Dist.
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Pty Ltd v
Minister for
Works (1965)
113 CLR 365

[HIGH COURT OF AUSTRALIA.]

CRITERION THEATRES LIMITED . . . APPELLANT;
PLAINTIFF,

AND

THE MUNICIPAL COUNCIL OF SYDNEY . RESPONDENT.
DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1925.

SYDNEY, *April* 7; *May* 4.

Knox C.J., Isaacs, Higgins and Rich JJ.

Local Government—Municipal Council of Sydney—Resumption of land—Purposes of resumption—Statement of purposes in notification of resumption—Validity of resumption—Sydney Corporation Amendment Act 1905 (*N.S.W.*) (*No.* 39 *of* 1905), *secs.* 16, 18, 19, 20*—*Sydney Corporation Amendment Act* 1906 (*N.S.W.*) (*No.* 16 *of* 1906), *secs.* 3, 5*—*Sydney Corporation (Dwelling-houses) Act* 1912 (*No.* 8 *of* 1912), *sec.* 2—*Sydney Corporation Amendment (Costs) Act* 1916 (*No.* 60 *of* 1916), *sec.* 7.

The Municipal Council of Sydney purported to resume certain land in the City of Sydney, the whole of which they might properly resume under sec. 16 of the *Sydney Corporation Amendment Act* 1905 (N.S.W.), as amended by sec. 3 of the *Sydney Corporation Amendment Act* 1906, as being land required for the widening of a certain street and land of which that required for that purpose

* As amended by sec. 3 of the *Sydney Corporation Amendment Act* 1906, sec. 16 of the *Sydney Corporation Amendment Act* 1905 (N.S.W.) (which has also been amended by sec. 2 of the *Sydney Corporation (Dwelling-houses) Act* 1912 and sec. 7 of the *Sydney Corporation Amendment (Costs) Act* 1916) provides that "The council may from time to time with the approval of the Governor, in pursuance of the provisions hereinafter mentioned, without further or other authority than this Act, purchase or resume all lands required for the opening of new public ways or the widening, enlarging, or extending of public ways in the city, and all lands of which those required for such purposes form part, . . . and any land required for carrying out improvements in or remodelling any portion of the said city," &c. Sec. 18 of the Act of 1905, as amended by sec. 5 of the Act of 1906, provides that "The Council may from time to time, with the approval of the Governor, cause a notice of the resumption of any of the lands mentioned in this Part, together

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formed part. In the notification of resumption it was stated that part of the land resumed was required for the purpose of widening the street and the remainder of it was required for improving and remodelling that portion of the City in the vicinity of the public way, but this land consisted wholly of land which was required for the first-mentioned purpose only and of land of which the land so required formed part.

Held, that the validity of the resumption of the whole of the land was not affected by the statement in the notice that the remainder of the land was required for improving and remodelling the portion of the City in the vicinity of that public way.

Per Higgins J.: Nothing is to be found in the above-mentioned Acts that makes an accurate statement (in the notice) of the purposes of the resumption essential to the validity of the resumption and vesting; though, if the purposes stated, or one of the purposes stated, were not sanctioned by those Acts, it might be very difficult to support the validity of the resumption.

Decision of the Supreme Court of New South Wales (*Maughan* A.J.), affirmed.

APPEAL from the Supreme Court of New South Wales.

A scheme had, on 23rd January 1924, been brought by a minute of the Lord Mayor before the Municipal Council of Sydney for the widening of Park Street in the City of Sydney. In substance the scheme was to resume an area comprising the whole of the blocks of land abutting on the southern side of Park Street and to take into the street 40 feet of the land so resumed. On 5th February 1924 a resolution was passed by the Council "that in the opinion of the Council it is desirable that further consideration be given to the proposal for the widening of Park Street and that the scheme providing for the widening of Park Street on the south side in accordance with the Lord Mayor's minute and estimates submitted on a freehold basis be and the same is hereby approved and adopted accordingly." A proposed notification of resumption of such land

