SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Springfield Land Corporation (No 2) P/L & Anor* [2009] QCA 381
PARTIES:	**STATE OF QUEENSLAND (ACTING THROUGH THE CHIEF EXECUTIVE OF THE DEPARTMENT OF MAIN ROADS)** (appellant/respondent) **v** **SPRINGFIELD LAND CORPORATION (NO 2) PTY LIMITED** ACN 056 462 205 (first respondent/first appellant) **SPRINGFIELD LAND CORPORATION PTY LIMITED** ACN 055 714 531 (second respondent/second appellant)
FILE NO/S:	Appeal No 7163 of 2009 SC No 10982 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2009
JUDGES:	Keane and Fraser JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. Appellants to pay the respondents' costs of the appeal to be assessed on the standard basis**
CATCHWORDS:	REAL PROPERTY – COMPULSORY ACQUISITION OF LAND – COMPENSATION – ASSESSMENT – ADJOINING LAND – where appellants held parcel of land divided into lots – where respondents compulsorily acquired land held by the appellants for road purposes – where amount of compensation payable under s 20(3) of the *Acquisition of Land Act* 1967 (Qld) referred to arbitration – where arbitrator found that land taken to effect realignment of transport corridor – where arbitrator found value of appellants' land not enhanced by that taking – where arbitrator found land adjoining land taken limited to appellants' lots or parts of lots immediately adjacent to land taken – where judge held

arbitrator erred in law and made findings favourable to respondents – whether arbitrator erred and, if so, whether errors were errors of law amenable to correction on appeal

Acquisition of Land Act 1967 (Qld), s 5, s 20
Commercial Arbitration Act 1990 (Qld), s 38
Transport Planning and Coordination Act 1994 (Qld), s 25

Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, cited
Gilmour Development Pty Ltd v Commissioner of Main Roads (1977) 4 QLCR 311, cited
Harris v Lee (1900) 21 LR (NSW) 173, cited
Josh v Josh (1858) 141 ER 185, cited
Moyses v Townsville City Council (1979) 6 QLCR 21, cited
Roads and Traffic Authority of New South Wales v Perry (2001) 52 NSWLR 222; [2001] NSWCA 251, considered
State of Queensland v Springfield Land Corporation (No 2) P/L & Anor [2009] QSC 143, considered
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481; [1985] HCA 28, cited
Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (2008) 233 CLR 259; [2008] HCA 5, considered
Waters & Ors v Welsh Development Agency [2004] 1 WLR 1304; [2004] UKHL 19, considered
Zoeller v Brisbane City Council (1973) 40 QCLLR 24, cited

COUNSEL: S L Doyle SC, with M D Hinson SC and B Le Plastrier, for the appellants
D R Gore QC, with J M Horton, for the respondent

SOLICITORS: Russell & Co for the appellants
Clayton Utz for the respondents

[1] **KEANE JA:** Section 20 of the *Acquisition of Land Act* 1967 (Qld) ("the Act") provides for the assessment of compensation for the taking of private land for public purposes. Section 20(3) of the Act requires that "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" must be taken into consideration by way of set-off or abatement in assessing the compensation to be paid.

[2] In this case three questions involving the interpretation of s 20(3) of the Act arose for determination: first, whether "the works or purpose for which land [was] taken" from the appellants were limited to the works immediately associated with the land taken or whether they included the totality of a road building project of which those works were a part; secondly, whether the value of land owned by the appellants adjoining the land taken was enhanced by the carrying out of the purpose for which the land was taken; and thirdly, whether the land which "adjoins the land" taken is only the lot or part of a lot immediately adjacent to the land taken or whether it encompasses the totality of land retained by the appellants adjoining the land taken.

[3] The first and second questions are closely inter-related in that the resolution of each of these issues depends on the identification of "the purpose for which the land is taken".

[4] Each of these questions was initially resolved in favour of the appellants by an arbitrator engaged by the parties. Those conclusions were reversed in favour of the present respondent ("the State") on an appeal to a judge of the Supreme Court pursuant to s 38 of the *Commercial Arbitration Act* 1990 (Qld).

[5] The learned judge held that the arbitrator erred in law in taking too narrow a view of "the works or purpose for which the land was taken" of the "land adjoining the land" taken in the acquisition. His Honour went on to hold that the enhancement of the value of the land remaining in the appellants' ownership by the carrying out of the road construction project exceeded the value of the land taken so that s 20(3) of the Act operated to reduce the compensation payable to the appellants.

[6] In this Court the appellant argues that the arbitrator's conclusions were correct and that if the arbitrator did err his error was an error of fact which is not susceptible to correction on an appeal under s 38 of the *Commercial Arbitration Act*.

[7] Before descending to a consideration of the arguments agitated in this Court, I propose to set out the factual and statutory context in which these questions arose. I will then summarise the reasons of the learned judge and proceed to a discussion of the arguments agitated in this Court.

The facts

[8] The appellants are the owners and developers of a large area of land known as Springfield in the local government area of Ipswich City Council ("the Council"). The development has proceeded pursuant to arrangements between the appellants, the State and the Council. These arrangements included the Springfield Development Control Plan 1997 ("the DCP") which required that infrastructure agreements be made with the Council and State instrumentalities before development takes place. The DCP also designated an area of land between the western boundary of the appellants' landholdings and the Ipswich Motorway as a Regional Transport Corridor ("RTC").

