SUPREME COURT OF QUEENSLAND

CITATION:	*Maroochydore Central Holdings P/L v Maroochy Shire Council* [2007] QCA 326
PARTIES:	**MAROOCHYDORE CENTRAL HOLDINGS PTY LTD** (applicant) **v** **MAROOCHY SHIRE COUNCIL** (respondent)
FILE NO/S:	Appeal No 2344 of 2007 LAC No 122 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from the Land Appeal Court
ORIGINATING COURT:	Land Appeal Court at Brisbane
DELIVERED ON:	5 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	7 September 2007
JUDGES:	Jerrard JA, Cullinane and Wilson JJ Separate reasons for judgment of each member of the Court, Jerrard JA dissenting in part
ORDER:	**1. Application dismissed** **2. The applicant is to pay the respondent's costs**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – OPERATION AND EFFECT OF STATUTES – GENERAL MATTERS – OTHER MATTERS – where the applicant's land was resumed for road purposes by the respondent – where an application for compensation was lodged in the Land Court – where provisional payments were made to the applicant as advances in respect of compensation payable – where the respondent later sought to transfer the land back to the applicant – whether the respondent acted in accordance with the statute *Acquisition of Land Act 1967* (Qld), s 17, s 20, s 41 *Land Court Act 2000* (Qld), s 33 *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1993-1994) 182 CLR 51, distinguished *Multistar Pty Ltd v Minister for Urban Affairs and Planning* (2000) 111 LGERA 319, considered *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, considered

COUNSEL:	G Allan for the applicant M Hinson SC, with A Skoien, for the respondent
SOLICITORS:	P & E Law for the applicant Maroochy Shire Council Solicitor for the respondent

[1] **JERRARD JA**: This is an application for leave to appeal from a decision of the Land Appeal Court, given on 2 February 2007. The point at issue, a matter of construction of the *Acquisition of Land Act 1967* (Qld) ("the Act") has so far resulted in a number of hearings. Of those, two significant ones have been in the Land Court, and two in the Land Appeal Court. This application for leave to appeal is from the second decision of the Land Appeal Court. The proceedings arise from the resumption in 1999 under the Act, by the respondent Maroochy Council, of land owned by the applicant company. The Council had paid some compensation to the company, but then resolved it no longer needed that land. All of the proceedings have resulted from disagreement over whether, and for how much, the company gets the land back.

Some background

[2] The first relevant decision (Decision 1) was in the Land Court, in *Maroochydore Central Holdings v Maroochy Shire Council* [2002] QLC 77, given on 25 September 2002. The judgment of the Land Court member recorded that the company had applied under s 33 of the *Land Court Act 2000* (Qld) for a declaration as to the appropriate procedure to be followed. The company had been the owner of land described as Lot 7 on RP 895682, in the County of Canning, Parish of Mooloolah, in the Maroochy Shire. Part of the land (645m^2) was resumed by the Council for road purposes, by a proclamation published in the Government Gazette on 19 March 1999. On 20 June 2000 the company lodged a claim for compensation in the Land Court in respect of that land, and between September 2000 and March 2001 the Council paid $180,000 to the company, as sums paid in advance under s 23 of the Act, in respect of compensation payable for the resumed land. That section allows for a resuming authority to make advances of compensation to claimants, relevantly not exceeding the authority's offer (or estimate) of the amount of compensation payable. The authority must be satisfied the claimant is entitled to compensation. Here, the company was.

[3] On 4 July 2001 the Maroochy Shire Council resolved that it discontinue taking the land, and that in accordance with s 17(1A) of the Act, it sought the agreement of the company in having the resumed area of 645m^2 transferred back to the company. Section 17 of the Act provided:

> "**Revocation before determination of compensation**
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> **(1)** If, at any time after the publication of the gazette resumption notice and before the amount of compensation to be paid in respect of the taking thereof is determined by the Land Court or the payment of compensation in respect of the taking is sooner made, it is found that the land or any part thereof is not required for the purpose for which it was taken, the Governor-in-Council, by a gazette notice (the "**revoking gazette notice"**) may revoke the gazette resumption and, if the gazette resumption notice has been amended, any amending gazette notice, or both the gazette resumption notice and any such amending gazette notice, either wholly or so far as the Governor-in-Council or Brisbane City Council thinks necessary.

> **(1A)** However, the revoking gazette notice shall not be made or published in the gazette unless the person entitled as owner to compensation in respect of the taking of the land has previously agreed in writing to the re-vesting as provided by this section of the land or part to which that notice relates.
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> **(2)** Upon the revocation wholly or otherwise by a revoking gazette notice of any gazette resumption notice or amending gazette notice –
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> **(b)** ... the land or part thereof, as the case may be, to which the revoking gazette notice relates shall re-vest in the person in whom the same vested immediately prior to the day when it was taken by the constructing authority or Brisbane City Council under the gazette resumption notice or amending gazette notice taking the land and, subject is hereinafter in this subparagraph provided, shall so re-vest for the person's then estate or interest therein; and
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> **(c)** The constructing authority shall cause a gazette copy of the revoking gazette notice to be lodged with the land registry, and the Registrar of Titles must as soon as may be thereafter, at the cost and expense of the constructing authority, do and execute all such acts, matters, and things as the Registrar of Titles shall consider necessary to give effect to this sub-section.
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> **(4)** Any person entitled to claim compensation under this Act in respect of the taking of any land may, upon the re-vesting of such land or part thereof pursuant to this section, claim from the constructing authority compensation for the loss or damage and (if any) costs or expenses incurred by the person in consequence of the taking of the land and prior to its re-vesting.
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> **(5)** The constructing authority and the claimant may agree upon the amount of the compensation to be paid under sub-section (4), or they may agree that such amount shall be determined by the Land Court, in which case such amount shall, upon the reference of either of them, be determined by the Land Court as if the land had been taken and not re-vested and the claim were limited to the compensation payable under that subsection."

[4] The Council advised the company of that resolution by letter dated 24 July 2001, ("the July letter") and the letter contained the following:

> "Please be advised Council by resolution of the 4 July 2001 resolved viz;
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> '...Council discontinue the taking of the land from Maroochydore Central Holdings and in accordance with the *Acquisition of Land Act* – s 17(1A) seeks the dispossessed owner's agreement to having the resumed area of 645m^2 transferred back to the dispossessed owner.

> Council subsequently seeks your agreement in writing to the re-vesting as provided by the aforementioned section of the land and the land is hereby offered to you at the price determined by the Valuer General *Acquisition of Land Act – Disposal of Land* 41.(1) and 41.(1)A, namely $180,000.
> This offer shall lapse at the expiration of 28 days from the date of this letter."

[5] Section 17 does not make any provision for when, or in what circumstances, offers made to prior owners to re-vest land shall lapse. Despite the reference in the July letter to the Council wanting the company's consent to re-vesting, the Council had evidently considered, and it asserted in the subsequent litigation, that s 17 was not applicable, because compensation of $180,000 had already been paid to the company prior to the Council's decision to discontinue the resumption.[1] The Council contended that the appropriate procedure was that set out in s 41 of the Act. Despite that argument, Decision 1 records that the Council, while arguing that the $180,000 was in fact the total compensation for the land taken, had also referred to that same amount in argument, from time to time, as an advance; and that it was so described in letters from the Council's legal officer at the time. The Land Court member also recorded in Decision 1 that it appeared to be the case that the $180,000 already paid to the company simply happened to be equal to a price later determined by the Chief Executive under s 41. That was because advice of that valuation had not been received by the Council until four months after the last payment of the amounts totalling $180,000 was made, and accordingly it could not have influenced the Council's earlier decision as the amount of the advance to be paid.

