HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MELVILLE ROBERT MARSHALL APPELLANT

AND

DIRECTOR-GENERAL, DEPARTMENT OF TRANSPORT RESPONDENT

Marshall v Director-General, Department of Transport
[2001] HCA 37
21 June 2001
B52/2000

ORDER

1. *Appeal allowed with costs including reserved costs.*

2. *Set aside the orders made by the Court of Appeal of the Supreme Court of Queensland on 22 October 1999, and in place thereof, order that:*

   (a) the appeal to that Court be allowed with costs;

   (b) the order of the Land Appeal Court made on 24 July 1998 be set aside;

   (c) the application dismissed by the Land Appeal Court be remitted to that Court to be dealt with in accordance with law.

On appeal from the Supreme Court of Queensland

Representation:

D F Jackson QC with D A Kelly for the appellant (instructed by James Conomos Lawyers)

P A Keane QC, Solicitor-General for the State of Queensland with R S Jones for the respondent (instructed by Crown Solicitor for Queensland)

CATCHWORDS

Marshall v Director-General, Department of Transport

Real property – Resumption of land by public body – Compensation – Whether compensation for injurious affection is payable in respect of land taken for the statutory purpose but not, or not yet, physically used for that purpose.

Words and phrases – "injurious affection" – "compensation" – "depreciation" – "severed land" – "residual land" – "road purposes".

Acquisition of Land Act 1967 (Q), ss 4, 7, 12, 20.
Land Act 1962 (Q) ss 44, 45.
Land Clauses Consolidation Act 1845 (UK), s 63.
Lands Acquisition Act 1955 (Cth), s 23.

GLEESON CJ, GUMMOW, KIRBY AND CALLINAN JJ.

The issue

1 The issue in this appeal is whether compensation for injurious affection payable to a dispossessed landowner pursuant to s 20 of the *Acquisition of Land Act* 1967 (Q) ("the Act") is restricted to compensation for the impact of the work done on the actual land taken, and the precise use to which that land is put.

Decision of the Queensland Land Court

2 The issue arises in this way. The appellant owned a large area of land immediately to the west of the Bruce Highway near Nambour in Queensland. Until 1985, the highway consisted of two lanes. In that year, a constructing authority within the meaning of s 4 of the Act[1], acquired about 5500 square metres of the appellant's land for "road purposes". Section 12(5) of the Act relevantly applied as follows to the resumed land:

> "… the estate and interest of every person entitled to the whole or any part of the land shall thereby be converted into a right to claim compensation under this Act. …"

The appellant sought compensation under the Act. Included in his application for compensation was a claim as follows:

> "Damages Due to Injurious Affection
>
> As a direct consequence of the construction of the road on the land resumed by the respondent Authority, the claimant has suffered loss, damage and a diminution in the value of the balance lands in that as at the date of resumption such lands could reasonably have been foreseen to be rendered more susceptible to flooding. The claimant's claim for compensation is calculated by reference to the cost of flood mitigation

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1 "**Meaning of terms**

In this Act, unless the context otherwise indicates or requires, the following terms shall have the meanings respectively assigned to them, that is to say:-

'Constructing authority' - The Crown or any person or local authority authorised by this Act or any other Act (and whether another Act passed before, on or after the commencement of this Act) to take land for any purpose;"

works already carried out and remaining to be carried out on the balance lands sufficient to return the said lands to the same degree of susceptibility to/immunity from flooding as was the case at the date of resumption for rainfall events in the Eudlo Creek catchment.

$651,325.00"

3 The claim for compensation was determined by the Land Court (Mr Scott), which delivered judgment on 20 February 1998. The description in the judgment of the appellant's land and its relationship with the Bruce Highway were as follows:

"The resumed land comprises a strip located on the eastern boundary of the parent block where it abuts the Bruce Highway. Mr Marshall's land has a frontage of 362 metres to that road. The land is located 8 to 9 km south of the Nambour Post Office and about 700 metres south of the junction of the Maroochydore Road and the Bruce Highway. The parent block enjoys the services of a town water supply, electricity and telephone, whilst connection to the sewerage plant at Kunda Park was available by construction of a rising main. The area is well supported by developed road infrastructure, with the Marshall land having had a single access point from the Bruce Highway in its north-eastern corner. Following the resumption, the access to the land changed…. The section of the Bruce Highway which fronts the subject land was declared 'limited access' by proclamation on 19 March 1977 and, following the construction of the works which generated the need for the resumption, access to Mr Marshall's land was provided in a more indirect manner involving an exit from the highway in a position north of the previous access point, then via Leafy Lane, which tracks back to the Marshall land. Leafy Lane functions as a service road which changes in name to Aird Lane, which then joins the Nambour connection road about 300 metres west of the Bruce Highway/Maroochydore interchange.

The resumption of Mr Marshall's land was associated with a project the respondent had planned for the duplication of a large part of the Bruce Highway. Prior to the duplication project being undertaken, the highway where it passed the subject land comprised two lanes only and, following duplication, that carriageway became the southbound lanes. *The new northbound lanes were constructed to the west and it was this new construction which gave rise to the resumption*.

The parent parcel of land is within the flood plain of Eudlo Creek and has been the subject of extensive extraction of sand and associated materials since its purchase by Mr Marshall in 1974. The result is that

there are now two large main lakes formed on the land which is zoned 'Extractive Industry' under the prevailing Town Plan. The first lake which one encounters just inside the entrance to the land was largely formed at the time of resumption. I will call this the 'main lake'. A second lake has since been formed towards the back of the property and, given its use on occasions for water-skiing purposes, it was referred to as the 'ski lake' during the hearing. Mr Marshall and his wife live on the land in a house constructed since the acquisition though utilised a caravan on the land prior to that.

Eudlo Creek, where it touches the parent parcel, is located in a well-defined channel, however, there was what Mr Marshall described as an anabranch which departed the main channel at a point to the west of where the main creek travelled under a bridge under the pre-existing two-lane Bruce Highway. The anabranch traversed in a north-easterly direction along the eastern boundary of the parent parcel, then drained under the previous highway through two large banks of box culverts. …

The current southbound carriageway was constructed in 1962 and drainage was provided under that carriageway by a bank of eight 2.1 metre by 2.1 metre box culverts and a bank of ten 2.1 metre by 2.1 metre box culverts, together with a 4 by 9 metre span bridge. In the process of construction of the new northbound carriageway which commenced in 1989, the two banks of box culverts were removed and replaced under each carriageway with two 1.9 metre diameter pipes, whilst the bridge was extended to seven 9 metre spans. In the claimant's view, the new drainage is inadequate and this inadequacy resulted in the parent parcel being flooded in February 1992, following substantial rains and following construction of the new carriageway. Mr Marshall explained how the flooding had inundated his land and had caused damage to equipment on his land. He said that to avoid a recurrence either the pre-existing box culvert drainage had to be reinstated under the highway or the previously dry land on the parent property needed to be increased in height by fill to render it secure from similar flooding. Mr Marshall and his wife were on the parent parcel living in a caravan in February 1992 during a heavy rainfall event and he described in evidence how he saw the flood developing. One indicator of the severity of the flooding which appeared to impress itself on Mr Marshall was that drums of bitumen of about 600 millimetres diameter floated almost below water surface level to the highway and were then carried over the highway to the other side. He said that his property was the only property flooded on that occasion. There had been a rainfall event of notable proportions in 1983, that is prior

to the highway upgrade, however, on that occasion his land had not been inundated.

