

HIGH COURT OF AUSTRALIA

FRENCH CJ
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

Matter No S384/2008

R & R FAZZOLARI PTY LIMITED

APPELLANT

AND

PARRAMATTA CITY COUNCIL

RESPONDENT

Matter No S385/2008

MAC'S PTY LIMITED

APPELLANT

AND

PARRAMATTA CITY COUNCIL & ANOR

RESPONDENTS

R & R Fazzolari Pty Limited v Parramatta City Council
Mac's Pty Limited v Parramatta City Council
[2009] HCA 12
2 April 2009
S384/2008 & S385/2008

ORDER

Matter No S384/2008

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 11 June 2008 and in their place order that:*
 - (a) *paragraph 2 of the orders of the Land and Environment Court of New South Wales made on 28 September 2007 be set aside; and*
 - (b) *the appeal to the Court of Appeal be otherwise dismissed with costs.*

Matter No S385/2008

1. *Appeal allowed with costs.*
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 - (b) *the appeal to the Court of Appeal be otherwise dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with I J Hemmings for the appellants (instructed by Hunt & Hunt Lawyers)

A Robertson SC with R J Carruthers and C R Ireland for the respondent in Matter No S384/2008 and the first respondent in Matter No S385/2008 (instructed by Blake Dawson Lawyers)

Submitting appearance for the second respondent in Matter No S385/2008

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

R & R Fazzolari Pty Limited v Parramatta City Council Mac's Pty Limited v Parramatta City Council

Real property – Compulsory acquisition – Where *Local Government Act* 1993 (NSW) ("LG Act"), s 186(1), provided that council may acquire land "for the purpose of exercising any of its functions" – Where LG Act, s 188(1) provided that council may not acquire land by compulsory process if land being "acquired for the purpose of re-sale" – Relationship between purpose of exercising any council functions and purpose of re-sale – Meaning of "purpose of re-sale" – Whether acquisition of land by council pursuant to development agreement requiring council to hold land acquired on trust for private developer, in exchange for money and money's worth, as part of larger public-private partnership, is acquisition for purpose of re-sale.

Real property – Compulsory acquisition – Where LG Act, s 188(2)(a) provided that land may be acquired by compulsory process even if acquisition for purpose of re-sale if land in question adjoins or lies in vicinity of other land acquired at same time under LG Act, Pt 1 of Ch 8, for purpose other than purpose of re-sale – Where adjoining land comprised public roads already vested in fee simple in council – Where *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW), s 7B provided that State authority authorised to acquire land by compulsory process may do so even where land already vested in authority – Whether adjoining land nevertheless acquired under LG Act, Pt 1 of Ch 8.

Statutes – Interpretation – Presumption that legislature does not intend to interfere with property rights unless contrary intention manifest – Consequences for identification of purpose of acquisition.

Words and phrases – "function", "public-private partnership", "purpose of re-sale", "re-sale".

Local Government Act 1993 (NSW), ss 24, 26, 186, 187, 188, 400B(1), 400B(2).
Land Acquisition (Just Terms Compensation) Act 1991 (NSW), s 7B.
Roads Act 1993 (NSW), ss 7(4), 145(3), 146(1)(e).

FRENCH CJ

Introduction

- 1 Parramatta City Council ("the Council") is a council constituted for the area of the City of Parramatta under the *Local Government Act* 1993 (NSW)¹ ("the LGA"). It is "a body politic of the State with perpetual succession and the legal capacity and powers of an individual"². Powers are conferred on the Council by the LGA. They include the power given by s 186 for the Council to "acquire land ... for the purpose of exercising any of its functions"³. In the case of a compulsory acquisition, that power is constrained by s 188(1), which provides:

"A council may not acquire land under this Part by compulsory process without the approval of the owner of the land if it is being acquired for the purpose of re-sale."

The constraint is qualified:

"(2) However, the owner's approval is not required if:

- (a) the land forms part of, or adjoins or lies in the vicinity of, other land acquired at the same time under this Part for a purpose other than the purpose of re-sale".

The term "function" in s 186 includes "a power, authority and duty"⁴.

- 2 On 1 June 2007 the Council sent proposed acquisition notices to the owners of land in a block in the Parramatta city centre bounded by Smith, Darcy, Church and Macquarie Streets. The acquisitions were related to the redevelopment of the block. It was to be called "Civic Place" upon completion. The redevelopment was to be carried out under a Public Private Partnership ("PPP") made pursuant to the LGA between the Council and two companies, Grocon (Civic Place) Pty Ltd ("GCP") and Grocon Constructors Pty Ltd ("GCPL") (together referred to as "Grocon"). The PPP was to be effected by a development agreement between the Council and Grocon. Under that agreement

1 LGA, s 219.

2 LGA, s 220(1).

3 LGA, s 186(1).

4 LGA, Dictionary.

the Council would transfer certain of the acquired land to Grocon and receive substantial financial payments and other consideration from Grocon.

3 Two owners, R & R Fazzolari Pty Ltd ("Fazzolari") and Mac's Pty Ltd ("Mac's") (together referred to as "the appellants"), challenged the proposed acquisitions in the Land and Environment Court of New South Wales as being for the purpose of re-sale and therefore falling within the constraint on acquisition imposed by s 188(1) of the LGA. Biscoe J in the Land and Environment Court held the proposed acquisitions to be unlawful. Declarations were made and injunctive relief granted accordingly⁵.

4 The Council appealed to the Court of Appeal of New South Wales. On 11 June 2008, the Court of Appeal unanimously allowed the appeals and set aside the declarations and orders made in the Land and Environment Court⁶. On 26 August 2008, the appellants were granted special leave to appeal against the decisions of the Court of Appeal.

5 The resolution of these appeals depends upon the proper construction of the LGA in so far as it defines the powers of a council to acquire land by compulsory process. In accordance with established principles of statutory interpretation the preferable construction is that which authorises the least interference with private property rights. That requires a focus upon the purpose for which the Council proposes to acquire each of the parcels of land the subject of its notices.

6 In this case the Council proposes to dispose of the acquired land to the developer and to receive consideration in money and other benefits. It seeks to characterise the purpose of the acquisition by reference to the larger ends of the Civic Place development. But it is what it intends to do with the appellants' land which, in this case, defines the relevant purpose which is that of re-sale.

7 In my opinion, the appeals should be allowed with costs. The declarations made by the primary judge should be restored and further orders made as proposed in the joint judgment.

5 *Mac's Pty Ltd v Minister Administering Local Government Act 1993* (2007) 155 LGERA 362.

6 *Parramatta City Council v R & R Fazzolari Pty Ltd; Parramatta City Council v Mac's Pty Ltd* (2008) 162 LGERA 1.

3.

The statutory and contractual framework

8 The essential features of the statutory and contractual framework of the proposed acquisitions are:

1. The *Environmental Planning and Assessment Act* 1979 (NSW) ("EPAA") provides for the making by the Minister of regional environmental plans in respect of a region⁷.
2. The *Sydney Regional Environmental Plan No 28 – Parramatta* ("SREP28") was made under the EPAA.
3. Clause 10 of SREP28 provides for the preparation by the Council of master plans outlining, inter alia, detailed provisions relating to development of land to which the master plan applies.
4. A master plan for the Civic Place Development ("the Master Plan") was prepared by the Council pursuant to SREP28, adopted on 14 May 2003 and came into effect on 1 June 2003.
5. The LGA provides that a council can enter into a PPP, being an arrangement between the council and a private person for the purpose, inter alia, of providing public infrastructure and facilities⁸.
6. The LGA entitles a council entering into a PPP for a particular project "to proceed with the carrying out of the project" under the PPP⁹.
7. A PPP was entered into by the Council with Grocon by way of an agreement entitled the "Civic Place Development Agreement" ("the Development Agreement") dated 21 July 2006.
8. Conditions precedent of the Development Agreement included the acquisition, in the name of the Council, of Darcy Street and Church

7 EPAA, s 51.

8 LGA, ss 400B and 400I. Councils entering such partnerships must comply with the requirements of Pt 6 of Ch 12 of the LGA.

9 LGA, ss 400I and 400E – the entitlement is subject to Div 2 of Pt 6 of Ch 12 of the LGA.

4.

Street¹⁰, vested in it under the *Roads Act* 1993 (NSW), and the freehold of properties in those streets including land owned by the appellants.

9. Pursuant to the Development Agreement, Grocon was to construct a residential building of 31 storeys, known as Park Apartments, on the land owned by Mac's and a 40 storey commercial office tower, known as the Atria, on the land owned by Fazzolari with one level of retail and four levels of car parking beneath the surface of both areas of land.
10. The Development Agreement provided that a number of parcels of land, including the appellants', would be consolidated and re-subdivided with most of it transferred to Grocon initially by a declaration of trust followed by transfer of legal title according to progressive completion of the development.
11. Under the Development Agreement the Council was to receive from Grocon upfront participation payments, a revenue share, council facilities and public domain and a housing cash contribution.
12. The *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) ("Just Terms Act") sets up procedures for the compulsory acquisition of land but, generally speaking, is not a source of power to acquire land¹¹. There is a relevant exception to that general proposition. An authority of the State which is authorised by law to acquire land by compulsory process in accordance with the Just Terms Act may so acquire the land if it is vested in the authority itself¹².