[6] Section 41 of the Act relevantly provided:

> "**Disposal of land**
> **41(1)** Notwithstanding any provision of any other Act, where land has been taken either pursuant to an agreement under s 15 or by compulsory process under this Act and, within 7 years after the date of taking, the constructing authority no longer requires the land, then the constructing authority shall offer the land to the former owner at a price determined by the Chief Executive of the department in which the *Valuation of Land Act 1944* is administered.
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> **(1A)** Unless soon accepted by the former owner the offer shall lapse at the expiration of 28 days after it is made.
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> **(2)** In this section –
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> **(3)** **"The former owner**" in relation to land means –
> (a) Where only 1 person had an interest in the land at the date of acquisition and that person is still alive or, in the case of a corporation, in existence – that person; or
> (b) In any other case – such person or persons (if any) as the Minister, in the Minster's absolute discretion, having regard to the interest that existed in the land

[1] Paragraph [11] of the reasons for judgment in Decision 1.

> at the date of acquisition, considered to be fairly entitled to the benefit of this section."

[7] The appeal record does not explain what difference, if any, it made to either party in July 2001 whether the $180,000 was requested or paid under s 17 or s 41. The company did not argue that it was not obliged to repay the $180.000, if it had the land re-vested in it. Reference to the Act provides some general principles about re-vesting, but not an answer as to why the character of the re-payment mattered at all. "Constructing authority" is defined in the Act to mean the State, or a local government or other person authorised by an Act to take land for any purpose. Section 5 of the Act describes the purposes for which constructing authorities may take land, and thereafter Part 2 provides the procedure. That includes the giving of notice to any person entitled to claim compensation in respect of the taking, provision for objections, and provision in s 9(3) that if, after due consideration, the constructing authority is of the opinion that the land in question is required for the purpose for which it is proposed to be taken, the constructing authority may apply to the Minister that the land be taken as prescribed.

[8] Section 9 goes on to require the Minister to consider every application made under the section, specifying some matters to be considered, and then declares that the Governor-in-Council may, by gazette notice, declare that the land particularised in the notice is taken for the purpose mentioned in the notice. The Act does not expressly require or empower the Minister to make a decision, or require that the declaration by gazette notice of the Governor-in-Council reflect or comply with the Minister's decision. Both those matters can safely be assumed in this application, in the absence of complaint. Section 12 declares the effect of a gazette notice, which is that it vests the land in the Crown as and from the date of its publication. The land thereon becomes unallocated State land (s 12(5)), and the previously held estate or interest of every person entitled to the land is converted into a right to claim compensation under the Act. Section 12(5B) provides that that claim may be enforced against the constructing authority.

[9] Section 16 provides for discontinuance of the taking, before publication of a gazette resumption notice, and s 17 for revocation of the gazette notice "if...it is found" that the land the subject of the gazette notice or any part thereof is not required for the purpose for which it was taken. Section 17 envisages two possibilities. One is that the conclusion is "found" before the amount of compensation to be paid is determined by the Land Court. The other is that the conclusion is "found" before the payment of compensation is made. In either event the Governor-in-Council may revoke (via gazette notice) the gazette notice of resumption. Section 17(1A) requires that there be no revoking gazette notice unless the person entitled as owner to compensation has previously agreed in writing to the re-vesting.

[10] Section 17 makes no reference to the constructing authority in s 17(1) or (1A), and gives the relevant power of revocation, of the original gazette resumption notice, to the Governor-in-Council and not to the constructing authority. By necessary implication, it is the constructing authority which is required to "find" that the land is not required for the purpose for which it is taken, but not necessarily the constructing authority with which or with whom the prior owner has agreed to the re-vesting. As a matter of practice, it usually would be the authority. What the section requires is that there be no revoking gazette notice, unless the previous owner has agreed in writing to re-vesting.

[11] Section 17(2) and 17(2A) have the effect that upon the publication of a revoking gazette notice, the land re-vests in the person in whom it was vested immediately prior

to the day when it was taken, and s 17(4) provides that any person entitled to claim compensation in respect of the taking of the land can claim from the constructing authority compensation for the loss or damage, and costs or expenses incurred by the person in consequence of the taking and prior to the re-vesting. Section 17(5) provides that in the absence of agreement as to such compensation, it will be the amount determined by the Land Court. Section 24 provides for a constructing authority or a claimant to refer to the Land Court for hearing and determining the matter of the amount of compensation, and s 26(1) provides that the Land Court has jurisdiction to hear and determine all matters relating to compensation under the Act.

Decision 1

[12] The issue settled in Decision 1 was whether, as the company submitted, the procedure provided by s 17 should be followed in that case. The Council argued that that section was not applicable, because there was no mechanism in the section to enforce the repayment of an advance. That was argued even though the Council had asked the company to agree to a re-vesting, in the July letter. The company had also in fact, acknowledged its liability to return the $180,000 if the land was re-vested under s 17, but the respondent Council submitted that there was no guarantee that, in another case, a land owner would return any money so paid by way of advance. The Land Court member did not regard that as an insuperable obstacle, and was satisfied that s 17 did apply.[2] The member accordingly declared that the appropriate procedure was that provided for in s 17.

[13] The learned member considered that construing the words "or the payment of compensation in respect of the taking is sooner made" in s 17, to mean that the section applied only where no compensation had been paid at all, did not sit easily with the proceeding phrase, which referred to the time "before the amount of compensation...is determined by the Land Court."[3] The member reasoned that it was only when the amount of compensation had been paid in full that the Governor-in-Council was precluded from acting under the section, and the member considered that interpretation consistent with the general arrangement of the Act.

[14] The member also considered that if (only) s 41 applied, it would follow that in a case such as the one then under consideration, an applicant for compensation would need to continue with an existing claim for full compensation, and then be faced with a "take it or leave it" situation when responding to an offer to repurchase the land under s 41, at a price to be determined by the Chief Executive.[4] The member considered that to be a clumsy and potentially lengthy process. Further, while there was no provision in s 17 dealing expressly with the return of any advance – the point relied on by the respondent Council – the member could see no reason why a resuming authority could not include a term in the agreement that was contemplated by s 17(1A), to the effect that the land owner agreed also to the return of the advance.[5] In any event, the member was satisfied that the money could be recovered in another court.

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2 Paragraph [17]-[19] of Decision 1.
3 Paragraph [14] of Decision 1.
4 Paragraph [16] of Decision 1.
5 Paragraph [17] of Decision 1.

The second hearing

[15] The respondent Maroochy Shire Council appealed to the Land Appeal Court, which gave judgment on 9 April 2003. ("Decision 2"). The Land Appeal Court recorded that the learned member whose judgment was appealed had noted that the procedure in s 17 could only be used where the owner entitled to compensation had agreed in writing to the re-vesting of the land, as required by s 17(1A) of the Act.[6] The Land Appeal Court held that if an owner failed to so agree, it would follow a resuming authority which no longer required the land would pay the appropriate compensation for it, and then, possibly, offer the property back to the owner pursuant to s 41, before selling it to a third party, should the original owner not wish to repurchase it.

[16] The Land Appeal Court considered it logical that a constructing authority was precluded from discontinuing with a resumption, after compensation for the taking of that land had been decided, or (if it had been agreed) had been paid.[7] But the Land Appeal Court considered that an advance in respect of compensation was not equivalent to the payment of compensation in respect of the taking;[8] and that while in some cases the amount of an advance might coincide with the amount of compensation ultimately determined or agreed, that possibility did not change the character of an advance. That character was described in s 23 of the Act as an advance payment on account of compensation claimable but not yet determined or agreed. Accordingly, the Land Appeal Court held that there had been no error by the learned member in her construction of s 17(1) of the Act, and her conclusion that it could have application, when an advance against compensation had been made under s 23 but the full amount had not been determined or, if agreed, paid.[9] I respectfully agree.