[9] By cl 55 of the Springfield Infrastructure Agreement ("SIA") between the appellants and the Council, the appellants were obliged to dedicate land to be used for road purposes within the RTC by way of a transfer to the Council subject to a trust for road purposes. Pursuant to this provision of the SIA, in August 1999 land to the west of the Springfield Town Centre extending to the western boundary of the appellants' landholdings was transferred to the Council. This land is known as Trust Lot 7.

[10] At that time the Council intended to construct on Trust Lot 7 a stage in the regional transport link between the Cunningham Highway and the Ipswich Motorway–Centenary Highway Interchange. The DCP was replaced in February 1999 by the Springfield Structure Plan 1999, but no change was made to the arrangements in place with respect to the RTC.

[11] In about 2000 the Department of Main Roads of the Queensland Government ("DMR") began to plan to take over the project. In this regard the arbitrator summarised the relevant history:

> "Trust Lots 1 and 2 which were originally transferred from Springfield to the Council pursuant to the Infrastructure Agreement in 1998 passed to DMR in June 2000 … and were incorporated in that part of the Centenary Highway which was constructed to the Town Centre in the vicinity of Augusta Parkway and opened to traffic in June 2000 …. Trust Lot 7 had been created by the registration of Plan of Subdivision SP 120403 on 5 August 1999 … and was located immediately to the west of Lots 1 and 2 and constituted the commencement point within the Springfield land of what was to be the SWTC to the west. Figure 11A of Exhibit 8 also shows the location of that part of the Transfer Land (Lot 11 on SP 124542, 5.144ha and Lot 46 on SP 124542) to the south of the Corridor and Trust Lot 7 and also that part of Trust Lot 7 to the north of what was to become the northern boundary of the Corridor and which had previously been within Lot 7 but which was returned to Springfield as a result of the 2006 Acquisition Agreement to be referred to shortly.
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> DMR had assumed control of the Transport Corridor in the vicinity of Trust Lot 7 in 2005 and gave to it the name SWTC and … a partially realigned route in the vicinity of Trust Lot 7 was provided for and this in turn was the reason for the NIRs. … The other lands, the subject of the first NIR (Lots 7 and 8 on SP 143597), were located immediately to the north of and on the frontage of the previously constructed Centenary Highway extension to Augusta Parkway. The immediate purpose of the proposed resumption of the 'Transfer Land' was that the SWTC in the vicinity of what had been Trust Lot 7 was to be given realigned boundaries, as was the Centenary Highway extension in the vicinity of what had been Trust Lots 1 and 2."

[12] As the arbitrator noted, the State became the owner of Trust Lot 7 in lieu of the Council and the land not required for the RTC was returned to the appellants. This land is referred to as "the Returned Land".

[13] On 13 October 2005 the chief executive of the DMR gave to the appellants notices of intention to resume four lots which at that time formed part of Trust Lot 7. The notices expressed the purpose of the resumption as the use of the land "for future transport purposes including the facilitation of transport infrastructure (namely road and busway, rail or light rail) for the South-West Transport Corridor".

[14] The parties then negotiated an agreement for the transfer by the appellants to the State of a little less than seven hectares of land ("the Transfer Land") in return for compensation to be "determined by arbitration … as an amount that would have been payable by Main Roads to [the appellants] if the Transfer Land had been compulsorily acquired under the [Act] …" The assessment of compensation proceeded to arbitration.

The arbitration

[15] The parties asked the arbitrator to assess the market value of the Transfer Land and to then assess the amount of any enhancement of the appellants' landholdings. Before the arbitrator, the State argued that the value of the appellants' retained

landholdings was enhanced by the carrying out of the project for the extension of the transport corridor west from the Springfield Town Centre towards the Cunningham Highway. Mr Slater, a registered valuer whose opinion was relied on by the State, adopted this approach and concluded that the enhancement of the value of the balance of the appellants' lands by the construction of the transport corridor vastly exceeded the value of the Transfer Land.

[16] The appellants argued that the purpose for which the land was taken was merely to effect a realignment of the planned transport corridor. This realignment did not enhance the value of the appellants' landholdings. Any enhancement of the appellants' retained landholding had already occurred.

[17] A useful summary of the competing arguments of the parties may be found in the following passage from the arbitrator's award:

> "It was said [for the State] to be a progressive scheme, the planning for which had begun, as described in the evidence, even as early as 1994 and that the relevant works or purpose 'as is characteristic of schemes started vague and over time became certain, crystallising with the Government's announcements in January 2004 and March 2005 that it would build the Western Extension'. Counsel emphasised that the briefing of SKW and the commencement of their investigations in 2001 was an important event in the progressive development of the scheme of the resumption. The same emerges from the evidence of Mr Slater, the Valuer for DMR. In his final submission, Counsel for DMR stated that, for the purposes of the case, it was sufficient that the scheme commenced in 2001 with the SKM investigation. These investigations however cannot be properly understood unless seen as part of a wider factual context and a part of a much longer historical context, commencing in about 1994.
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> For the claimant, in respect of the DMR claim for enhancement a much narrower case is alleged. It is submitted that the 'scheme' cases are not properly applicable to the facts of this case. The resumption or transfer of the land or interest referred to in the NIRs was of a relatively miniscule area in comparison with the whole of the area required for the construction of the SWTC. This transfer occurred only at a very late stage and then only for a very limited purpose. Trust Lot 7 had had a 'Regional Transport Corridor designation' for several years prior to the NIRs, at least since about 1999. Since the creation of Lot 7 by agreement and its transfer to Ipswich City Council on trust for road purposes in 1998, and even before that, an extension of the Centenary Highway to the west as a SWTC towards Ripley and the Cunningham Highway was in contemplation.
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> As Counsel for Springfield put to the witness Slater, the issue of enhancement to the other Springfield lands, for the purposes of Section 20(3), could only be relevant in this case once there was a resumption and compensation assessable in terms of Section 20(2).
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> Accordingly, the only relevant enhancement which could arise was that arising, if at all, on account of a proposed alteration to the boundaries of an already designated regional Transport Corridor

