SHORT PARTICULARS OF CASES
APPEALS

NOVEMBER 2007

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WALKER CORPORATION PTY LIMITED v SYDNEY HARBOUR FORESHORE AUTHORITY (S307/2007 & S308/2007)

Court appealed from: Court of Appeal of the Supreme Court of New South Wales

Dates of judgment: 27 July 2005 & 21 December 2006

Date of grant of special leave: 25 May 2007

On 26 September 2002 the Sydney Harbour Foreshore Authority ("the Authority") compulsorily acquired land at Ballast Point ("the land") on Sydney Harbour from the Walker Corporation Pty Ltd ("Walker Corporation"). This was done for the purpose of creating a harbourside park. At the time of its acquisition, the land was zoned "Industrial" under the Leichhardt Local Environment Plan 2000 ("LEP"). Its value would have been higher however had it been zoned "Residential".

Proceedings for the assessment of compensation under the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) ("the Acquisition Act") were commenced by Walker Corporation in the Land and Environment Court ("LEC"). On 9 July 2004 Justice Talbot held that the land's market value was $60 million. This was on the basis that the Council would have rezoned the land as "Residential" if it was not otherwise going be used for "Open Space". On 27 July 2005 the Court of Appeal set aside the LEC's judgment and remitted the matter for redetermination according to law.

An appeal was later brought under section 57(1) of the *Land and Environment Court Act* 1979 (NSW) against the second LEC judgment delivered on 4 April 2006. On that date Justice Talbot attributed a 100% prospect of the land being rezoned "Residential" and thus confirmed his previous valuation. Upon appeal the critical question was whether his Honour was correct to assume that the land should be treated as zoned "Residential".

On 21 December 2006 the Court of Appeal (Handley, Beazley & Basten JJA) unanimously allowed the Authority's appeal. Their Honours held that s 56(1) of the Acquisition Act encapsulates the principle that the market value of land is the amount that a willing but not anxious buyer would pay to a willing but not anxious seller. In this case the critical characteristic was the land's zoning. This is because it imposed a legal constraint on its possible development and hence its market value. At issue therefore is whether that zoning was part of the "public purpose" for which the land was required. Their Honours held that any precondition for notionally setting aside the land's zoning had not been established. The Court below therefore erred in law in doing just that.

The Court of Appeal also held that the value of land may reflect potentialities which have not yet been realised. A proposal to carry out the "public purpose" for which the land is later acquired may be seen as preventing that realisation, and hence diminishing its value. That decrease must therefore be disregarded. Their Honours found that Justice Talbot had erred in disregarding the Leichhardt Council's inaction in considering a draft LEP which would have led to the land's rezoning (to Residential). What his Honour should have done was to identify the diminution in its value caused by that inaction.

In matter number S307/2007 (relating to the Court of Appeal's judgment of 21 December 2006) the grounds of appeal include:

- The Court of Appeal took an unduly narrow view of the words "the proposal to carry out the public purpose for which the land was resumed" in section 56(1)(a) of the Acquisition Act.

- The Court of Appeal erred in holding that it was not possible, as a matter of law, to characterise the conduct of the Leichhardt Council as part of "the proposal to carry out the public purpose" for which the Appellant's land was acquired.

In matter number S308/2007 (relating to the Court of Appeal's judgment of 27 July 2005) the grounds of appeal include:

- The Court of Appeal erred in taking the view that it was "far from clear" that s 56(1)(a) operated so as to require that a failure to act be disregarded.

- The Court of Appeal erred in holding that relevant factual findings had not been made, or issues considered, by the LEC. Such a view was not consistent with the reasons of Talbot J, especially at paragraphs 110-114.

This appeal is part heard from Thursday 30 August 2007.

BETFAIR PTY LIMITED & ANOR v STATE OF WESTERN AUSTRALIA (C2/2007)

Date of Referral of Special Case to Full Court: 21 February 2007

The first plaintiff ("Betfair") holds a gaming licence granted by the Tasmanian Gaming Commission pursuant to the *Gaming Control Act 1993* (Tas) ("the Tasmanian Act") which permits Betfair to operate a betting exchange by means of internet connection or telephone and to broker wagering by players registered with Betfair, one of whom is the second plaintiff, Matthew Edward Erceg, a resident of Western Australia. On 23 January 2007 certain sections of the *Betting and Racing Legislation Amendment Act 2006* (WA) ("the amending Act") came into operation, including (relevantly) inserting new sections 24(1aa), 27B(1) and 27D(1) in the *Betting Control Act 1954* (WA) ("the Betting and Control Act"). These sections make it an offence to bet through a betting exchange or to establish or operate a betting exchange, wherever that betting exchange is located, or to publish or make available a WA race field (that is, the list of horses or greyhounds taking part in a race to be conducted in Western Australia), unless the bet is placed with, or the betting exchange operator is, Racing and Wagering Western Australia (RWWA) or a bookmaker or totalisator licensed under the Betting Control Act. The effect of these new sections is to prohibit Betfair from accepting bets from a person in Western Australia or publishing a WA race field, and to prohibit the second plaintiff from placing bets with Betfair.