The Development Agreement and the Deed of Trust

9. The Development Agreement provided that, upon the requisite acquisitions of Darcy and Church Streets and certain private properties, the Council and GCP were required to do anything that either might reasonably require to ensure that the properties became part of the defined trust land¹³. The trust land was to be included in the site of the proposed development¹⁴.

10 The Development Agreement refers to Darcy and Church Streets. The Council, however, applied for approval to acquire Darcy Street and *parts of* Church Street.

11 Just Terms Act, s 7.

12 Just Terms Act, s 7B.

13 Development Agreement cl 5.3(b).

14 See Attachment 4 to Exhibit F of the Development Agreement identifying the trust land which included the appellants' properties.

10 The appellants' properties, if acquired by Council, were to be subject to a declaration of trust by the Council in terms of a Deed of Trust exhibited to the Development Agreement¹⁵. The trustee was the Council and the beneficiary was GCP. The recitation to the Deed was in the following terms:

- "A The Beneficiary is the trustee of the Grocon Parramatta Trusts.
- B The Beneficiary has agreed to procure the development of the Trust Land on the terms and conditions set out in the Development Agreement.
- C Pursuant to the terms of the Development Agreement, including payment of the Transfer Consideration by the Beneficiary, the Trustee has agreed to hold the Trust Land and all Receipts and Rights on trust for the Beneficiary (in its capacity as trustee of the Grocon Parramatta Trusts) as provided in this deed."

The term "Transfer Consideration" was not defined in the Deed of Trust or the Development Agreement.

11 Under the Deed of Trust the Council agreed with GCP, inter alia, that it would exercise its power to transfer or otherwise deal with the trust land in any manner that GCP requested¹⁶.

12 The general operation of the trust was set out in a document entitled "Outline of Key Development Agreement Provisions", provided to Council before it entered into the Development Agreement. That explanation was in the following terms¹⁷:

"The effect of the Land Trust is as follows:

- (a) Council will transfer the equitable title of the site to GCP (that is an effective transfer of title to GCP);
- (b) Council will, however, remain registered as the owner on the land titles register maintained by the NSW Land & Property Information;

15 Development Agreement Exhibit Z.

16 Trust Deed cl 6.1(b).

17 Trust Deed cl 3.2.

6.

- (c) when the Council Related Works and the Open Space Works are completed, legal title to those parcels will be progressively transferred to Council;
- (d) when the Development Component is completed and subdivided into each of the individual parcels containing the different staged office, retail, residential and car park elements of the Development Component, Council will execute a transfer of the legal title in those parcels progressively to the Developer or its nominee or will be changed as trustee of the trustee [sic] (so as to effect that transfer);
- (e) the Developer will indemnify Council for all costs arising from the Land Trust, including any stamp duty, land tax, council or other rates, insurance costs or other costs; and
- (f) if additional land is acquired by the Developer, such as the Australia Post Site, this will be incorporated into the trust, at the request of the Developer."

13 Various payments were to be made by both Grocon and the Council under the terms of the Development Agreement. These were summarised in the outline document. The key payments were:

1. An initial cash payment of \$51 million (plus GST) by GCP to the Council ten business days after the date on which the last of the conditions precedent was satisfied or waived, subject to a proportionate reduction if the grant of development consent did not achieve the minimum acceptable floor space area.
2. 3.8 per cent of project revenues to be paid by GCP to the Council.
3. An additional payment by GCP to the Council in relation to the residential component of the project.
4. An additional payment to the Council by GCP in the event that total revenue from the project exceeded the total cost of the project by an agreed percentage ("Super Profit Share").
5. A payment by the Council to GCP of \$29.7 million (plus GST) as a contribution to defined "Council Related Works" on the date of expiry of a fit-out period after notice of practical completion and upon written notice by GCP indicating that the project revenue exceeded \$400 million.
6. A payment by the Council not exceeding \$8.87 million by way of rental covering a three year period during which it is entitled to remain in its

existing facilities or to new premises being constructed as part of the Council Related Works.

Council's applications for compulsory acquisition approval

14 On 24 December 2003, the Council applied to the Department of Local Government seeking ministerial approval for the compulsory acquisition of private properties in Darcy Street and on 24 November 2004 applied for approval for the compulsory acquisition of Darcy Street itself. The Darcy Street private property included Fazzolari's land at 20-22, 24 and 26 Darcy Street. Ministerial approval for the acquisition of Darcy Street, the Darcy Street properties and also 160 Church Street, the land owned by Mac's, was notified to the Council by letter dated 15 December 2006 from the Director General of the Department of Local Government.

15 On 13 December 2006 the Council applied to the Department of Local Government seeking ministerial approval for the compulsory acquisition of part of Church Street. Item 4 of Annexure 2 to that application was headed "Purpose of the Acquisition". This required a statement of the "public purpose" for which the land was being acquired. Reference was made to the Development Agreement and the provision, pursuant to that Agreement, of 12,000 square metres of public open space in the Parramatta CBD together with various other community facilities. The Council said:

"The inclusion of part of Church Street will result in the delivery of an additional 2,925 square metres of revitalised public open space. The provision of these public facilities will not be feasible without including Church Street and Darcy Street."

Its statement continued:

"The purpose of acquiring the relevant part of Church Street is to enable Parramatta City Council to:

- own the land free of encumbrances and interests;
- close this part of Church Street; and
- include part of Church Street in the overall Civic Place Development,

so that the Civic Place Development including the expected public facilities can proceed."

Reference was also made to the acquisition of a substratum beneath Church Street contiguous to the Civic Place site which would be transferred to the

developer, GCP, at a later date for the purpose of construction of public car parking and one level of retail development.

16 Annexure 1 to the application set out a checklist of information effectively requiring references to be given to where that information could be found in the text of the completed application. One of the items of information required was a "[s]tatement on why any resale proposal is ancillary to the purpose of the acquisition". The Council identified Item 9.1 of Annexure 2 in answering that request. Item 9.1 of Annexure 2 appeared under the heading "Re-sale" and repeated the substance of what appeared in Item 4 above.

17 A further requirement of the checklist was:

"(If acquisition is for re-sale) Indication of any intervening council activity, such as prior subdivision approval by the council."

The Council referred to Item 9.2 and Attachment I of Annexure 2. Attachment I referred to the transfer to GCP of the Church Street substratum already covered in Item 4. On 14 March 2007, the Council was notified by the Director General of the Department of Local Government of ministerial approval for the acquisition of part of the Church Street road reserve.

18 In respect of the compulsory acquisition of part of Darcy Street, the General Manager of the Council sent a proposed acquisition notice to the Council itself. The notice addressed to the Council began:

"The Parramatta City Council of New South Wales requires the whole of your interest in the land comprising Darcy Street, Parramatta, for a public purpose, namely the Civic Place Development. A full description and title details of the land are in the attached schedule."

The trial judge's findings

19 The primary judge, Biscoe J, reached the following principal conclusions:

1. The decision of the Council to acquire the appellants' properties compulsorily was not made for the purpose of exercising any of its functions within the meaning of s 186(1) of the LGA¹⁸.
2. The decision of the Council to acquire the appellants' properties compulsorily was not made for the purpose of exercising any of its functions under s 186(2)(b) of the LGA¹⁹.

18 (2007) 155 LGERA 362 at 443 [227], 449 [245].

3. The Council was seeking to acquire the appellants' properties compulsorily for the purpose of re-sale within the meaning of s 188(1)²⁰.
4. The appellants' properties did not adjoin or lie in the vicinity of other land to be acquired under the LGA for a purpose other than a purpose of re-sale within the meaning of s 188(2)(a)²¹.

20 The primary judge found that the constraint imposed on the power of compulsory acquisition by s 188(1) applied to the proposed acquisition of the appellants' properties. He said²²:

"In my opinion, a re-sale within the meaning of s 188 includes a transfer of land for a consideration which includes money. That is sufficient to cover what the council intends to do with the applicants' land in the present case."

21 The possibility under the Deed of Trust and the Development Agreement that the properties could return to full ownership of the Council if the project were to cease was no answer to the application of s 188(1). His Honour said²³:

"Relevantly, s 188(1) is only concerned with whether the proposed acquisition of the applicants' land is for '*the purpose*' of *re-sale*, not with a possibility that a re-sale contemplated by a contract might not occur in the event that the contract does not go ahead." (emphasis in original)

22 The question which arose under s 188(2)(a) was whether the appellants' properties adjoined or lay in the vicinity of other land to be acquired at the same time under the LGA for a purpose other than a purpose of re-sale within the meaning of s 188(2)(a). The Council argued that its acquisition of Church Street and Darcy Street was other than for re-sale. A purpose of acquiring the relevant part of Church Street was to "provide open space for giving effect to the development"²⁴. A purpose of acquiring a part of Darcy Street was the creation

19 (2007) 155 LGERA 362 at 449 [247], 457 [277].