> since it was for that purpose that the land was taken. The effect of the submission is that only the need for minor realignment of the corridor could be the purpose or catalyst for the resumption of Springfield land in order to carry out the works or purpose for which the particular land was taken. This limits significantly the scope of the DMR claim to abate or set any for enhancement in value against the sum payable by way of compensation for the lost land.
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> In summary, the claimants' submission in substance is that it is wrong and contrary to the proper application of Section 20(2) and (3) to compensate the claimants only for the land resumed but then offset against that any enhancement in value to the whole of the balance of the other Springfield land as a result of the total 'scheme', namely the planning and construction of the whole of the SWTC Corridor at least from the Western Interchange to Ripley and the Cunningham Highway in respect of which no resumption had occurred. Nor, it is submitted, is such a result envisaged by the Acquisition of Land Act.
>
> Such a result could only follow if the proper definition of the 'scheme or undertaking or project' underlying the resumption of the relevant parcels of land in this case, was not the realignment of an already definite corridor but the whole of the planning and development of the SWTC from its inception."

[18] On 9 October 2008 the arbitrator made an award under which the State was required to pay the appellants $1,468,806 by way of compensation.

[19] The arbitrator concluded that the value of the Returned Land should not be taken into account in assessing compensation. That conclusion is not in controversy.

[20] In relation to the scope of "the works or purpose for which the land was taken", the arbitrator focused upon the realignment of the RTC in the vicinity of Trust Lot 7 rather than the road construction project of which the realignment was part. The arbitrator concluded (at pages 50 to 52 of his award):

> "It is in my view beyond question that the NIRs [notices of intention to resume] were given solely for the purpose of DMR advising an intention to realign part of the existing Corridor 'in the vicinity of Trust Lot 7'. The realignment resulted only in an intention by DMR to acquire small parcels of land to make adjustments to the boundary of what had already been designated and which in fact had been dedicated by agreement in the 1998 Springfield Infrastructure Agreement. In short, the NIRs evidenced only DMR's intention to acquire smaller parcels to achieve the desired realignment and as a further consequence to return to Springfield any land which had in 1998 been given to Ipswich City Council on trust and later transferred to DMR, but which was no longer required. These arrangements were confirmed by the Acquisition Agreement 2006.
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> It is plain that Trust Lot 7 had been set aside in 1998 so as to provide the corridor of land to contain the relevant transport infrastructure which had been the subject of discussion at least since the Springfield Development Control Plan in 1994.

> One can easily test the correctness of the claimant's submission that the purpose of the resumption was the late decision to realign the boundaries of the corridor in minor respects by noting that, had the NIRs not been given, the road infrastructure would have been built within Trust Lot 7. No land would have been taken and no claim for compensation could have arisen. Further, had no claim for compensation arisen, then there would have been no occasion to consider any issue of enhancement. Clearly therefore it was the very narrow purpose of the resumption to realign in minor respects an existing proposed road corridor. That was why the land was taken; that is why only now the need to assess compensation arises; only as a result of that does the occasion now also arise to assess any and, if so, what enhancement accrued for the purposes of Section 20(3)…
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> Therefore the relevant question becomes: was there any enhancement in the value of the interest of the claimants in any land adjoining the land taken or severed therefrom by the carrying out of the works or purpose for which the land was taken [Section 20(3)]?"

[21] On the related issue of "enhancement", the arbitrator said (at page 52 of his award):

> "The land which was taken was the transfer land. The purpose for which that land was taken was to accommodate 'a slightly different corridor'. This necessarily required an alteration in the program of works to be carried out so as to give effect to the relevant purpose for which the land was taken. And so the final question emerges: was there any enhancement on that account to the value of the claimants' land adjoining the land taken or severed therefrom? The claimant submits that there is no evidence of any enhanced value to the claimants' adjoining or any balance land by the carrying out of the works or purpose for which the land was taken, that is, by reason of the design decision to require 'a slightly different corridor to that allowed for in the trust land' and the carrying out of the relevant works.
>
> I am satisfied that the proper application of Section 20(3) to the facts of the case does not support any claim by DMR for enhancement in the value of other Springfield lands.
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> In my view, the valuation approach by Mr Slater, that is, that enhancement to other Springfield land arises as a result of the scheme to develop the South-West Transport Corridor and appropriate road infrastructure, cannot be supported by any proper application by Section 20(3). Nor is it an acceptable application of principle in this case to allege that because in October 2005/January 2006 there had arisen a perceived need to slightly alter what was considered in earlier years to be the required boundaries of the proposed corridor realignment, it follows that the issue of enhancement has to be addressed on the basis of enhanced values by reason of the planning and construction of the whole of the South-West Transport Corridor scheme from at least 1999. I do not accept that to be a proper application of principle in a case of compulsory acquisition, nor is it supported by the proper application of Section 20(3)."

