pursuant to s 59(1)(d) of the Land Acquisition Act.

27 This sequencing arose as a consequence of Mr Tomasetti and Mr Lancaster having advised me, at a pre-trial mention in the week before the trial proper was due to commence, that the Gertos entities and TfNSW had reached agreement as to the market value of each of the parcels of land acquired from the Gertos entities. This agreement was subject to my determination of any compensation entitlement for Portman Securities for the market value of the compulsorily acquired from Marsden Developments land.

28 For the purposes of addressing the confined issue relating to market value, Mr Tomasetti and Mr Lancaster had proposed, at the pretrial mention, that I be provided with a statement reflecting those facts which were agreed between the Gertos entities and TfNSW. This document would set out what these parties represented as being facts derived from the circumstances of these proceedings and having regard to the findings of Pain J (undisturbed by the Court of Appeal) concerning the inability of the Pamboris interests to settle, in one line, the contracts for purchase of the land owned by the Gertos entities. This process was not objected to by Mr Jordan for the Pamboris interests.

29 A timetable was set to have the Gertos entities and TfNSW settle the proposed Statement of Agreed Facts, with the commencement of the trial proper delayed until the following Monday afternoon.

The first phase hearing

30 The afternoon of Monday 22 February and part of the afternoon of Tuesday 23 February 2021 were spent addressing and finalising the terms of the proposed Statement of Agreed Facts proposed by the Gertos entities and TfNSW.

31 Following the finalisation of that Statement of Agreed Facts (the third settled version becoming Exhibit G), Mr Tomasetti and Mr Lancaster made submissions as to the conclusion I should draw, from those agreed facts, as to what entitlement, if any, Portman Securities had to compensation for market value of the land it had contracted to purchase from Marsden Developments (the relevant Gertos' vendor entity). This consideration was necessary because, based on the Valuer General's determination, TfNSW had paid Portman Securities $7,915,000 plus statutory interest as compensation for the portion of the market value of 166-172 Parramatta Road as reflecting the extent of the estate Portman Securities had in that site when it had been compulsorily acquired by TfNSW.

32 A Notice of Motion, based upon leave granted at the pre-trial mention, was filed by TfNSW seeking to rely upon a cross-claim against Portman Securities in order to recover the principal and statutory interest paid to that Pamboris interest. This cross-claim was contingent on me accepting the position advanced based upon the Statement of Agreed Facts and the other evidence before me.

33 It is also to be observed that, during this phase, Mr Jordan, on behalf of the Pamboris interests:

- did not object to the terms of the Statement of Agreed Facts or seek to lead any evidence in contradiction of any element of it;
- did not object to leave being granted to TfNSW to rely on TfNSW's proposed cross-claim; and
- upon leave being granted to TfNSW to pursue its cross-claim, made no submissions and adduced no evidence in opposition to that cross-claim.

Preparation for the second phase hearing

34 At the conclusion of the above described first phase of the hearing, I adjourned for two days to permit the filing of a bundle of material concerning the claims of

each of the Gertos entities pursuant to s 59(1)(d) of the Land Acquisition Act to be paid a sum equivalent to the stamp duty liability which would arise if each of the Gertos entities was to seek to purchase a replacement property of the same market value as had been agreed between that Gertos entity and TfNSW as being the appropriate quantum of compensation to that Gertos entity for the compulsory acquisition of the site owned by it.

35 A timetable for filing of evidence and provision of written submissions for the second phase was settled at the conclusion of the first phase.

The second phase hearing

36 The second phase hearing took place on Friday 26 February 2021. It was confined, as noted above, to evidence and submissions related to the claims from each of the Gertos entities to payment of a stamp duty equivalent amount based on the market value of the land compulsorily acquired from that entity.

37 As will be seen from that which is later set out concerning the resolution of matters relating to the interrelationship of the Gertos entities and the Pamboris interests, the sole remaining issue in dispute in each of the Gertos entities' proceedings concerned the extent (if any) to which each Gertos entity was entitled to compensation for stamp duty which would be incurred if the relevant Gertos entity was to acquire a replacement property of the same value as that which had been acquired compulsorily.

38 These three confined disputes are of common statutory origin (s 55(1)(d) of the Land Acquisition Act) with these being the subject of the second phase of the hearing before me giving rise to this decision.

39 Mr Tomasetti made submissions in support of the Gertos entities' claims to be paid stamp duty equivalent amounts, whilst Mr Lancaster made submissions in opposition to those claims. The positions advanced for the Gertos entities and those in reply for TfNSW are later set out.

40 Two further observations are warranted:

(1) First, Mr Lancaster foreshadowed that TfNSW intended to provide me with a set of proposed orders that were said to embody the appropriate outcome of its cross-claim (with the legal representatives of the

Gertos entities and of the Pamboris interests being afforded the opportunity to comment upon them); and

(2) Second, Mr Jordan had been excused by me, at the conclusion of the first phase of the hearing, from participating in the second phase as no issues arose in this phase potentially engaging the interests of the Pamboris interests.

41 At the conclusion of the second phase, I reserved my decision on the matters requiring determination arising from both phases of the hearing.

The evidence

Introduction

42 In this context, it is appropriate to note that, by this decision, I am addressing at first instance all remaining outstanding compensation issues in each proceedings commenced by the relevant Gertos entity. Although there are three separate proceedings (one being commenced by each of the Gertos entities), all three of these have been heard together, with evidence and submissions in each being, to the extent relevant, applicable in all three proceedings.

43 During the course of the hearings in these proceedings, in addition to adopting the commonality of evidence and submissions in the Gertos entities' proceedings, I also made the same ruling with respect to the TfNSW cross-claim (the nature of this cross-claim and its resultant outcome are later discussed in some detail).

44 The evidence in the proceedings was divided into two distinct tranches. The first tranche addressed the matters requiring determination in the first phase of the hearings - being matters arising from the uncompleted contracts for sale between each of the Gertos entities and the relevant corresponding Pamboris interest. The second tranche addressed the stamp duty equivalent compensation claim by each Gertos entity.

The first phase market value evidence

45 The material which was tendered for this phase of the hearing is set out below.

46 The evidence for Gertos entities was:

(a) Statement of Agreed Facts (Version 1) (Exhibit A);

(b) Supplementary Agreed Statement of Facts (Version 1) (Exhibit B);

(c) Key documents comprising the Deed of Agreement and the Contracts for the Gertos entities, and the Advice from the Crown Solicitor's Office (Exhibit C);

(d) Key documents (in Matter No 2018/207357 - Regency Capital Pty Ltd, 160-162 Parramatta Rd) (Exhibit C);

(e) Key documents in Matter No 2018/207345 - London Capital Holding Pty Ltd, 164 Parramatta Rd) (Exhibit D);

(f) Key documents in Matter No 2018/207366 - Portman Securities Pty Ltd, 166-172 Parramatta Rd) (Exhibit E); and

(g) Supplementary Agreed Statement of Facts (Version 2 - final) (Exhibit G)

47 The documents in (c) to (f), noted above, were tendered in electronic form - having been provided to the Court by DropBox.

48 The affidavit evidence for TfNSW comprised two affidavits deposed by Mr Thomas White, a solicitor employed by its legal representatives. These affidavits were deposed in September 2020 and January 2021. Mr White was not required for cross-examination.

49 The documentary evidence for TfNSW was:

(a) An expert report of Mr Geoff Green, a chartered accountant (Exhibit 1);

(b) An expert report of Mr Anthony Mylott, a valuer (Exhibit 2);

(c) An expert report of Dr Rodney Ferrier; a forensic accountant (Exhibit 3);

(d) the bundle of documents exhibited to the affidavit of Mr Thomas White dated 19 September 2020 (Exhibit 4); and

(e) TfNSW's cross-claim (Exhibit 5)

50 No evidence on market value was tendered for the Pamboris interests.

The first phase cross-claim evidence

51 TfNSW's evidence on the cross-claim comprised Mr White's affidavit evidence noted above, together with the documents in Exhibit 4 noted above.

52 No evidence was tendered for Portman Securities on TfNSW's cross-claim.

The second phase evidence

53 The evidence that was relied upon for the purposes of the stamp duty claim pursuant to s 59(1)(d) is set out below.

54 For the Gertos entities, the evidence was:

(1) Three affidavits by Mr Bill Gertos, the guiding mind and functional controller of each of the Gertos entities. These three affidavits were dated 16 June 2020 and 25 and 26 February 2021. With respect to the first of these affidavits, only paragraphs 1 to 53 were relied upon, with Mr Tomasetti accepting a limiting ruling that Mr Gertos' evidence would only be admitted for the purposes of the claim under s 59(1)(d) with respect to those paragraphs and to the contents of the two affidavits of February 2021; and

(2) a bundle of documents (BG-4) exhibited to Mr Gertos' affidavit of 26 February 2021 was tendered, becoming Exhibit H.

55 Mr Gertos was not required for cross-examination.

56 A bundle of electronic documents had been provided by TfNSW, using Dropbox, in a folder entitled "Disturbance". There were 86 electronic documents in this folder. Mr Lancaster indicated that, of the documents contained in the folder, not all were tendered on behalf of TfNSW. It is to be observed that, during the course of this disturbance claim phase of the hearing, I was not taken to the detail of any of these documents that had been provided electronically for TfNSW. Because of this, it is not necessary to list these documents; however, they collectively became Exhibit 6.

57 In addition to these documents, an affidavit deposed by Mr Constantine Savell of 14 September 2018 (which affidavit had originally been filed and served on behalf of the Gertos entities) was tendered for TfNSW for the purposes of the stamp duty claims of the Gertos entities. This affidavit became Exhibit 7.

The Statement of Agreed Facts

58 As earlier noted, a Statement of Agreed Facts was adopted by the Gertos entities and TfNSW. As also earlier noted, this document was refined during the course of the first phase hearing, with the version relied upon by the Gertos entities and TfNSW becoming Exhibit G.

59 Although not adopted by the Pamboris interests, it is to be observed that the Pamboris interests did not submit that I should not accept this Statement of Agreed Facts as being true and did not adduce any evidence in contradiction of any matters contained in it. Its contents thus became uncontested evidence in these proceedings.

60 The terms of the Statement of Agreed Facts (Exhibit G) were:

This Statement of Agreed Facts contains the facts which are agreed between the Applicants and the First Respondent for the purposes of section 191 of the *Evidence Act 1995* (NSW) and the Court determining the issues raised in each proceeding being the **Notices of Motion filed 13 May 2020** by the Applicants in each of the proceedings and the First Respondent's Cross-claim filed on 19 February 2021 in 2018/207366 (Marsden / Portman).

Background

1 On **9 February 2018**, the First Respondent compulsorily acquired the interests of the Applicants and the Second Respondents in the land located at 160-162, 164 and 166-172 Parramatta Road, Annandale (also known as Camperdown) for the purposes of the *Roads Act 1993* (NSW) (**the Acquired Land**).

2 The Applicants are related corporate entities.

3 The Second Respondents are collectively, the purchasers of the land in the Contracts for Sale of Land and a Deed referred to below.

4 The Second Respondents were incorporated shortly before the entry into the contracts and Deed and were related corporate entities owned and controlled by Mr Mario Pamboris.

5 On 28 June 2016, the Applicants sold the land to the Second Respondents (as purchasers) pursuant to three contracts for sale of land (**Contracts**) and a Deed of Agreement (**Deed**), each dated 28 June 2016.