[17] However, the Land Appeal Court also held (at [41]) that as a matter of construction it was not self evidently apparent that each of s 17 and s 41 must result in mutually exclusive operation of their provisions. The conditions which needed to be satisfied to invoke the operation of each were not identical. Under s 17(1) the constructing authority must have found that land or some part that was taken was not required for the purpose for which it was taken. As against that, under s 41, land which had been taken must be offered for sale to the former owner when the constructing authority "no longer requires the land." The Land Appeal Court held that s 41 could therefore apply where the land had been used for the purpose for which it was resumed, but was no longer required for that purpose or for any other purpose, as well as applying where it was not actually used or required for any purpose after resumption.[10]

[18] The Land Appeal Court also agreed (at [39]), in my opinion correctly, with the Land Court member, that money paid by way of an advance would be recoverable in another court, citing *York Air-Conditioning and Refrigeration (A-SIA) Pty Ltd v The Commonwealth* (1949) CLR 11 at p 63-64, as an instance of an advance being recoverable as a provisional payment.

[19] The Land Appeal Court noted that by reason of s 17(1A), the Council would need to obtain the written consent from the owner before embarking on the process resulting in

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6 At paragraph [13] of the reasons in Decision 2.
7 Paragraph [34] of Decision 2.
8 Paragraph [35] of Decision 2.
9 Paragraph [40] of Decision 2.
10 Paragraph [43] of Decision 2.

revocation,[11] and that discontinuance of resumption under s 17 meant that the taking of the land was effectively reversed, with ownership reverting to the original owner, and with compensation limited to that which had accrued prior to the re-vesting.[12] Under s 41 a former owner had to purchase the land at a price at which s 41 required the constructing authority to offer the land for sale, namely the price determined by the Chief Executive. The s 17 process had the effect of continuity of ownership despite the taking of the land, whereas that under s 41 recognised there had been a taking of land which could be followed by a subsequent re-transfer of it.

[20] The Land Appeal Court accordingly held it was theoretically open for a constructing authority to find, where resumed land was not required for the purpose for which it was taken, that the processes under s 17 and s 41 could both apply.[13] It held that a constructing authority would have to consider whether it would proceed under s 17, before acting under s 41 of the Act. If the process under s 17 was successfully invoked, there was no longer a taking of the land, and so no room for s 41 to operate. The Land Appeal Court held that until a constructing authority had decided it was not appropriate to implement the process under s 17 or otherwise exhausted the possibility of acting under s 17, it should not proceed to apply s 41.[14]

[21] In the instant case, it was considered by the Land Appeal Court in Decision 2 that on the material before the learned member, the Maroochy Shire Council had not undergone the process of considering whether it was appropriate or feasible to seek the company's consent to the re-vesting of the land, on the terms provided by s 17.[15] The Land Appeal Court considered that for that reason it had not been open to the learned member to declare that the appropriate procedure to follow was that provided for in s 17, and, only for that reason, allowed the appeal, remitting the matter to the Land Court member for further hearing. No order for costs was made. Thereafter, matters became even more confused.

[22] The parties had supplemented the appeal record during this appeal, by putting in the letters which passed between the company and the Council in 2001. Those show that in response to the July letter, the company wrote back on 15 August 2001 announcing that it was currently considering its position in relation to whether it accepted the Council's offer to re-vest the land, and asserting that the Council had fallen into error in offering the land back under s 41. Then, five days later on 20 August 2001, the company advised that it consented to the re-vesting, and reserved its right to claim for costs and losses as a consequence of the resumption and the discontinuance. That letter of 20 August really did all that s 17(1A) required of the company, namely that despite whatever else is asserted, it agreed in writing to the re-vesting. However, on 21 August 2001 the Council responded, confirming that it was offering the land back for $180,000 (the Council contended that that accorded with s 41(1)), and that the Council did not seek the company's consent to re-vesting the land in its name. On 31 August 2001 the Council wrote again, noting that its offer in the July letter had expired (relying on the 28 day limit imposed therein) and seeking the company's agreement in writing to the re-vesting of the land for the amount of $180,000 as determined by the Valuer-General of the Department of Natural Resources. That letter again repeated that the offer contained in it would lapse at the expiration of 28 days from that date.

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11 Paragraph [44] of Decision 2.
12 Paragraph [46] of Decision 2.
13 Paragraph [48] of Decision 2.
14 Paragraph 53 of Decision 2.
15 Paragraph 55 of Decision 2.

The company simply did not reply. The non-response has been treated as a lack of relevant agreement under s 17(1A).

[23] The company's argument in this appeal included that at all times the Council had been obliged to act under s 17, particularly 17(1A). The argument did not concede what seems to be a fact, namely that the Council, while contending in 2001 that it acted under s 41 and s 17, was offering the company what appears to be the identical position to that which the company sought, namely the re-vesting of the land, assuming – as has never been contested – that the company accepted an obligation to repay the $180,000. Although the Council's correspondence was tainted by the assertion that its offers (made under s 17) were only open for 28 days, the Council had endeavoured to obtain the owner's agreement in writing to re-vesting, on the only grounds on which the land could be re-vested, namely, repayment of $180,000. The company had certainly agreed to the re-vesting.

[24] It follows, as the respondent's senior counsel Mr Hinson SC submitted in argument, that the company itself could have requested the Governor-in-Council to issue a revoking gazette notice. The correspondence between the parties could have been submitted by the company to the Governor-in-Council. Section 17(1) does not particularly place the obligation, to approach the Governor-in-Council, on the authority taking the land and which has found it is not required, rather than on the previously dispossessed land owner. What the section requires is that there be a finding that the land was not required for the purposes for which it was taken, which finding appears in this matter to be implicit in the correspondence (and conceded in the various hearings). Likewise, the section requires an agreement in writing to a re-vesting. That has happened. There is no record of any opposition by the company to the notion that it must repay the money. It might have been wise to do that first, and then to invite the Council to join in the application to the Governor-in-Council.

The third hearing

[25] The reason the Council succeeded on the first appeal in the Land Appeal Court was because that court held the appeal record before it did not reveal a basis for the Land Court member being satisfied the company would consent to the re-vesting of the land on the terms provided for by s 17. Neither the company nor the Council sought leave to appeal the Land Appeal Court judgment of April 2003. That judgment required the constructing authority to consider whether it would proceed under s 17, before acting under s 41. The next critical step was that on 24 November 2004 the Council resolved not to re-vest the land pursuant to s 17, and to proceed instead under s 41 of the Act. The appeal record shows the following events happened before that resolution.

[26] When the remitted matter came back on 28 September 2004, before the same Land Court member who had made Decision 1, the company's solicitor sought leave to seek orders that within seven days the Council make an election to proceed under s 17(1) or s 41(1) of the Act, and provide the applicant company with written notice of the election within one day after the decision. The learned Land Court member doubted her power to make the declaration sought, and the parties agreed to certain undertakings. Those appear at record 14-15 of the respondents' index to the bundle of documents, and include its undertaking that by 29 November 2004 it would decide whether or not to proceed under s 17(1) of the Act, and to that end would seek the company's agreement in respect of re-vesting the land; and if it decided not to so proceed under s 17(1) in respect of the re-vesting the land, it would offer the subject

land for sale back to the company under s 41. Orders were made on 29 September 2004 in terms which included those undertakings. The foreshadowed application by the company, and the orders made on those undertakings, concede a choice to the respondent Council to elect on how to proceed. That choice reflected the judgment of the Land Appeal Court in Decision No 2.