[22] As to the extent of the "land adjoining the land taken" for the purposes of s 20(3) of the Act, the Transfer Land was made up of parts of four lots, ie four separate titles in the register of titles kept under the *Land Title Act* 1994 (Qld). The appellants argued that only those parts of these four lots which were not transferred to the State were the "land adjoining the land taken".

[23] The State argued that the balance of the landholdings retained by the appellants which adjoined those lots was "land adjoining the land taken". If the State's argument were to be accepted, then, because the extent of that land is greater, the enhancement for the purposes of s 20(3) of the Act would inevitably also be greater and the compensation payable to the appellants reduced. Mr Slater's valuation proceeded on the footing that the entire balance of the appellants' land holdings retained by them after the transfer was "land adjoining the land taken" in the acquisition.

[24] The arbitrator preferred the argument of the appellants on this issue, saying (at pages 53 to 54 of his award):

> "The enhancement in value of other lands of the claimant by the carrying out of the works or purpose is limited by Section 20(3) to 'lands adjoining the land taken or severed therefrom'.
>
> In the case of severed land, its application is clear: enhancement operates only in respect of the remainder of the parcel from which the resumed area is severed. So too in the case of the resumption of a defined parcel. Section 20(3) similarly limits enhancement to other land which adjoins that land taken. This construction of Section 20(3) is consistent with the dicta of the Land Court in Brisbane City Council v. Zoeller (1973) 40 QCLLR 24 where it is said with reference to Section 20(3):-
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> > 'No doubt the underlying reason for this provision is that the construction of expensive public works, eg. railroads, highways, dams, etc. may, depending on particular circumstances, greatly increase the value of the lands in the localities which they serve. Whilst it has not been deemed equitable to place a betterment tax on all land so affected, the legislature has decreed that if the balance of a person's resumed land which adjoins the land taken from him is increased in value as a result of the works, then such increase will be set against the compensation otherwise payable…'
>
> In the case of adjoining, as distinct from severed land, the term 'adjoining' is generally considered by the legal dictionaries to have a meaning distinct from other terms such as 'adjacent'. A Dictionary of Modern English Usage (Garner) 1987 defines 'adjoining' as 'directly abutting, contiguous'. See also In re Wildman (1901) 27 VLR [43].
>
> There is no justification in Section 20(3) of the Acquisition of Land Act for Mr Slater's assertion (Exhibit 10, page 19) that 'in complying with the provisions of Section 20(3)' the term 'adjoining land refers to land in a general sense.' I reject his valuation approach which, in the circumstances of this case, would extend 'enhancement' to lands which are beyond the scope of the express terms of Section 20(3).' "

The Act

[25] Section 20 of the Act provides:

> "(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;
> (b) the exercise of any statutory powers by the constructing authority otherwise injuriously affecting such other land.
>
> (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.
>
> (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."

[26] The purposes for which land may be taken under the Act are stated in s 5 of the Act as follows:

> "(1) Land may be taken under and subject to this Act –
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> (a) where the constructing authority is the Crown, for any purpose set out in the schedule; or
> …
> (c) in the case of a constructing authority other than the Crown or a local government–
> (i) for any purpose set out in the schedule which that constructing authority may lawfully carry out; or
> (ii) for any purpose which that constructing authority is authorised or required, by a provision of an Act other than this Act, to carry out.
>
> (2) The power to take, under and subject to this Act, land for a purpose (the ***primary purpose***) includes power to take from time to time as required land either for the primary purpose or for any purpose incidental to the carrying out of the primary purpose."

The then schedule to the Act provided that the "purposes for which land may be taken under and subject to this Act" included "roads".

[27] It should also be noted here that the *Transport Planning and Coordination Act* 1994 (Qld), by s 25(1), authorised the chief executive of the DMR to acquire property for the purpose of transport or for the purpose of a transport associated development,

and by s 25(8), deemed the chief executive of the DMR as a constructing authority for the purposes of the Act.

The decision of the learned judge

[28] On the appeal from the arbitrator under s 38 of the *Commercial Arbitration Act*, the learned judge concluded that the arbitrator erred in law in failing to identify precisely what was involved in the relevant "works or purpose for which the land [was] taken" in proceeding on the footing that the relevant "works or purpose" were limited to the small realignment to be carried out on the Transfer Land. His Honour considered that it was an error to have regard only to those works or that purpose because they were only a means to an end, and it is the end to which the works are dedicated with which s 20(3) of the Act is concerned. In this regard his Honour said:[1]

> "The construction of such part of a highway which was on an individual resumed parcel of land would not be an end in itself. It would be a means to an end which would be the construction of a useable road … [J]ust how that road was to be defined in a particular case could involve a fine question. But on no reasonable view could the relevant works or purpose be confined to what was to happen to the particular land of a claimant. Such an approach could distort the assessment of the value of the land to be resumed … Similarly it could distort the assessment of compensation for injurious affection, as is shown by *Marshall v Department of Transport* ((2001) 205 CLR 603), which held that in the operation of s 20(1)(b) of the Act, the relevant exercise by the constructing authority of its statutory powers is not to be confined to what occurs on the land acquired from the claimant. Although *Marshall* concerned injurious affection, and not enhancement under s 20(3), it strongly indicates that the purpose of s 20(3) would not be served by limiting its operation to the effect of such of the works as are carried out upon the acquired land. In this case the respondents do not submit that s 20(3) should be so construed. Rather they submit that this is simply a factual question, and that in the circumstances of this case, it was open to the arbitrator to find that the relevant works or purpose were so confined.
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> In my respectful view, the arbitrator erred in identifying the relevant works or purpose. In particular, the arbitrator did not consider, or properly consider, what constituted the relevant works for which the land was taken. But for the proposal to construct the road west from the town centre, the transfer land, consisting of these few hectares, would not have been required. The *works* for which they were required could not be realistically defined in terms of part of the width of a relatively small section of a proposed road. As to the relevant *purpose*, it was not to realign something depicted upon a map, but to provide some of the land which was required for the construction of a single road, which the applicant was prepared to accept was the road yet to be constructed from the town centre westwards."

