HIGH COURT OF AUSTRALIA

McHUGH J,
GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

WESTERN AUSTRALIAN PLANNING COMMISSION APPELLANT

AND

TEMWOOD HOLDINGS PTY LTD RESPONDENT

Western Australian Planning Commission v Temwood Holdings Pty Ltd
[2004] HCA 63
9 December 2004
P90/2003

ORDER

1. *Appeal allowed.*

2. *Orders 1, 2, 3 and 5 of the Full Court of the Supreme Court of Western Australia made on 22 May 2002 set aside. In their place order that the appeal to that Court be dismissed.*

3. *The appellant pay the respondent's reasonable costs of the appeal to this Court.*

On appeal from the Supreme Court of Western Australia

Representation:

G T W Tannin SC with C J Thatcher for the appellant (instructed by the Crown Solicitor's Office of Western Australia)

D H Solomon with J C Giles for the respondent (instructed by Solomon Brothers)

CATCHWORDS

Western Australian Planning Commission v Temwood Holdings Pty Ltd

Town Planning (WA) – Statutory right to compensation conferred upon any person whose land or property was injuriously affected by the making of a specified planning scheme – Land injuriously affected by making of scheme not owned by respondent at time scheme was made but subsequently owned by respondent – Whether right to compensation passed with the land – Whether respondent had a statutory right to compensation.

Town Planning (WA) – Subdivision of land – Application for subdivision approval – Progressive subdivision of larger area – Town planning authority granted subdivision approval subject to a condition that a portion of the larger area be vested in the Crown free of cost and without any payment of compensation by the Crown – Whether condition imposed for a proper "planning purpose" – Whether condition fairly and reasonably related to the development permitted – Whether condition validly imposed.

Town Planning and Development Act 1928 (WA), ss 11, 20, 20A.
Metropolitan Region Town Planning Scheme Act 1959 (WA), ss 3, 5, 36.

1 McHUGH J. The issues in this appeal concern the construction of the *Town Planning and Development Act* 1928 (WA) ("the Town Planning Act") and the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) ("the Metropolitan Region Scheme Act"). The central issue is whether the Town Planning Appeal Tribunal ("the Tribunal") erred in law in approving a condition on the grant of three subdivision approvals under s 20 of the Town Planning Act. The condition required certain land reserved under a town planning scheme to be ceded free of cost to and without payment of compensation by the Crown.

2 In my opinion, the Tribunal did not err in law in approving the condition. The condition was one that the Tribunal had power to approve, was bona fide imposed for a legitimate planning purpose and was reasonably related to the proposed development.

Statement of the case

3 The appellant, the Western Australian Planning Commission ("the Commission"), is a body corporate established under s 4 of the *Western Australian Planning Commission Act* 1985 (WA). That Act, the Town Planning Act and the Metropolitan Region Scheme Act confer various functions on the Commission. One of the functions of the Commission under the Town Planning Act is to make decisions on applications for subdivision approval.

4 As it then stood, s 42 of the Town Planning Act established the Tribunal. One of the functions of the Tribunal was to hear "appeals" from decisions of the Commission on applications for subdivision approval. They were appeals on the merits of the case. Section 54B of the Town Planning Act allowed appeals from decisions of the Tribunal to the Supreme Court of Western Australia on a question of law[1].

5 Temwood Holdings Pty Ltd ("Temwood") appealed to the Tribunal against decisions of the Commission approving applications for three subdivisions of a larger parcel of land subject to the condition in each case that Temwood cede a certain portion of that land, which was reserved under a town planning scheme, to the Crown free of cost to and without payment of

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1 Section 11 of the *Planning Appeals Amendment Act* 2002 (WA) repealed Pt V of the Town Planning Act, which contained ss 42 and 54B, and inserted a new Pt V. Under the new Pt V, the Tribunal is established under s 36 of the Town Planning Act and appeals to the Supreme Court of Western Australia from decisions of the Tribunal on a question of law are permitted under s 67 of that Act.

compensation by the Crown. The Tribunal dismissed Temwood's complaints about the Commission's decisions[2].

6 Temwood then appealed to the Supreme Court of Western Australia arguing that the condition was invalid because the Commission had no power to impose it and because, in any event, it was imposed for an improper purpose. It identified the purpose as the defeat of Temwood's presently subsisting but deferred right to compensation for injurious affection under s 11 of the Town Planning Act and s 36(3) of the Metropolitan Region Scheme Act. McLure J[3] dismissed Temwood's appeal. Her Honour found that Temwood did not have a vested right to compensation under s 36 of the Metropolitan Region Scheme Act with respect to the reservation. Its "right" was merely a contingent or inchoate right[4]. Her Honour held that s 20 of the Town Planning Act gave the Commission (and on appeal the Tribunal) power to impose the condition[5] and that the power was not improperly exercised even though the condition defeated Temwood's contingent or inchoate right to compensation[6].

7 Temwood then appealed to the Full Court of the Supreme Court of Western Australia (Wallwork and Scott JJ and Olsson AUJ), which allowed the appeal[7]. The Full Court held[8] that s 11 of the Town Planning Act – which provides a mechanism for compensating persons whose land or property is injuriously affected by the making of a town planning scheme – conferred upon Temwood a "positive, unequivocal", "specific, definite, substantive" statutory right to compensation as a consequence of the reservation of that portion of its land under the relevant town planning scheme, the Metropolitan Region Scheme. The Court held[9] that actual enjoyment of this right was deferred until "the

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2 *Temwood Holdings Pty Ltd v Western Australian Planning Commission* [2001] WATPAT 4.

3 *Temwood Holdings Pty Ltd v Western Australian Planning Commission* (2001) 115 LGERA 152.

4 *Temwood* (2001) 115 LGERA 152 at 169.

5 *Temwood* (2001) 115 LGERA 152 at 171.

6 *Temwood* (2001) 115 LGERA 152 at 179.

7 *Temwood Holdings Pty Ltd v Western Australian Planning Commission* (2002) 25 WAR 484.

8 *Temwood* (2002) 25 WAR 484 at 495 per Olsson AUJ, Wallwork and Scott JJ agreeing.

9 *Temwood* (2002) 25 WAR 484 at 495.

relevant event stipulated in s 36(3) of the [Metropolitan Region Scheme Act] took place." The relevant event was when the land was first sold following the date of the reservation or when the Commission refused an application for subdivision approval or granted subdivision approval subject to conditions that were unacceptable to the applicant. The Court held[10] that a manifest legislative intention was required to abrogate this statutory right. Olsson AUJ, with whose judgment Wallwork and Scott JJ agreed, said[11]:

> "I find it impossible to accept that, having conferred such a specific statutory right, the legislature had in mind that, per medium of the general power of imposing conditions of approval conferred by s 20(1)(a) of the [Town Planning Act], the [Commission] could, in its discretion, attach a condition to an approval to subdivide which directly negated that right by extinguishing it."

8 The Court held[12] that it was beyond the Commission's power under s 20(1)(a) of the Town Planning Act – which empowers the Commission to give subdivision approvals "subject to conditions" – to attach a condition to a subdivision approval that directly negated that right. Accordingly, the Court held that the condition was beyond power and invalid. The Full Court also found[13] that the Commission had improperly exercised its power because the condition served no planning purpose and was not imposed as a bona fide exercise of the Commission's powers.

9 Subsequently, this Court granted the Commission special leave to appeal against the decision of the Full Court.

The material facts

10 The Bayshore Garden Estate ("the Land") is situated in a coastal area of Western Australia at Singleton, north of Mandurah and approximately 55 kilometres south of Perth. A Metropolitan Region Scheme was created and gazetted[14] in 1963 under ss 30 and 32 of the Metropolitan Region Scheme Act. On gazettal, the Scheme reserved a strip of land running the length of the foreshore frontage of the Land for the purpose of "Parks and recreation area".

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10 *Temwood* (2002) 25 WAR 484 at 495.

11 *Temwood* (2002) 25 WAR 484 at 495.

12 *Temwood* (2002) 25 WAR 484 at 495.

13 *Temwood* (2002) 25 WAR 484 at 497-500.

14 *Government Gazette of Western Australia*, No 60, 9 August 1963 at 2318.

The strip of land was approximately 200 metres wide and contained 20 ha ("the Foreshore Reserve"). The then registered proprietor of the reserved foreshore land retained ownership of that land: the reservation did not divest ownership.

11 In 1992, the respondent, Temwood, became the registered proprietor of the Land. Neither Temwood nor any previous registered owner has received compensation as a result of the reservation of the Foreshore Reserve.

12 Since 1993 Temwood has progressively subdivided and developed the Land as a residential area with associated facilities. In 1999 and 2000, Temwood lodged three applications with the Commission for subdivision approval in relation to portions of the Land. None of the applications sought approval to subdivide any part of the Foreshore Reserve. Acting under s 20(1)(a) of the Town Planning Act, the Commission approved the first application on 17 May 2000 and the other two on 7 September 2000. Each approval was subject to the condition that the Foreshore Reserve be "vested in the Crown under section 20A of the [Town Planning Act]" and "be ceded free of cost and without any payment of compensation by the Crown." The condition stated:

> "That portion of Pt Lot 1001 to the west of the land zoned 'Urban' under the Metropolitan Region Scheme being shown on the Diagram or Plan of Survey as a 'Reserve for Recreation' and vested in the Crown under section 20A of the [Town Planning Act], such land to be ceded free of cost and without any payment of compensation by the Crown."

The Commission's contentions

13 The Commission contends that its power to impose conditions on subdivision approval is not affected by any statutory presumption against interference with vested proprietary rights[15]. The Commission says that it is irrelevant that the Land is the subject of a reservation under the Metropolitan Region Scheme. The Commission also contends that the imposition of a condition on subdivision approval requiring the ceding of land to the Crown, free of cost, is not a confiscation or expropriation of a proprietary right.

14 The Commission contends that the Full Court erred in characterising the imposition of the condition as an extinguishment of a statutory right. The Commission claims that the entitlement to compensation for injurious affection for land reserved under the Metropolitan Region Scheme is governed by ss 11 and 12 of the Town Planning Act, as modified by s 36 of the Metropolitan

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15 *Lloyd v Robinson* (1962) 107 CLR 142 at 154.

Region Scheme Act. An entitlement to compensation is conditional upon the occurrence of one of the events specified in s 36(3)(a) and (b) of the Metropolitan Region Scheme Act and upon the claimant making a claim within the time specified in s 36(5) of that Act. The Commission argues that a landowner's entitlement to compensation as a result of the reservation of the Foreshore Reserve is a potential or contingent right until the occurrence of one of the events specified in s 36(3)(a) and (b) of the Metropolitan Region Scheme Act. It contends that the principle in *Clissold v Perry*[16] – that legislation is not presumed to interfere with vested proprietary rights unless the intention is manifest – does not apply to potential or contingent rights.

15 The Commission also contends that it imposed the condition for a proper planning purpose and not for any ulterior purpose and that the condition related reasonably and fairly to the development permitted and was not so unreasonable that no reasonable planning authority would have imposed the condition[17]. It claims that it imposed the condition for the legitimate planning purpose of securing public ownership of land for public purposes and to preserve the Foreshore Reserve and to ensure public access for recreation. The Commission says that the condition reasonably related to the entire subdivision of the Land, considered as a whole, and that the existence of the owner's contingent right to compensation did not make the condition unreasonable.

Temwood's contentions

16 In answer to the Commission's arguments, Temwood contends that s 36 of the Metropolitan Region Scheme Act conferred on it a deferred right to compensation. This right was not to be extinguished without clear words and s 20(1)(a) of the Town Planning Act did not manifest a clear intention to extinguish that right. Temwood also contends that the condition was invalid because it was imposed for the improper purpose of defeating a presently subsisting but postponed statutory right to compensation for injurious affection that Temwood enjoyed under s 11 of the Town Planning Act and s 36 of the Metropolitan Region Scheme Act.

The issues

17 For Temwood's argument to succeed, it must show that:

1. (a) when the condition was imposed, it had a presently subsisting but postponed statutory right to compensation; and

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16 (1904) 1 CLR 363 at 373 per Griffith CJ.

17 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

(b) the Town Planning Act as modified by the Metropolitan Region Scheme Act did not manifest an intention to defeat that right to compensation; or

2. the condition was imposed for the improper purpose of defeating Temwood's existing statutory right to compensation; or

3. the condition was imposed for a purpose extraneous to a legitimate planning purpose, such that its imposition could not be regarded as the bona fide exercise by the Commission of its powers to achieve a legitimate planning object.

Did Temwood have a presently subsisting, "vested" or deferred right to compensation?

18 The first issue in the appeal is whether s 11 of the Town Planning Act, read with s 36 of the Metropolitan Region Scheme Act, conferred on Temwood a vested but deferred right to compensation, as the Full Court held. In my opinion, the reservation of the Foreshore Reserve conferred no right to compensation of any kind on Temwood until it made an application for development approval that was rejected by the Commission or approved subject to a condition that it found unacceptable.

19 When the Metropolitan Region Scheme reserves land for public purposes, the interaction of the Town Planning Act and the Metropolitan Region Scheme Act may entitle an owner of the land to obtain compensation in one of three situations. The first is when the land is sold for the first time after the date of reservation. Only the person who owned the land when the reservation was made can obtain compensation in this situation. Temwood was not the owner of the Land when the reservation was made with respect to the Foreshore Reserve. Consequently, it never had any entitlement of any kind to compensation arising out of the first sale of the Land. The second and third situations that give rise to a right to compensation are where the Commission refuses a development application in respect of the land or approves it subject to a condition that the applicant will not accept. In either case, compensation is payable to the owner of the land *at the time of the application*. Temwood was the owner of the Land when the Commission approved its applications for development approval subject to the "transfer free of cost" condition. If Temwood found that condition "unacceptable", it then acquired a right to compensation. In this context, "unacceptable to the applicant" does not mean "disapproved by the applicant"; it means that the applicant does not accept the condition and will not pursue the development burdened by that condition. If the applicant proceeds with the development subject to that condition, it has no right to compensation. The result of the interaction of the Town Planning Act and the Metropolitan Region Scheme Act, therefore, is that at no stage prior to the Commission's conditional approval

of Temwood's development applications did Temwood have any right, contingent or otherwise, to compensation.

The relationship between the Metropolitan Region Scheme Act and the Town Planning Act

20 By virtue of s 5 of the Metropolitan Region Scheme Act, the Town Planning Act applies to the metropolitan region, except as modified by the Metropolitan Region Scheme Act. The Metropolitan Region Scheme Act is to be construed in conjunction with the Town Planning Act, as if the provisions of the Metropolitan Region Scheme Act were incorporated with and formed part of the Town Planning Act[18]. If the Metropolitan Region Scheme Act is in conflict or is inconsistent with the Town Planning Act (as modified by the Metropolitan Region Scheme Act), the provisions of the Metropolitan Region Scheme Act prevail to the extent of any conflict or inconsistency[19].

Subdivision approval and the imposition of conditions by the Commission

21 Under s 20(1)(a) of the Town Planning Act, the Commission may impose conditions on approvals for subdivision. The section prohibits a person from subdividing any lot without the approval of the Commission. Approval may be given "subject to conditions which shall be carried out before the approval becomes effective." Section 20(1)(a) relevantly provides:

> "[A] person shall not, without the approval of the Commission, … subdivide any lot …; and the Commission may give its approval under this paragraph subject to conditions which shall be carried out before the approval becomes effective."

22 In giving its approval under s 20(1)(a), the discretion of the Commission is not fettered by the provisions of a town planning scheme except to the extent necessary for compliance with an environmental condition relevant to the land under consideration[20]. (No such condition applied in the present case.)

23 The Commission must approve a plan of subdivision before any certificate of title may be created or registered. Where the Town Planning Act applies to a plan of subdivision, the Registrar of Titles must not create or register a certificate of title under the *Transfer of Land Act* 1893 (WA) for land the subject of that

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18 Metropolitan Region Scheme Act, s 3.

19 Metropolitan Region Scheme Act, s 3.

20 Town Planning Act, s 20(5).

plan unless the Commission has approved that plan[21]. If the Commission approves a plan of subdivision subject to the condition that a portion of the land vest in the Crown for the purpose of a reserve for foreshore management or recreation, the Registrar of Titles must vest that portion in the Crown without any conveyance, transfer or assignment or the payment of any fee. Section 20A(1) of the Town Planning Act relevantly provides:

> "When the Commission has approved, under this Act, a subdivision of land subject to the condition that certain portions of that land
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> shown on a diagram or plan of survey relating to the subdivision
>
> shall vest in the Crown for the purpose of conservation or protection of the environment or … reserve for … foreshore management or ... recreation, … the Registrar of Titles … shall, in accordance with the condition, vest in the Crown
>
> any land shown on the diagram or plan as being reserved for the purpose of a … reserve for … foreshore management … or recreation
>
> without any conveyance, transfer or assignment or the payment of any fee."

