IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-797
[2024] NZHC 36

UNDER	s 26 of the Land Valuation Proceedings Act 1948
IN THE MATTER	of a claim for compensation under Part 5 of the Public Works Act 1981
BETWEEN	TORDIS KATHARINA FLATH and STEPHEN BRENT MACKAY and SAS CORPORATE TRUSTEES LIMITED Appellants
AND	THE MINISTER FOR LAND INFORMATION Respondent

Hearing: 18 and 19 September and 5 October 2023

Appearances: C M Stevens and R P Conner for Appellants
G H Allan for Respondent

Judgment: 1 February 2024

JUDGMENT OF GRICE J AND W J M REID

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Introduction

[1] This is an appeal from the Land Valuation Tribunal (the Tribunal) concerning the compensation payable by the Minister (the Crown) to the appellant landowners in relation to part of their land. It was acquired for the stretch of road for the northern corridor motorway project, known as the Mackay's to Peka Peka Expressway (the Expressway), in July 2013.[1] The Expressway has been constructed and was opened to traffic in February 2017. This is the only case in which the Tribunal was required to determine the compensation. All other land taken for that part of the Expressway was acquired from owners by negotiation resulting in an agreed compensation package.

[2] The appeal raises issues concerning the appropriate valuation principles to be applied when assessing compensation under s 62(1)(b) of the Public Works Act 1981 (the Act) for the taking of part of a property and for "injurious affection" caused by the taking of the land and for other losses.

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1 *Flath v Minister for Land Information* [2022] NZLVT 30 [The Tribunal decision].

Background

[3] The relevant land is at 28 Leinster Avenue, Raumati South (the property). The property includes a small three-bedroom dwelling, buildings, and other improvements. The dwelling is on land elevated above the road frontage and takes up most of the frontage width. At the time the land was taken, that part of the land was zoned "residential" in the operative District Plan. The land before the taking contained 1.084 ha.[2] From that, 1,917 m² of the land was taken from the eastern/rear end of the section (the land taken). The rear of the property is low lying and was zoned "rural". It contained two blocks of sheds and at the rear adjoined a buffer strip beyond which sits the old State Highway 1 (called "Main South Road") and the main trunk railway line. After the taking, the Expressway was constructed slightly closer to the rear boundary of the subject property than the old State Highway. The old State Highway and railway line remain in use.

[4] The parties accept that for the purposes of assessing compensation, the specified date under s 62(2) of the Act is 18 July 2013.[2]

[5] The Minister served notification of intention to acquire 1,920 m² of the land on 7 September 2011.[3] Upon the acquisition of the land, the appellants (we also refer to them as the owners in this judgment) became entitled to compensation both for the land acquired by the Minister and for the injurious affection resulting from the acquisition or the taking of the land for the public work.[4]

[6] The parties were unable to agree on the compensation, therefore the Tribunal made the determination[5] which is the subject of this appeal.

[7] Under an agreement for Advance Compensation dated 6 December 2016, the respondent paid approximately $79,000 in compensation to the appellants. At that time, it was also agreed that the appellants would receive a fully formed and legal access to Leinster Avenue. This was because following the works, the existing legal

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2 At [7].
3 Subject to the survey being part of Lot 39 DP 17564.
4 Public Works Act 1981 [the Act], s 60(1).
5 The Tribunal decision, above n 1.

access to the remainder of the appellant's land (the "balance land") via an unformed right-of-way, running the length of the rear of the land from Poplar Avenue, was cut off. It was agreed that the appellants would instead receive a right-of-way from Leinster Avenue. The compensation is to be determined on the basis that the previous right-of-way and the new right-of-way "are equal". The agreement also provided for reimbursement of disturbance costs, provision of fencing between the land taken and the balance land (as specified) and reinstatement of damage to the balance land (including services).

[8] In its determination, the Tribunal assessed the compensation payable at $38,000, that being the value of the land taken.[6] In addition, it assessed the injurious affection at $32,000.[7]

[9] The appellants say that the value of the land taken should have been assessed at $195,000, there should be reimbursement for replacing the boundary fence of $3,500 (plus GST), and the injurious affection compensation should be reassessed based on the corrected value of the appellants' land.

[10] The Crown does not cross-appeal. It says there may have been some errors in the decision of the Tribunal, however they are not material, and the Tribunal approached the assessment of compensation correctly.

The Tribunal decision

[11] The Tribunal noted that the house stretched across almost the entire width of the property at the top of the sand dune which Leinster Avenue ran along, and the rear of the property descended to a lower level and then flat towards its eastern boundary. The rear of the property had an "informal access way" created over land to its north owned by the Wellington Regional Council and a legal (but unformed at the time of taking) right-of-way to Poplar Avenue to the south of the property. The land taken was situated toward the rear of the property, on the lower lying land behind the house. The

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6 At [45].
7 At [55].

1,917 m² taken was rectangular in shape with boundaries of 33.37 m x 57.4 m, and comprised approximately 20 per cent[8] of the total property.[9]

[12] The Tribunal noted that the front portion of the land was zoned "residential" in the operative District Plan, and the rear portion was zoned "rural". The Tribunal described this as an "odd mix of zoning". It said that all the land to the west of the old State Highway 1 and the new Expressway was "plainly destined for residential or associated uses", so the rural zone "made no sense".[10] It commented that:[11]

> …we were told that all the claimants' property had at one point been zoned Residential, but later the Council had deemed it appropriate to re-zone the rear portion as Rural because it was concerned at the prospect of houses being built on it, as it was considered flood-prone.[12]

[13] Before the appellants received notification of the proposed Expressway they were exploring the possibility of creating an access driveway from the Leinster Avenue house frontage to the rear of the property anticipating a subdivision of the land to provide residential sections. They had accepted that any subdivision would require relocation of the existing house given that it occupied almost the entire street frontage of the property. In November 2011, the appellants had been granted an earthworks consent to construct a driveway and in November 2012, after the notice that the land was to be taken, had lodged an application for consent to a nine-lot subdivision. The Tribunal noted that Mr MacKay was an experienced builder, and had been involved in a number of subdivision and building projects in the Kāpiti area and elsewhere.[13]

[14] The Tribunal said that it was for the:[14]

> …Tribunal to decide, on a principled basis under the provisions of the Public Works Act 1981, what compensation should be paid to the Claimants for the take of that portion of the land.

[15] The Tribunal noted that 18 July 2013 was the "specified date" (in terms of s 62(1)(b) of the Act), that being the date on which the value of the land taken, and

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8 The appellants' pointed out this was an error and the actual area was 18 per cent.
9 The Tribunal decision, above n 1, at [1] and [2].
10 At [3].
11 At [3].
12 The respondents said this was an error and there was not evidence that the land was "flood-prone".
13 The Tribunal decision, above n 1 at [4] and [5].
14 At [8].

injurious affection, is to be assessed. It was also for the Tribunal to resolve the amount, "if any", which should be paid to the owners for the injurious affection by the undertaking of the public work (that is, the Expressway).[15]

[16] The Tribunal went on to refer to the provisions of the Act relevant to assessing compensation for the taking of land and for injurious affection as contained in ss 62, 63 and 64 of the Act.[16] It attached a copy of those sections to the decision as Appendix 1.[17]

[17] The Tribunal set out the claim as put by Mr Doherty in his report supported by a valuation undertaken by Mr Wagenaar, who did not give evidence due to illness. Mr Doherty gave evidence for the appellants. He put the claim as follows:[18]

Land take	$210,000
Injurious affection	$140,000
TOTAL	**$350,000**

[18] In the course of the hearing, Mr Doherty revised his assessment for the land take to $195,000, therefore reducing the total claim to $335,000.[19] His reassessment followed cross-examination and his acceptance that he had omitted to make some appropriate deductions.

[19] The Crown valuers, Mr Whitaker and Mr Robertson provided valuation reports assessing the compensation as follows:[20]

Mr Whittaker:

Land take	$28,000

15 At [9].
16 The appellants say it was an error that the Tribunal did not refer to s 60 of the Act.
17 The Tribunal decision, above n 1, at [10].
18 At [11].
19 At [12].
20 At [13].

Injurious affection	8,000
TOTAL	**$36,000**

Mr Robertson:

Land take	$19,000
Injurious affection	21,000
TOTAL	**$40,000**

[20] Under the heading "Valuation Methodology", the Tribunal observed that the fundamental differences responsible for the gap in the valuations between the parties were whether the compensation for the land taken should be assessed as the value of the land taken or on a "before and after" assessment of the diminished value of the land, and how injurious affection should be assessed. It noted that all the valuers undertook a number of hypotheticals for subdivision scenario calculations to identify the impact of the land take on the subdivision potential of the property. The Tribunal said the evidence was that at the relevant date, "subdivision was not financially viable".[21] It said:[22]

> Any valuation assessments formed, based on an unrealistic assumption, are likely to provide limited assistance in determining the definition of compensation payable as set out in s62(1)(b) of the Public Works [A]ct 1981.

[21] The Tribunal, under the same heading, noted the owners' valuer had assessed the value of the land compulsorily acquired on the basis that costs of subdivision should not be taken into account as they were deemed to have already been met. For this assumption, Mr Doherty had relied on *Bishell v Minister of Works.*[23] That case he

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21 At [17].
22 At [17].
23 *Bishell v Minister of Works* LVC Blenheim, 24 November 1965 in Moira Thompson (ed) *Land Valuation Cases 1965-1992* (The New Zealand Institute of Valuers, Wellington, 1993).

said, was authority for the proposition that when land was taken compulsorily,[24] the valuer was entitled "virtually to assume…that a clear title can be given". The Tribunal rejected the proposition that costs of and related to the subdivision should not be deducted.[25] It said:[26]

> [19] The Claimants' valuer adopted a position whereby the assessment of the value of the land compulsorily acquired was made assuming those costs and risks incurred in providing such title had already been met. It is our interpretation that while clear title can be given, this does not necessitate that the value assessed must reflect the presence of such title, just the recognition that a clear title can be obtained.
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> [20] While the Tribunal acknowledges the Claimants provided [a] legal opinion in support of this proposition and further advocated the principles of equivalence, liberality and provided reference to various case law, it is of the opinion that s 62(1)(b)(ii) is drafted to properly allow an assessment of market value to be undertaken where there is typically *negligible market evidence* [emphasis added].[27] Where only part of the land of an owner is acquired under the Act, and it is of a size shape or nature for which no general demand of market exists, then support is provided to the utilisation of the *before and after* approach. It at no time imposes a limitation that the before and after valuation approach must be adopted.
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> [21] The intent of the Act is to provide full compensation and to ensure that a claimant is in the same financial position but not necessarily better off than prior to any compulsory acquisition.
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> [22] The Tribunal identifies that the acquired land (1,917 m²) is of a size, shape and nature for which demand exists: - it just needs to be subdivided and serviced. Under normal market conditions, a landowner can undertake a subdivision and sell a title to a prospective purchaser. Alternatively, the parties could negotiate a lower transfer price whereby the purchaser incurs the costs and risks associated with obtaining a title.
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> [23] There is significant recent case law that supports the proposition that the compensation amount should discount the costs of survey and subdivision, notwithstanding that an acquiring authority will necessarily incur those costs as part of the works program. The Act identifies that value is assessed on an *open market - willing seller - willing buyer* basis and is not to reflect the special value attributed to an acquiring authority.

[22] The Tribunal said it was mindful that the land taken had existing legal access via an unformed right-of-way to Poplar Avenue, and while it was zoned rural, it was

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24 The Tribunal decision, above n 1, at [17].

25 The appellants say the rejection of *Bishell*, above n 23, was wrong.

26 The Tribunal decision, above n 1 (footnote added). Both the appellants and respondent agree that the Tribunal made in error in referring to s 62(1)(b)(ii) as applying where there is "typically negligible market evidence".

27 The Tribunal has incorrectly paraphrased the provisions of s 62(1)(b)(ii) in the phrase emphasised and we comment on that error below.

likely that consent could be obtained for the 1,917 m² or any similar area to be subdivided to create a lot. However, it noted there were potential issues concerning the suitability of the land for building, the cost of provision of services and market conditions at the relevant date. It rejected the appellants' submission that subdivision and related costs should not be deducted. It said:[28]

> [28] The Tribunal identifies that compensation is assessed based on the loss in value of the balance land after the land take. Where the value of that parcel of land is underpinned by its potential to be subdivided as a single lot (as is the case in this instance), then its market value prior to the take is the value of the potential lot, less any costs associated with creation of this lot. Alternatively, any value is restricted to the added value any additional land area provides to a lifestyle block.

[23] The Tribunal cited three cases in support of the fact that the compensation amount should discount the costs of survey and subdivision in the situation that the land taken was marketable as a standalone lot with potential to be developed in its own right. The cases were: *Nutsford-Cumming v Minister of Lands*,[29] *Chief Executive LINZ v James*,[30] and *The Minister of Lands v Wech*.[31]

[24] Referring to the owners' closing submissions the Tribunal went on to reject the owners' calculations based on an "straight-line per square metre" rate. It observed that valuation does not follow such logic and that:[32]

> … typically value reflects the specific attributes and benefits each land area provides. Typically, highest value is attributed to a house site and thereafter additional land area would normally provide added valuation at a decreasing rate down towards a rural land value rate. Where additional land area provides additional subdivision opportunity such a general rule of thumb may not apply. In this instance the 1,917 m² does not generate any special value (additional subdivision rights) and its value reflects the larger balance area for a lifestyle property.

[25] In response to the appellants' submission that the Crown had not deducted the costs of subdivision in other compensation claims when it had reached settlements with others for taking of land along the Kāpiti Expressway, the Tribunal said it had insufficient information regarding the valuation methodologies employed in other

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28 The Tribunal decision, above n 1, at [28].
29 *Nutsford-Cumming v Minister of Lands* LVT Auckland LVP 20/01, 30 April 2002.
30 *Chief Executive LINZ v James* LVT Auckland LVP 02/05, 3 May 2006.
31 *The Minister of Lands v Wech* LVT Auckland LVP 71/03, 21 September 2005.
32 The Tribunal decision, above n 1, at [29].

settlements with other owners to enable it to comment. The Tribunal said that where a part of land is acquired which is not readily saleable and not on its own title, but potential exists for the title to be obtained for the land, valuation methodology demanded that consideration be given as to the value of that title. It rejected the contention by the owners that the costs "to obtain clear title are to be ignored", noting that neither *Bishell* nor Squire L Speedy's text *Land Compensation*[33] stipulate as such. The Tribunal said that the "before and after approach" under the Act was to allow valuers to apply this methodology where there is:[34]

> …limited evidence of the transfer of small parcels of land (normally via boundary adjustment to neighbours) or where parties negotiate a sale of a parcel of land prior to title being obtained.

