IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA311/2022
[2024] NZCA 592

BETWEEN	CASATA LIMITED Appellant
AND	MINISTER FOR LAND INFORMATION Respondent

Hearing:	7 September 2023
Court:	Cooper P, Gilbert and Goddard JJ
Counsel:	J E Hodder KC and G F Dawson for Appellant M J Bryant and K F Gaskell for Respondent
Judgment:	14 November 2024 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a complex appeal on a band A basis together with usual disbursements. We do not award costs in respect of second counsel.

REASONS OF THE COURT

(Given by Cooper P)

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Introduction

[1] This appeal concerns the proper approach to the assessment of "full compensation" or "compensation for any disturbance to [the owner's land]" under ss 60(1) and 66 of the Public Works Act 1981 (the Act) when land is acquired for a public work.

[2] The principal issue raised is whether the landowner can claim compensation for loss attributable to the inhibiting effect of the proposed acquisition during the "shadow period" — the time between the announcement of the proposed public work for which the land is to be acquired and completion of the acquisition. It is said that effects of the shadow are properly compensable whether under s 60(1)(c), for damage arising from the exercise of powers under the Act, or under s 66, for disturbance to the land.

[3] The appellant, Casata Ltd (Casata), contends that the shadow cast by the announcement of a roading project between the Hutt Valley and Tawa/Porirua, the Petone—Link Road (the Project), cost it the opportunity to sell or redevelop two properties located at Pito-One Road in Petone (referred to as No 7 and No 27, or together as the properties). Some three years later, the properties were acquired under the Act for the purposes of the Project. The parties were able to agree on the land

value of both properties, but unable to agree on Casata's claim for additional compensation referenced to the effects of the shadow.

[4] Casata's claim for additional compensation in the sum of $4,232,627 (plus GST if any) was rejected by the Land Valuation Tribunal (the LVT).[1] It held there was no evidence that the shadow had impaired Casata's property rights in respect of the two properties, in particular its ability to develop, sell and reinvest. Nor was their evidence to support application of a hypothetical investment model addressed in expert evidence called by Casata from Robert Cameron, a partner at PwC.[2]

[5] Casata's appeal to the High Court was dismissed.[3] While Edwards J considered that, consistently with the requirement that claimants receive full compensation, a claim for loss sustained in the shadow could in principle be advanced under s 60(1)(c) of the Act, such a claim would necessarily be for actual damage sustained.[4] On the present facts, Casata had not proven the shadow had caused it to suffer tangible loss.[5] The Judge also rejected the alternative claim advanced by Casata that it could be compensated for "disturbance" to its land caused by the shadow under s 66 of the Act.[6]

[6] The Judge subsequently granted an application by Casata for leave to appeal to this Court under s 18A of the Land Valuation Proceedings Act 1948.[7] In addressing the issues raised by the application for leave, the Judge noted that a key ground of the proposed appeal concerned the proper approach to the assessment of loss.[8] She recorded Casata's claim that both the LVT and the High Court erred by conflating the question of whether the shadow caused Casata loss with a quantification of that loss. This led both to an erroneous conclusion that Casata had to prove that it *would* have pursued the sale and reinvestment options.[9]

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1 *Casata Ltd v The Minister for Land Information* [2020] NZLVT 18 [LVT decision].
2 At [57]–[61].
3 *Casata Ltd v Minister for Land Information* [2022] NZHC 243 [High Court judgment].
4 At [106]–[108].
5 At [108].
6 At [123].
7 *Casata Ltd v Minister for Land Information* [2022] NZHC 1198 [High Court leave judgment].
8 At [11].
9 At [12].

[7] The Judge accepted that the approach to the assessment of loss involved a matter of general principle.[10] Further, there might "be room for a different view" as to the level of detail required in proving a claim premised on the impairment of property rights generally.[11] In these circumstances, she considered leave should be granted "to appeal the entire judgment", while stating this was conditional on the principal ground of appeal concerning the proper approach to proving and quantifying loss sustained during the shadow period.[12] The appeal was "not to be treated as an opportunity for Casata to re-run the claim brought before the [LVT] or presented on appeal" to the High Court.[13]

[8] The Judge's approach to the question of leave reflected the provisions of s 18A of the Land Valuation Proceedings Act, which required her to consider whether any question of law or general principle was involved in the proposed appeal and also enabled her to grant leave to appeal subject to such conditions as she thought fit.[14] We proceed on the basis that the issues engaged by the appeal are matters of general principle to be addressed in the context of the compensation claim advanced by Casata in the LVT.

[9] On appeal, Casata seeks judgment in its favour in the sum of $3,670,900. We note that this is a lower sum than was claimed in the LVT and High Court, however, Casata appears to attribute the reduction from the sum claimed to an adjustment reflecting an additional payment by the Crown made on 5 February 2021.[15]

Background facts

[10] Casata's core business at the relevant time was commercial property investment, with a focus on owning land subject to long-term ground leases and deriving income from rental returns and capital gains. It acquired the properties from the New Zealand Railways Corporation in 1993. At the time, they were subject to

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10 At [13].
11 At [14].
12 At [20].
13 At [20].
14 Land Valuation Proceedings Act 1948, s 18A(3).
15 The basis of this calculation was not made clear to us.

long-term ground leases to Transit New Zealand, now known as the New Zealand Transport Agency | Waka Kotahi (Waka Kotahi).

[11] No 27 was the larger of the properties, being 12,250 m^2 in area. Until October 2012, it had been leased to a car sales yard. As at 13 February 2014, the land had been developed by the erection of three interconnected warehouse buildings, classified as earthquake prone by the Hutt City Council. The land was zoned "General Business" in the Lower Hutt City District Plan, which became operative on 24 June 2003. The zoning permitted a range of commercial and industrial activities to take place.

[12] The property at No 7 was 2,157 m^2 in area. Parties agreed this was a "a bare parcel of land". It had similar locational attributes to No 27 and was also zoned "General Business". Casata placed the property on the market in 2011 but withdrew it before again commencing an active marketing programme in May 2013. It remained on the market when the Project was announced in February 2014.

[13] In a meeting on 11 February 2014, Waka Kotahi advised Andrew Wall, one of Casata's two directors, of the Project and gave him a letter and a draft public information pack. The letter stated that Waka Kotahi had been investigating a transportation link between the Hutt Valley and Porirua, and that Casata's properties had been identified as being potentially directly affected by the proposed options for the route. Although planning was in its early stages, Mr Wall was advised it was hoped there would be firm land requirements by mid-2015 which would enable confirmation of the impact on Casata's properties.

[14] At the 11 February meeting, Mr Wall informed Waka Kotahi representatives that the buildings on No 27 were earthquake prone and untenantable. He said that Casata had plans to construct a new commercial building on that site with a potential value of $22 million. Mr Wall stated that Casata would be claiming compensation for its redevelopment plans having been put "in jeopardy". He said that, if preferable, it would be happy to sell or lease the land to Waka Kotahi.

[15] Two days later, on 13 February 2014, the Project was publicly announced and public consultation commenced. At the High Court, Casata identified this as the "causation date", or the commencement of the shadow period.[16] At the time, it appeared to Mr Wall that all of No 27 would be required and only a small part of No 7. On 1 August 2014, Casata was sent a project update by Waka Kotahi advising the preferred option for the route was expected to be confirmed at the end of 2014. Resource consent applications would be lodged at the end of 2015. Detailed design would begin from 2017 and construction, subject to funding, would begin in 2019.

[16] On 10 December 2014, Casata sought an update on progress from Waka Kotahi, which responded noting that nothing had changed in terms of the impacts on No 7 and No 27. At that stage, it was anticipated that the consenting process would begin in late 2015. Achieving the necessary consents could then take a further year, but once they were in place, Waka Kotahi would be able to start conversations with landowners regarding potential acquisition.