6 It was a term the Contracts that the date for settlement of the Contracts was 28 June 2018 or such earlier time nominated by the purchaser giving 35 days' notice.

7 A deposit was paid by each of the Second Respondents of $50,000 on the exchange of each Contract and the deposit (totalling $150,000) was released to the Applicants (as vendors).

8 The total purchase price for the Acquired Land was $56,500,000.

9 It was a term of the Deed that "Completion of settlement for each of the contracts, validly exchanged on 28th June, 2016, is dependent upon each of the contracts settling simultaneously", such that all three Contracts had to be completed at the same time, such that if one sale did not complete then none of the sales would complete.

10 At the date of acquisition (**DOA**), the Contracts had not been completed.

11 Upon compulsory acquisition of the Acquired Land, all interests in the land were extinguished pursuant to section 20 of the *Land Acquisition (Just Terms Compensations Act 1991* (NSW) (**JT Act**) and the Applicants and the Second Respondents became entitled to compensation pursuant to section 37 of the Just Terms Act.

12 At the DOA:

a. the Applicants were vendors under the Contracts and

b. had a legal and equitable interest in the land the subject of the Contracts;

c. The Second Respondents were purchasers under the Contracts each had an equitable interest in the land the subject of the Contracts.

13 The Valuer General (**VG**) was required to determine the compensation to which each interest holder was entitled.

14 In making that determination the VG sought legal advice from the Crown Solicitor's Office (**CSO**).

15 On 23 February 2018 the CSO advised the VG that:

a. the "market value" of each parcel of the land was to be determined in accordance with section 56(1) of the JT Act as at the DOA;

b. where the "market value" of the land exceeded the purchase price for the relevant parcel of land under each contract, the relevant Applicant (as vendor) was to be paid the purchase price and the purchaser was to be paid the difference between the market value and the purchase price;

c. if the market price was less than the purchase price for the relevant parcel of land under the contract, the Applicant (as vendor) was to be paid the market value and not the purchase price and the purchaser was to be paid nothing.

16 The CSO did not when advising the VG refer to the Deed or the requirement in it that all three Contracts had to be completed at the same time, such that if one sale did not complete then none of the sales would complete.

17 The VG followed the CSO advice and on 22 June 2018 determined that the "market value" of each of the three parcels of land was:

Property	**Contract price**	**Market value sec 56(1)**
160-162 Parramatta Road	**$27,500,000**	**$14,200,000**
164 Parramatta Road	$23,000,000	$4,985,000
166-172 Parramatta Road	$6,000,000	$13,915,000
	$56,500,000	**$33,100,000**

18 The VG determined the compensation to be paid to the Applicants (as vendors) and the Second Respondents (as purchasers) for the "market value" of the acquired land, relying on the CSO advice, was:

Parcel of land	Applicants	Second Respondents
160- 162 Parramatta Road	$14,200,000 (G Capital)	Nil (Regency)
164 Parramatta Road	$4,985,000 (Gertos Holdings)	Nil (London)
166- 172 Parramatta Road	$6,000,000 (Marsden)	$7,915,000 (Portman)
	$25,185,000	**$7,915,000**

19 The First Respondent:

a. offered compensation for market value to each interest holder in accordance with the above table;

b. offered amounts to each of the Applicants for losses attributable to disturbance; and

c. offered a further $11,000 to each of the Second Respondents for losses attributable to disturbance.

20 On **5 July 2018** each applicant objected to the determination of compensation under section 66 of the *Land Acquisition (Just Terms Compensation) Act* 1991.

21 On **21 November 2018** the second respondents, London Capital Holdings Pty Ltd (**LCH**) and Regency Capital Pty Ltd (**RC**), objected to the determinations of compensation under section 66 of the *Land Acquisition (Just Terms Compensation) Act* 1991.

22 Portman Securities Pty Ltd (**PS**) did not object and accepted the offer referred to in pars 18 and 19 above.

23 On **24 June 2019** LCH and RC discontinued the proceedings commenced by them and signed Deeds of Release in favour of the first respondent.

24 On **14 February 2019** Pain J. in these proceedings ([2019] NSWLEC 12 at [90]) found that two of the purchasers, LCH and RC, would not have been able to raise sufficient money to complete the contracts, and the purchasers could not have completed in one line.

25 The Purchasers could not have settled the Contracts in one line as at the DOA.

26 In these proceedings, as part of a separate question hearing, Justice Pain found, based on the evidence before her, that:

a. there is evidence that only one of the Second Respondents could have completed the purchase of one lot at the date of settlement (see G *Capital Corporation Pty Ltd; Gertos Holdings Pty Ltd; Marsden Developments Ltd v Roads and Maritime Services* [2019] NSWLEC 12 at [90] per Pain J (**G *Capital Corporation***)***;***

b. two of the Second Respondents would not have been able to raise sufficient money to complete the contracts (see *G Capital Corporation* at [90]); and

c. the Second Respondents could not have completed all Contracts in one line (see *G Capital Corporation* at [90]).

27 The evidence that was before Justice Pain that led to her findings in [90] noted above were expert reports from:

a. Mr Geoff Green, Chartered Accountant;

b. Mr Anthony Mylott, Valuer; and

c. Dr Rodney Ferrier, Forensic Accountant

28 The findings made by Justice Pain noted above at paragraph 26 were not disturbed on appeal (*G Capital Corporation Pty Ltd v Roads and Maritime Services* [2019] NSWCA 234).

29 On the basis of the expert reports noted in paragraph 27 above, (these having been tendered in these proceedings before Justice Moore - becoming Exhibits 1, 2 and 3), the Applicant and the First Respondent agree that Justice Moore has proper evidentiary foundations to make findings in the same terms as those made by Justice Pain in paragraph [90] noted above at paragraph 26, namely that:

a. only one of the Second Respondents could have completed the purchase of one lot at the time for completion;

b. two of the Second Respondents would not have been able to raise sufficient money to complete the contracts, and

c. as the necessary consequence of (a) and (b), the Second Respondents could not have completed the contracts for sale in one line as required by the Deed (as noted at paragraph 9).

Market value

Submissions on the Gertos entities' market value issues

The Gertos entities' position

61 Mr Tomasetti submitted, if the position was correctly understood, that Portman Securities had no entitlement to any market value compensation arising from TfNSW's acquisition of 166-172 Parramatta Road.

62 The first proposition Mr Tomasetti put was that, as the sale from Marsden Developments to Portman Securities had not completed, such interest as Portman Securities had in the property at 166-172 Parramatta Road was an equitable interest (citing the reasons of Deane J in *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164; [1987] HCA 20 at page 191).

63 He then took me to various contractual documents between the relevant Gertos entity and the corresponding Pamboris interest to show the nature of the special conditions attaching to the various contracts for sale of the Gertos entities' properties to the Pamboris interests. These conditions, he submitted, made it clear that that which was mandated by the deed entered into by all of the Gertos entities and all of the Pamboris interests (mandating the settlement of the three sales in one line) made it clear that, for Portman Securities to have a compensable market value interest in 166-172 Parramatta Road, it would need to be demonstrated that all three properties could have settled in one line as the documents established and the deed mandated.

64 In this regard, paragraphs 9 and 10 and 24 to 29 of the Statement of Agreed Facts settled between the Gertos entities and TfNSW provided a proper basis for the conclusion that Portman Securities equitable interest in 166-172 Parramatta Road had no compensable market value as a consequence of the inability of all three interests to settle all three purchases at the one time.

65 Portman Securities' purchase price from Marsden Developments was $6 million, whilst the compensation determination by the Valuer General for 166-172 Parramatta Road was $13,915,000. As a consequence of the valuation being $7,915,000 in excess of the contract price for the sale of 166-172 Parramatta Road from Marsden Developments to Portman Securities, the Valuer General determined that the compensation to Marsden Developments should be $6 million, whilst the compensation to Portman Securities should be the balance above that amount ($7,915,000).

66 Mr Tomasetti also took me to the Crown Solicitor's advice to the Valuer General concerning compensation matters arising relating to the three properties here involved. As Mr Tomasetti noted (Transcript 23 February 2021, page 22, lines 22 to 26), the Crown Solicitor's advice to the Valuer General did not refer to the deed that mandated settlement for the purchases of all three Gertos entities' properties by the Pamboris interests to be at the same time.

67 The failure of the Crown Solicitor to advise comprehensively on the nature of the interlinked transactions led the Valuer General into error in assessing the compensation payable to Portman Securities. The agreed evidence (not contested by Mr Jordan on behalf of Portman Securities) demonstrated that, because the three sales were not capable of being settled as required by the deed, the value of Portman Securities equitable interest in 166-172 Parramatta Road was "Nil".

68 The consequence of this was that the entirety of the market value compensation determination made by the Valuer General should have been in favour of Marsden Developments only.

69 For the purposes of that which was here in contest (there being no dispute that the other two Pamboris interests did not have any equitable interest in the other relevant Gertos entity's property), meant that the entirety of the market value compensation for all three acquired properties was to the benefit of the Gertos entities.

70 However, as I was advised that there had now been agreement reached between each of the Gertos entities and TfNSW as to the market value of each of the Gertos entities' properties, the market value compensation elements of the Court's orders would be advised after my determination of the correct position concerning any compensation entitlement of Portman Securities and my determination of TfNSW's cross-claim against that company.

71 The case concerning Marsden Developments' entitlement to compensation was summarised by Mr Tomasetti as being (Transcript 23 February 2021, page 25, lines 32 to 37):

> However, if the Court determines that Portman was entitled to nil compensation for the acquisition of the market value of its interest under the

> contract and the deed, it follows on Transports case that there can be no deduction from the applicant's compensation of the compensation paid to Portman for the market value of Portman's interest. .

The TfNSW position

72 The position taken by TfNSW was succinctly put by Mr Lancaster as being (Transcript 23 February 2021, page 27, line 44 to page 28, line 2):

> Transport neither consents nor opposes that determination being made and we leave ourselves in your Honour's hands as to that determination. If your Honour determines in accordance with what my friend has put that the purchaser's interest in each case, including Portman, involves an entitlement to compensation of nil so far as market value is concerned because the contracts couldn't be completed in one line, in our submission that activates s 48(5) and Transport has a statutory procedure available to it by which it can recover an amount of compensation which has been paid to which a person is not entitled.

The Pamboris interests' position

73 See below at [88].

Consideration of market value issues

74 Given the unusual way that the evidence and submissions on market value matters have evolved, the conclusion to be drawn does not require lengthy elaboration.

75 In the absence of contest by either TfNSW or the Pamboris interests as to the validity of the submissions made by Mr Tomasetti on behalf of Marsden Developments (as supported by the relevant paragraphs of the Statement of Agreed Facts - evidence uncontested on behalf of Portman Securities as earlier noted), I am satisfied that I should determine that Portman Securities had no entitlement to compensation for its equitable interest in 166-172 Parramatta Road and that, as a result, the appropriate compensation determination for that interest is "Nil".

76 The result of this determination is that the entirety of the market value compensation agreed by the Gertos entities and TfNSW is to be paid to those Gertos entities.

The TfNSW cross-claim

The Gertos entities' position

77 Entirely understandably, Mr Tomasetti made no separate submissions concerning the TfNSW cross-claim.

The TfNSW position

78 The written and oral submissions advanced for TfNSW were, necessarily, contingent on my determination concerning the quantum of compensation for market value (if any) to which Portman Securities was entitled.