24 The Full Court described s 20A as "manifestly intended to achieve an administrative, machinery purpose only."[22]

25 If the Commission has approved a plan of subdivision on the condition that a portion of the land be vested in the Crown for parks, recreation grounds or open spaces generally, the owner of the land, in lieu thereof, may pay a sum that represents the value of the portion[23].

The compensation scheme

26 Section 11 of the Town Planning Act, as modified by the Metropolitan Region Scheme Act, provides a mechanism for compensating "[a]ny person whose land or property is injuriously affected by the *making of a town planning scheme*" (emphasis added). The Metropolitan Region Scheme is such a town planning scheme. Section 11(1) of the Town Planning Act confers an entitlement

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21 Town Planning Act, s 20(2).

22 *Temwood* (2002) 25 WAR 484 at 493.

23 Town Planning Act, s 20C.

to obtain compensation from the "responsible authority" (in this case, the Commission[24]). Relevantly, s 11(1) provides:

> "*Any person whose land or property is injuriously affected by the making of a town planning scheme shall*, if such person makes a claim within the time, if any, limited by the scheme (such time not being less than 6 months after the date when notice of the approval of the scheme is published in the manner prescribed by the regulations), *be entitled to obtain compensation in respect thereof from the responsible authority*". (emphasis added)

27 Section 11 has been in this form since 1928.

28 Section 36 of the Metropolitan Region Scheme Act imposes certain limitations and conditions on the liberty to apply for compensation conferred by s 11. In so far as they are inconsistent with the terms of s 11, the meaning of the latter section must be modified to accommodate them. The conditions include the following:

1. Under s 36(3), where "any land" has been reserved for a public purpose no compensation is payable until:

   (a) the land is first sold following the date of the reservation; or

   (b) the Commission refuses an application made under the Metropolitan Region Scheme for permission to carry out development on the land or grants permission to carry out development on the land subject to conditions that are unacceptable to the applicant.

2. Where "the land" is sold or the Commission refuses an application made under the Metropolitan Region Scheme for permission to carry out development on "the land" or grants permission to carry out development on "the land" subject to conditions that are unacceptable to the applicant, the Commission must be satisfied of certain matters before compensation is payable under s 36(3). Where the land is sold, the owner must have sold the land in good faith and taken reasonable steps to obtain a fair and reasonable price for the land and where a development application is made in respect of the land, the application must be made in good faith[25].

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24 Metropolitan Region Scheme Act, s 36(1)(a).

25 Metropolitan Region Scheme Act, s 36(4).

3. A claim for compensation under s 36(3)(c) must be made "at any time within 6 months after the land is sold or the application for permission to carry out development on the land is refused or the permission is granted subject to conditions that are unacceptable to the applicant."[26]

29 Compensation is payable under s 36(3)(a) to the owner of "the land" at the date of reservation in the case of a first sale of land[27]. It is payable under s 36(3)(b) to the owner of "the land" at the date of application in the case of the refusal of a development application or approval subject to unacceptable conditions[28]. Compensation for injurious affection to "any land" is payable under s 36(3) only once[29].

The owner at the time of reservation

30 Section 11 of the Town Planning Act, read with ss 36(3) and 36(3a) of the Metropolitan Region Scheme Act, conferred on the owner of the Land at the time when the Metropolitan Region Scheme was made a liberty to apply for compensation at a future time. "Liberty" or "expectation" rather than "right" is the description that best fits the entitlement of such an owner. Section 11 must be read with s 36 of the Metropolitan Region Scheme Act. Those sections in combination look to the future. Section 11 of the Town Planning Act declares generally that, if an owner whose land is injuriously affected makes a claim within the time specified, the owner shall "be entitled to obtain compensation". Section 36, however, postpones the entitlement until the happening of one of three events identified in s 36(3) of the Metropolitan Region Scheme Act. None of them may occur in the lifetime of the owner. And it is far from fanciful to think that in many cases none of them may occur for generations. Injuriously affected land may be passed down to family members or relatives for many decades before the affected land is sold or developed.

31 The mere reservation of the Foreshore Reserve conferred no right in a Hohfeldian sense on the owner of the Land at the time of reservation. No other person or persons came under any present or correlative duty, obligation, disability or liability by reason of the reservation. As Holmes CJ pointed out in *Tyler v Judges of the Court of Registration*[30], when he was Chief Justice of the

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26 Metropolitan Region Scheme Act, s 36(5).

27 Metropolitan Region Scheme Act, s 36(3a)(a).

28 Metropolitan Region Scheme Act, s 36(3a)(b).

29 Metropolitan Region Scheme Act, s 36(3a).

30 55 NE 812 at 814 (1900), cited in Hohfeld, "Fundamental Legal Conceptions As Applied in Judicial Reasoning", (1917) 26 *Yale Law Journal* 710 at 721.

Supreme Court of Massachusetts, "all rights ... are really against persons." Until one of the three events occurs, there is no interest, right or privilege that the owner of the Land could enforce against anyone, and no interest, right or privilege that the courts would protect by way of injunction or otherwise. And none might arise. If the owner made a gift of the Land before the occurrence of one of the events, he or she would retain no entitlement to any kind of compensation. It may even be the case that, if the owner died before the occurrence of one of those events, nothing would pass to the owner's estate that could ripen into a claim for compensation when one of the three events occurred. Perhaps the liberty has sufficient substance to be saved by the *Interpretation Act* 1984 (WA) if s 11 were to be repealed[31]. But assuming that is so, the liberty to apply for compensation in the future conferred by s 11 and restricted by s 36 bears no relationship to the rights considered in *Clissold v Perry*[32], the case upon which the Full Court relied. The rights in *Clissold* were existing rights that could be enforced against anyone except a person with a better title to the land. That is not the case with the liberty conferred by s 11 of the Town Planning Act, when it is read, as it must be, with s 36 of the Metropolitan Region Scheme Act.

32 Moreover, any entitlement to compensation by the person who owned the Land when the reservation was made would depend on the particular event that triggered the claim for compensation. If the event was the first sale of the Land, that person would be the only person who could obtain compensation. A subsequent purchaser or transferee of the Land would have no right to compensation in respect of that event.

Temwood's entitlements

33 A claim by Temwood to have a vested right to compensation is even more tenuous than that of the person who owned the Land when the reservation was made. Temwood was not the owner of the Land when the reservation was made. Consequently, it never had any entitlement of any kind to compensation arising out of the first sale of the Land after the reservation of the Foreshore Reserve. However, Temwood was the owner of the Land when the Commission approved its development applications subject to the "transfer free of cost" condition. If Temwood finds the condition "unacceptable" in the sense that its presence causes Temwood not to pursue the subdivisions burdened by that condition, it obtains a right to compensation. If Temwood proceeds with the subdivisions subject to that condition, it has no right to compensation. The result of the interaction of the Town Planning Act and the Metropolitan Region Scheme Act, therefore, is

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31 cf *Esber v The Commonwealth* (1992) 174 CLR 430; *Dossett v TKJ Nominees Pty Ltd* (2003) 78 ALJR 161; 202 ALR 428.

32 (1904) 1 CLR 363; aff'd on appeal in *Perry v Clissold* (1906) 4 CLR 374.

that at no stage prior to the Commission's conditional approval of Temwood's development applications did Temwood have any right, contingent or otherwise, to compensation. Any right of Temwood could only arise upon its election to treat the condition as unacceptable and not proceed with the subdivisions.

34 Moreover, in stating that Temwood has a right to compensation if it finds the condition unacceptable, I have assumed that the first sale of the Land – to Temwood or its predecessor – did not prevent Temwood from acquiring a right to compensation as a result of Temwood's finding the condition unacceptable. That assumption turns on the use of the disjunctive "until … or" in s 36(3) of the Metropolitan Region Scheme Act. Does the use of the disjunctive in that sub-section mean that compensation is payable as soon as one of the events referred to in s 36 occurs with the result that all rights to compensation are lost unless a claim is made within the prescribed period after the occurrence of that event?

Effect of the disjunctive "until … or" in s 36(3) of the Metropolitan Region Scheme Act

35 All the sub-sections of s 36 are expressed in "until … or" format or just in "or" format. No sub-section expressly states that compensation becomes payable once and for all as soon as one of the three events referred to in s 36(3) occurs. If s 36(3) has that construction, then the effect of s 36(3a) is that compensation becomes payable only to the owner of the land at the time of the reservation if the land is sold before any application for development is made. Conversely, it is payable only to the applicant for development if an application is refused or granted subject to conditions that are unacceptable to the applicant.

36 Section 36(10)[33] refers to the payment of a refund where a reservation is revoked or reduced in size and the Commission has already compensated an owner for injurious affection. Section 36(10) states that the refund is not payable by the owner of the land "until the land is first sold or subdivided following the date of the revocation or reduction referred to in subsection (9)(b) unless otherwise agreed by the owner and the Commission." If the sub-section refers to the time when the land is "first sold or subdivided", rather than when the land is "first sold" "or" "subdivided", the sub-section contemplates that it is the event that occurs *first in time* that is the relevant event which gives rise to the obligation to pay the refund. Arguably, a similar construction should apply in relation to the obligation to pay compensation when the reservation is first imposed. On the other hand, the silence in s 36 in relation to the time when the obligation to pay compensation arises supports the conclusion that it is not

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33 Section 36(10) was inserted by the *Planning Legislation Amendment Act (No 2)* 1994 (WA).

necessarily the event that occurs first in time that conclusively and finally triggers the right to compensation.

37 If the question had arisen for decision before 1986, the better construction of s 36(3) would have been that once one of the three events triggered a claim for compensation, the later occurrence of the two remaining events could not trigger a further claim. The reasons of Gummow and Hayne JJ show why that is so. Thus, once the land the subject of the reservation was sold, the refusal of development approval or its grant subject to unacceptable conditions could not trigger a further claim for compensation. However, in 1986, s 36(3a), which had been inserted in 1968, was repealed and a new sub-section substituted. The new sub-section provided that, where land the subject of a reservation is "first sold" after the making of the reservation, compensation is payable to the person who was the owner of the land *at the date of reservation*. Where the Commission refuses a development application in respect of that land, or grants permission to carry out development on the land on conditions unacceptable to the applicant, compensation is payable to the person who was the owner of the land *at the date of application.*

38 Whatever the effect of s 11 of the Town Planning Act may be if it stood alone, in cases where land has been reserved for public purposes, it must be read with s 36(3)-(5) of the Metropolitan Region Scheme Act. When that is done, the entitlement to compensation cannot be confined to the person who was the owner of the land when the reservation was made. Paragraph 36(3a)(a), when read with s 36(3), provides for the payment of compensation – where "the land is first sold following the date of the reservation" – to the owner of the land at that date. Paragraph 36(3a)(b), when read with s 36(3), provides for the payment of compensation – where an application for development has been rejected or approved subject to unacceptable conditions – "to the person who was the owner of the land at the date of application". It is impossible to escape the conclusion, therefore, that par 36(3a)(b) applies to a subsequent owner, and there is no reason for confining the class of subsequent owners to those who have obtained ownership other than by way of sale.

39 Accordingly, the reference to "[a]ny person" in s 11(1), when read with ss 36(3) and 36(3a) does not require that the owner of the property the subject of a reservation be the *same owner* as the person who owned the property at the time of the making of the scheme. Further, when s 11 is read with s 36(3)-(5), the words "affected by the making of a town planning scheme" should not be given a temporal connotation. Hence, in a case where land has been reserved for public purposes, a claim for compensation may be made where the ownership of the property has changed.

40 Thus, the terms of s 36(3a)(b) point irresistibly to the conclusion that a person who has bought the affected land and whose subsequent development application is rejected or approved subject to unacceptable conditions may be

entitled to compensation. The words "owner of the land at the date of application" would have little scope for operation unless this was so. Section 36(3a)(b) would operate only in the limited class of case where the owner at the date of reservation made an application for development or where the land had been conveyed to the applicant other than by sale – for example, by will or operation of law. This is such an unlikely construction that it must be rejected. On the construction of s 36(3a) that I favour, par (b) of that sub-section must be regarded as giving an independent claim of compensation unrelated to the fact of ownership at the date when the Scheme was made.

41 Moreover, once it is accepted that s 36 in combination with s 11 confers two independent rights, there is no reason why one right should expire because the other right to compensation was not pursued. Thus, where land is reserved under a town planning scheme, upon rejection of a development application or approval subject to conditions unacceptable to the applicant, a claim arises. If the claim lapses, however, for want of prosecution, I see no reason for holding that, upon the first sale of the land, a claim for compensation does not arise. And that is so, whether the rights subsist in different persons or the same person. Section 36(3a) declares that compensation is payable only once. It does not declare that both of the independent rights conferred lapse if one of them is not pursued after its triggering event occurs.

42 Accordingly, although Temwood had no presently subsisting, vested, deferred or contingent right to compensation under the Metropolitan Region Scheme Act, it would obtain a vested right to compensation if its applications for subdivision were refused or if they were approved subject to an unacceptable condition. But at no time did it have or could it acquire a right to compensation in respect of the sale of the Land. That right belonged to the owner of the Land at the time of the making of the Metropolitan Region Scheme.

The effect of the principle in Clissold v Perry

43 *Clissold v Perry*[34] held that legislation is presumed not to interfere with existing vested proprietary interests without adequate compensation. Griffith CJ said[35]:

> "In considering this matter it is necessary to bear in mind that it is a general rule to be followed in the construction of Statutes such as that with which we are now dealing, that they are not to be construed as interfering with vested interests unless that intention is manifest."

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34 (1904) 1 CLR 363.

35 *Clissold v Perry* (1904) 1 CLR 363 at 373.

The principle applied in *Clissold* is but a particular exemplification of the wider principle that, in the absence of clear words, legislation is not construed as intending to interfere with economic rights and interests without compensation[36].

44 As I have indicated, however, s 11 of the Town Planning Act, read together with s 36 of the Metropolitan Region Scheme Act, did not confer on Temwood any "certain definite" or "vested" right or any other kind of right to compensation before the Commission dealt with Temwood's development applications. Before the Commission gave its decision and Temwood made its election, Temwood had no right, contingent or vested, to compensation. The principle referred to in *Clissold* did not apply to the Commission's exercise of its powers under s 20 of the Town Planning Act.

45 Moreover, the decision of this Court in *Lloyd v Robinson*[37] inevitably leads to the conclusion that the Commission had power to impose the condition that it did.

The Commission's power to impose conditions

46 The Town Planning Act empowers the Commission to impose conditions on applications for subdivision[38]. That Act gives the Commission a broad discretion to impose conditions. The Commission's discretion is not fettered by the provisions of a town planning scheme except to the extent necessary for compliance with an environmental condition relevant to the land under consideration[39]. (That fetter does not apply here.) Section 20A contemplates that conditions for subdivision approval may be for the purpose of conservation or protection of the environment or a reserve for foreshore management or recreation.

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36 *Attorney-General v Horner* (1884) 14 QBD 245 at 256-257 per Brett MR; *Central Control Board (Liquor Traffic) v Cannon Brewery Co* [1919] AC 744 at 752 per Lord Atkinson; *Bond v Nottingham Corporation* [1940] Ch 429 at 435 per Sir Wilfrid Greene MR; *R v Evans* [1963] 1 QB 979 at 989; *Hartnell v Minister of Housing and Local Government* [1965] AC 1134 at 1172-1173 per Lord Wilberforce.

37 (1962) 107 CLR 142 at 153-155.

38 Town Planning Act, s 20.

39 Town Planning Act, s 20(5).

47 The Town Planning Act contemplates that the Commission may eventually acquire land the subject of a reservation[40]. The Metropolitan Region Scheme allows the Commission to elect to acquire land in respect of which a person claims injurious affection as a result of the making of a reservation under that Scheme[41]. If the Commission elects to acquire the land, the Metropolitan Region Scheme Act provides for the Commission and the owner to agree on a price for the land or, failing agreement, for the Commission to pay the owner the value of the land[42]. However, the provisions of the Metropolitan Region Scheme do not bind the Commission in the exercise of its discretion. The Commission submits that the purpose and effect of a reservation under the Metropolitan Region Scheme is to preserve the status quo with respect to that land until the Commission makes or is compelled to make a decision concerning its use or acquisition[43]. Although a reservation is not in itself a notice of intended acquisition, the reservation provisions imply eventual acquisition of the land by the Commission. In a Report prepared before extensive amendments to the legislative scheme in 1962, the Metropolitan Region Planning Authority acknowledged that[44]:

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40 See, eg, the second reading speech for the Metropolitan Region Town Planning Scheme Act Amendment Bill 1962 (WA): Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 September 1962 at 820 per Lewis. See also the second reading speech in relation to the Metropolitan Region Town Planning Scheme Act Amendment Bill 1968 (WA), where the Minister for Town Planning said that the insertion of the caveat provisions into s 36 was designed to ensure that:

> "any subsequent purchaser is aware that compensation has been paid and that *when the property is subsequently acquired by the authority* the amount to be paid will be reduced by an amount that has a relationship to the compensation previously paid." (emphasis added)

Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 September 1968 at 755 per Logan.

