

ACQUISTA INVESTMENTS PTY LTD & ANOR v THE URBAN RENEWAL AUTHORITY & ORS (A29/2015)

Court appealed from: Full Court of the Supreme Court of South Australia
[2015] SASCFC 91

Date of judgment: 20 July 2015

Date special leave granted: 13 November 2015

On 13 December 2013 the Urban Renewal Authority (the Authority), the Premier (and Minister for State Development) and the 3rd respondent, Adelaide Capital Partners Pty Ltd (ACP) entered into a contract (the Deed) granting options to ACP to purchase 407 hectares of land to the north of Adelaide. The appellants (Acquista) are entities who would have liked to have tendered for purchase of the land had it been placed on the open market. Acquista commenced an action for judicial review in the Supreme Court seeking, amongst other relief, to set aside the Deed. They challenged the validity of the Deed on several grounds, including that the decision was unlawful and void on account of non-compliance with s 11(1) of the *Public Corporations Act* 1993 (SA) (the PCA Act), which requires a public corporation to perform its commercial operations in accordance with prudent commercial principles. Although the trial judge (Blue J) found there had not been compliance with that requirement and that the contract was therefore unlawful, he declined to declare it void. Acquista also argued that the contract should be set aside on the basis that the decision to enter it was unreasonable in the *Wednesbury* sense, in that no reasonable person would have made the decision. The judge upheld that claim but found that this was not such as to render the agreement void.

In their appeal to the Full Court, Acquista argued that, having made the findings he made, the judge should have declared the contract void or unenforceable. The respondents argued by notices of contention that the findings that the decision to enter the contract was unlawful and legally unreasonable were in error and should be set aside. More fundamentally, the respondents also contended that the decision to enter the contract made by the Cabinet, and the contract itself, were not amenable to judicial review and that Acquista lacked standing to bring the action.

The majority (Vanstone and Lovell JJ, Debelle AJ dissenting) found that the Cabinet made the decision to sell the land, either as the delegate of the Authority or as an exercise of executive power. The issue was whether that decision was amenable to judicial review. Acquista asserted that non-compliance with the mandatory requirements in s 11(1) of the PCA Act brought the decision within the ambit of a reviewable decision. However the majority considered that s 11 was essentially aimed at the internal operations of statutory corporations and was not such as to restrict the powers of the Authority. Thus they did not consider that, even if there were non-compliance with s 11 (as to which they expressed no opinion) it could lead to a finding that the contract was unlawful and liable to be set aside.

As to the argument that the decision was legally unreasonable, the majority found no basis to make that finding. They noted that the Cabinet submissions which formed the basis of the discussion of the proposal were comprehensive in terms of outlining both positive and negative aspects of accepting ACP's proposal. Even assuming that

the only information before the Cabinet was that contained in those submissions, the decision to accept ACP's offer and not go to the open market would not be legally unreasonable. The majority considered that it was not the role of the Court, nor was the Court equipped, to adjudicate on the validity of the reasons which motivated the Cabinet to approve the proposal. The inability of the Court to assess the decision in all its aspects tended towards a conclusion that the decision to enter into the contract was not one susceptible of judicial review, at least on account of legal unreasonableness. Further, that decision was not one which affected any rights, interests or legitimate expectation, other than those of the parties to the contract. For this reason, too, neither the decision to enter the contract, nor the contract itself, was amenable to judicial review.

Debelle AJ (dissenting) held that the appeal should be allowed on the basis that the judge's findings that there was non-compliance with s 11 and as to legal unreasonableness were correct and that it followed that the contract should have been declared invalid and of no effect.

The grounds of appeal include:

- The majority erred in finding that the decision made by Cabinet, as the delegate, or purported delegate, of the first respondent (the Authority), to cause the Authority to enter into a deed dated 13 December 2013 between the Authority, the Minister for State Development and the third respondent was not amenable to judicial review.
- The majority erred in finding that the decision made by Cabinet, as the delegate or purported delegate of the Authority, to cause the Authority to enter into the deed was a valid exercise of the executive power of the State.

The 1st and 2nd respondents have filed a notice of contention, the grounds of which include:

- The appellants lacked the necessary standing to bring the action for judicial review to challenge the validity of the Deed, in circumstances where the appellants were not parties to the Deed.

The 3rd respondent has also filed a notice of contention the grounds of which include:

- Entry into the Deed was authorised because the Board of the Authority delegated authority to Cabinet to decide to enter the Deed.