[26] The Tribunal found that the:[35]

> …appropriate methodology to assess compensation payable for land loss is to identify the added value that this area provides to 28 Leinster Avenue noting the potential to subdivide it as a residential section with right-of-way access provided off Poplar Avenue.

[27] Under the heading "Value Determination", the Tribunal summarised the valuation evidence provided by the various valuers. It took the figure of $175,000 from a range of $170,000-$175,000 ascribed by the valuers to the house and curtilage.[36]

[28] The Tribunal went on to refer to comparable sales valuation evidence. It noted that a sale at 42 Matai Road, Raumati was recognised among the valuers as being of "most relevance" but that there was "significant contention" as to the application of appropriate discounts and "relativity adjustments" to that sale price.[37]

[29] The Tribunal, having rejected the Crown's application of the exception referred to Mr Whitaker's assessment at $472,000 and other comparators, and then assessed the balance land at $150,000 per hectare.[38]

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33 Squire L Speedy *Land Compensation* (The New Zealand Institute of Valuers, Wellington, 1985).
34 The Tribunal decision, above n 1, at [31].
35 At [32].
36 At [35].
37 At [36].
38 At [37].

[30] The Tribunal then adjusted the value of the land taken (1,917 m²) by a 25 per cent discount.[39]

[31] The Tribunal said it was not assisted by the subdivision scenarios. It found that the valuation evidence confirmed that irrespective of the proposed number of lots, a subdivision was not "economically viable".[40] It concluded that the typical costs provided in the subdivision scenarios "equated to approximately $100,000 per lot" and noted that "[i]t would seem unreasonable that costs for a single lot subdivision would yield a lower cost per lot than a multiple site development."[41]

[32] The Tribunal rejected Mr Doherty's approach of splitting the costs between the four landowners who had rights over the right-of-way. It said that in recognising the potentiality of the land being capable of subdivision,[42] the assessment must account for "the costs/risks" faced by the willing buyer or willing seller.[43] The Tribunal adopted a subdivision cost (inclusive of contingency/profit or risk) of $92,000.[44]

[33] The Tribunal then deducted the subdivision costs of $92,000 from the adjusted site value of $130,000 to determine a land value of $38,000.[45]

[34] The Tribunal then turned to "Injurious Affection". It noted that the assessment of injurious affection was a "particularly subjective area of valuation".[46] It rejected Mr Doherty's assessment for injurious affection based on a notional eight-lot subdivision saying it was an "unrealistic development scenario…".[47] In addition, it rejected Mr Doherty's reliance on compensation amounts negotiated with landowners in view of the "restricted information and analysis" which had been provided to the Tribunal.[48] Nevertheless, it recognised that discounts of up to 30 per cent were paid

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39 At [38].
40 At [39].
41 At [40].
42 At [32] and [39].
43 At [44].
44 At [44].
45 At [45].
46 At [48].
47 At [48].
48 At [49] and [50].

when the works were within 100 m of the dwelling and significantly lower discounts applied where the dwelling was a further distance from the works.[49]

[35] The Tribunal rejected the blanket discount of 20 per cent over the balance land advanced by Mr Doherty, noting that the existing dwelling was approximately 250 m from the Expressway.[50]

[36] The Tribunal instead adopted a graduated discount for injurious affection between 20 to 30 per cent over the balance land.[51] It applied a discount of 25 per cent based on Mr Whitaker's adjustment for the 2,000 m² adjoining the Expressway. It then applied a 10 per cent discount to the balance of the rural zoned land (including studio/other buildings) and 5 per cent to the dwelling and curtilage. The Tribunal then recorded that assessment in Table 3 in its judgment to give a total amount payable for injurious affection of $32,000.

[37] Finally, under the heading "Cobalt Sky", the Tribunal referred to material which had been introduced into the hearing in relation to the acquisition of 8,025 m² of land, located two properties to the south of 28 Leinster Avenue. The land had existing resource consent for a garden centre and café. It noted that the owners final submissions equated the Cobalt Sky settlement to $78 per square metre which, if applied to the 1,917 m² equalled approximately $150,000. The Tribunal noted that this was substantially less than the $210,000 claimed (which had been reduced to $195,000 by Mr Doherty). It expressed caution over the use of the information from the negotiated settlements referring to the "hierarchy of evidence".[52] It noted that the historic utilisation of the Cobalt Sky land, along with its Poplar Avenue frontage, gave it a higher value than the subject land.[53]

Grounds of appeal

[38] Mr Stevens for the appellants, in his grounds of appeal and in his submissions pointed to numerous errors made by the Tribunal in its decision. We have grouped the

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49 At [50].
50 At [51].
51 At [55].
52 At [59].
53 At [59].

grounds of appeal under the following headings: failure to apply statutory requirements; injurious affection; incorrect reliance on authority and failure to give reasons; failure to properly compensate for damage; and other errors in the Tribunal's decision.

Failure to apply statutory requirements

[39] The appellants submit that the Tribunal failed to follow the statutory requirements in assessing the compensation for the taking of land and injurious affection as required under ss 60–62 of the Act. In doing so it made errors as follows:

(a) It did not order "full compensation" for the "partitioning" of the appellants' land as it was required to do under s 60(1) of the Act. It did not refer to s 60(1), nor did it annex a copy of that section to its judgment, only attaching copies of ss 62 and 63 of the Act.

(b) It impermissibly "whittled down" the compensation by:

(i) Deducting 25 per cent from the curtilage value to assess the value of the land taken. This failed to take into account that the land taken was flat (unlike the house site, which was situated on a sand dune with a steep walk up access from the street) with separate legal access, and was described by a Crown valuer in a 2012 valuation as "a wooded area land providing a relatively safe, fenced, secured, natural 'adventure playground' complemented by local birdlife and wild rabbits".

(ii) Deducting hypothetical subdivision and other costs of $92,000 from the assessed value.

(iii) Misapplying s 62(1)(b)(ii) of the Act concerning the use of the "before and after valuation" methodology as it had held that the acquired land (1,917 m^2) was of a size shape and nature for which demand existed. Therefore, the valuation option was "irrelevant

and instead was a mechanism for whittling down the appellant's compensation."

(c) It incorrectly deducted subdivision costs making the following errors:

(i) The Tribunal did not provide particulars, or adequate reasoning for, and wrongly deducted from the compensation, hypothetical subdivision costs, which the Crown would never incur. These included holding costs, profit and risk, provision of services to the partitioned land, right-of-way formation costs and estimated additional building costs.

(ii) It made such deductions despite finding that the parent title "was not economically viable".

(iii) It incorrectly referred to "significant recent case law" as supporting that deduction. An acquiring authority will necessarily incur the survey and subdivision costs as part of the public works program.

(iv) It overturned *Bishell* which directs that on a willing seller/willing buyer valuation "we have to virtually assume…that a clear title can be given". The Tribunal incorrectly held "that while clear title can be given, this does not necessitate the value assessed must reflect the presence of such title."

(v) While it correctly stated that the valuation was to be assessed between an "informed willing buyer and willing seller" it incorrectly valued the partition upon the basis that a willing seller would accept the deduction by the respondent of significant hypothetical costs that would never be incurred by the buyer. It was therefore a "lopsided" market transaction which provided the Crown with a "windfall" and the appellants with a detriment

which neighbours along the same public work did not incur in their negotiated outcomes.

(vi) By applying "unchanged" subdivision costs in the manner that it did, compensation for more modestly sized takes of land would quickly reduce.

Injurious affection

[40] The appellants said that the Tribunal:

(a) Calculated injurious affection on an incorrectly discounted land valuation.

(b) Ignored the expert lighting evidence for the site. In addition, the respondent refused to provide its before and after noise and light-spill data for the site.

(c) Incorrectly minimised the injurious affection compensation due to failure to properly appreciate that effect at the level of the appellants' elevated home.

Incorrect reliance on authority and failure to give reasons.

[41] The Tribunal:

(a) Referred to the "significant volume of other market data, plus analysis of other NZTA compensation agreements within the immediate locality", however it ignored evidence relating to the compensation and valuation approaches taken by the Crown in relation to its settlements with other owners for partial takings of land along the Kāpiti Expressway. This was "uncontested evidence", and no subdivision costs were deducted from those settlements partitioning the land from their parent titles. The Tribunal wrongly concluded there was insufficient information before the Tribunal regarding the

methodologies employed in the settlements. This permitted a "different and adverse outcome for the appellants compared with neighbouring claimants".

(b) Failed to give reasons for its finding that all valuers agreed that the most relevant comparable for the partitioned land was "well superior", despite the fact that development on much of the comparable land was prohibited and that the respondent's valuers made negative adjustments of 50 per cent and 60 per cent.

(c) Had no evidence for its conclusion that the reason for a partial rural zoning of the appellants' site was that it was "flood-prone". In fact, the reason for this legacy zoning was disputed and "little or no weight should have been given to that zoning".

(d) The Tribunal's decision was "conclusionary, contradictory and with inadequate reasoning for its assessments".

Failure to properly compensate for damage

[42] The Tribunal failed to compensate for the cost of the appellants having to re-fence the boundary because the respondent neglected or refuse to do so.

Other errors in the Tribunal's decision

[43] Mr Stevens said the Tribunal made so many errors in its decision that its result could not be relied upon. He summarised the 24 errors which he said were apparent in the Tribunal's decision in a memorandum he submitted. We have dealt with the errors where relevant in our judgment, but for completeness in Attachment A to this judgment, we comment on each listed error in italics.

[44] The appellants also pointed to the fact that the respondent refused to attend an ordered judicial settlement conference because it expressly sought a decision from the Tribunal and said that it was necessary "as a matter of principle".

The Crown's position.

[45] The Crown supports the decision of the Tribunal. Mr Allan for the Crown submitted that while the Tribunal may have made errors it was not the journey that mattered but the destination. He submitted that the Tribunal had reached the right decision in view of which this Court could put the erroneous reasoning to one side and reach its own conclusion. In order to set the Tribunal's decision aside it must have reached the wrong end figure.

[46] Mr Stevens rejected that approach. He said if the journey was flawed and strewn with errors then the destination was unreliable.

[47] Mr Allan agreed that the Tribunal had make a mistake when it referred to the application of s 62(1)(b)(ii) where there was "negligible demand".

[48] However Mr Allan said the Tribunal was entitled to approach the willing seller/willing buyer market valuations undertaken to the land and in the manner it did, albeit the approach was "novel".

[49] Counsel also noted that the Tribunal had initially issued its decision following the hearing on the evidence, without hearing final submissions from the parties. This was despite the fact that the parties had expected to be given the opportunity to make closing submissions to the Tribunal. The parties therefore requested the Tribunal to set aside that decision to enable the closing submissions to be made. The Tribunal did so and then issued a further decision. No issue on appeal was taken in relation to this irregular procedure. Mr Stevens said he was not arguing predetermination or similar error by the Tribunal. He did however point out that the Tribunal had edited only four paragraphs in the reissued decision following the closing submissions.

[50] Mr Allan pointed to a further procedural anomaly. The Crown, despite requesting a chance to respond, was given no opportunity by the Tribunal to make submissions on material relating to the Cobalt Sky transaction filed by counsel for the owners on the last day of the hearing.

[51] The Cobalt Sky transaction was raised by Mr Doherty in re-examination, but he had not raised it in his report and so had not been cross-examined on it. He said he had deliberately not raised that settlement because he considered it irrelevant due to the Cobalt Sky property having a resource consent for a garden centre and café which would not be continued on the retained land. It was also valued on the basis of industrial zoning. The Tribunal specifically refers to this transaction in its decision despite the fact it never gave the Crown the opportunity to respond to the material. Mr Allan submitted that he was concerned at the Tribunal's reference to the compensation settlement given that the Crown was given no opportunity to respond and in fact, the Tribunal had expressed its doubts at the hearing as to the relevance of the transaction.

[52] Mr Allan submitted that while the Tribunal was not bound by the rules of evidence, it was bound by the rules of natural justice, which were not observed. He submitted that the material was tendered through counsel, rather than produced in evidence, and its use was not justified. Mr Allan noted that the Tribunal had commented that in the "hierarchy of evidence" of market value, Public Works Act negotiations are inferior and should be treated with caution. [54] The best approach was to analyse open market sales.

[53] However despite making the submissions on the irregular procedure, Mr Allan said the issue was not relevant to the appeal.

The law

[54] Compensation is payable for land taken and for land suffering injurious affection resulting from the acquisition or taking of any land of the owner for any public work. The Public Works Act relevantly provides:

> *Entitlement*
>
> **60 Basic entitlement to compensation**
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> (1) Where under this Act any land—
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> (a) is acquired or taken for any public work; or

[54] The Tribunal decision, above n 1, at [59].

(b) suffers any injurious affection resulting from the acquisition or taking of any other land of the owner for any public work; or

(c) suffers any damage from the exercise (whether proper or improper and whether normal or excessive) of—

(i) any power under this Act; or

(ii) any power which relates to a public work and is contained in any other Act—

and no other provision is made under this or any other Act for compensation for that acquisition, taking, injurious affection, or damage, the owner of that land shall be entitled to full compensation from the Crown (acting through the Minister) or local authority, as the case may be, for such acquisition, taking, injurious affection, or damage.

