# SUPREME COURT OF QUEENSLAND

CITATION: *Australand Land and Housing No 5 (Hope Island) Pty Ltd & Ors v Gold Coast City Council; Fish Developments (Hope Island) Pty Ltd & Ors v Gold Coast City Council* [2007] QCA 189

PARTIES: **AUSTRALAND LAND AND HOUSING NO 5 (HOPE ISLAND) PTY LTD** ACN 106 404 942
and
**AUSTRALAND LAND AND HOUSING NO 7 (HOPE ISLAND) PTY LTD** ACN 106 487 334
and
**AUSTRALAND LAND AND HOUSING NO 8 (HOPE ISLAND) PTY LTD** ACN 106 487 414
(applicants/respondents)
**v**
**GOLD COAST CITY COUNCIL**
(respondent/appellant)

**FISH DEVELOPMENTS (HOPE ISLAND) PTY LTD** ACN 102 390 214
and
**FALCONREST PTY LTD** ACN 098 954 968
and
**HOPE ISLAND PROJECTS PTY LTD** ACN 099 595 016
and
**ROTHMONT PROJECTS PTY LTD** ACN 098 994 453
and
**FISH DEVELOPMENTS PTY LTD** ACN 090 846 825
and
**MARCIA DAWN CAMPLIN**
and
**DOUGLAS JAMES LOCKHART**
and
**GLENDA JEAN DEUTSCHER**
and
**MURMAR PTY LTD** ACN 084 216 740
and
**DOVAN DANIEL LADIN**
and
**PEDE PTY LTD** ACN 002 659 083
and
**DARRYL LEONARD GOODE**
and
**LYNETTE EVELYN GOODE**
and
**JADEBOWL PTY LTD** ACN 010 743 058

and
**NERANG PASTORAL CO PTY LTD** ACN 010 119 990
and
**DEREK BARRETT ENTERPRISES PTY LTD**
ACN 010 625 082
and
**LOUIS DUNSTAN CONSTRUCTIONS PTY LTD**
ACN 004 926 354
and
**JOHN WILLIAM FISHBOURNE**
and
**LEAGROVE PTY LTD** ACN 103 669 405
and
**MARK FRANCIS STAFFORD**
and
**MARGARET STAFFORD**
and
**NORTH SHORE DEVELOPMENTS QLD PTY LTD**
ACN 104 699 998
and
**STEVEMAR PTY LTD** ACN 009 974 805
and
**GARY KEITH DOOLAN**
and
**KAREN LEIGH DOOLAN**
and
**BRUCE GEORGE NEUMANN**
and
**PETER JAMES NEUMANN**
and
**TERRANCE GEORGE STREET**
and
**BEVERLEY MAY STREET**
and
**COLIN FREDERICK HEFFERNAN**
and
**KATHERYN HEFFERNAN**
and
**BARRY MARK WINTOUR**
and
**LORELEI ANNE WINTOUR**
and
**KATHERYN MARGARET STAFFORD**
and
**GRAHAM JOHN LIGHTFOOT**
and
**LYNETTE FLORENCE LIGHTFOOT**
and
**LYNETTE MAREE MONAGHAN**
and
**ARSHAD SHEIDA**

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| | and<br>**ISLAND CANAL PTY LTD** ACN 105 996 423<br>and<br>**KATHLEEN SHIRLEY KRAL**<br>and<br>**GIANNI CANER LADINI**<br>and<br>**ANDREW GREGORY**<br>and<br>**CHARITINI GREGORY**<br>and<br>**ROSALIA LAFKO**<br>(applicants/respondents)<br>**v**<br>**GOLD COAST CITY COUNCIL**<br>(respondent/appellant) |
| FILE NO/S: | Appeal No 10615 of 2006<br>Appeal No 10616 of 2006<br>SC No 9273 of 2005<br>SC No 9748 of 2005 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 8 June 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 2 May 2007 |
| JUDGES: | de Jersey CJ, McMurdo P and Jerrard JA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Appeals dismissed**<br>**2. Appellants pay the respondents' costs of the appeal assessed on the standard basis** |
| CATCHWORDS: | ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the appellant resolved to impose a rate or charge upon the canal front land belonging to the respondents for the construction of the Hope Island canal and its associated works – where land other than that charged also benefited from the appellant's construction – whether the appellant was entitled to impose the rate or charge upon only the respondents under the *Local Government Act 1993* (Qld), s 971 |

*Local Government Act 1993* (Qld), s 971

*Alan E Tucker Pty Ltd v Orange City Council* (1969) 18 LGRA 314, applied
*Parramatta City Council v Pestell* (1973) 128 CLR 305, applied
*Severn Shire Council v North West County District Council* [1974] 1 NSWLR 190, distinguished
*Shanvale Pty Ltd v Council of the Shire of Livingston* (1999) 105 LGERA 380, applied
*Western Stores Ltd v Orange City Council* (1973) 47 ALJR 118, considered
*Western Stores Ltd v Orange City Council* (1971) 2 NSWLR 36, considered

COUNSEL: M Hinson SC, with S Fynes-Clinton, for the appellant
W Sofronoff QC, with D O'Brien, for the respondents in Appeal No 10615
D R Gore QC, with B G Cronin, for the respondents in Appeal No 10616

SOLICITORS: King & Company for the appellant
Allens Arthur Robinson for the first respondents
Hopgood Ganim for the second respondents

[1] **de JERSEY CJ**: I have had the advantage of reading the reasons for judgment of Jerrard JA. I agree with the orders proposed by his Honour, and with his reasons.