with a description of the land, to be published in the *Gazette* and four of the Sydney daily newspapers, and a plan of such land" &c. "shall be deposited with the city surveyor . . . which plans shall be open for public inspection. Sec. 19 of the former Act provides that "Upon the publication of such notice and description, the land therein described shall, for the purposes and subject to the provisions of this Act, be vested in the council for an estate in fee simple in possession freed and discharged from all trusts, obligations, estates, interests, contracts, charges, rates, rights of way, or easements whatsoever." Sec. 20 of the former Act provides that "The owner of any land so resumed, or the person who, but for the provisions of this Act, would have been such owner, shall be entitled to receive compensation for such land, and the amount of such compensation shall be ascertained in accordance with the provisions of the *Public Works Act* 1900," &c.

was, on 7th March 1924, forwarded by the Town Clerk for the approval of the Governor in Council, which, omitting formal parts, was as follows:—"Whereas the Municipal Council of Sydney (hereinafter called 'the said Council') is empowered with the approval of the Governor in pursuance of the provisions of the *Sydney Corporation Amendment Act* 1905 and any Act or Acts amending the same without further or other authority than the said Acts to purchase or resume *inter alia* all lands required for any of the purposes in the said Acts mentioned And whereas part of the land described in the schedule hereto is required by the said Council for the purpose of widening Park Street a public way within the City of Sydney and the remainder of such land is required for carrying out improvements and remodelling that portion of the said City in the vicinity of that public way And whereas on the eighteenth day of March one thousand nine hundred and twenty-four His Excellency the Governor with the advice of the Executive Council approved of the resumption of the land described in the said schedule for such last-mentioned purpose and also approved of the said Council causing this notice of the resumption of the land mentioned in the said schedule together with the description of the said land in the said schedule contained to be published in the New South Wales Government *Gazette* and four of the Sydney daily newspapers And whereas on the third day of April one thousand nine hundred and twenty-four the said Council resolved to resume the land described in the said schedule for such last-mentioned purpose Now therefore the said Council with the approval of His Excellency the Governor with the advice of the Executive Council as aforesaid doth hereby give notice that the land described in the schedule hereto is hereby resumed by the said Council under the provision of the *Sydney Corporation Amendment Act* 1905 aforesaid And the said Council doth hereby also give notice that a plan of such land has been deposited with the City Surveyor at the Town Hall Sydney and with the Chief Surveyor at the Department of Lands Sydney which plans are open for public inspection And the said Council doth hereby also give notice that upon the publication of this notice and the description in the schedule hereto the land therein described becomes for the purposes and subject to the provisions of the said

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Acts vested in the said Council for an estate in fee simple in possession freed and discharged from all trusts obligations estates interests contracts charges rates rights of way or easements whatsoever." In the schedule the land proposed to be resumed was described by metes and bounds.

On 28th March the approval by the Governor in Council of the resumption and the notification thereof were communicated to the Council. On 3rd April the Council passed a resolution approving of the resumption, and that resolution included the statement in the second recital above set out in the notification of resumption. A suit was shortly afterwards instituted against the Municipal Council of Sydney by Criterion Theatres Ltd., the owner in fee of one of the blocks of land sought to be resumed, claiming an injunction to restrain the Council from resuming or attempting to resume the plaintiff's land, and from publishing any notice or description in the *Gazette* or any Sydney daily newspapers including the plaintiff's land. On 23rd April the plaintiff obtained *ex parte* from *Street* C.J. in Eq. an interim injunction in the terms asked for, which was continued until 15th May. On that day a motion for its further continuance until the hearing of the suit was opposed by the defendant. The learned Chief Judge in Equity dismissed the motion. In the course of his judgment he said :—" The Council had statutory power to take all the plaintiff Company's land in connection with its proposal to widen Park Street, even though the whole of it might not be actually required for that purpose. This is admitted, but it is contended that it must be bound by its notification of resumption and that, as in that it purported to take part only of the land for the widening of the street and the remainder for other purposes, it cannot now be heard to say that it was in reality merely exercising its power of taking the whole of an owner's land of which part only was required in order to widen the street. I do not think that there is any substance in this. The Council has power, not only to take land required for the widening of a street, but also to take land of which that required for such purposes forms part, and it has ample statutory authority to deal with any surplus or residue of such land not actually required for the street in such a way as it may think best. The notification of resumption is not as aptly worded as it

