

[PRIVY COUNCIL.]

GRACE BROTHERS PROPRIETARY }
 LIMITED } APPELLANT ;
 PLAINTIFF,

AND

THE COMMONWEALTH AND ANOTHER . RESPONDENTS.
 DEFENDANTS,

ON APPEAL FROM THE HIGH COURT OF
 AUSTRALIA.

Constitutional Law (Cth.)—Privy Council—Jurisdiction—Appeal from High Court
—Question as to limits inter se of constitutional powers of Commonwealth and
States—Acquisition of land—Compensation—Just terms—Statute—Validity—
Certificate of High Court—The Constitution (63 & 64 Vict. c. 12), ss. 51 (xxxi.),
74—Lands Acquisition Act 1906-1936 (No. 13 of 1906—No. 60 of 1936),
ss. 13, 15, 16 (1), 17, 26, 28, 29, 36, 40.

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Lords Simonds,
 Normand,
 Morton of
 Henryton,
 MacDermott
 and Reid.

Section 29 (1) of the *Lands Acquisition Act 1906-1936*, provides, in relation to land compulsorily acquired by the Commonwealth, as follows :—

“29 (1). The value of any land acquired by compulsory process shall be assessed as follows :—

- (a) In the case of land acquired for a public purpose not authorized by a Special Act, according to the value of the land on the first day of January last preceding the date of acquisition ; and
- (b) In the case of land acquired for a public purpose authorized by a Special Act, according to the value of the land on the first day of January last preceding the first day of the Parliament in which the Special Act was passed.”

On an application to the Judicial Committee of the Privy Council for special leave to appeal from the decision of the High Court (*Grace Brothers Pty. Ltd. v. The Commonwealth*, (1946) 72 C.L.R. 269), leave was granted as to the following questions :—“(a) whether the petitioner is entitled to be compensated under s. 29 (1) of the *Lands Acquisition Act 1906-1936* or upon a common law basis (i.e., whether s. 29 (1) is *ultra vires* or not) and (b) as to

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the principles upon which such compensation is to be given; but not as to the question whether the actual acquisition under the said Act is invalid."

Held that, as the argument to be presented on behalf of the appellant involved a submission that s. 29 (1) did not provide just terms within the meaning of s. 51 (xxxi.) of the Constitution, and the appellant, not having obtained from the High Court a certificate under s. 74, and not having acquiesced in the High Court's decision on the validity of the impugned section, the Privy Council had no jurisdiction to entertain the appeal.

Appeal from the decision of the High Court: *Grace Brothers Pty. Ltd. v. The Commonwealth*, (1946) 72 C.L.R. 269, dismissed.

APPEAL from the High Court of Australia.

In its statement of claim in an action against the Commonwealth and the Minister for the Interior, Grace Bros. Pty. Ltd. alleged that by a notification published in the *Commonwealth Gazette* on 8th November 1945 the defendants had purported to acquire for the Commonwealth pursuant to the *Lands Acquisition Act* 1906-1936 certain land owned by the plaintiff and were proceeding to demolish a building on the land.

The published notification of acquisition stated that the land had been acquired "for the following purpose, namely: purposes of the Commonwealth at Sydney."

The plaintiff claimed:—

(1) A declaration that the notification "is void and of no effect in that such notification does not comply with the requirements of section 15 of the *Lands Acquisition Act* 1906-1936."

(2) A declaration "that the *Lands Acquisition Act* 1906-1936 is wholly void and of no effect in that such Act is ultra vires of the Constitution of the Commonwealth of Australia section 51 par. (xxxi.)."

(3) A declaration "(alternatively to (2)) that section 29 of the *Lands Acquisition Act* 1906-1936 is wholly void and of no effect in that the said section 29 is ultra vires of the Constitution of the Commonwealth of Australia section 51 par. (xxxi.)."

(4) An injunction "restraining the defendants and each of them and their servants and agents from—(a) entering upon or in any way interfering with the said land or premises erected thereon or the user or enjoyment thereof by the plaintiff or any person or persons lawfully claiming through the plaintiff and (b) selling, mortgaging, alienating, charging, encumbering or otherwise dealing with the said land."

The defendants demurred to the statement of claim on the grounds that:—

"(a) It discloses no cause of action.

(b) The *Lands Acquisition Act* 1906-1936 and every part thereof is a valid exercise of the legislative power of the Parliament of the said Commonwealth pursuant to the Constitution of the Commonwealth.

(c) The notification referred to in . . . the statement of claim . . . and every part thereof is a valid exercise of the power conferred on the Governor-General of the said Commonwealth by the *Lands Acquisition Act* 1906-1936."