41 Metropolitan Region Scheme Act, s 36(2)(a).

42 Metropolitan Region Scheme Act, ss 36(2)(b), 36(2a), 36(2b).

43 See the second reading speech for the Metropolitan Region Town Planning Scheme Act Amendment Bill 1962 (WA): Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 September 1962 at 820 per Lewis; Western Australia, Metropolitan Region Planning Authority, *Metropolitan Region Scheme Report*, (1962) at 40, 44.

44 Western Australia, Metropolitan Region Planning Authority, *Metropolitan Region Scheme Report*, (1962) at 45-46.

> "There is no simple or formula answer to the question of when the Authority should prohibit development on reserved land and acquire it, and when it is expedient to allow the development to proceed and accept the consequences of eventual increase [sic] cost of acquisition. Most of these questions will have to be faced up to as individual cases, decided on such bases as the nature and scale of development projected, the availability of funds from time to time for acquisition, the length of time before the property is required for public development, and probably other individual factors. The time factor in itself may well be an uncertain one".

48 The Metropolitan Region Scheme Act clearly contemplates the eventual public ownership (vesting in the Crown) of land reserved for public purposes. But does the Act support the imposition of a condition that requires the transfer of land free of cost to the Crown?

49 In *Lloyd v Robinson*[45], this Court held that a condition of subdivision approval that required the transfer free of cost to the Crown of land that did not form part of the application for subdivision was validly imposed by the predecessor of the Commission under the Town Planning Act. The condition was imposed on an application for subdivision under s 20(1)(a) of the Town Planning Act (as it then stood the section was not materially different from the present section). The condition specified that the subdividers should transfer a specified area of 25 acres of land[46] to the Crown free of cost for park and recreation purposes. The area to be transferred was outside the area for which approval to subdivide was sought but formed a part of the original parcel of land and had not been subdivided. The area was not the subject of a reservation.

50 The Court held that the condition was valid. In a unanimous judgment, Kitto, Menzies and Owen JJ held that the Town Planning Act should not be read down by principles of statutory construction concerning the confiscation of land[47]. Their Honours held that the Commission could impose conditions on approval that were bona fide and within the limits which, though not specified in the relevant legislation, were indicated by the nature of the purposes for which

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45 (1962) 107 CLR 142 at 153-155.

46 This included the transfer of 10 acres to which the subdividers had already agreed. The Board had originally required the transfer of 30 acres, but the Minister reduced this on appeal to 25 acres.

47 *Lloyd v Robinson* (1962) 107 CLR 142 at 154.

the Commission was entrusted with the relevant discretion[48]. Their Honours said[49]:

> "Given the necessary relevance of the conditions to the particular step which the Board is asked to approve, there is no foothold for any argument based on the general principle against construing statutes as enabling private property to be expropriated without compensation. The Act at its commencement took away the proprietary right to subdivide without approval, and it gave no compensation for the loss. But it enabled landowners to obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which, though not specified in the Act, were indicated by the nature of the purposes for which the Board was entrusted with the relevant discretion: see *Swan Hill Corporation v Bradbury*[50]; *Water Conservation and Irrigation Commission (NSW) v Browning*[51]. If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second. For the giving up of the second a *quid pro quo* is received, namely the restored right to subdivide the first. It may be that the *quid pro quo* is inadequate, and that the landowner, though under no legal compulsion to give up the second area of land if he chooses to forego the idea of subdividing the first, is nevertheless under some real compulsion, in a practical sense, to submit to the loss of it because of the importance to him of obtaining the approval. But there is no room for reading the [Town Planning Act] down in some fashion by appealing to a principle of construction that has to do with confiscation. If the Board has performed its statutory duty by giving approval to the subdivision subject only to conditions imposed in good faith and not with a view of achieving ends or objects extraneous to the purposes for which the discretion exists, the inescapable effect of the Act is that the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions."

51 The decision in *Lloyd* inevitably leads to the conclusion that the Commission could exercise its powers under s 20 of the Town Planning Act by approving Temwood's applications for subdivision subject to the condition that

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48 *Lloyd v Robinson* (1962) 107 CLR 142 at 154.

49 *Lloyd v Robinson* (1962) 107 CLR 142 at 154.

50 (1937) 56 CLR 746 at 757, 758 per Dixon J.

51 (1947) 74 CLR 492.

Temwood convey the Foreshore Reserve to the Crown free of cost and without compensation. When the Commission made its decision, Temwood had no right to compensation in respect of the Foreshore Reserve and, as the Court pointed out in *Lloyd*, the Act "took away the proprietary right to subdivide without approval, and it gave no compensation for the loss" of that right. Even if it is not correct to characterise the Act as taking away the proprietary *right* to subdivide without approval, the condition in the present case was validly imposed as it was within the limits which were indicated by the nature of the purposes for which the Commission was entrusted with the relevant discretion.

52 The Full Court erred in holding[52] that "the s 11 right ... was undoubtedly a specific, definite, substantive right of the type adverted to by Griffith CJ in *Clissold*". Indeed, it is not correct to speak of a s 11 right in the context of a reservation of land, particularly in the case of an owner who was not the owner of the land when the reservation was made. It is s 36 of the Metropolitan Region Scheme Act rather than s 11 of the Town Planning Act that confers compensation rights in respect of such reservations. When s 36 operates, it so modifies s 11 that that section is no more than a condition for the conferral of the rights described in s 36.

Planning purpose

53 On the assumption that the Commission had the power to impose the condition on Temwood's applications for subdivision approval, the question that then arises is whether the condition was imposed for a purpose extraneous to a legitimate planning purpose. Was it a bona fide exercise by the Commission of its powers for a legitimate planning purpose? Did it reasonably relate to the proposed development or was it so unreasonable that no reasonable planning authority would have imposed it?

The Full Court's decision

54 The Full Court found that the focus of the Metropolitan Region Scheme Act and the Metropolitan Region Scheme was not upon Crown acquisition of ownership of all, or any specific, reserve land. Instead, it saw the focus of the Act and the Scheme as "ensuring that adequate and appropriate reserves are created to satisfy proper planning objectives"[53]. It noted that, if a compensation claim is made in accordance with the statute, the Crown could "elect to acquire actual ownership, rather than pay compensation merely to preserve a status

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52 *Temwood* (2002) 25 WAR 484 at 495.

53 *Temwood* (2002) 25 WAR 484 at 499.

quo."[54] It said that the Crown had no need to take further action to secure the existence of a reserve that had already been brought into existence by the Metropolitan Region Scheme[55]. It rejected the argument that a shortage of acquisition funds supported the proposition that the Western Australian Parliament could on the one hand confer a specific statutory right to compensation and on the other make provision for the Commission effectively to negate that right[56]. As a result, the Full Court held that no planning purpose was served by imposing a condition accelerating possible Crown ownership because it was not "pitched at the orderly development of the locality and preservation of the amenity of the locality at all."[57] Rather, said the Court, "it simply manifests an administrative desire to contain monetary cost. Its essential thrust is based on fiscal, rather than planning, objectives."[58]

55 The Full Court also held that, even if the condition was imposed for a planning purpose, it was not imposed bona fide for that purpose. The Court acted on the Tribunal's statement that the condition was designed to circumvent the potential operation of s 36 of the Metropolitan Region Scheme Act in a situation where the requisite reserve already existed under the Metropolitan Region Scheme. The Court found that, as the Foreshore Reserve already existed, the purpose of avoiding a compensation liability to Temwood (which was conferred on Temwood by statute) was a major ulterior or extraneous purpose. Applying the reasoning in *Newbury District Council v Secretary of State for the Environment*[59] and *Thompson v Randwick Corporation*[60], the Full Court held that the imposition of the condition could not be regarded as the bona fide exercise by the Commission of its powers for a legitimate planning purpose[61].

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54 *Temwood* (2002) 25 WAR 484 at 499.

55 *Temwood* (2002) 25 WAR 484 at 499.

56 *Temwood* (2002) 25 WAR 484 at 499.

57 *Temwood* (2002) 25 WAR 484 at 499.

58 *Temwood* (2002) 25 WAR 484 at 499.

59 [1981] AC 578.

60 (1950) 81 CLR 87.

61 *Temwood* (2002) 25 WAR 484 at 500.

What is a legitimate planning purpose?

56 The Commission does not dispute that the power to attach conditions to development consents is limited to those conditions that are reasonably capable of being regarded as related to a legitimate planning purpose. That purpose is ascertained from a consideration of the applicable legislation and town planning instruments to which the responsible authority is subject. The purpose is not ascertained from "some preconceived general notion of what constitutes planning"[62]. In *Bathurst City Council v PWC Properties Pty Ltd*[63], this Court endorsed the statement of Walsh J in *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* that the power to attach conditions to development consents was to be understood[64]:

> "not as giving an unlimited discretion as to the conditions which may be imposed, but as conferring a power to impose conditions which are reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made. This purpose may be conveniently described, in accordance with the expression used by Lord Jenkins in *Fawcett Properties Ltd v Buckingham County Council*[65], as being 'the implementation of planning policy', provided that it is borne in mind that it is from the Act and from any relevant provisions of the Ordinance, and not from some preconceived general notion of what constitutes planning, that the scope of planning policy is to be ascertained."

57 The Commission also does not dispute that a condition attached to a consent must reasonably and fairly relate to the development permitted. A condition attached to a grant of planning permission will not be valid therefore unless[66]:

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62 *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 123 CLR 490 at 500 per Walsh J.

63 (1998) 195 CLR 566 at 577.

64 (1970) 123 CLR 490 at 499-500.

65 [1961] AC 636 at 684.

66 This test was articulated by the House of Lords in *Newbury District Council* [1981] AC 578.

1. The condition is for a planning purpose and not for any ulterior purpose. A planning purpose is one that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the authority, not by reference to some preconceived general notion of what constitutes planning.

2. The condition reasonably and fairly relates to the development permitted.

3. The condition is not so unreasonable that no reasonable planning authority could have imposed it.

58 A condition attached to a grant of planning permission may be invalid although its ulterior purpose is not the sole purpose[67]. If the ulterior purpose is a substantial purpose[68] for which the authority is exercising its power, the condition is invalid. Counsel for Temwood conceded that the purpose of reserving the Foreshore Reserve was a proper town planning purpose. The question is whether the condition was imposed for a proper planning purpose.

1. Was the condition imposed for a proper planning purpose?

59 I have already referred to the Commission's power to impose conditions on applications for subdivision. The Town Planning Act gives the Commission a broad discretion to impose conditions. Section 20A contemplates that a condition of subdivision approval may be for the purpose of conservation or protection of the environment or a reserve for foreshore management or recreation. The Town Planning Act contemplates that the Commission may eventually acquire land the subject of a reservation[69].

60 A condition is imposed for a proper planning purpose if it is "imposed in good faith and not with a view of achieving ends or objects extraneous to the purposes for which the discretion exists". In *Lloyd*, the land the subject of the condition was not reserved under the Metropolitan Region Scheme or any other town planning scheme. The condition that the land be ceded to the Crown free of cost was justified on the basis that the imposition of the condition was a reasonable response to the change in existing affairs created by the proposed subdivision.

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67 *Thompson* (1950) 81 CLR 87 at 106.

68 *Thompson* (1950) 81 CLR 87 at 106.

69 See, eg, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 September 1962 at 820 per Lewis; Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 September 1968 at 755 per Logan.

61 Here, the Foreshore Reserve was already reserved. The Commission had previously imposed an essentially identical condition (but did not enforce the condition) when it approved subdivision applications in respect of other parts of the Land. The requirement that the Foreshore Reserve be ceded had its origin in a Consultative Environmental Review of the area by the Environmental Protection Authority ("the EPA"). The Department of Conservation and Environment had recommended that the land be classified as system 6 recommendation M107. The M107 recommendation referred to the environmental features of the area. They included the extensive coastal dunes, valuable for coastal vegetation, recreational and aesthetic reasons[70]. The recommendation also referred to the need for a buffer zone of uncleared land to preserve the scenery and vegetation, a zone that would be an east-west link of open space between the coast and Mandurah Road[71]. The EPA Bulletin stated that the main purpose of the M107 area "was that the area's recreational and landscape values be protected by planning procedures which would not require public acquisition of the land involved."[72] As the east-west strip had not become part of the planning framework for the area, the EPA decided to consider other alternatives. The EPA recommended that there be an expanded coastal foreshore reserve, wider than that normally required by the planning authority. The Consultative Environmental Review culminated in a statement issued by the Minister for the Environment under s 45 of the *Environmental Protection Act* 1986 (WA) ("Statement that the Proposal May be Implemented") setting out the conditions under which the proposal could be implemented[73].

62 One condition was that there should be a foreshore reserve and, at subdivision, Temwood "shall transfer to public ownership the proposed foreshore reserve."[74] The statement also required that Temwood should provide, in exchange for a part of M107, additional open space adjacent to the Foreshore Reserve. By letter dated 13 January 1993, Temwood advised the Minister that "the conditions meet with our approval."[75] Before the Tribunal, Temwood also accepted the environmental condition that the Foreshore Reserve should be set aside for public use. The boundary of the Reserve was altered by the 1994 South

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70 *Temwood* [2001] WATPAT 4 at [31].

71 *Temwood* [2001] WATPAT 4 at [31].

72 *Temwood* [2001] WATPAT 4 at [32].

73 *Temwood* [2001] WATPAT 4 at [35].

74 *Temwood* [2001] WATPAT 4 at [35].

75 *Temwood* [2001] WATPAT 4 at [35].

West Corridor Omnibus Amendment No 960/33. The Commission described its failure to require the ceding of the Foreshore Reserve when it approved other subdivisions of the Land as an "oversight" and suggested that it had "assumed that ceding had taken place."[76]

63 The Tribunal found that the Commission had designed the condition to have the following effects[77]:

1. to enliven the machinery provisions in s 20A of the Town Planning Act (thereby facilitating the mechanical transfer of title to the Foreshore Reserve to the Crown); and

2. "to defeat the operation of Part V" of the Metropolitan Region Scheme Act, thereby rendering nugatory any right to compensation for injurious affection under s 36 of the Metropolitan Region Scheme Act.

64 The Tribunal also referred to the "necessity" of the Commission being able to impose a condition that land be ceded free of cost upon subdivision in appropriate cases. This was "because of the legitimate community concern that a developer contribute to infrastructure costs to the extent permissible" on the basis that "the condition is the price for the privilege of subdivision."[78] The Tribunal also noted the Commission's submission that the purpose of the condition was to enforce the historical condition.

65 The purpose of enlivening the machinery provisions of the Town Planning Act is not, without more, an ulterior purpose; it is simply directed at a procedural step. It is the purpose for which the Commission sought to enliven those machinery provisions that is critical. If the purpose was to defeat any existing liability to pay compensation (or perhaps to render nugatory any right to compensation under the Metropolitan Region Scheme Act), then that purpose would be an ulterior purpose. Even though there was no potential liability to pay compensation before imposing the condition, the purpose of defeating the operation of Pt V of the Metropolitan Region Scheme Act is not irrelevant in determining whether the Commission was actuated by an improper purpose. What would be relevant – if the Commission's purpose was the relevant purpose – is that the Commission would have imposed a condition not for a planning purpose but because it sought to achieve an object outside the scope of its

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76 *Temwood* [2001] WATPAT 4 at [39].

77 *Temwood* [2001] WATPAT 4 at [7]-[8].

78 *Temwood* [2001] WATPAT 4 at [26].

discretionary power. On that hypothesis, the Commission would have imposed – probably did impose – the condition for an improper purpose.

66 However, the Commission's purpose is not *the relevant purpose* in determining whether the condition was validly imposed. In hearing the appeals, the Tribunal was conducting a review of the merits based on the facts. In dismissing the appeals, the Tribunal was affirming the merits of the Commission's decision. It is the *Tribunal's purpose* in upholding the imposition of the condition that is the relevant purpose, not the original purpose of the Commission. An examination of the Tribunal's reasons shows that it found that "the basis for the imposition of the condition is that it was imposed historically and, having not be [sic] effectuated, requires to be imposed again until it is fulfilled."[79] The Tribunal did not say that it upheld the imposition of the condition because it would defeat Temwood's claim for compensation. And, given "the basis for the imposition of the condition" which the Tribunal stated, the purpose of defeating a claim for compensation should not be attributed to it.

67 The Supreme Court had power to set aside the Tribunal's decision to impose the condition only if the Tribunal had made an error of law. The merits of the Tribunal's decision was not a matter for the Supreme Court. If there was evidence that could reasonably support the Tribunal's decision, and if its reasons contained no error of legal principle, the Supreme Court had no power to set aside the decision.

68 The purpose of "enforcing" the historical condition was a legitimate planning purpose. Section 20A(1) of the Town Planning Act contemplates that the Commission may impose a condition that portions of "that land" be vested in the Crown for the purpose of conservation or protection of the environment or reserve for foreshore management or recreation. The Tribunal was entitled to regard the evidence as proving that the "historical condition" related to foreshore management and that it had a clear environmental protection or conservation purpose, namely, to maintain a buffer zone of uncleared land to preserve the scenery and vegetation. These purposes were deducible from the EPA M107 recommendation and the ministerial statement issued under s 45 of the *Environmental Protection Act*.