79 If I was to find that Portman Securities had no market value compensation entitlement, it was submitted this necessarily gave rise to a position where s 48(5) of the Land Acquisition Act was called into play giving rise to an overpayment to be repaid to TfNSW with, as a consequence, the Court having the power to make an order pursuant to s 48(6) that Portman Securities was to repay the amount claimed by TfNSW in this cross-claim.

80 Mr Lancaster submitted that there was no doubt that, for the purposes of s 48(6), I was empowered to make the orders necessary to require that Portman Securities make the necessary repayment to TfNSW (citing Sheahan J in *Brock v Roads and Traffic Authority of New South Wales (No.2)* [2012] NSWLEC 114 (*Brock*)).

81 He submitted that the appropriate period of time within which such repayment should be ordered would be within 28 days of the date of the orders in these proceedings.

Portman Securities' position on the cross-claim

82 At the conclusion of Mr Lancaster's submissions in support of the cross-claim, Mr Jordan sought a short adjournment to seek further instructions. After receiving those instructions, he advised me that he did not wish to make any submissions in reply (Transcript 23 February 2021, page 31, lines 18 to 20):

> JORDAN: My client has been present in the room and has heard submissions and my instructions are not to make any submissions, your Honour. Just to accept the Court's decision.

83 By necessary inference, this position applied to that which had been advanced as set out above with respect to both the market value submissions advanced for Marsden Developments and the TfNSW cross-claim.

TfNSW's proposed orders

84 During the course of the second phase hearing, Mr Lancaster foreshadowed that TfNSW would provide a proposed set of orders against the eventuality that I might determine that the cross-claim should be granted. On 26 February 2021, TfNSW's solicitor e-mailed to my Associate a copy of TfNSW's proposed orders on the cross-claim.

85 Those proposed orders were also provided to the legal representative of Marsden Developments and to the legal representative of Portman Securities (these two entities being those in the matter pertaining to the cross-claim).

86 The terms of TfNSW's proposed orders were:

> The Court:
>
> 1. Determines that the nature of the estate or interest of the Second Respondent in Lot 1 in DP 776389 known as 166-172 Parramatta Road, Annandale (the Acquired Land) as at 9 February 2018 was an equitable interest as the purchaser under a contract for the sale of land that had been exchanged but not completed.
>
> 2. Determines that the amount of compensation to which the Second Respondent is entitled in respect of the acquisition of the Acquired Land is:
>
> (a) as to market value under s 55(a) of the Land Acquisition (Just Terms Compensation) Act 1991: NIL
>
> (b) as to loss attributable to disturbance under s 55(d) of the Land Acquisition (Just Terms Compensation) Act 1991: $11,000
>
> (c) as to all other matters referred to in s 55 of the Land Acquisition (Just Terms Compensation) Act 1991: NIL
>
> 3. Orders, pursuant to s 48(5) of the Land Acquisition (Just Terms Compensation) Act 1991, that the Second Respondent repay to the First Respondent:
>
> (a) the amount of $7,915,000 paid by the First Respondent to the Second Respondent on 13 August 2018 (being the amount paid as compensation for market value under s 55(a) of the Land Acquisition (Just Terms Compensation) Act 1991 in accordance with the First Respondent's then obligations under s 42(1) and s 44 of the Land Acquisition (Just Terms Compensation) Act 1991); plus
>
> (b) the amount of $107,513.89 paid by the First Respondent to the Second Respondent on 13 August 2018 (being an amount for interest

on the amount in (a) above pursuant to s 49(1) of the Land Acquisition (Just Terms Compensation) Act 1991).

within 28 days of the date of these orders.

Marsden Development's position on TfNSW's proposed orders

87 On 26 February 2021, my Associate received an e-mail from the legal representative for Marsden Developments indicating that Marsden Developments' position on TfNSW's proposed orders was:

> The Applicant (Marsden):
>
> A. Consents to Orders 1 and 2; and
>
> B. Neither consents to, nor opposes, Order 3, in the proposed SMO.

Portman Securities' position on TfNSW's proposed orders

88 Portman Securities' legal representative advised my Associate on Monday 1 March 2021 that:

> We are instructed to make no submissions with respect to the form of orders proposed as against our clients by Transport for NSW.

Consideration of cross-claim (Introduction)

89 In light of the absence of any submission on behalf of Portman Securities in opposition to TfNSW's cross-claim and my earlier explained conclusion, based on what was set out in the position agreed by the Gertos entities and TfNSW for all three proceedings (as set out in the Statement of Agreed Facts), I am satisfied that the payment made by TfNSW to Portman Securities of $7,915,000 (plus statutory interest) constitutes a payment falling within the scope of s 48(5) of the Land Acquisition Act and is thus amenable to be recovered by TfNSW in a court of competent jurisdiction (s 48(6) of the Land Acquisition Act).

90 The questions that then arise, given that TfNSW seeks to have this Court make such an order, are:

(1) whether or not I have jurisdiction to consider making such an order? and

(2) if so, under the circumstances ought I exercise that power in the fashion proposed by TfNSW?

Consideration of cross-claim (Jurisdiction)

91 I have earlier set out the terms of s 16(1A) of the Court Act. It is, for present purposes, appropriate to reproduce its terms again. The provision reads:

16 Jurisdiction of the Court generally

(1) ...

(1A) The Court also has jurisdiction to hear and dispose of any matter not falling within its jurisdiction under any other provision of this Act or under any other Act, being a matter that is ancillary to a matter that falls within its jurisdiction under any other provision of this Act or under any other Act.

92 I am satisfied that, on a proper reading of this provision, the jurisdiction of the Court established by it is sufficiently broad to encompass addressing matters arising from the cross-claim made by TfNSW against Portman Securities. This position, in the context of whether or not the Court could engage with the issue of an overpayment to a party whose interest in land had been compulsorily acquired, was addressed by Sheahan J in *Brock* at [88] and [89]. His Honour concluded that this Court did have jurisdiction to consider such an application when it was ancillary to proceedings addressing an objection to a compensation determination. That is the case here. I am satisfied, for the reasons set out by his Honour, that the conclusion which he reached was the correct one.

Consideration of cross-claim (Power)

93 TfNSW proposed that s 22 of the Court Act established a proper basis upon which I would have the power to make a repayment order of the nature sought by TfNSW.

94 When considering the role of s 22 of the *Federal Court Act 1976* (Cth), a provision in near identical terms to that of s 22 of the Court Act, the High Court held that the provision was one which vested very broad power in the Federal Court to dispose of matters where, independently, there was a proper statutory foundation establishing that that court had jurisdiction to deal with the matter (*Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; [1981] HCA 7).

95 This position is applicable, by analogy, to s 22 of the Court Act, thus making clear that, in circumstances where I have jurisdiction (as I do for the reasons earlier explained), I also have power to make an order of the nature sought by TfNSW.

96 This position reflects the overall conclusion reached by Sheahan J in *Brock* (relying on the Court of Appeal's decision in *Haig v Minister Administering the National Parks & Wildlife Act (No 3)* (1996) 90 LGERA 408). His Honour determined that he did have both jurisdiction and power to make an order for the recovery of an overpayment of compensation made upon the compulsory acquisition of an interest in land pursuant to the Land Acquisition Act.

97 I also respectfully adopt his Honour's reasoning and conclusion on this point as being here applicable.

Conclusion on the cross-claim

98 As I am satisfied that I have both jurisdiction and power to make an order as sought by TfNSW for the recovery of the compensation paid to Portman Securities (when that entity had no entitlement to such compensation), there is no discretionary reason (given that Portman Securities advances no submission that I ought not make such an order) why I should not do so.

99 It is therefore appropriate that I uphold TfNSW's cross-claim and make such an order.

Disturbance issues

Introduction

100 The written submissions on behalf of the Gertos entities describe the matters to be addressed in these proceedings in the following terms:

> 2 The only remaining dispute between the Applicants and the First Respondent relating to the Applicants' entitlement to compensation under s 55 of the JT Act concerns their claim for stamp duty pursuant to s 59(1)(d) of the JT Act and/or s 59(1)(f).

101 However, it is also to be noted that the Gertos entities' written submissions, dated 24 February 2021, expressly disavowed that these stamp duty equivalent payment claims sought to canvass the "no actual use" determinations already made in earlier decisions in these proceedings (those noted at [11] and [13]). The written submissions said, at paragraphs 17 and 18:

> 17 The Applicants maintain their position that they had an "actual use" of the Acquired Land at the DOA and reserve their right to seek special leave to appeal to the High Court of Australia. In the meantime, and pending any such ultimate appeal, the Applicants accept that this Court is bound by the decision

of Justice Pain and the Court of Appeal decision in determining the proceedings: *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at 642; [1965] 2 All ER 4; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 245, 260 and 295. 18.

18 The Applicants make no further submission that stamp duty is recoverable under sec 59(1)(f) of the JT Act at this time.

102 The claim now pursued for each of the Gertos entities is pursuant to s 59(1)(d) - a claim seeking to be paid a stamp duty equivalent amount to each of the entities based on the stamp duty which would arise to be paid if, in each instance, a property to the same value of the market value now agreed with TfNSW was to be purchased.

103 Mr Tomasetti addressed the differences between s 59(1)(d) and (f) as follows (Transcript 26 February 2021, page 43, line 44 to page 45, line 19):

> But I return to my original proposition a moment ago, the discussion about stamp duty recovery is probably no longer open if the claim is made under s 59(1)(f) because s 59(1)(d) expressly provides for recovery of stamp duty and is by reference to that section that such recovery can only be made in our submission, that's not to say that if the claim under Fitzpatrick, in the Fitzpatrick case had been attempted to be characterised by reference to s 59(d), now (1)(d), that it wouldn't necessarily have been successful. It's just that going to s 59(1)(f) to try and understand what s 59(d) is about, in our expression is a flawed approach.
>
> I should also make the observation that s 59(1)(d) carries with it several qualifications or two qualifications at least that do not arise in relation to s 59(1)(d). And those qualifications are firstly, that it has to be a financial cost relating to the actual use of the land. The words, "the actual use of the land" do not appear in s 59(1)(d). Secondly, the cost or loss must be as a direct and natural consequence of the acquisition and those words have been important in the consideration of cases surrounding claims for stamp duty. Why? Because the concept of direct and natural consequence has played upon the circumstance of a person who had a property was a given monetary equivalent of its market value when it was acquired and has then decided to reinvest in real estate. The Courts have consistently said with some exceptions where one is dealing with businesses which hold a lot of land, the Courts have generally said if you've got an investor who holds a single property and the land is taken away, he gets the money in his hand and he can then make a decision as to where he puts the money. Bonds. Stock market. Randwick races.

104 The provision relied upon is in the following terms:

> **59 Loss attributable to disturbance**
>
> (1) In this Act—
>
> *loss attributable to disturbance of land* means any of the following—
>
> (a) …,

> (b) …,
>
> (c) …,
>
> (d) stamp duty costs reasonably incurred (or that might reasonably be incurred) by those persons in connection with the purchase of land for relocation (but not exceeding the amount that would be incurred for the purchase of land of equivalent value to the land compulsorily acquired),
>
> (e) …,
>
> (f) …

105 In essence, Mr Tomasetti's foundational position was that what could relevantly be relocated to provide a proper basis for each claim for stamp duty equivalent compensation made by a Gertos entity was the reinstatement of that entity to be able hold title to a parcel of land of equivalent value to that of the parcel of land which had been compulsorily acquired from that entity.