Negotiations for acquisition of No 27

[17] On 17 February 2015, Mr Wall met with a representative from Waka Kotahi. Mr Wall said in evidence that he reiterated the buildings on No 27 were earthquake prone, and had to be either strengthened or demolished by December 2018, and that he considered the best way forward for Casata was to build new buildings. He offered Waka Kotahi the choice of buying No 27 at that time for six million dollars, stating that, if they refused, Casata would proceed with its new development. In that case, Waka Kotahi would be purchasing the land and new buildings for $20 million. According to Mr Wall, Waka Kotahi's response was that it would wait until its processes were finished and that it would pay $20 million for the land and new buildings if it had to. Mr Wall stated that this surprised him but that, in light of this response, Casata proceeded with its plans for redevelopment.

[18] On 3 September 2015, Mr Wall emailed Waka Kotahi referring to the 17 February discussion, and asking whether Waka Kotahi still intended to wait until its processes were finished:

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[16] High Court judgment, above n 3, at [11].

> At our meeting at your office earlier this year on 17 February 2015 … I offered you the choice of either buying the land now for $6 million or buying the land later with new buildings on for $20 million. Your response was that [Waka Kotahi] would wait until its processes were finished and pay the $20 million. Is that still your position?

[19] Mr Wall advised Waka Kotahi that demolition consent for the buildings on No 27 had been obtained and that, accordingly, demolition would start later that month. Waka Kotahi representatives interpreted Mr Wall's email of 3 September 2015 as a request that Waka Kotahi make an advance purchase of No 27 at that stage. Although the Project remained in the investigation phase and a designation or notice of requirement had not been issued, Waka Kotahi decided to initiate the acquisition process, and on 25 September 2015 appointed David Hoffman, a property consultant at The Property Group Ltd (TPG), to negotiate the acquisition of No 27 on its behalf.

[20] On 20 October 2015, there was a meeting between Mr Wall and Mr Hoffmann to discuss the acquisition. Mr Wall advised Mr Hoffman that he had redevelopment plans for No 27. Mr Hoffman stated that, given the parties were now in negotiations for an advance purchase, Waka Kotahi expected the acquisition would be of a vacant site at current market value and that the parties would negotiate in good faith.

[21] Casata commenced demolition of the buildings at No 27 in October 2015 with practical completion achieved in early November 2015. Demolition costs exceeded $200,000. A resource consent application for the development of No 27 was lodged on 24 November 2015 and the consent was granted on 1 February 2016.

[22] In November 2015, Waka Kotahi announced its preferred route for the Petone-Grenada Link Road. On 11 November 2015, Mr Hoffman reiterated the steps necessary to agree on compensation to Mr Wall, the first being obtaining formal valuations of the land. Mr Wall wrote in reply on 19 November, noting that the redevelopment of No 27 was at an advanced stage, and stating:

> Casata Limited is a commercial property investor. It had leased the property to the Car Giant however that business failed and the lease was subsequently terminated. The collection of interlocking buildings were classified by the Hutt City Council as earthquake prone and were required to be either demolished or strengthened by 31 December 2018. The design of the buildings no longer suits the needs of commercial tenants and in any event tenants [are] not prepared to lease earthquake prone buildings. In the absence

> of any clear direction by [Waka Kotahi], Casata decided at the beginning of this year to redevelop the site and the former buildings have since been demolished in preparation for the construction of a new building.
>
> … We approached [Waka Kotahi] with the suggestion that whilst it makes very good commercial sense for Casata to redevelop the site it does not make very good commercial sense for [Waka Kotahi] to pay $20 million for a new building which they then have to demolish to make way for the interchange.
>
> With respect to the acquisition of land I note your statement that the basic entitlement to compensation is the current market value of the property. Given that redevelopment is at an advance state, the value is significantly more than vacant land value. How do you suggest that we address this, should it be an equitable % of the end project value as there are benefits to both parties. …

On 30 November, Mr Hoffman sought details of Casata's development plans which he suggested could be provided to the respective valuers.

[23] On 14 December 2015, Waka Kotahi received an independent market valuation of No 27 that it had commissioned from Martin Veale of TelferYoung (Wellington) Ltd. On the same day, Mr Hoffman emailed Mr Wall stating that negotiations for No 27 were taking place under the Act, and again recommending that Casata seek valuation advice. He requested that Casata confirm it had discontinued incurring costs in its redevelopment of No 27 as they may not be recoverable.

[24] On 22 December 2015, Mr Wall responded stating that Casata was in the business of creating long-term rental streams and confirming that it was continuing with the redevelopment as planned. Mr Wall asserted that there was no legal impediment preventing Casata from constructing the building as far as he was aware, but if there was, then he should be advised immediately.

[25] On 19 January 2016, Mr Hoffman emailed Mr Wall reiterating that the parties were negotiating with a view to reaching agreement under s 17 of the Act, the only statutory authority for the purchase. He noted it did not appear reasonable that Casata would continue with plans for development on the land when there was a high likelihood that the development would never be completed. He said that a notice of desire under s 18 of the Act had been requested from the Minister for Land

Information (the Minister) for service on Casata.[17] Mr Hoffman said this was necessary due to Casata's apparent intention to carry out works on the land with the purpose and effect of rendering the Project more costly. This created a need for agreement on what the current potential and market value of the land was. He again asked Casata for confirmation it had suspended development works.

[26] On 25 February 2016, Mr Wall advised that Casata had suspended redevelopment of No 27. He provided a "redevelopment information package", including a statement that the former buildings had been demolished, a resource consent for the new building had been issued, and engineering service reports. Mr Wall also said there was a tenant for the development and the Project was cash funded. The subsequent provision of this information to Mr Veale did not change his valuation in the absence of documentation supporting the existence of the purported lease.

[27] Casata's valuation for No 27, prepared by Michael Horsley of Colliers International (Wellington) Ltd (Colliers), was forwarded to Waka Kotahi in August 2016. A further updated valuation from a different valuer was forwarded in November 2016. Mr Veale provided an updated valuation for No 27 on 8 December 2016.

[28] The agreement for an advance purchase of No 27 was signed on 16 February 2017. The agreement was for $5,350,000 plus GST (if any). Settlement occurred on 28 February 2017, the property transferring to the Crown on that date. The valuers agreed the market valuation for No 27 as at February 2017 was $5,665,000 plus GST (if any). An additional sum of $315,000 was also agreed and paid to Casata in February 2021.

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[17] Under s 18(1) of the Public Works Act 1981, where any land is required for a public work the Minister must, before proceeding to take the land under the Act, serve notice of their desire to take the land on every person with a registered interest in it. This section, and others in the Act, refer to the Minister of Lands, but the relevant powers are with the Minister for Land Information: see *Dromgool v Poulton* [2022] NZSC 157 at [17], n 16.

Negotiations for acquisition of No 7

[29] In March 2016, Mr Wall emailed Mr Hoffman advising that two parties were interested in purchasing No 7. Given Waka Kotahi's intention to buy the land, Casata took the view it could not deal with those parties in good faith. The offers indicated a market value for the land of $950,000 to $985,000.

[30] Negotiations for an advance purchase of No 7 commenced two months later with valuations being exchanged in May 2016. The parties reached agreement in principle to a value of $990,000 plus GST (being the figure nominated in the valuation prepared by Colliers).

[31] On 30 May 2016, Casata executed a nine-year lease of No 7 with Safe Scaffolding Ltd. On 23 June 2016, Casata advised Waka Kotahi that it had received an offer for No 7 for $990,000 plus GST. On 11 July 2016, Casata sought assurances from Waka Kotahi that if the land was sold to the interested party, a s 18 notice would not be issued, therefore allowing the interested party to redevelop the land. Waka Kotahi declined to provide the assurances sought.

[32] An advance compensation agreement for No 7 was signed on 17 March 2017, with settlement taking place on 27 March 2017. The agreement provided for compensation in the sum of $990,000 plus GST (if any) and was subject to the existing lease.