[27] By letter dated 11 January 2005 the Council wrote to the company's solicitors, offering the land back to the company under s 41 at the price determined by the Valuer General, namely $400,000. The company did not accept that offer, and it subsequently filed an application in the Land Court, heard by the same member who made Decision 1. The application was dated 6 June 2005 in the Land Court. It sought declarations under s 33(1) of the *Land Court Act 2000,* in unusual terms, namely:

> "1. That pursuant to s 5 of the *Land Court Act 2000* and s 26 of the *Acquisition of Land Act 1967*, the Court does not have jurisdiction to hear and determine the Applicant's claim for compensation.
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> 2. Such further or other declaration or orders as the Court considers appropriate."

[28] It was the company's own claim for compensation (the original application for compensation for the compulsorily acquired land, referred to the Land Court on 20 June 2000, and amended on 19 March 2001) which it asked the Land Court to declare that that court had no jurisdiction to hear and determine. The judgment of the Land Court member on the company's application filed on 6 June 2005 ("Decision 3") includes the observation that that claim for compensation has not yet been heard and determined.[16]

[29] The oddity of the application is only partly explained by the fact that the company's counsel submitted in the Land Court, on the hearing of its June 2005 application, that it was a pre-condition to the exercise of the Land Court's power to determine compensation under s 20 of the Act that the land be used for the purpose for which it was resumed, citing *Clunies-Ross v The Commonwealth* (1984) 155 CLR 192 and s 20(3) of the Act. The company's argument ran that since the Council no longer required the resumed land for the purpose for which it was taken, the Land Court had no jurisdiction to hear and determine the company's claim under s 20 for compensation.

[30] Section 20 reads as follows:

> **"Assessment of compensation**
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> **20(1)** In assessing the compensation to be paid, regard shall in every case be had not only to the value of land taken but also to the damage (if any) caused by either or both of the following, namely—
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> (a) the severing of the land taken from other land of the claimant;
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> (b) the exercise of any statutory powers by the constructing authority otherwise injuriously affecting such other land.

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16 Paragraph [3] of Decision 3.

> **(2)** Compensation shall be assessed according to the value of the estate or interest of the claimant in the land taken on the date when it was taken.
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> **(3)** In assessing the compensation to be paid, there shall be taken into consideration, by way of set-off or abatement, any enhancement of the value of the interest of the claimant in any land adjoining the land taken or severed therefrom by the carrying out of the works or purpose for which the land is taken.
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> **(4)** But in no case shall subsection (3) operate so as to require any payment to be made by the claimant in consideration of such enhancement of value."

[31] The Land Court member held that the effect of s 12(5) of the Act was to create and vest a right, absolute and unqualified, to claim compensation.[17] The member noted[18] there was no suggestion that, as at the date of resumption, the Council did not require the land for a lawful purpose and that the resumption was therefore invalid. Instead, the Council had decided after the resumption that it no longer required the land for the purpose for which it was taken. The member held that while s 20 of the Act set out the principles to be applied when assessing the quantum of compensation, that section did not deal with the threshold question of whether the court had power to determine compensation, that being dealt with by other sections, including s 12, s 18(1), and s 26(1).[19] The fact that the works were not to be constructed might affect the quantum of compensation, and the amount allowed for injurious affection or enhancement under s 20(1)(b) and s 20(3), but they did not affect the jurisdiction of the Land Court.[20] Again, I respectfully agree.

[32] The member rejected the argument that s 20 provided any support for a submission that it was a precondition to the exercise by the Land Court of the power to determine compensation that the land would be used for the purpose for which it was resumed. The member concluded that a claimant's right to claim compensation, arising under s 12(5) of the Act, remain in existence and capable of assertion by a claimant following the Council's decision that it no longer required the land for the purpose for which it resumed it.[21] The Land Court member considered that the earlier judgment in the Land Appeal Court had necessarily concluded that a claim for compensation would remain to be finalised after a re-transfer of land (referring to [47] of the reasons for judgment in the Land Appeal Court, in the second decision). The member respectfully agreed with that conclusion.

[33] The Land Court member went on to hold that when compensation was assessed under s 17(4) of the *Acquisition of Land Act*, it was assessed on a different basis from an assessment under s 20, and that when the s 17 process was adopted, compensation must be assessed under s 17(4), and not s 20. The member held that if a s 17 process was not adopted, a claimant had no right to claim compensation under s 17(4).[22] The member went on to observe that the judgment of the Land Appeal Court had held that

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17 Paragraph [20] of Decision 3.
18 In paragraph [26] of Decision 3.
19 In paragraph [29] of Decision 3.
20 In paragraph [31] of Decision 3.
21 In paragraph [32] of Decision 3.
22 In paragraph [44] of Decision 3.

in appropriate cases a constructing authority had a choice as to whether to proceed under s 17 or s 41, although where both avenues were open, the constructing authority had first to consider whether it was appropriate to proceed under s 17.

[34] The member observed that the company's argument, that there was a mandatory obligation on the Council to put in train the s 17 process in the instant case, was contrary to the decision of the Land Appeal Court.[23] That matter had not been raised in those terms in that court, and there was no explanation for the omission. The member considered it unreasonable for the company not to have made that argument in the earlier proceedings in which construction of s 17 was an issue, and that the member was in any event bound by the decision of the Land Appeal Court. Accordingly, the application was dismissed.

The fourth decision

[35] There then followed an appeal to the Land Appeal Court, which delivered its judgment on 2 February 2007, ("Decision 4"), the decision now sought to be appealed. In that appeal the company had sought orders setting aside Decision No 3 of the Land Court, and that the Land Appeal Court make:

> "Appropriate orders to ensure that the land resumed by the Council is re-vested to the appellant in accordance with s 17 of the Act."[24]

[36] The Land Appeal Court judgment in Decision 4 records that pursuant to s 12(5) of the *Acquisition of Land Act*, on and from the date of publication of the taking of the land in the Queensland Government's Gazette, the resumed land vested in the constructing authority, and the company's estate and interest in the land was converted into a right to claim compensation under that Act. The judgment held that, generally speaking, compensation is assessed in accordance with the principles set out in s 20, but that s 17 provided for circumstances where, after the publication of the resumption in the gazette, resumed land is no longer required by the constructing authority.

[37] The Land Appeal Court went on to hold that s 17 and s 41 provided quite different and separate regimes for returning of resumed land to a previous owner, and the Council could not seek to rely on both sections.[25] It held that it had been open to the company to agree to the terms of the offer of 24 July 2001 ("the July letter"), and that if the agreement was in writing, the requirements of s 17(1A) would have been satisfied. But, that court held, the company did not agree to those terms and conditions offered on 24 July or 31 August 2001.[26] The Land Appeal Court agreed with the earlier decision by that same court that a resuming authority could include terms as to repayment of advances, or a range of terms or conditions, in the agreement contemplated by s 17(1A). The Land Appeal Court also held that a constructing authority might be able to avail itself of the procedures under either s 17 or s 41, to dispose of resumed land no longer required. The court then held that the correspondence by the company, consenting to the revocation, did not constitute or create an agreement as contemplated by s 17(1A), or any other obligation or duty requiring the Council to re-vest the land.

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23 In paragraph [51] of Decision 3.
24 Paragraph [10] of Decision 4.
25 Paragraph [15] of Decision 4.
26 Paragraph [15].