[2] **McMURDO P**: I agree with Jerrard JA's reasons for dismissing the appeal.

[3] The appellant, the Gold Coast City Council, levied the canal-front land belonging to the respondents with the Hope Island Canal Infrastructure Special Charge. This charge was said to be imposed under s 971 *Local Government Act 1993* (Qld) which relevantly provides:

> "(1) A local government may make and levy a special rate or charge on rateable land if –
>
> (a) the rate or charge is for a service, facility or activity; and
>
> (b) in the local government's opinion –
>
> (i) the land, or the occupier of the land, has or will specially benefit from, or has or will have special access to the service, facility or activity;
>
> …
>
> (6) Subsection (1) is taken to have been complied with if the special rate or charge is made and levied on –
>
> (a) all rateable land that, at the time of making and levying the rate or charge, could reasonably be identified as land on which the rate or charge may be made and levied; or

(b) all rateable land on which the rate or charge may be made and levied, other than land accidentally omitted."

[4] The charge levied was "to fund the cost of, and repayment of loan funds used for, construction of the Hope Island Canal Infrastructure works".[1] The Council described the service facility or activity for which the charge was made under s 971 as "the construction, and funding of construction, of the new canal system and associated infrastructure works".[2] These infrastructure works included the Council's acquisition of land to construct the canal, to replace parkland lost due to the construction of the canal and road closure and other property costs associated with canal construction; the cost of the canal construction; and the cost of building three bridges across the canal.[3] The Council's charge under s 971 on the respondents' canal-front land was on the basis that the land "specially benefits and will specially benefit from, and has and will have special access to, the infrastructure works generally".[4]

[5] Rateable land in the Hope Island area other than the respondents' land also benefited from the construction of the new canal system and the associated infrastructure works in that its drainage, developability and general amenity was very significantly improved. Some land not subject to the charge plainly obtained a greater benefit than the respondents' land from infrastructure works such as the bridges.[5] The respondents' canal-front land did obtain a special benefit from the construction of the canal over and above the benefit obtained by neighbouring land not the subject of the charge in that it gained the amenity of being waterfront land with direct access to the canal and ultimately the Coomera River and Moreton Bay. But the Council's charge on the respondents' canal-front land was not limited to covering the cost of the Council's partial construction of the canal. It extended to other infrastructure work, including the cost of building three bridges across the canal.

[6] *Parramatta City Council v Pestell*[6] and *Shanvale Pty Ltd v Council of the Shire of Livingstone*[7] make clear that a local government can only impose a charge of this type if it can reasonably form the view that the specially rated land enjoyed a special benefit not enjoyed by rateable land not subject to the charge. Section 971 does not make owners of rateable land achieving a special benefit from a particular service, facility or activity (here the partial construction of the canal) subsidise the cost of providing another or other associated services, facilities or activities (such as the bridges) which generally benefit the charged land but equally or further benefit rateable land not the subject of the charge. In the absence of the clearest of words to that effect, the legislature cannot have intended such an unfair consequence to flow from s 971.

[7] It follows that the Council was not entitled under s 971 to impose the Hope Island Canal Infrastructure Special Charge on the respondents' land. The primary judge

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1 Gold Coast City Council resolution, 17 June 2005.
2 Above.
3 Attachment A to the above resolution.
4 See fn 1.
5 *Australand Land and Housing No 5 (Hope Island) Pty Ltd & Ors v Gold Coast City Council* [2006] QSC 332, BS 9273 and BS 9748 of 2005, 7 November 2006, [51], [68]-[74].
6 (1972) 128 CLR 305.
7 (1999) 105 LGERA 380.

rightly declared the charge invalid and set aside the Council's resolution imposing the charge. The appeal should be dismissed with costs.

[8] **JERRARD JA**: This appeal is from a decision given on 7 November 2006, in which the learned trial judge made orders under the *Judicial Review Act 1991 (Qld)* declaring invalid and setting aside a resolution by the respondent Council of 17 June 2005, and consequential orders. The resolution set aside was that the Council would levy a special charge under s 971 of the *Local Government Act 1993* (Qld), ("the Act") in an amount of $19,227,883, on rateable land largely owned by the respondent companies. The issue is whether s 971(1)(b)(i) applies in the circumstances.

**The charged land**

[9] The land charged with that special charge ("the charged land") is rateable land abutting the Hope Island canal, and the rate was charged to recoup for the Council its actual and estimated cost of the completion of that part of the canal constructed by it, and for the provision of other infrastructure works necessary for completion of that canal project. As now finally constructed, the canal shape resembles the legless torso of a bird with an elongated neck and short tail. The tail is at the western end of the canal, constructed by the Council at Boykambil, adjacent to the mouth of the Coomera river. The canal gives access to the Coomera river, the Broadwater, Moreton Bay and beyond. The eastern part of the canal resembles the long neck of the bird, and the canal forks at the base of the neck, and rejoins at the beginning of the tail, to create the torso, which is an island – Hope Island – surrounded by canal water. The canal is 75 metres wide, and all of the charged land has frontage to that canal.