…

62 Assessment of compensation

(1) The amount of compensation payable under this Act, whether for land taken, land injuriously affected, or otherwise, shall be assessed in accordance with the following provisions:

(a) subject to the provisions of sections 72 to 76, no allowance shall be made on account of the taking of any land being compulsory:

(b) the value of land shall, except as otherwise provided, be taken to be that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise, unless—

(i) the assessment of compensation relates to any matter which is not directly based on the value of land and in respect of which a right to compensation is conferred under this or any other Act; or

(ii) only part of the land of an owner is taken or acquired under this Act and that part is of a size, shape, or nature for which there is no general demand or market, in which case the compensation for such land and the injurious affection caused by such taking or acquisition may be assessed by determining the market value of the whole of the owner's land and deducting from it the market value of the balance of the owner's land after the taking or acquisition:

(c) where the value of the land taken for any public work has, on or before the specified date, been increased or reduced by the work or the prospect of the work, the amount of that increase or reduction shall not be taken into account:

…

(f) the Tribunal shall take into account, by way of deduction from the total amount of compensation that would otherwise be awarded, any increase in the value of the parcel of land in respect of which compensation is claimed that has occurred as a result of the exercise by the New Zealand Transport Agency of any power under section 91 of the Government Roading Powers Act 1989.

…

[55] For the purposes of s 62(1)(b) the assessment of value of land taken, land injuriously affected or otherwise, is, subject to specified exceptions, taken as the amount "which the land if sold on the open market by a willing seller to a willing buyer on the specified date might be expected to realise…". Both parties on appeal agree that that is the appropriate approach in this case. Before the Tribunal, however, the Crown had argued for a valuation based on its valuers' views that this was a case where there the part taken was of a "size, shape, or nature for which there is no general demand or market".[55] That permits compensation for the land and injurious affection caused by the taking to be assessed by "determining the market value of the whole of the owner's land and deducting from it the market value of the balance of the owner's land after the taking". This is referred to as the "before/after method".

[56] The Tribunal found that the part of the land taken did not fall under the exception in s 62(1)(b)(ii), as demand existed for that part of the land and it could be sold if it was subdivided and title for the land was obtained. The costs of subdivision would reflect on the sale price.[56]

[57] "Market value" is the estimated amount which an asset should exchange on the date of valuation between a willing seller and a willing buyer in an arms length transaction after proper marketing wherein the parties each acted knowledgeably, prudently and without compulsion.[57]

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55 The Act, s 62(1)(b)(ii).

56 The Tribunal decision, above n 1, at [22].

57 *Green & McCahill Holdings Ltd v Auckland Council (as successor to Rodney District Council)* [2013] NZHC 507 at [61].

[58] The "willing seller/willing buyer" formulation in s 62(1)(b) has been considered on a number of occasions by the High Court and the Court of Appeal. The approach was summarised in *Green & McCahill Holdings Ltd v Auckland Council* as follows:[58]

> [61] As was noted in *Boat Park Limited v Hutchinson*, the objective is to assess the market value of the subject land at the effective date.
>
> > …The market value, or fair market value, is arrived at by determining what price the property would sell for on the open market under the normal conditions applicable in the market for the type and location of the property being valued… Fundamental to this task is the willing seller/willing buyer principle. Thus, "market value" is defined in the New Zealand Institute of Valuers, Valuation Standard 1, in these terms:
> >
> > > Market value is the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arms length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.
>
> [62] We agree with comments made in the course of an arbitral award in relation to the Green Group land, which the parties referred us to, that this requires identification of the knowledge or information the hypothetical parties would have been likely to have and to have taken into account at the specified date in coming to their conclusions about value. The nature and extent of the knowledge or information which the hypothetical party will be assumed to have had will be influenced by the nature and sensitivity of the particular issue to the value of the land in question.

[59] The Court in *Green & McCahill Holdings Ltd* went onto note that the exception under s 62(1)(b)(ii) did not abandon the willing seller/willing buyer notional transaction approach to the assessment of compensation:[59]

> [65] ...In this respect, it differs from the first exception. Under s 62(1)(b)(ii), a valuer adopting the before and after approach must assess the "market value" of the land on a before basis and then again on an after basis. Market value can only be assessed by reference to the willing seller/willing buyer test set out in s 62(1)(b). The valuations undertaken in the before situation and again in the after valuation should be made on a willing buyer/willing seller basis and by the most appropriate method that suits the circumstances. For example, a comparison of comparable sales may assist. So may a hypothetical subdivision analysis, or a discounted cashflow analysis. As Speedy has observed, although it is useful for the purposes of comparison to use the same method for each valuation required, it is not necessary if the

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58 *Green & McCahill Holdings Ltd,* above n 57, at [61] and [62] (footnotes omitted).
59 At [65] and [66] (footnotes omitted).

> circumstances indicate another approach. Further, as in any normal valuation, where possible, another method should be used as a cross check.
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> [66] It should be noted that the before and after approach is not compulsory, even in situations where there is no general demand or market for the land taken or acquired. The exception provides that the before and after approach "may" be used. A valuer assessing compensation under the Act, and a Land Valuation Tribunal hearing a compensation claim, will have to consider whether or not the before and after approach is appropriate. There can be practical difficulties in using the before and after approach. It may be unreliable if any averaging valuation method is used, as the approach determines the difference between the two situations. If a relatively small difference is revealed by the before and after approach, another method may need to be considered. It may not fairly assess the loss of improvements when viewed on a broad scale. Indeed, the Act expressly recognises that where land taken or acquired for a public purpose is of such a nature that there is no general demand or market for the land, compensation can be assessed on the basis of the reasonable cost of reinstatement in some other place.

[60] A basic concept in relation to valuing on a "willing seller/willing buyer" basis is that of "highest and best use" (HABU). This is described by Rodney L Jeffries in *Urban Valuation in New Zealand* as follows:[60]

> The highest and best use of a property can generally be described as that use which at the time of valuation would be the most profitable, likely, legal, and probable use of the property. Highest and best use analysis is an extension of economic analysis, particularly as related to the subject of urban land economics. In economic terms it is generally regarded as that use which is the most profitable use from among proposed uses that have been found to be legally permissible, physically possible, appropriately supported, financially feasible, and which would be expected to generate the highest rate of net return over a given income forecast period in relationship to the total capital required to be invested.
>
> It can alternatively be described as that use, or future utilisation of the property, that produces the greatest present land value …
>
> In general terms, however, a category of uses or a range of sizes or types of uses most likely to be the highest and best use is usually ascertainable, based upon calculation, experience and common sense.…

[61] Evidence of what a willing seller/willing buyer would pay takes into account genuine market transactions. However, in the case of partial compulsory takings, caution must be applied because the amount of compensation paid in the cases of other

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[60] Rodney L Jeffries (ed) *Urban Valuation in New Zealand* (2nd ed, New Zealand Institute of Valuers, Wellington, 1990) vol 1 at 5-17 and 5-18. On 8 November 2012, the appellants made a resource consent application to create a nine-lot subdivision. This did not proceed but was met with a request for information from the local authority (Kāpiti Coast District Council). No subdivision has been undertaken.

pieces of land taken may not be truly indicative of a free market situation. Jeffries comments:[61]

> I. Partial compulsory takings
>
> Where the taking of land for public works involves only a partial taking of the owner's land, then the price paid for that land may include not only an allowance for the value of the land taken, but also additional compensation for severance, damages, or even offset by an allowance for betterment. Any such transactions, usually noted on the title by means of a Compensation Certificate, should be disregarded as evidence of market value, unless the full details the price and its components are known and sufficient personal knowledge of the transaction is held by the valuer. Even then, such transactions are not truly indicative of the free market situation and would very rarely be used in a comparison to determine a willing seller-willing buyer valuation figure.

Injurious affection

[62] Injurious affection is the loss suffered by other land of the owner which is not taken but results from the taking.[62] It includes both losses resultant from the taking which are not reflected in compensation calculated for the land as well as compensation for loss due to the public works. This loss must be converted into a dollar figure to reflect that loss.

Relevant principles

[63] It is useful to outline some further principles which are relevant to the willing seller/willing buyer methodology. These are:

(a) Imaginary Market: The statutory criteria implies the concept of a willing seller in an open market on a specified date selling to a willing buyer of the property as it then existed including its zoning without the prospect of the public work. The price must be tested by the imaginary market which would have ruled had the land been exposed for sale before the public work was contemplated, but as at the specified date.

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61 Jeffries, above n 6060, at 5-13.
62 The Act, s 60(1)(b).

(b) Principle of Equivalence: Speedy in *Land Compensation* notes that "compensation" is a metaphorical expression, "the idea being derived from a pair of balances".[63] He says:[64]

> It is to be proportionate to the loss sustained, an equivalence to what is taken from the owner. It was never contemplated that the community should profit at the expense of the owner.
>
> The principle of equivalence is that statutory compensation cannot, and must not, exceed the owner's total loss. The owner is to be paid neither less nor more than his loss. The principle is at the root of compensation, because to do otherwise would be unfair on both parties. Unfair on the owner to pay him less than his entitlement, unfair on the acquiring authority that has been given the power of compulsory acquisition in the public interest.
>
> The fundamental principle can be expressed by saying that an owner's compensation should be equivalent to what he has lost by reason of the compulsory acquisition. What is to be considered is the loss caused by the compulsory acquisition. It is important that regardless of what losses are caused by the taking, there should be no duplication. The final global sum must be the equivalent of what the owner has lost by reason of the compulsory acquisition, neither more nor less.
>
> …
>
> The principle of equivalence is not only a judicial and valuation problem but also an economic and social one, because nothing really compensates an unwilling owner for his non-monetary losses which arise from his attachment to a property or from any sentimental, personal, or aesthetic reason. A genuine unwilling seller probably has an inflated idea of its worth. The economic concept is to convert land values and losses to their equivalent monetary value in the impersonal marketplace. Compulsory acquisition is an economic metamorphosis of that owner's equivalent loss.

(c) Potentialities: It must be assumed that both the seller and the hypothetical buyer are adequately informed of all relevant circumstances in negotiating a price. It implies a reasonable and bona fide seller. As Speedy notes:[65]

> Both the willing seller and the hypothetical willing buyer are deemed to be reasonable men who are prepared to give proper

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63 Speedy, above n 3333, at 6.
64 At 6 and 7.
65 At 24.

> but not excessive weight to all relevant circumstances. Yet he would not overlook any ordinary business consideration and would make full and careful inquiries on all relevant matters from public and other authorities."

Therefore any potential use of the land must be considered in determining compensation for the compulsory acquisition of land. This flows from the well-established principle that the land must be valued taking into account any potentialities. Potentialities are to be valued as such, and not as "actualities".

(d) Allowance For Realising Potentiality: In considering the value of "potentiality" one must make appropriate allowance for any risk that the claim potential is not realised. The application of the risk is not a mathematical process but rather recognises that the parties to a hypothetical sale are assumed to be fully informed and have made proper enquiries. They would make an allowance for this risk and attendant costs at the date of the acquisition. Therefore, such allowance must be factored into the market value. The extent and nature of the costs to realise the potential of the property by way of subdivision are in contention in this case and we deal with that in more detail below.

(e) Principle of Liberality: Speedy notes that:[66]

> …when land is taken compulsorily from an owner, compensation should be assessed liberally. This does not alter the principle of equivalence, nor the test of value. What it means is that in such cases doubts are to be resolved by the courts in favour of the dispossessed owner. …It does not enable the courts to take into consideration the age and health of the owner, nor to be influenced by sympathy, nor the desire to be generous to the owner. The emphasis is on the matter of doubt, which if it exists means that the court should lean towards the owner as may be justified by the evidence, but on fairly generous rather than niggardly terms.

The author goes on to say that this does not alter the normal valuation criterion.[67] He comments that "[i]t is a cardinal principle of compensation law

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66 At 7.
67 At 7.

that the owner is entitled to be put back into the same position in respect of his capital as he was in before the taking".[68]

Approach on appeal

[64] Section 26 of the Land Valuation Proceedings Act 1948 (LPVA) provides for an appeal from any order of the Tribunal by way of rehearing.

[65] The High Court in *Green & McCahill Holdings Ltd,* when dealing with two appeals against decisions of the Land Valuation Tribunal in relation to compensation paid for the taking of land for public works, noted that the approach by an appellate court is discussed by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[69] It summarised the approach as follows:[70]

> (a) the appellant bears the onus of satisfying the appeal Court that it should differ from the decision under appeal;
>
> (b) it is only if the appellate Court considers that the appealed decision is wrong that it is justified in interfering with it;
>
> (c) the appeal Court has the responsibility of arriving at its own assessment on the merits of the case;
>
> (d) no deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because, for example, credibility is important; and
>
> (e) the appellate Court is entitled to use the reasons of the first instance decision maker to assist it in reaching its own conclusions, but the weight that the Court places on them is a matter for it.

[66] Upon any appeal, the High Court can confirm, discharge, or vary the order of the Tribunal, or direct that the matter be referred back to the Tribunal for further consideration as it thinks fit.[71] The court can generally make such order as it considers just and equitable in the circumstances of the case. The High Court tends to refer matters back to the Tribunal only when it is not practical for to determine the dispute itself, for example, if there is insufficient evidence to do so.[72]

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68 At 8.
69 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
70 *Green & McCahill Holdings Ltd,* above n 57, at [37].
71 Land Valuation Proceedings Act 1948, s 26(4).
72 *Hardiway Enterprises Ltd v Palmerston North City Council* [2013] NZHC 2310, [2013] 3 NZLR 848 at [79].

Site Visit

[67] We undertook a site visit to the property at 28 Leinster Avenue on 5 October 2023 and familiarised ourselves with the area. We found the visit useful and are grateful to Mr Stevens for the appellants and Ms Watson from Crown Law for making themselves available to accompany us on the site visit. We do not expressly refer to our observations in any detail, but the visit allowed us to have a better understanding of the evidence, particularly as it related to contours and location of the property.

Analysis

[68] Mr Allan noted that before the Tribunal the two valuers for the Crown, Mr Whitaker and Mr Robertson had both concluded that the land should be valued using the "before and after" valuation methodology under the exception set out in s 62(1)(b)(ii) of the Act. This involved determining the market value of the whole of the owner's property and deducting from it the market value of the balance of the owner's property after the taking or acquisition. They had taken this approach on the basis that the exception applied because there was "no general demand or market" for the part of land in question. This was due to the nature of the land taken and that it could not be subdivided off economically. This was largely due to the nature and value of any subdivided lots, high costs of subdivision and providing services to the subdivided lots. They also undertook valuations based on a "willing seller/willing buyer" methodology as well as a hypothetical subdivision as cross checks.