[38] The Land Appeal Court then held that s 17(1) did not create rights or entitlements. It conferred a discretionary power or authority to revoke a resumption notice, rather than an authority which had to be exercised if other conditions necessary for the operation of s 17(1) were satisfied.[27] The Land Appeal Court also held that the proper construction to be given to s 17(1) and s 41 of the Act had always been a critical issue,[28] and that the company had not argued that s 17(1) imposed mandatory obligations on the respondent until December 2005, at the second hearing of the matter by the Land Court. It had been argued in the first appeal to the Land Appeal Court, by the company, that the procedures provided for under s 41 were not intended to be operative except in circumstances where compensation had been paid.[29] The Land Appeal Court had already rejected those submissions, and found s 17 and s 41 were not mutually exclusive in their operation; and if the company considered the earlier decision was wrong, it could have appealed to the Court of Appeal.[30] To allow the company to succeed now on appeal, on the basis that s 17 imposed mandatory obligations on the Council to re-vest the land, would achieve a judgment and consequential relief in conflict with the earlier decision of the Land Appeal Court.[31]

[39] The Land Appeal Court therefore concluded that an estoppel of the kind contemplated in *Port of Melbourne Authority v Anshun Pty Ltd* (1980-1981) 147 CLR 589 applied, to prevent the company from raising for the first time in the Land Court, and then in the Land Appeal Court, an argument which would lead to an entirely different construction of s 17(1), to that decided in the earlier decision of the Land Appeal Court on 9 April 2003.[32] Accordingly, the appeal was dismissed.

This application

[40] The appeal to this Court is by leave (s 74 of the *Land Court Act 2000*), and only on the ground of error or mistake of law, or that the Land Appeal Court had no jurisdiction, or exceeded its jurisdiction. The grounds of appeal allege error in construing s 17(1A) of the *Acquisition of Land Act 1967*, an error in the finding that the company had not agreed in writing in accordance with s 17(1A) to the re-vesting of the land, and in finding that its consent did not create a duty in the Council to re-vest the land. Other errors are alleged, namely construing s 17(1) as conferring a discretion (on the Council) rather than a mandatory obligation; in following the earlier decision of the Land Appeal Court in the construction therein of s 17 and s 41 as not being mutually exclusive; and in construing s 17(1). The company sought orders requiring the Council to do all things necessary under s 17(1) of the Act to re-vest the land.

[41] The company's submissions included that s 17(1) did not authorise a re-vesting subject to conditions. It submitted that the Land Appeal Court erred in Decision No 4, where it held that the agreement contemplated by s 17(1A) could include a range of terms and conditions that the parties considered appropriate. The company submitted that s 17(1A) spoke only of a prior agreement in writing "to the re-vesting as provided by this section of the land", and not re-vesting "upon such terms and conditions as the parties may deem appropriate." The company also argued that the Land Appeal Court

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27 Paragraph [22] of Decision 4.
28 Paragraph [38] of Decision 4.
29 Paragraph [40] of Decision 4.
30 Paragraph [44] of Decision 4.
31 Paragraph [47] of Decision 4.
32 Paragraph [47] of Decision 4.

erred in finding that the correspondence sent by it did not constitute an agreement to re-vesting of the land.

[42] The company argued as well on this application that the word "may" in s 9(7) of the Act was not intended to give a discretion, and accordingly "may" in s 17(1) should not be so construed. Instead, "may" should be understood as imposing a duty. The company again contended that s 41 could only operate where compensation had been determined; and that s 17(1) and s 41(1) of the Act were mutually exclusive.

Conclusions

[43] Where a constructing authority does find that land is not required for the purpose to which it was taken, the Act gives the previous owner a right to a re-vesting, should the owner agree in writing to that re-vesting. In this matter the company did so agree. The Land Court member and Land Appeal Court have construed s 17(1A) to imply necessarily that the agreement by the previous land owner to the re-vesting could include terms and conditions. That led the Land Appeal Court to the view, in its second decision,[33] that the correspondence by the company did not constitute or create an agreement as contemplated by s 17(1A).

[44] That approach required more from the original land owner – in this matter the company – than s 17(1A) actually specified. The section is satisfied if the previous owner agreed to the re-vesting. The company did agree. A previous owner who so agrees can still claim compensation under s 17(4), and it is only where an owner has not agreed to re-vesting that s 17(1A) will not apply. I agree with the Land Court member that when a decision is taken that land is not required for the purpose for which it was taken and some payments or partial payment of compensation has been made by that date, but not all, s 17(1) can apply, provided the owner agrees to the re-vesting. Where money has been paid in part compensation, there can only sensibly be an agreement to re-vesting if there is an agreement also to repay, assuming the constructing authority wants repayment. That is the qualification or implication necessitated by the reference to "agreed" in s 17(1A), namely that any willingness to re-take the title must also accept an obligation to repay the money. Otherwise there is no true agreement. However, that would seem to be the only term or condition which can obviously apply to that agreement to have title re-vested. There may be others, as contemplated by the Land Appeal Court, but none are demonstrated in this matter.

[45] Section 41 extends the right given to a prior owner by s 17, to an associated right. The circumstances in which the rights can be exercised may be the same, or different. But the right given by s 41 does not diminish that given by s 17, a right to re-vesting if so agreed, obviously conditioned on repayment of compensation already partly paid. Section 41 envisages a sale, and of necessity the fixing of a price, not by agreement; and s 17 envisages instead a re-vesting of title, and by necessity the repayment of any compensation partly paid.

[46] The applicant argued that the reasoning of Mason CJ in *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1993-1994) 182 CLR 51 at p 64 supported its claim that the power given in s 17(1) was one which a constructing authority, such as the Council, was bound to exercise when the conditions for its exercise had arisen. Mason CJ had referred to the judgment in *Ward v Williams* (1955) 92 CLR 496 at 505, that the question whether a public officer, to whom a power was

[33] At [17] in Decision No 4.

given by facultative words, was bound to exercise that power upon any particular occasion, or in any particular manner, was to be answered from the context, from the particular provisions, and from the general scope and objects of the enactment conferring the power. The applicant's counsel submitted that once it had agreed to a re-vesting of the land, the Council was obliged to act under s 17(1). The power there given had to be exercised when the circumstances for exercise arose. The problem with the submission is simply the terms of s 17, which gives the power to the Governor-in-Council, not to the constructing authority. The Council had no defined part at all to play in obtaining a revoking gazette notice.

[47] The applicant also contended that the principles of *Anshun* estoppel did not apply in matters of public law, citing the judgment of Stein J in *Rosemont Estates Pty Ltd v Minister for Urban Affairs and Planning* (1996) 90 LGERA 1. Stein J wrote at p 32 that:

> "In my opinion, the *Anshun* estoppel principle is inapplicable to the applicants' claim that the environmental impact statement is invalid. This is primarily because the principle has no application to public law proceedings under 'open standing' provisions in environmental legislation, such as s 123 of the Act."

That Land Appeal Court rejected the submission, holding that approach to be in conflict with the joint judgment of McMurdo P and Thomas JA in *TM Burke Estates Pty Ltd v Council of the Shire of Noosa* [2001] QCA 42; (2001) 113 LGERA 368 at 379, where the joint judgment concluded that an estoppel of the kind referred to by the joint judgment in *Anshun* would arise in the circumstances in *TM Burke Estates Pty Ltd v Council of the Shire of Noosa.* In that matter the applicant land developer had claimed compensation for injurious affection pursuant s 3.5 of the *Local Government (Planning and Environment Act) (1990)* (Qld), and the Council had based its defence upon s 3.5(4)(c) and (g) only. A District Court judge upheld the Council's submissions that those two sub-paragraphs applied, but TM Burke successfully appealed. The Council then sought to rely on another sub-section of 3.5(4).