By writ of summons filed 29 January 2007, the plaintiffs seek declarations that sections 24(1aa) and 27D(1) of the Betting Control Act (and the amending Act to the extent that it inserts those sections) are invalid as a restraint on inter-state trade, contrary to section 92 of the Constitution, and that section 27D(1) of the Betting Control Act does not, on its proper construction, prohibit Betfair from operating a betting exchange in according with the licence granted to it under the Tasmanian Act or, in the alternative, that section 27B(1) of the Betting Control Act (and the amending Act to the extent that it inserts that section) are invalid as contrary to sections 92 and 118 of the Constitution.

The questions stated for the opinion of the Full Court include:

- Is section 24(1aa) of the Betting Control Act invalid as contrary to section 92 of the Constitution either wholly or as it applies to the second plaintiff when making a bet through Betfair's betting exchange by telephone or internet from a place in Western Australia to Betfair's Tasmanian premises?

- Is section 27D(1) of the Betting Control Act invalid as contrary to section 92 of the Constitution either wholly or as it applies to Betfair publishing or making available a WA race field by telephone or internet communication between its Tasmanian premises and a place in another State, or for the purpose of taking bets through its betting exchange by telephone or internet between its Tasmanian premises and a place in another State?

- Is section 27D(1) of the Betting Control Act invalid or inoperative by reason of section 118 of the Constitution either wholly or to the extent that that section would apply to Betfair publishing or making available a WA race field in Tasmania, Western Australia or elsewhere?

The Attorney-General of the Commonwealth of Australia, and the Attorneys-General for the States of New South Wales, South Australia, Victoria, Queensland and Tasmania are intervening in this matter pursuant to s. 78A of the *Judiciary Act* 1903.

TELSTRA CORPORATION LIMITED v COMMONWEALTH OF AUSTRALIA & ORS (S42/2007)

Date of stated case: 11 July 2007

Both the Plaintiff ("Telstra") and the Fourth Defendant ("Optus") are holders of a carrier licence under the *Telecommunications Act* 1997 (Cth) ("Telco Act"). They are also carriers, service providers and carriage service providers within the meaning of that Act. On 22 November 1991, each of the Australian Telecommunications Corporation and Optus (then named "AUSSAT Pty Ltd") was granted a general telecommunications licence under Part 5 of the *Telecommunications Act* 1991 (Cth) ("1991 Act"). Both licences came into force on 26 November 1991. Also on 25 November 1991, Telstra (then known as the "Australian and Overseas Telecommunications Corporation Limited") was granted a general telecommunications licence under Part 5 of the 1991 Act. That licence came into force on 1 February 1992.

On 22 November 1991, pursuant to section 64 of the 1991 Act, the Minister for Transport and Communications made the following declarations specifiying conditions to which all general telecommunications licences were subject:

a) *Telecommunications (General Telecommunications Licences) Declaration No.1 of 1991; and*

b) *Telecommunications (General Telecommunications Licences) Declaration No.2 of 1991.*

From 1 July 1997, pursuant to section 49 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act* 1997 (Cth), the Telco Act has had effect in relation to Testra and Optus as if the Australian Communications Authority (now the Australian Communications and Media Authority) had granted each a carrier licence under that Act at the beginning of 1 July 1997. Telstra's carrier licence under the Telco Act is and has been subject to licence conditions specified in declarations made by the Minister under section 63 of the Telco Act, including the *Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997* (as amended from time to time).

Each of the Third Defendant ("Primus"), the Fifth Defendent ("Chime"), the Sixth Defendant ("XYZed"), the Seventh Defendant ("Powertel"), the Eleventh Defendant ("Amcom"), the Twelth Defendant ("Adam") and the Thirteenth Defendant ("Agile") is:

a) the holder of a carrier licence under the Telco Act, granted to it on or after 1 July 1997; and

b) a carrier, a service provider and a carriage service provider within the meaing of the Telco Act.

Each of the Eighth Defendant ("Request"), the Ninth Defendant ("NEC") and the Tenth Defendant ("Macquarie") is a service provider and a carriage service provider within the meaning of the Telco Act. The Second Defendant ("the Commission") is the body established by section 6A of the *Trade Practices Act* 1974 (Cth) ("TPA").

As part of the T3 Telstra share float in 2006, the relevant disclosure documents identified various regulatory risks associated with Telstra's business concerning

what is known as the Unconditional Local Loop Service ("ULLS") and the Line Sharing Service ("LSS"). Those risks were said to arise because of the possibility that the Commission might exercise its powers under Part XIC of the TPA with the effect of reducing the price which Telstra was able to charge for those services.

On 11 July 2007 Justice Gummow stated a case in the following terms:

- Question One

  In their application to the ULLS, are any of:

  (i) section 152AL(3) of the TPA;
  (ii) section 152AR of the TPA; or
  (iii) any other provision(s) in Part XIC of the TPA,

  beyond the legislative competence of the Parliament by reason on section 51(xxxi) of the Constitution?