106 The reasons advanced by Mr Tomasetti in support of this proposition are later set out.

107 TfNSW's submissions were to the effect that the proposition advanced by Mr Tomasetti was fundamentally flawed as, for a relocation to be effected for the purposes of this statutory provision, something tangible and able to be relocated from the relevant acquired site was necessary and that no such circumstance existed in each instance.

Mr Gertos' business activities

108 In his affidavit of 25 February 2021, at paragraphs 4 to 7, Mr Gertos described his past and present business activities in the following terms:

> 4 I describe each company as a special purpose vehicle (SPV) as the purpose of their being incorporated was to own for the time being and/or carry out any development of a particular parcel of land if and when that occurred. Each of the applicants in these proceedings I regard as a SPV.
>
> 5 My business has been to buy a parcel of land and then to develop it in the ways I have previously described in my earlier affidavit. Sometimes my development plans became redundant for a particular parcel if an opportunity arose to sell the land at a profit arose without carrying out development.
>
> 6 At present I am in the process of developing land at 137 Campbell Hill Road, Chester Hill, NSW for 100 residential units. I purchased that land in March 2020 for $6,350.000. I obtained a development consent for that development. Annexed and marked "**B**" is a copy of the development consent (Determination and Statement of Reasons dated 17 August 2017). The land was purchased in the name of a SPV namely Waldron Hill Properties Pty Ltd. I

> am the sold [sole] director and shareholder of that company. Annexed and marked "**C**" is a copy of an ASIC extract for Waldron Hill Properties Pty Ltd obtained 25 February 2021.
>
> 7 I have also purchased land at 921-925 Punchbowl Road, Punchbowl, NSW in the name of Westwood Capital Pty Ltd for $26 million. I am the sole director and shareholder of Westwood Capital Pty Ltd. Annexed and marked "**D**" is a copy of an ASIC extract for Westwood Capital Pty Ltd obtained 21 February 2021. Contracts were exchanged on 27 December 2019 and settlement has not yet occurred. Annexed and marked "**E**" is a copy of the front page of the Contract and execution page. I caused to be made an application for a Gateway determination to rezone the land at Punchbowl. A copy of the Gateway determination dated 25 May 2018 is annexed and marked "**F**". I am proposing to develop a shopping centre and shop top housing (380 dwellings) on that site.

109 It is not necessary consider the detail of any of the documents referenced in the above paragraphs of Mr Gertos' affidavit.

Submissions on disturbance issues

The Gertos' interests' position

110 In the context of the stamp duty claims of each of the Gertos entities here being considered, Mr Tomasetti advanced the proposition that each of these Gertos entities was a special purpose vehicle established by Mr Gertos for the purposes of holding the relevant land which had been acquired by compulsory acquisition.

111 The land owned by each of the Gertos entities involved in these proceedings was held, Mr Tomasetti submitted, as an integral part of Mr Gertos' business. As earlier set out from Mr Gertos' affidavit evidence, his business activities are multifaceted. It is under the umbrella of Mr Gertos' business, it was submitted, that each of the Gertos entities here involved is entitled to be compensated in a sum that represents the stamp duty amount that would be incurred if each of those entities was to purchase a replacement property of the same market value as that which has been compulsorily acquired from that entity.

112 It is to be noted, in passing, that although there is no evidence that any of the three Gertos entities have actually acquired a replacement property and thus incurred stamp duty, such a transaction and duty liability does not have to be effected for a stamp duty entitlement to arise if all the other relevant elements of s 59(1)(d) are satisfied (*Melino v Roads and Maritime Services* (2018) 98 NSWLR 625; [2018] NSWCA 251 (*Melino*) at [103]).

113 In this context, Mr Tomasetti summarised the position which he submitted rendered necessary the awarding of a stamp duty equivalent payment to each of the Gertos entities, as this approach was required to be consistent with the overall framework set by the Land Acquisition Act for providing adequate and complete compensation to dispossessed owners. He said (Transcript 26 February 2021, page 52, lines 26 to 37):

> If the person is given the market value of the land and wants to go and buy other land, then he's not being fully compensated for his loss by just paying the market value. If you get compensation and you want to go and buy shares well you don't incur stamp duty cost. If you want to go and buy government bonds you don't incur a tax or a duty. But if you want to go and buy you do. So what 59(1)(d) we respectfully submit is addressing and it's a fact with provision designed to properly compensate people in appropriate circumstances is to ensure that if they get a million dollars in compensation, they want to then go and buy land to replace that which they have lost, they don't have to then go into their own savings to find whatever is the relevant stamp duty component on that purchase. Here we're talking about much larger sums but the same philosophy applies.

114 Mr Tomasetti submitted that the nature of the activities undertaken by Mr Gertos under the broad umbrella of his business interests, as earlier described, fell within the concept of a "business", as discussed by Mason J in *Hope v Bathurst City Council* (1980) 144 CLR 1; [1980] HCA 16, at page 8, where his Honour said:

> I accept, then, that "business' in the sub-section has the ordinary or popular meaning which it would be given in the expression "carrying on the business of grazing". It denotes grazing activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis.

115 Mr Tomasetti, in the written submissions on behalf of the Gertos entities, at paragraphs 23 to 26, explained why, contrary to Lloyd J's comment in *Fitzpatrick Investments Pty Limited v Blacktown City Council (No 2)* [2000] NSWLEC 139, at [18], that relocation could not apply to a person's investments or assets, "relocation" did have a broad context (as had been explained by Robson J in both *Speter v Roads and Maritime Services* [2016] NSWLEC 128 (*Speter*), at [85], and *Rocco Fraietta v Roads and Maritime Services* [2017] NSWLEC 11 (*Fraietta*), at [170]).

116 Mr Tomasetti submitted that the holding of land by each of the Gertos entities constituted part of the activities of Mr Gertos' overall business. Because of this,

relocation in the sense used in s 59(1)(d) would encompass acquisition of replacement parcels of land to ensure the continuation of Mr Gertos' business.

117 These matters were set out at paragraphs 26 to 31 of the written submissions. These paragraphs are set out below:

> 26. In *Speter*, the applicants submitted that their investment was a business and, therefore, could be relocated: at [87]. The Court accepted that the applicants derived an income from leasing the acquired land, however determined that the applicants were not engaged in any enterprise beyond passively receiving that income and only held one investment, so could not be described as being in the business of investing: [87]. On this basis, Robson J held that the applicants' investment in the acquired land could not be considered a business: at [87].
>
> 27. Unlike the circumstances in *Speter*, the Applicants, are part of Mr Gertos' umbrella group of companies (the "Gertos Group"), were in the collective sense in the business of land development. The Applicants were part of a portfolio of companies created to do that business: *SNS Pty Ltd v Roads and Maritime Services* [2018] NSWLEC 7 at [56] and [346] (**SNS**). The Applicants rely on the Affidavit of Bill Gertos affirmed on 16 June 2020 (**Gertos Affidavit**). It discloses that Mr Gertos:
>
> (a) Is the sole director of G Capital and Gertos Holdings: at [1].
>
> (b) Has a long history of involvement in the business of acquiring property and either holding the property for a time and then selling or redeveloping it as the opportunity presented itself. The purchases of land were generally made by a corporate entity, otherwise known as a "special purpose vehicle" (SPV) over which he exercised ultimate control.
>
> (c) Sold his accounting practice and ceased work as an accountant in 2002: at [10]. In that year he obtained a contractor's licence as a builder and he continues to hold that licence: [11].
>
> (d) Has invested in land and property development from 1988 to date: at [11]ff. Often land he purchased was leased for long periods before a decision was taken to either develop the land or to resell it.
>
> (e) Purchased 164 in April 2000 because he considered it had an advantageous location and it was underdeveloped: at [14] and [21]-[22]. He relocated his accounting practice there: at [16].
>
> (f) Purchased 160-162 in April 2001 for the same reasons as for 164: at [27]-[28]. Further the consolidated site would have more development potential: at [29].
>
> (g) Purchased 166-172 in May 2004 for the same strategic reasons as the two adjoining properties at 160-162 and 164: at [40]-[41].
>
> 28. In addition, the company searches for the Applicants indicate that, at the DOA, the registered address and place of business for each of them was at 164.
>
> 29. The Court should, with respect, find that the Applicants were part of Mr Gertos' land development companies (the "Gertos Group") and, therefore,

> the Acquired Land was an asset of the business which was land investment and development.
>
> 30. In circumstances where the business asset was compulsorily acquired and the business could not continue to have as one of its assets, the Acquired Land, it is reasonable for the asset to be relocated - replaced - with other land. It is the intention of Mr Gertos, through the Applicants or other special purpose vehicles, to purchase replacement land for the business. This will attract stamp duty on the purchase price.
>
> 31. In *Speter*, Robson J went on to say that even if the applicants operated a business, it was not relocated because the investing of money (received as a result of a resumption) "*in another property is not a relocation of the original investment, but rather a reinvestment of the money paid for the original investment*": at [88]-[89]. With respect, the Applicants submit that this is a semantic distinction between relocation costs and the costs of reinstating or replacing a core asset of a business - an asset that was compulsorily taken.

118 Mr Tomasetti further addressed these matters in his written submissions by reference to *Hua and Anor v Hurstville City Council* [2010] NSWLEC 61 (*Hua*) (as I later address as arising from his oral and written submissions in combination).

119 Mr Tomasetti accepted that the words "those persons" in s 59(1)(d) were the persons entitled to compensation referred to in s 59(1)(a) (vide *Melino* at [104] per Payne JA). He then addressed the precise structure of the words contained in s 59(1)(d).

120 In this context, Mr Tomasetti submitted that the absence of the words "of those persons" after the word "relocation" in s 59(1)(d) meant that the relocation envisaged was not confined to relocation of a claimant itself. In support of this proposition, he relied on the decision of Robson J in *Speter*, at [85], where his Honour said:

> 85 Sections 59(1)(d) and (e) of the Just Terms Act, however, refer simply to "relocation". Given that this term is not defined in the Just Terms Act, it should be read in context and given its ordinary meaning. The word "relocate" is defined in the Macquarie Dictionary as "to move (a firm, a factory, etc.) to a different place". Its context, and in particular the exclusion of the words "of those persons", suggests that the disturbance for the relocation of something other than the applicants personally can be claimed.

121 This enabled a broad approach to be taken to what was capable of being relocated and thus falling within the ambit of s 59(1)(d). He submitted (Transcript 26 February 2021, page 49, line 41 to page 50, line 5):

> So it's a broad - the notion of a business contemplates activities. The activities don't have to be carried out on the land, your Honour, but the land can be part

> of the activities of the business. Mr Gertos has put on his evidence, just as Mr Royal did, to explain that over the last two to three decades he's been involved in a business of land dealing. Sometimes he buys land and then resells it. He doesn't say in his affidavit whether every sale is at a profit or not, but that's what happens. Sometimes he buys land and he strata titles it because it has an existing building on it and he sells off the strata title, the strata subdivided lots. Sometimes he buys land, demolishes buildings, and then carries out redevelopment, and that's spelt out in some detail in his earlier affidavit of June. He says he does that through special purpose vehicles.
>
> Where the Speter claim for stamp duty came unstuck is that his Honour said, look, Mr Speter, you've only got one investment property. It's not really a business that you're involved in, in holding one property for investment, and therefore I'm not going to allow the claim for stamp duty.