[69] Mr Doherty valued the land on the basis of a "willing seller willing buyer" and undertook various subdivision assessments. He did not undertake a "before and after" valuation.

[70] Both the appellants and the Crown took the position on appeal that the appropriate methodology for the valuation in this case was that of the "willing seller/willing buyer" market valuation under s 62(1)(b). They said that the exception under s 62(1)(b)(ii) did not apply. We sought further submissions on this point but both parties maintained their positions.

[71] Mr Stevens said that the Tribunal was erroneously influenced by the "before and after approach." He referred to various paragraphs in the decision to illustrate this. These included [20] where the Tribunal referred to s 62(1)(b)(ii) as being "drafted to properly allow an assessment of market value to be undertaken where there is *typically negligible market evidence*.…" (emphasis added). Mr Allan agrees that this is an incorrect paraphrasing by the Tribunal of that exception. The relevant exception only applies where the part of the land taken is of a "size, shape, or nature for which there is no general demand or market, in which case the compensation" may be assessed using the "before and after" method.

[72] Putting aside the erroneous paraphrasing, the Tribunal went on to make the point that the exception did not impose a "limitation that the before and after valuation must be adopted." Rather the exception permitted the before/after methodology to be used as the primary valuation approach but it was only an option.

[73] Paragraphs [28] and [32], which Mr Stevens also relies on as indicating the influence of the "before and after" valuation methodology on the Tribunal, address the fact that the Tribunal must take into account "potentialities" in order to determine the HABU of the property. While at [28] the Tribunal referred to "any value" being "restricted to the added value any additional land area provided to a lifestyle block," what it was referencing, was that the HABU was as a lifestyle block with the potential to subdivide the property to create a residential section with right-of-way access off Poplar Avenue. In the following paragraph, at [29], the Tribunal clarified that the point being made was that the land taken (1,917 m²) did not generate "any special value (additional subdivision rights)" and the HABU "reflects the larger balance land area for a lifestyle property."

[74] The Tribunal specifically stated that the land taken was of a size shape and nature for which demand existed and under normal market conditions it could be subdivided and sold to a prospective buyer or sold for a lower transfer price with the buyer incurring the costs and risks required to obtain title.[73]

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[73] The Tribunal decision, above n 1, at [22].

[75] The approach taken by the Tribunal was described by Mr Allan as "novel" in some respects. The Tribunal, having rejected the application of the exception, used Mr Doherty's house and curtilage valuation figure on the basis of "applying liberality" (being the highest of the three relevant valuations) and then adjusting downwards to determine the value of the land taken. It took the figure of $175,000 from the range of $170,000-$175,000 ascribed by the valuers to the house and curtilage. This was Mr Doherty's valuation and the highest of the range but as recognised by the Tribunal, Mr Doherty had adopted 1675 m² for the curtilage while the Crown valuers' took 2286 m² as the residential zone site area.[74]

[76] The Tribunal then adjusted that figure down to around $150,000 per hectare for the balance land. This was after referring to evidence of Mr Whitaker and comparative sales information (at [37] of its decision), and making adjustments for the house site, dwelling and other buildings.

[77] The Tribunal then adjusted the value of the land taken (1,917 m²) by a 25 per cent discount.[75] The adjustment was justified by reference to the fact that the subject property was an elevated sand dune site with associated benefits, existing "residential" zoning, and frontage to 28 Leinster Avenue including access to services. However, it said the land taken of 1,917 m² is:

a) low lying; thus would have higher house foundations costs (although there is a dispute as to quantum);

b) accessed via a shared right-of-way reducing future development potential;

c) in closer proximity to the old State Highway 1.

[78] The cost of foundations was an area of dispute. Mr Stevens said the Tribunal had referred to and been influenced by hearsay evidence that the land taken was "considered flood prone".[76] The Tribunal's reference here is to a comment on what it

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74 At [35].
75 At [38].
76 At [3].

described as the "odd mix of zoning" and that the Council had deemed it appropriate to rezone the rear portion of the land rural because it was "concerned at the prospect of houses being built on it, as it was considered flood prone". It is common ground that there was no evidence that the land was noted as "flood prone" on the District Plan. Nevertheless, there was considerable evidence that the land taken was low lying and there had been flooding on properties in the area (although not shown in a flood plan because the area had not been comprehensively mapped for flooding).

[79] The relevant issue for assessment purposes as far as the Tribunal was concerned, was the quantum of any discount the hypothetical buyer might make to the market value due to likely building costs on the land taken, in particular, related to foundations. There was evidence that the land taken was subject to "deep peat soil conditions" and ponding which would likely lead to higher foundation and geotechnical costs.[77] Mr Robertson, the Crown's valuer was questioned by the Tribunal on the issue of whether or not the area was subject to flooding. Mr Robertson commented that he thought the word "flooding" was a bit rich but confirmed the low-lying land comprised a layer of peat with a high-water table and localised ponding issues.

[80] The second and third factors the Tribunal referred to as justifying the discount it applied to the balance land were access as it related to the potential subdivision lot and proximity to the old State Highway 1. Before we turn to the Tribunal's comments on the subdivision potential and its assessment of the hypothetical subdivision valuations carried out by the valuers, we review how the Tribunal dealt with the comparator market sales which had been adduced in evidence.

[81] The Tribunal in its decision suggested that the most relevant comparator sale was of a property at 42 Matai Road, Raumati.[78] The valuers in their Expert Witnessing Joint Witness Statement dated 18 January 2022 (expert statement) had agreed that this sale was the "most appropriate starting point". The expert statement refers to the

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77 A geotechnical report prepared by A-Build Engineering dated June 2006; a geotechnical report from Cardno; and a costing report from Cutriss annexing a report by Mr Edgar noting it was generally acknowledged "that there are localised ponding issues" the land being "very low and subsoil conditions likely to be 3 to 4 m of peat with a high water table".

78 The Tribunal decision, above n 1, at [36].

disagreement between the Crown valuers on the one hand who made negative adjustments of up to 50-60 per cent from the 42 Matai Road sale and Mr Doherty for the owners, on the other, who considered that the value of the Matai Road property at $250,000.00 was a close comparator. The reasons for the differences between those valuers were set out in the expert statement. The valuers differed in relation to the allowance for peat and costs of subdivision on the subject property as well as locality.

[82] We agree with the Tribunal's observation that 42 Matai Road was "well superior" to the land taken. Apart from being a much superior location, in terms of the residential surroundings amenities and distance to the beach, it had services from the road frontage and was further away and well protected (by trees and contour) from the State Highway. We agree with the Crown valuers' view that while there was some restriction on the subdivision potential of 42 Matai Road compared to the subject property, that restriction was not significant (15-20 per cent is referred to in the expert statement). Comparator adjustments are matters of evaluation and judgement based on the expertise and experience of the valuers. In our view the justification by the Crown valuers for the significant discounting to the value of the subject property was correct. We acknowledge that in any case there are dangers to making significant discounts to comparators. However, that property was not the sole comparator used by the Crown valuers.

[83] The Tribunal also said that there was "included a significant volume of other market data, plus analysis of other NZTA compensation agreements within the immediate locality" which supported the adjustments made.[79] It noted that what was required was regard to the "whole market, rather than undue reliance on a single transaction."[80] It expressed its concerns about the "level of, and variance between, valuers in adjustments made in analysis of the [42 Matai Road] sale".[81] The Tribunal went on to note that it had regard to all the evidence.[82] It said that in particular it recognised the value of 28 Leinster Ave before the take and noted the valuations of the Mr Whitaker at "an assessment of $472,000 (GST incl.) for the 1.08478ha, which

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79 The Tribunal decision, above n 1, at [36].
80 At [36].
81 At [37].
82 At [37].

figure compares with $620,000 "(24 Leinster Av, 1.708ha); $575,000 (10 Leinster Avenue, 0.9429ha) and $415,000 (14 Leinster Av, 1.3083ha)".[83]

[84] There was a substantial amount of valuation evidence before the Tribunal from the valuers. Both the Crown valuers had concluded that the appropriate approach was the "before and after" approach using the exception due to the lack of general demand in the marketplace for the land to be taken. They reasoned it was inappropriately zoned for subdivision (a subdivision would require consent), access was over a long right-of-way covered in dense vegetation and impassable by vehicles, and there were no services provided to the additional lot(s). In addition, a hypothetical seller/buyer would need to consider factors such as the costs of subdivision and foundations. Each of those valuers undertook a relatively comprehensive market assessment of comparative property sales.

[85] Mr Robertson was of the view that the best comparisons for the residential component were residential sales in Leinster Avenue and 42 Matai Road. In relation to the rural component, he had researched lifestyle sections sales and analysed them into components, the curtilage value and the value associated with the balance of the land. He found there was limited comparable sales evidence within Raumati and Paraparaumu which he analysed, including the 42 Matai Road, Raumati sale. He also looked at post-dated sales of 10, 14 and 32 Leinster Avenue. Mr Robertson widened his search to Paraparaumu to look at sales for vacant lifestyle sections, as he was unable to locate vacant lifestyle sections sales in Raumati. For the purposes of assessing injurious affection, he also analysed sales first affected and secondly unaffected by the prospect of the Expressway. Mr Robertson also undertook valuations based on a hypothetical subdivision on a "before and after" basis comprising two-lots and on a before basis for five-lots.

[86] Mr Whitaker agreed with Mr Robertson. He concluded the costs of servicing a subdivision would make the subdivision impractical. For the purposes of the notional subdivision he relied on the costs detailed in the Cuttriss Consultants Ltd (Cuttriss) Report of $92,700 (plus GST) but noted that did not include an allowance

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[83] At [37].

for sewer or water facilities. The Cardno reports indicated these would be necessary and given the saturated peat in the area there would need to be piles as deep as 6 m in parts to create a stable building platform. At the specified date Mr Whitaker noted that the land taken was in a designated "noise corridor" which would trigger a raft of other compliance issues.

[87] Mr Whitaker concluded that the costs of subdivision of the part of land taken meant that the costs outweighed the likely sale price. To ascertain the price, he looked at a range of sales of sites but they required adjustment and there were limited sales of sites which were proximate to State Highway 1. Of those, they had existing formed driveways and superior entry and exit points. They also had title and a building platform and reticulated services in closer proximity to the building platform. Mr Whitaker also noted that the peat and the "flooding" issues of the subject property needed to be taken into account.

[88] Mr Doherty in his valuation dated 7 August 2020 largely relied on comparisons with the 42 Matai Road sale as well as seven vacant site sales. He deducted an outlier (3 Arawa Street Raumati Beach sold for $295,000 comprising 770 m² (net) equating to $383.12 per square metre) to establish a range of $250.57–$353.43 per square metre for the subject property.

[89] Mr Whitaker noted that Mr Doherty for the owners had used comparison sites (the vacant section sales) which had the benefit of their own title, road frontage, site services and an approved building platform which the Crown valuer said made the comparisons inappropriate and so the valuation range determined by Mr Doherty was too high. All these sections were in better locations, with titles and services as well as being more distant from State Highway 1 than the subject property.

[90] Mr Doherty justified their inclusion by their smaller size than the subject property and the fact that they were affected by noise from the proximity of an aerodrome runway. There was no analysis of this issue, nor any information concerning the mitigation in place for the aerodrome effects. Mr Doherty also placed reliance on information he obtained concerning settlements negotiated by the Crown

with other landowners. However, he provided no detail on the settlements.[84] The settlement information was unable to be tested. It is unclear what is included in the settlement figures and in our view the information as to the global settlement figures adds little useful information to the valuation exercise.

[91] Mr Doherty also undertook hypothetical subdivision valuations. He relied on figures from Adamson Shaw for the costs of access and services. He made a number of admitted errors in his costs to which we refer to later. We consider those costs are too conservative and should have recognised the additional costs in the vicinity of a further $20,000, in accordance with the adjustments suggested by Ms Nicola Todd detailed below.

[92] Mr Doherty also divides the costs of the services for the hypothetical subdivision between four owners (the owner of the subject property and three others sharing the right-of-way). For reasons we outline below, we do not consider this was an appropriate adjustment.

[93] Mr Doherty either underestimated or failed to account for costs for other services and increased construction related costs relevant to a hypothetical buyer/seller. The costs and risks he failed to factor in, which would be factors relevant to hypothetical market sale value, include the site related costs for the foundations and construction costs related to compliance with noise mitigation (due to the noise corridor requirements), as well as some risk for the fact that consent to subdivision was required. The latter may be a low risk but, given the nature of the site and the right-of-way, it would be a material consideration for any hypothetical buyer/seller. In addition, Mr Doherty failed to account for title costs which would be incurred in a subdivision. We also consider there was a high risk that the other three owners would not contribute to any of the subdivision, access, and services costs.

[94] On the market valuation we consider Mr Doherty has inappropriately overvalued the property by both using comparators without the appropriate negative adjustments as well underestimating the costs related to the hypothetical subdivision.

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[84] Apart from the Cobalt Sky negotiated settlement which was not in his valuation report but to which he made reference in his re-examination and to which we refer below.

[95] The Tribunal had ample valuation evidence to base the adjustments it went on to make. Adjusting for the value of the house, site and other buildings, the Tribunal assessed the balance land at $/h rate of ~$150,000. The owners point out that the Tribunal in those comments had incorrectly referred to 24 Leinster Avenue as containing 1.708 ha whereas the correct area is 1.078 ha. We consider this to be a typographical error which has no materiality to the comments made by the Tribunal in relation to the comparison with that sale.

[96] At [37] the Tribunal also refers to a closing submission it says was made by the owners concerning a calculation of the per hectare value based on an extrapolation of figures made in closing submission, which Mr Stevens says was not made.