might have been in the circumstances, or at least so it seems to be, but I have no doubt that what the Council really intended to do was merely to exercise its power of taking all the land fronting on to the southern side of Park Street. This is a power which, if exercised bona fide, the plaintiff company cannot complain of, and I do not think that the Court should be astute to disregard the substance and to interfere with the Council in the exercise of its powers merely because of some irregularity in form or procedure. The plaintiff company has not been prejudiced in any way; and, though it is important that a public body exercising statutory powers should be compelled to observe its statutory obligations and to comply with statutory requirements in the exercise of its powers, I do not think that where it is apparent that it is acting in the bona fide exercise of its powers and is keeping within the limits of its authority it should be interfered with because of some suggested irregularity or defect in form which works no wrong to anybody which misleads nobody and by which nobody is prejudiced. Mr. Davidson said that it was not acting bona fide in what it did; but there is nothing to suggest this. I am unable, too, to agree with his contention that on the true construction of the Act it cannot, at its option, take either the whole or part of an owner's land fronting on to a proposed new or widened street. I think that as long as it acts in good faith it can."

From that decision the plaintiff appealed to the Full Court, which, on 3rd June, dismissed the appeal. On 6th June the notification of resumption as approved by the Governor in Council was published in the Government *Gazette* and in six Sydney newspapers. On 7th August the suit came on for hearing before *Maughan* A.J., who dismissed it with costs.

From the decision of *Maughan* A.J. the plaintiff now appealed to the High Court.

Flannery K.C. (with him *Davidson* and *Weston*), for the appellant. Under sec. 16 of the *Sydney Corporation Amendment Act* 1905, as amended by sec. 3 of the *Sydney Corporation Amendment Act* 1906, the Council might have resumed the whole of the land referred to in the notification of resumption for the purpose of widening the

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street. But it has stated in the notification that part is required for widening the street and part for carrying out improvements and remodelling that portion of the City and these parts are definitely marked out on the plan of the resumption. As to the part which is required for widening the street, namely, the 40 feet, the appellant does not object to the resumption; but as to the other part there was no inquiry by the Council into the question of improvements or remodelling, and the resumption is ineffective. Before there is an exercise of a statutory power such as that of the Council in this case, there must be due inquiry (*Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (1)). It is essential to a resumption under sec. 16 that the purpose for which the land is to be resumed should be stated. Notwithstanding the publication pursuant to sec. 18 of the notification of resumption, there is no vesting unless the land in fact answers the description in sec. 16. The publication of the notification does not operate irrespective of what has gone before (see *Carington* v. *Wycombe Railway Co.* (2)), and there is no vesting unless all the preliminary conditions have been complied with. Even if there is a vesting, the land is subject to being divested on proof of non-compliance with the conditions. The appellant would then be entitled to an order revesting the land in it.

Hooton, for the respondent, was not called on.

Cur. adv. vult.

May 4.

The following written judgments were delivered :—

KNOX C.J. For the reasons given by the Chief Judge in Equity, now Chief Justice of New South Wales, I am of opinion that his decision and that of the Full Court of the Supreme Court are correct.

In this view of the case it is not necessary to consider whether or to what extent the provisions of secs. 19 and 20 of the *Sydney Corporation Amendment Act* of 1905 affect the power of the Court to restrain the Municipal Council from dealing in accordance with the provisions of the Sydney Corporation Acts with land vested in it by force of sec. 19.

In my opinion the appeal should be dismissed.

(1) (1914) 31 T.L.R. 120; 79 J.P. 481. (2) (1868) L.R. 3 Ch. 377.