[10] The history of the area and of the canal is succinctly recorded in the following passages in the judgment under appeal, which I quote:

> "[1] The last meander of the Coomera River before it flows into the waters of southern Moreton Bay encloses land known as Hope Island. The land is low and flat. Until recently it was poorly drained and flood prone. After a severe storm the waters of the Coomera river did not follow the loop of the meander but flowed across the southern part of Hope Island, more or less directly to the river mouth. This flow path was known as the Boykambil flood plain. Boykambil is a settlement on the east of Hope Island adjacent to the river mouth.
>
> [2] On 8 December 1976 the Albert Shire Council ('ASC'), a predecessor to the respondent, declared most of Hope Island to be a drainage problem area and, in 1995, introduced a planning scheme which included a development control plan ('DCP') and a preferred dominant land use plan ('PDLUP') for the island. These plans designated the Boykambil flood plain as 'drainage and access reserve'.
>
> [3] In the meantime land in the northern portion of Hope Island had been developed into expensive residential communities, Sanctuary Cove and Hope Island, which included golf courses, marinas, shopping villages and a hotel. Land to the south of these developments adjacent to the 'drainage and access reserve' had its

potential for development constrained by its susceptibility to flood and the respondent's designation.

[4] Accordingly, for a number of years from about 1990 the respondent and several landowners negotiated for the construction of a canal to be built in the general vicinity of the drainage and access reserve. The purpose of the canal was to confine flood waters in the canal and so divert it from the flood plain, thereby increasing the area of land available for development and reducing the cost and physical constraints on development.

[5] On 17 March 1995 the ASC and the Hope Island Canal Association ('HICA') signed an agreement ('the canal agreement') which provided that the respondent would coordinate the construction of a canal to be built by the owners of the land through which the canal would be dug.

…

[8] On 5 October 1995 the Governor in Council gave approval to the construction of the canal 'to ease flooding in Boykambil on Hope Island … conditional upon the Gold Coast City Council being responsible for future maintenance of the works'.

[9] A convenient history is set out in a report to the respondent of May 1996:

> 'The original draft Hope Island [development control plan] prepared in 1988 was based on a concept of open space drainage paths, 175 metres wide, designed to accommodate flood flows. Following submissions from landowners, this was changed to a canal concept to enhance adjacent private land.
>
> The important point is that the Boykambil area has always been a flood-prone area, even before the Sanctuary Cove and Hope Island Resort Development, and in 1976, Council declared virtually all of the Island as a drainage problem area …
>
> The purpose of the declaration was to give Council additional design control over all building and development applications in the area, due to significant drainage and flooding difficulties in the area.'"[8]

**The canal facility**

[11] The majority of the canal was excavated and constructed by the adjacent landowners, owners of the charged land, save for the eastern most section adjacent to the Coomera River at its entrance to the Broadwater (the tail of the duck),

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8 These passages appear at AR 2514-2517, in the Reasons for Judgment.

constructed by the Council. Where the canal forked to create the Island, that Island had a road, Grant Avenue, which ran along its length, and which connected at its western end with another road, Sickle Avenue, running in a north south direction across the flood plain. Sickle Avenue had, of necessity, been disrupted by the construction of the two channels of the canal, and two bridges had to be built to reinstate that avenue. They were designated "Sickle Avenue Bridge (North)" and "Sickle Avenue Bridge (South)", and respectively give vehicular access north and south of Hope Island. Likewise the settlement of Boykambil had been divided and separated by the construction of the eastern most part of the canal, and communication between those two parts is proposed to be re-established by the construction of an as yet unbuilt pedestrian and bicycle bridge, which will join to Crescent Avenue, which in turn was severed by the canal. Finally, some parkland was also destroyed by the construction of the eastern-most part of the canal, and the Council acquired land in the vicinity and developed that land into a park, in substitution for the lost parkland.

**The special charge**

[12] The special charge sought to recoup the Council's costs of acquisition of land, canal construction, bridge construction and design, and professional fees paid by the Council. Those works and fees were performed and paid as necessary steps by the Council for the provision of a canal. Mr Hinson SC for the appellant Council took the Court to historical documents and reports, describing the Council's developing intent to assist in the creation of the canal. It was apparent that from the very beginning some loss of parkland had been foreseen, and the need to replace that; likewise the provision of at least the two road bridges, and the construction of the pedestrian and bicycle bridge. Mr Gore QC, senior counsel for the respondent Fish Developments, made the point that the exact location of the two road bridges had varied over time, but the respondents accepted that those works were always contemplated by the Council as a necessary part of the infrastructure it would provide to assist the private landowners in the creation of the canal.

[13] The special charge included the cost of two parcels of land acquired because that land was subsumed by the canal at both locations where it forked, and the cost of two other parcels of land acquired to replace the lost parkland. It included the cost of the part of the canal constructed by the Council, and the cost of relocating a tennis court and club house. It included the construction and design costs of the bridges and proposed pedestrian and bicycle bridge, and a variety of professional fees charged for various studies. All of the charged land had a frontage onto the canal, and it was only that land which was made subject to the charge.