It is said by the claimant that compensation for injurious affection should be awarded on the basis that, in general terms, the highway duplication which resulted from and which was the purpose of the resumption from Mr Marshall's land, brought about the 1992 flooding and, on the basis of that, has reduced the value of Mr Marshall's retained land given the prospect that further flooding following certain rainfall events will take place. The measure of the amount of $651,325 claimed is based on the cost of flood mitigation works needed, on the claimant's view, to return the land to its pre-resumption state of immunity from flooding." (emphasis added)

4 There was a conflict of expert evidence whether the appellant's land became more susceptible to flooding by reason of the work undertaken by the respondent following the resumption. The Land Court did not resolve this conflict because of the view that the Court took of the operation of s 20 of the Act. It was dealt with it in this way:

"The road surface of the new northbound carriageway, the new culverts and the extended bridge are all located on the original road reserve. There is, located partly on the road reserve and partly on the resumed land, what I will refer to as a 'rock spill', but a critical issue is whether any part of the embankment supporting the northbound carriageway is located on the resumed land. In addition to this issue, the claimant raised the proposition that drainage works were carried out on the resumed land and that these need to be taken into account.

Let me consider first of all the question of the rock spill. *There is, located partly on the resumed land and partly on the original road reserve, a rock spill spread over an area of about 80 to 100 metres in length in the southern section of the area where the highway passes Mr Marshall's land*. The rocks were said to be 50 to 100 centimetres in size in general with some up to 1 metre in diameter, apparently uneven in their spread on the surface of the land, both in terms of their height and in their distribution. They are not located along a contour. The area in the location of the rock spill is substantially overgrown and it is clear from the evidence that the surveyors had difficulty in locating the exact boundaries of the spill area. Ian Andrew Thomson, surveyor, who was called by the respondent, thought that the spill extended about 5 metres into the resumed land, whereas a plan tendered by Mr Baker, whom I have mentioned earlier, indicated the spread to be up to 8 metres. The rock

spill was not found on the eastern side of the new carriageway. The spill is located on land designated as being low lying, however, it is not confined to the boundary of that land.

The evidence from Philip James Breene, civil engineer called by the respondent, is that whilst the rock may have some use in the embankment supporting the northbound carriageway; and his opinion on this was more one of speculation than of putting forward a considered view; that part of the rock spill which spread onto the resumed land had, in his view, *no discernible purpose to serve*. I should mention that no part of the road embankment, if I can use that term generally, extended onto the resumed land in the area of the rock spill. It was suggested by the claimant that the rock may have been associated with a proposed exit lane intended to provide access onto the Marshall land and Mr Breene agreed that the location of the rock spill was at least in part consistent with the provision of such a lane. At some stage, however, the then Department of Main Roads changed its view about how access should be provided into the claimant's land, so even if the rock spill was placed in anticipation of the original access proposal being pursued, I cannot see how a discontinuance of that plan makes the rock spill *part of the road structure*. It is clearly the case that the rock spill in no way causes the flooding on Mr Marshall's land, so in that sense alone it cannot be the basis of a claim for injurious affection. To the extent that part of the rock spill may have been part of the embankment supporting the northbound carriageway, I need to consider whether the presence of part of that rock spill on the resumed land means that a practical separation cannot be made between the rock spill found on the resumed land and that which is an integral part of the embankment structure. Mr Baker inspected the rock spill and said that he could see no reason for it being in place. Mr Baker is, of course, a surveyor and it would be the evidence of an engineer that I would prefer and it is therefore Mr Breene's evidence which is of greater interest to me on this point. There was no evidence from the claimant's side to say that the rock is part of the structure, it simply being a possibility in the view of Mr Breene who was called by the respondent. Whilst it is clear that for a claimant to bring himself within a head of claim there is a legal onus to adduce cogent evidence in support of such a claim, it matters not that the source of that evidence is the respondent's side. Having said this, however, I note that Mr Breene's evidence is that whilst the inclusion of that rock in the road structure has some possible engineering merit that the remainder of the rock spill located on the resumed land has no arguable or apparent purpose. I cannot hold that the rock spill on the resumed land is therefore part of the works which cause the flooding. Let me demonstrate my reasoning by analogy. If it were the case that the nuisance complained

> of was noise emanating from the road surface and for the sake of my example assume that gravel from the road surface has been left either tidily or untidily located on the resumed land. In such a factual scenario a dispossessed owner would not be able to claim injurious affection resulting from noise on the carriageway which is not on the resumed land, on the basis of the presence of gravel on the resumed land. Indeed, even if it were the case that the road surface was gravel and the gravelling extended down the supporting embankment and through the drainage area, a claim of injurious affection due to noise could not be maintained." (emphasis added)

5 After attempting to undertake this detailed, if not to say microscopic examination of precisely what work had been done on the enlarged highway and the resumed land, the Land Court said this:

> "My view of this issue is that the inquiry which must be undertaken is not to ask whether, in an engineering sense, one part of the project is connected with or dependent upon another part, but is to ask whether it is possible in a practical sense to separate the works carried out on the resumed land from those which cause the nuisance complained of. If it is the case that Mr Marshall's land was resumed to provide drainage along the outside of the highway, then it is quite separate in a practical sense from that part of the highway which causes the flooding. The drainage on the resumed land would be concerned with shifting water to avoid flooding. It is quite unconnected with the cause of flooding which includes the carriageway embankment, together with the culverts and bridge opening within that embankment which together generate the net effect of inundation of Mr Marshall's land. It cannot be said that what might be described as a table drain designed to move water from one place to another is part of the cause of flooding on the land."

6 Mr Scott then said that he could test his reasoning by reference to a "but for" test which he said had received some judicial support in *March v Stramare (E & MH) Pty Ltd*[2]. He posed and answered this question:

> "'Would flooding have occurred on the subject land even if the table drain had not been constructed?' The answer to the question is 'Yes'."

The claim, the Land Court therefore held, for injurious affection, could not be entertained at law: the reasoning in *Edwards v Minister of Transport*[3] precluded

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2 (1991) 171 CLR 506.

it, and the appellant's claim for injurious affection should be dismissed. The Land Court accordingly ordered the payment of a sum in compensation which excluded any amount in respect of that head of claim.

The decision of the Land Appeal Court

7 The appellant appealed against the decision of the Land Court to the Land Appeal Court on a number of grounds including that the Land Court erred in failing to allow and assess compensation for injurious affection. By his notice of appeal the appellant gave notice that on the hearing of the appeal he intended to seek leave to adduce further evidence in support of his claim for compensation.

8 The appellant then made application in advance of the appeal to the Land Appeal Court for leave to adduce further evidence pursuant to s 44(13) of the *Land Act* 1994 (Q) ("the Land Act"). Section 44(13)(a) of the Land Act provides as follows:

> "The Land Appeal Court may admit further evidence only if:
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> (i) it is satisfied that admission of the evidence is necessary to avoid grave injustice and there is adequate reason that the evidence was not previously given; or
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> (ii) the appellant and respondent agree to its admission."

9 The application of the appellant needed to be considered in the context of the legislation and rules governing proceedings in the Land Court and the Land Appeal Court, which make no provision for pre-trial discovery or inspection of relevant materials in the possession of the parties or others.

10 The further evidence sought to be adduced fell into two categories of expert evidence: commentary upon the totality of another expert's report into flooding caused by Eudlo Creek on land on which the highway was constructed and the appellant's land, to part only of which the appellant's expert witness Mr Winders had had access before and at the time of giving evidence for the appellant in the Land Court; and, evidence to establish whether any part of the duplication of the actual highway was on the appellant's land. As to the former, Mr Winders deposed that he was able to offer a "preliminary opinion" only, that the parts of the report to which he had not had access were consistent with the opinions that he gave in evidence in the Land Court and inconsistent with the

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3 [1964] 2 QB 134.

respondent's evidence. And, as to the latter, Mr Winders was unable to say what the evidence and its effect upon the outcome of the appeal would be until a survey could be made.