122 Mr Tomasetti proposed that I should regard the decision by Pain J in *SNS Pty Ltd v Roads and Maritime Services* [2018] NSWLEC 7 (*SNS*) as being an appropriate and relevant analogy for the position arising with respect to each of the Gertos entities. In *SNS*, Mr Royal, the principal and guiding mind behind that company, undertook his commercial activities using a variety of special purpose vehicles for different sites as is here the position in the activities undertaken by Mr Gertos (including these three Gertos entities). In *SNS*, Pain J concluded that it was appropriate to order the payment of an amount equal to stamp duty to *SNS* by the acquiring authority.

123 In this context, Mr Tomasetti took me to two paragraphs in her Honour's decision. The first, [56], was in the following terms.

> 56 Mr Royal director of SNS affirmed an affidavit on 15 September 2017. SNS is part of a group of companies (Sans Group) directed and managed by Mr Royal each of which carries on the business of acquiring and developing property. Mr Royal listed six additional companies within the Sans Group which had purchased and been involved in the development of seven properties since 1986. Mr Royal also stated that some of the Sans Group companies have acquired partial interests in various development properties.

124 Mr Tomasetti then took me to [346], a paragraph in the following terms:

> 346 Mr Royal as the sole director of SNS attested to having a number of development companies through which he has pursued developments of various kinds over many years. His business model is to create a company for each development site under an umbrella group of companies. I accept that he is in the business of land development and that SNS is part of his portfolio of companies created to achieve that end. The stamp duty claim for replacement land is reasonable as the area acquired was substantial in the context of the MSTCP.

125 With respect to the above extracted paragraphs, Mr Tomasetti submitted (Transcript 26 February 2021, page 46, lines 27 to 30):

> And her Honour, therefore notwithstanding that there was special purpose vehicles assembled to acquire land and what was taken from one of those companies was land, accepted that the business of Mr Royal was such that stamp duty should be recoverable in the name, presumably, of the claimant.

126 It will later be necessary to return, in my consideration of Mr Tomasetti's submissions, to an exchange I had with him following the above quoted passage of the transcript.

127 Mr Tomasetti further submitted that the approach taken by Pain J in *SNS* of regarding relocation and reinstatement as being appropriately relevant synonyms should be adopted by me. This approach, he said, having regard to the method by which Mr Gertos undertook his commercial activities, was consistent with that undertaken by Mr Royal as dealt with by Pain J in *SNS*.

128 On this basis, Mr Tomasetti submitted that there was no relevant distinction to be drawn between the circumstances which had arisen for consideration by Pain J and those which arose for my consideration with respect to each of the Gertos entities.

129 Mr Tomasetti proposed that the approach that I should adopt to the concept of relocation was, initially, to be derived from the decision of Preston CJ in *George D Angus Pty Limited v Health Administration Corporation* [2013] NSWLEC 212 (*George D Angus*) (written submissions at paragraph 22(e)). He submitted that the relevant paragraph of his Honour's decision was in the following terms:

> 72 Fourthly, the costs reasonably incurred must be in connection with the "relocation". The concept of "relocation" involves moving to a different place. Ordinarily, the relocation will be from the acquired land to a different place. However, it can also include relocation from some land other than the acquired land to yet other land, provided a sufficient connection with the acquired land is established. Hence, where only a part of a parcel of land has been acquired leaving residue land, costs incurred in relocating buildings from the acquired land to the residue land will be recoverable: see *McDonald v Roads and Traffic Authority (NSW)* at [119] not challenged on appeal in *Roads and Traffic Authority (NSW) v McDonald*.

130 As a consequence, as I understood him, reinstatement in these circumstances was to be regarded as reinstating each of the Gertos entities to a position where it would be able to purchase a replacement property of equal value without suffering the financial detriment of needing to meet the payment of

stamp duty from its own assets, a detriment that would arise if the claims of the various Gertos entities were not to be granted.

131 In this regard, again as I understood him, the Gertos entities' positions were to be distinguished from those which applied in *Speter* because, in *Speter*, that ownership was of a single property by an individual and not, as here, ownership by entities that were special-purpose vehicles created by Mr Gertos for elements of his commercial activities under the overall umbrella of those commercial activities.

132 Mr Tomasetti proposed that what was here being sought was reinstatement of Mr Gertos' business to its former position in the fashion which had been considered by Pain J in *Hua*, at [43] and [59].

> 43 There is a semantic distinction to be drawn between relocation costs and the costs of reinstating a business in that the terms, while related, are not identical. The *Macquarie Dictionary Online* (2010), Macmillan Publishers Australia, definition of relocate is *"to move (a firm, factory, etc) to a different place"*, and the definition of reinstate is *"to put back or establish again, as in a former position or state"*. That distinction was not considered early in the proceedings and was not raised with the two experts Mr Coleman and Mr Firth during oral evidence. Their evidence refers to both relocation and reinstatement as if these are the same. Hyam refers to the reinstatement principle of compensation following the compulsory acquisition of land as a principle developed by judicial decisions (see p 394), but acknowledges that it has not been definitively analysed and that there have been differences in view as to what precisely it covers (at p 395 citing Gobbo J in *Kozaris v Roads Corporation* [1991] 1 VR 237 at 240).
>
> …
>
> 59 On reviewing the cases above, relocation costs in s 59(c) can include the replacement of essential equipment in new premises which can be described as reinstatement as I have already stated in par 45. To the extent relocation under s 59(c) does not cover all aspects of such a claim, s 59(f) is potentially available as the cost does relate to the actual use of the land and is incurred as a direct and natural consequence of the acquisition. The preferable view is that the costs of re-establishing the business elsewhere, whether described as relocation or reinstatement is claimable under s 59(c).

133 He submitted that, in the context of these proceedings, by inference as I understood him, the concept of relocation should also be understood to encompass re-establishment of Mr Gertos' business elsewhere. In this regard, he said (Transcript 26 February 2021, page 54, lines 15 to 18):

> There's no material difference between her Honour referring to 59(c) in the context of this argument and 59(d). So her Honour thought that we're

> descending into semantics if we place too much weight on the word, "Relocation".

134 He followed this broader submission by expanding on it, saying (Transcript 26 February 2021, page 54, lines 20 to 37):

> Your Honour, if you can relocate the chattels of a business, the desks, the chairs, the lights, the computers, if you can replace the carpets, the light fittings, if you can replace the partitioning, the kitchen fit out et cetera that you lose on acquisition, they are chattels, fittings and fixtures. You can also in the appropriate case replace the other essential feature of the business which is the land. We accept that you can't, because it's real property, move the land from here to there but that's to read s 59(z) too narrowly, because what we are in truth doing is not relocating the land but we're reinstating an essential asset of the business, the business of the three applicants being no more than land dealing, and element of land dealings, as evidence by the controller of the group, Mr Gertos. I've probably said this already but in a slightly different way, but if the applicants are paid the market value of the land and as a necessary feature of the business it's reasonable to go out and buy more land, then if the stamp duty cost is to be incurred it should be compensated for. Remember, with respect, your Honour, that the decision to incur the cost is what has to be responsible, not the quantum. In this particular case, quantum is covered by the maximum provided for in the express working of the section.

135 Mr Tomasetti also summarised what he said was the relevance of each of the entities forming part of Mr Gertos' business in circumstances where each entity was not seeking to have the Gertos Group or Mr Gertos compensated as a consequence of these three proceedings. He described the relevance of Mr Gertos' evidence concerning his business interests (Transcript 26 February 2021, page 55, line 13 to line 31):

> Your Honour the relevance of Mr Gertos' evidence is that he is establishing a pattern and a course of dealings with respect to companies like the applicants which all fall under the umbrella as Pain J accepted in SMS [as transcribed] of the Group but it doesn't mean that we're asking your Honour for a moment to award compensation to anybody else other than the applicants.
>
> Your Honour will have regard to the context, the background facts. If I can just put it this way it's a rhetorical question. These are special purpose vehicles. They've had the land taken from them but the companies haven't ended. Why would Mr Gertos establish new SPVs in respect of the continuation of the business. The market value of the land that's being taken is being paid to the applicants, so they will have money but will have no purpose unless that money is reinvested. There is no evidence before your Honour that these companies are going to put that money in the bank, buy government bonds or buy shares because that's not what they're about. There is just no evidence of that and you would, in our respectful submission, be more inclined to accept in a civil case like this that it would be reasonable for them to incur stamp duty costs when they reinvest the compensation monies that they've been paid.

136 He explained why awarding the amounts claimed pursuant to s 59(1)(d) was necessary to effect complete compensation for the compulsory acquisition of the land from each Gertos entity. He submitted (Transcript 26 February 2021, page 53, lines 11 to 33):

> …, what we need to show in this case to answer your Honour's question which I've been doing my best to answer is to show that on the facts the land it's taken is part of the business. It doesn't require the people to be in occupation. It doesn't require the land to be physically actually use like s 59(1)(f) does. The section doesn't require any of those limiting things. If your Honour is satisfied on the facts that this company is part of a group and that it's likely, not likely that it's reasonable that the company might reasonably incur stamp duty costs on a replacement parcel, then on the facts of this there is relevant relocation.
>
> Now relocation is, a word as Robson J said, not defined but it can be likened to replacement. It can be likened to reinstatement. The Just Terms Act doesn't use the expression reinstatement but if the idea is to compensate a person as much as money can to put them back in the same position then reinstatement can occur. I should add while I'm on that thread of thought another word might be reestablishment.
>
> Your Honour can I just take this. Money is provided to replace the land that was taken, that is, to give the person the monetary equivalent of that which is taken. It's the monetary equivalent of the real estate. We submit it's not adequate compensation where the person is likely to replace the land taken and will therefore necessarily incur stamp duty but where he's not compensated for that necessary step as well.

137 Finally, it is to be noted that, during the course of his oral submissions, Mr Tomasetti expressly disavowed any entitlement for a stamp duty payment for any of the Gertos entities because that entity could potentially be regarded as "landbanking" in the sense addressed *in Blacktown Council v Fitzpatrick Investments* [2001] NSWCA 259 (*Fitzpatrick Investments*). Mr Tomasetti's express disavowal is recorded in the transcript of 26 February 2021 at page 57, line 44 to page 58, line 3.

The TfNSW position

138 In summary, the position advanced on behalf of TfNSW, in both its written and oral submissions, is that the issue of relocation does not arise on the facts in each of these proceedings as there is nothing to relocate in each instance. Thus, TfNSW says, there is no entitlement to any stamp duty equivalent compensation.

139 Written submissions were provided for TfNSW opposing the claims by the Gertos entities for a stamp duty equivalent payment pursuant to s 59(1)(d) of

the Land Acquisition Act. The position advanced for TfNSW in the written submissions (and later expanded upon by Mr Lancaster in his oral submissions) was based on three propositions. These were that:

(1) Despite the fact that the compulsory acquisitions from the Gertos entities took place in February 2018, no relocation of anything had been effected by any of the Gertos entities since that date;

(2) As there was no actual use by the Gertos entities of any of the compulsorily acquired parcels of land, there was nothing that could or might be relocated by any of the Gertos entities; and

(3) The only potential claimant, in each proceeding, was the relevant Gertos entity from which the land had been compulsorily acquired so that (paragraph 4(c)):

> … The expectations and intentions of someone else (whether it be Mr Gertos, the Gertos group, or other special purpose vehicles) are immaterial and could not establish any entitlement of any of the Gertos entities to a stamp duty equivalent payment.