- Question Two

  If the answer to any part of Question One is "Yes", can the relevant provision(s) be read down so that it is valid and, if so, how?

- Question Three

  In their application to the LSS, are any of:

  (i) section 152AL(3) of the TPA;
  (ii) section 152AR of the TPA; or
  (iii) any other provision(s) in Part XIC of the TPA,

  beyond the legislative competence of the Parliament by reason of section 51(xxxi) of the Constitution?

- Question Four

  If the answer to any part of Question Three is "Yes", can the relevant provision(s) be read down so that it is valid and, if so, how?

GRIFFITHS & ANOR v MINISTER FOR LANDS, PLANNING AND ENVIRONMENT & ANOR (D8/2007)

Court appealed from: Court of Appeal, Supreme Court of the Northern Territory

Date of Judgment: 10 May 2004

Date of grant of special leave: 21 June 2007

The first respondent issued three notices under section 32 of the *Lands Acquisition Act* 1978 (NT) for the compulsory acquisition of "all interests including native title rights and interests (if any)" in unalienated Crown land in the town of Timber Creek. The notice was in relation to Lots 47, 109, 97-100 and 114. The lots were the subject of registered native title determination applications made by the appellants under the *Native Title Act* 1993 (Cth).

In respect of Lots 47 and 109 Lloyd Fogarty had held a Crown lease and a grazing licence respectively from 1986 to 1996 and 1987 to 1997 respectively. Mr Fogarty made applications under the *Crown Lands Act* 2000 (NT) to purchase these lots. In pursuance of this, the Minister issued notices of proposed compulsory acquisition in relation to those Lots. The notices stated the manner in which the Territory proposed to deal with the land, which was, if acquired, to grant Crown leases under the *Crown Lands Act* to Warren Pty Ltd, a company controlled by Mr Fogarty. Upon the completion of the development, the leases might be surrendered in exchange for a freehold title.

In respect of Lots 97 to 100 and 114, following requests for the release of land in Timber Creek, the Minister issued a notice of proposed compulsory acquisition. It stated the manner in which the Territory proposed to deal with the land if acquired, which was to offer the lots for sale by public auction and grant Crown leases under the *Crown Lands Act* for the purpose of commercial tourism development. Upon the completion of the development, the leases might be surrendered in exchange for freehold title.

The appellants, Alan Griffiths and William Gulwin on behalf of the Ngaliwurru and Nungali Peoples as registered native title claimants to the land, lodged objections to the proposed acquisitions. The Minister referred these to the second respondent, the Lands and Mining Tribunal, for determination. The appellants contended that the Tribunal lacked jurisdiction because the notices of proposed acquisition were invalid. The Tribunal held that it had jurisdiction and proceeded to determine the objections and recommended that the Minister proceed to effect the proposed acquisitions. The Minister advised the registered native title claimants that he intended to act on the recommendations.

On an application to review the Tribunal's recommendations and the Minister's decision, the primary judge (Angel J) held that the notices were invalid because they sought to acquire all interests in unalienated Crown land and that the power conferred by the *Lands Acquisition Act* did not extend to the acquisition of unalienated Crown land.

The Minister appealed from the decision and by notice of contention the appellants sought to uphold the decision of the primary judge on the basis that the power conferred on the Minister to issue the notices was exercised for a

purpose other than the purpose for which the power was conferred. The Court of Appeal (Martin (BR) CJ, Mildren and Riley JJ) allowed the Minister's appeal and rejected the appellants' contention.

The application for special leave to appeal to this Court was part-heard on 22 April 2005 (Hayne and Callinan JJ) and adjourned to permit proceedings in the Federal Court of Australia to make a determination of native title in respect of the land the subject of the proposed compulsory acquisition to take place. On 28 August 2006 the Federal Court determined that native title exists in the subject land, the nature and extent of the native title to be "non-exclusive rights to use and enjoy the land" (*Griffiths v Northern Territory (No.2)* [2006] FCA 1155). The appellants have appealed to the Full Court of the Federal Court from that decision. Following further written submissions by the parties, special leave was granted on 21 June 2007.

The grounds of appeal include:

- In circumstances where land the subject of a compulsory acquisition is unalienated Crown land in which the only interests are those of the Crown and native title rights and interests:

    (1) Does the *Lands Acquisition Act* 1978 (NT) permit the compulsory acquisition of native title rights and interests in the land for the purpose of extinguishing the native title, in order to alienate the land for the private benefit of another citizen; and

    (2) Does section 24MD of the *Native Title Act* 1993 (Cth) permit the acquisition to vest the land in the Territory freed and discharged of the native title rights and interests?

The Attorney-General of the Commonwealth of Australia and the Attorney-General for the State of New South Wales are intervening in this matter pursuant to s. 78A of the *Judiciary Act* 1903.