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[1] *State of Queensland v Springfield Land Corporation (No 2) P/L & Anor* [2009] QSC 143 at [25] – [26] (citation footnoted in original).

[29] The learned judge went on to give his reasons for rejecting the appellants' contention that the arbitrator's error in this regard was one of fact not law. His Honour said:[2]

> "The respondents argue that any such error was one of fact, not of law. But as Lord Nicholls explained in the above passage from *Waters v Welsh Development Agency*, this is not a process of fact finding as ordinarily understood; rather, it involves the exercise of a judgment. In the present case, the relevant facts were found, and the arbitrator's error was in the application of s 20(3) to them. The question involved the scope or effect of s 20(3). In *Hope v Bathurst City Council* ((1980) 144 CLR 1, 7), Mason J held that 'whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law'. His Honour said:
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> > 'One example is the judgment of Fullagar J. in *Hayes v. Federal Commissioner of Taxation* (1956) 96 C.L.R. 47, at p. 51, where his Honour quoted the comment of Lord Parker of Waddington in *Farmer v. Cotton's Trustees* [1915] A.C. 922, at p. 932, which was adopted by Latham C.J. in *Commissioner of Taxation v. Miller* (1946) 73 C.L.R. 93, at p. 97, that where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only. Fullagar J. then said (1956) 96 C.L.R. at p. 51:
> >
> > > '…this seems to me to be the only reasonable view. The distinction between the two classes of question is, I think, greatly simplified, if we bear in mind the distinction, so clearly drawn by Wigmore, between the *factum probandum* (the ultimate fact in issue) and *facta probantia* (the facts adduced to prove or disprove that ultimate fact). The 'facts' referred to by Lord Parker … are the *facta probantia*. Where the *factum probandum* involves a term used in a statute, the question whether the accepted *facta probantia* establish that *factum probandum* will generally – so far as I can see, always – be a question of law.' '
>
> Mason J added that special considerations apply when a statute uses words according to their ordinary meaning and the question is whether the facts as found fall within those words. Adopting what was said by Kitto J in *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* ((1956) 94 CLR 509, 511-2), his Honour said that where it is reasonably open to hold that the facts as found do fall within the enactment, the question of whether they do so or not is one of fact. But the question of whether the facts as found do reasonably admit different conclusions as to the operation of the Act is one of law. In applying these principles in *Collector of*

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[2] [2009] QSC 143 at [27] – [28] (citations footnoted in original).

Customs v Pozzolanic Enterprises Pty Ltd ((1993) 43 FCR 280), the Full Federal Court (Neaves, French and Cooper JJ) held that the Administrative Appeals Tribunal had erred in law in deciding that the respondents had purchased diesel fuel for use in 'operations connected with … primary production'. The Court held:

> 'Although the words of the statute are construed according to their ordinary English meaning, that does not mean that their application to a set of facts is simply described as the matching of that set of facts with a factual description. There is necessarily a selection process involved. The range of relationships to which the words apply for the purpose of the Act depends upon a judgment about that purpose. The selection process involved is analogous to that used in determining what causal relationships between conduct and loss attract liability for the purpose of s 82 of the *Trade Practices Act* (1974) (Cth): see *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410 at 418-419; *Munchies Management Pty Ltd v Belperio* (1988) 84 ALR 700 at 712-713. In the end this is not a process of fact finding. The facts are found. What is left is a value judgment about the range of the Act and that is a question of law.' ((1993) 43 FCR 280, 288-289)

In my conclusion the error here was one of law. It was not open to the arbitrator to conclude that on the facts as found, the relevant works or purpose was as he described them. That involved a misinterpretation of s 20(3), and in particular what was meant by the 'works' or 'purpose' when applied to the facts of this case."

[30] The learned judge also held that the arbitrator erred in his interpretation of the expression "land adjoining the land taken" in s 20(3) of the Act. His Honour said:[3]

> "With respect, there is nothing in the passage cited from *Brisbane City Council v Zoeller* which supported the arbitrator's conclusion. Nor was the question to be resolved according to whether 'adjoining', in this provision, refers to some physical contiguity or instead close physical proximity, as Kirby P described the alternatives in *Hornsby Shire Council v Malcolm* ((1986) 60 LGRA 429, 433). Referring to what he said was the useful discussion of the authorities in the judgment of Hogarth J in *Minister of Works v Antonia* ([1966] SASR 54, 61), Kirby P said that which of those meanings was correct depended upon the statutory context. But the applicant here accepts that in this statutory context, 'adjoining' does mean physically contiguous. The question is whether it is relevant that the first respondent's land had been subdivided into several lots, and that not every lot was contiguous with the land which was taken.
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> The arbitrator held that there was 'no justification' for reading s 20(3) in the way suggested by the applicant. In my respectful view, that cannot be accepted. The starting point is that s 20(3) makes no

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3 [2009] QSC 143 at [31] – [32] (citations footnoted in original).

