

Just Terms Compensation And The Compulsory Acquisition Of Land

Refereed Paper

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ABSTRACT

Just Terms Compensation in Australia is predicated on the principles of placing the dispossessed party in the same or similar position prior to the acquisition of their land. This compensation is based on various statutes and rulings by the courts which have evolved over several decades and have guided the assessment of value and quantum of compensation in the acquisition process.

This paper examines the principles that govern the assessment of value and compensation and identifies gaps in the parity of compensation that impact on some parties in the compulsory acquisition process. Compensation quantum and principles that impact on value and the way value is determined have been examined and the methods used are discussed. A survey of dispossessed property owners in New South Wales has been reviewed in measuring the success of the legislation and process in that State.

The paper concludes with an analysis of court directives which contribute to the resolution of points of difference in the assessment of value which. These directives are designed to assist the court in expediting compulsory acquisition matters that come before it.

Key words: Before and after, piecemeal, just terms compensation, joint statements and expert evidence.

Introduction

Compulsory acquisition of land in Australia is administered at Local, State and Commonwealth levels. Each jurisdiction has its own legislation with the common intention of compensation being assessed on Just Terms. This paper uses New South Wales examples in demonstrating and assessing the relevant principles and assessment of value.

In addressing the definition of value, reference is made to *Spencer v. The Commonwealth of Australia* (1907), 5 C.L.R. 418, better known as *Spencers' Case*, the simple but concise attributes of the judgement and definition of market value handed down by Griffiths J and Isaac J, have stood the test of time and have been adopted by legislators in various statutory definitions of value in the acquisition and rating and taxing legislation throughout Australia and the Commonwealth. The key components of the surmised made by the judges in this case follow:

.... To suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land and cognisant of all circumstances which might affect its value, either advantageously or prejudicially (Rost & Collins 1996:36)

This definition has been seen by many dispossessed parties as a legal construct for the acceptance of a process in which their decision to be a willing seller is not a consideration. It is this factor which has provided the greatest opposition to the compulsory taking of land. *Spencer's case* is an important case as it arose out of a case contested over the acquisition of land in Western Australia.

Willing and not willing to trade

Whilst dealing with the issue of the sufficiency of compensation, the justification for the compulsory acquisition of land is enshrined in the principle of the competing needs of the individual versus the needs of the community in which the purpose of the acquisition will serve. This principle has been challenged along with the definition of 'Public Purpose' in *Kelo v New London City* in which the use of Private Public Partnerships (PPP's) has redefined the context and application of this principle where private companies retain a profit margin in developing the public purpose.

Despite the fluency of the definition which constitutes a hypothetical willing buyer, willing seller scenario, in which both parties are willing but not anxious to trade, this hypothesis has met much resistance from dispossessed parties not willing to sell for any price. It is in these

cases, that a hypothetical framework is adopted by the courts in the assessment of compensation on Just Terms. A further level of complexity is added to the acquisition process when distinguishing the difference between a genuine potential dispossessed party not wishing to trade at all and a potential dispossessed party seeking ransom value (value in excess of market value) for their property.