20 (2007) 155 LGERA 362 at 457 [278], 460 [292].

21 (2007) 155 LGERA 362 at 460 [293], 461 [298].

22 (2007) 155 LGERA 362 at 460 [290].

23 (2007) 155 LGERA 362 at 460 [291].

24 (2007) 155 LGERA 362 at 460 [294].

of Station Square which would also be open space. His Honour rejected the Council's argument. He held that the reference to "other land" in s 188(2)(a) is a reference to land not already owned by the Council. The Council was already the owner of Church Street and Darcy Street. It could not rely upon the contemporaneous "acquisition" of its existing interest in those streets. In any event the purpose for which Darcy Street and Church Street were to be acquired included re-sale as a substantial purpose.

- 23 His Honour made declarations that the proposed acquisitions were unlawful. Injunctive relief was also granted preventing publication of the proposed acquisition notices in the *New South Wales Government Gazette* and further steps to compulsorily acquire the properties.

The Court of Appeal judgment

- 24 The principal judgment in the Court of Appeal was delivered by Tobias JA, with whom Hodgson JA and Palmer J agreed subject to their own concurring reasons²⁵. Key conclusions in the judgment of Tobias JA were:

1. The implementation of the Master Plan was a function of the Council such that s 186(1) empowered it to acquire land for the purpose of exercising that function²⁶.
2. The Council's purpose in acquiring the appellants' properties was at all times, and remained, the implementation of the Civic Place project as contemplated by the Master Plan²⁷.
3. The primary judge's conclusion in relation to s 186(1) was incorrect²⁸.
4. The s 186(2)(b) question did not arise²⁹.
5. The Development Agreement did not propose a "re-sale" of the appellants' land within the meaning of s 188(1). The primary judge's conclusion in relation to s 188(1) was incorrect³⁰.

25 (2008) 162 LGERA 1.

26 (2008) 162 LGERA 1 at 38 [143].

27 (2008) 162 LGERA 1 at 43 [176].

28 (2008) 162 LGERA 1 at 43 [177].

29 (2008) 162 LGERA 1 at 43-44 [178].

30 (2008) 162 LGERA 1 at 46 [196].

6. It was unnecessary to deal with the subsidiary questions arising under s 188(2)(a)³¹.

25 There is no issue on the appeal to this Court about the conclusion of the Court of Appeal that, subject to any constraint imposed by s 188, the Council had power to make the proposed acquisitions under s 186. It is sufficient therefore to refer briefly to the reasoning of Tobias JA on the s 188 questions.

26 Tobias JA held that the critical question not answered by the primary judge was whether the purpose, which he found the Council had, of transferring the appellants' land to Grocon for consideration, was its substantial purpose³². He found³³:

"The documentary history of this matter makes it clear in my view that the Council proposed and needed to proceed with the acquisition, if necessary by compulsory process, of the [appellants'] land irrespective of whether it was ultimately transferred to Grocon or any other developer."

His Honour adopted what he called³⁴ "the test adumbrated by the High Court in *CC Auto Port Pty Ltd*³⁵" requiring identification of "'the initiating and abiding purpose' of the proposed acquisition". He said³⁶:

"On the basis of that test, in my opinion the purpose of the proposed acquisition of the [appellants'] land was not one of re-sale."

27 Tobias JA also rejected the proposition that the proposed acquisitions involved a re-sale of the appellants' land. He relied upon *Chan v Dainford Ltd*³⁷ for the proposition that the ordinary meaning of "sale" is the exchange of

31 (2008) 162 LGERA 1 at 46 [197].

32 In the sense used in *Thompson v Randwick Corporation* (1950) 81 CLR 87; [1950] HCA 33.

33 (2008) 162 LGERA 1 at 45 [186].

34 (2008) 162 LGERA 1 at 45 [188].

35 *CC Auto Port Pty Ltd v Minister for Works* (1965) 113 CLR 365 at 381; [1965] HCA 55.

36 (2008) 162 LGERA 1 at 45 [188].

37 (1985) 155 CLR 533 at 537; [1985] HCA 15.

property for money. He acknowledged that the word "sale" must take its meaning from its statutory context and that its ordinary meaning could be extended expressly or by implication. There was nothing in s 188(1) to extend that ordinary meaning either expressly or by necessary implication. There was nothing to extend it to the complex financial arrangements the subject of the Development Agreement³⁸.

- 28 A difficulty with this aspect of his Honour's reasoning is that the invocation of the "complex" nature of the financial arrangements the subject of the Development Agreement does not expose a basis for rejecting their characterisation as "re-sale" in so far as they involve the transfer of the appellants' land to Grocon and the payment by Grocon of consideration to the Council in relation to that transfer (albeit without specific allocation of any part of the consideration to the appellants' lots). Where compulsory acquisition of a number of parcels of land as part of some overarching development scheme is concerned the general proposition nevertheless applies that "[t]he validity of the acquisition of each parcel depends upon the facts concerning that parcel"³⁹.

Grounds of Appeal

- 29 The grounds of appeal set out in the notice of appeal for each of the appeals, amended by leave at the beginning of the hearing, were as follows:

- "2. The New South Wales Court of Appeal erred by construing the expression 'purpose of re-sale' in sub-section 188(1) of the *Local Government Act 1993* (New South Wales) to require re-sale to be the dominant purpose when the Act as a whole means that re-sale could only ever be subservient to some other authorised purpose or statutory function proposed to be carried out by the respondent.
- 2A. The New South Wales Court of Appeal erred by not characterizing the proposed eventual transfer to Grocon (Civic Place) Pty Ltd and Grocon Constructors Pty Ltd or their nominee or nominees, in return for money and money's worth, of land including the appellant's land as, in the circumstances, a proposed 're-sale' within the meaning of subsec 188(1) of the *Local Government Act 1993* (NSW)."

- 30 The grounds as amended identify two issues. The first, embodied in ground 2A, is whether the transfer of land, including the appellants' land, and the

38 (2008) 162 LGERA 1 at 46 [195].

39 *Estates Development Co Pty Ltd v State of Western Australia* (1952) 87 CLR 126 at 142; [1952] HCA 42.

13.

receipt of payment would be a "re-sale" of the appellants' land for the purposes of s 188(1). The second is whether the proposed acquisition was for the purpose of re-sale of the land.

Notice of Contention

31 By its notice of contention, the respondent sought to uphold the decision of the Court of Appeal on the ground:

"That the Court below failed to decided [sic] that if the appellants' land was to be acquired for the purpose of re-sale within the meaning of s 188(1), then the exception to s 188(1) contained in s 188(2)(a) would apply on the basis that the appellants' land forms part of, or adjoins or lies in the vicinity of, other land to be acquired at the same time under Part 1 of Chapter 8 of the *Local Government Act* 1993 (NSW) for a purpose other than the purpose of re-sale, such other land being the Darcy Street and Church Street road reserves or in the alternative each part of that land that is to be in Council ownership."

Legislative history

32 It is helpful to refer briefly to the legislative history leading up to the enactment of s 188.

33 In *Thompson v Randwick Corporation*⁴⁰ this Court held that powers of compulsory acquisition conferred by the *Local Government Act* 1919 (NSW) could only be exercised with respect to land purchased or resumed for a purpose authorised elsewhere in that Act. Where a council attempted to resume more land than required to construct a proposed road, it was held not to be acting in good faith but actuated substantially by the purpose of profit-making by sale of the land not so required. The proposed resumption was therefore not for the purpose of the undertaking by the council of the statutory function of "improvement and embellishment of the area" within the meaning of s 321(d).

34 In the following year, the Court held in *Minister for Public Works v Duggan*⁴¹ that a council was not empowered by the *Local Government Act* 1919 to acquire land in excess of what it required to fulfil a statutory purpose then resell the excess and use the proceeds to defray the costs of the proposed scheme. In the course of its judgment, the Court said⁴²:

40 (1950) 81 CLR 87.

41 (1951) 83 CLR 424; [1951] HCA 29.

42 (1951) 83 CLR 424 at 449-450.

"The question when the whole of a person's lands may be acquired although part only is required for some undertaking so that the residue may be resold at a profit has frequently arisen in England. English legislation often specifies the lands that may be resumed for the statutory purpose. Even so, if the land is resumed for the benefit of a body trading for private gain, such as a railway company, the body may usually be restrained from resuming more of the land so specified than is actually required for the particular work. Public bodies usually may resume the whole of such lands although parts only are required for the particular purpose with a view to re-selling the residue at a profit. But these are all cases where the public body is on the face of the statute authorized to acquire the whole of the land and then empowered to re-sell the surplus land."

It is important to note the use by the Court of the term "re-sell" to describe a sale following upon a compulsory acquisition.