> reference to a lot or lots but to 'land'. Elsewhere the Act distinguishes between land and a lot or lots. For example, in s 7(3)(b), which prescribes the content of a notice of intention to resume, it is provided that 'if the land is described as a separate lot or parcel in a plan of survey registered in the land registry …', then the notice shall describe the land as such. The word 'land' is defined to mean 'land, or any estate or interest in land, that is held in fee simple, but does not include a freeholding lease under the *Land Act* 1994'."

[31] In the proceedings before the learned judge the appellants did not seek to dispute the evidence of Mr Slater as to the valuation of the extent of enhancement. Accordingly, the learned judge allowed the State's appeal and substituted a value of "nil" as the assessed compensation.

The arguments in this Court

[32] The appellants argue that the learned judge erred in failing to appreciate that the resumption of the Transfer Land by the DMR for the purpose of the realignment of the road was indeed an end in itself rather than merely a means to an end. They argue that it was only the need for the realignment which prompted the acquisition in question, and that no enhancement to the appellants' land adjoining the Transfer Land resulted from the carrying out of the realignment: any enhancement in value occurred between 1999 and 2005 prior to the taking of the land by the DMR. The appellants also maintain the position that the arbitrator's conclusion as to the purpose for which the land was taken was a conclusion on a matter of fact.

[33] In relation to the third issue referred to at the outset, the appellants argue that the only land adjoining the parts of the four lots which comprised the Transfer Land were the parts of those particular lots retained by the appellants.

[34] The appellants also argue that the learned judge should not have acted upon Mr Slater's evidence to conclude that the value of compensation should be "nil".

[35] The State supports the reasoning of the learned judge. The State also argues that the appellants conducted their case before the learned judge on the footing that there was no dispute as to the factual aspects of Mr Slater's valuation and, accordingly, should not be allowed to raise such a dispute on their appeal to this Court.

Discussion

The purpose of the taking and the issue of enhancement

[36] In relation to the first two issues raised in the appeal to this Court, one may begin by observing that the "but for" reasoning employed by the arbitrator is not apt, of itself, to provide a satisfactory resolution of these issues in their favour. One might as well say that "but for" the purpose of constructing the road corridor, there would have been no need for small the realignment of the road which necessitated the taking in question. The first issue can be resolved in the way urged by the appellants only if one adopts a narrower approach to the interpretation of s 20(3) of the Act than was applied by the learned judge. The approach to the interpretation of the phrase "the works or purpose for which the land is taken" in s 20(3) of the Act adopted by the arbitrator and advocated by the appellants depends upon the notion that the task of identifying the relevant works or purpose must focus upon the particular works to be carried out on the particular piece of land the subject of acquisition even though those works also serve a larger purpose.

[37] It is, I think, a telling point against the appellants that, neither the notices of intention to resume, nor any other instrument which could be said to be concerned with identifying the purpose of the taking of the land, suggests that the purpose of the taking was other than the construction of the transport corridor. That purpose was the only "transport purpose" which is apt to explain the taking of the Transfer Land. There can be no suggestion that the realignment was necessitated as a response to traffic conditions of peculiarly local significance which arose independently of the carrying out of the transport corridor project.

[38] The narrow perspective adopted by the arbitrator and advocated by the appellants in this Court is not supported by the text of s 20(3) of the Act: nothing in the text invites or encourages a piecemeal approach whereby the relevant purpose or works are to be identified as the particular purpose or works to be effected on the particular parcel of land the subject of the particular acquisition. In this regard, the text of s 20(3) does not speak of "the enhancement of the value of the interest of the claimant … derived from the carrying out of works on or immediately adjoining the land taken". One may note here that the course of authority in relation to land acquisition in this State affords no support for the adoption of such a gloss on the language of the statute.[4]

[39] If one takes a purposive approach to statutory construction, it is difficult to discern in the language of s 20(3) of the Act an intention on the part of the legislature that a landowner whose land is taken to enable an unexpected obstacle to be sidestepped in the course of constructing a road well into the planning and construction should be in a better position, so far as compensation is concerned, than a neighbour whose land was always designated as land to be taken for the purposes of the construction of the same road.

[40] The appellants referred to a number of cases in support of their contentions. In my respectful opinion, there is nothing in these authorities which suggests that the learned judge's interpretation of s 20(3) of the Act is erroneous. In particular there is nothing in these cases which supports the narrow approach to the interpretation of s 20(3) of the Act advocated by the appellants.

[41] In *Roads and Traffic Authority of New South Wales v Perry*,[5] the New South Wales Court of Appeal considered s 56(1)(a) of the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) ("the NSW Act") which required the identification of "the public purpose for which the land was acquired". The relevance of the decision for the purposes of the appellants' argument is that it supports the propositions that there is a need to identify the scheme or project which underlies the acquisition and that this process is one of factual evaluation.[6] These propositions may be readily accepted. The more significant aspect of this decision for present purposes lies in the holding in the case that a finding that land is taken for the purpose of building a highway deviation is not apt to preclude a sound finding of fact that the scheme which underlies the acquisition has a broader purpose and that it is this broader purpose which is decisive of the operation of the statute. Handley JA, with whom Powell JA agreed, said:[7]

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4 Cf *Zoeller v Brisbane City Council* (1973) 40 QCLLR 24; *Gilmour Development Pty Ltd v Commissioner of Main Roads* (1977) 4 QLCR 311; *Moyses v Townsville City Council* (1979) 6 QLCR 21.