The additional compensation claim

[33] Both advance compensation agreements were without prejudice to Casata's rights to claim compensation for additional losses it said it had suffered during the shadow period. Ongoing correspondence did not resolve the issues and, on 8 August 2018, Casata served a notice of claim for compensation on the Minister. Legal proceedings were filed on 28 September 2018.

[34] For present purposes, it is convenient to treat both properties as subject to the shadow for a period of approximately three years. Casata claims that it was prevented from maximising its returns from the capital invested in the properties — during the

shadow period, it was effectively unable to either invest in the development of the land or sell the land and reinvest elsewhere. Casata's claim for additional compensation for the incremental impact of the shadow is $585,798 for No 7 and $3,085,102 for No 27.[18] The claim was based on the hypothetical reinvestment model addressed by Mr Cameron in evidence to the LVT. Mr Cameron was a registered valuer, a fellow of the New Zealand Institute of Valuers and a member of the Royal Institute of Chartered Surveyors. It is unnecessary to set out the detail of his calculation of the amounts claimed as additional compensation.

[35] Mr Cameron's approach to loss as he described it was that:

> 23. As a consequence of the notice, Casata's property rights were effectively suspended, and it could not continue with its development plans for 27 Pito-One Road (and generate rental from that investment), or alternatively sell that land, nor could it sell 7 Pito-One Road (and acquire other property assets from which it could generate rental and capital appreciation).

[36] Concerning No 27, he stated that:

> 30. I have considered the compensation claim on a basis whereby Casata could have sold the land at the Notice Date and reinvested the funds into either direct or indirect real estate, generating either a rental or distribution return.
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> 31. I refer to this as the reinvestment approach and it addresses the total return from property, comprising income returns (in this case, the rental or distribution returns) and capital returns (change in market value).
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> …
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> 35. In addition to the business loss, which I have described above, the compensation claim includes the market value of the site (adjusted for the capital gain foregone in respect of the hypothetical alternative investment) as at the Settlement Date. By this I mean that had Casata been able to complete its development, or sell and reinvest in other real estate assets it would have benefited from an increase in the value of its assets. During the period from the Notice Date to the Settlement Date there was an increase in land values, market rentals and a firming of capitalisation rates. This resulted in significant capital appreciation.

[18] We refer to the sums claimed in submissions to this Court.

[37] As to No 7, he said that:

> 38 The full compensation for 7 Pito-One Road can also be assessed using the reinvestment approach as detailed above. However, in this case an off-setting allowance has to be made for the interim rental income from a short term lease of the land.

[38] Waka Kotahi called William Apps, a chartered accountant and director of Staples Rodway Corporate Finance Ltd, with expertise in corporate finance and business valuation and the measurement of economic loss.

[39] Mr Apps considered Mr Cameron's approach to assessing loss was not "necessarily the only or best way of assessing quantum". He disputed Mr Cameron's methodology on the basis it resulted in a claim for additional compensation which represented 80 per cent of the value of the underlying assets as at the date of the announcement of the Project and 73 per cent of the value of the advance sums paid to the purchase of the land. He was sceptical of the magnitude of those sums compared to the value of the land itself. He was also critical of, amongst other things, the apparent assumptions in Mr Cameron's reinvestment model that, on the date the Project was announced, there was an immediate entitlement to compensation at unaffected market value, and that the proceeds of sale were received on the same date and immediately able to be reinvested into tenanted properties.

[40] The method which Mr Apps believed to be most appropriate was the traditional "but for" assessment of loss, which would apply to the properties as follows:

(a) For No 27, if Casata's intention was to develop, tenant and sell the property, the appropriate measure of loss was:

> … the present value of the net proceeds from constructing, tenanting and selling the properties discounted at a rate that reflects the time value of money and the risk inherent in the development and ultimate sale of the property.

(b) For No 7, to the extent the property was in the process of being sold, the appropriate measure of loss was "the difference between market values at the settlement date and the amount compensated".

In respect of No 27, he was unable to calculate the loss incurred using this method due to insufficient evidence.

[41] In the event Mr Cameron's approach was adopted, Mr Apps considered a number of adjustments needed to be made which would have the effect of reducing the amount payable by the Crown by $1,250,501.

The LVT decision

[42] The LVT declined Casata's claim for additional compensation.

[43] The LVT considered that the outcome of the proceedings turned upon the resolution of two factual issues. First, whether the shadow actually interfered with Casata's dealing with the properties in the manner claimed, and second whether Casata actually suffered the alternative investment loss calculated by Mr Cameron.[19]

[44] Turning first to No 7, the LVT was not satisfied as a matter of fact that there was any potential sale of No 7 to a party (other than the Crown) that had been precluded, prejudiced or upset by the shadow prior to Waka Kotahi signalling its intention to acquire the property.[20]

[45] As to No 27, the LVT found that, even if Casata had been able to pursue its redevelopment proposal unencumbered by announcement of the Project, the development could not have been undertaken before about October or November 2015. There was no potential sale or reinvestment during the intervening period because Casata had never sought to do that.[21]

[46] On the second factual issue, the LVT was not persuaded by Casata's claim that, if the Crown had acquired the properties for their market value within four months of announcement, Casata could have taken the capital thereby released and reinvested it in the property market, earning both a market rental income and a capital gain which would have resulted in "full compensation".[22] While the LVT accepted that could

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19 LVT decision, above n 1, at [45].
20 At [57].
21 At [57].
22 At [58].

have happened, Casata's evidence did not establish it would have done so. It followed that the loss scenario advanced by Casata was "hypothetical in every sense of that word", and indeed had been so described by Mr Cameron in his assessment.[23]

[47] The LVT also concluded there was no evidence that, between February 2014 and the confirmation of Waka Kotahi's intention to acquire the properties, Casata had turned its mind to an alternative investment as hypothesised by Mr Cameron.[24] Nor was there evidence that such an alternative investment property with the features identified by Mr Cameron for the purposes of his calculations was available for purchase by Casata between mid-June 2014 (four months after the announcement of the Project) and confirmation of Waka Kotahi's intention to acquire the properties. Rather:[25]

> The only information before the [LVT] on that subject is Collier's email of 5 February 2016 to Mr Wall, describing the increasing scarcity of industrial land in the lower valley at that time.

[48] For those reasons, the LVT was not satisfied that Casata actually suffered the alternative investment loss that formed the basis of its claim.[26]

[49] In conclusion, the LVT held the appropriate basis for assessing loss was determination of the "actual loss" suffered by Casata. It was not satisfied that Casata actually lost:[27]

- The opportunity to sell No 7 and invest the proceeds of sale in an alternative investment … ;
- The opportunity to sell No 27 and invest the proceeds of sale in an alternative investment … ;
- The opportunity to purchase an alternative investment property bearing the features identified in Mr Cameron's calculations of loss.

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23 At [59].
24 At [60].
25 At [61].
26 At [62].
27 At [64].

The High Court

[50] In essence, the Judge held that it was insufficient to simply rely on the existence of a shadow in making a claim for compensation. Casata had to prove its loss. Calculations of loss, even on a hypothetical counterfactual, were to be bound by the realities of what would have happened but for the threat of acquisition.[28]

[51] The Judge considered that:

(a) Casata was required to particularise and quantify its claim — ease of calculation could not lead to the adoption of a model that is removed from the harm or damage alleged.[29]

(b) The relevant counterfactual for the assessment of loss is what *would* have happened but for the effect of the shadow, not what *could* have happened.[30]

(c) Casata had to prove that its ownership rights had been impaired in fact, and that loss flowing from that impairment was not unreasonable nor too remote.[31]

[52] The Judge held there was insufficient evidence to substantiate Casata's counterfactual and this was a sufficient basis to dispose of the appeal.[32] She nevertheless proceeded to deal with the point of principle underlying Casata's claim, holding that s 60(1)(c) could found a claim for loss sustained during the shadow period: "[a]s a matter of broad principle" such a claim would be "consistent with the requirement that claimants receive full compensation and the principle of equivalence which underpins the [Act]".[33] However, such a claim would be difficult to prove. And if, as in this case, the claim is "closely associated with the taking of land and market

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28 High Court judgment, above n 3, at [52], [58] and [64].
29 At [58]–[60].
30 At [61]–[63].
31 At [64].
32 At [73], [79] and [82]–[84].
33 At [106].

value for that land has already been paid, it may be more difficult to bring it within s 60(1)(c)".[34] She observed:[35]

> The scheme of the Act is that compensation for the taking of land is fixed as at the date of acquisition and according to the market value of the land. It strains plain meaning to suggest that the Act provides for compensation to be paid for a delayed taking, particularly if there has been an increase in market values in the interim.