11 On 24 July 1998, the Land Appeal Court (Muir J, Messrs Trickett and Neate) refused the application to adduce further evidence on the appeal. The Court stated its conclusions in this way:

> "In our view, neither limb of section 44(13)(a)(i) is satisfied.
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> …
>
> Even if this Court had the power to make the various orders sought, [the appellant] has not shown any reason why we should."

The decision of the Court of Appeal of Queensland

12 The appellant then unsuccessfully appealed to the Court of Appeal of Queensland[4]. Initially, his appeal challenged only the decision of the Land Appeal Court to refuse leave to adduce further evidence. However, on 4 August 1999, the Court of Appeal granted leave to the appellant to add one ground of appeal as follows:

> "The decision in *Edwards v Minister of Transport*[5] is wrong and should not be followed."

13 Appeals to the Court of Appeal from the Land Appeal Court are confined, by s 45 of the Land Act, to appeals by reason of error, or mistake of law or an absence, or an excess of jurisdiction. In their reasons for judgment dismissing the appeal, the Court of Appeal of Queensland, (de Jersey CJ, Davies and Thomas JJA) said:

> "On the existing authorities on this subject, including *Edwards v Minister of Transport*, additional compensation of this kind [for injurious affection] could not be granted unless at the very least some damage to the balance land was caused by (or by the use of) works performed on the resumed land. Later discussion will show that on any view of the law at least this much must be established. The Land Court member found that

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4 *Marshall v Director-General, Department of Transport* (1999) 106 LGERA 349.

5 [1964] 2 QB 134.

the evidence failed to establish that any part of the works was performed upon the resumed land. Neither was it established that any works on the resumed land caused or contributed to the flooding problem. On the findings of the Land Court member on this issue, which was clearly litigated before him, the flooding problems were entirely attributable to the performance of the works beyond the boundary of the resumed land." (footnotes deleted)

14 The Court of Appeal then summarised in what it identified as items (a)-(e) the evidence which the appellant wished to adduce in the Land Appeal Court and held that the appellant had not satisfied the test prescribed by s 45 of the Land Act for its reception.

15 Their Honours in the Court of Appeal took the view that this Court in *The Commonwealth v Morison*[6] impliedly approved the reasoning of the Court of Appeal in the United Kingdom in *Edwards*. *Morison* involved the application of par (c) of s 23(1)[7] of the *Lands Acquisition Act* 1955 (Cth) ("the Commonwealth Act"). One question in *Morison* was whether the terms of par (c) differed to any significant degree from those of s 63 of the *Land Clauses Consolidation Act* 1845 (UK) ("the 1845 Act"), the provision construed in *Edwards*. In the present case, the Court of Appeal referred[8] to what was said in *Morison* by Menzies J and Gibbs J:

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6 (1972) 127 CLR 32.

7 "(1) In the determination of the amount of compensation payable in respect of land compulsorily acquired under this Act, regard shall be had to -

(a) the value of the land at the date of acquisition;

(b) the damage (if any) caused by the severance of the land from other land in which the claimant had an interest at the date of acquisition; and

(c) the enhancement or depreciation in value of the interest of the claimant, at the date of acquisition, in other land adjoining or severed from the acquired land by reason of the carrying out of or the proposal to carry out the public purpose for which the land was acquired."

8 (1999) 106 LGERA 349 at 359.

> "Only two members of the Court, Menzies J and Gibbs J based their decision upon the conclusion that upon the correct construction of s 23 the depreciatory affect of the balance land was to be assessed according to the effect of the overall carrying out of the public purpose of the resuming authority. Whilst the expression of a ratio in *Morison* is difficult, quite clearly no doubt was cast upon the validity of decisions such as *Edwards* in relation to legislation such as s 63 of the *Lands Clauses Consolidation Act*."

The Court of Appeal rejected the appellant's argument that *Edwards* had no application because s 20 of the Act differed from s 63 of the 1845 Act. Their Honours said this[9]:

> "*Edwards* has been consistently followed in this State for many years, and indeed the same construction had already been reached by the Land Court in *Curtis v The Crown*[10] before *Edwards* was decided. *Edwards* has also been applied in other jurisdictions within and beyond Australia, but it is unnecessary to pursue its application further. For the purposes of s 20 of the *Acquisition of Land Act* it may be taken as settled law." (footnotes deleted)

As will appear, their Honours were, with respect, in error both in their understanding of the reasoning in *Morison* and their view that *Edwards* had been consistently followed in the Land Court of Queensland.

16 For completeness, what the Court of Appeal said in relation to the further conduct of the proceedings in the Land Appeal Court should be set out[11]:

> "In dismissing the appeal it may be noted that the Land Appeal Court may regulate the future conduct of the appeal. It is by no means inconceivable that the question whether the member erred in holding that the appellant failed to surmount the *Edwards* requirement could be heard as a preliminary issue. If the conclusion of the Land Court on that question was held to be wrong, then the relevance of the evidence in items (a), (b) and (c), accompanied by a better analysis of such items than presently exists might give the appellant a better case for the reception of

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9 (1999) 106 LGERA 349 at 360.

10 (1961) 28 QCLLR 310.

11 (1999 106 LGERA 349 at 361.

fresh evidence than he currently has. We are by no means seeking to encourage the appellant to make further applications or to direct the Land Appeal Court to sever the issues in this way. These comments simply underline the prematurity and the lack of quality of the evidence presently relied on, having regard to the statutory test."

The appeal to this Court

17 The appellant appeals to this Court on grounds limited to the following:

1. The Court of Appeal erred in concluding that, s 20 of the *Acquisition of Land Act* 1967 (Q), as amended, bore a meaning similar to that adopted in relation to s 63 of the *Land Clauses Consolidation Act* 1845 (UK), in *Edwards v Minister of Transport.*

2. The Court of Appeal erred in concluding that for the purposes of s 20 of the *Acquisition of Land Act* 1967 (Q), *Edwards* should be taken as settled law.

Analysis of the applicable statutory provision

18 Whether the English Court of Appeal did or did not accurately construe s 63 of the 1845 Act is beside the point. The English provision is relevantly as follows:

"… to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith."

19 It is true that sub-s (1) of s 20 of the Act uses similar language. It is convenient to set out the whole of s 20:

"Assessment of compensation

(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 -

(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.

But in no case shall this subsection operate so as to require any payment to be made by the claimant in consideration of such enhancement of value."

20 In our opinion, however, the language of s 20(1)(b) of the Act could hardly be plainer. In assessing compensation, regard is to be had not only to the value of the land taken but also to the damage caused by the exercise of *any statutory powers* by the constructing authority otherwise injuriously affecting *such other* [the remaining, severed] *land*. The section does not say "the exercise of any statutory powers by the constructing authority on and only on the land taken …". The section clearly distinguishes between the land taken and the severed land. It does not seek to distinguish between the various activities carried out by a constructing authority in the exercise of its statutory powers: for example, the conduct of a survey, the construction of a road, the building of a bridge, the installation of drainage or footpaths beside the road, and the subsequent use of everything that has been done or brought into existence as, and for the purposes of, a road. In truth, all of these can relevantly and properly be characterised as part and parcel of the construction, and subsequently the use of the road. Once the constructing authority acquires land for a statutory purpose and carries out the statutory purpose, it must, pursuant to s 20(1)(b) of the Act, compensate the dispossessed owner for the injurious effect upon the residual land resulting from the undertaking and the implementation of that purpose, actual and prospective.

21 In this case, the respondent gave notice of intention to the appellant to resume the land for "road purposes" as required by s 7 of the Act. That notice was given following the making of a proclamation pursuant to s 12 of the Act[12].