35 Following the decision in *Duggan*, the *Local Government Act* 1919 was amended by the *Local Government (Land Acquisition) Amendment Act* 1951 (NSW). The amendment extended the powers of councils with respect to the acquisition of land (including acquisition by resumption) by providing that lands acquired under the 1919 Act⁴³:

"may be so acquired for sale or re-sale and applying the proceeds thereof in defraying in whole or in part the expenses incurred by the council in carrying out any work upon lands:—

- (i) acquired for any purpose of this Act; and
- (ii) of which the lands acquired under paragraph (a) of subsection two of this section form part, or which adjoin or are in the vicinity of land acquired under paragraph (b) of that subsection."

36 In the Second Reading Speech it was said, inter alia, that the Bill was designed to ensure that land could be acquired for re-sale and for recoupment in whole or in part of a council's expenditure on work done on land acquired in the same way, as was believed to be permissible under the existing provisions of the 1919 Act before the decisions of this Court in *Thompson* and *Duggan*⁴⁴. The

43 This amendment was effected by the insertion of s 532(3).

44 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 November 1951 at 4591.

Minister referred to "the principle of recoupment" as "well established in local government law in both England and this country"⁴⁵.

37 Major changes to the law relating to local government in New South Wales were introduced with the enactment of the LGA. In the Second Reading Speech the Minister for Local Government described as one of the main features of the legislation that it involved "a fundamental shift from prescriptive to a permissive expression of local government law". This was said to be evidenced by "the conferral of broad general powers on councils accompanied by specific constraints on power – rather than vice versa."⁴⁶

38 The acquisition of land was not mentioned in the Second Reading Speech but explanatory notes tabled with the Speech stated, in relation to the Chapter of the LGA which includes ss 186 and 188⁴⁷:

"The chapter begins with setting out the purposes for which council may acquire land. The provisions are generally a re-enactment of the *Local Government Act* 1919 in that councils may acquire land by agreement or compulsory process in accordance with the *Land Acquisition (Just Terms) Compensation Act* 1991. However, a major variation occurs in the creation of a limitation on compulsory acquisition by council for the purpose of re-sale. A council may not acquire land by compulsory process without the approval of the owner if it is being acquired for the purpose of re-sale, as re-sale is not strictly a legitimate Local Government purpose.

39 The Bill lapsed in 1992 and was reintroduced in a revised form in 1993. However, it was not suggested that any revisions in 1993 relevantly affected s 188 or rendered any less relevant the observations contained in the Second Reading Speech for the 1992 Bill. Importantly, in my opinion, the character of s 188(1) as a specific constraint on a broad power does not preclude the application to it of established approaches for the interpretation of statutes affecting property rights.

45 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 November 1951 at 4593.

46 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 November 1992 at 10387.

47 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 27 November 1992 at 10411.

The approach to interpretation

40 Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights.

41 Blackstone said that the common law would not authorise the "least violation" of private property notwithstanding the public benefit that might follow⁴⁸. He accepted however that the legislature could compel acquisition and in so doing wrote⁴⁹:

"All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform."

It was and has remained the case in England and Australia that compulsory acquisition and compensation for such acquisition is entirely the creation of statute⁵⁰.

42 The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights. It was expressed by Griffith CJ in *Clissold v Perry*⁵¹, a land resumption case, thus⁵²:

"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."

48 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 1 at 135.

49 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1, c 1 at 135.

50 *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202 at 214 per Lord Pearson, cited with approval in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 270 [29]; [2008] HCA 5.

51 (1904) 1 CLR 363; [1904] HCA 12.

52 (1904) 1 CLR 363 at 373, Barton and O'Connor JJ concurring at 378.

The presumption has been restated on more than one occasion in this Court⁵³. That does not, of course, authorise the court to put to one side "the unambiguous effect of the words which the Parliament has seen fit to use"⁵⁴.

43 The terminology of "presumption" is linked to that of "legislative intention". As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights. That approach resembles and may even be seen as an aspect of the general principle that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law. It operates in the United Kingdom as a manifestation of a "principle of legality" and has been described in Australia as an aspect of the rule of law⁵⁵.

44 In its application to property rights this long-standing interpretive principle is consistent with international developments in the recognition of human rights since World War II. Although not specifically protected by the International Covenant on Civil and Political Rights, or the International Covenant on Economic, Social and Cultural Rights, the right to property was recognised in the Universal Declaration of Human Rights and in various other international instruments⁵⁶. Discrimination, based on race, in relation to the enjoyment of property rights is prohibited by Art 5 of the International Convention on the Elimination of all Forms of Racial Discrimination 1965⁵⁷.

53 *Greville v Williams* (1906) 4 CLR 694; [1906] HCA 97; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; [1969] HCA 28; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193; [1984] HCA 65 and see generally Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 179-180 [5.18].

54 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 146; [1994] HCA 27.

55 *K-Generation Pty Limited v Liquor Licensing Court* (2009) 83 ALJR 327 at 338 [47]; 252 ALR 471 at 481; [2009] HCA 4.

56 Universal Declaration of Human Rights 1948, Art 17; American Declaration of the Rights and Duties of Man 1948, Art 23; European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Protocol 1, Art 1; American Convention on Human Rights 1969, Art 21; African Charter on Human and Peoples' Rights 1981, Art 14.

57 See also Arts 15 and 16 of the Convention on the Elimination of All Forms of Discrimination Against Women 1979. And generally: Jayawickrama, *The Judicial Application of Human Rights Law*, (2002) at 908-920; and Martin et al, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis*, (Footnote continues on next page)

45 The constraint imposed by s 188 on the power conferred by s 186 is to be read conventionally according to the ordinary meaning of the words of the section having regard to their context and purpose and, in this case, having regard to the established rules for the construction of statutes affecting property rights. That has a particular consequence for the way in which the purpose of the relevant acquisition is identified. That identification will focus on the use to which the particular land to be acquired is to be put rather than larger developmental objectives involving other parcels of land.

Whether the Development Agreement involved re-sale of the appellants' land

46 The first question to be addressed is whether the proposed transfer of the appellants' land to GCP, coupled with the proposed payments to Council, would constitute a "re-sale" of the land within the meaning of that term in s 188(1).

47 The word "re-sale" in s 188(1) is directed to sale by the council following compulsory acquisition of the land. It is used on the assumption that the antecedent compulsory acquisition by the council is to be treated as a forced sale to the council by the owner of the land. That usage is consistent with the use of the term "re-sell" in the passage quoted from *Duggan*. It is a usage which was reflected in the 1951 amendments to the *Local Government Act* 1919.

48 The question which then arises is whether the proposed transfer of the appellants' land to Grocon is a "sale" of that land to Grocon. If so then, putting to one side the distinct question of the purpose of the proposed acquisition of the land by Council, it would be a "re-sale" by the Council within the meaning of s 188.

49 The relevant ordinary meaning of the word "sale" is⁵⁸:

"the exchange of a commodity for money or other valuable consideration."

This Court in *Chan v Dainford Ltd*⁵⁹ in construing s 71 of the *Property Law Act* 1974 (Qld) observed⁶⁰:

(2006) at 911-936; Sieghart, *The International Law of Human Rights* (1983) at 252-258.

58 *Shorter Oxford English Dictionary*, 3rd ed (1973), vol 2 at 1876-1877.

59 (1985) 155 CLR 533.

60 (1985) 155 CLR 533 at 537.

"The primary meaning of sale is an exchange of property, the subject of the sale, for money."

That cannot be taken to exclude the possibility that a sale of land may involve its transfer for money and/or other valuable consideration. The constraint, protective of property rights, imposed by s 188 cannot be limited to cases in which the proposed re-sale is for money. Such a construction would artificially limit the scope of the word "re-sale" to one aspect of the ordinary meaning of the word "sale". It would also allow transactions to be structured by local authorities in such a way as to avoid the constraint imposed by s 188 while perpetrating the very mischief it is designed to prevent.

50 The Development Agreement required the Council to transfer the appellants' land to Grocon. In consideration of the Council performing its obligations it was to receive money and other benefits from Grocon. It is not to the point that no element of the consideration moving from Grocon was allocated to the appellants' properties. The land was to be transferred, along with other land, in exchange for money and other consideration. The land was therefore to be the subject of a "re-sale" by the Council within the meaning of s 188.

Whether the proposed acquisition was for the purpose of re-sale

51 The Development Agreement necessarily involved the re-sale by the Council of the appellants' properties to Grocon. The question therefore arises whether the proposed acquisition of those properties was "for the purpose of re-sale" within the meaning of s 188(1).

52 The conclusion is inescapable that re-sale was one of the purposes of the proposed acquisitions, albeit it was said to have been in aid of the larger purpose of the redevelopment of Civic Place in Parramatta. Whether they were acquisitions for the purpose of re-sale within the meaning of s 188(1) depends upon the proper construction of that sub-section. One constructional question is whether the purpose of re-sale necessary to attract the constraint imposed by s 188(1) must be:

- (i) the sole purpose or;
- (ii) the dominant purpose or;
- (iii) a substantial purpose;

or whether it suffices that a purpose of re-sale be one among a number of purposes of the acquisition.