**The Act**

[14] Section 971 relevantly provides:

> "(1) A local government may make and levy a special rate or charge on rateable land if –
>
> (a) the rate or charge is for a service, facility or activity; and
>
> (b) in the local government's opinion –
>
> (i) the land, or the occupier of the land, has or will specially benefit from, or has or will have special access to, the service, facility or activity; or
>
> (ii) the occupier of the land, or the use made or to be made of the land, has, or will, specially

contribute to the need for the service, facility or activity.

*(The legislation then provides examples).*

(2) The special rate or charge may be made and levied on the bases the local government considers appropriate.

……

(3) Without limiting subsection (2), the amount of the special rate or charge may vary according to the extent to which, in the local government's opinion –

(a) the land, or the occupier of the land, has or will specially benefit from, or has or will have special access to, the service, facility or activity; or

(b) the occupier of the land, or the use made or to be made of the land, has, or will, specially contribute to the need for the service, facility or activity.

(4) The local government's resolution making the special rate or charge must identify –

(a) the rateable land to which the rate or charge applies; and

(b) the overall plan for the supply of the service, facility or activity.

(4A) The overall plan must –

(a) be adopted by the local government by resolution either before, or at the same time as, the local government first makes the special rate or charge; and

(b) identify the rateable land to which the rate or charge applies; and

(c) describe the service, facility or activity; and

(d) state the estimated cost of implementing the overall plan; and

(e) state the estimated time for implementing the overall plan.

……

(6) Subsection (1) is taken to have been complied with if the special rate or charge is made and levied on –

(a) all rateable land that, at the time of making and levying the rate or charge, could reasonably be identified as land on which the rate or charge may be made and levied; or

(b) all rateable land on which the rate or charge may be made and levied, other than land accidentally omitted."

**The Council's argument**

[15] The Council did not justify the special rate on the basis of s 971(1)(b)(ii), (special need for the canal) relying only on s 971(1)(b)(i) (special benefit or access). That

latter subsection relevantly authorised a special charge or rate for a service, facility or activity, which could be made and levied on the basis the local government considered appropriate, and levied on rateable land if the local authority had the opinion that the land, or the occupier of the land, had or would specially benefit from, or have special access to, the service, facility or activity. The local authority was obliged when resolving to make the special rate to identify the rateable land to which the rate or charge applied, and the overall plan for the supply of the service, facility or activity; which plan had to identify the rateable land to which the charge applied, and describe the service, facility or activity. The special rate had to be levied on all rateable land about which the local government could have the opinion that that land would specially benefit from, or have special access to, the service, facility or activity. The *Local Government Act* does not define "service" or "activity", but "facility" is defined to include "work". "Work" is not further defined, but in planning and local government terminology, a bridge or a canal could each be called a "work".

[16] Section 971 is expressed in the singular. That is, a rate or charge may be levied for a service, a facility, or (an) activity, which must be described in the overall plan. The introductory words in (1) authorise the making of "a" special rate or charge, not more than one. The words in 971(1)(a) convey that most appropriately, "a" special rate will be for "a" service, facility, or (an) activity; but words in the singular include the plural.[9] One special rate could properly be charged for, say, three facilities, but it would be necessary for the local government to have the reasonable opinion (if it relied on s 971(1)(b)(i)) that the land or the occupier so charged had specially benefited from, or had special access to, each of the facilities. The local government's opinion would necessarily identify whether the special benefit or access was the same with respect to each of the three facilities, or whether the special benefit or access derived in combination from the facilities, with discrete contributions from each. The appellant Council did not attempt to justify the special charge in this matter on the basis that it had provided more than one facility or service, and which each gave the same special benefit or access to the charged land, or in combination gave a special benefit or access.

[17] The appellant Council argued instead there was one facility, and that the learned trial judge, and the respondents, were in error in the view that there were a number of discrete facilities. Those discrete facilities were identified by the judge and the respondents as the completion of the construction of the canal in the part built by the Council, the construction of each of the two road bridges and the proposed bicycle and foot bridge, and the acquisition of land for the creation of a new park. Mr Hinson SC submitted that the judge had erred in "disaggregating" the works into their individual components, and then undertaking a search for benefit that flowed from each. He submitted that the judge should have treated those works as a unified package that had a unifying purpose and object, namely to complete the canal, and that there was a single project in view, namely an operating canal facility. His oral submissions described the works as having a single purpose, being inspired by a single object, having a degree of inter-relatedness and connection, such that they should have been seen as that single facility.[10] Mr Hinson SC also submitted that the interdependent works formed a unified structural facility conferring what he submitted was a special benefit on all of the charged land, and on no other land.

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9 *Acts Interpretation Act 1954* (Qld), s 32C.

10 At Transcript 26.

That special benefit was the conversion (by reason of the canal facility) of the charged land from flood prone parcels with significant development constraints, into waterfront parcels suitable for high quality residential development.

[18] Arguing the appellant's case on the basis of "a" facility giving "a" special benefit accorded with the language of s 971(1), although it presented the difficulty of arguing that what would otherwise constitute separate works or facilities – the bridges and the canals – were each parts of the one facility. The manner in which the appellant's case was presented did reflect other decisions on comparable legislation; laws in generally similar terms have been the subject of consideration over the years. Both parties referred to the same relatively small number of authorities, and there appeared general agreement as to the principles described in the judgments. Senior counsel for the relevant parties were content to attempt to distinguish cases considered adverse on the facts, rather than suggesting that there was any conflict between that party's argument and the approach taken in earlier decisions.