69 In addition, s 20C(1) of the Town Planning Act contemplates that the Commission may require a portion of land the subject of an approved plan of subdivision to be "set aside and vested in the Crown for parks, recreation grounds or open spaces generally". The section permits the owner of the land to pay money in lieu thereof to the local government in whose district the portion is situated. Given that the Foreshore Reserve was reserved under the Metropolitan

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79 *Temwood* [2001] WATPAT 4 at [45].

Region Scheme for the purpose of "Parks and recreation area", the condition is consistent with a vesting for the purpose of parks, recreation grounds or open spaces generally. Before the Tribunal, Temwood "accepted the environmental condition that the land should be set aside for public use."[80]

70 In my opinion, Temwood has failed to show that the Tribunal erred in law because the condition was imposed for an improper planning purpose.

2. Did the condition reasonably and fairly relate to the development permitted?

71 In this case, the condition did not relate to the land the subject of Temwood's three applications for subdivision. This raises the question whether the condition, although made for a legitimate planning purpose, reasonably and fairly related to the development permitted.

72 A condition must "reasonably and fairly relate" to the permitted development to be valid. A condition is "relevant" to the development if it falls within the proper limits of the Commission's functions under the Town Planning Act and the Metropolitan Region Scheme Act or is imposed to maintain proper standards in local development. The condition need not relate to the subdivision in question, if the subdivision is one of a series of subdivisions of a larger parcel of land, and the condition relates to the larger parcel of land as a whole. In *Lloyd v Robinson*, this Court held[81] that the Commission may impose a condition on a grant of subdivision approval that requires the giving up of another area of land for purposes relevant to the subdivision of the first. That condition must be "imposed in good faith and not with a view of achieving ends or objects extraneous to the purposes for which the discretion exists"[82]. The Court also held that the condition need not relate to the subdivision in question, if the subdivision is one of a series of subdivisions of a larger parcel of land, and the condition relates to the larger parcel of land as a whole[83]. Even if the condition approved by the Tribunal did not relate to the land the subject of the subdivision applications, *Lloyd v Robinson* supports the proposition that the condition reasonably and fairly related to the approved development. This is because the condition clearly related to the Land as a whole.

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80 *Temwood* [2001] WATPAT 4 at [46].

81 (1962) 107 CLR 142 at 153.

82 *Lloyd v Robinson* (1962) 107 CLR 142 at 154.

83 *Lloyd v Robinson* (1962) 107 CLR 142 at 153.

73 Counsel for Temwood seemed to suggest that a condition reasonably and fairly relates to a proposed development only if the development is benefited by the imposition of the condition. Before the Full Court[84], counsel asked rhetorically: "Why would the Crown wish or need to take further action to secure the existence of a reserve which has already been brought into existence by the [Metropolitan Region Scheme]?" But this misstates the issue – which is not whether the condition requiring the ceding of the Foreshore Reserve to the Crown secures the *existence* of a reserve, but whether the development is benefited by the Crown's acquiring all the rights and liabilities entailed by *ownership* of the Foreshore Reserve. The Town Planning Act contemplates the eventual public ownership of reserved land for public purposes, such as foreshore management or the protection of the environment. As the Court remarked in *Lloyd v Robinson*[85], there may be no legally enforceable obligation on the Crown to keep the Foreshore Reserve reserved for the purpose of "Parks and recreation area": the ultimate sanction may be political only. Here, the subdivision was part of a series of subdivisions of a larger parcel of land. The condition was imposed for environmental protection reasons or foreshore management reasons in respect of that larger parcel of land. Moreover, the Minister had previously rejected an application for two grouped dwellings on the Foreshore Reserve. In these circumstances, the Tribunal was entitled to take the view that as a matter of fact the vesting of the Foreshore Reserve in the Crown secured that protection and those environmental protection or foreshore management objectives.

74 Once this is accepted, there is no ground for concluding that the condition was so unreasonable that no reasonable planning authority could have imposed it. Accordingly, the condition was validly imposed.

Order

75 The appeal must be allowed.

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84 *Temwood* (2002) 25 WAR 484 at 499.

85 (1962) 107 CLR 142 at 155.

76 GUMMOW AND HAYNE JJ. The issues in this appeal from the Full Court of the Supreme Court of Western Australia (Wallwork and Scott JJ, Olsson AUJ)[86] concern the construction of the *Town Planning and Development Act* 1928 (WA) ("the Town Planning Act") and the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) ("the Metropolitan Region Act"). The relevant facts are not in dispute, although there is disagreement as to the conclusions of law to be drawn from them.

77 The appellant ("the Commission") is a body corporate established by s 4 of the *Western Australian Planning Commission Act* 1985 (WA) and, in addition to functions specified in that statute, has various functions conferred on it by other laws, including the Town Planning Act and the Metropolitan Region Act. The respondent ("Temwood") in 1992 became the registered proprietor under the *Transfer of Land Act* 1893 (WA) of certain land in a coastal area at Singleton, north of Mandurah and approximately 55 kilometres south of Perth. The land is known as the Bayshore Garden Estate ("the Land") and since 1993 Temwood progressively has been subdividing it and developing it as a residential area with associated facilities.

78 The Town Planning Act establishes (s 42) the Town Planning Appeal Tribunal ("the Tribunal") whose functions include the determination of "appeals" from decisions of the Commission upon applications for subdivision approval[87]. The present litigation began in the Supreme Court (McLure J) as an appeal by Temwood under the Town Planning Act (s 54B) against the dismissal by the Tribunal of its complaints respecting decisions of the Commission[88]. The dispute before the Tribunal arose as follows.

The Foreshore Reserve

79 Well before the acquisition by Temwood of the Land, a strip running the length of the foreshore frontage of the Land and with an area of approximately

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86 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484.

87 The provisions governing appeals from the Commission are contained in Pt V of the Town Planning Act. References to those provisions are to Pt V as it stood before the commencement of the *Planning Appeals Amendment Act* 2002 (WA) which repealed the old Pt V and introduced a new Pt V. For present purposes, nothing turns on that.

88 *Temwood Holdings Pty Ltd v Western Australian Planning Commission* (2001) 115 LGERA 152.

20 ha ("the Foreshore Reserve") had been reserved for the purpose of "Parks and recreation area". This step was taken in 1963 on the gazettal of the Metropolitan Region Scheme ("the MRS")[89]. The MRS was created pursuant to the Metropolitan Region Act (s 30). The boundary of the Foreshore Reserve was altered in 1994 and has been the subject of natural accretion of the shore line.

80 The reservation made in 1963 did not divest the ownership from the then registered proprietor. Section 13 of the Town Planning Act conferred, subject to what was then the *Public Works Act* 1902 (WA), a power of compulsory acquisition of land for the purpose of a town planning scheme, but that power was not utilised[90]. However, cl 13 of the MRS forbad any development on the Foreshore Reserve without the prior approval of the Commission. Further, s 20(1)(a) of the Town Planning Act stipulates that:

> "[A] person shall not, without the approval of the Commission ... subdivide any lot ... and the Commission may give its approval under this paragraph subject to conditions which shall be carried out before the approval becomes effective."

Section 20(2) forbids the creation or registration of a certificate of title for land the subject of an unapproved plan of subdivision.

81 Section 11 of the Town Planning Act confers, subject to certain conditions, upon "[a]ny person whose land or property is injuriously affected *by the making* of a town planning scheme" an entitlement "to obtain compensation in respect thereof from the responsible authority" (emphasis added). In broad terms, the nature of this entitlement is the decrease in the market value of the land caused by the making of the scheme and the inability of the owner to use the land for purposes conflicting with that scheme (s 36(6) of the Metropolitan Region Act).

82 Section 5(2) of the Metropolitan Region Act states[91]:

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89 *Government Gazette of Western Australia*, No 60, 9 August 1963.

90 References to the *Land Administration Act* 1997 (WA) were substituted by ss 86 and 142 of the *Acts Amendment (Land Administration) Act* 1997 (WA).

91 The latter part of s 3 of the Metropolitan Region Act deals with the relationship between the two statutes where they are "in conflict or inconsistent". That section states:

> "This Act shall be construed in conjunction with the Town Planning Act, as if the provisions of this Act were incorporated with and formed part of that Act, but where the provisions of this Act are in conflict or are inconsistent

(Footnote continues on next page)

"The provisions of the Town Planning Act, except as modified by this Act, apply to the metropolitan region."

Section 6 of the Metropolitan Region Act defines "Scheme" in terms which include the MRS. Section 36 of that statute includes provisions which have the effect in the present case of applying to the MRS s 11 of the Town Planning Act in a modified form. The "responsible authority" for s 11 is the Commission (s 36(1)(a)). Further, s 11 of the Town Planning Act conditions the entitlement to obtain compensation upon the making of a claim within any time limited by the scheme in question, but s 36 contains detailed provisions deferring or postponing entitlement to payment of compensation and imposing a time limit on the making of compensation claims. Section 36(3) provides:

> "Subject to subsection (4), where under the Scheme any land has been reserved for a public purpose, no compensation is payable by the responsible authority for injurious affection to that land alleged to be due to or arising out of such reservation until –
>
> (a) the land is first sold following the date of the reservation; or
>
> (b) the responsible authority refuses an application made under the Scheme for permission to carry out development on the land or grants permission to carry out development on the land subject to conditions that are unacceptable to the applicant."

Then, s 36(5) deals with the making of claims as follows:

> "A claim for compensation under subsection (3) shall be made at any time within 6 months after the land is sold or the application for permission to carry out development on the land is refused or the permission is granted subject to conditions that are unacceptable to the applicant."

> with the provisions of that Act, the provisions of this Act prevail to the extent to which they are so in conflict or inconsistent."

Inconsistency or conflict for the purposes of s 3 is to be assessed only after the operation of s 5(2) has applied the provisions of the Town Planning Act, as modified by the Metropolitan Region Act, to the metropolitan region. For this reason, this case turns upon that modified application of the Town Planning Act, not upon the operation of the latter part of s 3.

83 Section 36(4)(a) stipulates that, before compensation be payable under s 36(3), in the case of the first sale, the body fixing the amount of compensation must be satisfied of three matters. These are:

> "(i) that the owner of the land has sold the land at a lesser price than he might reasonably have expected to receive had there been no reservation of the land under the Scheme;
>
> (ii) that the owner before selling the land gave notice in writing to the responsible authority of his intention to sell the land; and
>
> (iii) that the owner sold the land in good faith and took reasonable steps to obtain a fair and reasonable price for the land".

In the case of refusal of a development application, the requisite satisfaction is that the application was made in good faith (s 36(4)(b)). The phrases "first sold" in s 36(3) and "before selling the land gave notice" in s 36(4)(a)(ii) were construed in *Bond Corporation Pty Ltd v Western Australian Planning Commission*[92] as if the references to sale were to conveyance. In so concluding, Ipp J said[93]:

> "I prefer the argument that Parliament intended the [Metropolitan Region Act] to provide that payment for compensation should only be made when the owner of land actually receives less money for the land than he or she would have received had there been no reservation, or when the genuine intention of the owner to develop the land is frustrated by a development refusal brought about by the reservation."

84 Sub-sections (3) and (4) were added to s 36 of the Metropolitan Region Act[94] before the gazettal of the MRS. It is not disputed that the making of the MRS injuriously affected at least that portion of the Land, but no compensation has been paid to any person in respect of the reservation in 1963 of the Foreshore Reserve. The record discloses that there was an application to change the zoning of the balance of the Land in 1990 but the changes (if any) in ownership between 1963 and the acquisition by Temwood in 1992 do not appear.

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92 (2000) 110 LGERA 179.

93 (2000) 110 LGERA 179 at 188.

94 By s 5 of the *Metropolitan Region Town Planning Scheme Act Amendment Act* 1962 (WA).

The Condition

85 In the course of the year 2000, the Commission granted, pursuant to s 20(1)(a) of the Town Planning Act, approval to three applications by Temwood for subdivisions of portions of the Land but did so subject to a condition ("the Condition") that a part of the Land, being the Foreshore Reserve, be "vested in the Crown under section 20A of the [Town Planning Act]" and "be ceded free of cost and without any payment of compensation by the Crown". Section 20A provides for the steps whereby, in the present case, the Registrar of Titles would vest the land in question in the Crown without any conveyance, transfer or assignment or the payment of any fee.

86 The imposition of the Condition was not a bolt from the blue. By letter dated 13 January 1993, Temwood had told the responsible Minister that proposed conditions for development of the Land met with its approval. These conditions included the transfer, at subdivision, of an expanded coastal foreshore reserve to public ownership. The events that occurred thereafter were described by McLure J as follows[95]:

> "In October 1993, the [Commission] approved a subdivision of the [Land] on condition, inter alia, that the Foreshore Reserve be ceded to the Crown without compensation. For reasons which are not entirely clear, the plans of the subdivision were endorsed without the ceding of the Foreshore Reserve. In 1994 the [Commission] agreed to a proposal by [Temwood] that the Foreshore Reserve be ceded to the Crown in three stages. It was intended that the agreement be recorded in a deed. A draft deed was prepared but never executed. Seven subsequent subdivisions of the [Land] were approved by the [Commission] without a ceding condition in relation to the Foreshore Reserve. The evidence before the [Tribunal] was that this was an oversight. The [Condition] was again imposed by the [Commission] in its approvals of the May 2000 subdivision and the first and second September 2000 subdivisions."

87 It is upon the validity of the Condition imposed by the Commission in 2000 that the present litigation turns. However, before proceeding further, it is convenient at this stage to refer to what was decided by this Court in *Lloyd v Robinson*[96]. That appeal from the Supreme Court of Western Australia concerned the construction of s 20(1) of the Town Planning Act as it stood in a form with no material differences, save for the identification of the approving

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95 (2001) 115 LGERA 152 at 174.

96 (1962) 107 CLR 142.

authority as the Town Planning Board of Western Australia. In particular, s 20(1)(a) provided:

> "[A] person shall not, without the approval of the Board ... subdivide ... or sell land ... except as a lot or as lots; and the Board may give its approval under this paragraph subject to conditions which shall be carried out before the approval becomes effective."

The Board had required, as a condition of approval, that the subdividers of the land in question transfer a specified area of 20 acres to the Crown free of cost for park and recreation purposes. This Court held that the condition had been validly imposed. In their joint judgment, Kitto, Menzies and Owen JJ said[97]:

> "If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second. For the giving up of the second a *quid pro quo* is received, namely the restored right to subdivide the first. It may be that the *quid pro quo* is inadequate, and that the landowner, though under no legal compulsion to give up the second area of land if he chooses to forego the idea of subdividing the first, is nevertheless under some real compulsion, in a practical sense, to submit to the loss of it because of the importance to him of obtaining the approval. But there is no room for reading the Act down in some fashion by appealing to a principle of construction that has to do with confiscation."

Their Honours added[98]:

> "If the Board has performed its statutory duty by giving approval to the subdivision *subject only to conditions imposed in good faith and not with a view of achieving ends or objects extraneous to the purposes for which the discretion exists*, the inescapable effect of the Act is that the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions." (emphasis added)

88 The Commission relies heavily upon what was said in these passages as supporting the validity of the imposition of the Condition. On the other hand, Temwood refers to the emphasised words and contends that the Condition was

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97 (1962) 107 CLR 142 at 154.

98 (1962) 107 CLR 142 at 154.

imposed not in good faith but with a view of achieving an extraneous object. That object is said to be the vesting of the Foreshore Reserve in the Crown, thereby to defeat the presently subsisting but postponed right of Temwood to compensation for injurious affection under s 11 of the Town Planning Act and s 36(3) of the Metropolitan Region Act.

The litigation

89 Part V of the Town Planning Act is headed "Appeals". Temwood instituted an appeal to the Tribunal against the imposition of the Condition upon the grants of the three subdivision approvals. The appeals were dismissed by the Tribunal. However, s 54B of the Town Planning Act provides for an appeal to the Supreme Court of Western Australia on condition that the appeal involves a question of law[99]. Pursuant to s 54B an appeal was taken by Temwood to the Supreme Court. As already indicated, the appeal was heard by McLure J, who dismissed it[100]. However, a further appeal by Temwood to the Full Court was allowed with costs. The orders of McLure J were set aside and in place thereof it was ordered that the appeal from the Tribunal be allowed and that the orders of the Tribunal be set aside and a declaration made that the Condition "be and is ... void". Special leave was granted by this Court to the Commission on terms that it pay Temwood's reasonable costs of the appeal and that it not seek to disturb the costs order made by the Full Court.