53 That question can distract from a more important aspect of the operation of the section. The purpose with which the section is concerned is the purpose of the acquisition of the particular land to be acquired. Where a number of parcels of land are to be acquired in aid of some large scale redevelopment, it is nevertheless the purpose of the acquisition of each such parcel of land that is to be considered in determining whether it is within or beyond power. The constraint imposed by s 188(1) upon the general power conferred upon Council by s 186 to acquire land for the purpose of exercising any of its functions is a constraint which requires "the approval of the owner of the land if it is being acquired for the purpose of re-sale". The acquisition upon which the constraint operates is that of a particular parcel of land. The question which it poses is whether that parcel of land is being acquired for the purpose of re-sale.

54 The primary judge found that⁶¹:

"In the present case the purpose of the proposed acquisition of the applicants' land is not to use any part of their land for any public purpose, but rather to transfer the whole of it to Grocon, or to allow Grocon to develop it in order to make a profit."

This finding, made in the context of the s 186(1) question, was sufficient to support his Honour's conclusion that s 188(1) applied to the acquisition.

55 Given that the compulsory acquisition of land for re-sale will almost always be supported by reference to some larger public purpose, it cannot be a necessary condition of the application of s 188(1) that the purpose of re-sale be the sole or even the dominant purpose of acquisition. It should suffice that it is a substantial, ie non-trivial purpose. These alternative constructions, however, tend to become indistinguishable in their practical application when the inquiry is, as it should be, focussed on the purpose for which the particular parcel of land is to be acquired from its owner without that owner's approval. That purpose will be assessed by what the council intends to do with the land, ie whether it intends to re-sell it or to do something else with it in the exercise of its functions. It was in support of this proposition that the trial judge quoted⁶² the following passage from Gleeson CJ's judgment in *Woollahra Municipal Council v Minister for the Environment*⁶³:

"In the context of planning law, a statement of the purpose for which land is being used is a description or characterisation of what is

61 (2007) 155 LGERA 362 at 448 [241].

62 (2007) 155 LGERA 362 at 444 [234].

63 (1991) 23 NSWLR 710 at 714-715.

being done with, or upon, the land, not an account of the motives of the persons involved in that activity. The question in the present case is whether the use to which the land is being put, which is to be identified by reference to the nature of the activity being conducted upon it, is a use for a purpose authorised by the Act."

56 The Council submitted that, having regard to the context provided by the Development Agreement, its purpose should not be characterised solely by reference to what would occur to a specific lot. The "integrated" nature of the development of Civic Place was invoked. In the circumstances it was said to be "inapt to suggest that Council's 'purpose' would have differed had the ultimate design resulted in a library or Council's chambers being erected upon [the appellants'] lands".

57 The appellants in reply said that the Council's argument wrongly ignored the fundamental focus of the statutory power of acquisition upon individual pieces of land with individual owners. It was the purpose of acquisition of each owner's "lot" which had to be characterised in order to know whether the power could be exercised regardless of the owner's consent. In my opinion, for the reasons already given, the appellants' submission in this respect is correct.

58 The Council's purpose in relation to the appellants' lots is the purpose of re-sale. If it be necessary to say so, it is a substantial purpose and indeed the dominant purpose in relation to those particular parcels of land. It follows that, subject to the possible application of s 188(2)(a), the proposed acquisition of the appellants' properties is caught by s 188(1) and lies beyond the power of the Council.

Whether the proposed acquisition of the appellants' properties was valid under s 188(2)(a)

59 The Council sought to support the decision of the Court of Appeal on the basis that the qualification in s 188(2)(a) upon the constraint imposed by s 188(1) was applicable to this case.

60 As outlined earlier in these reasons, the learned primary judge held that s 188(2)(a) could not apply because it did not extend to the acquisition by the Council of "other land" already owned by the Council. In this case the "other land" to be acquired by the Council comprised the parts of Church and Darcy Streets which were the subject of its applications for compulsory acquisition approval in November 2004 and December 2006 respectively. In any event, the learned primary judge held that the acquisition of those parts of the streets included re-sale as a substantial purpose⁶⁴.

64 (2007) 155 LGERA 362 at 460-461 [295]-[298].

61 The Court of Appeal, having found that his Honour was mistaken in his answers to the earlier question about s 186(1), held that the application of s 186(2)(b) did not arise⁶⁵.

62 The appellants submitted that the proposed acquisition by the Council of Darcy Street and parts of Church Street would necessarily be made pursuant to s 7B of the Just Terms Act. That section provides:

"An authority of the State that is authorised by law to acquire land by compulsory process in accordance with this Act may so acquire the land even if the land is vested in the authority itself."

The term "authority of the State" is defined in s 4 of the Just Terms Act to include "a council or a county council within the meaning of the *Local Government Act 1993*".

63 The appellants argued that it is by virtue of s 7B of the Just Terms Act that the Council is expressly authorised compulsorily to acquire land from itself. This would mean that the power of compulsory acquisition in respect of such land is made under s 7B, and not under the LGA nor covered by s 188(2)(a).

64 It is not contentious that the Council's interest in Church and Darcy Streets derives from the *Roads Act 1993*. That Act provides, inter alia⁶⁶:

"All public roads within a local government area (other than freeways and Crown roads) are vested in fee simple in the appropriate roads authority."

The dedication of land as a public road⁶⁷:

"does not authorise the owner of the road to dispose of any interest (other than an easement or covenant) in the land ..."

The Act also provides that the council of a local government area is the roads authority for all public roads within the area save for exceptions which are immaterial for present purposes⁶⁸.

65 (2008) 162 LGERA 1 at 43-44 [178].

66 *Roads Act 1993*, s 145(3).

67 *Roads Act 1993*, s 146(1)(e).

68 *Roads Act 1993*, s 7(4).

65 While the Just Terms Act deals with procedures for the compulsory acquisition of land by authorities of the State and compensation on just terms for the owners of such land, s 7B goes beyond those procedures. It is a substantive source of power not conferred upon the Council by the LGA, to acquire an unencumbered interest in land vested in the Council itself, in this case the land known as Church and Darcy Streets.

66 Because the qualification in s 188(2)(a) upon the constraint imposed by s 188(1) is only engaged where the "other land" acquired by the Council is acquired "under this Part", that is under Pt 1 of Ch 8 of the LGA, it does not apply where the other land is, as in this case, acquired under s 7B of the Just Terms Act.

Conclusion

67 For the preceding reasons each of the appeals to this Court should be allowed with costs. I agree with the proposal in the joint judgment that the declarations made by the learned primary judge should be restored. I agree with the orders proposed in the joint judgment.

Gummow J
Hayne J
Heydon J
Kiefel J

24.

68 GUMMOW, HAYNE, HEYDON AND KIEFEL JJ. In July 2006, the respondent, Parramatta City Council ("the Council") made an agreement ("the development agreement") with Grocon (Civic Place) Pty Ltd ("GCP") and Grocon Constructors Pty Limited (together, "Grocon") to effect the development of an area bounded by Smith, Darcy, Church and Macquarie Streets, Parramatta, which will be called "Civic Place". The appellant in each of these appeals owns land in that area. R & R Fazzolari Pty Limited ("Fazzolari") owns three pieces of land in Darcy Street (known as 20-22, 24 and 26 Darcy Street); Mac's Pty Limited ("Mac's") owns the land known as 160 Church Street. In June 2007, the Council gave notice to the appellants that it intends to acquire each appellant's land compulsorily.

69 The appellants allege that the compulsory acquisition of their land, proposed by the Council, is not authorised by the provisions of Pt 1 of Ch 8 (ss 186-190) of the *Local Government Act 1993* (NSW) ("the LG Act"). They submit that their land is being "acquired for the purpose of re-sale" within the meaning of s 188(1) and that the Council may therefore not acquire the land under Pt 1 of Ch 8 by compulsory process, without the approval of the owner. The Council denies that the land is being acquired for the purpose of re-sale and says that, in any event, s 188(2)(a) of the LG Act is engaged. That sub-section provides that the owner's consent is not required for acquisition if the land to be acquired "adjoins or lies in the vicinity of, other land acquired at the same time under [Pt 1 of Ch 8] for a purpose other than the purpose of re-sale". The "other land" identified is Darcy Street and Church Street, which the Council intends to acquire compulsorily at the same time as it acquires each appellant's land.

70 In this Court, the appellants seek orders restoring declarations made in the Land and Environment Court of New South Wales⁶⁹ that the compulsory acquisition of each appellant's land, proposed by the Council, is unlawful. These reasons will show that the appellants are entitled to that relief. The Fazzolari land and the Mac's land is being acquired for the purpose of re-sale. The Council does intend to acquire, at the same time as the appellants' land, the land now forming Darcy Street and Church Street, but that acquisition will not be made under Pt 1 of Ch 8 of the LG Act.

69 *Mac's Pty Ltd v Minister Administering Local Government Act 1993* (2007) 155 LGERA 362.

The facts

71 The area which it is intended will become Civic Place has an area of about 32,000 square metres of which the Council owned about 50 per cent. The area adjoins the Parramatta Railway Station and Transport Interchange. It contains the Council's administrative offices, its council chambers, town hall, library and community meeting rooms.