ISAACS J. The recent decision of the Privy Council in *Municipal Council of Sydney* v. *Campbell* (1) relieves us from considering how far the Governor in Council is constituted by the Legislature the statutory tribunal to examine and determine whether a proposed resumption by the City Council is required or not, and how far an affirmative decision of the Governor in Council can be overriden by a Court, so far as sec. 16 of the Act is concerned. But, starting from the position that the jurisdiction exists and must in a proper case be exercised, I shall assume the second resolution stated in the published notice of resumption to be invalid for the reasons stated in *Campbell's Case*. Nevertheless, in my opinion, the appeal fails on two grounds. The first is that, after discarding the second resolution, there is left a perfectly valid ground for supporting the resumption. It is not disputed that the first resolution is good; and that carries the part of the land required for widening Park Street. The balance of the land and the part so required, added together, constitute what is described in sec. 16 of the Act as "lands of which those required for such purposes form part." This is a ground entirely independent of, and is unaffected by, the failure of the second resolution. The second ground on which the appeal fails is found in sec. 19, which is untouched by *Campbell's Case*. The publication of the notice of resumption and description referred to in that section having taken place, the statutory consequence follows, namely, the vesting of the described land in the Council for the purposes of the Act. When Parliament declares that result in unequivocal terms, a Court cannot dispute it. A Court can examine the matter to ascertain whether the conditions prescribed by Parliament have been fulfilled; if they have, there is an end of the matter. And that is the case here.

HIGGINS J. In my opinion, this appeal must fail. The error in the resolution for resumption, an error which has been carried on into the notice of resumption published in the Government *Gazette* and newspapers, does not affect the validity of the resumption or prevent the vesting of the plaintiff's land in the corporation. Looking at sec. 16 of the *Sydney Corporation Amendment Act* 1905, we find

(1) (1925) A.C. 338.

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there is power for the corporation to resume all lands required for the purposes (*inter alia*) of widening, enlarging or extending of public ways, and all *lands of which those required for such purposes form part*, and any land required for carrying out improvements in, or remodelling, any portion of the City. The plaintiff's land lying along Park Street was included in the resolution for resumption (3rd April 1924). The back portion of that land was *not* required for the widening of Park Street; but, as the words of sec. 16 show, the corporation had power to take that portion with the rest of the plaintiff's land. The resolution stated, however, that part of the land was required for the purpose of widening Park Street, and that the remainder of the land was required for carrying out improvements in and remodelling that portion of the city in the vicinity of the street. *Both* purposes are legitimate grounds for resumption; but it is clear on the evidence that the purpose of improvements and remodelling was not within the intention of the councillors who voted for the resolution. The exact origin of the mistake has not been fully traced, but it is clearly due to the confusion resulting from the long-continued struggle as to Park Street between two parties in the Council. Probably the words were in previous resolutions, and no one pointed out that they should be deleted. But the fact remains, whatever was said as to the purposes of the resumption, that there was power under the Act to resume the whole of the plaintiff's land for any or all of the purposes mentioned in sec. 16, and it was in fact resumed for one of those purposes. Under sec. 18 the Council may with the approval of the Governor (in Council) cause a notice of the resumption of any lands together with a description of the land to be published in the *Gazette* and four Sydney newspapers, and a plan of the land resumed is to be deposited for public inspection. Under sec. 19, "upon the publication of such notice and description, the land described shall, for the purposes and subject to the provisions of this Act, be vested in the council for an estate in fee simple."

Neither sec. 18 nor sec. 19 makes a statement of the purpose or purposes of resumption essential to the validity of the resumption. As soon as the fact of resumption, with the approval of the Governor in Council, and with a description of the property resumed, has

been published in the Government *Gazette* and the four newspapers, the land resumed vests in the Council without conveyance. Probably it is expedient to state the purposes of the resumption in order to get the Governor in Council to approve of the resumption and of the notice (secs. 16, 18); but, as a matter of law, I do not see why a mere statement of resumption under the powers would not be enough to vest the land. Nothing is to be found in the Act that makes an accurate statement of the purposes of resumption essential to the validity of the resumption and vesting; though, if the purpose stated, or one of the purposes stated, were not sanctioned by the Act, it might be very difficult to support the validity of the resumption.