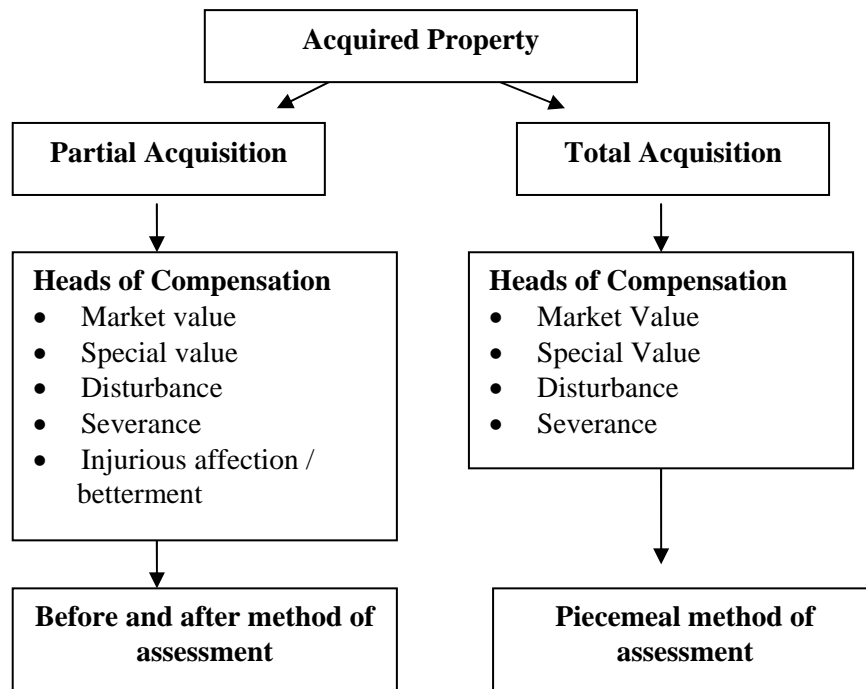
Regardless of the circumstances of the affected party, State and Commonwealth legislation permits for land to be compulsory acquired for a public purpose. In exchange for an interest in property, Article 17 of the Universal Declaration of Human Rights states: "Everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property." (United Nations 1948). In New South Wales the compulsory acquisition of land occurs once a notice to acquire is approved by the Governor and advertised in the Government Gazette. Brown (2004) highlights that at this point, all interests in the acquired land are vested in the Crown and the owner's interest is converted to a claim for compensation. This process is further defined by Jacobs (1998) who refers to section 20 of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW), which discharges all interests in the land, including dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land.

Prior to the compulsory acquisition process, all acquisition legislation in Australia provides for acquisition by agreement, in which the relevant government authority must attempt to acquire property by agreement. It is not until this process is exhausted that the compulsory process will commence. Despite the best efforts of an acquiring authority to negotiate the purchase of property, a small percentage of dispossessed owners choose not to negotiate or proceed through negotiation and the acquisition will proceed through the compulsory process. Whether the acquisition is achieved by negotiation or the compulsory process, valuers on each side are engaged to assess the value of the interest to be acquired. Their approach, method and supporting market evidence are important factors in determining whether the acquisition is achieved by negotiation or by compulsion.

The nature of the acquisition and assessment of value

The basis of a claim for compensation will depend on the acquisition, the impact of the acquisition on the dispossessed party and in the case of a partial acquisition, the impact of the land taken has on the land retained by the dispossessed. The nature of the claim will impact on the Heads of Compensation claimable and most importantly will drive the valuation methodology used in the assessment of compensation. Figure 1 distinguishes the difference in a claim, Heads of Compensation and method of assessment or valuation.

Figure 1: Total v Partial Acquisition Approach



The acquisition of land and the extent of the acquisition is primarily determined by the requirements of an acquiring authority. An acquiring authority is not compelled to acquire any more land than is required for the public purpose. Whilst case law prohibits the taking of any additional land than is required for the public purpose as defined in, *Minister for Public Works (NSW) v Duggan* (1951) 83 CLR 824 and *Thompson v Randwick Corporation* (1950) 81 CLR 87, the State of Tasmania has the statutory power to enter into agreement under section 10 Land Acquisition Act 1993 to acquire more land than is required by agreement. In NSW, it is not uncommon for an acquiring authority to negotiate the acquisition of the total property, particularly in the case of residential property, where a partial acquisition has been proposed and is not in the best interest of the dispossessed party. In Figure 1, it is noted that in partial acquisitions of land, an additional head of compensation, injurious affection / betterment is to be considered and the method of assessment differs from total acquisition. In the case of total acquisition, the formula for this approach follows:

Piecemeal Formula:

Market Value + Special Value + Disturbance + Severance = Sum of Compensation

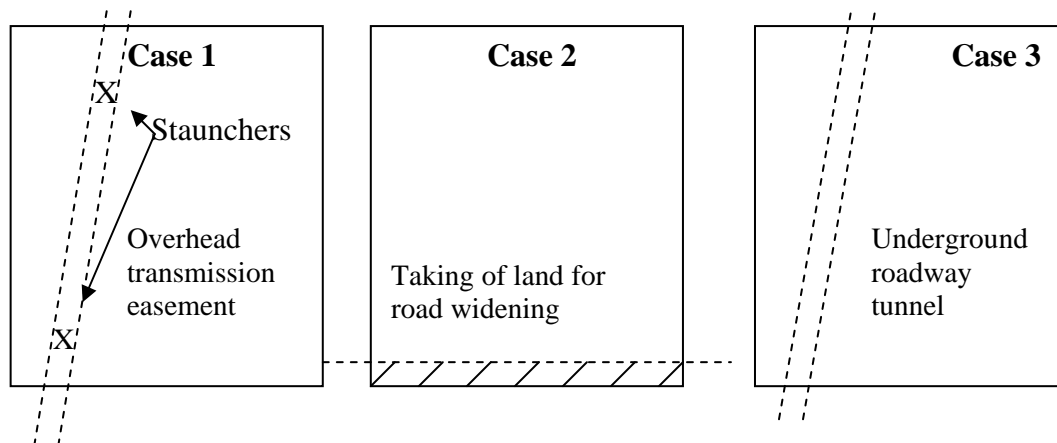
This formula requires the addition of the sum of each element of compensation payable. This model assumes each of the heads of compensation are payable, however this is to be determined on a case by case basis. In the case of the partial acquisition of land, an additional element of consideration is required, injurious affection or betterment which is to be considered and assessed in the compensation. This method adds an additional layer of conceptual complexity in the assessment process and judgement of the valuer. In contrast to

the piecemeal formula, Hornby (1996) highlights that the before and after method is not the sum of values, but a judgement of the assessment of the properties value before acquisition and the value of the residual after acquisition, with the difference between the two values constituting the impact of the acquisition on the property retained. This method is not clearly understood by some valuers or property owners who have been dispossessed of part of their property. The value of the land taken is not the subject of compensation, but it is the impact of the taking on the residual property that is the matter to be assessed in partial acquisitions.

Assessing value and the impact of the taking

The difficulty with the principle of establishing the market value of the property after a partial acquisition is the measurement of value of the residual land after the works have been carried out. The degree of difficulty in the judgement and assessment of the after value is dependent on the nature of the taking and most importantly, the impact of the use to which the land taken is put. The following three examples are used to demonstrate the different impact on the same property of a partial acquisition of land:

Figure 2: Alternate affectations over the same property



The parcel of land in the above example is a 1 hectare block on the urban fringe of a city in NSW which is ripe for residential subdivision and will accommodate sixteen 500 m² residential blocks of land. In each case the impact of the acquisition and the use to which the acquired land is put will impact differently of the retained land.

The subject property in Case 1 requires very little land for the support stanchions of the overhead easement. The primary issue being the impact on value of the subject land resulting from the visual impact and any other environmental consequences of the easement use. In Case 2, approximately ten percent of the land is to be acquired from the front of the property for road widening purposes of which the anticipated increase in traffic flow fronting the property is about 5 percent. There will be no change to the permitted entry and exit from the property. In Case 3, the valuation approach is not applicable in New South Wales, no compensation is payable for land taken beneath the surface of land for an easement. Section

62 of the Land Acquisition (Just Terms Compensation) Act 1991 legislates that no compensation is payable to the party in the case of a sub-stratum, beyond any damage caused to the surface of the property resulting from the works undertaken.

The imprecision of valuation

As observed from these three cases, each use has a different impact on the land retained by the affected party. The method of assessment of compensation in Cases 1 & 2 is the Before and After method of assessment. This will necessitate evidence of transactions of similar property with and without the proposed works to assess a measure of difference on a before and after basis. Despite the simplicity of the descriptive approach in assessing the before and after method, the non-heterogeneous attributes of property coupled with judgement for adjustments between sales and the subject property, render the valuation approach subject to imprecision as defined in *Singer & Friedlander Ltd v John D Wood & Co* [1977] 2 EGLR 84, in which Watkins J stated;

“...two able and experienced men, each confronted with the same task, might come to different conclusions without anyone being justified in saying that either of them lacked competence and reasonable care, still less integrity, in doing his work ...
Valuation is an art, not a science.”

In contrast to the impact of injurious affection highlighted in Cases 1,2 & 3, the reciprocal of this impact is Betterment, which must also be considered in the partial taking of land. In the above three cases, betterment does not apply, however a valuer assessing the impact of a partial taking must also weigh up the benefits of the use to which the land taken has on the value of the residual land retained. This was defined in *Brell anor v. Penrith City Council* (1965) 11 LGRA 156, in which a small portion of land at the rear of a shop was taken to form part of a car park, which enhanced the value of the residue of the property. In this case it was shown that the use of the acquired land enhanced the value of the residual land beyond its value prior to the acquisition and no compensation was determined for the value of the land taken.

