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## Land Court reviews compensation for ‘*material change in circumstances*’

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### Nothdurft v QGC [2017] QLC 41

The Land Court of Queensland has handed down its first review of compensation on the basis of material change in circumstances under the petroleum legislation.

### Introduction

A compensation dispute between landholders and a major coal seam gas producer over compensation has been determined by the Land Court.

In a decision handed down 18 August 2017, the Land Court has considered the provisions of the petroleum legislation regarding a review of compensation where the landholders contended there had been a material change in circumstances following the entry into a conduct and compensation agreement (CCA).

*Nothdurft & Anor v QGC Pty Limited & Ors*<sup>1</sup> provides helpful insight into how the Land Court will apply the material change threshold to compensation reviews.

### Background

Allan and Narelle Nothdurft own a property south of Chinchilla which they use for cropping, grazing and conducting a manure spreading business. The property is overlaid by two petroleum leases, held by QGC on behalf of the Queensland Curtis LNG Project participants (now operated by Shell Australia).

In 2005 and 2006, QGC and the landholders entered into several CCAs in respect of QGC’s activities on the property known as ‘Bellara’. The CCAs allowed the construction and operation of seven coal seam gas wells, among other things.

In addition to the activities on the landholders’ property, QGC operates two Field Compressor Stations, a Processing Plant and a Water Treatment Plant in the vicinity of the property. Within a 2.5 kilometre radius of the landholders’ property, there are also 36 gas wells, 17 high point vents and three permanent locations for flaring.<sup>2</sup>

The landholders and QGC were in dispute over

whether there had been a material change in circumstances since the CCAs were agreed, which would entitle them to additional compensation. QGC acknowledged that there had been some change in circumstances, but argued that they were not material so as to affect its compensation liability.

The landholders brought an application in the Land Court for a review of compensation pursuant to s 537C of the Petroleum and Gas (Production and Safety) Act 2004 (**P&G Act**), which empowers the Land Court to review the compensation payable under a CCA if there has been a material change in circumstances. Section 537C has been repealed and replaced with s 101 of the Mineral and Energy Resources (Common Provisions) Act 2004 (**MERCP Act**), which is drafted in materially the same terms.

The matter was heard over four days, and the key questions for consideration by the Land Court were:

1. When and to what extent can the Court review agreed compensation?
2. Has there been a material change in circumstances?
3. Can or should the Court amend the compensation agreed by the parties?



## The Land Court's powers to review compensation

President Kingham examined the powers of the Land Court to review compensation for activities authorised by a petroleum lease. She considered s 537C of the P&G Act (now s 101 MERCP Act), which provides:

### **537C Land Court review of compensation**

*(1) This section applies if—*

- (a) the compensation liability or future compensation liability of a petroleum authority holder to an eligible claimant has been agreed to under a conduct and compensation agreement or decided by the Land Court (the original compensation); and*
- (b) there has been a material change in circumstances (the change) since the agreement or decision.*

*(2) The eligible claimant or the holder may apply to the Land Court for it to review the original compensation.*

*(3) In carrying out the review, the Land Court may review the original compensation only to the extent it is affected by the change.*

*(4) If the Land Court considers the original compensation is not affected by the change, it must not carry out or continue with the review.*

*(5) The Land Court may, after carrying out the review, decide to confirm the original compensation or amend it in a way the court considers appropriate.*

*(6) If the decision is to amend the compensation, the original compensation as amended under the decision is, for this Act, taken to be the original compensation.*

President Kingham contended that the construction of s 537C raised two questions:

1. What is the meaning of the phrase 'a material change in circumstances'?
2. Assuming there is a material change in circumstances, what is the scope of the review? <sup>3</sup>

On the first question, President Kingham concluded that, in determining whether there has been a material change in circumstances, the Land Court must first be satisfied that the circumstances had, in fact, changed, and secondly, that the change is material to the agreement about compensation.

When considering whether a change is 'material' or not, the Court adopted the approach taken in an earlier decision of the Land Appeal Court in *ERO Georgetown Gold Operations Pty Ltd v Henry*<sup>4</sup>, which said this about the materiality threshold in the context of a mining lease:

*'It is enough to note that the condition is satisfied when there is a material difference between the circumstances for the mining lease when the compensation was originally agreed or determined, and the circumstances for the mining lease at the date when the change is said to have occurred, the change relating to circumstances relevant to the agreement about or determination of compensation.'*

President Kingham expanded on this further, by stating:

*'The focus on effect rather than activity means not every change in circumstance that might be relevant to compensation will require review of the original compensation. The requirement of materiality qualifies the degree of relevance. Something is material*



*if it is of significance or importance. It must be of moment or of significance, not merely trivial or inconsequential. If reliance is placed on a change in amenity, the impacts must be more than minimal.'*

On the question of scope, President Kingham considered the extent to which the Land Court could review the original compensation. The landholders were seeking a 'global' review of the compensation payable as if no agreement had been entered into in respect of the activities carried out.<sup>5</sup>

The Land Court rejected this approach, and found that the petroleum legislation contained an express limitation on the Court's power to review compensation 'to the extent it is affected by the [material] change'.