72 In 2003, the Council adopted a Master Plan which applied to the proposed Civic Place site. That Master Plan recorded that the redevelopment of the site "will reposition Parramatta as the capital of western Sydney and a centre of business, tourism, entertainment, culture and heritage".

73 Development of the site in the manner proposed would be too expensive for the Council to undertake alone. In July 2006, the Council made the development agreement with Grocon. The development agreement established what the LG Act refers to as a "public-private partnership". So far as now relevant, the LG Act defines⁷⁰ a public-private partnership as:

"an arrangement between a council and a private person for the purposes of:

- (a) providing public infrastructure or facilities (being infrastructure or facilities in respect of which the council has an interest, liability or responsibility under the arrangement)".

The term "arrangement" is defined⁷¹ in the LG Act as including "a contract or understanding (whether or not involving the formation of an entity)" and "entity" is defined⁷² as meaning "any partnership, trust, corporation, joint venture, syndicate or other body (whether or not incorporated)".

74 As the breadth of the definitions of "arrangement" and "entity" indicate, the expression "public-private partnership", when used in the LG Act, can apply to many forms of contract or understanding between a council and a "private person". Just as "[t]he term 'joint venture' is not a technical one with a settled

70 s 400B(1). References to the applicable provisions are to the form they took at the relevant time.

71 s 400B(2).

72 s 400B(2).

Gummow J
Hayne J
Heydon J
Kiefel J

26.

common law meaning"⁷³, the expression "public-private partnership" cannot be understood as having any technical meaning separate from the meaning the LG Act gives it. The content of the rights and obligations created by or subsisting under an arrangement constituting a public-private partnership will depend upon the terms of the particular arrangement.

75 Section 400E of the LG Act provides that a council must not enter into, or carry out any project under, a public-private partnership except in accordance with Pt 6 of Ch 12 of that Act. Part 6 of Ch 12 contains a number of provisions for assessing a proposed project and makes particular provision⁷⁴ for the project to be reviewed by the Project Review Committee if it is a "significant project" or if, in the opinion of the Director-General of Local Government, it has a "high risk". The Project Review Committee is comprised⁷⁵ of senior State government officials or their nominees. The development agreement between the Council and Grocon recorded that the Project Review Committee had approved the entry by the Council into the agreement pursuant to s 400I of the LG Act.

76 The development agreement provided that the Council granted Grocon the right to carry out the development of the "Site" and obliged Grocon (at Grocon's cost) to finance, design, construct and commission the "Works" in accordance with the agreement. The "Site" was defined in the agreement and included what was called the "Trust Land". The "Trust Land" included what was referred to in an attachment to the agreement as the "Darcy Street Properties (as acquired by Compulsory Acquisition)". Those properties included the Fazzolari land and the Mac's land. The "Works" comprised not only buildings and facilities which the Council would use or make available for use by the public, but also residential, commercial and retail buildings which Grocon would own and be able to dispose of as those companies saw fit.

77 Clause 2.1 of the development agreement provided that until certain conditions precedent were satisfied or waived, the rights and obligations of the parties under the agreement, apart from some that were specifically identified, would not become binding. One of the conditions precedent was the acquisition, in the name of the Council, of the freehold of the "Darcy and Church Street

73 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10 per Mason, Brennan and Deane JJ; [1985] HCA 49.

74 s 400F(3).

75 s 400J.

Properties". Those properties included the Fazzolari land and the Mac's land but also included Darcy Street and Church Street.

78 The use in the development agreement of the expression "Trust Land" reflects the way in which the development agreement provided for that land to be dealt with. The development agreement provided that, upon acquisition by the Council of the Darcy and Church Street Properties, the Council and GCP were each bound to do anything that either might reasonably require to ensure that the appellants' land (and certain other land) "become part of the Trust Land". That was to be done by the Council executing a Trust Declaration (in a form annexed to the development agreement) at the same time as GCP paid to the Council an amount fixed according to a formula set out in the agreement.

79 The agreed form of Trust Declaration provided for the Council to declare that it holds the Trust Land on trust for GCP (in its capacity as trustee for certain other trusts). The Trust Declaration recorded that the Council, as Trustee, agrees with GCP that it would not sell, encumber or otherwise dispose of the Trust Land, or any interest in it, and that it would exercise its powers, including the power to transfer or otherwise deal with the Trust Land, "in any manner [GCP] ... from time to time requests in writing and not otherwise". And the Trust Declaration further recorded that in certain circumstances GCP might remove the Council as Trustee, and appoint a new trustee. For present purposes, it is sufficient to observe that one such circumstance is the completion of the Council and Community Facilities referred to in the agreement as "Council Works", and GCP procuring the creation, by plan of subdivision, of a separate stratum parcel registered under the *Real Property Act* 1900 (NSW) for the Council Works.

The relevant provisions of the LG Act

80 Disposition of the present matter turns particularly upon the proper construction and application of s 188(1) and (2)(a) of the LG Act. To put those provisions in their proper context, however, and to follow the course of proceedings in the courts below, it is necessary to consider s 186. The text of the relevant provisions is as follows:

"186 For what purposes may a council acquire land?"

- (1) A council may acquire land (including an interest in land) for the purpose of exercising any of its functions.
- (2) Without limiting subsection (1), a council may acquire:

Gummow J
Hayne J
Heydon J
Kiefel J

28.

- (a) land that is to be made available for any public purpose for which it is reserved or zoned under an environmental planning instrument, or
 - (b) land which forms part of, or adjoins or lies in the vicinity of, other land proposed to be acquired under this Part.
- (3) However, if the land acquired is, before its acquisition, community land vested in a council, the acquisition does not discharge the land from any trusts, estates, interests, dedications, conditions, restrictions or covenants that affected the land or any part of the land immediately before that acquisition.

...

188 Restriction on compulsory acquisition of land for re-sale

- (1) A council may not acquire land under this Part by compulsory process without the approval of the owner of the land if it is being acquired for the purpose of re-sale.
- (2) However, the owner's approval is not required if:
 - (a) the land forms part of, or adjoins or lies in the vicinity of, other land acquired at the same time under this Part for a purpose other than the purpose of re-sale".

The proceedings below

81 The proposed acquisition notices which the Council gave the appellants on 1 June 2007 were given under s 11 of the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) ("the Acquisition Act"). Each notice related to a separate parcel of land and stated that the Council required the whole of the appellant's interest in that land "for a public purpose, namely the Civic Place Development". After the notices were given, each appellant commenced a proceeding in the Land and Environment Court seeking declarations that the acquisitions proposed by the Council are unlawful, and seeking interlocutory and permanent injunctions restraining the Council from effecting the acquisitions. Mac's brought its proceeding against not only the Council but also the Minister administering the LG Act. No relief was granted against the Minister at first

instance. The Minister filed a submitting appearance in this Court. It is not necessary to refer further to this aspect of the matter.

82 Each appellant alleged, in the Land and Environment Court, not only that the proposed compulsory acquisition would be in breach of s 188(1) of the LG Act (because the land is being acquired for the purpose of re-sale) but also that the proposed acquisition is beyond the Council's powers because it is not for the purpose of exercising any function of the Council but rather for the purpose of benefiting Grocon, a third party. This second argument is not maintained in this Court. The Council submitted that s 188(1) does not apply, first, because the acquisitions were not "for the purpose of re-sale", and secondly, because s 188(2)(a) is engaged.

83 At first instance, Biscoe J held⁷⁶ that each appellant was entitled to the declarations and injunctions it sought against the Council. His Honour concluded⁷⁷ that the Council proposed to acquire the land for the purpose of re-sale. In his Honour's opinion⁷⁸ "'the' purpose of the acquisition of the [appellants'] land is to transfer it to Grocon for the consideration" of money and other benefits which the development agreement obliges Grocon to provide to the Council.

84 On the issue presented by s 188(2)(a) of the LG Act, Biscoe J concluded⁷⁹ that the appellants' land did not adjoin, or lie in the vicinity of, "other land acquired at the same time ... for a purpose other than the purpose of re-sale". Two separate reasons were given for that conclusion. First, Biscoe J held⁸⁰ that the reference to "other land acquired at the same time" should be construed as a reference to land not already owned by the Council, and the Council is already the owner of Darcy Street and Church Street. Secondly, Biscoe J held⁸¹ that the purpose for which Darcy Street and Church Street are each to be acquired "includes re-sale as a substantial purpose".

76 (2007) 155 LGERA 362.

77 (2007) 155 LGERA 362 at 457-458 [281].

78 (2007) 155 LGERA 362 at 457-458 [281].

79 (2007) 155 LGERA 362 at 460-461 [293]-[298].

80 (2007) 155 LGERA 362 at 460 [295].

81 (2007) 155 LGERA 362 at 460 [296].

85 The Council appealed to the Court of Appeal in each matter. That Court (Hodgson and Tobias JJA, Palmer J) allowed⁸² the Council's appeals, set aside the declarations made and injunctions ordered by Biscoe J, and in their place, ordered that the proceedings in the Land and Environment Court be dismissed.

