

Article

Compulsory Acquisition

Timely reminder of adequate compensation as house markets rise

By Helene Chryssidis

Chadrysiak v CMR of Highways [2018] SASC 77

In today's housing market, it is timely to reflect on the 2018 case of *Chadrysiak v Commissioner of Highways* [2018] SASC 77, as it is an opportune reminder that the heads of compensation are not limited to the categories expressly stated in the *Land Acquisition Act* 1969 (SA) (**Act**), and in certain circumstances, loss due to a rising market was recoverable head of loss.

In *Chadrysiak*, the Court was concerned with whether the Act gives a right to compensation for a loss suffered by a claimant in a rising market where due to the payment of inadequate compensation a claimant could not afford to buy a replacement property.

In *Chadrysiak*, the Court found that the claimant must also prove that their inability to purchase a replacement property was caused by inadequate compensation provided to them after the acquisition of their property.

Facts

Chadrysiak concerned the Claimant's entitlement to compensation following the acquisition of their property under section 16 of the Act. The Claimant contended that the amount of compensation offered by the Commissioner was 'manifestly inadequate'. The result of this inadequacy was that he was unable to purchase a replacement property post-acquisition. The rise in the housing market in the area

surrounding the acquired property post-acquisition caused this inadequacy. The time between the notice of acquisition and the final determination of compensation extended from 15 October 2013 to 3 May 2016. During that time, the price of purchasing a replacement property of the same value increased by \$67,670. The court then considered whether loss "due to a rising market" was a 'recoverable head of loss'.

Relevant principles

Section 22 of the Act provides that a person is entitled to compensation for the acquisition of land under this Act if their interest is diminished or their enjoyment of that interest is adversely affected by the acquisition of the land. Principles in accordance with which compensation is to be determined are set out in subsection 25(1).

Section 25 of the Act provides that where the claimant is the owner in fee simple of the land, the compensation is to be such as will adequately compensate the owner for any loss suffered by reason of the acquisition of the land. In *Haines v Bendall*, Mason CJ, Dawson, Toohey and Gaudron JJ said:

The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as

money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed. Compensation is the cardinal concept. It is the “one principle that is absolutely firm, and which must control all else”: Skelton v Collins per Windeyer J.

Broadly speaking, that loss falls under two headings: the actual value of the land taken, which must be fixed as at the date of the acquisition; and then other losses which are occasioned by reason of the taking and which may be placed under the headings of severance, disturbance, injurious affection, or any other loss [68].

Various types of loss are included under the head of disturbance, including purchasing a comparable property and removal expenses¹. “Severance” and “injurious affection” both relate to the detrimental effect of the acquisition of part of the owner’s land on the value to the owner of the remaining part retained [70]. “Loss” Extends further than the loss caused solely by the divestment of the owner’s interest in the land. One example is disturbance where the owner can recover the stamp duty and other incidental costs of purchasing replacement land [73].

Findings by the court

Head of Loss

Ultimately, Blue J found that subject to proof of causation and consideration of the principles of remoteness and mitigation of loss, a loss due to a rising market is indeed a recoverable head of loss under the Act.

Blue J came to this decision in *Chadrysiak* (and later cited and relied on in *Nelson v Commissioner of Highways (No 2)*) as he drew parallels between the requirement to adequately compensate land owners for loss suffered by reason of the acquisition, and the principles of compensation applicable in tort or breach of contract.

The Court found that an owner suffering loss because “due to the payment of inadequate compensation the owner cannot afford to buy a replacement property” satisfies the “but for test”. Further the court found that:

The mere fact that this will only cause loss in a concurrence of three circumstances, namely payment of inadequate compensation, the owner’s straitened financial means and a rise in the market, does not mean that the divestment is not a commonsense cause of the loss [75] ... Having regard to the text, context, and evident purpose of subsection 25(1), loss due to a rising market is a recoverable head of loss provided that the claimant proves causation on the evidence.

The court’s reasoning followed the decision of *Kerry v State Transport Authority*, which found that a claimant who could not find an equivalent property for 18 months after acquisition was compensated for the \$18,000 increase in market value over this time. The court rejected the Commissioner’s submission that *Kerry* was contrary to principle and that the provision of statutory interest compensated claimants for not being able to access funds straight away. The court found that interest and a loss due to a rising market are distinct matters which depend on entirely different circumstances [79].

The recoverability of a loss due to a rising market does not depend on a claimant having an entitlement to purchase a replacement property: it depends on the claimant establishing that the acquisition relevantly caused the loss.

Causation

Notably, the Claimant still failed in this instance as they were unable to demonstrate that the lack of remuneration caused their inability to purchase a new property. Notably, if Mr Chadrysiak had succeeded in proving causation, he will still have to prove that the loss is not too remote. However, causation is

¹ *Brewarrana Pty Ltd v Commissioner of Highways*

assessed independently of and prior to consideration of remoteness. The court found that the Claimant could not prove that he did not and could not buy a replacement property in the first half of 2014 because he did not have sufficient funds to do so. The court found that the Claimant did not purchase a replacement home during this time because he was frustrated at the inadequate offer of \$385,000.

Key lessons

The decision in *Chadrysiak* is a reminder that the categories of compensation under the Act are not closed. The intention of section 25 of the Act is to adequately compensate the claimant for “any loss” that the claimant has suffered by reason of the acquisition of land. Relevant to the current housing climate, and subject to proof of causation and consideration of the principles of remoteness and mitigation of loss, a claimant may be entitled to recover losses due to the rising housing market.

Our compulsory acquisition team understands the individual complexities of ownership and how the nature, development and use of property can affect its valuation. We work closely with valuers specialising in this area to ensure our clients obtain a fair market value for their losses. Applicants are also entitled to be reimbursed for their reasonable professional costs including legal costs of the proceedings under the Act².

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MORE INFO

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