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12 "Effect of Proclamation or Notification of Resumption

(Footnote continues on next page)

A constructing authority does not have an unfettered right to resume land. Unless the authority has a *bona fide* purpose of exercising a statutory power in respect of the land, a purported resumption of it would be unlawful[13]. There is no suggestion of unlawfulness here. What is extraordinary here is the respondent's submission that having acquired the land for "road purposes" its use of the land thereafter was, and is not, for any of those purposes.

22 The correct view is, in our opinion, that the land, whether it is a site for the deposition of residue from the road works, a site for the support of a batter, or for drainage associated with the roadworks, or for future road-widenings, or has a use as a passive buffer[14], is land used for "road purposes", the Bruce Highway.

The authority of *Edwards*

23 The correctness of *Edwards* has, understandably in our opinion, been questioned. It followed and purported to apply the advice of the Privy Council in *Sisters of Charity of Rockingham v The King*[15]. It was held in that case that the

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(1) Subject to subsection (4) of this section -

(a) land taken by Proclamation -

(i) shall vest, according as the Proclamation prescribes, in the Crown or in the constructing authority which requires the land on and from the date of the publication in the Gazette of the Proclamation; or

…

(2) Where land taken consists of the whole estate in fee-simple and vests in the Crown it shall be and remain Crown land until it is, according to the purpose for which it is taken, dealt with as prescribed by an Act other than this Act. …"

13 cf *The Queen v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 187 per Gibbs CJ.

14 cf *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 and in the Privy Council at (1959) 100 CLR 1 at 2-3.

15 [1922] 2 AC 315.

appellants were entitled to compensation[16] "so long as their claim is not extended beyond mischief which arises from the apprehended legal user of the two promontories as part of a railway shunting yard". Certainly, we do not read what was said in *Morison* as an endorsement, enthusiastic or otherwise, of *Edwards*.

24 In *Morison*, although Barwick CJ appeared to accept the correctness of *Edwards*, his Honour expressed some scepticism about the way in which the principle for which it stood could be applied to an assessment of compensation for injurious affection[17]:

> "But that case was presented to the Court on the footing that a separate and identifiable depreciatory effect could be attributed exclusively to the work done and the use made of the work done on the acquired land. How this was perceived and quantified in the circumstances has for me elements of mystery with which I need have no present concern."

25 Menzies J distinguished *Edwards*[18]. Walsh J did not think it threw much light upon s 23 of the Commonwealth Act which the Court had under consideration there[19]. Section 23 stated:

> "(1) In the determination of the amount of compensation payable in respect of land compulsorily acquired under this Act, regard shall be had to -
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> (a) the value of the land at the date of acquisition;
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> (b) the damage (if any) caused by the severance of the land from other land in which the claimant had an interest at the date of acquisition; and
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> (c) the enhancement or depreciation in value of the interest of the claimant, at the date of acquisition, in other land adjoining or severed from the acquired land by reason of the

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16 [1922] 2 AC 315 at 329.

17 (1972) 127 CLR 32 at 40.

18 (1972) 127 CLR 32 at 45. The reference is to the *Lands Acquisition Act* 1955 (Cth).

19 (1972) 127 CLR 32 at 47.

carrying out of or the proposal to carry out the public purpose for which the land was acquired.

(2) In determining the value of land acquired under this Act, regard shall not be had to any increase in the value of the land arising from the carrying out of or the proposal to carry out the public purpose for which the land was acquired.

(3) Where the value of the interest of the claimant in other land adjoining the land acquired is enhanced or depreciated by reason of the carrying out of or the proposal to carry out the public purpose for which the land was acquired, the enhancement or depreciation shall be set off against, or added to, as the case requires, the amount of the compensation otherwise payable to the claimant."

Walsh J thought that, in any event, both *Edwards*[20] and *Sisters of Charity of Rockingham v The King*[21] were distinguishable[22], and, as the Court of Appeal said in the present case, both Menzies J and Gibbs J concluded that the depreciatory effect on the balance land was to be assessed according to the effect of the overall carrying out of the public purpose of the resuming authorities. But it should not be overlooked that Barwick CJ reached a similar conclusion by a slightly different process of reasoning. His Honour said this[23]:

> "It is, in my opinion, a sound principle in the application of s 23 that the depreciation in value of retained land for which compensation is to be given is the depreciation caused by the use of the constructions placed on the acquired land. In a case in which it is possible to isolate the depreciatory factors to the work done upon or to the use of work done upon the acquired land, it would be proper, in my opinion, to confine the depreciation in value to the effect of those factors. After all, it is the fact of acquisition of his land which alone gives to the claimant any right of compensation for the use by government, or an authorized person or body, of any facility adjoining his land. But it does not follow, in a case such as the present, that because the acquisition is the source of the right to

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20 [1964] 2 QB 134

21 [1922] 2 AC 315.

22 (1972) 127 CLR 32 at 47.

23 (1972) 127 CLR 32 at 39.

compensation for depreciation in value, the compensable depreciation may not include the effect of the use of the constructions on the acquired land in combination with other land and the constructions thereon. In a real sense the results of the use of constructions on the combined areas can properly be said, in my opinion, to flow from the use of the constructions on the acquired land, once it is clear that it is not possible to refer any part of such results exclusively to the use of the constructions on the acquired land. After much consideration, I see no practical way in which in the facts and circumstances of this case, the effect of the use of the constructions on the acquired land could be isolated so that it related exclusively to such use."

Applications of *Morison* in Queensland decisions

26 Furthermore, contrary to what the Court of Appeal said, *Edwards* has not been consistently applied, or at least certainly not in an unqualified way in Queensland. There are two cases in the Land Court of Queensland which demonstrate not only the unreality and the unfairness of any unqualified application of *Edwards* but also that the practical approach generally adopted by this Court in *Morison* has been preferred in Queensland. In *The South East Queensland Electricity Board v Beaver Dredging Pty Ltd*[24], the Land Appeal Court (Derrington J, Messrs Carter and White) said this[25]:

"In this case there was a novel attack in that, as the power line structures are mainly not on the subject easement, but on the golf course, easement, then compensation should be only minimal (vide *Edwards v Minister for Transport*). With this suggestion we do not agree. In *Re: Commonwealth v Morison*, the High Court, in distinguishing *Edwards v Minister for Transport*, held that where the Commonwealth acquired land used as a sheep station adjacent to an airport, for the extension of the airport, after which the airport was suitable for use by jet aircraft, the assessment of compensation for the resumption should be made on the footing that allowance should be made for the depreciation in the value of the adjacent land by the use of the whole of the extended aerodrome. Further, compensation under this heading was not limited to allowance for depreciatory effects exclusively traceable to the construction and use of

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24 (1985) 10 QLCR 166. See also *Vanhoff Pty Ltd v The Commissioner of Main Roads* (1992) 14 QLCR 331.

25 (1985) 10 QLCR 166 at 172.

works constructed on the acquired land. We have no doubt that the resumption of the subject easement is an integral and inseparable part of the resumptions necessary for the construction of the power line and we cannot appreciate in a practical sense and in having regard to the rights and obligations conferred and imposed by the easement how a separation of damage flowing from the resumptions could be made in view of the uses to which such lands have been put or are capable of being put.