86 The principal reasons of the Court of Appeal were those of Tobias JA. Each of Hodgson JA and Palmer J agreed substantially with the reasons of Tobias JA but added short reasons dealing separately with one or more aspects of the matter.

87 In the Court of Appeal a deal of argument was directed to whether the Council is given power by s 186(1) of the LG Act to acquire the appellants' land. That question turned upon whether the Council sought to acquire the land in question "for the purpose of exercising any of its functions". Reference was made, in that connection, to the provisions of s 24 of the LG Act. That section provides:

"A council may provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to this Act, the regulations and any other law."

The Council noted that the dictionary provided in the LG Act said that "**function** includes a power, authority and duty" and argued that its proposed acquisition of the land was for the purpose of exercising its function under s 24 to "carry out activities, appropriate to the current and future needs within its local community and of the wider public". It would seem, however, that little attention was directed in argument in the Court of Appeal to the effect of the limiting words at the end of s 24: "subject to this Act, the regulations and any other law".

88 Because the appellants accepted, in this Court, that the acquisitions which the Council proposed were for the purpose of exercising its function of carrying into effect the public-private partnership with Grocon, it is not necessary to examine any question about the proper construction of s 24 or whether s 24 is engaged in any relevant way. It is important, however, to notice that the reasoning adopted in the Court of Appeal on the issues tendered in this Court must be understood against a background provided by the need to identify the relevant function of the Council and the Council's reliance upon arguments which

82 *Parramatta City Council v R & R Fazzolari Pty Ltd* (2008) 162 LGERA 1.

identified that function at the level of generality and abstraction in which s 24 of the LG Act is expressed.

89 Identifying, for the purposes of s 186(1), the relevant *function* of the Council as being to "provide ... services and facilities ... appropriate to the current and future needs within its local community and of the wider public" appears to have been an important step towards the conclusions reached by Tobias JA about the application of s 188(1) and, in particular, the purpose of the acquisitions. First, Tobias JA concluded⁸³ that "the Council's sole or dominant purpose" in making the development agreement with Grocon was to implement the Civic Place project. And upon that footing Tobias JA reached the further conclusion⁸⁴ that the "financial structure" adopted by the Council and recorded in the development agreement was not "'the purpose' for which the [appellants'] land was acquired". Rather, Tobias JA concluded⁸⁵ that the Council's purpose in acquiring the appellants' land (and the other Darcy Street properties) "was at all times and remained the implementation of the Civic Place project as contemplated by the Master Plan".

90 It will be observed that the reasoning proceeds from a conclusion about the Council's functions (a question relevant to the Council's power under s 186(1) to acquire the land) to a conclusion about the Council's purpose in making the development agreement. This latter purpose is then treated as being the purpose of the acquisition of the land. But as will later be explained, to ask what function the Council is exercising when it seeks to acquire land does not answer, at least in these cases, the different question posed by s 188(1), which is whether the acquisition of the land is for the purpose of re-sale.

91 In his separate reasons, Hodgson JA concluded⁸⁶ that to engage s 188(1) the purpose of re-sale "must be the dominant purpose, or at least a substantial element of the dominant purpose or a substantial purpose which is independent of the dominant purpose that satisfies s 186(1)". In these cases, Hodgson JA

83 (2008) 162 LGERA 1 at 38-39 [147].

84 (2008) 162 LGERA 1 at 39 [148].

85 (2008) 162 LGERA 1 at 43 [176].

86 (2008) 162 LGERA 1 at 6 [6].

Gummow J
Hayne J
Heydon J
Kiefel J

32.

concluded⁸⁷ that "re-sale is neither the dominant purpose nor a substantial element of it, nor is it a substantial purpose independent of ... the dominant purpose of putting into effect the substance of the Master Plan". Palmer J agreed⁸⁸ with the reasons of Tobias JA and the additional reasons given by Hodgson JA about the question of purpose.

92 Because the Court of Appeal held that the primary judge had erred in concluding that the land was being acquired by the Council for the purpose of re-sale, it was not necessary for that Court to reach any conclusion about the issue posed by s 188(2)(a): whether the appellants' land adjoins or lies in the vicinity of other land acquired at the same time under Pt 1 of Ch 8 for a purpose other than the purpose of re-sale.

Acquired for the purpose of re-sale?

93 The expression "acquired for the purpose of re-sale", when used in s 188(1), identifies a class of acquisitions of land that a council may not effect by compulsory process without the approval of the owner of the land. It identifies that class by focusing attention upon whether the purpose of the acquisition was a specific purpose – "re-sale" – rather than whether the purpose can be described as being an exercise of the Council's functions, the question posed by s 186(1). As noted earlier, it was accepted that the acquisitions of the appellants' land was for the purpose of exercising the Council's function of carrying the public-private partnership into effect. To ask which function or functions of the Council would be being exercised if the Council acquired either the Fazzolari land or the Mac's land does not assist in deciding whether, under s 188(1), the acquisition was for the purpose of re-sale.

94 It is not necessary in these cases to decide whether "the purpose" spoken of in s 188(1) is to be defined more precisely: whether as the *sole* purpose, or the *dominant* purpose, or in some other way. That is not necessary because the proposed acquisition of both the Fazzolari land and the Mac's land is for only one purpose: the purpose of re-sale of the appellants' land to Grocon.

95 The purpose of the acquisition can be expressed at different levels of generality and abstraction. So, for example, it can be described as being for the purpose of the Civic Place development, or for the purpose of fulfilling the

⁸⁷ (2008) 162 LGERA 1 at 6 [6].

⁸⁸ (2008) 162 LGERA 1 at 47 [202].

development agreement, or for the purpose of the Council performing its obligations under that agreement. Perhaps there are other expressions of the purpose that could be adopted. But whatever level of generality or abstraction is chosen when identifying the purpose of the acquisition, closer examination of that purpose will always reveal that, upon the land being acquired, the Council is to declare itself trustee of the land in return for Grocon's provision of money and money's worth. For that is the means that is stipulated in the development agreement as the means of achieving whatever more general or abstract statement of purpose is adopted.

96 No doubt the acquisitions of the Fazzolari land and the Mac's land are only two steps in a much larger arrangement recorded in the development agreement. And the development agreement can be described as being directed to the end of implementing the Master Plan for the development of Civic Place. It is therefore possible to describe each of the steps for which the development agreement provides as a step towards implementing the Master Plan or effecting the development of Civic Place. But when the Council gave proposed acquisition notices to Fazzolari and to Mac's, the Council had made the development agreement with Grocon. The development of Civic Place for which the appellants' land was to be acquired is for the development *as the Council and Grocon stipulated in the development agreement*. Stating the purpose of the acquisition as being to implement the Master Plan or to develop Civic Place, or at some other similar level of generality, must not be permitted to obscure the fact that when the acquisitions were proposed a precise form of development had been agreed. Very particular terms governing both acquisition and disposition of the appellants' land had been stipulated in the development agreement.

97 The steps which the development agreement requires to be taken, of the Council declaring itself trustee of the Trust Land (including the Fazzolari land and the Mac's land) on the terms stipulated, in return for Grocon providing the agreed consideration, are properly described as a "re-sale" of the land. Of course the word "re-sale" suggests the need to identify a prior sale to the Council. But it is important to recognise that "re-sale" is used in the context of acquisition by compulsory process. The compulsory acquisition of the land by the Council is an acquisition for which the Council must pay monetary compensation. The disposition of the land by the Council to Grocon is a disposition in return for the money and money's worth which the development agreement obliges Grocon to provide. That disposition is properly called a "re-sale".

98 It may be observed that the provisions of the development agreement which stipulate the parties' obligations are more elaborate than a simple agreement to buy an identified piece of land for a stated price. But neither the elaboration of the agreement, nor the attachment to it of the descriptive title of

Gummow J
Hayne J
Heydon J
Kiefel J

34.

"financial structure", denies that the development agreement provides for the Council to first acquire the Fazzolari land and the Mac's land by compulsory process, and then to dispose of the land to Grocon in return for money and money's worth. Neither the elaboration of the terms nor the identification of the arrangement as providing a financial structure detracts from the conclusion that the disposition to Grocon is a "re-sale" of the land.

99 For these reasons it follows that Biscoe J was right to hold that the purpose of the acquisitions, in these cases, was to transfer the land to Grocon for the stipulated consideration. That is, the land was to be acquired for the purpose of re-sale.

100 It then is necessary to consider the question presented by s 188(2)(a). Do the Fazzolari land and the Mac's land adjoin or lie in the vicinity of other land the Council acquires at the same time under Pt 1 of Ch 8 for a purpose other than the purpose of re-sale? As noted earlier, the "other land" in these cases is the land forming Darcy Street and Church Street.