There is no specific legislative provision that requires an acquiring authority to take more land than is required for the public works than is required. Despite the absence of such a provision, where the primary activity or use of the land can longer continue or is affected by the use too which the acquired land is put, the impact of the acquired land may render the residual so heavily affected, the sum of compensation may be close to the value of the whole land. In addressing judgement of total versus partial acquisition, the courts will assess this by quantum where their discretion is limited.

Parity of Compensation and when should reinstatement apply?

In a number of circumstances, the taking of land through the compulsory acquisition process is inevitable. This is primarily due to the discrepancy in the meaning of value of a property to a dispossessed party and the definition of value as defined in the Spencer case as highlighted in the introduction of this paper. For some home and business owners, the acquisition of their property means the extinguishment of their tenement in land, of which the assessment of market value under traditional terms by reference to similar property transaction is not parity of compensation. This is primarily due to the amount of compensation offered being insufficient to re-establish the dispossessed parties freehold tenement. From a residential perspective, it is the extinguishment of a home.

Table 1: Nation legislative comparison for Re-instatement

| Jurisdiction | Relevant Provisions | Statute |
|-------------------|-----------------------|---|
| Commonwealth | Section 58 | Lands Acquisition Act 1989 |
| New South Wales | No specific provision | Land Acquisition (Just Terms Compensation) Act 1991 |
| Tasmania | Section 31 | Land Acquisition Act 1993 |
| Queensland | No specific provision | Acquisition of Land Act 1967 |
| South Australia | Section 25 | Land Acquisition Act 1969 |
| Western Australia | No specific provision | Land Administration Act 1997 |
| Victoria | Section 42 | Land Acquisition Act and Compensation Act 1986 |

Whilst a definitive rationale for the circumstances of the case and tenancy to be considered has not been provided by the Supreme Court, it may be questioned as to whether the emergence of a possessory interest in property is recognised. The potential for the possession status of a property may be argued to be encompassed in its market value, however, its importance emerges as a principle for recognition when a party is not a willing seller, as the value of possession to them extends beyond its market value as defined under the Spencer test. The missing link in the assessment of Just Terms Compensation is the element of value where a non-willing seller is assumed to be a willing seller in order for the construct of the traditional market value definition to be used to settle acquisition matters. What legislators, courts and acquiring authorities are attempting to do, is to define and reduce all interests acquired in land into a financial datum for the settlement of non-commercial interests in land.

This is of greatest concern for those with marginal value property or property at the lower end of the market in low socio economic locations and who are not in a financial position to increase levels of debt to accommodate the purchase and finance of alternate higher value

premises. To these dispossessed parties, the value of their dispossession is the security of their environment in which they live and bears no relevance to the Spencer principle as the option of being a willing seller would not realistically become an option of choice. In these circumstances, it must be asked whether the objectives of Just Terms Compensation have been applied. To this end, it is questioned as to whether the traditional definition of market value as defined in the Spencer case is the primary consideration for the assessment of Just Terms Compensation.

To date the Courts have avoided this issue by reference to the absence of provisions for reinstatement in acquisition legislation. This issue is further defined by Brown (2004) who states, "Any question of compensation for resumed land being based on the cost of purchasing alternative, similar land must depend on the compensation provisions contained in the relevant resumption statutes" (p.157). The provision for reinstatement is absent in the NSW legislation.

It cannot be said that the epistemology of value has served those parties it is applied to in the assessment of Just Terms Compensation, when the assessment of value is channelled through a narrow conduit of interpretation by reference to transactions that bear little or no reference to the circumstances of the dispossessed. This issue has been raised by Hunt (1998) who in contrast to the comparability of the property in the sale analysis process, looks at the comparability of the sale which encompasses additional information, including: the special conditions of the sale, vendor/purchaser/agent motive, method of sale, marketing period, and market dynamics under which the transaction occurred.