[48] The joint judgment held (at 379):

> "Our primary view is that all available defences under s 3.5(4) were litigated in that counsel, for reasons seemed good, refrained from supporting a defence based on sub-paragraph (d). It seems to us to be a clear case of a defence that was so relevant to the subject matter of the preliminary point that it would have been unreasonable not to bring it forward. We would conclude that an estoppel of the kind referred to by Gibbs CJ, Mason and Aickin JJ at 602-603 of *Anshun* would arise in the present circumstances."

It was further stated in *Anshun* that:

> "It has generally been accepted that a party will be estopped from bringing an action, which, if it succeeds, will result in a judgment which conflicts with an earlier judgment."

And:

> "The likelihood that the omission to plead a defence will contribute to the existing of conflicting judgments is obviously an important factor to be taken into account in deciding whether the omission to

> plead can found an estoppel against the assertion of the same matter as a foundation for a cause of action in a second proceeding.
>
> In our view an estoppel arises in the present case on this footing also. If the Council were now permitted to rely on a defence based on s 3.5(4)(d) it would, if it succeeded in such a plea, achieve a judgment which conflicts with the earlier judgment of the Court of Appeal."

[49] That too was a public law case, involving the construction of the P & E Act, and the argument for an estoppel was rejected. Likewise, in *Multistar Pty Ltd v Minister for Urban Affairs and Planning* (2000) 111 LGERA 319 Lloyd J declined to follow Stein J in the *Rosemont* decision, being satisfied that in the judgment in the High Court in *Re Wakim; ex parte McNally* (1999) 198 CLR 511, and in the New South Wales Court of Appeal in *Cachia v Isaacs* (1985) 3 NSWLR 366, there was no distinction made between public and private litigation. There may be an important distinction in a case unlike this one, where there has been so much pointless disagreement that no clear principle can be extracted.

[50] The arguments and rulings in this matter have slowly deviated from the simple issue of whether the company agreed to the title being re-vested. On the evidence, it did. But the Council has not acted in any way in breach of the Act, because the Council asked the company to agree to re-vesting. The Council was not obliged by the Act to keep re-offering the land for re-vesting, once it had done so and had been ignored. The various hearings in these proceedings, and the appeals, have focused on other matters and not the essential one, and the company appears to have been denied an available right, although because of its own conduct. The company did include in its grounds of appeal a complaint of error in finding that the company had not agreed in writing to re-vesting of the land. I would uphold the appeal on that limited ground, and accordingly give leave to appeal, allow the appeal, order that the orders of the Land Appeal Court be set aside, and order that the parties do all things necessary under the Act to re-vest the land in the applicant, upon the applicant repaying any as yet unrepaid compensation previously paid to it. Because the company largely contributed to the result, I would not make any orders as to costs.

[51] **CULLINANE J:** I have had the advantage of reading the reasons for judgment of Jerrard JA in this matter and gratefully adopt His Honour's detailed outline of the somewhat tortured history of this matter.

[52] The issues said to warrant the grant of leave concern primarily the terms of s 17 of the *Acquisition of Land Act 1967*. This section provides as follows:

> "17 **Revocation before determination of compensation**
>
> (1) If, at any time after the publication of the gazette resumption notice and before the amount of compensation to be paid in respect of the taking thereof is determined by the Land Court or the payment of compensation in respect of the taking is sooner made, it is found that the land or any part thereof is not required for the purpose for which it was taken, the Governor in Council, by a gazette notice (the *revoking gazette notice*) may revoke the gazette resumption notice and, if the gazette resumption notice has been amended, any amending

gazette notice, or both the gazette resumption notice and any such amending gazette notice, either wholly or so far as the Governor in Council thinks necessary.

(1A) However, the revoking gazette notice shall not be made or published in the gazette unless the person entitled as owner to compensation in respect of the taking of the land has previously agreed in writing to the revesting as provided by this section of the land or part to which that notice relates.

(2) Upon the revocation wholly or otherwise by a revoking gazette notice of any gazette resumption notice or amending gazette notice—

(a) the gazette resumption notice or amending gazette notice shall to the extent to which so revoked be deemed to be absolutely void as from the making thereof as if it had not been made; and

(b) without prejudice to the provisions of paragraph (a), the land or part thereof, as the case may be, to which the revoking gazette notice relates shall revest in the person in whom the same vested immediately prior to the day when it was taken by the constructing authority under the gazette resumption notice or amending gazette notice taking the land and, subject as hereinafter in this subparagraph provided, shall so revest for the person's then estate or interest therein; and

(c) the constructing authority shall cause a gazette copy of the revoking gazette notice to be lodged with the land registry, and the registrar of titles must as soon as may be thereafter, at the cost and expense of the constructing authority, do and execute all such acts, matters, and things as the registrar of titles shall consider necessary to give effect to this subsection.

(2A) Subject to subsection (2)(a), for subsection (2)(b) the land or part shall so revest subject to all trusts, obligations, mortgages, encumbrances, charges, rates, contracts, claims, estates and interests of what kind soever subsisting therein or thereover immediately prior to the taking thereof, but so that no person shall be prejudiced by reason of the person having, in consequence of the gazette resumption notice or amending gazette notice taking the land in question and in the meantime, done or omitted to do any act or thing or failed to exercise any right in respect of any such trust, obligation, mortgage, encumbrance, charge, rate, contract, claim, estate, or

> interest and, without limiting the generality of the aforegoing, so that the time allowed under any such trust, obligation, mortgage, encumbrance, charge, rate, contract, claim, estate, or interest for the doing of any act or the exercising of any right shall be deemed not to be shortened by the period commencing on and including the date on which the land was taken and ending with and including the day immediately preceding the date on which the land or part was revested.
>
> (3) Without limiting the generality of the provisions of subsection (2)(c), the registrar of titles may make such endorsements upon the deed of grant or certificate of title for any lot or parcel of such revested land or part, or issued such new certificates of title therefor with such endorsements thereon (if any) as the registrar of titles may deem requisite in the circumstances.
>
> (4) Any person entitled to claim compensation under this Act in respect of the taking of any land may, upon the revesting of such land or part thereof pursuant to this section, claim from the constructing authority compensation for the loss or damage and (if any) costs or expenses incurred by the person in consequence of the taking of the land and prior to its revesting.
>
> (5) The constructing authority and the claimant may agree upon the amount of the compensation to be paid under subsection (4), or they may agree that such amount be determined by the Land Court, in which case such amount shall, upon the reference of either of them, be determined by the Land Court as if the land had been taken and not revested and the claim were limited to the compensation payable under that subsection."

[53] I agree with the conclusions of Jerrard JA that the requirements of s 17(1A) are satisfied by the written signification by a dispossessed owner of consent to the revocation of the resumption.

[54] The Land Appeal Court in the judgment the subject of this application, concluded that there had been no agreement reached which would satisfy s 17(1A) and in this regard took the same view as the Land Appeal Court on the earlier occasion ("the second hearing" referred to by Jerrard JA).

[55] On each occasion (that is in the second and the fourth hearing) the Land Appeal Court approached the matter on the basis of whether there was in existence a concluded contract between the parties and concluded that there had not been an acceptance in terms of the offer which was subject to certain conditions. The court on each occasion considered whether the resuming authority was entitled to make an offer subject to conditions.

[56] In my view for the reasons which Jerrard JA sets out in his reasons for judgment, s 17(1A) requires no more than the former owner's consent in writing to the revocation.

[57] It follows then that the conditions upon which a revesting pursuant to s 17 of the Act might occur existed in this case.

[58] However, I do not think that it follows that the applicant in this case would be entitled to the relief claimed. The error of law by the Land Appeal Court cannot in my judgment be said to have affected the outcome. In my view there are two major obstacles to the applicants' prospects of success.

[59] The first is that on any view s 17 of the Act cannot be regarded as imposing a duty to act.