5 (2001) 52 NSWLR 222.

6 (2001) 52 NSWLR 222 at 235 – 236 [63] – [65].

7 (2001) 52 NSWLR 222 at 235 – 236 [65] – [66].

> "The particular purposes, in the sense of the uses to which particular land will be put, do not exclude the wider public purpose to be served by the acquisition. If so it is this wider public purpose, scheme or project which underlay the acquisition, which governs the operation of s 56(1)(a).
>
> The resumption of land in the middle of a substantial extension to an existing railway or highway will be for the public purpose of that scheme or project as a whole, and not just for whatever part of it is to be constructed on that land. Section 56(1)(a) would fail to achieve its evident purpose if the Court could award compensation for an increase in value due to the construction of the new railway or highway up to the boundaries of the land resumed and only had to ignore the proposal as it directly related to that land."

[42] Hodgson JA agreed generally with Handley JA and went on to say:[8]

> "In a case such as the present, it is necessary to determine what is the public purpose for which the claimant's land was acquired, including the appropriate level of generality at which the purpose should be identified. In this case, at the most general level, the purpose could be identified as the upgrading of the Pacific Highway between Sydney and the Queensland border; and there are other possible identifications, including the Raleigh Deviation generally, or particular versions of the Raleigh Deviation, or the extension of the Raleigh Deviation to Perry's Hill.
>
> I do not think there are any clear rules determining how the relevant purpose or the appropriate level of generality is to be determined. Factors to be taken into account would, in my opinion, include the degree of continuity and consistency of various elements of what is proposed and done, and fairness to both the claimant and the acquiring authority. In the present case, I think it unlikely that the relevant public purpose could be as wide as the upgrading of the Pacific Highway between Sydney and the Queensland border; while on the other hand, assuming there have been a number of versions of the Perry's Hill extension, I think it unlikely that the public purpose could be as narrow as just the last of those versions. The public purpose could be as wide as the Raleigh Deviation generally, encompassing all the variations of that project including all versions of the Perry's Hill extension, or it could be somewhat narrower."

[43] The next case referred to by the appellants was *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority*[9] which was also concerned with s 56(1)(a) of the NSW Act. The appellants referred to this case because it upheld the view that s 56(1)(a) of the NSW Act linked the "proposal to carry out the public purpose for which the land is acquired" to the increase in value of the land for which the resuming authority itself was responsible.

[44] It is said on behalf of the appellants that, in the present case, the scheme which caused the enhancement in the value of the appellants' land was that of the Council

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8 (2001) 52 NSWLR 222 at 241 [99] – [100].

9 (2008) 233 CLR 259.

and not of the DMR. But to say this is to ignore the reality that the genesis of the scheme which enhanced the appellants' land involved agencies of the State Government as well as the Council. And in any event, if it is correct (as I think it is) to regard the construction of the transport corridor as the "carrying out of the works or purpose" for which the land was taken, the fact that the agency charged with the implementation of that purpose may have changed over the term of the project would not mean that the enhancement of the value of the land retained by the appellants was not due to the carrying out of that purpose.

[45] The third case to which the appellants referred was the decision of the House of Lords in *Waters & Ors v Welsh Development Agency*.[10] The appellants referred to this decision to reinforce the general point that the identification of the purpose which underlies a taking of land for public purposes is a matter of fact.[11] The appellants also draw support from this case for the more particular point that, in engaging in the difficult task of identifying the "scheme" in question, it may be that there are several "schemes" afoot at least where one is concerned with:

> "[a] major development project of a general character, covering a wide geographical area, [which] may proceed in several phases, each phase taking years to implement, [with] the detailed content and geographical extent of each phase being subject to change and finalised only as the phase nears the time when the work will be carried out."[12]

[46] The actual decision of the House of Lords affords little support for the appellants' contention that the taking of the land was part of a broader scheme separate and distinct from the transport corridor project.[13] The House of Lords held that, although the acquisition of the land of the claimant in that case was not identified at the outset of the project, the project had proceeded throughout on the basis that some reserve for the particular purpose which was the immediate reason for the acquisition of the claimant's land, would be required. On this basis, the actual acquisition of the claimant's land for the particular purpose was regarded as an integral part of the overall project and, accordingly, an aspect of one broad scheme.

[47] The appellants argue that to apply s 20(3) of the Act as the State urges in this case can lead to absurd and unjust results. They put the example of a sale by the appellants in early 2005 of all of the Transfer Land and the adjoining land to a new owner. The market value of the totality of the land sold would reflect the enhancement due to the carrying out of the project for the development of the transport corridor. The buyer would not have been able to identify the Transfer Land as part of the corridor because it was not identified as such until June 2005. Subsequently the Transfer Land is compulsorily acquired. The new owner would, on the view urged by the State, receive no compensation for the Transfer Land, not because the Transfer Land has no value, but because the adjoining land has been enhanced in value by reason of events between 1999 and early 2005. On behalf of the appellants, it is argued that the legislature cannot be taken to have intended that s 20(3) of the Act would produce such an obviously unjust result.

[48] The absurdity and injustice to which the appellants point in their example arise because under the terms of the hypothetical bargain by which the new owner has

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10 [2004] 1 WLR 1304.

11 [2004] 1 WLR 1304 at 1319 [59].