We find in this matter that it is an unrealistic proposition to suggest that the very existence of the power lines would not be off-putting for potential purchasers of adjacent subdivided residential lots (even for eccentric purchasers such as some mentioned in evidence) for a variety of reasons, many of which are obvious, but the principal one being the unsightly nature of the towers, and to a lesser degree, the transmission lines." (footnotes deleted)

27 In *Treston v Brisbane City Council*[26], before the implementation of the statutory road scheme, the claimants' suburban allotment on which their residence stood was adjoined by a like allotment similarly used. After it, there ran beside their reduced allotment a footpath and a busy roadway constructed on the neighbouring allotment. The footpath was constructed on the sliver of land acquired by resumption from the claimants. The respondent there argued that the claimants were not, or were hardly, injuriously affected by the relatively innocuous use to which the actual land taken from them was put, as a footpath, and that they were not entitled to be compensated for injurious affection caused by the noise and fumes resulting from the use of the new road. The Land Court[27] (Mr White) found itself able to reject that argument by adopting the same sort of approach as the Land Appeal Court had adopted in *Beaver Dredging*[28].

28 It is no answer to say, as was suggested by the respondent in argument here, that there may be others who have lost no land but who may be either equally, or almost equally, injuriously affected in the enjoyment of their land by the implementation of a constructing authority's purpose, yet have no entitlement to any compensation. That is irrelevant. The fact that the enjoyment or utilisation by them of their property may have been adversely affected, and

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26 (1985) 10 QLCR 247.

27 (1985) 10 QLCR 247 at 256-259.

28 (1985) 10 QLCR 166. See also *Vanhoff Pty Ltd v The Commissioner of Main Roads* (1992) 14 QLCR 331.

indeed, perhaps unfairly so by reason of the unavailability to them of compensation, provides no reason to distort the language of the Act, and to deprive others, who have lost land, of compensation for injurious affection.

Other reasons for not following *Edwards*

29 Other matters were advanced as practical difficulties in giving s 20 of the Act its ordinary meaning. The difficulties suggested are illusory only. One was that the resuming authority might have a long-term purpose which is not to be carried into effect within an identifiable period. That will raise a merely factual question of the quantification of postponed damage or loss, an exercise regularly undertaken by courts today. A further difficulty, of measuring the effects of the implementation of the statutory purpose, the degree of vibration, the extent of the escape of noise, or dust or fumes, was suggested. Again, this raises a question of fact and one well capable of resolution on evidence of the kind regularly given in planning courts and tribunals, as well as those in which compensation falls to be determined.

30 The respondent argued that the legislature enacted s 20 in the knowledge of, and against the background of, the decision in *Edwards*, and that, therefore, the Queensland legislature intended that the courts give s 20 a meaning attributed to s 63 of the 1845 Act by the English Court of Appeal. The respondent referred, in support of this argument, to the second reading speech for the Acquisition of Land Bill by the Minister for Lands[29]:

> "The principles for the assessment of compensation are unchanged from those which presently operate. The existing principles are well established and require no change. They are in fact largely conventional to the law of English-speaking nations. They are well tried and proven, and their interpretation is assisted by a great body of case law covering every aspect of their application."

31 That statement preceded *Morison*[30], which in turn was decided before the High Court became the final court of appeal in this country for all matters. It had

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29 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 December 1967, at 2299.

30 See Todd, "The Mystique of Injurious Affection in the Law of Expropriation", (1967) *University of British Columbia Law Review* (C de D) 127, which discusses the application of a number of different provisions in various jurisdictions.

no regard to the fact that the Minister was proposing legislation which used somewhat different language from the 1845 Act and enactments in other jurisdictions. It did not descend to detail and made no reference to the set-off and abatement provision in s 20(3) of the Act. It overlooked that "the principles" which the Minister chose to describe as well established and largely conventional, were, in some respects, controversial and still in fact unsettled as, for example, *Morison* itself, and a recent case[31] in this Court dealing with the concept of "special value" demonstrates. An analogue of s 20(3) has appeared in relevant Queensland legislation from as early as 1901[32]. The probability is that in 1968 no particular attention was given to s 20(1)(b) of the Act and any construction that may have been given to its predecessors or to differently expressed provisions elsewhere. The Minister's speech provides no basis for reading the Act in a manner contrary to its unambiguous language.

32 The reasoning in *Edwards* is in our respectful opinion, in any event unconvincing. Harman LJ[33] described "injurious affection" as a piece of jargon. It is more than that. It is a neat, expressive way of describing the adverse effect of the activities of a resuming authority upon a dispossessed owner's land. Reference to it in disparaging language does nothing in our view to assist in the elucidation of what it involves. The use of this common expression serves well to distinguish the statutory right from the common law claim in nuisance. It is unnecessary, and it would be unprofitable in these reasons, to examine his Lordship's reasons and his analysis of the earlier cases to ascertain why the apparently unambiguous language of s 63 of the 1845 Act was given the meaning which his Lordship and others have attributed to it. Like the Court in *Beaver Dredging*, we do not read the decision in *Morison* as embracing the reasoning in *Edwards*.

The landowner is entitled to compensation for injurious affection

33 The appellant is entitled to have compensation assessed for injurious affection to his remaining land resulting from the exercise of the respondent's

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31 *Boland v Yates Property Corporation Pty Limited* (1999) 74 ALJR 209; 167 ALR 575.

32 Section 19(1), *Property for Public Purposes Acquisition Act* 1901 (Q); s 28(2), *Lands Acquisition Act* 1906 (Q).

33 [1964] 2 QB 134 at 144.

power in duplicating the highway. Just as each pylon in *Beaver Dredging*[34] was an integral part of a power line constructed by the authority there, and, as Barwick CJ in *Morison*[35] said, regard should be had to "the use of the constructions on the acquired land in combination with other land and the constructions thereon". The use of the appellant's land acquired here should be taken in combination with the use of other land for the duplication of the highway, for the purposes of assessing the damage to the appellant's remaining land by reason of injurious affection to it.

34 The acquisition of the land, the work done on it, and the use, passive or active, to which it is put in pursuance of a statutory purpose such as that involved here, will form part of the exercise of the relevant statutory power so as to give rise to a right to compensation for such injurious affection as is caused to remaining land by reason of the exercise of the power. If it were otherwise, the authority would have neither the need nor the legal right to acquire the land in question.

Orders

35 The appeal should be allowed with costs including reserved costs. The orders of the Supreme Court of Queensland (Court of Appeal) should be set aside. In place thereof, the appeal to the Court of Appeal should be allowed with costs, the order of the Land Appeal Court made on 24 July 1998 set aside and the application dismissed by the Land Appeal Court remitted to that Court to be dealt with in accordance with law.

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34 (1985) 10 QLCR 166. See also *Vanhoff Pty Ltd v The Commissioner of Main Roads* (1992) 14 QLCR 331.

35 (1972) 127 CLR 32 at 39.

36 GAUDRON J. I agree with the joint judgment of Gleeson CJ, Gummow, Kirby and Callinan JJ and with the orders which they propose. I wish, however, to add some short observations of my own.

37 It is a basic rule of statutory construction that legislative provisions are to be construed according to their natural and ordinary meaning unless that would lead to a result that the legislature must be taken not to have intended[36]. The rule serves the important purpose of ensuring that those who are subject to the law understand the nature and extent of their rights and obligations[37]. And because it serves that purpose, good reason must be shown before it will be concluded that the legislature did not intend the consequences that would flow if the provision in question were given its natural and ordinary meaning.

38 Although the rule that legislative provisions are to be construed according to their natural and ordinary meaning is a rule of general application, it is particularly important that it be given its full effect when, to do otherwise, would limit or impair individual rights, particularly property rights. The right to compensation for injurious affection following upon the resumption of land is an important right of that kind and statutory provisions conferring such a right should be construed with all the generality that their words permit. Certainly, such provisions should not be construed on the basis that the right to compensation is subject to limitations or qualifications which are not found in the terms of the statute.