90 The Full Court held that s 11 of the Town Planning Act conferred upon Temwood a statutory right to compensation as a consequence of the reservation of the Foreshore Reserve under the MRS, actual enjoyment of which was deferred until the occurrence of a relevant event stipulated in s 36(3) of the Metropolitan Region Act; that such a right was not taken away by some other statutory provision unless such an intention is manifest; and that the Commission could not by exercise of its powers under par (a) of s 20(1) of the Town Planning Act attach a condition to an approval to subdivide which directly negated that right. The result was that the purported exercise of power by the imposition of the Condition was ultra vires and invalid. In this Court the Commission challenges that conclusion.

91 The Commission also challenges the further holding of the Full Court with respect not to the existence of power but to the improper exercise of the power. The Full Court concluded that a condition of a development approval which

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99 cf *Ruhamah Property Co Ltd v Federal Commissioner of Taxation* (1928) 41 CLR 148 at 151.

100 (2001) 115 LGERA 152.

required the cession of land reserved for public purposes under a town planning scheme is invalid as serving no proper "planning purpose", and that the imposition of the Condition was invalid because it was not imposed by the Commission for a planning purpose.

92 The appeal should succeed, for the reasons which follow.

Planning purposes

93 With respect to the meaning of the expression "planning purpose", in *Bathurst City Council v PWC Properties Pty Ltd*[101] the Court adopted what had been said by Walsh J in *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council*[102]. His Honour had pointed out that a power to attach conditions to development consents was to be understood as a power to impose conditions reasonably capable of being regarded as related to the purpose for which the functions of the responsible authority were being exercised; that purpose was to be ascertained from a consideration of the applicable legislation and town planning instruments rather than from "some preconceived general notion of what constitutes planning"[103]. Earlier, in *Thompson v Randwick Corporation*[104], the Court had said of the conclusion that, in the exercise of these powers a local government body was not acting in good faith, that by this[105]:

> "we do not mean that the Council is acting dishonestly. All that we mean is that the Council is not exercising its powers for the purposes for which they were granted but for what is in law an ulterior purpose. It is not necessary that this ulterior purpose should be the sole purpose. The Council, no doubt, believes that the new road will have advantages over Bloomfield Street and Wisdom Street from the point of view of access and upkeep. But the evidence establishes that one purpose at least of the

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101 (1998) 195 CLR 566 at 576-577 [15].

102 (1970) 123 CLR 490 at 499-500.

103 (1970) 123 CLR 490 at 500. See also the speech of Lord Scarman in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 at 618-619.

104 (1950) 81 CLR 87 at 105-106.

105 (1950) 81 CLR 87 at 106; see also *Walton v Gardiner* (1993) 177 CLR 378 at 410; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 148-149 [30].

> Council in attempting to acquire the land not required to construct the new road is to appropriate the betterments arising from its construction."

The Full Court stated and accepted these principles but there is dispute as to the way in which it applied them.

Right to compensation?

94 However, there is a threshold issue. If Temwood enjoyed no statutory right to compensation for injurious affection, as successor in title to the owner of the Land in 1963 when the Foreshore Reserve was created by the MRS, then so much of its case as assumes the contrary as a necessary step must fail. The point was not taken in the Tribunal or the Supreme Court but is a question of law and should, as the Commission now has it, be dealt with by this Court.

95 Section 11(1) of the Town Planning Act, read with the Metropolitan Region Act, conferred an entitlement to compensation upon any person whose land or property was injuriously affected "by the making" of the MRS. The legislation thus recognised, as it was put in *Bond Corporation*[106], that:

> "[o]wners of land suffer loss merely by the reservation of land for public purposes. That loss is constituted simply by the reduction in the market value of the land caused by the reservation and the inability of the owner to use the land for purposes conflicting with the reservation (even where the owner does not intend to develop the land in any way). The loss sustained on reservation occurs without the owner taking any action in connection with the land, and while the owner still holds the land in the form it was in immediately prior to the reservation."

96 However, Temwood held no land which was injuriously affected in this fashion by the making of the MRS. Had Temwood been so affected in the necessary sense, its entitlement to compensation under the legislation would have been qualified by the restrictions imposed as to the time of payment by s 36(3) of the Metropolitan Region Act and by s 36(6) as to the amount of compensation. Upon that hypothesis, in the interval between the entitlement to compensation arising and the compensation becoming payable, Temwood may well have enjoyed under the legislation what, in the event of a repeal, s 37(1)(c) of the *Interpretation Act* 1984 (WA) would save as an accrued, acquired or established right, interest, title, power or privilege[107]. Those terms are to be understood by reference to the provision of the repealed statute which is in question; they are

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106 (2000) 110 LGERA 179 at 187-188.

107 See *Dossett v TKJ Nominees Pty Ltd* (2003) 78 ALJR 161; 202 ALR 428.

not used in s 37 solely in any technical sense derived exclusively from property law or analytical jurisprudence[108]. But, on the facts of this case, no question respecting s 37 arises.

97 Nor does there arise the issue considered by this Court and then by the Privy Council in *Perry v Clissold*[109]. That issue concerned the construction of New South Wales legislation which required a valuation to be made upon disclosure to the Minister of a prima facie case for compensation upon resumption of land for public purposes; this Court and the Privy Council held that such a prima facie case was made out by the executors of an applicant who had had a possessory title to the resumed land. That possessory title was held to be an estate or interest within the meaning of the statute. Lord Macnaghten explained[110]:

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner."

98 The title against all the world but the rightful owner of a person in possession in the assumed character of an owner and exercising peaceably the ordinary rights of ownership was conferred by the common law, although by operation of limitation statutes the possessory owner might then acquire an absolute title[111]. In the present case, the Full Court regarded *Perry v Clissold* as an instance "where a statute confers specific, definite rights on a party" and as an authority that "those rights are not to be deemed to be taken away by some other statutory provision unless such an intention is manifest"[112]. The earlier case is not such an authority. A more appropriate realm of discourse would be found in the treatment of the notion of implied repeal in such authorities as *Kartinyeri v The Commonwealth*[113]. However, the special provision made in ss 3 and 5 of the Metropolitan Region Act for the reading of that statute with the Town Planning

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108 See the remarks of Windeyer J in *Mathieson v Burton* (1971) 124 CLR 1 at 12-13; cf *Esber v The Commonwealth* (1992) 174 CLR 430 at 440-441, 445-448.

109 (1904) 1 CLR 363; affd (1906) 4 CLR (Pt 1) 374.

110 (1906) 4 CLR (Pt 1) 374 at 377.

111 (1906) 4 CLR (Pt 1) 374 at 377.

112 (2002) 25 WAR 484 at 494.

113 (1998) 195 CLR 337 at 352-354 [7]-[10], 375-376 [66]-[70].

Act evidently were designed to deal explicitly with questions of implied repeal which might otherwise have arisen.

99 The Full Court went on to accept Temwood's submission, renewed in this Court, that[114]:

> "s 11 of the [Town Planning Act] expressly conferred on [Temwood] a positive, unequivocal, statutory right to compensation as a consequence of the MRS scheme reservation, actual enjoyment of which was deferred until the relevant event stipulated in s 36(3) of the [Metropolitan Region Act] took place."

100 However, in its terms, s 11(1), as indicated earlier in these reasons, conferred no entitlement of any description upon Temwood, speaking as it did at a time and to a situation long before Temwood acquired the Land, including the Foreshore Reserve. Faced with that chronology, Temwood submitted in this Court that the entitlement conferred by s 11(1) arose at the time of the reservation by the MRS in 1963 but was "a species of a right in rem" which attached to the Land, passed to Temwood as subsequent owner, and was deferred so long as the owner for the time being did not wish to sell or develop the Foreshore Reserve.

101 It was suggested that *Bond Corporation* was decided on such a footing, but the issue could not have arisen on the facts of that case. The land in question there had been owned by the appellant when reserved for "Parks and recreation" in 1996, and the appellant entered into an agreement to sell it in 1997[115].

102 The construction of the legislation put forward by Temwood should not be accepted. The controlling words of what follows are the opening words of s 11(1) of the Town Planning Act:

> "Any person whose land or property is injuriously affected *by the making* of a town planning scheme ...". (emphasis added)

What follows in s 11(1) is to be read as if, among other things, sub-ss (3) and (4) of s 36 of the Metropolitan Region Act were included and the payment and quantification of compensation were deferred accordingly. In particular, s 36(3) defers any right to payment until (a) first sale following the date of the reservation, "or" (b) refusal of a development application or a grant of permission on conditions unacceptable to the applicant for approval ("development refusal"). The claim for compensation must be made within six months thereafter (s 36(5)).

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114 (2002) 25 WAR 484 at 495.

115 (2000) 110 LGERA 179 at 182.

103 Temwood would read "until" and the disjunctive "or" in s 36(3) as postponing the entitlement until the later to happen of first sale following reservation and refusal of a development application or a grant of permission subject to unacceptable conditions. However, the sub-section should be construed by treating the deferral of the entitlement to payment as terminated upon the first to occur of first sale or development refusal. There are several reasons why this is so.

104 First, as it was put in *Bond Corporation*, the loss in value suffered on reservation "is less concrete or tangible" than "the kind of loss sustained on conveyance or development refusal where owners are prevented from developing land in accordance with their genuine intent"[116].

105 Secondly, this is confirmed by the Second Reading Speech on the Bill including what became s 36(3)[117]:

> "It can properly be argued that reservation under the scheme depreciates the value of land. However, the depreciation is, in many cases, hypothetical and becomes real only when the land is sold at a price which reflects this depreciation, or when development is frustrated by a refusal of consent under the scheme. The amendment proposes that compensation for injurious affection be limited to two circumstances: where a sale is effected at a depressed value attributable to reservation under the scheme, or where consent to develop is refused on the ground of reservation under the scheme."

106 Thirdly, the depreciation of which the Minister there spoke "becomes real" upon the first to happen of the stipulated events; in this case, that was no later than when Temwood's vendor sold to it at what is postulated as a price reflecting the depreciation.

107 Fourthly, as was pointed out in the Second Reading Speech in the Legislative Council on the Bill for what became the *Metropolitan Region Town Planning Scheme Act Amendment Act* 1968 (WA) ("the 1968 Amendment")[118], s 36(3) was designed to protect the position of the owner at the time of the

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116 (2000) 110 LGERA 179 at 188.

117 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 September 1962 at 820.

118 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 September 1968 at 754.

reservation so that when he later sold he was to be compensated if unable to realise the full market value, but "[s]ubsequent purchasers are aware of the scheme provisions at the time of purchase" so that they "would not be at the same disadvantage as the original owner".

108 Fifthly, reference also should be made to s 36(3a), which was added by the 1968 Amendment, further amended thereafter, and now reads:

> "Compensation for injurious affection to any land is payable only once under subsection (3) and is so payable –
>
> (a) under paragraph (a) of that subsection to the person who was the owner of the land at the date of reservation; or
>
> (b) under paragraph (b) of that subsection to the person who was the owner of the land at the date of application,
>
> referred to in that paragraph, unless after the payment of that compensation further injurious affection to the land results from –
>
> (c) an alteration of the existing reservation thereof; or
>
> (d) the imposition of another reservation thereon."

The sub-section confirms the above indications as to the construction of s 36(3) by stipulating that compensation is payable only once, subject to the occurrence after that payment of further injurious affection of the land resulting from alteration of the existing reservation or imposition of another reservation. The inclusion of the reference in par (b) of s 36(3a) to the owner of the land at the date of a development application that is rejected or is approved with unacceptable conditions accommodates such special situations as the death by the owner before any sale and the making of a development application by those volunteers taking the land by testamentary or intestate succession from that owner. Paragraph (b) of s 36(3a) has no application where there has been a sale by the owner as indicated in par (a).

109 The result of the foregoing is that Temwood had no presently subsisting, albeit postponed, right to compensation in respect of injurious affection by the making of the MRS in 1963. Thus, there was nothing to be defeated by the allegedly improper exercise of power by the Commission in imposing the Condition.

110 Temwood sought to outflank that conclusion by submitting in argument that it was sufficient that the Commission exercised its power to defeat an *arguable* entitlement to compensation. Such an entitlement, in the eyes of the law, either did or did not exist. It did not exist.

111 Upon further consideration, this submission appeared to be but a corollary of the principal submission that there was no "planning purpose" which could, as a matter of power, have founded the imposition of the Condition. If, contrary to Temwood's case, there was a "planning purpose" in the imposition of the Condition and the inevitable consequence in law of compliance with the Condition would be a vesting of the Foreshore Reserve in the Crown under other provisions of the legislation, the prospect of that outcome would not render that planning purpose an improper exercise of the power under s 20(1)(a) to impose the Condition.

No planning purpose?

112 The classification of the Condition as the manifestation of a "planning purpose" turns upon the considerations referred to by Walsh J in *Allen Commercial Constructions*[119] and other authorities, as discussed earlier in these reasons. Looking to the subject-matter, scope and purpose of the Town Planning Act, when read with the Metropolitan Region Act, was the imposition of the Condition capable of being regarded as related to the purpose under s 20(1)(a) of the former statute for which the functions of the Commission were being exercised?

113 The discretion of the Commission under s 20(1)(a) was "not fettered" by the provisions of a town planning scheme "except to the extent necessary for compliance with an environmental condition relevant to the land under consideration" (s 20(5)). In argument, Temwood accepted that the purpose of the reservation of the Foreshore Reserve was a "planning purpose".

114 The Condition in terms spoke of vesting in the Crown "under s 20A". Section 20A, to which reference is made earlier in these reasons, speaks of a condition of approval by the Commission that portion of the land in a subdivision shall vest in the Crown, among other purposes, for the "purpose of conservation or protection of the environment"; the Registrar of Titles is to vest that land in the Crown without any transfer. In the alternative, s 20C establishes a system whereby, with the approval of the local government authority and the Commission, the owner of the portion of the land to be set aside and vested in the Crown for "parks, recreation grounds or open spaces generally" may, in lieu thereof, pay to that authority a sum that represents the value of the portion.

115 The Town Planning Act thus in direct terms assumes the power under par (a) of s 20(1) to impose upon approvals of subdivisions a term of the nature

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119 (1970) 123 CLR 490 at 499-500.

of the Condition. The imposition of the Condition plainly is capable of being regarded as related to the purpose for which the functions of the Commission under par (a) were being exercised. The imposition of the Condition was within power.

116 Further, the imposition of the Condition did not acquire the character of an exercise of power to achieve extraneous ends or objects merely because the inescapable effect of the legislation under which it was imposed was that, if Temwood were then to subdivide, the right to do so may have been achieved at what Temwood regarded as too high a cost. That, as the Commission rightly emphasised, is a proposition supported by *Lloyd v Robinson*.

117 In that case, Kitto, Menzies and Owen JJ remarked[120]:

> "The assumption may be accepted that the statutory power to annex conditions to an approval of a subdivision does not extend to requiring the setting aside for public recreation of land which is so unrelated to the land to be subdivided, because of remoteness from it or some other circumstance, that there is no real connexion between the provision of the open space and the contemplated development of the area to be subdivided. But in the present case it must not be forgotten that the subdivision for which the respondents sought approval was one of a series by means of which an area, fairly to be considered as a whole, was being gradually carved up and placed on the market; and it was well within the limits of a proper understanding of the Board's functions under the [Town Planning Act] to insist, at appropriate stages in the course of applications for approval to the constituent subdivisions, that open spaces be suitably located within the total area to satisfy reasonable requirements in respect of the total area."

Their Honours added[121]:

> "Moreover, any suggestion that the power to impose conditions was exercised arbitrarily, or otherwise than in an endeavour in good faith to serve the purposes for which it was conferred, is answered by the trial judge's acceptance of evidence given before him by the Town Planning Commissioner to the effect that the spaces required were reasonable and proper and were arrived at by the Board in accordance with recognized principles of town-planning."

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120 (1962) 107 CLR 142 at 153.

121 (1962) 107 CLR 142 at 153.

118 In the present case, the findings by the Tribunal, which were unchallenged, showed that the requirement that the Foreshore Reserve be ceded had its origin in a statement by the Minister for the Environment issued under s 45 of the *Environmental Protection Act* 1986 (WA). That statement had been made after detailed considerations by the Environmental Protection Authority of the need for a "buffer zone" to protect the scenery and the vegetation of the coastal strip.

Terms of vesting

119 It remains only to refer to the statement in *Lloyd v Robinson*[122]:

> "True it is that if the land required for open space reserves is transferred to the Crown for park and recreation purposes as the conditions require, the beneficial title to it will pass to or be vested in the Crown without legal fetter. There will be a moral obligation on the Government to keep it reserved for the purposes mentioned, but no legally enforceable obligation. The ultimate sanction must be political only."

The terms in which s 20A of the Town Planning Act describe the vesting as for one or more of public purposes there identified appear to require some qualification in the application of what was said in the above passage to the statute in its present form. The authorities considered in *Bathurst City Council*[123] suggest that the Crown would be subject to more than a moral or political obligation to observe the purpose of the vesting under s 20A. This appeal may be disposed of without expressing a concluded view on the matter.