[53] She considered that whether a claim for loss in the shadow period could be sustained would depend on the nature of the alleged impact and associated loss. The claims sustained in cases to which she referred, including *Director of Buildings and Lands v Shun Fung Ironworks Ltd*, *Cockburn v Minister of Works and Development*, *Pattle v Secretary of State for Transport* and *Hamilton v Minister of Lands*, were to be understood in that light.[36] It followed that any compensation to be paid under s 60(1)(c) must be for actual damage sustained. Casata's inability to prove that the shadow caused it to suffer tangible loss meant that "an assessment of whether the claim would otherwise have fallen within s 60(1)(c) [could not] be made".[37]

[54] As noted previously, the Judge also concluded that Casata's claims did not fall within the definition of "disturbance costs" for the purposes of s 66 of the Act. She characterised that section as being related to "downstream flow on effects" not related directly to the value of the property acquired by the Crown.[38] Casata's claim for business losses was, however, essentially "intertwined" with the value of the land, being for losses said to arise from an inability to extract value from the land by either selling it prior to the acquisition or redeveloping it.[39] Further, the kinds of loss that Casata sought to recover did not fit into the language used in s 66(1)(a). On their face, they were not costs arising from the disturbance of the land.[40]

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34 At [107].
35 At [107].
36 At [108], citing *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 (PC); *Cockburn v Minister of Works and Development* [1984] 2 NZLR 466 (CA); *Pattle v The Secretary of State for Transport* [2009] UKUT 141 (LC); and *Hamilton v Minister of Lands* LVT Auckland LVP 019/10, 28 June2012.
37 At [108].
38 At [111], citing *Ace Developments Ltd v Attorney-General* [2017] NZCA 409, [2017] 3 NZLR 728 at [48].
39 At [111].
40 At [117].

The argument on appeal

[55] The parties directed their arguments to the same three issues, being:

(a) whether the High Court erred in identifying the proper approach to proving and quantifying loss sustained by the appellant as the owner of undeveloped commercial land by reason of a "shadow" effect;

(b) if the answer to (a) is yes, whether the High Court erred in concluding that the appellant had provided insufficient evidence to prove the loss claimed; and

(c) if the answer to (b) is also yes, whether the High Court erred in concluding that the appellant's claim was not within ss 60(1)(c) and 66 of the Act.

Proving and quantifying loss sustained during a shadow period

[56] Mr Hodder KC for Casata referred to the fundamental common law right not to be deprived of property without compensation,[41] which he submitted was the foundation and context for the Act's provisions on compulsory acquisition of land for public works and "full compensation" for the owner of land so acquired.[42] Casata had in fact suffered damage by reason of public announcement of Waka Kotahi's proposal for the Project. The commencement of the shadow period meant that its property rights were effectively suspended: Casata was not able to invest in the development of its properties, nor could it sell the properties and reinvest in other land.

[57] Mr Hodder submitted that the requirement for full compensation means, in accordance with this Court's decision in *Drower v Minister of Works and Development*, that the owner must be paid "the complete equivalent of that which has been taken away from him" — the entitlement "must not be whittled down in any respect".[43] And, as this Court said in *Ace Developments Ltd v Attorney-General*, a

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41 See, for example, *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [51], n 72 per Winkelmann CJ and [209] per O'Regan and Arnold JJ.

42 Public Works Act, s 60(1)(c).

43 *Drower v Minister of Works and Development* [1984] 1 NZLR 26 (CA) at 29 per Woodhouse P

claimant "has the right to be put, so far as money can do it, in the same position as if their land had not been taken".[44] Mr Hodder encapsulated the required approach by referring to the "principle of equivalence", a phrase used by Lord Nicholls in delivering the judgment of the Privy Council in *Shun Fung*.[45]

[58] Mr Hodder submitted that the reinvestment model adopted by Mr Cameron was more appropriate than that of Mr Apps, as Casata's property rights were effectively suspended by the commencement of the shadow period. Public notification of a public work which will require the acquisition of land casts an immediate shadow on dealings with the relevant land, as no current or future owner of that land can reliably utilise it for its highest and best use. As a consequence, Casata's claim necessarily involved a hypothetical counterfactual scenario that it had retained the options to either sell or redevelop the properties. The purpose of the counterfactual was to objectively identify the scope of loss.

The sufficiency of evidence proving the loss claimed

[59] Mr Hodder submitted that it was not necessary for Casata to produce evidence that it had a preference for sale or reinvestment, or to speculate whether either preference would have eventuated. It was not appropriate to engage in a *factual* analysis, as the LVT had done: what was required was a *counterfactual* analysis. The shadow immediately prevented Casata from being able to exercise its property rights in normal market conditions, as the market incentive for purchasers and developers was gone. The High Court's focus on "actual loss" and proof of "what *would* have happened" failed to recognise the factual threat of acquisition meant that all analyses were required to engage with a hypothetical counterfactual.

[60] The counterfactual requires assuming away the constraints on Casata's ability to exercise of its options during the shadow period, and this is the relevant loss. Casata had listed No 7 for sale in 2014 and had general intentions to sell and redevelop No 27. The shadow immediately prevented Casata from being able to exercise its property rights in normal market conditions.

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and Roper J.

44 *Ace Developments Ltd v Attorney-General*, above n 38, at [65] (footnote omitted).

45 *Shun Fung Ironworks Ltd,* above n 36, at 125.

Sections 60(1)(c) and 66

[61] Mr Hodder noted that the existence of a shadow period has been recognised by the High Court, in accordance with the judgment of the Privy Council in *Shun Fung*,[46] and this Court's approach in *Cockburn*.[47]

[62] With respect to s 60(1)(c), Mr Hodder argued it is not limited to the market value of the land. "[L]and" includes any estate or interest in land,[48] reflecting the bundle of rights involved in land ownership. Mr Hodder submitted Casata's rights in land did suffer damage in terms of s 60(1)(c) by reason of the commencement and implementation of the statutory processes.

[63] Section 66(1) provides for compensation for "any disturbance to [the owner's] land" taken or acquired under the Act. Mr Hodder submitted this type of loss was held recoverable in *Shun Fung* so long as it was reasonable and not too remote.[49] The claim upheld in that case was for lost rental during a shadow period when pre-acquisition negotiations with the Crown rendered the land untenantable. Casata said that s 66 should be liberally and purposively interpreted to give effect to the Act's core purpose of full and fair compensation where a landowner's rights are disturbed by the Act's processes.

Analysis

[64] We start by setting out the relevant provisions of the Act, beginning with s 60(1) which provides as follows:[50]

> **60 Basic entitlement to compensation**
>
> (1) Where under this Act any land—
>
> (a) is acquired or taken for any public work; or
>
> (b) suffers any injurious affection resulting from the acquisition or taking of any other land of the owner for any public work; or

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46 *Shun Fung Ironworks Ltd,* above n 36, at 125.
47 *Cockburn*, above n 36, at 471 per Richardson J.
48 Public Works Act, s 2 definition of "land".
49 *Shun Fung Ironworks Ltd*, above n 36, at 126 and 137–138.
50 Emphasis added.