140 With respect to the first of the earlier set out summary propositions, TfNSW relied upon what was put to be the correct understanding of the decision of Payne J in the Court of Appeal in *Melino* at [104]. None of the Gertos entities could be regarded as being located on the land at the time of acquisition as they had not been making any use of the land at that time. TfNSW noted that these decisions were not, for the purposes of these proceedings, questioned by the Gertos entities.

141 In his oral submissions, Mr Lancaster put that the decision of the Court of Appeal in *Melino* was relevant because the critical element to which Payne JA had referred in [104] was that there was no one living on the land (from amongst "those persons" for the purposes of s 59(1)(a) and thus for s 59(1)(d)) capable of being relocated.

142 Mr Lancaster also submitted that, with respect to Mr Tomasetti's reliance on *Fraietta*, this decision revealed, at [170], that the circumstances there were ones where (Transcript 26 February 2021, page 59, lines 44 to 47):

> … people or a business or physical objects on the land that are being relocated by the person entitled to compensation such that purchase of land for that relocation was an expense which has been incurred or likely to be incurred by that person.

143 He submitted that this was not the circumstance for any of the Gertos entities in these proceedings.

144 As a consequence of the lack of actual use by any of the Gertos entities of the parcel compulsorily acquired from it, it was appropriate to conclude that the land was, in each case, held solely as an investment. In such circumstances, a passive investor is not entitled to stamp duty equivalent compensation (citing a range of decisions not necessary to be listed in support of this proposition).

145 TfNSW's written submissions said, at paragraph 29:

> 29 Where land is not actually used but may be awaiting future development at the time of its compulsory acquisition, does not give rise to any relocation in the relevant sense.

146 In his oral submissions, Mr Lancaster adverted to the two cases which had been cited in the footnote to the above quoted paragraph. The first was *Bezzina Developers Pty Limited v Leichhardt Municipal Council* [2006] NSWLEC 175 (*Bezzina*). Mr Lancaster referred to [115] where Talbot J had said that "a single parcel holding is not equivalent holding tracts of land for subdivision and resale, so distinguishing it from the kind of purpose that was the basis of the decision in *Fitzpatrick"* (Transcript 26 February 2021, page 61, lines 10 to 12).

147 With respect to the second footnoted case, *Kirela Pty Limited v The Minister administering the Environmental Planning and Assessment Act* 1979 *(No 2)* (2004) 132 LGERA 90; [2004] NSWLEC 68 (Cowdroy J) (*Kirela*), Mr Lancaster summarised what he said was to be taken from this decision (Transcript 26 February 2021, page 61, lines 14 to 18):

> But the other case in footnote 13, *Corella v the Minister* [**as transcribed**] at para 14 indicated that there was no maintaining of the claim because there was no relocation of any business as a matter of fact in that case. In para 19 of that decision, if I could add that to the footnote, there was no evidence of uses of a land bank, only there was, at the most, potential future use.

148 TfNSW's written submissions also relied on elements of the affidavit of Mr Savell (Exhibit 7) concerning the bases upon which each of the acquired properties had been leased as providing evidence of the fact that Mr Gertos, as the governing mind of the Gertos entities, held each of those properties as a long-term passive investment. In this context, the absence of any documents

evidencing any intention to develop any of the properties reinforced this as establishing the nature of Mr Gertos' holding, through a special purpose vehicle, of each of the acquired properties on this purely passive basis.

149 The final point on this aspect of TfNSW's written submissions, at paragraph 35, was that:

> 35 The Applicants have not demonstrated anything more than a "potential future use" of the properties by another legal entity (Mr Gertos or some new special purpose corporate vehicle he might create), which is insufficient to establish any entitlement to compensation.

150 In support of the above proposition, TfNSW's written submissions cited *Fitzpatrick Investments* at [5] and *Speter* at [91]-[94].

151 In his oral submissions, Mr Lancaster also addressed the submissions made by Mr Tomasetti in seeking to rely upon the decision of Pain J in *SNS*.

152 First, Mr Lancaster submitted that [346] was in that part of her Honour's decision addressing a claim made pursuant to s 59(1)(f) of the Land Acquisition Act and was thus in an entirely different context to that which I am considering concerning the Gertos entities.

153 Second, Mr Lancaster noted that the dispossessed entity had in fact been undertaking development on the compulsorily acquired land, a position which was different from the circumstances which here arise with respect to each of the acquired properties.

154 In addition, Mr Lancaster further submitted that [346] of her Honour's decision, properly understood, did not have the breadth of application proposed by Mr Tomasetti and was not, in any fashion, addressing the operation of s 59(1)(d).

155 Mr Lancaster acknowledged that, when a person or entity owns the acquired property and is running a business on it with the resulting necessity to move the business to other land after compulsory acquisition, that does then give rise to an entitlement to compensation for stamp duty on the purchase of the replacement land (Transcript 26 February 2021, page 60, lines 2 to 7).

156 Mr Lancaster also addressed what he regarded as Mr Tomasetti's submissions concerning the appropriateness of approaching the legislation's compensation

entitlement provisions to the effect that, as a matter of proper understanding of the overall framework and policy objectives of the Land Acquisition Act, Mr Gertos and his special purpose vehicles should be entitled to stamp duty equivalent payments to provide what might be described as a complete compensation payment for the acquired land.

157 In this context, it is appropriate to address the above approach by setting out the entirety of Mr Lancaster's oral submissions in this regard. Mr Lancaster said (Transcript 26 February 2021, page 60, line 9 to page 61, line 3):

> My learned friend addressed on a number of occasions the proposition that's set out in paragraphs 27 to 30 of his submissions about this all being, that is, each of the applicants' properties, being land owned by special purpose vehicles under the umbrella of the Gertos Group, and my learned friend said that it's part of the purpose of compensation under the Act to allow not just market value compensation, but, in fairness, to include stamp duty compensation.
>
> At times, my learned friend seemed to be arguing against the policy of the Act as it's represented in its current form, but, of course, your Honour needs to apply and interpret the terms of 59(1), in particular, (1)(d), and the applicants, and indeed the acquiring authority, have to live with the way that that's been legislated. There can't be any overarching principle of fairness of the changes that the statute brings.
>
> In this case, there is simply no evidence that each applicant wants to go out and buy other land. My learned friend referred to Mr Gertos being the alter ego of the applicant companies, but Mr Gertos doesn't even say he is going to cause each applicant to do anything. All he's saying is I'm going to either myself buy other land or I'm going to create other special purpose vehicles because the Gertos Group is interested in continuing to buy, sometimes to sell, property. But that just doesn't speak to any satisfaction of the condition of terms of 59(1)(d). There's no evidence of the applicants' intention to incur anything or buy anything or reinvest in other land, and it's really not to the point for my learned friend to say don't worry about this, these are the special purpose vehicles, it's Mr Gertos' structure and he intends to go and buy other land with other special purpose vehicles.
>
> But the short answer to that is, if Mr Gertos wants to use, for the purpose of his land investments, a special purpose vehicle structure, he has to take the good with the bad. The good, of course, includes the limited liability provisions that applies to each individual corporate entity that owns its own separate land. Many investors do take the approach that they wish to take advantage of the limited liability and other advantages in tax and otherwise of having the individual different companies buy individual different properties.
>
> But if that's the structure that this investor wants to take, as I said, he has to take the good with the bad, and more importantly for your Honour's present purposes, 59(1)(d) has to be understood in its statutory language, and if it's understood in its statutory language, there is just no basis upon which each of the applicant companies is entitled to stamp duty because they haven't satisfied the pre-condition in 59(1) (b); that is, because, as we say in para 31

> of our submissions, there is no evidence of an activity or business, plant or equipment or other thing of the applicants that was located on the land and that could or might be relocated.

158 Mr Tomasetti's submissions in reply to the above propositions are later also reproduced in full.

159 Mr Lancaster concluded by submitting that the expectation or intention of someone other than the dispossessed entity to buy different land could not satisfy the requirement plainly set out in s 59(1)(d) and, thus, Mr Gertos and his group business structure gave rise to no entitlement of any of the Gertos entities to a stamp duty equivalent payment as a consequence of the compulsory acquisition of the relevant property.

The Gertos interests' reply submissions

160 Mr Tomasetti commenced his reply submissions by confirming that the Gertos entities were not "landbanking" and that it was the agreed position that no claim pursuant to s 59(1)(f) was available in these proceedings - now reflecting the settled state of the law.

161 With respect to Mr Lancaster's submissions concerning [346] of Pain J's decision in *SNS*, Mr Tomasetti accepted that Mr Royal was actually developing the land that had been acquired from that special purpose vehicle and, as a consequence, the compensation was appropriate to be awarded pursuant to s 59(1)(f). However, he submitted that Mr Royal's business structure was a relevant consideration, putting (Transcript 26 February 2021, page 62, lines 26 to 29):

> … that her Honour was right to take into account these background facts and matters in determining whether or not the applicant was entitled to the specific form of compensation albeit that she was applying different tests.

162 With respect to *Melino* and *Fraietta*, as relied upon by Mr Lancaster, Mr Tomasetti put that I would not accept what had been proposed for TfNSW because of the particular factual circumstances in those proceedings. He said that those factual circumstances were not akin to those with which I was dealing. He submitted (Transcript 26 February 21, page 62, line 49 to page 63, line 1):

> We don't have to establish a need to buy another property but what we do need to establish is a reasonable - that this is a cost that might reasonably be incurred.

163 Mr Tomasetti also submitted that I should have no regard to the fact that the acquisitions from the Gertos entities had taken place in early 2018 as evidencing any factor relevant in my consideration, given that the Gertos entities had been involved in litigation during that period, saying (Transcript 26 February 2021, page 63, lines 14 to 18):

> … nothing should be inferred against a dispossessed owner in respect of this argument where the resuming authority says, "Well you haven't gone and bought anything in the meantime" when they're locked in litigation trying to determine what the appropriate amount of compensation to be paid is.

164 After a short interruption in proceedings because of malfunctioning of the Court's recording equipment, Mr Tomasetti returned (Transcript 26 February 2021, page 64, lines 5 to 16) to:

> … addressing Mr Lancaster's submission that we were arguing against the policy of the Act and what I have said there was the policy of the Act is reflected in its objectives and the objective is that the compensation will be not less than the market value of the land, clearly contemplating payment of compensation about that where appropriate. The same policy is reflected in s 10 where there's a statutory statement of the guarantee for the same effect. Accordingly, there's nothing contrary to the policy of the Act when you read the Act with s 54 to say here's the state exercising its power to take private property and there's compensation to be paid to ensure the person is not disadvantaged. That's the policy of the Act and that's consistent with our broad submissions, that the approach to s 54(1)(d) should not be narrowly confined but should be confined broadly.

165 Mr Tomasetti then turned to explain why I ought to reject submissions that had been advanced on behalf of TfNSW that were addressed to the conduct of Mr Gertos or what had been suggested I might draw from the nature of Mr Gertos' structuring of his business interests. Given that I am satisfied that these are, for reasons I will later discuss, matters irrelevant in the present circumstances, it is not necessary to traverse this aspect of Mr Tomasetti's submissions in any detail.

166 Mr Tomasetti then addressed the submissions made with respect to the earlier decisions in *Bezzina* and *Kirela*. He submitted that, in each instance, an examination of the terms of the relevant decision showed that issues relating to s 59(d) (the then equivalent of s 59(1)(d)) had not been fully argued. He put that there was no fully reasoned analysis explaining why the stamp duty claim

in each of those cases was rejected - thus providing me with no assistance for my consideration in these proceedings.