The court concluded:

*'Section 537C, read as a whole, indicates the review is not an opportunity to consider compensation afresh. It does not invite consideration of the appropriateness of the original compensation, on the circumstances as they then existed. On a fair reading of the entire section, the scope of the review is confined by the compensatable effects of the material change. The limiting phrase used in s 537C(3) is reinforced by the further restriction imposed by s 537C(4). It prevents the Court from carrying out or continuing with the review if it considers the original compensation is not affected by the change.'*<sup>6</sup>

*I interpret s 537C as meaning the Court is limited to considering whether additional compensation should be awarded for the compensatable effects suffered by the landholder which are caused by the material change in circumstances. That requires the Court to identify the compensatable effects of the material change and consider whether they justify compensation not already provided for.'*<sup>7</sup>

## Had there been a material change in circumstance?

Having confirmed the scope of the Land Court's jurisdiction to review compensation, the court turned its attention to the specific circumstances that gave rise to the application.

The landholders raised a number of circumstances which they claimed had changed materially since the CCAs were agreed, including:

1. Non-compliance with noise limits;
2. Discontinuance of untreated CSG water supply;
3. Emission of gas;
4. Construction of wells in locations not agreed;

5. Increase in owners' time and resources responding;
6. Contamination of rainwater tanks by dust;
7. Perceived health risks in living in or around this gasfield (the landholders initially argued actual health impacts, but abandoned reliance on this circumstance); and
8. Need to relocate place of residence and business office.

The Land Court heard extensive evidence of the change in circumstances alleged by the landholders. Of the 'circumstances' argued, the Land Court accepted there had been changes to only two 'circumstances' – the non-compliance with noise limits and the discontinuance of untreated CSG water supply.

## Non-compliance with noise limits

The landholders alleged that the noise levels at their home have been, and continue to be, frequently and substantially in breach of the conditions of the project environmental authority, which rendered the homestead not suitable for residential use.<sup>8</sup> QGC accepted that it had exceeded the noise limits on a few occasions, but disputed the extent, frequency and impact of the noise exceedances.

The court accepted evidence that the Kenya Central Processing Plant, which is located over 5.5km away from the Nothdurfts' residence, is the 'dominant plant noise source from QGC's operations in the vicinity of the Nothdurft residence'.<sup>9</sup>

The landholders led their own evidence about the exceedances of noise limits based on their measurements of noise using a personal sound meter. The Land Court rejected the landholders' readings as evidence the noise conditions in the environmental authority were breached, but accepted that it showed there was a basis for the landholders' complaints about night time noise in 2015 and 2016.

The court reviewed QGC's noise monitoring reports, two Penalty Infringement Notices issued under the *Environmental Protection Act 1994* for contraventions of noise conditions and a Transitional Environmental Program issued by the Department of Environment and Heritage Protection (DEHP) to bring QGC's activities into compliance. The court heard evidence of the steps QGC had taken to minimise the noise



impact of its activities, including QGC's proposal to attenuate noise impacts by making modifications to the landholders' home, which were rejected by the landholders.<sup>10</sup>

The court concluded that the evidence did not establish that the noise exceedances were *'frequent and substantially in breach of the EA'*<sup>11</sup> and rejected the landholders' contention that the noise impacts rendered the homestead uninhabitable or required the relocation of their business. However, President Kingham found that the landholders *'experienced noise from QGC's activities in excess of authorised limits in their home at night on an irregular but ongoing basis from early 2015. This is an increase in amenity impacts which amounts to a material change in circumstances.'*<sup>12</sup>



## Discontinuance of CSG water supply

The landholders also argued that there had been a material change in circumstances as a result of QGC ceasing to provide untreated CSG water. Under the CCAs, QGC gave the landholders a conditional right of supply to untreated CSG water for stock purposes. This arrangement came to an end in 2010 as a result of regulatory changes introduced by the DEHP.

The court agreed that *'the prospect of unlimited access to untreated CSG water, if it was or could be made suitable for stock use, would have significance or importance to a landholder's decision about what compensation should be paid, particularly for a property which is a dry land property.'*<sup>13</sup>

QGC argued that, while there had been a change in circumstances as a result of the cessation of water supply, it was not material because the landholders now had access to treated CSG water which is of better quality and was not restricted to use for stock purposes.<sup>14</sup>

On balance, the court accepted that the change in access to water was material, but declined the opportunity to revise compensation accordingly on the basis that there was *'no evidence any compensatable effect of QGC's activities has worsened because [the landholders] no longer ha[d] access to untreated*

*CSG water under the Compensation Agreement.'*<sup>15</sup> In making this finding, it was of significance that the landholders' lost water supply had been replaced by a new scheme (the Chinchilla Beneficial Use Scheme), to which QGC's activities in the region were key.