**Other decisions**

[19] The appellant particularly relied on *Severn Shire Council v North West County District Council*.[11] In that matter the three plaintiffs were councils of three of the shires which together made up the county district of the defendant. That county district consisted of three municipalities, and the whole or a part of 10 separate shires. At issue were 23 separate resolutions by the defendant county district Council, in respect of 23 loans taken out by the defendant between 1947 and 1972, raised for the purpose of a programme of rural electrification undertaken by the defendant to make electrical power available to persons in shires, as well as those living in municipalities. In general, the scheme involved the construction of electricity lines through various parts of the county district, and various works necessary for or ancillary to the provision of electrical power.

[20] Section 572B of the *Local Government Act 1919* (NSW) relevantly read:

> "Provided that where the amount so assessed is in respect of a loan raised for any work or service which in the opinion of the county council would be of special benefit to a portion only of the county district the amount required for payment of interest or repayment of principal may, at the discretion of the county council, be assessed only on the councils of the area within which such portion is situated and the assessment shall be made upon each of the councils concerned of the areas within which such portion is situated ….".

Relying on that power, the defendant made assessments - separate ones for each loan - on the Councils of nine of the 10 shire Councils. Each assessment specified particular sums as assessed upon the individual shire Council. The assessments were for the whole of the area of all nine relevant shires, but for different amounts. Three Councils sought declarations that the assessments were invalid. Their counsel argued that the defendant had to identify the "work or service" "for" which a particular loan was raised, and that the defendant would have to form the opinion that the work or service so identified "would be of special benefit to a portion only of the county district".

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11 [1974] 1 NSWLR 190.

[21] The defendant had resolved to adopt the opinion of its county clerk that, while moneys from some loans were expended on works which were physically located in a particular shire or area:

> "I am of the opinion that in respect of the expenditure from each loan the work covered by such loan was and is of special benefit to all the Shires in the County District".

For that reason the defendant by its 23 resolutions assessed, each time, each of nine of the 10 shire Councils – the same nine each time – with particular sums. Counsel for the three shires which objected submitted that since the "work or service" "for" which each of the particular loans was raised was in each case the construction of the particular electricity line and associated works referred to, no reasonable person could form the opinion in respect of any one of those "works or services" that it was of special benefit to the whole of the area specified by the defendant in the 23 assessments. Mahoney J held that the proper inference to be drawn from the evidence in the case was that there was at the time of the raising of all of the loans, and had then been formulated by the defendant, a master plan for the supply of electricity to the rural, as distinct from the town, areas in the county district. That plan involved the construction of the electricity lines and ancillary works in question.

[22] His Honour went on:[12]

> "In my opinion the words 'work or service' in s. 572B may include the result of a series of operations, even though they extend over a number of years, and, notwithstanding that, as the particular parts are completed, those parts confer an immediate benefit upon the individuals for whose benefit the operations were undertaken.
>
> However, the fact that there may have existed from the outset a 'master plan' of the particular operations to be carried out does not of itself result in those operations being one work or service within the section. Several separate 'works or services' may obviously be included in the one plan.
>
> For the operations of the kind here in question to be properly categorised as one work or service for the purposes of s. 572B it is necessary for there to be an appropriate degree of inter-relation between and integration of the operations and the results of the operations. That which is the result of the operations must in its actual or intended function or operation be as between its parts interdependent to a substantial degree.
>
> In relation to any planned series of operations, the determination of whether the degree of inter-relation or inter-dependence is sufficient to constitute the plan as the plan of a single work or service or one of several separate works or services may depend ultimately upon the impression which the evidence as a whole makes upon the court. In such cases it may be generally sufficient for the court to form a conclusion upon the question and to state it: to say, to paraphrase

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12 At p 206.

> Lord Haldane, that there are sufficient grains of corn together to make a heap."

[23] His Honour went on:[13]

> "It also appears to be a proper inference that, for example, the transmission lines and facilities actually erected with individual loan moneys were of a design such as to fit in with the requirements of the system as expressed in the master plan; the inference appears to be that the particular works were designed in the way they were because of the requirements of the system as envisaged in the master plan as a whole.
>
> In the light of all of the evidence I am satisfied that in plan, in the design of their individual parts, and in their planned and actual operation, the works or operations carried out with the loan moneys in question had such an inter relation and integration as to be capable of constituting a single work or service within the meaning of s. 572B."

[24] Mr Hinson SC urged the same opinion here, but the difficulty is that in that matter the same special benefit – the provision of electricity to rural residents of the plaintiff shire councils – could be shown, albeit it was received at different times by different works in different places over the years. The various different works produced the same result, the special benefit, throughout. Here, the different works provide other, different, benefits from the special benefit relied on by the Council. The reasons for judgment record that the traffic engineers engaged by the parties agreed that the three proposed bridges restored in varying degrees access previously provided by roads, and a significant proportion of the traffic on the Sickle Avenue bridges was generated by developments not included within the charged land. The two road bridges would be used by both traffic generated by the use of the land subject to the special charge, and also by other land. The Crescent Avenue bridge would reinstate pedestrian and bicycle access to the areas immediately adjacent to that bridge. While that proposed pedestrian and bicycle bridge would benefit the residents of Boykambil, as the learned judge held, it was very difficult to see that any benefit was conferred by that particular bridge upon any of the charged land. The same was true of the new parkland. Some properties abutting it were not subject to the charge, while land "remote from it and separated from it by the canal" was subject to the charge. Regarding the road bridges, likewise the land owned by Australand was located to the west of the canal (the long neck of the duck), and vehicular access to it did not depend upon either of the two bridges. The learned judge accordingly thought it difficult to see how that land could derive any special benefit from the construction of those bridges, which while they would benefit the land owned by Fish Developments (on the Island and abutting the canal), would benefit more land than that respondent's.