Orders

120 The appeal should be allowed; orders 1, 2, 3 and 5 of the Full Court set aside and in place thereof it be ordered that the appeal to that Court be dismissed. Costs are dealt with in accordance with the undertaking, to which reference has been made.

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122 (1962) 107 CLR 142 at 155.

123 (1998) 195 CLR 566 at 582-583 [34]-[36], 585-592 [44]-[65].

121 CALLINAN J. It is no doubt tempting for planning authorities, especially those that are also rating or taxing authorities[124], to seek to obtain for the perceived public benefit, such parcels of land as they can, for as little as they can, or for nothing. But that temptation cannot of itself justify the opportunistic imposition of a condition on a planning or a subdivisional approval, that the land owner convey land free of cost to an authority. The test of validity of such a condition is not whether its imposition is in the public interest, but whether the condition is for a planning purpose and reasonably required by, and related to the subdivision, in the light of other relevant considerations such as the changes, burdens and demands that the subdivision will produce. A condition which answers this description may still be valid even if it produces benefits for people other than the persons connected with, or who will occupy or use the subdivided land. It follows that the test is not simply one of *Wednesbury*[125] unreasonableness, a matter to which I will in due course return.

122 The actual question in this case is whether the appellant, as a planning authority, was entitled to impose the condition that it did, that the subdivider cede valuable coastal land to the Crown free of cost, as a condition of a series of grants of subdivisional approvals. It is not whether the respondent had a current right to claim compensation for injurious affection to that land by reason of its earlier gazettal as a Foreshore Reserve. An argument in support of the latter proposition based on a construction of the relevant enactments was suggested as a possible argument by the Court, and for the first time, during the appeal. The appellant was initially reluctant to embrace it. The problem with such an embrace is that this Court suffers, as I think it did here, the disadvantages of the *absence* of a studied preparation, and a careful analysis of the relevant enactments by the parties, and a reasoned judgment on the point by the intermediate Court of Appeal. A further problem with the argument is that it ran counter to a position that the appellant had until then maintained, not only in the courts and tribunals below, but also repeatedly during the appeal in this Court: that the time for the making of a claim had not arrived because the event after which it might be made had not occurred.

Facts

123 It is unnecessary for me to repeat all of the facts. One observation should at this point however be made. Neither party to this appeal has acted consistently in relation to the relevant land and the condition. For example, in January 1993

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124 The appellant is a revenue raising authority under Pt VI of the *Metropolitan Region Town Planning Scheme Act* 1959 (WA).

125 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

the respondent had advised the responsible Minister, in effect, that it did not then object to the imposition of a condition of the kind the subject of the appeal. Notwithstanding that, the appellant took no steps to possess itself of the land covered by it, or to have it conveyed to the Crown. Instead, it permitted a number of subdivisions of land in the vicinity owned by the respondent to be undertaken. Nothing turns upon these circumstances: it was not suggested that either party was in any way estopped, or otherwise precluded from adopting the stances that each has done in the current litigation (save for the appellant's late embrace of the argument referred to in the previous paragraph).

124 There are some facts and some aspects of the decisions in the Town Planning Appeal Tribunal of Western Australia ("the Tribunal"), and of the Supreme Court of Western Australia, which do require some further attention.

125 The gazettal of the Reserve neither divested the appellant of its ownership of the land nor severed it from the land to the east of it of which it formed part. At any time since the gazettal the appellant could have compulsorily acquired the land if it wished. Indeed, as was pointed out in the Second Reading Speech in the Legislative Council on the Bill for the Amendment Act to the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) ("the Scheme Act") in 1968, the responsible Minister repeated that the intention then, as it had been earlier, was that the owner should be compensated for any loss in market value of the land[126].

126 What then was the effect of the gazettal of the land as Foreshore Reserve? It certainly did not in terms prohibit subdivision of it. What it did, by cl 13 of the Metropolitan Region Scheme ("the Scheme"), was to repose in the appellant a power to oversee, and to forbid development without its prior approval. The gazettal of the Foreshore Reserve would, in all likelihood, have had an immediate adverse impact upon the value of the land the subject of it, and also, in all probability upon the value of the land now in the ownership of the respondent to the east of it. The precise legal effect of the gazettal upon the owner's proprietary rights is not entirely clear. There is no suggestion however that the gazettal deprived the land of all utility and value to the owner. Indeed, cl 13 of the Scheme provided that the owner could erect a boundary fence without the need for any consent by the appellant, and cl 14 provided that the owner might continue to use the land for any purpose for which it was lawfully being used before the Scheme had the force of law[127]. Whilst the Foreshore Reserve remained in private ownership therefore, the owner could still use and occupy it,

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126 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 3 September 1968, at 754.

127 The Scheme drew a distinction between "Parks and Recreation area" and "Parks and Recreation Area – restricted public access."

and deny entry upon or use of it to anyone else except authorized official entrants. It should not be automatically assumed, and it was not suggested in argument, that all uses, or means of exploitation of the land within the Reserve would be necessarily incompatible with its reservation. Furthermore, whilst it remained in the ownership of the same person as owned land to the east of it, it continued to have added value for the purpose of preserving views, of preventing the obstruction of prevailing sea breezes, and as a means of giving direct access to the beach, thereby enhancing the value of the eastern lands. In addition, the owner had a valuable right to claim compensation in respect of it in due course.

127 The result wrought by the imposition of the condition is a quite different and more drastic one. The Tribunal approached the case as if the only effect of the condition was to deprive the respondent of a right to compensation that it would otherwise have had. That was an erroneous approach and one which has subsequently infected this litigation. It is erroneous because the condition, if valid, did much more than that. The condition deprived the owner of its valuable proprietary rights relating to, and over the Foreshore Reserve, including, but by no means confined to, the right to claim compensation for the injurious affection caused by the Scheme, of the land to the east of it to which I have referred. In short in its passive and unused state it still enhanced the amenity of the land to the east[128], and had a potential for uses not incompatible with its reservation as a Foreshore Reserve.

The decision of the Tribunal

128 The Tribunal in its decision recited that the respondent had argued that the condition did not fairly and reasonably relate to the approvals and was unreasonable. I should observe at this point that in my opinion, for reasons which will appear, this is the correct test although the concept of "unreasonableness" will require some further consideration.

129 After a discussion of some of the authorities, the Tribunal, possibly because that was the matter upon which the respondent was then concentrating, turned its mind to the question whether the condition failed to satisfy the

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128 Compare *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 at 498-499 per Williams J; and on appeal to the Privy Council reported at (1959) 100 CLR 1; [1959] AC 248; see also *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 617 [22] per Gleeson CJ, Gummow, Kirby and Callinan JJ.

appropriate test because it "takes away the right to compensation under the [Scheme Act]". Later in its reasons the Tribunal said this[129]:

> "[B]alanced against this difficulty [of reconciling the Western Australian authorities] is the necessity that the [Commission] be able to impose a condition, in appropriate cases, that land be ceded free of cost upon subdivision. This necessity arises because of the legitimate community concern that a developer contribute to infrastructure costs to the extent permissible, a concept accepted by the High Court in *Lloyd v Robinson*[130] on the basis that the condition is the price for the privilege of subdivision."

The Tribunal fell into error in the passage that I have quoted in these respects. First, the test is not one of legitimate community concern or otherwise, even though of course the community, or sections of it, may in fact be concerned. Secondly, the authority is not entitled to determine the conditions upon the basis of the maximum contribution that it can extract from the developer. It is true that the Tribunal uses the words "to the extent *permissible*" but those words are open to an inference that the authority should be looking to, and is entitled to extract the maximum that it can from the developer rather than what is fair and reasonable in the circumstances. Public authorities, particularly those with power to affect proprietary rights, are bound to act not only in good faith, but also fairly and reasonably. No public interest is truly served by conduct which falls short of this standard. Indeed, high-handed, unfair acquisitive conduct is not only unlawful but is also likely to weaken the authority of, and confidence in public administration. The third error in the passage is the assertion that *Lloyd v Robinson*[131] stands for the propositions earlier stated. And, as will also appear, *Lloyd* does not accurately and fully state the current law on the topic.

130 Next the Tribunal said this[132]:

> "... the effect of a free of cost ceding condition on a future right to compensation is overstated. The ceding condition does not take away a future right to compensation but requires the giving up of the land free of cost. The reality is that if land is reserved, the owner loses a possible right to compensation but, most importantly, if land is not reserved, the owner loses the value of the land ceded: the same value in each case. There is

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129 *Temwood Holdings Pty Ltd v Western Australian Planning Commission* [2001] WATPAT 4 at [26].

130 (1962) 107 CLR 142.

131 (1962) 107 CLR 142.

132 [2001] WATPAT 4 at [27].

> no difference in the effect of the condition if the land is injuriously affected: in all cases, the value of the land is lost."

131 This is another error. It is not right to say that the ceding condition does not take away a future right to compensation but (merely) requires the giving up of the land free of cost. Once the land is given up free of cost no right to compensation exists, because the land the subject of it has passed out of the ownership of its former owner. The former owner who continues to own the adjoining land would have no right to claim compensation for injurious affection to that adjoining, now severed land by reason of the loss of the Foreshore Reserve as a result of the imposition of the condition, a right which in all probability it had when the Foreshore and the adjoining land were unsubdivided, in the same ownership, and subject only to the gazettal of the Reserve. Neither the value nor the loss is the same in each case. The passage overlooks the fact that the Foreshore Reserve was of utility and value to the respondent whilst it was in its ownership. The Tribunal repeatedly spoke as if the legal and practical efforts of the gazettal and the imposition of the condition were identical. Even if, as I do not think to be the case, the right to compensation had already been lost, the condition deprived the respondent of more than it had lost by the gazettal of the Foreshore Reserve for the reasons that I have given. If it were otherwise there would have been no need to impose the condition: the reservation by the gazettal would have sufficed.

132 The next step in the reasoning of the Tribunal was to hold that[133]: "the basis for the imposition of the condition is that it was imposed historically and, having not [been] effectuated, requires to be imposed again until it is fulfilled". The Tribunal records that it was not argued that the land the subject of the condition should not be set aside for Foreshore Reserve, and that the appellant accepted the environmental condition that the land should be set aside for public use. This did not mean however that the respondent accepted the condition as imposed, and is to overlook the critical element of it, that the land was to be ceded, *free of cost*. Nor has the respondent resiled from the arguments: (a) that the condition in its totality does not reasonably relate to the subdivision of any of the lands that it owns, and has owned, including those the subject of current applications for subdivision, and those intended to be subdivided in the future, and (b) that the condition does not implement a relevant planning purpose as contemplated by the Scheme.

133 It is possible that a case could be made to justify imposing a condition that the land be ceded free of cost on the basis that it does reasonably relate to the lands subdivided or to be subdivided. It may be that having regard to the total quantity of those lands, their location, and the intended use of them, it is proper

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133 [2001] WATPAT 4 at [45].

that foreshore land of the area in question should be put into public ownership, and used for open space, public recreation, or indeed preserved for passive enjoyment only[134]. But this was not the inquiry that was made by the Tribunal. Perhaps it was distracted from undertaking that inquiry because of the concentration by the respondent upon the arguments which the Tribunal recorded in detail. That is not however to the point. In its earlier statement of the test the Tribunal acknowledged what its obligation was, but proceeding and reasoning as it did, failed to meet that obligation. It should also be pointed out that the appellant made no attempt in evidence or otherwise, to explain why, in pursuance of a valid and proper planning purpose, land already reserved by gazettal as Foreshore Reserve, should now be ceded free of cost.

134 The decision of the Tribunal was erroneous therefore in the several respects to which I have referred.

135 I will now go directly to the decision of the Full Court of the Supreme Court of Western Australia to which the respondent appealed after its appeal against the Tribunal's decision to a single judge (McLure J) of the Supreme Court failed.

Full Court of the Supreme Court of Western Australia

136 In the Full Court, Wallwork J and Scott J agreed with the reasons for judgment of Olsson AUJ. His Honour first stated the facts which he said were uncontroversial, and then went on to say that it was not entirely clear as to what was concluded by the Tribunal with respect to the issue of planning purpose[135]. His Honour was right to raise that question in view of the matters that I have stated. He quoted from the decision of the Tribunal and pointed out that the Tribunal claimed that the condition served a proper planning purpose, and could not therefore be said to have infringed the *Wednesbury* principle[136].

137 In the course of his reasons his Honour said that there had been a decrease in the market value of the land caused by the reservation, and the inability of the owner to use the land for purposes conflicting with the reservation, and that was

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134 Policy documents of the appellant in evidence suggest that what a subdivider should cede free, for public open space, was 10 per cent of the gross subdividable area.

135 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484 at 489 [26].

136 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484 at 490 [30].

the matter which gave rise to the entitlement to compensation[137]. It was, his Honour said, an issue, but not, I would interpolate, the only issue on the appeal, whether that right could be extinguished by the imposition, pursuant to s 20 of the *Town Planning and Development Act* 1928 (WA) ("the TP Act"), of the condition. It was because that was thought to be the main issue, because again it was no doubt the one upon which the parties particularly focussed, that much of the balance of the reasoning of his Honour was taken up with an examination of the nature of the right to compensation arising out of the gazettal, and the effect of the TP Act upon it. Olsson AUJ did however record an argument by the respondent that the appellant had exercised its power for an impermissible purpose[138]:

> "It was 'bound to treat the application for planning approval ... on its merits, and not in such a way as to enable the [Crown] to acquire the land for less, or more easily': see *Moneywood Pty Ltd v Salamon Nominees Pty Ltd*[139]. That was, in fact, the aim, or at least a substantial aim, of the imposition of the impugned condition. As such, it was improper ..."

In my opinion, this argument, as recorded by his Honour, was substantially correct and should be accepted.

138 In the following passage his Honour made this valid criticism of the reasoning of the Tribunal[140]:

> "In other words, the Tribunal, quite correctly, appreciated that it is one thing to be able to characterise, in conceptual terms, the topic of a condition as, prima facie, being related to a planning purpose. It is entirely another to conclude that it is in fact required to actually fulfil such a purpose, in the circumstances under consideration. Interestingly, for present purposes, the example ventured by the Tribunal was a condition requiring ceding of open space where, patently, that was unnecessary for the orderly and proper planning of a locality of which the relevant subdivision was a part.

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137 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484 at 493 [39].

138 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484 at 496 [65].

139 (2001) 202 CLR 351 at 407 [175].

140 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484 at 497 [71]-[72].

In the present case, the relevant policy is, by virtue of the Scheme Act, to be derived from the [Scheme] which mandates the principles of orderly development to be applied to the subject land."

139 Later his Honour said, and in my opinion, correctly, this[141]:

"Finally, the shortage of acquisition funds, is scarcely any basis for supposing that the legislature envisaged creation of the somewhat Gilbertian situation that it would confer a specific statutory right, by interaction of s 11 of the [TP Act] and s 36 of the Scheme Act, and, at the same time, leave it open to the respondent, by exercise of a general power of imposing conditions on subdivision applications, to effectively negate that right.

I am unable to accept the propositions either that the focus of the Scheme Act and the [Scheme] is as stated, or that it can fairly be said that it was a planning purpose, in the *Fawcett*[142] sense, merely to accelerate possible Crown ownership in the manner adumbrated. Such a concept is not, in the circumstances before the court, pitched at the orderly development of the locality and preservation of the amenity of the locality at all. Rather, it simply manifests an administrative desire to contain monetary cost. Its essential thrust is based on fiscal, rather than planning, objectives.

In my view, at the end of the day, not only was no planning purpose identified either before the Tribunal or in the court below, but also there was simply no evidence of such a purpose ever placed before the Tribunal.

It follows that the appellant was entitled to succeed on the merits in any event and the Tribunal erred in dismissing its appeal."

140 He added this[143]:

"At the very least, the Tribunal reasons evidenced, by clear inference, the existence of a major ulterior or extraneous purpose – namely to avoid a compensation liability to the appellant, conferred on the

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141 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484 at 499-500 [90]-[93].

142 *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636.

143 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484 at 500 [96].

> latter by statute. The reasoning in *Newbury*[144] and *Thompson*[145] inexorably leads to the conclusion that, in the circumstances, the imposition of the impugned condition cannot be regarded as the bona fide exercise by the respondent of its powers for a legitimate planning purpose."

141 For those reasons his Honour concluded that the appeal should be allowed and that it was unnecessary to make any judgment about the other arguments that had been advanced by the parties.

The appeal to this Court

Lloyd v Robinson

142 *Lloyd* requires separate consideration. I have foreshadowed that in my opinion *Lloyd* cannot stand in the way of a decision in this appeal in favour of the respondent. This is so for a number of reasons.

143 *Lloyd* is a decision of three Justices of this Court (Kitto, Menzies and Owen JJ) on appeal from a single judge of the Supreme Court of Western Australia (Virtue J). The issue there was similar to, but not identical with, the issue here, whether a condition could be imposed in respect of staged subdivisions that the subdivider convey to the Crown free of charge a large area out of the subdivider's land not presently the subject of an application for an approval to subdivide, for park and recreation purposes. Much of what was said by their Honours in that case has either been overtaken by subsequent experience and authority, or was so sweepingly stated as to require qualification in the light of that experience and authority.