Measuring the success of compulsory acquisition in New South Wales – A 10 year review

The Land Acquisition (Just Terms Compensation) Act 1991 replaced the rigid, inflexible and government focused objectives of the Public Works Act 1912. Enacted in New South Wales to ensure expedient acquisition of land through agreement over compulsory taking, the objectives of the Land Acquisition (Just Terms Compensation) Act were reviewed in 2002 to accord with the 10 year anniversary of this Act. In a thesis supervised by the writer, Prentice (2002) has measured the success of the Land Acquisition (Just Terms Compensation) Act in achieving its objectives. A survey of 23 property owners who had their property compulsorily acquired or were nearing the completion of this process were surveyed on a number of key issues.

The 23 property owners surveyed were randomly selected from a pool of dispossessed residential property owners. The sample of approximately three percent of dispossessed

owners gives an indicative opinion only off the success of the legislation. A summary of the key findings of this survey with discussion follows:

Table 1a: Survey summary with results expressed as a percentage

| Question | Satisfied | Dissatisfied | Neutral |
|--|-----------|--------------|---------|
| 1) How satisfied were you with the amount of compensation paid? | 74 | 22 | 4 |
| 2) Do you think the timeframe for the acquisition process was suitable | 83 | 17 | nil |

Table 1b: Survey summary to questions expressed as a Yes or No percentage

| Question | Yes | No | Unsure |
|---|-----|-----|--------|
| 3) If the underground of your land were acquired for a tunnel or easement would you expect compensation? | 100 | nil | nil |
| 4) Did you object to the amount of compensation that was initially offered by the acquiring authority? | 61 | 39 | n/a |
| 5) Question to the 61 percent who objected in Q 4) above: Did your compensation amount increase? | 36 | 64 | n/a |
| 6) In your opinion, do you think that the Commonwealth or State Government should have the power to acquire land? | 22 | 78 | nil |

Source: Prentice 2002

In the above survey, of the 23 parties dispossessed of their property, 19 parties or 83 percent negotiated a settlement with the Roads and Traffic Authority and 4 parties or 17 percent had their property compulsorily acquired of which 2 cases proceeded to court. In conclusion to this survey, participants were asked to give suggestions as to ways in which the acquisition process and compensation could be improved in the future. The key issues and feedback are:

- 1) **In the case of partial acquisition:** a majority of the parties who objected to the amount of compensation initially offered, were the subject of partial acquisitions and excluding the amount of compensation amount were most dissatisfied with noise and access to their property during the works being carried out and time taken to carryout the works. The primary issue with partial acquisition was the non-claimable provision for the inconvenience factor experienced during the works.
- 2) **In the case of total acquisition:** the key issue apart from the amount of compensation was the time frame for completion of the process.

Of the 23 respondents to the survey, 40% did not have any complaints or suggestions for improvement to the process.

The compelling feedback and observations from this survey shows that in general terms the Act was achieving its objectives in the acquisition of residential property. In the cases observed, the primary area of disputation occurred in cases of partial acquisition of land. A further interesting point of note was the acquiescence of property owners not to fight the

acquisition process, once they were aware of the works to be carried out and the impact those works would have on their property.

Valuation points of difference and expediting resolution

The expedition of resolution in the acquisition process is a uniform objective of most acquisition legislation across Australia. Using a NSW example, this is best demonstrated in Section 3(1)(c) of the Land Acquisition (Just Terms Compensation) Act 1991 which provides the following objective:

“to establish new procedures for the compulsory acquisition of land by authorities of the State to simplify and expedite the acquisition process”

Time frames have been provided in the Act to assist with this objective, which requires 90 days notice to be given of a proposed acquisition and the acquisition must occur within 120 days. A further safeguard has been included in the Act, which allows an acquiring authority to make an advanced payment to the dispossessed party after the acquisition has occurred, being the date of gazettal. A safe guard in the acceptance of such an offer is covered under section 48 of the Act, which states:

“The acceptance by a person of an advance payment of compensation does not constitute an acceptance of any offer of compensation.”

This provision allows for the dispossessed party to be able to utilise an advanced payment for the purchase of alternate premises rather than being out of the market, particularly if the market is rising. Whilst provision is made for statutory interest to accrue on the compensation amount between the date of gazettal and date of payment of the compensation, in a rising market this may prove insufficient, particularly where the resolution process is protracted and litigious.