Consideration of disturbance issues

Introduction

167 It is to be observed that much of the past litigation concerning potential entitlement to stamp duty payment as a consequence of a compulsory acquisition of land has been founded on a claim for such an entitlement arising under s 59(1)(f) - as a financial cost falling on the dispossessed owner as a consequence of the compulsory acquisition and *relating to the actual use of the land*.

168 In these proceedings, it is accepted by the Gertos entities and TfNSW that recent decisions of the Court of Appeal (*Roads and Maritime Services v United Petroleum Pty Ltd* (2019) 99 NSWLR 279; (2009) 236 LGERA 389; [2019] NSWCA 41 (*United Petroleum*)**;** *Alexandria Landfill Pty Ltd v Transport for NSW* (2020) 243 LGERA 102; [2020] NSWCA 165 (*Alexandria Landfill*)) have had the effect of narrowing the scope of potential recovery pursuant to s 59(1)(f), so that a broader stamp duty claim can no longer be pursued seeking to utilise that provision.

169 Although s 59(1)(f) is no longer available as a potential vehicle for claims such as these made by the Gertos entities, aspects of those past decisions do provide assistance in reaching a proper understanding of how the wording of s 59(1)(d) is to be understood.

170 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, at [70] and [71], made it clear that the meaning of the provisions of a statute is to be ascertained by examining the context in which the language of those provisions is used and seeking to give effect to the purpose and language of the provisions.

171 Although, in Taylor v The Owners of Strata Plan 11564 and Others (2014) 253 CLR 531; [2014] HCA 9, the High Court explained that the notional incorporation of additional words, if necessary, for a proper and coherent understanding of a statutory provision was permissible, there is no such

necessity here arising. The language of s 59(1)(d) does not warrant importing any expansionary or qualifying words.

172 It is also to be observed that, although s 59(1)(c) is confined to circumstances where the relocation is confined to being of "those persons", decisions concerning understanding of the concept of relocation in that statutory provision are also of assistance in understanding how that word is to be taken in the context here involved.

173 Although the case advanced by Mr Tomasetti on behalf of the Gertos entities was cogently argued, the complexity of the path advocated to the proposed conclusion that a stamp duty equivalent entitlement arises as a consequence of relocation is flawed.

174 I am satisfied that the approach advocated is impermissible. Indeed, I am satisfied that, generally for the reasons put on behalf of TfNSW, this impermissibility can be comparatively easily discerned from a range of past decisions concerning the concept of "relocation" - whether those decisions were ones arising concerning the application of s 59(1)(c), (d) or (f).

175 All of these past determinations lead inevitably to the conclusion that something tangible (and not merely the concept of ownership) must be relocated for such an entitlement to arise.

176 However, there are four matters overall which require to be addressed in explaining why these claims made by the Gertos entities for stamp duty equivalent payments are to be dismissed. One of them is of a quite precise and specific nature, whilst the other three are of a broad, general nature. These matters are:

(1) The first, specific matters are why the decision of Pain J in *SNS* provides no assistance in support of the submission that, because the Gertos entities are under the umbrella of Mr Gertos' business interests, this potentially gives rise to an entitlement to stamp duty equivalent compensation and why the decision of Pain J in *Hua* is also of no assistance to the case advanced for the Gertos entities;

(2) The second matter is that the concept of relocation necessarily involves the relocation of something tangible (whether an active use that was being carried out on the compulsorily acquired lands or physical assets

located on the compulsorily acquired land) that needs to be moved to another location;

(3) The third matter is that the policy objectives of the Land Acquisition Act do not provide a proper basis upon which to adopt the notion that a passive investment, held within an array of business activities conducted by a single individual or entity, provides a proper foundation for granting these claims made by any of the Gertos entities; and

(4) The fourth matter, of perhaps trifling consequence, is that the only element of each of the Gertos entities' corporate existence actually capable of being relocated (the registered office of that entity) was not located at the acquired land at the time of acquisition in each instance.

177 I now turn to address the above matters.

The decisions in SNS and Hua

178 I have earlier set out the submissions made by Mr Tomasetti proposing that Pain J's decision in *SNS* should be followed, by analogy, as a basis for establishing that each of the Gertos entities was entitled to a stamp duty payment as has been claimed. I there indicated I would set out an exchange I had with Mr Tomasetti - an exchange raising my concerns about the relevance of *SNS*. That exchange was in the following terms (Transcript 26 February 2021, page 46, line 32 to page 47, line 20):

> HIS HONOUR: But she doesn't explain, does she, as to why Mr Royal constitutes "the person" for the purposes of 59(1)(a) and that "the person" somehow lifts SNS up into some corporate aggregation. There is no reason at all given for that conclusion, is there?
>
> TOMASETTI: I don't think she did what your Honour said. What she awarded was stamp duty for replacement land to SNS. That was the company from whom the land was acquired.
>
> HIS HONOUR: I understand that but her reasoning, at least as I read that paragraph, was because it was within Mr Royal's umbrella group of development companies and that the basis was that Mr Royal was entitled to be recompensed for stamp duty even if paid to SNS and that was in circumstances where SNS was, in fact, undertaking a development activity on the relevant site at the time of its acquisition.
>
> TOMASETTI: With respect, I don't accept that, your Honour. What her Honour was doing was entertaining a claim for replacement of stamp duty, tried to understand, by accepting facts advanced by Mr Royal, that he was the controlling interest of this and other companies and that the business of the
>
> company from whom the land was acquired was an integral part of an overall business which was involved in land development.
>
> HIS HONOUR: So in that case, doesn't what follows, for example, in the discussion at 348 and onwards, mean that there was the commencement of a

> use of the land for the purposes of development, something which is absent in these proceedings as a consequence of the Court of Appeal's decision.
>
> TOMASETTI: She was dealing with a claim under s 59(1)(f), your Honour, and that required a finding that the land was being actually used. In s 59(1)(d) there is no such requirement--
>
> HIS HONOUR: I understand that but you've been careful to tell me I should tread very carefully with respect of decisions under 59(1)(f) as a consequence of more recent authority which has had the effect, if I could say this in short terms, of significantly tightening up what is potentially available under 59(1)(f) and it's in the constraints that are put on me by the decisions of the Court of Appeal in United and George D Angus and in Alexandria Landfill that I must approach any of the heads under 59(1).

179 In order to explain why I am satisfied that her Honour's decision provides no support for the Gertos entities in the fashion proposed by Mr Tomasetti, it is necessary, first, to set out the entirety of the portion of her Honour's decision that resulted in her Honour determining that a stamp duty equivalent payment was appropriate. The relevant paragraphs are [345] to [347], these being in the following terms:

> 345 Whether SNS should be regarded as in the business of land development with parcels of land as stock-in-trade arises in relation to the stamp duty claim. Actual use of land can include "land banking" for future development, *Fitzpatrick* at [4], [27].
>
> 346 Mr Royal as the sole director of SNS attested to having a number of development companies through which he has pursued developments of various kinds over many years. His business model is to create a company for each development site under an umbrella group of companies. I accept that he is in the business of land development and that SNS is part of his portfolio of companies created to achieve that end. The stamp duty claim for replacement land is reasonable as the area acquired was substantial in the context of the MSTCP.
>
> 347 In *Speter* the Court found the applicants were not in the business of investing, holding only a single investment of land citing *Cannavo*. *Kirela*, *Speter* and *Cannavo* are distinguishable given their different facts to this matter.

180 First, it is to be observed that the claim made by SNS in those proceedings was a claim pursuant to s 59(1)(f), being a claim founded on the more expansive past interpretation of how that provision might be understood. That position no longer obtains as a consequence of the decision of the Court of Appeal in *United Petroleum*.

181 Indeed, to the extent that her Honour relied in *SNS* on the expansive interpretation as applied by Preston CJ in *George D Angus,* it is to be noted that Preston CJ accepted, in *United Petroleum* at [128], that his own expansive

position adopted in that decision was not a correct interpretation of the provision.

182 Second, as her Honour made clear, in [353], there was an actual use by SNS of the compulsorily acquired land as a consequence of the commencement of demolition of structures on that land pursuant to a complying development certificate - such certificate having been issued in anticipation of a yet-to-be-granted development consent for a mixed use development on the site of which the acquired land formed part.

183 As decided by Pain J in 2019, and upheld by the Court of Appeal in 2020, there was no actual use by the relevant Gertos entity of the site owned by it.

184 Two further observations are to be made in this regard. These are that:

(1) The relevant Gertos entity (whilst reserving further potential appeal rights) also expressly disavowed, during the second phase hearing, making or implying any submission that the decisions concerning the absence of actual use of any of these sites was questioned in these proceedings (Transcript 26 February 2021, page 56, lines 17 to 20 and page 58, lines 41 to 50).

(2) The written submissions for TfNSW said, at paragraph 34:

> There are no documents (such as meeting minutes, memorandums, plans, development applications or proposals) which reflect an intention to develop the Properties, despite a call for such documents in notices to produce to the Applicants in 2018.

185 During the course of the hearing, I enquired of Mr Tomasetti as to whether he accepted that this was a correct statement of the position and he did so. I recorded the concession (Transcript 26 February 2021, page 37, lines 1 to 7) with no objection raised by Mr Tomasetti to it.

186 I have also earlier set out the submissions that Mr Tomasetti made relying on the decision of Pain J in *Hua* as supporting the proposition that "relocation" and "re-establishment" were to be regarded as synonyms for application concerning the position of the entities. I am unable to accept that *Hua* provides assistance in the fashion proposed for the Gertos entities. There are three reasons for this:

(1) First, in *Hua*, that which her Honour was considering was compensation for the potential relocation of a bakery in circumstances where a large piece of equipment used as an essential element of the bakery's operation was said to be unable to be moved from the acquired land to

any location where the bakery might be located. That position has no equivalent in these proceedings;

(2) Second, her Honour's decision was one involving consideration of a combination of matters in (the then) s 59 in the era when s 59(f) (and now s 59(1)(f)) was taken to be a potential supplementary provision of wide scope capable of complementing applications of the more specific earlier elements of the section in consideration of claims. It is to be observed that the decision in *Hua* was given in 2010, when the more flexible and expansive interpretation of s 59(f) and its interrelationship with the other elements of the provision were assumed to be available. That is no longer the position; and

(3) Third, as her Honour made clear in [59], what she was dealing with was the issue of appropriate compensation arising out of an actual use of the acquired premises - that, here, is not the case.

Judicial consideration of the concept of relocation

187 Historically, the position has been that for relocation to be effected in a fashion which would give rise to a stamp duty equivalent compensation payment (whether the relocation took place or not being, in the present context, immaterial), the actual or potential relocation needed to be a relocation of an actual use of the land (whether of physical assets or a physical activity also being immaterial). This is exemplified by two cases cited in these proceedings. Those cases and the relevant passages from the decisions in them are set out below.

188 In McBaron v Roads and Traffic Authority of New South Wales (1995) 87 LGERA 238, Talbot J found, at 248, that the applicant was entitled to compensation for stamp duty on acquisition of replacement grazing land to be used to become part of the dairy farm - that is, for the relocation of an actual use on the replacement land.

189 In Kirela, Cowdroy J found, at [14], that because the applicant had not relocated its business, it was not entitled to compensation under s 59(1)(d) of the Land Acquisition Act saying

> 14 Pursuant to s 59(d) of the Act stamp duty costs reasonably incurred "*in connection with the purchase of land for relocation*" is recoverable. The applicant did not "relocate" its business and is therefore not entitled to recover stamp duty costs pursuant to s 59(d) of the Act.