[60] It is noteworthy that no reference is made to a resuming authority in the section. The Governor in Council is empowered to take the necessary steps to revoke a resumption. This is plainly enough because it is by virtue of the Governor in Council's resumption notice and its publication that the resumption has taken place.

[61] It is of course to be expected that in virtually all cases the resuming authority will be the body which puts in train the process for which s 17 provides but the statute is not in its terms addressed to the resuming authority. It is possible to argue situations in which the resuming authority might play a secondary role.

[62] The language used in the section is permissive and not mandatory.

[63] It is of course always a matter of construction whether a legislative provision which is expressed in permissive terms is nonetheless to be construed as imposing a duty to act.

[64] The Land Appeal Court in the judgment we are concerned with, agreed with the decision of the Land Appeal Court in the second hearing that s 17 did not impose a duty upon the respondent to act in the circumstances provided for in s 17(1).

[65] At that time the applicant's argument was that where it was found prior to the payment or determination of compensation that the land or any part of it was not required for the purpose for which it was taken there was an obligation to affect a revocation of the resumption.

[66] The Land Appeal Court on the second hearing rejected this argument.

[67] Before the Land Appeal Court in the fourth hearing the applicant put the matter somewhat differently contending that the resuming authority had no power to make an offer subject to conditions and that all preconditions (both those contained in s 17(1) and that contained in s 17(1A)) had been satisfied and there was a duty in those circumstances to revoke the resumption.

[68] As the Land Appeal Court in its judgment in this matter (the fourth hearing) pointed out the Act is replete with provisions which use the word "shall" and also provisions which use the word "may".

[69] As will be seen in s 41 it is expressed in mandatory terms and is addressed to the resuming authority. Its language is to be contrasted with that used in s 17.

[70] We were referred to cases such as *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1993-1994) 182 CLR 51 and particularly the passage of Mason CJ at page 64;

> "The question whether a public officer, to whom a power is given by facultative words, is bound to exercise that power upon any particular occasion, or in any particular manner, is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power (29)."

[71] Such an approach is to be formed especially, but not limited to, revenue statutes.

[72] There is nothing in my view in the context in which the section appears or in the scope and nature and purpose of the Act which would justify the conclusion that the power to revoke the resumption becomes an obligation to do so upon satisfaction of the various conditions, to which the exercise of the power is subject.

[73] The applicant has succeeded to the extent of disturbing one of the findings of the Land Appeal Court namely that there had been no satisfaction of the requirements of s 17(1A).

[74] This does not however alter the fact that the section remains permissive and does not in my view confer any arguable prospects of success upon the applicant. The error which the Land Appeal Court made could not have materially affected the decision the subject of this application

[75] The second obstacle which the applicant faces arises from the application of the principle in *Port of Melbourne Authority v Anshun Pty Ltd* (1980-1991) 147 CLR 589.

[76] The first hearing before the Land Appeal Court involved as will be apparent from what has been said earlier the proper construction to be given to s 17 of the Act and in particular whether it was to be regarded as being mandatory in its affect. The argument before the Land Appeal Court in the matter now before this Court also concerned this issue although on a marginally different basis.

[77] I agree with the members of the Land Appeal Court in the matter, the subject of this application, where in its judgment the court said at paragraph [47]:

> "The argument now being advanced concerning the construction of s 17 was one that clearly could and should have been raised before the Land Appeal Court on the previous occasion. It was not, and no satisfactory excuse or reason was advanced in respect of that omission."

[78] The same might be said of the situation before us. No explanation was advanced.

[79] This matter is not affected by the different view taken in this Court of the requirements of s 17(1A) in my view.

[80] The *Anshun* principle stands as a bar to the applicant being able to litigate an issue which plainly should have been litigated in the first proceedings. Nor in my view is there any principle which the applicant is entitled to invoke which would deny the operation of the *Anshun* principle to proceedings of this kind involving the construction of a statute.

[81] I would refuse the application with costs.

[82] **WILSON J:** I have read the reasons for judgment of Jerrard JA and Cullinane J, and wish to add the following.

[83] The second ground of the draft notice of appeal to this Court is –

> "(2) The Court erred at law in finding, at paragraph [17] of its decision that:
>
> (a) the Appellant had not agreed in writing, in accordance with s 17(1A) of the Act to the revesting of the land;
>
> (b) the consent by the Appellant to the revesting did not create a duty on the respondent to revest the land."

[84] In its first decision[34] the Land Appeal Court held –

(a) that ss 17 and 41 of the *Acquisition of Land Act 1967* are not necessarily mutually exclusive in their operation;[35] and

(b) that a constructing authority would have to consider whether it would proceed under s 17 before acting under s 41.[36]

[85] While I respectfully doubt whether there needed to be a formal resolution of the respondent not to proceed under s 17 before it could proceed under s 41, there was no appeal against that decision. The issue is whether, in the particular circumstances, the s 17 procedure was invoked.

[86] I proceed on the basis that both procedures (that under s 17 and that under s 41) were open in the circumstances of this case.

[87] On 24 July 2001 the respondent wrote to the applicant in these terms –

> "DISCONTINUANCE OF TAKING OF LAND
>
> I refer to the above matter.
>
> Please be advised Council by resolution of the 4th July 2001 resolved viz;
>
> '…Council discontinue the taking of the land from Maroochydore Central Holdings and in accordance with the Acquisition of Land Act –Section 17(1A) seek the dispossessed owners agreement in having the resumed area of 645m2 transferred back to the dispossessed owner'
>
> Council subsequently seeks your agreement in writing to the revesting as provided by the aforementioned section of the land and the land is hereby offered to you at the price determined by the Valuer General (Acquisition of Land Act –Disposal of land 41.(1) and 41.(1A)), namely $180,000.00.

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34 *Maroochy Shire Council v Maroochydore Central Holdings Pty Ltd* [2003] QLAC 24, "Decision 2" as referred to by Jerrard JA.

35 *Maroochy Shire Council v Maroochydore Central Holdings Pty Ltd* [2003] QLAC 24, [41].

36 *Maroochy Shire Council v Maroochydore Central Holdings Pty Ltd* [2003] QLAC 24, [53].

> This offer shall lapse at the expiration of 28 days from the date of this letter.
>
> Should you require any further assistance in the matter please do not hesitate to contact Council's Property Services Section on the above telephone number."

[88] The applicant's solicitors replied on 15 August 2001 canvassing legal issues and saying –

> "Council's resolution was to proceed under s 17 (1A) of the Act. Therefore, Council's purported offer to our client to accept $180,000 is, in our submission, invalid. Council should offer to revest the land strictly in accordance with its own resolution.
>
> If our client were to consent to a revesting of the land, the parties can discuss reasonable terms and conditions for that revesting, which should include an allowance for our client's costs.
>
> Further, the time limit, which the Council purports to impose on its offer, is not applicable under s 17. Council should not regard itself as being at liberty to transfer the land to any other party until our client either provides its consent to revesting, or declines to give that consent."

[89] On 20 August 2001 the applicant's solicitors wrote –

> "RE: MAROOCHYDORE CENTRAL HOLDINGS PTY LTD v MAROOCHY SHIRE COUNCIL
>
> We refer to our fax of 15 August and note that you have not as yet responded.
>
> We are instructed to advise that:
>
> 1. Our client consents to the revesting of the subject land under s17 of the Acquisition of Land Act, as the Council resolved to do on 4 July 2001.
> 2. Our client reserves the right to pursue its claim for costs and losses as a consequence of the resumption and its discontinuance.
>
> We await your response."