39 When s 20 of the *Acquisition of Land Act* 1967 (Q) is construed in accordance with the above principles, the limitation suggested by *Edwards v Minister of Transport*[38] must be rejected. Accordingly, the appeal must be allowed and consequential orders made as proposed by Gleeson CJ, Gummow, Kirby and Callinan JJ.

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36 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-162 per Higgins J; *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 648 per Dixon J; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 per Gibbs CJ; *Mills v Meeking* (1990) 169 CLR 214 at 223 per Mason CJ and Toohey J, cf 235 per Dawson J; *Thompson v His Honour Judge Byrne* (1999) 196 CLR 141 at 149 [19] per Gleeson CJ, Gummow, Kirby and Callinan JJ, 158 [45] per Gaudron J.

37 Note that this purpose is recognised by s 15AB(3)(a) of the *Acts Interpretation Act* 1901 (Cth).

38 [1964] 2 QB 134.

40 McHUGH J. Where a "constructing authority" in Queensland compulsorily acquires land by "severing" it from other land, the law of that State requires payment of compensation to the owner for the damage caused by "the exercise of any statutory powers by the … authority otherwise injuriously affecting such other land"[39]. The appellant owned land adjoining a highway. A constructing authority resumed part of the land "for road purposes". The appellant claims that, when the authority subsequently widened the highway, it altered the drainage system under the highway making the residue of his land vulnerable to periodic flooding. No part of the widened highway or the altered drainage system is on the land resumed. Nor was the resumed land used to carry out work for widening or draining the highway. Is the appellant entitled to compensation if he proves that the altered drainage system makes his land susceptible to flooding? That is the issue in this appeal brought against an order of the Court of Appeal of Queensland.

41 The Court of Appeal (de Jersey CJ, Davies and Thomas JJA) unanimously held that the appellant was not entitled to compensation for injurious affection to his land. Their Honours said[40] that "[o]n the existing authorities on this subject … additional compensation of this kind could not be granted unless at the very least some damage to the balance land was caused by (or by the use of) works performed on the resumed land." The central question in this appeal is whether "the existing authorities" are applicable to s 20(1)(b) of the *Acquisition of Land Act* 1967 (Qld) ("the Act"). In my opinion, those authorities do not give effect to the language of s 20(1)(b). If the appellant can make good his claim that altering the drainage system makes his land susceptible to flooding – an issue still to be determined – he is entitled to compensation for injurious affection to the land that he retained. Accordingly, the appeal must be allowed.

42 Section 20 gives effect to the direction in s 12(5) of the Act that, on the date of publication of a Notification of Resumption, the land thereby taken is vested or becomes Crown land "and the estate and interest of every person entitled to the whole or any part of the land shall thereby be converted into a right to claim compensation under this Act". Section 20 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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39 *Acquisition of Land Act* 1967 (Qld), s 20(1)(b).

40 *Marshall v Director-General, Department of Transport* (1999) 106 LGERA 349 at 354.

(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.

But in no case shall this subsection operate so as to require any payment to be made by the claimant in consideration of such enhancement of value."

43 Section 4 of the Act defined "constructing authority" at the relevant time to mean: "[t]he Crown or any person or local authority authorised by this Act or any other Act … to take land for any purpose".

The construction of s 20(1)(b)

44 The natural and ordinary meaning of s 20(1)(b) of the Act directs the relevant tribunal, when determining the amount of compensation to be awarded to the claimant, to have regard to any damage caused by the exercise of *any* statutory powers by the constructing authority injuriously affecting the land of the claimant that he or she retains after the severance. That is a separate head of compensation from compensation for the value of the land taken and compensation for damage resulting from the severing of the land of the claimant. Nothing in the section gives any ground for supposing that compensation for injurious affection is conditioned on the statutory powers of the constructing authority being exercised on the resumed land. All that the claimant is required to prove is that the exercise of a statutory power by the constructing authority injuriously affected the "other land" of the claimant.

45 Mr D F Jackson QC, counsel for the appellant, accepted that the damage must be relevant to the implementation of the purpose for which the land was compulsorily acquired. That concession would seem to be correct. The "constructing authority" referred to in s 20(1)(b) is the "Crown or any person or local authority authorised by this Act or any other Act … to take land for any

purpose"[41]. It seems natural to read the reference in that paragraph to "the exercise of any statutory powers" by that authority as referring to the exercise of powers implementing the purpose for which the land was taken[42]. The exercise of a power for any function or purpose incidental to the purpose for which the land was acquired is therefore an exercise of statutory power within the meaning of s 20(1)(b). No narrow view should be taken of what is incidental to the purpose for which the land was acquired. If part of a parcel of land is taken for road purposes, any damage caused to the residue in the course of constructing, paving, draining or making safe the road and its accessories will be injurious affection for the purpose of the paragraph.

46 Damage for the purpose of s 20(1)(b) is not confined to physical damage to the remaining land. Injurious affection does not include damage resulting from the act of severing the land. That is a separate head of damage. But it includes any other injurious consequence, resulting from the exercise of a statutory power, which depreciates the value of or increases the cost of using the "other land". If the exercise of the power limits the activities on or the use of that land[43], interferes with the amenity or character of the land[44], deters purchasers from buying the land[45] or makes it more expensive to use the land[46], the claimant is entitled to compensation for injurious affection.

47 No narrow view should be taken of what constitutes the exercise of a statutory power when the acts or omission of the constructing authority have resulted or will result in damage to the remaining land of the claimant. In particular, there is no scope for applying the principles that courts use in construing provisions that protect public authorities from actions arising out of the exercise of statutory powers. In that context, the courts accept that a grant of statutory power carries with it "by necessary implication a statutory authority to do all those incidental acts necessary to the exercise of that power which the [authority] ... could not lawfully perform without such an authority"[47]. But,

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41 Section 4.

42 *Westaway v The Council of the Shire of Landsborough* (1964) 31 CLLR 1 at 16.

43 *Suntown Pty Ltd v Gold Coast City Council* (1979) 6 QLCR 196.

44 *Walker v Doncaster Rural District Council* (1955) 6 P & CR 47.

45 *Howard v The Minister* (1939) 14 LGR (NSW) 74; *Konowalow v Minister for Works* [1961] WAR 40; *Kimber v The Minister* (1966) 19 *The Valuer* 448; *Cohen v Commissioner for Main Roads* (1968) 15 LGRA 423.

46 *In re The Stockport, Timperley and Altringham Railway Co* (1864) 33 LJQB 251.

47 *Hudson v Venderheld* (1968) 118 CLR 171 at 175.

because the implication arises from necessity, it is "limited by the extent of the need"[48]. Consequently, "[t]here can be no implication of a grant of power to do, in the performance of the duty, what is in any case lawful"[49]. Applying these principles, this Court has held that damage caused by a fire engine on its way to a fire was not "damage caused in the bona fide exercise of [the] powers" conferred by the *Fire Brigades Act* 1909 (NSW)[50]. It has held that injury was not "done under [the] Act" when a Council truck caused injury on the highway in the course of performing duties imposed by the *Local Government Act* 1919 (NSW)[51]. And it has held that the failure of the Australian National Airlines Commission to provide a safe system of work was not something "done or purporting to have been done" under the *Australian National Airlines Act* 1945 (Cth)[52]. In each of these cases, the particular act or omission of the public authority was done or omitted to be done in the course of an activity which was lawful independently of the legislation governing the activities of the authority. Consequently, the immunity was construed as not covering acts or omissions causing damage but done in the course of otherwise lawful activities.

48 In cases conferring immunities on public authorities, the legislation is read with the presumption that the legislature did not intend that the protection to the authority "granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow"[53]. In the case of legislation dealing with the compensation to be awarded in respect of the compulsory acquisition of land, however, a different presumption operates. The legislation is intended to ensure that the person whose land has been taken is justly compensated. Such legislation should be construed with the presumption

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48 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 118; *Hudson v Venderheld* (1968) 118 CLR 171 at 175.