[97] We now consider the Tribunal's treatment of the hypothetical subdivision evidence. This is in the context of the Tribunal discussion of the potentialities of the property which would be recognised in the hypothetical market sale. The Tribunal noted that the owners' valuer's costings were reliant largely on the evidence given by the survey firm Adamson Shaw.[85] A two-lot subdivision referred to as "before option 2" was a "near mirror image" of the actual land take.[86] The Tribunal noted the concern about the variance in costings provided by Adamson Shaw compared to other costings. It further said the typical costings in the subdivision scenarios equated to approximately $100,000 per lot. The Tribunal also said it would seem unreasonable that costs for a single lot subdivision would be lower per lot than for a multiple site development.

[98] The Tribunal rejected some assumptions used by the owners' valuer which had contributed to the higher notional value ascribed to subdivided lots and so the increased value of the land taken, as follows:

(i) The splitting of the costs of subdivision between four owners who had the rights-of-way over the access to the notional subdivided lots proposed for the present site.[87] It first said that two of those other

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85 The Tribunal decision, above n 1, at [40].
86 At [40].
87 At [41].

owners already had alternative access or frontage. The owners' valuer had conceded that he had taken the costs of services for the subdivision as being delivered from the Leinster Road frontage not along the then existing Poplar Road right-of-way. Therefore, there would be little advantage for the adjoining owners. We agree with the Tribunal's view in that regard. Making deductions for costs based on assumed contributions in the circumstances was high risk. To put it another way it was sound to assume the potentiality for contribution in the hypothetical market sale was low and would be recognised as such by the hypothetical seller and buyer.

(ii) The costs and risks of subdivision in the case of the two-lot subdivision which near mirrored the land taken were not to be taken into account. The justification for that assumption by Mr Doherty was based on the 1965 Land Valuation Court case of *Bishell*. The Tribunal rejected that argument and said *Bishell* was not authority for the assumption that no cost should be ascribed to the cost of subdivision but rather was authority for the proposition that for any part of land to be taken it should be "virtually" assumed that a "clear title can be given".[88] However, an inquiry should be made in order to "find out what the land should have realised if sold by a willing seller to a willing buyer in the open market".[89] We agree with the Tribunal's position on that point for the reasons that follow.

[99] Mr Doherty's valuation failed to factor in the survey or consenting costs associated with actually securing separate title in order to sell it as a standalone lot. He failed to take into account the notional adjustment to price that a buyer would make for securing separate title to the land if sold without separate title. Mr Doherty relied on an incorrect interpretation of *Bishell* in support of his position.[90]

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88 At [18].
89 At [18].
90 *Bishell,* above n 23.

[100] We agree with the Tribunal's view that if there is a potential for subdivision the hypothetical parties will negotiate a transfer price reflecting the "costs and risks associated with obtaining a title."[91]

[101] In *Bishell*, Archer J in the Land Valuation Court, in a very brief decision of half a page, dealt with a compulsory acquisition notional valuation of a small part of land cut off from a larger area where there were restrictions on subdivision. The Court held that the assessment of a small part of land taken compulsorily is made on the basis the land "could have been sold on the open market."[92] The Judge said:

> It is difficult to know how to value a piece of land which has been cut off from a larger area and where there are restrictions on subdivision in the district where the land is situated. It seems to us that when we have to assess the value of a small piece of land taken compulsorily we must assume that that particular piece of land could be sold. We have to find out what the land should have realised if sold by a willing seller to a willing purchaser and that implies that the land can be sold on the open market. We have virtually to assume therefore that a clear title can be given. On that assumption we think the subject land would be sold for more than was offered by the Crown. …

[102] The Court in *Bishell* went on to allow £300 for the land on the basis that there had been a concession by the Crown "that if available for sale the land might fetch up to £300". In addition, the Court noted "there was some degree of injurious affection owing to the fact that the land taken included a large proportion of the frontage of the property as a whole". It noted that the land taken was practically a square part of land, and not the sort of section that a landowner would readily sell from the front of his property. For this reason, it allowed £100 for injurious affection.

[103] From the brief report of *Bishell*, it appears that the Court did not turn its mind to what a willing buyer would pay for that part of land given that buyer had been required to pay the cost of subdividing that land. It merely took the indication by the Crown that the land might reach £300, although we do not know how that £300 was assessed.

[104] The Crown submitted that in any event *Bishell* is not now reliable authority as the statutory regime has changed. The case was decided in 1965 before the coming

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91 The Tribunal decision, above n 1, at [22].

92 *Bishell,* above n 23, at 78.

into force of the Public Works Act 1981 and in particular the provisions in s 62(1)(b)(ii). That exception, Mr Allan submitted, solved the problem that was faced by the court in *Bishell*, where due to the "size, shape, or nature" of the land taken there was no demand or no market for it, by permitting a "before/after" valuation. We have not had detailed argument on that point. Regardless of that, the *Bishell* decision is short, and gives no details as to the calculation of the compensation for the part taken. The Court has relied on what appears to be a concession by the Crown as to the value of the land to be taken. The lack of detail and reasoning reinforces the fact that, at best, it can only be authority for the proposition that even if a part of land could not be subdivided by reason of its characteristics including inability to subdivide due to restrictions, that fact will not inhibit it being valued as if it were able to be subdivided and title could issue.

[105] We agree with the Tribunal that nothing in the *Bishell* case note suggests that costs of such subdivision should be ignored. The failure to recognise those costs in a notional subdivision goes against the basic principle of equivalence, which is at the root of compensation. This principle indicates that statutory compensation cannot, and must not, exceed the owner's total loss. The principle requires that the owner is to be paid neither less nor more than his loss. As Speedy notes, "…to do otherwise would be unfair on both parties. Unfair on the owner to pay him less than his entitlement, unfair on the acquiring authority that has been given the power of compulsory acquisition in the public interest."[93]

[106] Mr Stevens argued that the Crown was getting a windfall as it necessarily had to subdivide the land and incur the costs of subdivision in order to take the part of land for the public work. This overlooks the fact that the compensation payable is for loss to the owners based on a notional market value sale. In the hypothetical market sale, the appropriately informed hypothetical buyer and seller would factor into the notional price the cost of subdivision, including the costs required to obtain title. There is no windfall for the Crown. It will incur the costs of taking for the purposes of the public work, but that is not a cost which should be credited to the owner.

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[93] Speedy, above n 33, at 6.

[107] Finally, Mr Stevens sought to distinguish the cases referred to by the Tribunal as illustrating the fact that the subdivision costs should not be taken into account in a notional subdivision. Those cases to which we refer above were all cases involving land taking and the need to factor into notional market valuations deduction of costs of subdivision.[94] In *Nutsford-Cumming v Minister of Lands* the exception under s 62(1)(b)(ii) applied and the HABU was the land subdivided.[95] It was agreed that the costs of subdivision were required to be deducted from the compensation amount. The second case cited, *Chief Executive LINZ v James* is authority for the proposition that expenditure and holding costs to obtain a suitable zoning should be taken into account in considering a valuation.[96] Mr Stevens sought to distinguish this case as being one in which the HABU was a notional subdivision and rezoning would be required. The land in question was large and was the last available site in an industrial area. The zoning meant there were no comparable sales. There was no contest that the costs of subdivision should be taken into account there.

[108] The third case is *Minister of Lands v Wech*.[97] The Tribunal said this was authority for the proposition that, in a notional market involving the hypothetical willing seller/willing buyer where the HABU is a subdivision, the land value must include consideration of a profit and risk adjustment. Mr Stevens said that *Wech* was a case where the valuers accepted that HABU was for a subdivisional development which might be staged. It was submitted that the site was 76.5 times larger than the subject property in this case and therefore not authority for the proposition that the costs of subdivision should be taken into account here. We do not agree. The principle that costs of subdivision must be taken into account in a valuation where the potentiality inquiry considers a hypothetical subdivision applies equally to this case. The costs of obtaining title are not to be ignored or discounted because the acquiring authority will necessarily incur costs associated with obtaining the title to part of the land for the public work.

[109] The Tribunal made no error in its citation of those cases in support of its rejection of the argument that the costs of subdivision should not be taken into account

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94 The Tribunal decision, above n 1, at [24]–[26].
95 *Nutsford-Cumming v Minister of Lands*, above n 29.
96 *Chief Executive LINZ v James & Ors*, above n 30.
97 *Minister of Lands v Wech,* above n 31.

in this case. The size of the subdivision in question does not alter the underlying principle of equivalence. Full compensation is compensation for loss to the owner. That is why the costs were taken into account in the cases cited and why they should also be taken into account here.

[110] The Privy Council decision in *Re Whareroa 2E Block, Maori Trustee v Ministry of Works* was cited on the issue of costs of subdivision.[98] Despite its age it remains good authority on that issue. In that case the Privy Council considered the approach to valuation where the land to be taken was from a large block (242 acres) intended for subdivision by the Māori Trustee. Of the 242 acres, about 91 acres were to be taken for the public work. The land was "ripe for a building development" and would have likely obtained the required approvals.[99] It was accepted that a good deal was required to be done before the land could be disposed of in lots by way of subdivision and there would be risk and delay in addition to expenses. Their Lordships adopted the opinion of the New Zealand Court of Appeal that the valuation must be of the land in the state in which it is on the specified date and any potentialities must be taken into account in assessing its value. Their Lordships also agreed that if the land has to be valued as a whole, the Court in assessing the potentialities may take into account the suitability of the land for subdivision, the prospective yield from the subdivision, the costs of effecting such a subdivision, and the likelihood that a buyer acquiring the land with that object would allow some margin for unforeseen costs, contingencies, and profit for himself.

[111] Their Lordships noted that land in the hands of an owner is just capital for whatever purpose he chooses to put it. The owner may choose to employ his capital in the subdivisional scheme in which case the profit he will make cannot in anticipation be taken to increase the value of the land before that profit has been realised. The land at the relevant time was worth "no more in the hands of the appellant than it would have been in the hands of some other owner who had acquired it with a view to subdivision."[100] Their Lordships put it as follows:[101]

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98 *Re Whareroa 2E Block, Maori Trustee v Ministry of Works* [1959] NZLR 7 (PC).
99 At 11–12.
100 At 14, citing *Turner v Minister of Public Instruction* (1956) 95 CLR 245 at 295 per Taylor J.
101 At 14.

> If the owner be regarded as a hypothetical purchaser of the land to be valued wishing to buy it for subdivision, he would not be expected to pay more for it than any other purchaser buying for the same purpose.

[112] The Privy Council also noted that there could only be one market valuation applying to the land.[102] The same point was recently emphasised in *Green & McCahill Holdings Ltd.*[103] This becomes relevant in this case to submissions made by the owners that Mr McKay was a developer and had done subdivisions before. He had access to the equipment and could do the subdivision for lower costs than those which were put before the Tribunal. As the Privy Council put it, if Mr Mackay were to be regarded as a hypothetical buyer of the subject land wishing to buy it for subdivision, he would not be expected to pay any more for it than any other buyer buying it for the same purpose. There cannot be two different valuation figures. The exercise requires consideration of the knowledge that the hypothetical buyer/seller of the land would have and how that knowledge would be used to adjust the purchase price. That knowledge includes the information as to costs which may be incurred on a subdivision and information concerning the nature of the site and likely sale price.

[113] The statutory context is important, and caution is required when relying on cases from overseas jurisdictions. Nevertheless, the general comments on the approach of the notional willing buyer to costs of subdivision and development made by Waddell AJ in the Land and Environment Court of New South Wales in *State Bank of NSW v Blacktown City Council* are useful.[104] The market value of the before and after valuations under consideration in that case was defined as: "the amount that would have been paid for the land if it had been sold (on the date of its acquisition) by a willing but not anxious seller to a willing but not anxious buyer."[105] The Court said:[106]

> It is important to remember that the question to be determined is what allowance would have been made for this cost at the date of acquisition by a seller and a buyer of the kind described in the definition of "market value". This is an inquiry which is different to determining in a detailed way what work would have been necessary at that time and how much it would have cost.

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102 At 14.
103 *Green & McCahill Holdings Ltd,* above n 5757.
104 *State Bank of NSW v Blacktown City Council* [1994] NSWLEC 158.
105 At 2.
106 At 3.

> Both the buyer and the seller would have regarded the nature and cost of the drainage works as a very important consideration because of their effect on the value of the land. On any view this would have justified reasonably substantial expenditure in getting expert engineering advice on these questions.
>
> The buyer and the seller would have borne in mind that development consent would be necessary for whatever use of the land was proposed and that such consent was likely to be conditional on carrying out the drainage works in a form which was acceptable to the Council.

[114] Mr Stevens also argued that subdivision costs should not be deducted because it inevitably followed that if the land taken was smaller than the subject land taken here then logically the same costs would need to be deducted. Such deductions made in relation to a smaller and less valuable part of land would mean the valuation would diminish substantially. Mr Stevens argues the costs of "water reticulation, sewage and telephone services, the resource consent costs, the right-of-way formation, the consent monitoring etc" would lead to a situation where the "full compensation" would rapidly become zero. This submission overlooks the fact that the hypothetical subdivision assessment is undertaken to ensure the full value of the property is recognised. In this case there was some value added by factoring in a potential for subdivision. In other cases such as the one that Mr Stevens points to as likely to result in a zero added value for subdivision, there is no potentiality to be factored in. It does not mean that the compensation is zero, just that no subdivision potentiality exists so none needs to be factored in.

[115] A further submission by Mr Stevens is that the "unchallenged evidence" given by Mr Doherty was that transactions for other land acquisitions and compensation settlements for this Expressway project had not factored in deductions for costs of subdivision. The evidence provided by Mr Doherty of these transactions was only the bare figures for the transactions. No details were provided to enable proper comparisons to be made with these transactions. The background to these agreed figures, how they were calculated and what other factors were taken into account were not before the Tribunal in any detail. In some cases, whole properties were purchased and in others there was a partial take. All the other acquisitions for the Expressway project had resulted in consensual and negotiated outcomes. The figures do not have the rigour of a market sale nor of a full determination by a compensation authority. The circumstances of other land takes are often wholly different and outside the

influence of free market forces. They do not reflect the critical test of comparability. As Speedy notes it is "at best dangerous" to use such information as evidence without very careful investigation into the full circumstances.[107] He comments that "at worst such evidence may be wrong in law." In our view there will be many reasons why costs of subdivision were not factored into to those acquisitions, but those reasons were not before the Tribunal.