## Other material changes

The landholders led evidence to suggest that QGC had caused an environmental nuisance by releasing gas which affected air quality at the homestead. The court concluded that expert evidence did not support the claim. Similarly, the Land Court rejected the landholders' contention that their rainwater tanks had been polluted by dust in the absence of any evidence.

The allegation about the incorrect location of the wells was also rejected by the Land Court as a material circumstance giving rise to an entitlement for additional compensation. Aside from the fact that the court determined there was a problem with the original GPS coordinates, the court said that there must be a link between the material change in circumstances and the compensatable effects caused by the activity. Where the proposed and actual well locations were within undeveloped scrub land, the Land Court could not find a link so as to justify a finding of material change in circumstance.

On the issue of perceived health risks inherent in living in or around a gas field, President Kingham noted that the landholders' *'position in relation to ill health shifted during the course of proceedings.'*<sup>16</sup> The court noted that the landholders initially alleged that they and their children had suffered ill-health as a result of the excessive noise and fugitive gas emissions on the basis of medical evidence. However, the landholders appeared to abandon this argument on the basis that they did not wish to call the doctor as an expert witness. The court cautioned the landholders and their agent that failure to call the doctor as a witness meant that they could not sustain an argument on the actual health risks associated with living in or around a gas field, but that ultimately the landholders *'made an informed choice not to lead expert evidence of health symptoms, diagnosis or possible cause.'*<sup>17</sup>

Accordingly, the landholders relied on an argument about the perceived health risk associated with living in or around a gas field, which the also court rejected on the basis that the legislation required them to demonstrate a change in circumstances: *'That must mean actual circumstances, not perceptions about them. I fail to see how perception, without foundation in fact, can constitute a material change in circumstances.'*

## Can or should the Court amend the compensation agreed by the parties?

Having determined that there had been a material change in respect of at least two of the 'circumstances' raised by the landholders (exceedance of noise conditions and the cessation of access to untreated CSG water), the Land Court was then tasked with deciding whether the original compensation should be amended. On this point, President Kingham said the key issue was the impact of the changes to the 'compensatable effects'.<sup>18</sup>

As mentioned earlier, the Land Court concluded that the cessation of CSG water supply did not worsen the compensatable effects of QGC's activities, and therefore no additional award of compensation was made.

In respect of the material change caused by the exceedance of noise limits, the court acknowledged that *'the impact of noise on the amenity of a home can diminish its value, which is a compensatable effect. However, there is scant evidence from either [the landholders or QGC] that would allow the Court to determine the diminution of value of the increased amenity impacts on the home. Further, I have found that those are largely in the past, not current and enduring, impacts. This makes an assessment based on land value problematic.'*<sup>19</sup>

QGC submitted that any additional compensation for noise impacts should not exceed \$55,000, which represented the cost of noise attenuation modifications that could be made to the homestead and which QGC had previously offered the landholders. The Land Court accepted that figure and applied an uplift of 10% for the landholders' time in raising and responding to noise impacts.<sup>20</sup>

The Land Court ordered QGC to pay an additional \$60,500 by way of compensation.<sup>21</sup> No award has been made as to costs at this stage, although the parties may still be heard in relation to costs.

## Conclusion

The Land Court's decision in *Nothdurft* provides further guidance as to when changes in circumstances

will be considered to be material for the purpose of reviewing compensation previously agreed under a conduct and compensation agreement.

Interestingly, the decision implies that the Land Court will be prepared to reassess compensation previously agreed for a compensatable effect arising from an activity that:

1. is undertaken off the eligible claimant's property;
2. was not contemplated by the original compensation agreement; and
3. potentially, is undertaken pursuant to a resource authority different to that which encompasses the eligible claimant's property.

....

<sup>1</sup> [2017] QLC 41.

<sup>2</sup> Ibid 11.

<sup>3</sup> Ibid 20.

<sup>4</sup> (2015) 212 LGERA 342.

<sup>5</sup> *Nothdurft & Anor v QGC Pty Limited & Ors* [2017] QLC 41, 32.

<sup>6</sup> Ibid 36.

<sup>7</sup> Ibid 37.

<sup>8</sup> Ibid 42.

<sup>9</sup> Ibid 78.

<sup>10</sup> Ibid 83.

<sup>11</sup> Ibid 73.

<sup>12</sup> Ibid 90.

<sup>13</sup> Ibid 94.

<sup>14</sup> Ibid 97.

<sup>15</sup> Ibid 150.

<sup>16</sup> Ibid 128.

<sup>17</sup> Ibid 135.

<sup>18</sup> Ibid 142.

<sup>19</sup> Ibid 152.

<sup>20</sup> Ibid 155.

<sup>21</sup> Ibid 162.

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