(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.

…

[65] Section 62 deals with the assessment of the amount of compensation payable under the Act. The section relevantly provides:

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:

…

(2) In this section, the term **specified date** means—

(a) in the case of any claim in respect of land of the claimant which has been taken pursuant to section 26, the date on which the land became vested in the Crown or in the local authority, as the case may be:

…

[66] As discussed, Mr Hodder also argued that compensation for the effect of the shadow was within the ambit of s 66 which provides for disturbance payments. Section 66 relevantly provides:

66 Disturbance payments

(1) Subject to subsection (2), the owner of any land taken or acquired under this Act for a public work shall be entitled to recover compensation for any disturbance to his land and in particular to recover, where appropriate,—

(a) all reasonable costs incurred by him in moving from the land taken or acquired to other land acquired by him in substitution for the land taken or acquired, including—

…

(ii) the reasonable valuation and legal fees or costs incurred in respect of the land taken or acquired:

(iii) the reasonable valuation and legal fees or costs incurred in respect of the land acquired in substitution, but not exceeding the reasonable valuation and legal fees or costs which would be incurred in respect of land with a market value equal to the land taken or acquired:

(iv) the actual and reasonable costs incurred by him in transporting his goods and chattels and those of his family from the land taken or acquired to the land acquired in substitution, but not exceeding the reasonable costs of such transport by road over a distance of 80 kilometres, or such greater distance as is necessary to reach the nearest land that reasonably could have been acquired in substitution:

(b) an allowance for any improvements not readily removable from the land taken or acquired which are of particular use to a disabled owner or any disabled member of an owner's family and which are not reflected in the market value of the land.

…

[67] We consider the outcome of the appeal turns on whether the loss Casata alleges is compensable under the Act. First, we assess the claim for "full compensation" under s 60(1)(c). We then assess the claim for "compensation for any disturbance to [the owner's land]" under s 66. For the reasons we give, we dismiss the appeal.

Section 60(1)(c)

[68] Mr Hodder's argument that Casata's rights in land suffered "damage" in terms of s 60(1)(c) was based on the effect of the shadow and the statutory process to publicise and implement the Project. Casata identifies the announcement date, 13 February 2014, as the commencement of the shadow period and the date its rights in land began to suffer "damage".

[69] We consider there are two defects with this argument:

(a) The statutory entitlement to compensation in s 60(1)(c) requires the identification of a relevant statutory power, the exercise of which has given rise to damage. It is only where the exercise of such a power has caused land to suffer damage that compensation is payable for that damage.

(b) In our view, the natural and ordinary meaning of the phrase "any land … [s]uffers any damage" as it appears in s 60(1)(c) requires physical interference with the land: that is, something that affects the land itself.

The statutory entitlement to compensation

[70] Mr Hodder did not point to the exercise of a particular power in the Act on the date the shadow period commenced.[51] Nor did he refer to the exercise of a power under any other Act which marked the commencement of the shadow period.[52] The announcement of a project that will require the acquisition of land may well result in a shadow effect of the kind recognised in *Shun Fung*. But such an announcement will not of itself constitute the exercise of a statutory power whether under the

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51 Public Works Act, s 60(1)(c)(i).
52 Section 60(1)(c)(i).

Public Works Act or any other Act. In fact, it is clear that when the Project was announced the land acquisition requirements had not been the subject of any final decision.

[71] That is not to say that the announcement of a project could never affect the desirability of a property for potential purchasers, or development plans which might have been under consideration before the announcement of a project. But, for s 60(1)(c) to apply, it is necessary to point to the exercise of a relevant statutory power: it is only where the exercise of such a power has caused land to suffer damage that compensation is payable for the damage. Statutory powers that might result in such damage include s 27, which provides for circumstances under which natural material on land may be acquired or taken for public work; and s 173, which permits land to be temporarily occupied and used for the purpose of constructing, reconstructing, or repairing a railway.[53]

[72] The decision of the Privy Council in *Shun Fung* does not lead to a different conclusion.[54] In that case, a compensation claim was made by a company for losses it had incurred between notification of the possibility of resumption, and the date of resumption itself. Although Lord Nicholls concluded such compensation could be recovered,[55] we consider this finding is limited to the facts of that case and the Crown Lands Resumption Ordinance (HK) (the Ordinance).[56]

[73] The claimant had operated a "mini-mill" business in Hong Kong. In November 1981, the government advised the company claimant that it intended to develop the area in which the business operated and that the land would be resumed by the government under the Ordinance. It was not until October 1985 that the Governor made an order that the claimant's land was required for a public purpose, fixing 30 July 1986 as the date of resumption. The claimant was unable to obtain another suitable site prior to that date and consequently closed down its business. The claimant's company lost not only the land and buildings but also its plant,

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53 Peter Salmon *The Compulsory Acquisition of Land in New Zealand* (Butterworths, Wellington, 1982) at [16.3]. Salmon also listed ss 126 and 141, but we note those have since been repealed by s 116(1) of the Government Roading Powers Act 1989.

54 *Shun Fung Ironworks Ltd*, above n 36.

55 At 137–139.

56 Crown Lands Resumption Ordinance (Cap 124) (HK) [the Ordinance].

machinery, business and the profits which the business could have been expected to produce.

[74] Mr Hodder relied on a number of statements of principle in the judgment of Lord Nicholls, including his discussion of the purpose of the provisions providing for compensation in both Hong Kong and the United Kingdom.[57] The purpose of such provisions, Lord Nicholls said, was to provide fair compensation for a claimant whose land has been compulsorily taken, sometimes described as the "principle of equivalence".[58] Under this principle, a claimant landowner is entitled to be compensated "fairly and fully" for loss attributable to the taking of the land.[59]

[75] Mr Hodder placed particular reliance on what was said about a claim advanced for the loss of profits during the "shadow period". Lord Nicholls referred to the "paralysing effect on the claimant's operations" after it received the letter from the government in November 1981.[60] The possibility that the claimant's site might be resumed at some indefinite date became generally known and customers became unwilling to enter into long-term forward contracts. The company itself had reasonably decided in June 1982 that it would not enter into contracts exceeding six months' duration. Between November 1981 to January 1987, while operating as well as it could under the threat of resumption, the company suffered financially to the extent of over $18 million, that being the difference between the losses the claimant made in fact and the profits or reduced losses it would have made in that period but for the threat of resumption.[61]

[76] The Privy Council held that the proper approach was to recognise that losses incurred in anticipation of resumption and because of its threat were to be regarded as losses caused by the resumption as much as losses arising after resumption took place. Lord Nicholls wrote:[62]

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57 At 124–125, citing the Ordinance, Acquisition of Land (Assessment of Compensation) Act 1919 (UK), Land Compensation Act 1961 (UK), and Compulsory Purchase Act 1965 (UK).
58 *Shun Fung Ironworks Ltd*, above n 36, at 125.
59 At 125.
60 At 135.
61 At 135.
62 At 138.

> A loss sustained post-scheme and pre-resumption will not fail for lack of causal connection by reason only that the loss arose before resumption, provided it arose in anticipation of resumption and because of the threat which resumption presented. In the terms of the Resumption Ordinance, a pre-resumption loss which satisfies these criteria is as much "due to" the resumption of the land as a post-resumption loss.

And later:[63]

> … [A]t the outset of a shadow period, there may be no certainty that resumption will take place. As time passes, and the scheme proceeds, the likelihood of resumption increases, until the Governor makes a resumption order. At that stage, but not before, there is a legal commitment. Their Lordships can see no sound reason for attempting to draw a spurious line somewhere along this penumbra of gradually darkening shadow.