[116] Although there is no principle of law which requires the Tribunal to reject such evidence completely, we agree with the Tribunal that in this case the evidence is of virtually no weight at all, either as individual transactions or as a whole. They cannot be used as comparators without proper detail as negotiated outcomes are the result of an entirely different process to that which is being undertaken in this case.

[117] We agree with the Tribunal that the specific attributes and characteristics of each compulsory acquisition needed to be disclosed and "each assessment considered on a case-by-case basis".[108] The Tribunal made no error in rejecting in general terms the "land take settlement" information advanced by Mr Doherty.

[118] We have concerns about the Tribunal's use of the material provided to it through counsel on the Cobalt Sky agreed compensation following the taking of its land for the Expressway.[109] We have referred to this earlier in the context of the Crown submissions that it had not been afforded the right to respond to this material. The Tribunal and the Crown were provided with the relevant material by counsel after the close of evidence following the mention of the transaction in re-examination by Mr Doherty. The Crown did not have the opportunity of cross-examining on the material. It asked but was not given a chance to comment on it by way of submissions. Even Mr Doherty for the owners said he had not referred to it as it was not a comparator. We also note that the Tribunal itself recognised the Cobalt Sky property was of higher value than the subject land and having regard to the "hierarchy of evidence" said it applied caution to the use of the material.[110] We consider that

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107 Speedy, above n 3333, at 26.
108 The Tribunal decision, above n 1, at [30].
109 At [56]–[59].
110 At [59].

material is not reliable as it has not been tested. The Tribunal erred by relying on it at all.

[119] The Tribunal, having indicated that it reached a site value of $175,000 for the land taken, adjusted it to $130,000 as outlined above and then deducted the sum of $92,000 for subdivision costs. We agree that an allowance should be made for subdivision costs and related intangibles. The question is, what would the hypothetical parties factor in for this in the notional open market? This inquiry is different to determining in a detailed way what work would have been necessary and how much it would cost, although of course the cost will inform the inquiry. That is recognised by the Tribunal where it says:

> [44] By necessity, any assessment must recognise the costs/risks either the willing purchaser or willing vendor would face in negotiating to acquire the land taken. After consideration of the various pieces of evidence the Tribunal adopts a subdivision cost (inclusive of contingency/profit or risk) of $92,000.

[120] The Tribunal determined the deduction should be $92,000 based on the costings for hypothetical subdivisions of the property into two-lots. The range referred to, of between $84,700 and $107,731 (plus GST) is taken from the evidence of Ms Todd.[111]

[121] Ms Todd gave evidence for the Crown. She is a Licensed Cadastral Surveyor for the survey, civil engineering and planning company Cuttriss. She has considerable experience working in land developments in the Kāpiti Coast; works across land surveying, civil engineering, and resource management planning; has particular expertise in: small to large-scale urban and rural subdivision design, land development feasibility analysis, project management and resource consent issues. The Tribunal found that her evidence on costs "relative to both Adamson Shaw and those other professional cost estimates" was compelling.[112]

[122] Ms Todd gave evidence as an expert. She reviewed the valuations and other evidence. She considered the development costings as at July 2013 for the subject property for various development scenarios both before and after the land take. There

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111 At [43].
112 At [42].

were eight "before" and nine "after" scheme plans prepared by various firms over the course of the matter, ranging from proposals for subdivisions into five-lots down to two-lots. Ms Todd was also asked to provide a cost estimate for the subdivision of the land taken by the Crown from the parent title.

[123] Ms Todd noted that the property was very low lying and subsoil conditions were likely to be 3–4 metres of peat which would require specific foundation design, likely driven piles.

[124] Ms Todd said she had not addressed the costs of building in her cost estimate for the subdivision of the land taken by the Crown from the parent title. However, there would be building costs (in addition to the subdivision costs) to construct a dwelling on the proposed Lot 2 (roughly equating to the land taken). She said building costs would cover matters such as driven piles, a private pump station and water tanks which would likely add as a "ballpark" figure $40,000 (plus GST) for building costs. In cross-examination she confirmed she was not a building expert, and gave ballpark figures in the same way she estimated legal and other costs.

[125] Ms Todd criticises the costings for a two-lot subdivision proposal made by Adamson Shaw as being too light. She was cross-examined and questioned by the Tribunal on her reasons for this. The Tribunal was satisfied, as are we, about her explanations as to why the costs were underestimated. For instance, Adamson Shaw did not allow for earthworks (including raising the land up to provide an elevated building platform). Ms Todd's adjustments made appear reasonable. We consider her figures are reliable given her experience, expertise and her responses to questions. In particular, her responses in relation to building on the proposed lot on the low-lying rear of the property and the issues due to the peat layer and dampness of that land (such as land settlement), were factors that the hypothetical buyer/seller would know about and consider. Her justifications for the extra costs required to be expended were persuasive.

[126] The Tribunal took the costs of and related to subdivision at $92,000 which was lower than Ms Todd's estimate of $92,700 for the two-lot subdivision (before the land take). Her estimate included a $5000 contingency fee and provided for building an

elevated building platform but had included no costs for piling or other building costs. These excluded costs were the subject of her ballpark estimate of $40,000 (plus GST). The Adamson Shaw cost estimate for the provision of access and services to the two-lot subdivision was approximately $20,000 less than Ms Todd's allowances. However, her responses when questioned about the reasons for the difference were convincing. The Adamson Shaw figures were not realistic, for instance not providing for the elevated building platform required on the peat. At the higher end of the range, Ms Todd had estimated a cost of $107,731 for a two-lot subdivision along the lines of taking the land acquired by the Crown from the parent title. This also incorporated the contingency but no extra costs for building.

[127] In our view the Tribunal was generous to the owners in taking the figure of $92,000 as an adjustment to the value for costs and intangibles at the date of the acquisition by the hypothetical seller and buyer.[113] The Tribunal could appropriately have factored in a higher allowance for risks, costs and intangibles in reaching its hypothetical valuation. These risks might have included increased building costs due to the likely presence of deeper than anticipated peat in the low-lying Lot 2. The adjustment could also take into account contingencies, other risks, and profit components which the hypothetical market assessment would consider. The hypothetical market price could take into account all of these factors.

[128] Having identified $92,000 as the notional discount to value attributable to costs of subdivision (inclusive of contingency/profit or risk) and deducted that from the calculation of adjusted site value (unadjusted $175,000 and adjusted $130,000) the Tribunal determined the value of the land taken to be $38,000.[114]

Conclusion on value of land taken

[129] The Crown submitted before the Tribunal that in this case the correct approach to assessing a compensation amount was by the application of the exception allowing an "before and after" comparison to obtain a figure equivalent to the diminished value

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113 The Tribunal decision, at n 1, at [44].
114 At [45].

to the land as a result of the taking. It supported this approach, as do the Crown valuers, rather than assessing the market value of the land taken.

[130] To gauge whether or not there was a "general demand or market" for the land taken as a lot separate to the balance land, the Crown in its submissions to the Tribunal set out the steps to be followed which we agree are appropriate. That is:

(a) The valuer must consider whether the land taken can be subdivided from the balance land to obtain its own title.

(b) If the land taken can obtain its own title, the valuer must determine whether there is a general demand or market for the land taken as a single lot (with assessment made with reference to the land taken's size, shape, or nature).

(c) If there is such a demand or market, the land taken must be valued in accordance with the current market value approach under s 62(1)(b). Reasonable costs of subdivision and associated costs (planning advice, resource consent, legal costs), sale costs (agents fees and holding period) as well as a profit and risk component must be deducted to ascertain the amount a willing seller would be expected to realise (with this deduction being relevant also to whether there is a general demand or market for the land as a single lot). The valuer will also separately need to consider any injurious affection to the balance lot.

(d) If the land taken cannot obtain its own title, or can obtain its own title but there is no general demand or market for it, its value must be determined under s 62(1)(b)(ii). A valuer can use the before and after method to value the land, but can also use other methods of valuation if the before and after method does not assist in the circumstances. Such methods might include a partial before and after approach or a restitution approach.

(e) Whichever approach is used, and whether the land is valued under s 62(1)(b) or s 62(1)(b)(ii), a valuer should cross check any valuation of the land using different valuation method for accuracy.

[131] The Crown said, based on the evidence of its valuers as the notional participants in the hypothetical "open" market (and not a "closed" market dominated by the personal characteristics of the particular owners), the hypothetical willing participants would have factored in the costs and contingency figures adopted by the Crown valuers. If the subdivision scheme was not financially viable, it could be said there would not be a general demand for the land to be taken. Therefore, the before and after valuation methodology was permitted under the exception.

[132] The market valuation of the land taken in this case was difficult due to the limited number of comparator sites and the nature of the land taken. The Tribunal adopted an unusual approach to the valuation, the logic of which was difficult to follow at points in the judgment. Nevertheless, we agree in general terms with the conclusion it reached.

[133] The Tribunal need not go into undue detail as to all the evidence it relied upon and its reasons, particularly in view of the fact it is an expert body, and it will be making its own assessments of the evidence before it. The Tribunal is entitled to abbreviate its reasons where appropriate. Nevertheless it must provide reasons which:

(i) are intelligible;

(ii) are adequate;

(iii) provide an understanding of why the matter has been decided that way; and

(iv) articulate the conclusions reached on the important issues.

[134] In *South Buckingham Shire District Council v Porter (No. 2)* Lord Bridge – in in the context of public law, but equally applicable as a general statement of the need for reasons - put it as follows:[115]

> "The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need to refer only to the main issues in the dispute, not to every material consideration."

[135] We consider the reasons given by the Tribunal were inadequate and did not provide an understanding of why the matter had been decided in the way it was. This is particularly in relation to the deduction of $92,000 it made in the valuation. We have elaborated on the reasons we consider apply by reference to the evidence before the Tribunal and the evidence does support the conclusions of the Tribunal. In addition we have concerns about the hearing process, particularly relating to the failure to allow the Crown an opportunity to respond to the Cobalt Sky material. That however was not material to the outcome.

[136] The other errors to which Mr Stevens pointed were in some respects minor typographical or transcription errors and in other respects were errors due to the failure to properly articulate its reasons.

[137] We consider that despite the errors the Tribunal reached the correct result in the circumstances. It did not follow a "before/after" methodology. It applied a "willing seller/willing buyer" methodology. On the merits there is always a range of valuations available for the part of land taken. In this case, the range was also affected by the add on value provided by the potential to subdivide to obtain Lot 2. The value was dependent on the level of costs and related deductions which were ascribed to the subdivision and development. This would inform the hypothetical participants' behaviour in the market sale and dictate the level of adjustment they would make to the hypothetical purchase price.

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115 *South Bucks District Council v Porter (No. 2)* [2004] UKHL 33, [2004] 1 WLR 1953 at [36].

[138] The adjustments made by the Crown valuers which reflected costs and related deductions for the uncertainties over the subdivision of that part of land were higher than the adjustment that the Tribunal made to its valuation for such considerations. For instance, Mr Whitaker used the Cuttriss costings with adjustments for connections by way of pipework and pumping to Leinster Avenue, which he said was due to the high-water table, as well as adjusted allowances for fill and piling costs and allowances for hydraulic assessments which would need to accompany any subdivision proposal. Mr Whitaker also factored in holding costs and return on outlay as well as development interest, all of which would be expected to be factored in by the parties to the market sale.

[139] If the Tribunal had adopted the Crown valuers' figures for costs and deductions, the adjustments to the value of the land taken would be such that there was no general demand nor any market for the land taken. The Tribunal would then have adopted the Crown's position before the Tribunal that the exception applied.

[140] We called for submissions on whether or not the "before/after" valuation should have been adopted by the Tribunal, and both parties submitted that the exception did not apply in this case. The Crown has not cross appealed but has supported the Tribunal's approach and conclusions. It submitted that the Tribunal was correct in rejecting the application of s 62(2)(b)(ii). Our conclusion based on the argument we have heard and the evidence before the Tribunal is that despite failures in its reasoning which gives rise to an appealable error, the conclusion of the Tribunal was correct. Our observations on the application of the exception are merely by way of comment. We also reiterate that in any event the "before/after" methodology is permitted, not mandated, when the exception applies.

[141] Despite the Tribunal's error we are of the view that its ultimate assessment of compensation both for the land taken and the injurious affection were correct, subject to an arithmetical error in the latter to which we refer below. The value of the land taken by the Tribunal as explained in this judgment was determined using the "willing seller/willing buyer" methodology. We conclude the Tribunal did not take the value of the land as an amount assessed using "before/after" method. The Tribunal factored in the value of the part of land to be taken as a stand-alone lot ready to sell. It checked

this figure against the comparators in the evidence in the course of its judgment. It did this by undertaking an analysis of the evidence and assessing the value of the property by applying different values to different parts of the property, starting with the house and curtilage at $175,000 and discounting the balance of the land to a per hectare value of $150,00.00. In summary, as the Tribunal had indicated, the valuation was undertaken by way of valuation of the property as a whole, factoring in the potentiality of subdivision. We agree with that approach.

[142] As we have indicated, we consider the Tribunal's valuation was within range. It depended on the assessment of evidence which the Tribunal was in a good position to undertake and while we consider there was a range of valuation, we do not consider the Tribunal assessment should be interfered with by this Court. We are influenced in that view by the principle of liberality, as in our view the Tribunal's valuation was generous to the owners. We also note that the Crown supported the Tribunal determination and while that is not a factor which is of any significant weight in our assessment, nevertheless nothing was put before us which would persuade us that a different point in the range would have been more appropriate.

[143] In terms of the appeal, we do not consider that this Court should differ from the conclusion of the decision under appeal. The conclusion is not wrong, albeit as we have indicated, the method employed by the Tribunal in the valuation and its reasoning was not clear. We have undertaken our own assessment on the merits and reached the same conclusion. We have used the figures adopted by the first instance decision maker but clarified the reasons for the outcome. We recognise that in this case the Tribunal did have the advantage of seeing and hearing the relevant witnesses, which was particularly important in its assessment of the valuation evidence and the evidence as to costs given the competing views. We have therefore placed some weight on the Tribunal's assessment in reaching our own conclusion. In those circumstances we confirm the order of the Tribunal in relation to the determination of the value of the land taken.