190 In Bezzina, at [112], Talbot J concluded that a claim pursuant to s 59(1)(d) of the Land Acquisition Act was not maintained because "no physical activities [were] to be relocated" as a result of the acquisition. He said:

> 112 Following the lapse of the Rosecorp consent, for the reasons outlined, the land could not be utilised for "*actual use*" in connection with the business of the applicant as a developer. A claim for reimbursement pursuant to s 59(d) was not pursued as no physical activities are to be relocated as a consequence of the compulsory acquisition of the land.

191 These cases proceeded on the assumption that some direct manifestation of what might have needed to be relocated was able to be discerned.

192 In *McDonald v Roads & Traffic Authority of NSW* (2009) 169 LGERA 352; [2009] NSWLEC 105 (*McDonald*), at [107], Biscoe J described the word "relocation" in the then s 59(c) (now s 59(1)(c)) as having a wide meaning. Noting that the High Court decision he proposed to cite was determined under different resumption legislation, he nonetheless adopted and relied upon what Dixon J had said in *Minister of State for Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459 (*Parbury*), at 507, that disturbance costs include costs that a claimant:

> "reasonably incurs in removing his furniture and goods including tenants' fixtures and the expenses in setting up in new premises for the purposes of carrying on his business. Nor is it denied that the expenses may include the net cost of installing fixtures, both those removed and, where reasonably necessary, newly acquired fittings. The residual value which would remain to him must of course be taken into account."

193 Biscoe J also cited Williams J, saying, in Parbury at 514, that the claimants were entitled to compensation:

> "not only for the value of the proprietary interests so acquired, but also for what can be compendiously called expenses of removal into premises at least as commodious and congenial taking a broad view of the matter, as those of which they were dispossessed."

194 It is to be observed that Starke J, at 500-501, in Parbury, also addressed removal expenses in a fashion consistent only with physical removal of an actual use of the acquired premises.

195 At [107] and [108], Biscoe J also cited two decisions of Bignold J (Peter Croke Holdings Pty Ltd v Roads and Traffic Authority of NSW (1998) 101 LGERA 30 and Home Care Services (NSW) v Albury City Council (2003) 136 LGERA 117;

[2003] NSWLEC 214) as examples of the extent to which relocation costs of a move to re-establish, physically, a business could fall within s 59(c) (now s 59(1)(c)).

196 A reading of the decision in Parbury reveals that the High Court was primarily dealing with jurisdictional disputes. Nonetheless, as noted by Biscoe J in McDonald, matters of merit were also dealt with in several of the bundle of cases brought together for determination in Parbury.

197 The above approach concerning what could be taken to be describing the limits on relocation was not questioned on, or disturbed by, appeal (Roads & Traffic Authority of NSW v McDonald (2003) 175 LGERA 276; [2010] NSWCA 236).

198 The above approach provides a proper basis confirming, I am satisfied, the necessary inference that for any relocation to provide a proper foundation for a stamp duty equivalent claim pursuant to s 59(1)(d) (as here relevant), the relocation or potential relocation would need to be one arising from an actual use of the compulsorily acquired property interest or land.

199 I have earlier noted Mr Tomasetti's limited reliance on Preston CJ's decision in *George D Angus,* at [72]. However, at [77], the clear inference from his Honour's reasoning was that relocation, as his Honour was dealing with, involved relocation of activities or things as part of an actual use of the acquired land:

> 77 The category of costs that may reasonably be incurred in connection with relocation is wide, and includes expenses in removing furniture and goods from the old premises, moving to the new premises and setting up in the new premises, including fit out costs: see *McDonald v Roads and Traffic Authority (NSW)* at [107]-[109]. It can also include replacement of essential equipment not able to be relocated: *Hua v Hurstville City Council* [2010] NSWLEC 61 at [59].

200 In *G. Suonaf Holdings Pty Ltd v Roads and Maritime Services* [2016] NSWLEC 116**,** Preston CJ also declined to award compensation for potential relocation in circumstances where there was no active use and the property was held as a passive, income-generating investment.

201 I earlier explained why *Hua* does not provide any assistance to Mr Tomasetti in the propositions that he sought to draw from that decision.

202 More recently, Robson J has dealt with the approach to the concept of relocation in two separate decisions. It is convenient to set out how his Honour approached the concept of relocation in each of these instances.

203 In Speter, at [84] and [85], Robson J adopted the approach that physical relocation was required, saying:

> 84 Before proceeding, I note that s 59(1) (c) of the Just Terms Act refers to the "relocation of those persons". I have seen no evidence, nor heard any submissions from the applicants, which suggested that any person, natural or corporate, has been relocated as a result of this resumption. Given this, I find that the applicants' claim for financial costs pursuant to s 59(1) (c) cannot be maintained, as the applicants have not been personally relocated.
>
> 85 Sections 59(1)(d) and (e) of the Just Terms Act, however, refer simply to "relocation". Given that this term is not defined in the Just Terms Act, it should be read in context and given its ordinary meaning. The word "relocate" is defined in the Macquarie Dictionary as "to move (a firm, a factory, etc.) to a different place". Its context, and in particular the exclusion of the words "of those persons", suggests that the disturbance for the relocation of something other than the applicants personally can be claimed.

204 The necessity for a physical manifestation of a relocation or potential relocation was dealt with by Robson J, in *Fraietta*, where he said, at [170]:

> 170 Relocation requires, necessarily, that something be relocated. The intention to purchase a replacement property alone is insufficient, unless something is also relocated, whether it be a person, a business or physical objects. As noted above, the applicant has not personally been relocated. Whilst certain physical items on the property have been relocated, this has occurred without the need for the applicant to purchase another property or take out another mortgage, whatever his intentions may be. I therefore find that there has been no relocation that would enliven any requirement to compensate the applicant pursuant to ss 59(1)(d) and 59(1) (e) of the Just Terms Act.

205 Although Robson J cited *McDonald* in *Speter* (at [91]) and *Fraietta* (at [172]), this was not in the context of dealing with relocation.

206 In a number of more recent decisions by judges of this Court, where issues of claims for compensation for actual or potential relocation have been involved, the line of reasoning set out by Robson J in *Speter* has been adopted and applied.

207 The consistent approach taken has been that there needs to be some tangible manifestation of an actual or potential relocation for an entitlement to arise. Given that the claim here, in each of the proceedings, is, on behalf of the relevant Gertos entity (each Gertos entity being, relevantly, the person with the

entitlement (as can be seen from s 59(1)(a) - *Alexandria Landfill* at [377]), the relevant entity can point to no tangible manifestation that would provide a basis for it to be awarded a stamp duty equivalent compensation payment pursuant to s 59(1)(d).

The policy objectives of the Land Acquisition Act

208 Although Mr Tomasetti rejected the proposition that the Gertos entities sought to rely in any broad fashion upon the objectives of, and the policy embedded in, the Land Acquisition Act to support the approach he advocated on behalf the Gertos entities, it is appropriate, nonetheless, to respond briefly as to why such an approach would be invalid. There are two reasons.

209 The primary one is that, had the legislature intended that there be a special application of s 59(1)(d) to a class of investors, such as Mr Gertos (or Mr Royal), arising from the structuring of investment activities being through multiple special-purpose corporate entities when compared to holders of single, passive investments (as arose in *Speter* and other cases that have followed the line of reasoning adopted by Robson J in those proceedings), then the legislature would have expressly done so.

210 Second, to adopt such an approach would be to compensate Mr Gertos in circumstances where it is clear that the elements of s 59(1) are confined to assessing the compensation payable to "those persons" whose land has been compulsorily acquired. In each of these proceedings, the person is the relevant Gertos entity and not Mr Gertos personally. Taking each entity as being the compensable person, the reasoning of all the earlier decisions I have discussed in the preceding section of this judgment necessarily apply to the Gertos entities in each individual proceeding as providing a basis to refuse the stamp duty equivalent compensation payment sought by each of them.

The actual potential for "relocation" by the Gertos entities

211 Finally, it might be observed, semi-facetiously, the only physical manifestation of each of the Gertos entities would be the certificate of incorporation mandated by corporations' law to be displayed at the registered office of each of the entities. Whilst I have no direct evidence (via any extract from the ASIC database) for each of the entities, the reasonable inference to be drawn

is that those registered offices are at the premises of Westwood Accountants, Mr Savell's accounting firm. Although Westwood Accountants had been located at one of the properties that had been compulsorily acquired, the firm had moved to a different location by the date of the compulsory acquisition. Thus, the only physical manifestation of each of the Gertos entities did not require to be relocated from any acquired property in any fashion.

Conclusions

212 Three significant conclusions arise as a result of my consideration of the issues requiring to be addressed in these proceedings. They can be set out succinctly:

(1) First, the compensation to which Portman Securities is entitled for its equitable interest in 166-172 Parramatta Road, Annandale, is "Nil";

(2) Second, the necessary consequence following from my first finding is that TfNSW must succeed in its cross-claim against Portman Securities in Matter No 207366 of 2018; and

(3) Third, in each proceeding, the relevant Gertos entity is not entitled to any compensation for disturbance pursuant to s 59(1)(d) of the Land Acquisition Act.

Costs

213 As TfNSW has been entirely successful in its cross-claim against Portman Securities, in Matter No 207366 of 2018, Portman Securities should be ordered to pay TfNSW's costs of the cross-claim as agreed or assessed. Given the extremely limited participation by the Pamboris interests in the proceedings, this is the appropriate limit of those interests' cost exposure.

214 As to the position between each of the Gertos entities and TfNSW, two matters are to be observed impacting on the costs position between the relevant Gertos entity and TfNSW. For the two proceedings involving G Capital and Gertos Holdings, market value and all other statutory compensation issues other than the claim for disturbance pursuant to s 59(1)(d) of the Land Acquisition Act have been agreed with TfNSW.

215 In the third proceedings, Marsden Developments has succeeded in its substantive position that Portman Securities was not entitled to any market value compensation for 166-172 Parramatta Road, Annandale. On this basis, as I understand the position, market value and all other statutory compensation

issues (other than the claim for disturbance pursuant to s 59(1)(d) of the Land Acquisition Act) concerning Marsden Developments have been agreed with TfNSW.

216 However, TfNSW has successfully resisted the claim of each Gertos entity for stamp duty equivalent compensation pursuant to s 59(1)(d) of the Land Acquisition Act with respect to the compulsory acquisition of the property acquired from that entity.

217 Having regard to these various outcomes between the Gertos entities and TfNSW in each of the proceedings, the appropriate position is that costs between each Gertos entity and TfNSW should be reserved unless agreement is reached between the relevant Gertos entity and TfNSW on costs in each proceeding.

Orders

218 The Gertos entities and TfNSW are directed to bring in settled orders in each proceeding (incorporating, in Matter No 207366 of 2018, the orders sought by TfNSW on its cross-claim together with costs of the cross-claim in TfNSW's favour against Portman Securities). If agreement is reached in each proceeding, a copy of each of the settled orders is to be provided to the legal representative of the Pamboris interests before being provided to me. If there are settled orders in each proceedings (agreed between the relevant Gertos entity and TfNSW) and these are provided electronically to my Associate by e-mail by the close of business on Friday 28 May 2021, I will make those orders in chambers.

219 If agreement between the relevant Gertos entity and TfNSW is not reached in any of the matters, that matter is to be listed before me in the Land Valuation and Compensation List on Friday 11 June 2021 for finalisation of the matter.

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material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.