144 In rejecting a holding of the primary judge in *Lloyd* that to impose the condition that the subdivider transfer the land free of cost to the Crown was outside the contemplation of the relevant Act, because in the absence of any provision of compensation, the Act should not be construed as intending to authorize what would amount to the confiscation of private property, the Court said this[146]:

> "Given the necessary relevance of the conditions to the particular step which the [Town Planning] Board is asked to approve, there is no foothold for any argument based on the general principle against construing statutes

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144 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

145 *Thompson v Council of the Municipality of Randwick* (1950) 81 CLR 87.

146 (1962) 107 CLR 142 at 154.

> as enabling private property to be expropriated without compensation. The Act at its commencement took away the proprietary right to sub-divide without approval, and it gave no compensation for the loss. But it enabled landowners to obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which, though not specified in the Act, were indicated by the nature of the purposes for which the Board was entrusted with the relevant discretion: see *Swan Hill Corporation v Bradbury*[147]; *Water Conservation and Irrigation Commission (NSW) v Browning*[148]. If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second."

145 *Lloyd* was decided in 1962 only three years after the Scheme Act had been passed. There had, accordingly, been relatively little experience of it by the time that the appeal was argued in June of that year. Although town planning Acts had been enacted in Australia from time to time in various rather rudimentary forms, sophisticated and detailed town planning enactments and procedures have only gradually evolved[149] and, I would suggest, come to be well understood in this country in the last 30 or so years. During that period there has been a great increase in population, and in the development and subdivision of land to accommodate it. Over those years many instances have been noted of aggressive action, even impropriety, and excess of power on the part of planning authorities

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147 (1937) 56 CLR 746 at 757, 758.

148 (1947) 74 CLR 492.

149 See Fogg, *Australian Town Planning Law: Uniformity and Change*, 2nd ed (rev) (1982) at 11-31.

in regulating that development and subdivision[150]. Even the most cursory resort to planning law reports will throw up examples of that[151].

146 Whilst it is true that principles applying to the construction of statutes enabling the expropriation of private property are not directly relevant to the lawful imposition of conditions with respect to subdivisions and developments, the fact that the condition may result in the acquisition of property by an authority free of charge, does provide reason for a careful examination of the nature and extent of the development or subdivision, and the relevance of the condition to it.

147 I cannot agree that the Act to which the Court was referring in *Lloyd* took away the proprietary right to subdivide without approval. In my opinion a more accurate statement of the position is that the Act made provision for the regulation of subdivision. This is particularly so because, in deciding whether to grant or withhold approval, and as to the appropriateness of conditions, the Board was bound to act reasonably and fairly, and in no way arbitrarily. Furthermore, to speak as if there were a proprietary right to subdivide without approval before the Act, and as if that right were an absolute one is to put the matter too high. The making of a subdivision that purports to create allotments without access to public roads will usually result in the creation of easements of necessity at common law[152]. Many subdivisions also involve the creation of new roads. This cannot be done unilaterally by the subdivider: the Crown or the local authority

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150 *Prentice v Brisbane City Council* [1966] Qd R 394; *Brisbane City Council v Mareen Development Pty Ltd* (1972) 46 ALJR 377; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170. A commission of inquiry (conducted by Bennett QC and established on 3 October 1966 by the Governor in Council of Queensland) inquired into the planning activities of the Brisbane City Council, a planning authority under Queensland enactments. The report of the Inquiry was made on 10 April 1967. It recorded many instances, not only of aggressive, but also of highly unreasonable and unlawful conduct by the Brisbane City Council in imposing conditions on subdivisional approvals or in refusing approvals altogether: see Queensland, Bennett QC, *Report of the Brisbane City Council Subdivision Use and Development of Land Commission*, June 1967 at 68-72.

151 See for example: *Finlay v Brisbane City Council* (1978) 36 LGRA 352; *Corsi v Johnstone Shire Council* (1979) 38 LGRA 316; *Carroll v Brisbane City Council* (1981) 41 LGRA 446; *Allsands Pty Ltd v Shoalhaven City Council* (1993) 78 LGERA 435; *Trehy & Ingold v Gosford City Council* (1995) 87 LGERA 262; *Western Australian Planning Commission v Erujin Pty Ltd* (2001) 115 LGERA 24; *Ben-Menashe v Ku-ring-gai Municipal Council* (2001) 115 LGERA 181.

152 See Megarry and Wade, *The Law of Real Property*, 6th ed (2000) at 1105-1106.

must be willing for this to occur and to accept the road as a public road, and to permit it to intersect, or make a junction with an existing public road. Also, apart from the practical constraints upon any subdivider compelling it to subdivide in such a way as to ensure appropriate access, configuration and shape and size of lots to enable them to be utilized, and to meet a market, or serve some other purpose, the creation of subdivisions of land under the Torrens system (as this land is) was always subject to a degree of supervision by the Registrar of Titles[153].

148 The passage that I have quoted from *Lloyd* refers to the judgment of Dixon J in *Swan Hill Corporation v Bradbury*[154]. The issue in that case was whether a municipal by-law prohibiting the erection of any building within the municipality unless with the approval of the Council, was within a power to make by-laws "regulating and restraining the erection and construction of buildings". The by-law was unanimously held to be beyond power. The case was one of statutory construction, and many of the observations regarding the exercise of discretionary Council's powers were obiter. Dixon J said[155] that an authority such as a Council had a discretion unlimited by anything but the scope and object of the instrument conferring it. That may be to state a familiar formula but it is not to state accurately and fully the relevant test. His Honour did go on to say that it is usually impracticable to say in advance what the permissible limits, within which the discretion is exercisable, will be. On any view however, it cannot be within the scope, and an object of either or both, of the Scheme Act and the TP Act to get the Foreshore Reserve for nothing, and without regard to relevant town planning considerations such as the effects of the proposed subdivisions, the demands and impacts that they may make upon the

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153 Section 166 of the *Transfer of Land Act* 1893 (WA) from its inception has had this effect, and when *Lloyd* was decided provided as follows:

> "**166.** Any proprietor subdividing any land under the operation of this Act for the purpose of selling the same in allotments shall deposit with the Registrar a map of such land if so required. Such map shall exhibit distinctly delineated all roads streets passages thoroughfares squares or reserves appropriated or set apart for the use of the purchasers and all permanent drains and also all allotments into which the said land may be divided marked with distinct numbers or symbols and shall also show the areas and shall comply in every respect with the Rules and Regulations for the time being for the guidance of surveyors when practising under this Act. In case a portion only of the land comprised in any certificate be subdivided the existing certificate shall be cancelled to the extent of such portion and a fresh certificate shall be issued for the same."

154 (1937) 56 CLR 746.

155 (1937) 56 CLR 746 at 758.

amenity and existing infrastructure, and the relevance of the ceding, free of cost of the Foreshore, to the Crown, to those considerations. Subsequent authority to which I will refer makes it clear that the test relating to conditions has more to it than the dictum of Dixon J suggests.

149 The other case to which the Court referred in *Lloyd* was *Water Conservation and Irrigation Commission (NSW) v Browning*[156]. With the greatest of respect I cannot regard this case as other than a product of its time, and as one in which the same conclusion would not be reached today. The authority there was a water authority charged with the power as lessor, of granting or refusing consent to the transfer of irrigation farm leases. Its decision, to withhold consent to a transfer to a naturalized Australian of Italian, that is to say enemy origin, was affirmed by the Court. The case very much turns upon its own facts and the relevant legislation, and provides little guidance to the resolution of an appeal which is concerned with planning conditions.

150 There are other reasons to doubt the correctness of *Lloyd*. The Justices in that case were critical of a statement by the primary judge in posing the question for his consideration in the way in which his Honour did, by referring to an expropriation of the land for the benefit of the Crown. They said[157]:

> "[T]here is here no expropriation for the benefit of the Crown in any real sense of the expression. True it is that if the land required for open space reserves is transferred to the Crown for park and recreation purposes as the conditions require, the beneficial title ... will pass ... without legal fetter. There will be a moral obligation on the Government to keep it reserved for the purposes mentioned, but no legally enforceable obligation. The ultimate sanction must be political only."

151 This passage cannot be regarded as a sound statement of the law relating to the future use of the Foreshore Reserve by the Crown in light of *Bathurst City Council v PWC Properties Pty Limited*[158] and the cases considered there[159].

Was the imposition of the condition lawful?

152 A later case in which this Court, constituted on this occasion by five Justices, considered the validity of conditions attaching to the approval of a

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156 (1947) 74 CLR 492.

157 (1962) 107 CLR 142 at 155.

158 (1998) 195 CLR 566.

159 See especially (1998) 195 CLR 566 at 582-583 [34]-[36], 585-592 [44]-[65].

subdivision, is *Cardwell Shire Council v King Ranch Australia Pty Ltd*[160]. The imposition of the condition there was governed by a Queensland enactment that expressly stated that a condition could not be imposed unless it was reasonably required by the subdivision of the land. I do not take this statutory test to be different from the test that should be applied to a subdivision under the TP Act. This is so because it seems to me to be highly unlikely that the legislature of Western Australia would have intended to confer upon any planning authority in that State a power to impose conditions that *were not reasonably required by the subdivision*. If it were otherwise, the authority could arbitrarily impose a condition that had little or nothing to do with the subdivision, or was quite unreasonable having regard to the likely consequences of the subdivision. Gibbs CJ, with whom the other four members of the Court (Mason, Wilson, Brennan and Dawson JJ) agreed, said this[161]:

> "The statutory test that has to be applied by a local authority in deciding whether to attach conditions to its approval in a case such as the present is whether the conditions are reasonably required by the subdivision. This means that the local authority, in deciding whether a condition is reasonably required by the subdivision, is entitled to take into account the fact of the subdivision and the changes that the subdivision is likely to produce – for example, in a case such as the present, the increased use of the road and of the bridge – and to impose such conditions as appear to be reasonably required in those circumstances."

153 As Gibbs CJ made clear however, that did not mean that the condition could be regarded as reasonable only if the product of its implementation would be for the exclusive benefit of persons connected with the subject land[162].

154 It seems to me that even though the Court was considering a condition which was governed by particular legislation in *Cardwell*, the same approach as was adopted there should be adopted under the TP Act despite that it does not use the word "reasonably".

155 The test stated in *Cardwell* is moreover, a similar test to the one adopted by the House of Lords in *Newbury District Council v Secretary of State for the Environment*[163]: that a condition must be for a planning purpose and not for any ulterior purpose, must fairly and reasonably relate to the proposed development,

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160 (1984) 58 ALJR 386; 53 ALR 632.

161 (1984) 58 ALJR 386 at 388; 53 ALR 632 at 635.

162 (1984) 58 ALJR 386 at 388; 53 ALR 632 at 635.

163 [1981] AC 578.

and, thirdly must not be so unreasonable that no reasonable planning authority could have imposed it[164]. It may be doubted whether the third limb of the test is necessary. It uses the language of *Wednesbury*[165], but if, as the second limb of the test requires, the condition must fairly and reasonably relate to the proposed development, it must be a condition, not simply justifiable as one which a reasonable planning authority could impose, but one which is fair and reasonable *in the circumstances of the particular case*. The reference therefore to *Wednesbury* unreasonableness serves to confuse, rather than to illuminate the issue in cases of potentially unlawful conditions. On any view therefore I do not think it appropriate to regard the language of *Lloyd*, particularly the passages that I have quoted as being applicable to contemporary planning problems and the resolution of this appeal.

156 The adoption by this Court (Gaudron, McHugh, Gummow, Hayne and Callinan JJ) in *Bathurst*[166] of what was said by Walsh J in *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council*[167] does not dictate a different conclusion. It is necessary to keep in mind everything that was said by Walsh J in the passage quoted in *Bathurst*, in particular that the discretion (to impose conditions) was not unlimited, and that the conditions must be "*reasonably* capable of being regarded as related to *the purpose* for which *the function* of the authority is being exercised"[168]. Neither the purpose nor the function of the authority is to get land for nothing for a planning purpose at large: the function and purpose of the authority is of deciding whether the subdivision should be permitted, and if so, whether any and which conditions reasonably and fairly relate to it and should be imposed.

157 The conclusion which I have reached is not affected by s 20C of the TP Act which provides that an owner may, with the approval of the local authority and the appellant, pay money in lieu of the provision of land for parks, recreation grounds or open spaces generally. It is clear that from the outset the appellant and the Crown in this instance were interested in the particular land, and not money in lieu of it. As the Scheme makes clear, they wanted all of the foreshore land in the vicinity for foreshore preservation as well as perhaps other purposes. There is not the slightest suggestion that the Crown or the appellant would have

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164 [1981] AC 578 at 599-600 per Viscount Dilhorne and at 607-608 per Lord Fraser of Tullybelton.

165 [1948] 1 KB 223.

166 (1998) 195 CLR 566 at 577.

167 (1970) 123 CLR 490.

168 (1970) 123 CLR 490 at 499 (emphasis added).

consented to take money rather than reserve and ultimately take the land. The fact that the land was reserved long before the subdivision or subdivisions were conceived means that the reservation could have nothing to do with them. Whilst it cannot be doubted that there is a power to impose a condition of the kind imposed here, the condition has to be one which is fairly and reasonably related to the subdivision or development, the application for the approval of which is to provide the occasion and need for its imposition: no attempt has been made by the appellant to establish that vital connexion. Section 20C is obviously designed to allow flexibility in cases such as ones in which the general policies of, for example, taking a certain percentage of land for parks, cannot be implemented, or other circumstances make it appropriate for the appellant or the Crown to take money instead of land.

The respondent's entitlement to compensation

158 What I have said so far, that the Tribunal failed to make the proper inquiry and erred in the other ways that I have described, is sufficient to dispose of the appeal in the respondent's favour. If I am correct in so holding then whether the respondent had made a claim within time or not for compensation, or otherwise had an entitlement to it is not determinative, and no further consideration of this appeal would be required. But, as the question was argued and because I take a different view of it from other members of the Court I now turn to that question.

Has the respondent a right to claim compensation?

159 As Gummow and Hayne JJ have explained in their reasons, the right to compensation stems from the application, by s 36 of the Scheme Act, of s 11 of the TP Act to the injurious effects of a Scheme. Sub-sections 11(1) to (4) of the TP Act provide as follows:

> "**11 Compensation**
>
> (1) Any person whose land or property is injuriously affected by the making of a town planning scheme shall, if such person makes a claim within the time, if any, limited by the scheme (such time not being less than 6 months after the date when notice of the approval of the scheme is published in the manner prescribed by the regulations), be entitled to obtain compensation in respect thereof from the responsible authority:
>
> Provided that a person shall not be entitled to obtain compensation under this section on account of any building erected, or any contract made, or other thing done with respect to land included in a scheme after the date of the approval of a scheme, or after such other date as the Minister may fix for the purpose, being not earlier than the date of the approval of the scheme.

Provided also that the local government may make agreements with owners for the development of their land during the time that the town planning scheme is being prepared.

(2) Whenever, by the expenditure of money by the responsible authority in the making and carrying out of any town planning scheme, any land or property is within 12 months of the completion of the work, or of the section of the work affecting such land, as the case may be, increased in value, the responsible authority shall be entitled to recover from any person whose land or property is so increased in value, one half of the amount of such increase, if the responsible authority makes a claim for that purpose within the time, if any, limited by the scheme, not being less than 3 months after the date when notice of the approval of the scheme is first published.

(3) Where a town planning scheme is altered or revoked by an order of the Minister under this Act, any person who has incurred expenditure for the purpose of complying with the scheme shall be entitled to compensation from the responsible authority, in so far as any such expenditure is rendered abortive by reason of the alteration or revocation of the scheme.

(4) Any question as to whether any land or property is injuriously affected or increased in value within the meaning of this section, and as to the amount and manner of payment (whether by instalments or otherwise) of the sum which is to be paid as compensation under this section, or which the responsible authority is entitled to recover from a person whose land is increased in value shall be determined by arbitration under and in accordance with the *Commercial Arbitration Act 1985*, unless the parties agree on some other method of determination."

160 Although the principles relating to confiscation or acquisition of property do not directly apply to conditions to attach to subdivisions under the TP Act, they do have relevance to the provisions relating to compensation under the Scheme Act[169].

161 It follows in my view, that the words in s 11(1) of the TP Act "[a]ny person whose land or property is injuriously affected by the making of a town

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169 cf *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 623 [38] per Gaudron J. See also *Kettering Pty Ltd v Noosa Shire Council* (2004) 78 ALJR 1022 at 1029-1030 [31]-[32]; 207 ALR 1 at 10 per McHugh, Gummow, Hayne, Callinan and Heydon JJ.

planning scheme shall ... be entitled to obtain compensation" should not be read as confined to a person who actually owned the land at the time that the scheme was made if the land has subsequently been sold. The section simply does not say that. Any person who owns land affected by a scheme is injuriously affected by the making of the Scheme even if that person only acquired the land after the Scheme was made. Section 11 is not the provision which specifies the time within which a claim must be made. It can be seen that it contemplates that the Scheme itself may specify a relevant time for the making of a claim and indeed that that time must be not less than six months after the Scheme becomes lawfully enforceable. Clearly it is possible that during such a period of not fewer than six months the property could change hands. Furthermore, the Scheme has a continuing adverse effect after it is first made by continuing to restrict prospective development of land subject to it. It is not without significance that the section does not use the word "gazettal" rather than "making".