[77] We accept Mr Hodder's basic proposition that the shadow period following the announcement of a project that will be advanced by means of compulsory acquisition under the Act will have an effect on a landowner's ability to deal with the land likely to be acquired for the purposes of the work. During this shadow period principles such as those discussed in *Shun Fung* are likely to give appropriate guidance to the assessment of compensation properly payable under the Act.[64]

[78] However, the relevant aspect of the claim in *Shun Fung* turned on whether a loss occurring *before* resumption could be regarded, for compensation purposes, as a loss occurring *as a result of* the resumption. This was because of the specific wording of the provision under which the claim was made — s 10(2)(d) of the Ordinance:[65]

> **10. Determination by Tribunal of compensation payable by Crown**
>
> (1) The Tribunal shall determine the amount of compensation (if any) payable in respect of a claim submitted to it under section 6(3) or 8(2) on the basis of *the loss or damage suffered by the claimant* due to the resumption of the land specified in the claim.
>
> (2) The Tribunal shall determine the compensation (if any) payable under subsection (1) on the basis of—
>
> …
>
> (d) the amount of loss or damage to a business conducted by a claimant at the date of resumption on the land resumed or in any building erected thereon, due to the removal of the

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63 At 138.
64 At 137–139.
65 Emphasis added.

> business from that land or building *as a result of the resumption*;
>
> …

The loss claimed was "loss or damage *suffered* [as a result of the resumption] *by the claimant*" to be determined on the basis of "the amount of loss or damage *to a business*". There are thus two key distinctions between this provision and the New Zealand equivalent.

[79] First, the Ordinance provides for compensation for loss to the claimant which is due to the resumption of land — distinctly broader from that which is compensable under s 60(1)(c) of the New Zealand Act, which must be damage *to land* caused by the exercise of a relevant statutory power.

[80] Second, compensation was claimed under s 10(2)(d) of the Ordinance — to be determined on the basis of the amount of loss or damage to a business. In New Zealand, a claim for compensation for business loss would be made under s 68 of the Act. Such claims may include claims for business loss resulting from relocation of the business made necessary by the compulsory acquisition, or loss of the goodwill of any such business.[66] We see no reason why, in an appropriate case, a claim could not encompass actual business losses sustained as a result of the announcement of a proposed public work or at least sustained following service of a notice of intention to acquire. There would, of course, need to be proper evidence establishing what such losses were. But this is not such a case.

[81] The difficulty that Casata faces here is that its claim has been made under a provision directed to compensating damage to land and not business loss. In such a case, for reasons we will explain below, compensation is limited (with specified exceptions) to the value of the land, which includes its value as a commodity which might have been developed and/or sold but for the announcement of the Project, because any effect of the prospect of the public work is put to one side for the purposes of the valuation exercise.[67]

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66 Public Works Act, s 68(1).

67 Public Works Act, s 62; Salmon, above n 53, at [13.4]; and Kenneth Palmer "Compulsory Acquisition and Compensation" in Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed,

Damage to land

[82] We consider it is clear from the drafting of s 60(1) that its successive paragraphs contemplate compensation for particular and different kinds of loss. Paragraph (a) refers to *land* being acquired or taken; para (b) relates to injurious affection *to land* resulting from the acquisition or taking of any other land of the owner; and para (c) refers to *damage to land* from the exercise of statutory powers.

[83] When s 62(1) commences with reference to compensation payable "whether for land taken, land injuriously affected, or otherwise," we consider it must be read as referring to the different kinds of entitlement to compensation set out in s 60(1). The compensation will be for the value of land acquired, or for injurious effects on other land retained by the owner, or for physical damage to land arising from the exercise of statutory powers. The last of these comes within s 62's reference to "otherwise". We do not consider the word creates a free-ranging basis for compensation: it is about the assessment of the amount of compensation for entitlements to compensation already set out in s 60(1)(c).

[84] The effects of the shadow relied on as causing damage to Casata's "rights in land" are essentially inhibitions on what the owner may do with the land to realise its potential, whether by sale or development. Even if the announcement could somehow be said to arise from the exercise of a statutory power, we do not see how its effect could be said to amount to damage to land as opposed to damage to the owner or the owner's business.

[85] We reiterate our view that the natural and ordinary meaning of "any damage" in the phrase "any land … [s]uffers any damage" is physical damage or something that affects the land itself. We are not persuaded that, in this context, it extends to the kinds of inhibition which Casata contends affected its rights to sell and reinvest the proceeds and/or retain and develop the land.

Thomson Reuters, Wellington, 2017) [15] at [15.6.03], citing *Cedars Rapids Manufacturing and Power Co v Lacote* [1914] AC 569 (PC) at 576 per Lord Dunedin; *Birmingham Corp v West Midland Baptist (Trust) Assoc (Inc)* [1970] AC 874 (HL) at 893 per Lord Reid; and *Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302 (PC) at 313.

[86] "[L]and", as defined in the Act, includes "any estate or interest in land".[68] Mr Hodder submitted, relying on a 1991 decision of the LVT, that this definition included "notional aspects of land other than the physical land itself".[69] However, we note that this statement was made by the LVT in the context of assessing a claim under s 63 for compensation in relation to a reduction in value of the claimant's land arising from a "change of land drainage and hazards".[70] The LVT was concerned with the meaning of "injurious affection to land" in the context of a claim based on the adverse effects of the reconstruction of part of a road on land adjacent to the claimant's property. Section 63 provides compensation for injurious affection where no land is taken and the owner continues in occupation. The rationale of the section is not appropriately applied in cases where the land is taken and any effects on value of the prospect of the public work are required to be set to one side.[71]

[87] Our view that s 60(1)(c) requires a physical interference with land is consistent with what was held in *Superior Lands Ltd v Wellington City Corp*.[72] In that case, Superior Lands Ltd owned an extensive area of land in Johnsonville which it sought to subdivide in accordance with its residential zoning. In 1968, it submitted a scheme plan to the Wellington City Council, which refused its approval on the basis that the land was part of an area that it wished to designate for the purposes of a municipal rubbish tip. The Council had initiated the process of trying to designate the land for that purpose, but eventually abandoned the proposal. Consent to the subdivision plan was obtained in 1971 from the Town and Country Planning Appeal Board. Superior Lands then lodged a claim for compensation for damage suffered by it as a consequence of the land lying idle due to the Council's refusal of consent. Beattie J, sitting in the then Supreme Court, determined that compensation was not payable under s 166 of the Municipal Corporations Act 1954,[73] which provided:[74]

> 166. Every person having any estate or interest in any lands taken under the authority of this Act for any public work, or injuriously affected thereby, or suffering any damage from the exercise of any of the powers hereby given,

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68 Public Works Act, s 2 definition of "land".
69 *Eckhold v Department of Lands* [1991] NZAR 202 (LVT) at 206.
70 At 203.
71 See Public Works Act, s 62(1), discussed below.
72 *Superior Lands Ltd v Wellington City Corp* [1974] 2 NZLR 251 (CA) [*Superior Lands* (CA)].
73 *Superior Lands Ltd v Wellington City Corp* [1974] 1 NZLR 240 (SC).
74 Emphasis omitted.

> shall be entitled to full compensation … determined in the manner provided by the Public Works Act 1928.

[88] Superior Lands appealed. After reviewing various authorities, this Court held that the damage referred to in the section must result from an act of physical interference.[75] Writing for the Court, Richmond J said:[76]

> Although s 166 provides for compensation not only for the taking of land for a public work but also for land injuriously affected by a public work and for damage done in the exercise of the powers given by the Act it is in our opinion clear that *both* the two latter cases refer only to injurious affection or damage caused by "a *physical* interference with some right, public or private, which the owners [or occupiers] of property are by law entitled to make use of in connection with such property".