[25] It does not follow that because individual works carried out in creating part of a facility produce no special benefit to charged land, that the charged land does not specially benefit from that facility. But it does make it critical to establish that the works make a single facility, and that the facility results in an identified special benefit to all the charged land, and no other land.

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[13] At p 207.

[26] The respondents urged the view of the trial judge, that there were separate facilities constituted by the various works, giving different benefits to the charged land and to uncharged land. They encouraged as appropriate the approach by Else-Mitchell J in *Alan E Tucker Pty Ltd v Orange City Council* (1969) 18 LGRA 314. In that case that learned judge heard appeals against a resolution to impose a local rate on the unimproved value of all land in part of the business area of the city of Orange. The rate was imposed under s 121 of the *Local Government Act 1919-1969* (NSW), which relevantly provided that:

> "For or towards defraying the expenses of executing any work or service or for or towards repaying with interest any ... debt incurred or loan raised in connection with the execution of any work or service where, in either case, such work or service in the opinion of the council would be of special benefit to a portion of its area ... the council ... may make and levy a local rate on the unimproved capital value or on the improved capital value of ratable land within such portion."

[27] The learned judge's reasons in that case show that a variety of works were proposed, and that some of those were of very limited and particular relevance to a small section only of the defined area, while other works had a particular relevance to other sections of the area. Further, some of the services to be provided had a quality which would normally benefit a much wider area than that defined by the Council's resolution. Those matters, and others, led His Honour (at p 323 of the report) to the conclusion that there was:

> "... such an absence of similar or common benefit from the several categories of works and services that there can be no basis upon which the council could reasonably form the opinion that all the lands in the defined area would be likely to derive special benefit from each and every one of the proposed works and services. True it is that in many cases there will be some special benefit from one or other of the works and services, but in others there can be no benefit at all and between these extremes there will be innumerable instances of benefits of varying degree ... In such circumstances I find it difficult to say that there is any basis upon which a council acting reasonably could reach the conclusion that every parcel of land in the defined area would derive a special benefit, that is, a benefit over and above some common or general benefit, from each of the works and services. Upon this basis I am of the opinion that the service area local rate has not been validly made under s. 121 of the *Local Government Act*."

[28] The respondents urged a similar view in this matter, and Mr Gore QC referred the court to the history of subsequent litigation in which the Orange City Council endeavoured to justify a similar rate, in reliance instead on s 121(2) of the *Local Government Act 1919*. That section, not relied on by the Council in the earlier decision, read:

> "(2) The council of a municipality or shire may by notice in the gazette from time to time define part of the area to be known as a "town improvement district" within which a "town improvement local rate" may be levied under the provisions of this section."

[29] Mr Gore QC suggested that the appellant was endeavouring to treat s 971 of the Act as giving a power similar to that given by s 121(2) of that New South Wales legislation. The opinion of the Privy Council (given in *Western Stores Ltd v Orange City Council* (1973) 47 ALJR 118, endorsing that part of the view of Moffitt J in *Western Stores Ltd v Orange City Council* [1971] 2 NSWLR 36), was that:

> "The concept introduced by s. 121(2) is such that exercise of the power does not necessarily involve an examination of whether each improvement provides special benefit to every part of the town improvement district."

The appellant's case was that it had identified a special benefit exclusive to the charged land, derived from the one facility, and that it was unnecessary and irrelevant to ask if each work constituting that facility provided the same special benefit to each lot of the charged land, and to no other land.

[30] In *Parramatta City Council v Pestell* (1972) 128 CLR 305, the High Court had occasion to consider s 121 of the *Local Government Act 1919* (NSW), (but not s 121(2)). In that matter a municipal council had resolved to levy a rate under s 121 for the construction of roads, kerbing and guttering, concrete footpaths, drainage and the general embellishment of an area. Some 90 lots were excluded from the special rates, those being residential lots in an area generally used for industrial purposes. Barwick CJ wrote (at 314):

> "But, in this case, some of the excluded lots or parcels form islands surrounded by land subjected to the local rate ... no rational basis could exist for holding at the same time an opinion that the land surrounding these island lots would derive a special benefit from the execution of those works and services and the opinion that these island lots would not."