In cases of larger land holdings, and acquisitions which involves the extinguishment of a business, it is not uncommon for these matters to take up to 3 times longer than residential acquisitions (Land & Environment Court NSW 2006). The NSW Land and Environment Court has embarked on the expedition of matters which come before it, in which it refers to this as the process of ‘case management’ in the achievement of this objective. The Court in dealing with matters before it including compulsory acquisition matters under Rule 5A which states:

“The overriding purpose of the rules, in their application to civil proceedings, being to facilitate to the just, quick and cheap resolution of the real issues in such proceedings.” (Land & Environment Court NSW 2006:2)

In adopting this approach, the Court has not gone without criticism by those who see it as a resolution mechanism in itself, where as the Court has sought resolution or at least the establishment of common ground on as many points as possible, in order that it might focus on the issues of differences between the parties. In its defence, the Court (2006) has justified its approach by defining its brand of what is 'Just' in the process. To this, the Court has stated "some think that quick and cheap disposal, by definition, is not just, whereas we think that disposal which is not quick and cheap, by definition, is not just." (p. 3)

Resolution Methodology

In cases involving the sufficiency of compensation, the Court has sought to expedite the resolution and completion of these matters through its Compensation Claims Practice Direction 2006. This Direction requires Expert valuers to confer and engage in the following process and provide information pertaining to:

- Method of valuation and check method where one has been used
- Full workings, documents relied upon and details of any personal communication relied upon
- Sales relied upon and all relevant information relating to those sales including price, date, area of land and improvements, rate /m2 analysis, zoning and planning controls and comparisons between the sales with percentage adjustments between the sales and the subject property.

Once the above information has been exchanged between valuers, they are to confirm matters they agree upon and identify matters they disagree on, these matters should include the following:

- highest and best use
- list of comparable sales agreed upon
- facts and assumptions upon which the respective valuations are based on
- comparable sales used by each valuer with their analysis
- percentage adjustments between the sales and their application to the subject

To ensure that the expert valuers engaged by their respective parties are fully acquainted with the expectations of the Court under the Compensation Claims Practice Direction 2006, Expert valuers are required to be served with this Direction by their instructing party and sign that they have received and understand the requirements of this Directive. The requirements of the Practice Direction prohibit the introduction of any evidence not provided in the Experts statement, report or affidavit. Joyce & Norris (1996) define this process as the Anti-ambush rule. In effect, the objective of the proceedings becomes the resolution of the matter, not a decisive win by one side or the other. Procedural fluency in the process through disclosure and articulation of reasoning of the valuation process and evidence used to underpin opinions of value are important, however, as highlighted in *Singer & Friedlander Ltd v John D Wood & Co* [1977], valuation is not an exact science but an imprecise art which goes beyond the articulation of process to cognitive judgement by the valuer.

Conclusion

The assessment of value in the determination of Just Term Compensation provides a construct in which the commercial assessment of value can be defined in settling compensation matters. In the case of the proposed partial acquisitions of land, it may be appropriate to assist the dispossessed party where required by offering a total acquisition of their property. In these circumstances a true test of value may be achieved through transactions. The first transaction is the agreement to purchase the subject property at its market value unaffected by the acquisition and proposed works. The second transaction is the sale of the residual part of the acquired property after the public works are complete. This would provide an option and encourage agreement by negotiation where some discretion and choice is given to the dispossessed party. As noted earlier this may not be perceived as a feasible or affordable option by an acquiring authority.

The reinstatement option needs to be incorporated within State acquisition legislation. It is important that the dispossessed party is placed in the same position they were in before the acquisition process commenced. In achieving this objective, assessment on Just Terms cannot be solely made by reference to the dollar amount of the acquired home, but by parity of status. Whilst it is important for a context to be drawn in which compensation matters may be defined, this context must not be driven by a process which seeks to dispense with these matters with expedition as its primary objective.

As compulsory acquisition matters come before the courts, the basis of argument supporting the compensation assessed is important. It is essential when assessing values, that valuers establish points of agreement and differences in expediting the resolution process. This can only be achieved when valuers assume the role of determining market value and other relevant heads of compensation from the beginning of their brief. This objective cannot be achieved where the approach adopted by the valuer is to act as advocate for their client. The role of the valuer is to assist the court in assessing compensation and provide their best technical expertise in assisting the court resolve the issues before it.

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