[89] This approach was based on the long line of English authorities discussed by this Court in *Strongman Electric Supply Co Ltd v Thames Valley Electric Power Board* and said to have been consistently applied in New Zealand under the Act.[77] To similar effect are the observations of Lord Wilberforce in *Argyle Motors (Birkenhead) Ltd v Birkenhead Corp*, discussing the entitlement to compensation for land taken or injuriously affected, set out in s 68 of the Land Clauses Consolidation Act 1845 (UK):[78]

> … [B]y a series of judicial observations of high authority it is well established that the only compensation which can be obtained under this section is "in respect of … lands," i.e., in respect of some loss of value of land, or … in respect of some *damage to lands*, and that compensation cannot be obtained for any loss which is personal to the owner, or which is related to some particular user of the land.

[90] This is consistent with this Court's approach to s 42 of the Public Works Act 1928 in *Strongman Electric Supply* and *Superior Lands*.[79] Compensation relates to

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75 *Superior Lands* (CA), above n 72, at 257, citing *Strongman Electric Supply Co Ltd v Thames Valley Electric Power Board* [1964] NZLR 592 (CA); and *Wood v Taranaki Electric-Power Board* [1927] NZLR 392 (SC).

76 *Superior Lands* (CA), above n 72, at 257, citing *Halsbury's Laws of England* (3rd ed, 1955) vol 10 Compulsory Acquisition at 156–158; and *Strongman Electric Supply Co Ltd*, above n 75, at 600 (emphasis added).

77 *Strongman Electric Supply Co Ltd*, above n 75, at 600–601.

78 *Argyle Motors (Birkenhead) Ltd v Birkenhead Corp* [1975] AC 99 (HL) at 129 (emphasis added).

79 Although the decision in *Superior Lands* (CA), above n 81, was concerned with s 166 of the Town and Country Planning Act 1977, Richmond J observed that the language of that provision was substantially the same as the equivalent provision (s 42) of the Public Works Act 1928. Similarly, the decision in *Strongman Electric Supply Co Ltd*, above n 75, was concerned with s 94 of the Electric Power Boards Act 1925, the terms of which are almost identical to s 42 of the Public Works Act 1928.

the land, not the owner or the owner's business model.[80] This is made plain in the 1981 Act's expression of the "[b]asic entitlement to compensation" in s 60, arising where *land* is acquired or taken, suffers any injurious affection, or suffers any damage.

[91] There is no suggestion in the parliamentary materials that the 1981 Act was intended to change the long-standing approach that, where there is to be compensation for damage, the damage must be physical interference to the land.

[92] In his book, *The Compulsory Acquisition of Land in New Zealand*, Peter Salmon supported the proposition that s 60(1)(c) requires physical damage to or interference with the land itself. In addressing the third class of loss entitling an owner to compensation under s 60(2), he referred to *Superior Lands* and *Strongman Electric Supply* as authoritative statements of the law, applicable under the 1981 Act:[81]

> [16.2] Compensation for damage to land is available only if caused by a *physical interference* with some right public or private which the owners of property are lawfully entitled to make use of in connection with such property. The argument that arose under previous legislation as to whether the New Zealand section contemplated that compensation might be awarded for personal wrongs can no longer be sustained because the wording of s 60 clearly relates the damage *to the land*.

[93] The reference in that passage to the possibility that compensation might be awarded for personal wrongs under the previous legislation reflected observations about s 42 of the 1928 Act in *Strongman Electric Supply*, which noted the drafting of the 1928 Act and its predecessors left room for the possible award of compensation for personal wrongs.[82] However, the Court noted that possibility had been rejected and the rule limiting compensable damage to physical interference with an owner's right in respect of property, as opposed to personal injury, consistently applied.[83]

[94] In the above extract, Salmon was clearly intending to contrast the drafting of s 60(1) of the 1981 Act with s 42(1) of the 1928 Act. The marginal note to s 42 of the

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80 *Strongman Electric Supply Co Ltd,* above n 75, at 600; and *Superior Lands* (CA), above n 72, at 257.

81 Salmon, above n 53, citing *Superior Lands* (CA), above n 72; and *Strongman Electric Supply Co Ltd,* above n 75, at 258 (footnotes omitted and emphasis added).

82 *Strongman Electric Supply Co Ltd,* above n 75, at 601.

83 At 602, citing *Wood v Taranaki Electric-Power Board* [1927] NZLR 392 (SC) at 405; and *Tawa Central Ltd v Minister of Public Works* [1934] NZLR 841 (SC) at 860 per Reed J.

1928 Act stated "[a]ll persons suffering damage entitled to compensation". Subsection (1) provided:

> 42. (1) Every person having any estate or interest in any lands taken under this Act for any public works, or injuriously affected thereby, or suffering any damage from the exercise of any of the powers hereby given, shall be entitled to full compensation for the same from the Minister or local authority…

In contrast, the placement of the word "land" in the chapeau of s 60(1) of the 1981 Act clearly constrains damage for the purposes of subs (1)(c) to that suffered by the land.

[95] We consider that there was no such damage in the present case. This is not, as Mr Hodder contended in reliance on the observations of Woodhouse P and Roper J in *Drower*, to "whittle… down" the right to full compensation,[84] or to deny Casata the complete equivalent of that which has been taken away from it. The right to full compensation must fall within the parameters of the statutory entitlement.

[96] Mr Hodder sought to rely on this Court's decision in *Cockburn* to suggest a different approach may be appropriate.[85] In *Cockburn*, the issue was whether a landowner was entitled to compensation for a depreciation in the value of land due to the loss of developmental potential between the date of notice taking the land and the later withdrawal of that notice. The landowner would have subdivided and sold his land but for the fact that the Minister invoked rights of acquisition under the 1928 Act and later decided not to proceed with acquisition — however, a proposed change to the relevant district scheme meant that the land could no longer be subdivided.

[97] The Minister had exercised express statutory powers in giving a notice of intention to take the land, confirming that intention, and eventually withdrawing the notice.[86] Richardson J framed the relevant question as being whether any proved depreciation in the value of the land resulting from the exercise of one or more of those powers was compensable:[87]

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84 *Drower v Minister of Works and Development* [1984] 1 NZLR 26 (CA), at 29 per Woodhouse P and Roper J.

85 *Cockburn*, above n 36.

86 At 474 per McMullin J.

87 At 468 per Richardson J.

> … [I]n short whether in those circumstances in the words of s 42 the appellant is a person having an estate or interest in any lands suffering any damage from that exercise of those powers. That question cannot be determined in a vacuum. It must be considered in its statutory context and, materially for present purposes, in relation to the powers conferred on the taking authority to change its mind and extricate itself from an acquisition of land which it had set in train.

[98] Richardson and McMullin JJ held that the diminution in the value of the land resulting from the loss of subdivisional potential was damage for which the Minister was obliged to pay compensation under s 42.[88] It is clear that the exercise of the Minister's statutory power to end the process without completing the acquisition of the land was seen as justifying a different approach to compensation than that taken in *Superior Lands*; that case and others applying the rule that there must be physical interference with the land were distinguished without any suggestion that they were wrong.[89] As Richardson J said:[90]

> The… rule is not immutable. It must yield to the statutory context in the same way as this Court in the *Strongman* case held that its application was excluded under the provisions of the Electric Power Boards Act 1925. Those cases where a public authority has commenced to take land and then abandoned the exercise or has taken land and later withdrawn from the taking are … in a class of their own and are part and parcel of the land acquisition regime. For reasons earlier discussed I consider it implicit in the scheme of the legislation that the corollary to the statutory right of the public authority to disengage itself retrospectively from the taking of land on which it has embarked is its obligation to pay compensation for damage in respect of the diminution in the value of the land concerned sustained by the owner of the land which is occasioned by its interference with his rights in relation to the land.