Menzies J wrote (at 322) that the basic principle behind s 121 was:

> "... that owners of rateable land within the defined portion of the municipal area, which would be specially benefited by the execution by a council of proposed works or services, can be called upon to make a special contribution towards the expenses of their execution by means of the imposition of a local rate. The section, however leaves it to Council to form a binding opinion that what is to be done 'would be of special benefit to a portion of its area to be defined as prescribed'... A council must therefore form an opinion whether any and what portion of its area would be specially benefited by the execution of what is proposed ... If it could be shown that the portion defined included land about which the council concerned could not in reason hold the opinion that it would be specially benefited by the execution of the works, the section would not authorise the making and levying of a local rate ...
>
> Less obviously perhaps, if the portion defined did not include land which any reasonable man, who considered the matter, must be of the opinion would be specially benefited by the execution of the works equally with the land within the portion defined, the section would not authorise the making and levying of a local rate within the

> portion defined ... The section does not authorise a council to pick and choose among lands that would be specially benefited."

His Honour went on:

> "A court may interfere only when it appears that the portion defined is so obviously not the land which the execution of the work benefits specially that the court can say that the council's professed opinion that it is, is one that is not in keeping with the section so that the making and levying of a rate on the basis of the opinion is outside its power." (323).

[31] Gibbs J wrote (at 327) that:

> "Work done in the local authority area may be of benefit only to a portion of the area or it may benefit the whole area; in the latter case, all the lands in the area will not necessarily benefit in equal measure. A work is of special benefit to a portion of a local authority area if the lands comprising that portion derived from the work a benefit which is not shared by other lands or a benefit which is additional to, or greater than, that which is derived by other lands ... For obvious reasons therefore, the legislature has left it to the council to form its opinion as to whether a particular work is of special benefit to a portion of the area. A court has no power to override the council's opinion on such a matter simply because it considers it to be wrong. However, a court may interfere to ensure that the council acts within the powers confided to it by law."

His Honour added, a little later (at 328), that:

> "… if in the opinion of the council two parcels of land would benefit equally from a work, the council could not define a portion under s. 121(1) so as to include one parcel and exclude the other."

[32] The respondents urge that the reasoning in that decision, which made reference to the decision in *Allen E Tucker Pty Ltd v Orange City Council* without criticism, invalidates what they argue was the appellant overlooking the benefit given to uncharged land by the bridges and the parklands, benefits not enjoyed by the charged land, or enjoyed by some parts only of the charged land. The appellant Council contended it has not selected amongst lands that would be specially benefited, and that what the uncharged land received by way of a benefit or benefits from the works which together constituted the facility did not equate to the special benefit uniquely enjoyed by the charged land.

[33] All parties made reference to this Court's decision in *Shanvale Pty Ltd v Council of the Shire of Livingstone* (1999) 105 LGERA 380. In that matter this Court considered s 21 of the *Local Government Act 1936* (Qld), which relevantly provided:

> "(4) A separate rate or charge is a rate or charge made and levied on all or any rateable land in the local authority's area for or towards meeting the cost of any works, services, facilities, or activities supplied or undertaken, or proposed to be supplied or undertaken by or on behalf of the local authority.

> (4A) A separate rate or charge must be made and levied on the rateable land in the local authority's area that, in the local authority's opinion, has or will benefit from, or have access, to the work, service, facility, or activity because of which the rate is made and levied."

[34] A local authority had imposed a separate charge of $900 on each of the allotments within a proposed benefited area, that being an area on a grazing property which contained a very old (1862) subdivision of a township of over 900 lots. The subdivided land was never developed or used for any purposes other than grazing. The appellant company had purchased the grazing property in 1991 on which that old subdivision existed, obtained separate title deeds to each surveyed lot, and advertised the smaller lots for sale. There was no dedicated road to the old town lots, and the local Council resolved to fund road works by a levy on those allotments. McMurdo P wrote in her judgment (at p 390) that it was common ground that other lots which were not within the defined benefited area also benefited, and still other lots as well would benefit equally with the owners of the old town lots through the improvement in access to their properties by the upgraded all weather road and creek crossing proposed. Many of the levied old town lots did not have frontage on the proposed road, and arguably had less benefit than some of the properties not subject to the levy.

[35] The President also wrote that the respondent Council had erred, when forming its opinion as to what land would benefit from the proposed improved road, to decide that issue on the basis of what land brought about the need for the improved road, the subject of the levy. Derrington J in that same case also wrote to that effect (at p397):

> "... the legislation in force at the time made it mandatory for the Council to levy any separate rate upon all the land that would benefit from the provision of the road. This cannot be confined to the land the development of which led to its need. Any land that would benefit from it had to be included. This encompassed not only the land for which the road provided primary access but also that land for which access to a good all weather road would constitute a real benefit, even though there may have been alternative primary means of access."

[36] Those decisions to which the parties referred make clear that where a local authority does not rely on s 971(1)(b)(ii) of the Act, it is important to distinguish on the one hand between special benefit to the land or the occupier from a facility, (or access to it) and on the other hand to any special contribution by the occupier or the use made of the land to the need for a facility. That makes it irrelevant in this case, because of the way it was argued, that the use to be made of the specially charged land specially contributed to the need for the works – the bridges and the recreation area – that the Council contends are part of the facility giving that specially charged land its special benefit. The cases referred to also emphasise the need to identify a special benefit enjoyed by all specially charged land and no other land, derived from the facility described in the overall plan. As well as benefit being the relevant criteria, not need, the approach taken in earlier cases and not challenged in this one, prevents a Council from picking and choosing between lots which gain an equal or similar special benefit; and while there can be a similar special benefit enjoyed at

different times and places as part of an overall plan or project, that does not apply to disparate benefits received by different lots.