49 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 118; *Hudson v Venderheld* (1968) 118 CLR 171 at 175; *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 473.

50 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105. *Fire Brigades Act* 1909 (NSW), s 46.

51 *Hudson v Venderheld* (1968) 118 CLR 171. *Local Government Act* 1919 (NSW), s 508.

52 *Australian National Airlines Commission v Newman* (1987) 162 CLR 466. *Australian National Airlines Act* 1945 (Cth), s 63.

53 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116.

that the legislature intended the claimant to be liberally compensated[54]. That being so, it would be wrong to construe a provision such as s 20(1)(b) as conferring compensation only for damage that results from an act that is "the very thing, or an integral part of or step in the very thing, which the provisions of the Act"[55] gave the constructing authority power to carry out. Whenever the constructing authority takes steps to achieve any purpose or carry out any function that is incidental to the purpose for which part of the land was acquired, it should be regarded as the exercise of a statutory power within the meaning of s 20(1)(b).

The English decisions

49 Only in one respect did the argument of Mr P A Keane QC, counsel for the respondent, expressly challenge the validity of the above propositions. He supported the reasons of the Court of Appeal and contended that it was a condition of the payment of compensation for injurious affection that the harm-causing conduct occurred on the land resumed. His contention is supported by a series of cases extending over a century that were decided on legislative provisions similar in principle, but not identical in detail, to s 20(1)(b). The series of cases commences with *In re The Stockport, Timperley and Altringham Railway Co*[56], a case decided on s 63 of the *Land Clauses Consolidation Act* 1845 (UK) which provided:

> "In estimating the purchase money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justices … not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or *otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith*." (emphasis added)

50 In *Stockport*, a railway company, acting under the powers conferred by its legislation, took part of the land on which the claimant operated a cotton mill. The Court of Queen's Bench upheld a jury's right to award compensation to the claimant for "injury to the premises, by reason of the risk of fire being so much increased by the proximity to the railway … and to make the mill not insurable, except at a greatly increased premium, and so to render the property of less value

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54 cf Dixon J in *Commissioner of Succession Duties (SA) v Executor Trustee and Agency Co of South Australia Ltd* (1947) 74 CLR 358 at 373-374.

55 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 117.

56 (1864) 33 LJQB 251.

to a purchaser"[57]. Giving the judgment of the Court, Crompton J accepted[58] "the well-established rule, that compensation is only given by such acts of parliament, when what would have been unlawful and actionable but for an act of parliament, is permitted by the act of parliament". But his Lordship went on to say[59]:

> "Where the damage is occasioned by what is done upon other land which the company have purchased, and such damage would not have been actionable as against the original proprietor … the company have a right to say, We had done what we had a right to do as proprietors, and do not require the protection of any act of parliament; we, therefore, have not injured you by virtue of the provisions of the act; no cause of action has been taken away from you by the act. Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say, it is by the act of parliament, and the act of parliament only, that you have done the acts which have caused the damage; without the act of parliament, everything you have done, and are about to do, in the making and using the railway, would have been illegal and actionable, and is, therefore, matter for compensation ..."

51 The House of Lords approved the reasoning in *Stockport* in *Cowper Essex v Local Board for Acton*[60], a case that also turned on the meaning and application of s 63 of the *Land Clauses Consolidation Act*. Lord Halsbury LC regarded it as "conclusively established" that[61]:

> "[W]here part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of

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57 (1864) 33 LJQB 251 at 252.

58 (1864) 33 LJQB 251 at 253.

59 (1864) 33 LJQB 251 at 253.

60 (1889) 14 App Cas 153. In *Sisters of Charity of Rockingham v The King* [1922] 2 AC 315 at 324-325, the Judicial Committee of the Privy Council was of the view that the House of Lords had also approved "the law as applied by Crompton J" in *Stockport* in the earlier case of *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 HL 418. In *Buccleuch*, however, none of the Law Lords referred to *Stockport* although it had been approved by Hannen J (at 446) in the course of answering questions put to the Judges by the House of Lords.

61 (1889) 14 App Cas 153 at 161.

> neighbouring proprietors from whom nothing had been taken for the purpose of the intended works."

52 *Cowper Essex* was followed and applied by the Judicial Committee of the Privy Council in *Sisters of Charity of Rockingham v The King*[62], a Canadian appeal. Lord Parmoor, who delivered the Board's Advice, said[63] that there were clauses in the English legislation that did not appear in the Canadian legislation. He pointed out, however, that the words "injuriously affected by the construction of any public work" in the Canadian legislation were also in s 6 of the *Railways Clauses Consolidation Act* 1845 (UK) "and substantially similar words [were] to be found in s 68 of the Lands Clauses Act, 1845." Applying the reasoning in *Stockport* and *Cowper Essex*, the Judicial Committee held that the claimant was entitled to compensation for injurious affection for the depreciation in value of the residue of its land from the use of works that might be constructed upon the land taken from it. The Judicial Committee referred to and applied[64] the statement of principle formulated by Lord Halsbury LC in *Cowper Essex* that is set out above. Their Lordships said[65] that "the fact that other lands are comprised in the scheme [of works] in addition to the lands taken from the appellants, does not deprive the appellants of their right to compensation, so long as their claim is not extended beyond mischief which arises from the apprehended legal user" of the land taken from them.

53 *Sisters of Charity of Rockingham v The King*[66] was followed and applied by the English Court of Appeal in *Edwards v Minister of Transport*[67], another decision on s 63 of the *Land Clauses Consolidation Act*. The Court of Appeal held that damage for injurious affection must be confined to damage arising from the use of land taken from the claimant. Where damage arises partly from the use of land taken from the claimant and partly from the use of land that the claimant did not own, compensation for injurious affection is limited to damage arising from the use of the land taken from the claimant.

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62 [1922] 2 AC 315.

63 [1922] 2 AC 315 at 323.

64 [1922] 2 AC 315 at 327-328.

65 [1922] 2 AC 315 at 329.

66 [1922] 2 AC 315.

67 [1964] 2 QB 134.

54 The principles applied in the English cases concerned with injurious affection have frequently been referred to with approval by Australian courts[68]. In *Curtis v The Crown*[69], decided three years before the decision in *Edwards v Minister of Transport*[70], the Land Court of Queensland had applied the principles of the English cases to s 19 of the *Public Works Land Resumption Act* 1906 (Qld), whose terms were similar to s 20 of the Act. The Court said[71]:

> "To give a wider meaning to the paragraph would lead to a result that a claimant may seek before the Land Court compensation for injurious affection to his unresumed land by the exercise of any statutory powers by the same constructing authority anywhere in the vicinity. Such injurious affection would not arise from the particular resumption suffered by the claimant."

55 In *The Commonwealth v Morison*[72], Barwick CJ, with whose judgment McTiernan J agreed, held that the principles of the English decisions were applicable to s 23(1)(c) of the *Lands Acquisition Act* 1955 (Cth)[73], despite the substantial textual differences between that Act and the English legislation. On the facts of the case, however, Barwick CJ held that it was not possible to isolate the factors causing depreciation in the value of the retained land. The claimant was therefore entitled to compensation for the whole of the depreciation in value of the retained land even though part of the damage arose from work done on land that had not been acquired from the claimant[74].