[144] We have assessed the value of the land taken on its merits and decline to interfere with the Tribunal's determination. As we have said, we consider the valuation was on the generous side. If the Tribunal had concluded it was appropriate

to factor in higher costs and deductions for risks and intangibles as were factored in by the Crown valuers, the exception might have applied and the before/after approach would have been permitted. It would then have been an available approach due to the nature of the land being such (particularly due to the prohibitive costs of subdivision) that there was no general demand or market for the land taken.

[145] However, we agree with the outcome reached by the Tribunal. The Tribunal referred to comparators to the subject property before the taking.[116] It also referred to Mr Whitakers' valuation at $472,000. This was a valuation undertaken in 2012. At that time, he adopted a sum of $23,000 for the land taken assessment. We consider the correct before valuation here, is in the vicinity of Mr Whitaker's 2012 valuation figure. In 2020 Mr Whitaker again valued the property on a before/after basis at $436,000 and then adopted a compensation figure for the land taken of 1,917 m² at $28,000. These compensation figures compare with the Tribunal's assessment of $38,000 for the land taken. We emphasise that the before/after method used by Mr Whitaker cannot be used to value the land taken unless the exception under s 62(1)(b)(ii) applies. We have determined it does not. Nevertheless, there is no prohibition on using the before/after assessment of net loss as a cross check on the market valuations. Although some caution is required as the before/after valuation may include elements of injurious affection of the whole property. We note compensation for injurious affection is in addition to land take compensation in this case.

Injurious affection

[146] The High Court in *Green & McCahill Holdings Ltd* described injurious affection as follows:[117]

> [71] Injurious affection is not defined in the Act. It is a "piece of jargon", albeit of "respectable pedigree". It is loss suffered by other land of the disposed owner that is not taken. Section 60(1)(b) of the Act gives an entitlement to compensation for injurious affection as a result of the "acquisition or taking". The terminology used in s 62(1)(b)(ii) — "after the taking or acquisition" — fits in with the entitlement to compensation created by s 60(1)(b). However, in practice, two types of loss are incorporated in the term "injurious affection". The first is the depreciation in the value of the

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116 The Tribunal decision, above n 1, at [37].
117 *Green v McCahill Holdings Ltd*, above n 57 (footnotes omitted).

> remaining land caused as a result of the severance from that land of the portion taken for the public work. This type of loss is expressly allowed by s 60(1)(b) and caught by the words "after the acquisition or taking" used in 62(1)(b)(ii). However, it is commonly accepted that injurious affection also extends to loss which is caused by the operation of the public work on the land taken. Injurious affection of this type can, for example, arise from dust, noise, visual detraction, loss of privacy and the like. Notwithstanding that injurious affection of this kind has been recognised by the law for well over a century — the leading case dates back to 1872 — the relevant provisions in the Act dealing with the assessment of compensation for injurious affection do not expressly recognise that losses of this kind, commonly accepted to be compensatable, arise from the carrying out or operation of the public work rather than the taking or acquisition.
>
> [72] Curiously, the provisions governing the assessment of compensation for substantial injurious affection from a public work where no land is taken but a person's land is nevertheless affected in certain ways, expressly refer to substantial injurious affection "caused by the construction" of the public work.
>
> [73] It seems that, as a matter of practice, generous interpretation of the statute has allowed the words "taking or acquisition" used in s 62(1)(b)(ii) to extend to injurious affection not directly arising from the taking or acquisition but rather from the existence and operation of the public work. Consequently, the practice has developed, by default, of assuming that the public work exists, when calculating under s 62(1)(b)(ii) injurious affection on other land of the claimant caused by the taking or acquisition.

[147] The amount for the loss referred to as injurious affection is the compensation expressed as a monetary amount. The calculation necessarily contains subjective elements, but the assessment must be based on evidence. As counsel agreed, the assessment involves consideration of the before and after position as it looks at the consequent loss "after the acquisition or taking". It also extends to losses resulting from how the operation of the public work affects the property.

[148] To reach the figure claimed by the owners for injurious affection, Mr Doherty provided two options for assessment. First, he applied a 20 per cent discount over his figure for assessed market value of the property, to reach an injurious affection compensation figure of $107,000. His second assessment was summarily dismissed by the Tribunal on the basis it produced a higher compensation figure derived from a hypothetical subdivisions where each lot was individually assessed for injurious affection. The Tribunal said it was "unwilling to adopt an assessment derived from unrealistic development scenarios."[118]

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[118] The Tribunal decision, above n 1, at [48].

[149] We agree with the Tribunal's rejection of Mr Doherty's second assessment, which involved calculations based on injurious affection applied to each of eight hypothetical lots on the basis that the highest amount for injurious affection was if the property was divided into eight-lots. This approach is based on an unrealistic subdivision scenario. The HABU was not the subdivision proposed by Mr Doherty. As the Tribunal noted the owners had lodged a subdivision proposal with the local authority after the date they received notice from the Crown of the land taking. On 8 November 2012, the appellants applied for resource consent to create a nine-lot subdivision. This was met with a request for information from Kāpiti Coast District Council. No subdivision has been undertaken since. The Crown valuers agreed a subdivision (particularly into more than two-lots), was not practicable due to prohibitive costs and the risks of such a development on the property. We agree.

[150] To reach his injurious affection compensation figures, Mr Doherty relied on compensation amounts negotiated with other landowners. The Tribunal acknowledged that it was reasonable for the owners to regard figures agreed relating to injurious affection for properties impacted by the same project, but it was unfortunate that there was only restricted information and analysis provided to the Tribunal on those settlements. The Tribunal criticised the lack of detail in the information provided by Mr Doherty and said it provided limited assistance apart from the fact it was apparent from that material that discounts of up to 30 per cent were only paid when the works were within 100 m of the dwelling and significantly lower discounts applied where the dwelling was a further distance from the works.[119]

[151] We agree and consider that the Tribunal was correct to be cautious in relying on those injurious affection compensation figures. However, it was entitled to look at the general indication that discounts were graduated depending on how far the relevant land was from the works.

[152] Mr Whitaker for the Crown in his valuation of 5 October 2020 notes that there were some complications involved in the injurious affection assessment. Mr Whitaker noted the subject property at the rear was 42 m from the old State Highway 1 and the

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[119] At [49] and [50].

new rear boundary also 42 m from the Expressway. The dwelling is 300 m from the old State Highway 1 and 255 m from the Expressway. He noted there was little difference in that proximity and mitigating factors such as the cycleway, walk and landscaping gave better mitigation than had existed for the old motorway. On the other hand, the Expressway was more elevated than the old State Highway.

[153] Mr Whitaker pointed to the physical attributes of the Expressway, noting that there was space absorbed by the cycleway, batter slope and surrounding landscape strips between the subject property and the Expressway. He also noted that in any assessment the status quo would include the negative impacts of the old motorway and railway line. The construction, elevation and position of the new Expressway had the effect of spreading out much of the negative acoustic and visual elements previously caused by the close proximity of the railway line according to Mr Whitaker. He also noted there were misunderstandings about the characteristics of noise and pointed out wind and traffic volumes needed to be considered. The prevailing wind was northwesterly which directed noise away from the subject property.

[154] In addition, Mr Whitaker noted that noise volume was less on straight sections of the roadway where vehicles did not generally vary their speed. The relevant part of the Expressway is straight. He also pointed out that the Expressway height along the relevant subject boundary ranged from an increase of 3.8 to 5.1 m above the existing State Highway 1. Mr Whitaker noted traffic volumes were projected to be lower than those on the old motorway. He cited figures indicating that the volume pre-Expressway on the old motorway of 27,000 vehicle movements per day which dropped to an average of 12,100 for the Expressway and 17,300 for the old State Highway which remains in use. This was expected to drop further post 2026. Mr Whitaker also pointed out that insulation was required in any event in dwellings under the new code and that the property was not now subject to the noise corridor requirements. He noted that an amplifying factor for noise was the geophysical feature of an escarpment which ran the length of the State Highway and inhibited the dispersal of noise. He noted however that the geographical feature of itself did not trigger entitlement to compensation.

[155] Mr Whitaker also noted the existing railway noise would be concerning to a hypothetical buyer as well as the visual impact of the transmission lines.

[156] We accept the status quo effects of the old State Highway 1 and the railway line form the baseline from which to assess injurious affection related to the public work.

[157] Mr Whitaker compared various local developments that fronted the Expressway or the old State Highway; and made adjustments based on the nature of the developments and the fact that the frontage would have been closer than for the subject property. He also looked at elevated sites situated at the north end of Paraparaumu which indicated land values beyond 30–40 m proximity to the Highway showed no difference to those further afield. He concluded the spread of injury was relatively confined.

[158] Mr Whitaker also considered the lighting report entitled "Black Yard Engineering Lighting Investigation Audit and Report of 26 July 2019". He had inspected the benchmark property referred to in that report as well as the subject and adjoining properties at various times to observe first-hand the impact of light spill as it may or may not affect the subject property. He noted the report assessed the lighting effects (light spill and glare) as being minimal and it was unlikely that the nearest residential residences on Leinster Avenue would be adversely affected. The report further noted the Expressway was orientated perpendicular to the properties in question and the headlight sweep from passing vehicles were not observed to influence the light levels on either side.

[159] Mr Whitaker had also considered the noise reports produced by Acousafe and reviewed by Marshall Day Acoustics.

[160] Mr Whitaker's review of the factors relevant to injurious affection in our view was comprehensive and his comparisons and adjustments were appropriate. He came to the view that there was no discernible loss in value beyond 100 m, and within 25 m to 45 m there was a loss ranging from 5 to 21 per cent, dependent on the density of the development. The less the density, the greater the spread of the negative effect.

He said there was no evidence to suggest this extended beyond 100 m. He also reviewed some sale prices of less desirable sites with no Expressway influence against the sale price of 109 Leinster Avenue and concluded it had been discounted by approximately 20 per cent due to the effect of the Expressway. A further site at Rongomau Lane which was within 32 m of the edge of the sealed carriageway (4,085 m² site) indicated a negative effect caused by the Expressway in the order of 15 to 20 per cent.

[161] In his conclusion Mr Whitaker pointed out that the property already suffered the negative consequences of backing onto the old State Highway 1, the traffic flows on the Expressway were half of what they were on the old State Highway, and the elevated nature of the Expressway served to screen out traffic and rail noise further eastward. He also noted that the planting on the batter slope and surrounds continue to mature and visually screen out the more prominent aspects of the elevated nature of the relevant portion of the Expressway, particularly when viewed from western more elevated areas of the subject property. Taking all the factors into account he adopted a 25 per cent discount at 35 m depth of the site measured from the rear boundary of 2,000 m². This was the distance of 75 m between the edge of the carriageway and the point at which he believed there was no measurable negative injurious effect on the balance land. He said it was arguable that a graduated percentage range could be justified at the higher end closer to the Expressway and reducing as the distance from the Expressway increases but he considered that would produce virtually the same outcome as he had assessed. No further allowance was made as he considered that any loss in value because of road noise and associated negativity had already been reflected in the adopted rates.

[162] Mr Robertson carried out an analysis of lifestyle block sales affected by the prospect of an Expressway compared to those unaffected by the prospect of an Expressway. He carried out the same exercise for residential sales. He concluded that the impact on the rural component of the subject property was 30 per cent. He noted that this lined up with the value of the land in the post-dated sales that he had considered.

[163] As we have indicated Mr Doherty relied on the multiplication of the injurious affection losses on a notional eight-lot subdivision for one assessment, which the Tribunal was correct to reject. Similarly in view of the market evidence indicating the injurious affection loss, Mr Doherty's primary assessment of a blanket 20 per cent of his property value is not supported by the evidence. We note that while caution is required, we do not consider that the Tribunal was in error in using the information Mr Doherty provided from settlement transactions on injurious affection in general. While no breakdown was supplied it did in general terms indicated a trend confirming that compensation diminished for injurious affection commensurate with the distance from the public work.

[164] Reports on light and noise were also before the Tribunal. Mr Doherty pointed to the lighting investigation undertaken by Black Yard Engineering. He said that no light reading had been made prior to the work but a before example was taken at 174 Main South Road, being similar to the subject property prior to the Expressway being constructed. Mr Doherty produced a summary of the report. The summary he produced referred to percentages but without reference to the effect on the value of the property by any changes that information is not useful. Mr Whitaker's comments on the effect of light are not contradicted.

[165] Mr Doherty also produced an excerpt from the acoustic investigation, again the material to which he points is not useful because it merely refers to increases in noise levels and the effect on the site is obscure.

[166] The Tribunal correctly rejected the blanket discount of 20 per cent over the balance property advanced by Mr Doherty, noting that the existing dwelling was approximately 250 m from the Expressway.[120]

[167] The approaches taken by Crown valuers to the assessment of injurious affection were more nuanced and supported by detailed analysis of comparators than that of Mr Doherty. Mr Robertson reached an injurious affection figure of $21,000.

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120 The Tribunal decision, above n 1, at [51].

[168] The Tribunal adopted a graduated discount for injurious affection between 20 to 30 per cent over the site.[121] The highest discount of 25 per cent was based on Mr Whitaker's adjustment for the 2000 m² adjoining the Expressway. The Tribunal said it applied a 10 per cent discount to the balance of the rural zoned land (including studio/other buildings) and 5 per cent to the dwelling and curtilage. It then recorded that assessment in Table 3 in its judgment to give the total amount payable for injurious affection of $32,000.

[169] However, there were two errors in the table set out in the judgment. Table 3 recorded for the area of 2000 m² a 25 per cent deduction on its value of $29,903, providing a sum for injurious affection of $7000. This is arithmetically incorrect the figure should be $7,476. The table then refers to a sum of $9000 for injurious affection for an area of 4644 m² on a value of $94,435. The correct calculation using the area and value would result in a figure of $9,444. The adjustment for the 2286 m² on a value of $320,000 is recorded as $16,000 stating that this adjustment is 5 per cent. This calculation is correct. However, the total for injurious affection correcting for the arithmetical errors is $32,920.