12 [2004] 1 WLR 1304 at 1315 [43].

13 Cf *Waters & Ors v Welsh Development Agency* [2004] 1 WLR 1304.

become the owner of the land the new owner has paid full value for the enhancement resulting from the transport corridor project. In the real world, that assumption may not always be sound. More importantly, however, the concern of the legislature evidenced by the Act is to ensure that landowners are fairly compensated for the land taken from them; the Act is not concerned to ensure the fairness of bargains made by landowners with other persons. If one were to assume the contrary, ie, that the Act is indeed concerned with the fairness of bargains made by those who have become owners of land affected by a taking to which the Act applies, then it would be arguable that, when s 20(3) speaks of "enhancement of the value of the interest of the claimant in any land adjoining the land taken … by the carrying out of the … purpose for which the land is taken", it should be taken to be referring only to an enhancement of the value of the claimant's interest as owner of the adjoining land. On this basis the purchaser in the hypothetical case posed by the appellants would not have derived any relevant enhancement in the value of its interest as owner of the land by reason of the carrying out of the project because it has, *ex hypothesi*, paid for the value of that enhancement in acquiring the adjoining land.

Error of law?

[49] In relation to the question whether the error on the part of the arbitrator was an error of law or an error of fact, it may be conceded immediately that there may be cases where the purpose of an acquisition of a small parcel of land is solely for realigning a short stretch of road. Whether or not the need for the realignment, considered alone, sufficiently identifies the "works or purpose for which the land is taken" will, no doubt, depend on the facts of the particular case. This point is well made in the reasons of Hodgson JA in *Roads and Traffic Authority of New South Wales v Perry*, cited above.

[50] It would, for example, be easier sensibly to conclude that a realignment is a purpose in itself if the road of which it was an adjunct had been constructed many years earlier or if the realignment was a response to the exigencies of transport functions in the immediate vicinity of the stretch of road being realigned. To say this, however, is to recognise that the arbitrator in this case acted upon a view of s 20(3) of the Act which was apt to make such differences in the facts of the case immaterial because of the narrow focus of his approach.

[51] It is, in my respectful opinion, a compelling demonstration that the arbitrator's error was indeed an error of law that the arbitrator held that it was the "test" of the correctness of the appellants' submission as to the scope of s 20(3) of the Act "that the purpose of the resumption was the late decision to realign the boundaries of the corridor in minor respects by noting that, had the NIRs not been given, the road infrastructure would have been built within Trust Lot 7". Central to the arbitrator's narrowly focused understanding of the scope of s 20(3) was the consideration that in the arbitrator's words:

> "No land would have been taken and no claim for compensation could have arisen. Further, had no claim for compensation arisen, then there would have been no occasion to consider any issue of enhancement. Clearly therefore it was the very narrow purpose of the resumption to realign in minor respects an existing proposed road corridor. That is why the land was taken; that is why only now the need to assess compensation arises; only as a result of that does the occasion now also arise to assess any and, if so, what enhancement accrued for the purposes of Section 20(3)".

[52] In my respectful opinion the application by the arbitrator of the narrow approach to the interpretation of s 20(3) of the Act involved an error of law on his part.

The adjoining land

[53] The text of s 20(3) of the Act does not reveal any concern as to the means whereby a claimant for compensation evidences its ownership of the adjoining land. Much less does it reveal concern on the part of the legislature in whether that ownership is evidenced by one or many titles under the *Land Title Act* 1994. It is the value of the land adjoining the land which is taken which is significant for the purposes of s 20(3), not the evidence by which ownership of that land is proved.

[54] It may also be noted that longstanding authority does not support the appellants' argument.[14]

[55] A purposive approach to the scope of the reference in s 20(3) to the "land adjoining the land taken" also suggests that the appellants' argument should be rejected. It is impossible rationally to attribute to the legislature an intention that the amount of compensation payable to a landowner might vary depending on whether the balance of the land retained by the landowner after the acquisition is contained in one or one hundred registered titles for the purposes of the *Land Title Act* 1994.

[56] The evident purpose of s 20(3) of the Act is to ensure that a landowner whose land is taken for public purposes is compensated for, but not aggrandised by reason of, the acquisition. That purpose is not well served by an interpretation of s 20(3) under which a landowner benefited by the construction of a road adjoining its land is benefited more generously if that adjoining land has been subdivided into several lots for the purposes of title registration than if it is held under one title.

The determination of compensation

[57] As to the appellants' complaint that the learned judge erred in giving effect to his view of the case by determining the quantum of compensation payable to the appellants, it is apparent that the appellants raised no objection to the course taken by his Honour.

[58] There is no reason in terms of procedural fairness why the appellants should not be bound by the conduct of their case at first instance, and the desirability of finality in litigation affords a compelling reason to hold them to the manner in which they conducted their case below.[15]

Conclusion and order

[59] The decision of the learned judge was correct.

[60] I would dismiss the appeal.

[61] The appellants should pay the State's costs of the appeal to be assessed on the standard basis.

[62] **FRASER JA:** I have had the advantage of reading the reasons for judgment prepared by Keane JA. I agree with those reasons and the orders proposed by his Honour.

[63] **ATKINSON J:** I agree with the orders proposed by Keane JA and with his Honour's reasons.

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14 *Josh v Josh* (1858) 141 ER 185; *Harris v Lee* (1900) 21 LR (NSW) 173.

15 *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; *Coulton v Holcombe* (1986) 162 CLR 1 at 18.