162 Nor do I think that any other provisions of the Scheme Act preclude an owner becoming an owner subsequent to the making of the Scheme, from making a claim.

163 Section 36 of the Scheme Act has been amended from time to time but it is common ground that s 36(3) in its current form applies to this case. That section limits the time within which a claim must be made, and provides as follows:

> "(3) Subject to subsection (4), where under the Scheme any land has been reserved for a public purpose, no compensation is payable by the responsible authority for injurious affection to that land alleged to be due to or arising out of such reservation until –
>
> (a) the land is first sold following the date of the reservation; or
>
> (b) the responsible authority refuses an application made under the Scheme for permission to carry out development on the land or grants permission to carry out development on the land subject to conditions that are unacceptable to the applicant."

164 It can be seen that s 36(3) is phrased in such a way as to identify an event before which compensation may *not* be claimed. The relevant event is either the first sale following the date of the reservation, or the refusal by the responsible authority under the scheme of permission to carry out development on the land, or to carry out development on the land subject to conditions that are unacceptable to the applicant.

165 In order for s 36(3) to bear a construction that would defeat a claim for compensation following an application for subdivisional approval by a person

not the owner at the time of the making of the Scheme, and who is a purchaser from that owner or a subsequent owner, two implications must be read into it.

166 The first is, after the word "land" in each place in which it appears, the words "or land of which the land forms part" should be added because "the land" in question is the Foreshore Reserve and not the adjoining land. The other implication consists of the words "whichever shall first occur". There is no necessary reason why these words should be read into s 36(3). To read such words into the sub-section is to introduce unnecessary implications and to adopt an approach to the construction of a compensation provision which is inconsistent with the cases referred to in *Kettering*[170].

167 There are other reasons why the words should not be read into s 36(3). Section 36(3a) is not without its obscurities, but it does make it clear that compensation for injurious affection is payable only once unless the reservation changes as it did in fact here[171]. To prevent double or multiple payments is its principal purpose. It provides as follows:

> "(3a) Compensation for injurious affection to any land is payable only once under subsection (3) and is so payable –
>
> (a) under paragraph (a) of that subsection to the person who was the owner of the land at the date of reservation; or
>
> (b) under paragraph (b) of that subsection to the person who was the owner of the land at the date of application,
>
> referred to in that paragraph, unless after the payment of that compensation further injurious affection to the land results from —
>
> (c) an alteration of the existing reservation thereof; or
>
> (d) the imposition of another reservation thereon."

168 Section 36(4) does not produce any different a result. It is intended to ensure that an application for compensation is bona fide in the sense that if the event is the sale, it has been a sale genuinely made at the best possible price.

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170 (2004) 78 ALJR 1022 at 1029-1030 [31]-[32]; 207 ALR 1 at 10 per McHugh, Gummow, Hayne, Callinan and Heydon JJ.

171 The boundary was altered in 1994 by the "South West Corridor Omnibus Amendment No 960/33."

169 The fact is that if the construction that I prefer is correct, then the price on a sale following the date of the reservation should include a component for the compensation to which the purchaser or any subsequent purchaser will become entitled, if in due course the responsible authority refuses an application, or imposes unacceptable conditions in respect of an application, by a subsequent purchaser or purchasers. It may be that there is little or no loss on the first sale following the date of the reservation. Loss, if any, or the true and full loss, may only crystallise and be sustained by a purchaser seeking to develop the land, who is then able to see and assess the precise and full adverse effect of the Scheme. It was for this reason no doubt that the Full Court thought that some statements in the recent decision of this Court in *Moneywood Pty Ltd v Salamon Nominees Pty Ltd* **[172]** were relevant.

170 Section 36(3a) is not an easy provision to construe. The words "unless after the payment of that compensation" which appear in the section produce the result that it is only if compensation has already been paid and received, that the criterion for further compensation, of a change in the reservation, has to be satisfied.

171 There are other indications that the event giving rise to a right to claim has not occurred. Section 36(3) of the Scheme Act refers to, and identifies the relevant land as "any land [that] has been reserved for a public purpose". Section 36(3)(b) identifies the alternative event after which a claim for compensation can be made, as the refusal of an application, or the imposition of unacceptable conditions in relation to a proposed "development on the land". The application that was made here was an application for the subdivision, that is to say the development, of the adjoining land. As I understand it, the respondent has never made any application to subdivide, or otherwise develop the land reserved for a public purpose, the Foreshore Reserve. Accordingly, the event has not occurred, and the time within which an application should be made has not expired. Section 36(5) which provides that a claim must be made within six months of the relevant event again expresses the matter disjunctively without qualification and consistently with the earlier sub-sections.

172 The construction which I prefer and which eschews implications, provides a fairer result. It allows the claim to be made when the true effect of the Scheme becomes known and the full loss is incurred. In the meantime, the owner of the land remains liable for the rates and other charges payable in respect of it, and the appellant enjoys the advantage of a large measure of control over the land, and the postponement of any liability to acquire or pay for it. If the owner wishes to claim immediately following the making of the Scheme, then that is a matter for

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172 (2001) 202 CLR 351 at 407 [175].

it. Because only one claim can be made prudence would ordinarily dictate that it be made as and when the full loss is ascertainable.

173 The construction which I consider to be correct is also consistent with the relevant extrinsic materials which were in evidence. The Metropolitan Region Scheme Report 1962 with which this Scheme was submitted for Parliamentary approval pursuant to the Scheme Act made this acknowledgment. "The depreciation [of the reserved land] in value is, in many instances hypothetical. It becomes real only when property *is sold at a value depressed by the reservation, or when development is frustrated by a refusal of consent*." Later this appears in the Report:

> "183 Different considerations arise in respect of compensation and reservations. As discussed earlier in this Report, the Authority believes it essential that legislative provision be made for compensation in respect of reservations to be contained to those areas where a sale at a depressed price has been effected or where consent for development has been withheld. There is accordingly no time specified in the Scheme within which a compensation claim must be lodged in respect of reservations. These may be expected to arise at any time following either a sale at a depressed price or a decision under the Scheme to refuse consent for development, and they must be lodged within six months thereafter."

174 The use of the word "either", absent any reference to the first occurrence of either of the alternative events, and the reference to a *sale* at a depressed price, suggest that the emphasis is upon the ascertainment of the true loss, and the actual event which gives rise to it. Why, it may be asked should the Crown get the land for nothing unless that reasonably and relevantly fulfils a proper planning purpose relating to the subdivisions? It should be remembered that the reservation was made years before any subdivision was undertaken. It is difficult to see how then the fact of a subdivision or subdivisions could provide a basis for the ceding of the land, let alone the ceding of it free of cost in 1998.

175 The Second Reading speech for the amendment of the Scheme Act is to a similar effect to the Report. The responsible Minister said this[173]:

> "The Bill also amends the compensation provisions in respect of the metropolitan region scheme. This amendment arises from a consideration of the financial resources of the metropolitan improvement fund and problems of planning authorities in other States where claims for compensation have totalled many millions of pounds – far beyond the

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173 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 September 1962 at 820.

resources of the responsible authorities. It has been said that many of these claims were due to the uncertainty of the owners in respect of their right.

As indicated in the report submitted by the authority, it is quite impossible to contemplate the acquisition immediately, or over a short period of time, of land which will not be required for many years ahead and the cost of which will, in the aggregate, run to many millions of pounds. However, as the Act stands, the authority could be confronted with a heavy claim for compensation in respect of the whole of the land reserved under the scheme and far beyond its financial ability to meet. Nevertheless, it is necessary that the land be reserved in the scheme for this future need; and the reservation imposes an obligation in respect of compensation.

It can properly be argued that reservation under the scheme depreciates the value of land. However, the depreciation is, in many cases, hypothetical and becomes real only when the land is sold at a price which reflects this depreciation, or when development is frustrated by a refusal of consent under the scheme. The amendment proposes that compensation for injurious affection be limited to two circumstances: where a sale is effected at a depressed value attributable to reservation under the scheme, or where consent to develop is refused on the ground of reservation under the scheme.

These provisions are designed to protect the interests of landowners as well as to secure that the scheme shall not be defeated by the inability of the fund to meet claims upon it. The authority is already empowered to purchase land; and, with the provisions now proposed, there should be no problem in dealing with a case of individual hardship should it arise."

The speech also indicates that it was in the interest of the Crown to defer payment of compensation. The responsible Minister did not suggest that any reservations made by the Scheme needed to be made because of any subdivisions, current or prospective.

176 Even if therefore, as I do not think to be the case, the existence of a continuing right or an unspent right to compensation was a necessary plank in the respondent's case, that plank is in place and is sound.

177 Accordingly I would dismiss the appeal with costs.

178 HEYDON J. It is convenient to employ the terminology and abbreviations appearing in the reasons for judgment of Callinan J.

Questions which do not arise

179 *The issue below and s 36 of the Scheme Act.* The crucial issue below depended on s 20(1)(a) of the TP Act. It gave the appellant power to grant approval for the subdivision of lots on conditions. The question was whether the appellant had power to impose on three approvals for subdivision of the relevant land a condition that the Foreshore Reserve be vested in the Crown "free of cost and without any payment of compensation by the Crown." The resolution of that question turns largely on the significance of the finding by the Tribunal that one "intended effect of the condition is to defeat the operation of Part V of the [Scheme Act, which] provides … that compensation may be claimed for injurious affection of land that is reserved under [the Scheme]". That finding, which loomed large in the respondent's Notices of Appeal to McLure J and to the Full Court, is crucial to the respondent's argument.

180 Conditions imposed by the appellant under s 20(1)(a) must not be imposed for any purpose extraneous to those permitted by the legislation. A planning authority which intends a particular effect may be said to have a purpose of bringing about that effect. Hence it is strictly irrelevant whether, assuming that the condition had not been imposed, the respondent would have been able to claim compensation: it suffices that the appellant had – if it did – the purpose of defeating any claim open to the respondent, which in the circumstances was outside the range of objects permitted by s 20(1)(a)[174]. A decision can be invalidated by an extraneous purpose even though the goal which underlies that purpose is futile or unnecessary or impossible of achievement. For that reason, the arguments of the parties in the courts below about whether the respondent had any right to compensation, and the discussions of those arguments by the courts below, are irrelevant. Further, for that reason, and for the reasons given by Callinan J[175], it is not necessary to examine a question not raised below but raised in this Court, namely the true construction of s 36 of the Scheme Act. Since the question is one peculiarly affecting the complex and specialised subject of town planning law in a particular State, it would be valuable for this Court to have the assistance of a specialist institution charged with relevant responsibilities, like the Tribunal, as well as that of the judges of the Supreme Court of Western Australia. The Tribunal will certainly have had, and the judges will probably have had, vastly greater experience of the legislation than this Court. In view of the way the proceedings were conducted below, this Court has been deprived of that valuable assistance.

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174 See McHugh J's reasons at [65].

175 Callinan J's reasons at [122].

181 *Bad faith/improper purpose.* In argument, some colourful language was used about the relevant inquiry. The key question posed below is not whether the appellant acted in bad faith, or mala fide, or improperly, in one of the ranges of meaning which those words bear. The question is simply whether the appellant was actuated by a purpose which, in the circumstances of the case, was extraneous to those permitted by s 20(1)(a).

182 *Was* Lloyd v Robinson *right?* The appellant placed *Lloyd v Robinson*[176] at the centre of its argument. The respondent, on the other hand, contended that *Lloyd v Robinson* could be distinguished. But the respondent did not contend that *Lloyd v Robinson* should be overruled or that any particular part of the reasoning in it, so far as it rested on propositions of law, should be departed from. Those steps should not be taken unless it is necessary to do so. It is not necessary to do so for the following reasons. The question in *Lloyd v Robinson* was whether particular conditions imposed on a subdivision of the land involved in that case on 16 March 1960 were validly imposed (and, in particular, whether they had extraneous objects). That question is entirely distinct from the question in this case – whether the condition imposed on the subdivisions of the land on 17 May and 7 September 2000 had an extraneous object. In *Lloyd v Robinson*, this Court answered the question before it by finding that the imposition of the conditions by the Board was in order to serve purposes which it was justified in pursuing. It does not follow from that answer that the same answer should be given to the question raised by this case, and hence it is not necessary to consider the correctness of *Lloyd v Robinson*.

Did the Commission have an extraneous purpose?

183 The Tribunal's finding that one intended effect of the impugned condition was to defeat any claim the respondent had to compensation was arrived at by construing the condition[177]. As the respondent said in ground 4 of its Notice of Appeal to the Full Court, the appellant did not, in the appeal to McLure J, contest that finding in any notice of cross-appeal or notice of contention. And McLure J accepted the finding of intended effect. She said of the finding[178]:

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176 (1962) 107 CLR 142 at 153-155 per Kitto, Menzies and Owen JJ.

177 *Temwood Holdings Pty Ltd v Western Australian Planning Commission* [2001] WATPAT 4 at [7], where the Tribunal referred to the effects of the condition "as it is worded".

178 *Temwood Holdings Pty Ltd v Western Australian Planning Commission* (2001) 115 LGERA 152 at 173-174 [79].

"The tribunal is saying nothing more than it infers from the wording of the condition that it was designed to achieve the stated effects. The tribunal then goes on in its reasons to test the validity and conduct a merits review of the condition. In particular, it makes an assessment that:

(a) it is necessary for the commission in appropriate circumstances to impose a vesting condition because of the legitimate community concern that a developer contribute to infrastructure cost to the extent permissible on the basis that the condition is a price for the privilege of subdivision …;

(b) the condition does not take away a future right to compensation but requires the giving up of the reserved land free of cost which is the effect the condition has on an owner of unreserved land …; [and]

(c) having considered the history of the subdivision (set out earlier in these reasons) and the relationship between the relevant land and the condition, the condition had a clear planning purpose."

184 Her Honour then said[179]:

"the focus of the [Scheme Act] and the [Scheme] is to secure (eventual) public ownership of land reserved for public purposes. That is a planning purpose. That same purpose of achieving public ownership of land to be used for public purposes is achieved by the condition. It is no less a proper planning purpose because it is achieved at an earlier time as part of subdivisional approval of land of which the reserve forms part."

185 Later, McLure J outflanked the finding of intended effect as follows[180]:

"In this case there is no basis in the evidence to support a finding that the sole or dominant or substantial purpose of the condition was to prevent the [respondent] ever claiming compensation under the [Scheme Act]. It cannot be disputed that the intended effect of the 'free of cost' element of the condition is to secure public ownership of the land at no cost to the public purse. That does not render the purpose of a ceding condition improper … . It is not converted to an improper effect (and by inference,

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179 *Temwood Holdings Pty Ltd v Western Australian Planning Commission* (2001) 115 LGERA 152 at 175 [86].

180 *Temwood Holdings Pty Ltd v Western Australian Planning Commission* (2001) 115 LGERA 152 at 176 [90].

purpose) because the ceding of the land has the practical consequence of preventing the satisfaction of a condition upon which entitlement to compensation under the [Scheme Act] depends."

186 I would agree with the reasons of Olsson AUJ for rejecting the reasoning of McLure J (and hence the reasoning of the Tribunal) in the first passage quoted[181], and with the reasons which relate to that reasoning given by Callinan J[182] (apart from the criticism of *Lloyd v Robinson*[183]). I also agree with the reasons given by Olsson AUJ for rejecting the reasoning in the second passage quoted[184], which are quoted by Callinan J[185]. The third passage quoted from the reasons for judgment of McLure J erroneously assumes that an intended effect of securing public ownership free of cost is, in this case, an intra vires purpose, and can be distinguished from the substantial purpose of denying the respondent compensation. I would agree with Olsson AUJ's reasons[186], quoted by Callinan J[187], for differing from her Honour's conclusion. I agree with Callinan J[188] that it is possible that in some cases an intended effect, and hence a purpose, of a condition that land be ceded to the Crown without compensation would not be extraneous to the purposes which are within s 20(1)(a), but that is not so here.

Orders

187 The appeal should be dismissed with costs.

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181 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484 at 498-499 [78] and [82]-[84].

182 Reasons of Callinan J at [129]-[132].

183 (1962) 107 CLR 142 at 153-155.

184 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484 at 499-500 [85]-[93].

185 Reasons of Callinan J at [137]-[140].

186 *Temwood Holdings Pty Ltd v Western Australian Planning Commission [No 2]* (2002) 25 WAR 484 at 500 [96].

187 Reasons of Callinan J at [140].

188 Reasons of Callinan J at [133].