[170] In carrying out those adjustments the Tribunal said it was adopting the 20 per cent to 30 per cent discount as allowed by the three valuers.[122] The evidence before it from the Crown valuers in particular indicated that discounts representing the injurious affection levels reduced over distance from the works. In our view the application of a diminishing rate of compensation commensurate with the reduction in injurious affects was appropriate and we agree with the Tribunal's approach subject to the correction of arithmetical errors.

[171] The Tribunal preferred to make its own assessment based on the material before it. We again think that it has been generous but do not consider that its assessment is incorrect. We also bear in mind that it had the advantage of hearing all the witnesses as well as undertaking a site visit. We therefore consider that on the merits the conclusion of the Tribunal under this heading is correct.

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121 At [55].
122 At [55].

Conclusion on injurious affection

[172] Mr Robertson determined the injurious affection compensation at the sum of $21,000 based on an impact of 30 per cent discount over 200 m. Mr Whitaker assessed a compensation figure of $8000 being 25 per cent discount over 35 m measured from the rear boundary, an approximate area of 2000 m². Beyond the distance of 75 m between the edge of the carriageway and the subject property he determined there was no measurable negative injurious effect. He supported a graduated percentage range as being justifiable with the higher end closer to the Expressway and reducing as distance from the Expressway increased. His view was this should produce virtually the same outcome as the 25 per cent blanket application to the 2000 m².

[173] We do not consider that Mr Doherty had reliable evidence either as to the loss of value to the property in determining his option of a 20 per cent discount to his valuation of the property nor as to the breakdown which he said was as follows:

Visual pollution	2.5%
Noise pollution	10%
Lighting pollution	7.5%
Total	**20%**

[174] We have commented on Mr Doherty's second approach which was the hypothetical eight-lot subdivision assessment of injurious affection. As we have noted the Tribunal was correct to reject that assessment.

[175] The Tribunal took a more nuanced approach as we have set out above. The evidence supported a graduated discount to assess compensation over the property decreasing from the rear boundary which was closest to the Expressway. There is some subjectivity involved particularly as to the points at which the discount is made. The Tribunal was well placed to make that assessment and we agree with it. However, it made an arithmetical error in its calculations and we consider the correct figures are

the ones we have calculated above resulting in a total of $32,920 compensation for injurious affection.

[176] Injurious affection represents the loss to the owner not only for the depreciation in the value of the remaining land as a result of the severance of the portion taken for the public work but also for loss which is caused by the operation of the public work on the land taken. We move on to consider other claims made by the owners.

Fencing Costs and Relocation Interest

[177] The owners noted that they have lost the protection of the mature trees at the boundary of their land and the Crown has refused to re-fence contrary to its obligation to do so. The "Advanced Agreement" stated that the Crown would permanently fence the land taken from the balance land with a new post and a seven-wire fence. Mr Stevens submitted that Mr Mackay had eventually built the fence himself at a cost of $3,500 (plus GST). Mr Stevens also submitted that the appellants were delayed in obtaining reimbursement of the cost of their business after they were denied access to the back of the property from where they ran their building and earthmoving business. Mr Stevens said that it taken place in 2015/16 and was paid after five years delay despite being due under s 66 of the Act. Mr Stevens referred to an email from the Crown indicating it would pay an outstanding balance of $6,975 in full and final settlement for the costs of relocating material including yard rental and hiring a truck because of the owner's loss of "informal access to their land".

[178] Mr Allan for the Crown in response says that if there were breaches of the covenants in the Advanced Agreement that is a separate matter from the valuation and the injurious affection compensation which are the subject of the appeal. We agree. The claim for compensation refers to costs of $6,300 associated with the compulsory acquisition due to the need to relocate materials when for informal access to the land was blocked for five months in December 2015, but there is no reference to the claim concerning the fencing. The claim for compensation for the costs of relocation appears to have been resolved apart from the question of interest which we are not in a position to determine.

[179] The fencing issue is a matter that should be dealt with under the Advanced Agreement provisions as it appears to relate to a breach of that contract and is not a matter which should be the subject of this appeal.

[180] Accordingly, we dismiss the appeal insofar as it relates to the fencing costs and relocation interest claim.

Conclusion

[181] The appeal is allowed. However, the result remains similar. We vary the determination of the Tribunal. The value of the land taken (1,917 m² Section 4 SO 459352) is $38,000 and the injurious affection to the balance of the land (Section 8 SO 459352) is assessed at $32,920 which we round up to $33,000. The injurious affection compensation is increased by $1,000 over the Tribunal's determination. Therefore, the total compensation is assessed at $71,000.

Costs

[182] Failing agreement as to costs any application for costs together with submissions (by way of memorandum) must be made within one week of the date of this judgment and any response within a further week. Any reply is to be made within a further three days.

Grice J

W J M Reid

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ATTACHMENT A

Errors in Tribunal decision pointed to by the Appellants:

(Memorandum of Counsel for the Appellant says to the submitted errors in Land Valuation Tribunal's decision of 18 September 2023)

1. The exclusion of s 60 "Basic entitlement to compensation", Public Works Act 1981:
    a. The failure to refer to s 60(1) in the Decision.
    b. Its exclusion at [10] from the list of "The provisions of the Public Works Act relevant to assessing compensation for the taking of land and for injurious affection …".
    c. The failure to include it in Appendix 1 which contained the Tribunal's relevant sections of the Act.

2. The inclusion of s 63 "Compensation for injurious affection where no land taken" Public Works Act 1981:
    a. At [10] in the list of "The provisions of the Public Works Act relevant to assessing compensation for the taking of land and for injurious affection …".
    b. In Appendix 1 which contained the Tribunal's stated relevant sections of the Act.

It was not an error of the Tribunal to fail to refer to s 60. We have no doubt that the Tribunal was well aware of and would have borne in mind the provisions of s 60. Similarly, there was no error in including reference to s 63.

3. Ignoring, despite submissions being given, the compelling authorities of:
    a. The Court of Appeal in *Drower* – compensation must not be whittled down.
    b. The Court of Appeal in *Boat Park* that a willing buyer/willing seller shall be knowledgeable, prudent and act without any compulsion; and

c. The guidance in the agreed "leading authority" on the application of the Act's compensation provisions in *Green & McCahill*.

We have provided a detailed assessment of the Tribunal's decision and how determinations insofar as the application of the relevant law is referred to in the relevant caselaw.

4. The significant deduction of $92,000 from the severed land's value at [45], being costs that the Crown would not incur.

5. At [18], [19] and [31] restricting the application of *Bishell* that a partial take's assumed title "… does not necessitate that the value assessed must reflect the presence of such title, just the recognition that cleared title can be obtained". The Tribunal relied upon the absence of a negative (at [31]) to hold that "[t]he *Bishell* judgment and Speedy text do not say that those costs to obtain clear title are to be ignored."

6. At [23] that "[t]here is significant case law that supports the proposition that the compensation amount should discount the costs of survey and subdivision …":
   a. That was incorrect in itself – no precedents were cited to support this.
   b. The three cases cited were irrelevant and distinguishable:
      i. One was not a compensation case, but rather a s 40 buy-back case - *Chief Executive LINZ v James* (at [26]).
      ii. In the other two cases, *Nutsford Cumming* (at [24]) and *Wech* (at [26]), all of their respective valuers agreed that the highest and best uses of the partial takes were obtained by hypothetical subdivisions of all of the land using the before and after methodology. Therefore, the before valuations assessed full hypothetical subdivisions values.
   c. The Tribunal misapplied the cases by simply deducting from the severed land, in an after valuation of the partial take, hypothetical survey, subdivision, contingency, profit and risk and holding costs.

We have addressed the issue of the approach to the consideration of costs of a subdivision by a hypothetical buyer/seller as it affects the value of the subdivision in the judgment.

7. It was erroneously influenced by a s 62(1)(b)(ii) before and after approach to valuation (for instance at [20], [28] and [32]) when s 62(1)(b)(ii) did not apply to the appellants' partial take because the severed land: was rectangular in shape [2]; was destined for residential or associated uses [3]; and a market existed for it [22].

8. Further, s 62(1)(b)(ii) has prescriptive wording. It does not say "negligible market evidence" [20] – it requires "no general demand or market" and then only because of the "size, shape, or nature" of that "part of the land" that is taken. The LVT wrongly equated negligible market evidence and no general demand [20].

We agree and the error by the Tribunal was conceded by the Crown. We refer to this in our judgment.

9. Deducting from the severed land's compensation $92,000 of unspecified but assumed survey, subdivision, contingency, profit and risk and holding costs, as if it were a full subdivision of that land, despite it having held:
    a. At [17] that "it was evident to the tribunal in all instances, including before the road take … at the relevant date subdivision was not financially viable. Any valuation assessments formed, based on an unrealistic assumption, are likely to provide limited assistance in determining the definition of compensation payable as set out in s 62(1)(b) the Public Works Act 1981"; and
    b. At [39] including "as confirmed by all of the valuation evidence, the proposed subdivision of 28 Leinster Avenue, irrespective of the proposed number of lots, was not economically viable."

10. It was irrational to therefore deduct hypothetical survey and subdivision costs that no knowledgeable and prudent owner would have undertaken – [17] and [49].

We have outlined the appropriate manner in which the costs of a hypothetical subdivision in valuing potentiality should be dealt with in our judgment.

11. It was unprincipled to ignore the inequity, and was contrary to the principles of liberality and equivalence, that no other partial takes along the Expressway had had survey and subdivision costs deducted. At [30] to justify ignoring Mr Doherty's evidence that for twelve or thirteen other known partial takes along the Expressway no survey and subdivision costs were deducted, that "… it is incumbent on the tribunal to assess the proper compensation payable under the Act."

The Tribunal was correct to put little weight to Mr Doherty's evidence on the compensation packages negotiated with other owners relating to the public work. No proper detail was provided which would have enabled that evidence to be tested. The details of the settlements were opaque although the Tribunal was entitled to take into account the fact that information supplied by Mr Doherty at a high level indicated that compensation for injurious affection had been assessed at different percentages depending on the distance from the public work. The Tribunal should not have taken into account the Cobalt Sky settlement in view of the fact the evidence was not tested. The Tribunal failed to allow the evidence to be tested in circumstances where the crown had specifically asked to make submissions on the point, particularly in view of the fact that Mr Doherty had omitted the material as not being relevant to this case.

12. At [3] the LVT referred to and seemed influenced by hearsay evidence that the partial take land was "considered flood prone" while:
    a. ignoring the contradictory evidence of Mr Mackay and the Council officer at the District Plan review hearing that there was no evidence of this land being flood-prone; and
    b. ignoring that the land was not on the Council's flood hazard maps.

While the partial take land was not mapped as being flood prone, there was ample evidence that the land was "damp" and comprised a level of peat. The relevant point was that this was knowledge the hypothetical buyer/seller would be appraised of and would take into account when adjusting the notional purchase price.

13. At [23] to incorrectly hold that "… an acquiring authority will necessarily incur those costs [of survey, subdivision, contingency, profit and risk and holding costs] as part of the work programme."

We have addressed the approach to taking into account costs of subdivision in the assessment of the market value of the site in our judgment.

14. That the right-of-way:
    a. at [38], would "[reduce] future development potential" when to the contrary, it would have enabled future development potential;
    b. at [41], splitting "the costs equally between the four landowners who had rights over the right-of-way. Such an assumption is unreasonable" despite it enabling significantly shorter access via Poplar Avenue than from the end of Leinster Avenue and Rongomau Lane, and facilitating potential subdivision of the rear of each of those properties; and
    c. also at [41], that the location of services along the right-of-way would have minimal advantage to the adjoining owners".

We have addressed the approach to the hypothetical subdivision in valuing potentiality in this case and determined that there was high risk that the costs would not be split equally between the 4 landowners and therefore it was no error to conclude that the hypothetical buyer/seller would discount this possibility.

15. Without authority, at [38] that the curtilage value was the starting point for valuing the partial take (which reaffirmed the assumed higher value of curtilage stated at [29]).

16. The decision was conclusionary, rather than reasoned, as to:

a. the breakdown of the $92,000 deduction; and
b. why the deduction of 25% off the curtilage, which ignored that the partial take was larger, flat, wooded and had legal drive on access – rather than walk up access, was steep and was a smaller site (1,665m² compared to the partial take of 1,917m²).

17. At [36 - 37] implicitly endorsing the Crown valuers' deductions (of 50% and 60%) for the 42 Matai Road agreed key comparable.

In our judgment we have addressed the Tribunal's approach to its valuation and are satisfied that it had a proper basis and evidence upon which to reach its conclusions.

18. Despite holding at [48] that "[a]ssessment of injurious assessment is a particularly subjective area of valuation", it ignored the experts' reports including that the greatest noise impact was at the appellants' unprotected and elevated home, not at the boundary with the severed land.

The Tribunal was correct in its approach applying a graduated injurious affection to the land including that the highest effects were at the closest point to the public work. We have dealt with this issue in our judgment and note that while the elevation of the dwelling was a factor it was only one of many and the Tribunal had evidence upon which to base its approach and apportionment of injurious affection over the property, taking a holistic approach. The graduated approach accorded with the evidence of the Crown valuers.

19. Contradictory positions were set out on the extent of the evidence of other Waka Kotahi settlements, despite holding that "settlements in close proximity form an important source of evidence" – [30] and [36].

We have addressed the manner in which the Tribunal used the information provided by Mr Doherty on the Crown settlements. It made no errors in that respect.

20. At [37] applying a materially overstated land area (by 58%) for 24 Leinster Ave (it was 1.078 ha not 1.708 ha).

This misstatement of the land area was a typographical error and is not material.

21. Not accounting for the 24 Leinster Avenue per square metre rate and Cobalt Sky's "balance" land rate in valuing the severed land.

The Tribunal was not required to refer to every comparator property put before it and we are satisfied that it reached its determination based on relevant comparators with appropriate adjustments.

The Tribunal was in error in taking into account the Cobalt Sky settlement at all.

22. It was in error at [29] in rejecting that a hypothetical reduced take of smaller land area, but with deduction of what were fixed survey and subdivision costs, would rapidly lead to zero compensation.

We have dealt with this in our judgment.