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68 *Wilson v The Minister* (1908) 8 SR (NSW) 427; *Laycock v Victorian Railways Commissioners* [1917] VLR 556; *Konowalow v Minister for Works* [1961] WAR 40; *Curtis v The Crown* (1961) 28 CLLR 310; *Thorpe v Brisbane City Council* (1962) 29 CLLR 367; *Westaway v The Council of the Shire of Landsborough* (1964) 31 CLLR 1; *Cohen v Commissioner for Main Roads* (1968) 15 LGRA 423.

69 (1961) 28 CLLR 310.

70 [1964] 2 QB 134.

71 (1961) 28 CLLR 310 at 313.

72 (1972) 127 CLR 32 at 39.

73 Section 23(1)(c) required that, in determining the compensation payable in respect of land compulsorily acquired under the Act, regard was to be had to "the enhancement or depreciation in value of the interest of the claimant, at the date of acquisition, in other land adjoining or severed from the acquired land by reason of the carrying out of or the proposal to carry out the public purpose for which the land was acquired."

74 (1972) 127 CLR 32 at 39.

56 Menzies and Gibbs JJ said that the English decisions were not applicable to s 23(1)(c). Gibbs J said[75] that it was not implicit in the ordinary and grammatical meaning of the words of that paragraph "that the public purpose should be carried out, or should be proposed to be carried out, on the land acquired."

57 Walsh J, the other member of the Court, said[76] that it was not necessary to decide in that case whether the English decisions "should be applied in dealing with claims under s 23(1)(c) of the Act, when the facts are such that it is possible to apply them." His Honour said that, even if the trial judge erred in refusing to apply the English decisions, it had not been shown that he erred in giving compensation for the whole of the depreciation. Nevertheless, his Honour's discussion of the English cases suggests that he thought that they were applicable to s 23(1)(c). He examined them at length and concluded his discussion by saying[77]:

> "The decisions do not lay down an inflexible rule that the tribunal assessing compensation in such cases must always fix separately the amount of depreciation caused by activities taking place on the land taken from the claimant. They do not assert that the tribunal must do this even if it is not possible to do it. The decisions do indicate, I think, that the tribunal should make an appropriate dissection of the total amount of damage where this can be done, although that may be a difficult task. But they cannot go any further than that."

58 This conclusion and his extended discussion of the English decisions suggests that Walsh J inclined to the view that those decisions were applicable to s 23(1)(c) whenever the facts of a case permitted them to be applied. But his Honour did not say so, and *Morison* cannot be regarded as deciding that those decisions applied to that paragraph.

The English decisions are not applicable to s 20(1)(b)

59 This review of the case law provides formidable support for the contention of the respondent that it is a condition of a claim for injurious affection that the statutory power concerned must have been exercised on the resumed land of the claimant. In my opinion, however, the language of s 20(1)(b) is too clear to read it down by reference to the English cases that were decided on legislative

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75 (1972) 127 CLR 32 at 61.

76 (1972) 127 CLR 32 at 53-54.

77 (1972) 127 CLR 32 at 53.

provisions, such as s 63 of the *Land Clauses Consolidation Act*, in similar but not identical terms to s 20. In *Morison*[78], Gibbs J said that:

> "The 'exercise of the powers' referred to in s 63 appears to mean the particular exercise of statutory powers by which the land in question was taken. Since the section referred to injurious affection resulting from the exercise of the powers to take the land, it is understandable that it was held to limit compensation to the damage resulting from what was done or expected to be done on the land actually taken."

60 If this were the reason that s 63 of the *Land Clauses Consolidation Act* was construed in the way that it was, it would be easy enough to distinguish the English decisions because there is no equivalent limitation on the face of s 20 of the Act. Section 20(1)(b) refers to the exercise of "any statutory powers by the constructing authority otherwise injuriously affecting such other land". But with great respect to his Honour, I doubt that his explanation accurately states the reason that s 63 has been read in the way that it has. As the judgment of Crompton J in *Stockport*[79] and the speech of Lord Halsbury LC in *Cowper Essex*[80] make plain, the words of s 63 were not seen as words of limitation. The claimant, according to Lord Halsbury LC, had a right "different in kind from that which is suffered by the rest of Her Majesty's subjects"[81]. It was different because it was the taking of the claimant's land and the use of it that had enabled the authority to damage the retained land of the claimant. Because that was so, the claimant was seen as being in a special position in respect of the land retained in so far as that land was injuriously affected by the use of or work on the acquired land.

61 Why the claimant should be in a preferred position in respect of work done on the acquired land and have no rights in respect of work done off the acquired land that affected the retained land is not readily apparent. Upon acquisition of the land, the claimant stood in the same relationship to the acquirer as neighbouring occupiers. However, s 63, like s 20(1)(b), gave the claimant a special right to compensation for injurious affection arising from the exercise of the powers of the acquirer. It is not easy to see anything in s 63 which supports the view that, the special right having been given, a claim for injurious affection should be limited to consequences arising from the use of or works done on the resumed land. According to Lord Parmoor in *Sisters of Charity of Rockingham v*

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78 (1972) 127 CLR 32 at 56-57.

79 (1864) 33 LJQB 251 at 253.

80 (1889) 14 App Cas 153 at 162.

81 (1889) 14 App Cas 153 at 162.

The King[82], the decision in *Stockport* "[f]or a time ... gave rise to considerable difference of judicial opinion" until its reasoning was subsequently approved by the House of Lords.

62 I do not think that there are any grounds upon which the principles laid down in the English cases and frequently followed in this country can be persuasively distinguished because of differences in the texts of s 63 of the *Land Clauses Consolidation Act* and s 20(1)(b) of the Act. The language of s 63 is not readily distinguishable from that of s 20(1)(b). But that does not mean that the courts of Queensland, when construing the legislation of that State, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are guides to, but cannot control, the meaning of legislation in the court's jurisdiction. Judicial decisions are not substitutes for the text of legislation although, by reason of the doctrine of precedent and the hierarchical nature of our court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation.

63 Mr Keane QC contended that the second reading speech of the Minister for Lands in introducing the Act made it clear that the English decisions were intended to apply to s 20. The Minister said[83]:

> "The principles for the assessment of compensation are unchanged from those which presently operate. The existing principles are well established and require no change. They are in fact largely conventional to the law of English-speaking nations. They are well tried and proven, and their interpretation is assisted by a great body of case law covering every aspect of their application."

64 But a statement of such generality should not be read as indicating an intention that Parliament, in enacting the legislation, would be approving every judicial decision on injurious affection. In *R v Reynhoudt*[84], Dixon CJ said:

> "In any case the view that in modern legislation the repetition of a provision which has been dealt with by the courts means that a judicial

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82 [1922] 2 AC 315 at 324-325.

83 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 December 1967 at 2299.

84 (1962) 107 CLR 381 at 388.

> interpretation has been legislatively approved is, I think, quite artificial. To repeat what I have said before, the mechanics of law-making no longer provide it with the foundation in probability which the doctrine was supposed once to have possessed. I note that Lord Radcliffe describes it as 'an almost mystical method of discovering the law'[85]."

65 The principles expounded in the English decisions are therefore not applicable to s 20(1)(b) of the Act. In particular, it is not a condition of a claim for injurious affection under that paragraph that the statutory power injuriously affecting the claimant's remaining land was exercised on the resumed land of the claimant.

Order

66 The appeal should be allowed and orders made in the form proposed in the joint judgment of Gleeson CJ, Gummow, Kirby and Callinan JJ.

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85 *Galloway v Galloway* [1956] AC 299 at 320.

67 HAYNE J. I agree, substantially for the reasons their Honours give, that orders should be made in the form proposed in the joint judgment of Gleeson CJ, Gummow, Kirby and Callinan JJ. I also agree with the observations of Gaudron J about the importance of construing legislation according to its natural and ordinary meaning where, to do otherwise, would limit or impair individual rights.