[99] While Mr Hodder emphasised the statement that the rule requiring physical interference was not immutable, we consider the circumstances of this case are very different from those discussed in *Cockburn*. And while the majority applied s 42 of the 1928 Act, that was on the basis that the exercise of the Minister's powers had prevented the owner from utilising its subdivision potential and had caused a diminution in the value of the land. This was seen as falling within the right to compensation for damage from the exercise of the Minister's statutory powers in circumstances where the land was not acquired and no other compensation would be

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88 At 472 per Richardson J and 477 per McMullin J. Greig J delivered a dissenting judgment.
89 At 471–472 per Richardson J and 476–477 per McMullin J.
90 At 472 per Richardson J.

payable.[91] In the present case, the land has in fact been acquired and any reduction in value caused by the exercise of the relevant statutory powers should not have affected the assessment of compensation.[92]

[100] We note that in *Luoni v Minister of Works and Development*, this Court followed *Superior Lands*, confirming that the damage referred to in s 42(1) of the 1928 Act was confined to damage resulting from physical interference.[93] In that case, the Court held that *Cockburn* could not be relied on to support the claimant having a right to compensation under the 1981 Act.[94]

[101] Mr Hodder also sought to rely on *Shun Fung*, specifically on the "principle of equivalence".[95] However, as noted above, *Shun Fung* can be distinguished on the basis of the wording of the entitling provision — s 10(1) of the Ordinance (reproduced above at [78]) provided for claims made on the basis of "loss or damage *suffered by the claimant* due to the resumption of land".

[102] This brings us to a further and related difficulty with the argument advanced by Casata. Even if Casata's basic proposition, that the announcement of the Project damaged the land by impairing Casata's property rights, is regarded as sound, it is difficult to see how the damage could be compensable other than in relation to the value of the land. The land has not been damaged physically, so the effect of the Project's announcement must be an economic one. But it would still have to be brought within the right to compensation set out in s 60(1)(c). Section 62(1) clearly provides that the assessment of compensation must not be affected where the value of the land taken for any public work has been reduced by the prospect of the work.[96]

[103] Applied to the circumstances of cases such as the present, this means that adverse effects on land value caused by the announcement of a Project must be set to one side for the purposes of valuing the land to be acquired. Importantly, the section

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91 At 470 per Richardson J and 477 per McMullin J.
92 Public Works Act, s 62(1)(c).
93 *Luoni v Minister of Works and Development* [1989] 1 NZLR 62 (CA) at 64.
94 At 64–65, citing *Cockburn*, above n 36.
95 *Shun Fung*, above n 36, at 125.
96 Public Works Act, s 62(1)(c). Under s 62(1)(c) increases in value due to the prospect of the public work are also not to be taken into account.

demonstrates legislative acceptance of the fact that shadow effects will arise, and requires them not to be brought to account in the valuation exercise. This is, of course, to the benefit of the party whose land is to be taken. But this limited recognition of the shadow effect gives no basis for postulating a more expansive right to compensation than is to be inferred from the plain meaning of the statutory provisions establishing entitlements to compensation. Indeed, we think the reverse is true. Reading s 60(1)(c) together with s 62(1)(c) leads to the conclusion that economic effects of the shadow are those that relate to the value of the land. The potential of the land for development remains as it was before the announcement, and must reflect what the notional willing buyer would pay for the land if sold on the open market, in accordance with the rule in s 62(1)(b). Development potential is a recognised component of the value of land.[97]

[104] These considerations bring into focus the difficulty that Casata has faced in the LVT and in the High Court of quantifying the loss that it claims was caused by the shadow. If the loss did not relate to land value, it is necessary to postulate some sort of business loss that was in fact sustained and demonstrate that by reference to something concrete. Neither the LVT nor the High Court were persuaded that had been done.[98] This Court, on an appeal under s 18A of the Land Valuation Proceedings Act, would be slow to reach a different conclusion on what is essentially a question of fact unless error of law was demonstrated in arriving at the factual conclusion.

[105] If what was lost after announcement of the Project was simply the opportunity to develop the land, or sell it and reinvest, we do not understand why these opportunities would not be reflected in the value of the land, preserved by the effect of s 62(1)(c).

[106] For all these reasons, we are satisfied that Casata's claim based on s 60(1)(c) of the Act was rightly rejected by the LVT and the High Court.

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97 *Re Whareroa 2E Block, Maori Trustee v Ministry of Works* [1959] NZLR 7 (PC) at 10 and 13–14, applied in *Wellington City Corp v Berger Paints NZ Ltd* [1975] 1 NZLR 184 (CA).

98 LVT decision, above n 1, at [58]–[64]; and High Court judgment, above n 3, at [106]–[108].

Section 66

[107] Casata advances an alternative claim for compensation based on s 66 of the Act. Section 66 is set out above.[99]

[108] We have already summarised the High Court's reasons for rejecting Casata's argument.[100] On appeal, Casata repeats its argument that it has a valid claim for disturbance based on the shadow effect of the use of the compulsory acquisition powers in the Act preventing it utilising the capital invested in the land. It relies on *Shun Fung*, noting that a "disturbance loss" was held to be recoverable subject to causal connection, remoteness and reasonableness.[101]

[109] Counsel submitted that the Judge had wrongly characterised its claim as "intertwined with the value of the land".[102] Rather, the claim was for disturbance to the utilisation of its property rights, the loss of business opportunity, and not for loss of land value. Section 66 should be liberally and purposively interpreted to give effect to the Act's core purpose of fully and fairly compensating a landowner whose rights are disturbed by the compulsory acquisition procedures. *Shun Fung*'s approach to "disturbance loss" is settled and applicable.

[110] As this Court explained in *Ace Developments*, decided before the enactment of s 66, disturbance payments were often included in compensation paid in cases where businesses had been required to move as a result of land being taken.[103] Section 66 of the Act was the first specific statutory expression of that element of compensation. However, it was clear from the legislative history of the Act that this section was intended to state the existing law and provide clarity by giving examples of available disturbance payments.[104] Writing for the Court, French J observed that market value

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99 Above at [66].

100 Above at [59]–[54].

101 *Shun Fung*, above n 36, at 125–126.

102 High Court judgment, above n 3, at [111].

103 *Ace Developments Ltd*, above n 38, at [33], citing *Berger Paints NZ Ltd v Wellington City Corp* [1973] 2 NZLR 739 (SC).

104 At [68], citing New Zealand Public Works Act Review Committee *Report of the Public Works Act Review Committee* (Ministry of Works and Development, Wellington, 1977) at 5. As the case notes, this report was recognised in the parliamentary debate as being the basis of the legislation: (12 December 1980) 436 NZPD 5921. See also Salmon, above n 53, at [14.2]–[14.3].

is the primary compensation that landowners are paid for the loss of their land.[105] She continued:[106]

> The concept of market value deems land to be fungible, any special attributes for a given use being already built into the market value. The underlying premise is that having received the market value of the land, the landowner can use that money to buy equivalent land somewhere else if they wish.

[111] For reasons we have already addressed in dealing with Casata's claim for compensation under s 60(1)(c), we consider the loss alleged to be caused by the shadow essentially goes to value. As such, we do not consider it can fall within s 66, and we do not consider that the claim advanced is one for disturbance to land.

[112] The kinds of disturbance payments which are set out in s 66(1) reinforce us in that view. It is clear that Casata's claim is not a claim for reasonable costs incurred in moving from the land taken,[107] and nor does it relate to improvements not readily removeable from the land.[108]

[113] Casata's reliance on *Shun Fung* in this context is misplaced. The provision in the Ordinance under which the claim was made was drafted to preserve the express entitlement to compensation for damage to a business.[109] As stated above, s 68 of the 1981 Act makes direct provision for business losses, which are distinct from disturbance costs.[110]

[114] We are satisfied that the claim Casata advances cannot be brought within s 66. This argument too must be rejected.

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105 At [71].
106 At [71].
107 Public Works Act, s 66(1)(a)(ii).
108 Section 66(1)(b).
109 *Shun Fung*, above n 36, at 124.
110 Public Works Act, s 68.

Result

[115] The appeal is dismissed.

[116] The appellant must pay the respondent costs for a complex appeal on a band A basis together with usual disbursements. We do not award costs in respect of second counsel.

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