[90] The respondent replied the next day –

> "MAROOCHY SHIRE COUNCIL ats MAROOCHYDORE CENTRAL HOLDINGS PTY LTD – LAND COURT
>
> We thank you for your facsimile dated 20 August 2001, received this morning.
>
> We note that Council did not seek your client's consent to revest the land in its name, other than as implied in the offer pursuant to s41(1) of the *Acquisition of Land Act* 1967 (Q). We confirm that Council offered the land back to your client for the amount of $180,000.00 in

accordance with s41(1), in our correspondence to your client dated 24 July 2001.

Should you client accept Council's offer, its residual claim which does not relate to the valuation of the land remains on foot.

Could you please advise as soon as possible whether your correspondence constitutes your client's acceptance of Council's offer."

[91] On 31 August 2001 the respondent wrote –

"DISCONTINUANCE OF TAKING OF LAND

We refer to Council's offer dated 24 July 2001, and note that the offer expired since it was not accepted in the terms proposed. This has necessitated a further resolution and offer in accordance with the provisions of the *Acquisition of Land Act 1967* (Q).

Please be advised Council by resolution of 29 August 2001 resolved viz:

1. That Council has taken the relevant property by compulsory process under the *Acquisition of Land Act*, no longer requires the land.
2. That Council discontinue the taking of the land from Maroochydore Central Holdings and in accordance with the *Acquisition of Land Act* – Section 41(1) offer the land back to the dispossessed owner for $180,000.00, being the amount valued by the Valuer-General.

Council subsequently seeks your agreement in writing to the revesting of the land for the amount of $180,000.00, as determined by the Valuer-General of the Department of Natural Resources.

This offer shall lapse at the expiration of 28 days from the date of this letter."

[92] The Land Appeal Court has consistently taken the view that the applicant did not accept the respondent's offer of 24 July 2001. In its first decision it said –

"The offer in the terms in which it was framed by the appellant in its letter of 24 July 2001 was not accepted by the respondent."[37]

[93] In the decision under appeal to this Court[38] it said –

"However, as the correspondence set out above clearly shows, the appellant did not agree to the terms and conditions of the respondent's offers of 24 July 2001 or of 31 August 2001."[39]

It went on –

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37 *Maroochy Shire Council v Maroochydore Central Holdings Pty Ltd* [2003] QLAC 24, [5].

38 *Maroochydore Central Holdings Pty Ltd (No 2) v Maroochy Shire Council* [2007] QLAC 3, "Decision 4" as referred to by Jerrard JA.

39 *Maroochydore Central Holdings Pty Ltd (No 2) v Maroochy Shire Council* [2007] QLAC 3, [15].

> "When these parties first came before the Land Appeal Court, the Court concluded that it was not necessarily apparent that the construction of each of ss. 17 and 41 must result in the mutually exclusive operation of those sections and, depending on the circumstances, a construction authority may be able to avail itself of the procedures under either s. 17 or s. 41 of the Act to dispose of resumed land no longer required. We agree with those conclusions. It follows that the correspondence sent on behalf of the appellant consenting to the revocation did not, in the circumstances of this case, constitute or create an agreement as contemplated by s. 17(1A), or any other obligation or duty requiring the respondent to revest the land."[40]

[94] With respect, it does not follow from the availability of the two procedures that the correspondence sent on behalf of the applicant did not constitute or create an agreement as contemplated by s 17(1A).

[95] Section 17 may be invoked only where compensation for the resumption has not been determined or it has not been paid. Here a claim for compensation was lodged on 20 June 2000, but it has never been determined. Between September 2000 and March 2001 the respondent paid the applicant sums totalling $180,000 as an advance in respect of the compensation payable, pursuant to s 23. That advance was a provisional payment only, not properly characterised as compensation.

[96] A revesting is effected by the making or publication of a relevant gazette notice. By s 17(1A) such a notice shall not be made or published unless the former owner of the land "has previously agreed in writing to the revesting as provided by this section …". I have some doubt whether s 17 authorises a revesting subject to conditions, whether it be that money paid as an advance against compensation be repaid or some other condition. Rather the reference to a prior agreement in s 17(1A) is, I think, a reference simply to a willingness to take the land back on the basis that it revest retrospectively (ie as if the resumption had never occurred: s 17(2)(a)), and with compensation being thereupon claimable under s 17(4).

[97] The $180,000 paid as an advance against compensation, a provisional payment, would clearly be recoverable as moneys had and received if the land were revested under s 17.[41] That would be so regardless of any acknowledgment of the obligation to repay or any agreement to repay.

[98] The applicant has never disputed its obligation to repay this sum. What it has demanded is compensation for loss or damage and costs or expenses incurred in consequence of the resumption and prior to the revesting, pursuant to s 17(4).

[99] By s 41, where land "has been taken … by compulsory process under this Act and, within 7 years after the date of taking, the constructing authority no longer requires the land", the constructing authority is obliged to offer the land to the former owner at a price determined by the Chief Executive.

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40 *Maroochydore Central Holdings Pty Ltd (No 2) v Maroochy Shire Council* [2007] QLAC 3, [17] (footnote removed).

41 See *York Air Conditioning & Refrigeration (Australasia) Pty Ltd v Commonwealth* (1949) 80 CLR 11.

[100] The application of s 41 in this case would have required the applicant –

(a) to continue its claim for compensation (which would have to be assessed at the date of the resumption); and

(b) to accept or reject the offer to repurchase at the price determined by the Chief Executive (presumably as at the date of repurchase).

In fact neither party has taken steps to progress the assessment of compensation for the resumption.

[101] Co-incidentally, the price determined by the Chief Executive was equal to the advance against compensation already paid ($180,000), but it seems that the respondent did not receive advice of that determination until 23/24 July 2001.

[102] The respondent's letter of 24 July 2001 was not well expressed. Both procedures were open. It had resolved to invoke the s 17 procedure, but it purported to offer the applicant both. Whether it could have been bound to proceed under s 41 is not necessary to decide. By its solicitors' letter of 20 August 2001, the applicant indicated its agreement (in the sense of consent) to the s 17 procedure.

[103] In its second decision[42] the Land Appeal Court dismissed an appeal against the Land Court's refusal to make a declaration that it did not have jurisdiction to hear and determine the claim for compensation presently filed in the Registry (ie the claim under s 20 lodged on 20 June 2000). The Land Court's refusal to do so was consistent with the view taken by the Land Appeal Court in its first decision that s 41 may be invoked even when compensation has not been determined, and that in such circumstances compensation could be finalised after the retransfer.[43]

[104] The Land Court held that there was an *Anshun* estoppel precluding the applicant from arguing that in the circumstances of this case there was an obligation on the respondent to put in train the s 17 process.[44] The Land Appeal Court was correct in holding that there is no reason in principle why such an estoppel might not arise in a case of this nature, and that it did so.[45] I respectfully agree with what Jerrard JA and Cullinane J have said on this aspect.[46]

[105] In any event, it would not assist the applicant if this argument were open to it and if it were determined in its favour. Revocation under s 17 requires an act of the Governor in Council, not the respondent.

[106] The application for leave to appeal should be dismissed with costs.

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42 *Maroochydore Central Holdings Pty Ltd (No 2) v Maroochy Shire Council* [2007] QLAC 3, "Decision 4" as referred to by Jerrard JA.

43 *Maroochy Shire Council v Maroochydore Central Holdings Pty Ltd* [2003] QLAC 24, [47].

44 *Maroochydore Central Holdings Pty Ltd (No 2) v Maroochy Shire Council* [2007] QLAC 3, [47].

45 *Maroochydore Central Holdings Pty Ltd (No 2) v Maroochy Shire Council* [2007] QLAC 3, [43]-[47].

46 See [46]-[48] (Jerrard JA) and [75]-[80] (Cullinane J).