**Special benefit to uncharged land**

[37] The respondents contended that some uncharged land equally benefited from the improvement in drainage. That submission was established by the evidence, and particularly applied to land in the western part of the canal, near Australand's charged land. But that uncharged land did not have canal frontage, and so did not derive the same special benefit, as described in the appeal. Likewise, the respondents pointed to evidence that land without canal frontage, and not subject to the special charge, but adjoining charged land under the same ownership and with canal frontage, had and would enjoy, in the common opinion of the valuers whose opinion was sought, a similar increase in value to the charged land. That would be the result of the capacity of the owner of the land to ensure waterfront access for that owner's charged and uncharged land. But that particular benefit would depend upon the decisions of the landowner, and the Council was reasonably entitled to the view that the waterfront land or its occupiers specially benefited from the canal facility.

**Problems with the resolution**

[38] The respondents also pointed to the terms of the Council resolution imposing the charge, which did not refer to the improved amenity of the specially charged land (its waterfront access). Instead, the resolution referred only to the charged lands improved capacity for development. The Council's resolution of 17 June 2005, reproduced in the judgment under appeal, relevantly reads in these terms:

> "*Hope Island Canal Infrastructure Special Charge*
> That Council levy a special charge under s 971 of the *Local Government Act 1993*, to be known as the Hope Island Canal Infrastructure Special Charge, (the "special charge") as follows:
> 1. Council make and levy a special charge on the rateable land described below to fund the cost of, and repayment of loan funds used for, construction of the Hope Island Canal Infrastructure works to facilitate development of land within the Hope Island Canal Catchment.
>
> 2. The overall plan for those works can be identified as follows:-
>  (a) The rateable land to which the plan applies is all of the land specified and described in the table of special charges below;
>  (b) Those lands are contained within the locality identified by Council as the Hope Island Canal Catchment, and have been developed, or are suitable for development;
>  (c) The service facility or activity for which this overall plan is made is the construction, and funding of construction, of the new canal system and associated infrastructure works ("the infrastructure works") which provides necessary development infrastructure to service, and facilitates further development of, the lands to be levied. A more detailed description and

> itemisation of the infrastructure works constructed (or to be constructed) is set out in Attachment A.
>
> ... (4). The Council is of the opinion that the rateable land proposed to be levied with the special charge specially benefits and will specially benefit from, and has and will have special access to, the infrastructure works generally because the specific purpose and function of those works is to provide necessary development infrastructure to service and facilitate development of the rateable land. The land could not be developed and used for such purposes without provision of the infrastructure works, and the provision of the works by the Council, and levy of the special charge, means that future development approvals for the land will not be subject to development conditions requiring the provision of, or payment of the cost of, essential development infrastructure."

[39] The resolution also recorded:

> "(5) The Council is further of the opinion that:
>
> (a) the special benefit of the canal infrastructure works is enjoyed by all of the lands proposed to be levied;
>
> (b) as the development potential and the likely forms of development for all of the lands to be levied are generally similar, the most appropriate basis of apportioning the total cost of implementation of the overall plan among the identified parcels of rateable land is a on a pro-rata valuation basis."

[40] The learned judge found fault with the verbiage in that resolution, particularly in [4]. The special benefit identified is the resulting ability of the specially charged land to be developed, resulting from that land's special access to the infrastructure works as defined. The Council's resolution says nothing about the special amenity of the charged land relied on in the appeal, namely its waterfront access, unless that is what is comprehended in [4] by the reference to "special access to the infrastructure works generally". That seems unlikely; the explanation given in [4] of those last quoted words is that the function of the works – including the bridges and the parklands – was to provide development infrastructure to service and facilitate development of the specially charged land. It follows both that the Council resolution did not identify the special benefit relied on in the appeal, and that the special benefit identified in the resolution would equally apply to the land not having canal waterfront, but benefiting by way of enhanced development potential, from the improved drainage resulting from the canal infrastructure. That means the Council resolution failed to accord with the command in s 971(6) that the special rate be levied on all rateable land that could reasonably be identified as land on which the rate might be levied. Accordingly, it was in breach of both that provision of the Act, and the general requirements identified by the High Court in *Pestell*, that a Council not pick and choose.

[41] That might simply be a matter of a differently worded resolution, but the Council faces a more fundamental problem. That is that while the charged land did get a special benefit from the works that no other land got to the same degree – waterfront access from land readily capable of development – other land got a different benefit

or benefits from various of the works that were part of this project and necessary for it, and the charged land did not get those same benefits. The special benefit enjoyed by the charged land came from the provision of the canal and the road bridges, but the fact that other land got quite separate benefits from the bridges and the parkland demonstrates that each of those other works was itself a facility provided by the Council. They were each a facility provided to land and occupiers other than the charged land. In arguing that there was but one facility, the canal project, the appellant Council has really tried to have s 971(1) do too much work.

[42] The specially charged land specially benefits from the canal facility, and generally from the other facilities; or specially benefits from the facilities in combination. But I consider there were separate facilities, as the learned trial judge found, even though they were part of an overall project. The appellant conducted its case on the basis that there was one facility, not several, and so I would dismiss the appeal and order the appellant pay the respondents' costs of the appeal, assessed on the standard basis.