The case of *Municipal Council of Sydney* v. *Campbell* (1) has been misunderstood. That is, to put it briefly, a case of fraud on a power—not fraud in any criminal sense, but an attempt to use for purpose B a power conferred for purpose A. The position as expressed by the Judicial Committee (2) was as follows: "A body such as the Municipal Council of Sydney, authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere." There the Council was attempting to resume lands not needed for any legitimate purpose of extension "solely for the purpose of appropriating the betterments arising from the extension"—an illegitimate purpose. In support of this finding, the Judicial Committee pointed to the fact (*inter alia*) that no plan of improvement or remodelling was at any time before the Council. But it would be a mistake to think that the Judicial Committee held that a plan of any sort was a condition precedent to the validity of any resumption under sec. 16, or that the Courts are bound to weigh the amount of information which the Council has acquired, or the inquiry which it has made, before it attempts to resume (cf. *Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (3)).

RICH J. In March 1924 the Council resolved to take the subject land. The approval of the Governor was asked, and he was informed that part of the land was required for the widening of Park Street

(1) (1925) A.C. 338.
(2) (1914) 31 T.L.R. 120; 79 J.P. 481.
(2) 1925) A.C., at p. 343.

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and the rest of it for carrying out improvements in and remodelling the City in the vicinity of Park Street. He had then a statutory power to exercise, and the Governor there means Governor in Council, i.e., the Ministry of the day. With these purposes before him the Governor in Council approved of the resumption for those reasons and also approved of the publication of the resumption. The publication was about to follow, but was stopped by these proceedings until after the Full Court dismissed the appeal from the Chief Judge in Equity refusing the injunction. On 6th June 1924 the publication was made in the *Gazette* and on or about the same time in four daily Sydney newspapers. When this appeal came before this Court originally the case of *Municipal Council of Sydney* v. *Campbell* (1) was pending before the Judicial Committee. Very serious questions presented themselves to us at that time as to whether sec. 16 of the *Sydney Corporation Amendment Act* was really on all fours with cases in England where statutory bodies had been held not to have exercised their powers bona fide. There the Court necessarily entertained the question. But in the New South Wales Act statutory provision is made for controlling the conduct of the Municipal Council. That control is placed in the hands of the Governor in Council. The function of the Governor in Council could not be exercised without examining the whole matter anew; that is to say, there must be two independent opinions expressed as to whether the land is required for the alleged purposes or not. If the Governor in Council thinks for any reason that approval should be withheld, it is withheld. It may be because the Governor in Council thinks that the purpose is not sufficiently great, or that financial considerations forbid resumption, or that the Municipal Council has not properly considered the matter. If approval is given, it must be because the Governor in Council affirmatively decides that it is proper in the public interest to carry out the work. That a Court can afterwards cover the same or a great deal of the same ground, and come to a different conclusion which is to prevail notwithstanding the Governor in Council's decision, is very serious. Moreover, if the Court can revise the Council's proceedings, why can it not revise the proceedings of the Governor in Council by finding that that body did

(1) (1925) A.C. 338.

not properly apply its mind to the same questions as the Municipal Council is expected to do? However, this case was adjourned, and the judgment of the Privy Council finally answers those questions by deciding that the Governor in Council's approval is no obstacle to the inquiry by the Court. The objection raised in this case to the second resolution is therefore open. But, whatever may be said as to the invalidity of the second part of the resolution, the first part of the resolution was not attacked. That includes the appellant's land fronting Park Street. The inclusion of the remainder of such land is not left to implication as in *Galloway* v. *Mayor of London* (1), but falls within the express provisions of sec. 16 as part of the land effectively taken by the first part of the resolution. Moreover, all conditions precedent to vesting under sec. 19 were fulfilled and, the statutory vesting having taken place, this Court is unable to canvass it. The appeal therefore fails.

Appeal dismissed with costs.

Solicitor for the appellant, *W. H. Drew.*

Solicitors for the respondent, *Dawson, Waldron, Glover & Edwards.*

B. L.

(1) (1866) L.R. 1 H.L. 34.