Acquiring Darcy Street and Church Street

101 Both Darcy Street and Church Street are public roads. The *Roads Act* 1993 (NSW) ("the Roads Act") provides⁸⁹ that, subject to some exceptions which are not engaged in these matters, all public roads within a local government area "are vested in fee simple in the appropriate roads authority". The Council is⁹⁰ the "appropriate roads authority". Section 146 of the Roads Act provides for what the heading to the section describes as the "Nature of ownership of public roads". For present purposes, it is important to notice only s 146(1)(e), and its provision that dedication of land as a public road "does not authorise the owner of the road to dispose of *any* interest (other than an easement or covenant) in the land" (emphasis added).

102 Although the Roads Act vests Darcy Street and Church Street in the Council in fee simple, the development agreement between Grocon and the Council obliges the Council to acquire Darcy Street and Church Street by compulsory process. That step, of the Council acquiring by compulsory process land which is already vested in it, is permitted by s 7B of the Acquisition Act which provides that:

89 s 145(3).

90 *Roads Act* 1993 (NSW) ("the Roads Act"), s 7(4).

"An authority of the State that is authorised by law to acquire land by compulsory process in accordance with this Act may so acquire the land even if the land is vested in the authority itself."

103 A consequence of the Council acquiring the two streets by compulsory process would be that each street would cease to be a public road⁹¹. Upon each street ceasing to be a public road the Council would be freed from the limitation on its powers now provided by s 146(1)(e) of the Roads Act – that its ownership of the two streets does not authorise the Council to dispose of any interest in the land other than an easement or covenant.

104 Most of the land which forms Darcy Street, and a stratum of land beneath Church Street (the precise identification of which is to be agreed by the Council and GCP), is to be dealt with under the development agreement as Trust Land. Some of the area of what is now Darcy Street will be incorporated within commercial and residential buildings to be built by Grocon. Some will be returned to the Council for use as a public road and as public space. As Biscoe J⁹² found:

"[t]he surface and subsurface of this land will in part form part of publicly available arcades and a retail concourse linking the Civic Place development with the Parramatta Transport Interchange. A deeper subsurface stratum will be part of the publicly available subsurface parking".

105 Most of the area of what is now Church Street is to be refurbished by Grocon and returned to the Council as open space. The stratum to be transferred to Grocon is for the construction of a public car park and one level of retail development.

106 Is the land comprising the two streets to be "acquired at the same time under this Part" as the Fazzolari land and the Mac's land "for a purpose other than the purpose of re-sale"?

107 The appellants submitted that there were two separate reasons to conclude that the land comprising the two streets did not meet the description given in s 188(2)(a). First, they submitted that the land comprising the streets was not

91 Roads Act, s 41.

92 (2007) 155 LGERA 362 at 369 [12].

Gummow J
Hayne J
Heydon J
Kiefel J

36.

"acquired ... under this Part". Secondly, they submitted that the land comprising the streets was not acquired for a purpose other than the purpose of re-sale.

108 The first point made by the appellants in this connection (that the land was not "acquired ... under this Part") is a point not previously taken in the litigation. The point is one of law. It is not a point which, if taken earlier, might have altered what evidence was adduced, or otherwise affected the course of the litigation⁹³. The appellants should not now be precluded from taking the point.

109 The land comprising the streets is not to be acquired under Pt 1 of Ch 8 of the LG Act. Section 187(1) of the LG Act provides: "Land that a council is authorised to acquire under this Part may be acquired by agreement or by compulsory process in accordance with the [Acquisition Act]." The Council proposes to acquire the two streets in question by compulsory process in accordance with the Acquisition Act. The power to do that derives only from s 7B of the Acquisition Act. The Council submitted that s 7B of the Acquisition Act "points beyond itself as the source of the power of compulsory acquisition by a council of its own land, and thus ss 186 and 187(1) of the [LG Act] are the source of the power". The answer to the submission is that while s 186 describes the purposes for which a council may acquire land, s 187(1) describes the methods by which it is to be acquired. The sole method of acquiring by compulsory process is that given by s 7B.

110 It may be accepted that, as the Council pointed out, s 186(3) of the LG Act contemplates the acquisition, by a council, of "community land vested in a council". Section 186(3) provides that such an acquisition "does not discharge the land from any trusts, estates, interests, dedications, conditions, restrictions or covenants that affected the land or any part of the land immediately before that acquisition".

111 A public road vested in a council, however, is not what the LG Act identifies in its Dictionary as "public land", and a public road is therefore not "community land"⁹⁴. Section 186(3) of the LG Act thus has no application to either of Darcy Street or Church Street. Even accepting for the purposes of argument that s 186 of the LG Act authorises a council to acquire, from itself, what the LG Act identifies as community land, it does not follow that the

93 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; [1950] HCA 35; *Coulton v Holcombe* (1986) 162 CLR 1; [1986] HCA 33.

94 *Local Government Act* 1993 (NSW), s 26.

Council's acquisition by compulsory process of public roads that are vested in it are acquisitions under Pt 1 of Ch 8 of the LG Act. Rather, each is an acquisition made under s 7B of the Acquisition Act, not an acquisition of the land comprising the relevant street under Pt 1 of Ch 8 of the LG Act.

112 It is not necessary, in these circumstances, to decide whether the second argument advanced by the appellants about the application of s 188(2)(a) is right. It may be observed, however, that the appellants' argument that s 188(2)(a) is not engaged in relation to the acquisition of their land proceeded on the footing that the provision requires the identification of a single purpose as the relevant purpose of acquiring the "other land" which is part of, or adjoins or lies in the vicinity of, the subject land and is acquired at the same time as the subject land. That is, the argument assumed that s 188(2)(a) requires choosing between the acquisition of that other land being for the purpose of re-sale or "a purpose other than the purpose of re-sale".

113 By contrast, the Council's arguments about the engagement of s 188(2)(a) assumed that an acquisition of the other land could be undertaken for more than one purpose and that s 188(2)(a) was engaged if one of the several purposes of that acquisition was a purpose other than the purpose of re-sale. Thus, the Council submitted that it was important to recognise that not all of the land which now comprises Church Street is to be acquired by Grocon; only a stratum beneath the surface is Trust Land which passes to or at the direction of Grocon. And the Council pointed out that part of Darcy Street (at Station Square) will ultimately remain in Council ownership. It followed, so the Council submitted, that *a* purpose of the acquisition of the two streets was a purpose other than transferring to Grocon those parts of the land which are to be dealt with in that way.

114 Particular attention was directed to how s 188(2)(a) would apply in the case where the land that is to be acquired "forms part of ... other land acquired at the same time ... for a purpose other than the purpose of re-sale". This, in turn, was seen as directing attention to whether the word "land" was used, in the reference to "other land" in s 188(2)(a), as identifying a part of the terrestrial globe, or was used as referring not to a physical area but to a form of real property interest. But no matter which of those readings is to be preferred over the other, the more fundamental question of construction that is presently relevant is whether s 188(2)(a) requires identification of *the* purpose of acquisition of the other land, and classification of that purpose as either re-sale, or a purpose other than the purpose of re-sale. Deciding whether "land" is to be understood as a physical area or as a real property interest does not assist in resolving that more fundamental question.

Gummow J
Hayne J
Heydon J
Kiefel J

38.

115 Section 188(2)(a) stands as an exception to the requirement of s 188(1) that the approval of the owner of "the land" is required "if it [the land] is being acquired for the purpose of re-sale". As noted earlier, it is not necessary to decide in these cases whether "the purpose of re-sale" that is mentioned in s 188(1) is to be understood as the "sole", the "dominant", or the "substantial" purpose in question. That is not necessary in these cases because *the* purpose of the acquisition of the appellants' land was to put the Council in a position to fulfil its obligations to Grocon by reselling the appellants' land to Grocon. But where, as is the case with both Darcy Street and Church Street, only part of the land is to be resold and part is to be retained by the Council, the better view may well be that the land comprising those streets is acquired for more than one purpose. The more natural meaning of s 188(2)(a) applied to such a case would appear to be that those streets, if they were "other land" acquired at the same time as the appellants' land, were each acquired for a purpose other than the purpose of re-sale.

116 It is, however, not necessary to resolve these questions. It is sufficient to decide in these cases that neither Darcy Street nor Church Street is land that would be acquired at the same time as the appellants' land under Pt 1 of Ch 8 of the LG Act.

Conclusion and orders

117 Each appeal to this Court should be allowed with costs.

118 Because the proposed acquisition notices given by the Council to Fazzolari and Mac's are no longer current, it is neither necessary nor appropriate to reinstate the injunctive orders made at first instance. It is appropriate however to restore the declarations that were made by Biscoe J. As the Council pointed out, the argument that neither Darcy Street nor Church Street is land that would be acquired at the same time as the appellants' land under Pt 1 of Ch 8 of the LG Act was not put in the courts below. Nonetheless, costs should follow the event not only in this Court but also in the courts below. It follows that in addition to the orders dealing with the appeals to this Court there should in each matter be the further consequential orders: Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 11 June 2008 and in their place order that paragraph 2 of the orders of the Land and Environment Court of New South Wales made on 28 September 2007 is set aside but the appeal to the Court of Appeal is otherwise dismissed with costs.