The motion was referred to the Full Court for hearing with the demurrer.

The High Court allowed the demurrer, dismissed the motion with costs, and also dismissed the action with costs (*Grace Brothers Pty. Ltd. v. The Commonwealth* (1)).

On an application to the Judicial Committee of the Privy Council for special leave to appeal from the whole of the High Court's decision leave was granted subject to the limitation set out hereunder in the judgment of their Lordships at pp. 362, 363.

The relevant statutory provisions are sufficiently set forth in the judgment hereunder.

G. E. Barwick K.C. and *Gilbert Dare*, for the appellant.

A. R. Taylor K.C., *F. Gahan* and *R. Else-Mitchell*, for the respondents.

Their Lordships took time to consider the advice which they would tender to His Majesty.

LORD NORMAND delivered the judgment of their Lordships as follows:—

This Appeal by special leave from a judgment of the High Court of Australia, is governed by the decision of *Nelungaloo Pty. Ltd. v. The Commonwealth* (2).

The facts are these. The appellant company, which is incorporated according to the laws of New South Wales, was the registered proprietor in New South Wales of certain land on which a large building had been erected. By a notification in the *Commonwealth of Australia Gazette* on 8th November 1945, the Commonwealth purported to acquire the land and building under the *Lands Acquisition Act* 1906-1936. The Commonwealth entered into possession and began alterations and demolitions. The appellant thereupon commenced a suit in the original jurisdiction of the High

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(1) (1946) 72 C.L.R. 269.

(2) (1950) 81 C.L.R. 144.

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Court of Australia against the Commonwealth and the Minister of State for the Interior, the respondents in this appeal. In the writ of summons the appellant claimed a declaration that the notification was void as not complying with the *Lands Acquisition Act*; a declaration that the *Lands Acquisition Act* was ultra vires of the Constitution of the Commonwealth of Australia, s. 51, par. (xxxi.), and an alternative declaration that s. 29 of the said Act was ultra vires of this same section and paragraph. There was a claim, for an injunction against entering on or interfering with the land and premises, or selling, mortgaging, alienating, charging or encumbering or otherwise dealing with them, and a claim for damages.

The respondents demurred to the statement of claim on *inter alia* the ground that the *Lands Acquisition Act* and every part thereof was a valid exercise of the legislative power of the Commonwealth of Australia.

The material provisions of the *Lands Acquisition Act* are as follows:—

“ 13. The Commonwealth may acquire any land for public purposes—

- (a) by agreement with the owner; or
- (b) by compulsory process.

15.—(1) The Governor-General may direct that any land may be acquired by the Commonwealth from the owner by compulsory process.

(2) The Governor-General may thereupon, by notification published in the *Gazette*, declare that the land has been acquired under this Act for the public purpose therein expressed.

(3) A copy of the notification shall be laid before both Houses of the Parliament within fourteen days after its publication in the *Gazette* if the Parliament is then sitting, and if not then within fourteen days after the next meeting of the Parliament.

16.—(1) Upon the publication of the notification in the *Gazette*, the land described therein shall, by force of this Act—

- (a) be vested in the Commonwealth; and
- (b) be freed and discharged from all trusts, obligations, estates, interests, contracts, licences, charges, rates, and easements, to the intent that the legal estate therein, together with all rights and powers incident thereto or conferred by this Act, shall be vested in the Commonwealth.

(2) . . .

17. Upon the publication of the notification in the *Gazette*, the estate and interest of every person entitled to the land specified in the notification, and the title of the State to any Crown land

specified in the notification, shall be taken to have been converted into a claim for compensation.

26. Where any land (other than Crown land) is acquired by compulsory process, the owner of the land shall, if deprived of the land in whole or in part, be entitled to compensation under this Act.

28.—(1) In determining the compensation under this Act, regard shall be had (subject to this Act) to the following matters :—

- (a) The value of the land acquired ;
- (b) The damage caused by the severance of the land acquired from other land of the person entitled to compensation ; and
- (c) The enhancement or depreciation in value of other land adjoining the land taken or severed therefrom of the person entitled to compensation by reason of the carrying out of the public purpose for which the acquired land was acquired.

(2) The enhancement or depreciation in value shall be set off against or added to the amount of the value and damage specified in paragraphs (a) and (b) of sub-section (1) of this section.

29.—(1) The value of any land acquired by compulsory process shall be assessed as follows :—

- (a) In the case of land acquired for a public purpose not authorized by a Special Act, according to the value of the land on the first day of January last preceding the date of acquisition ; and

- (b) In the case of land acquired for a public purpose authorized by a Special Act, according to the value of the land on the first day of January last preceding the first day of the Parliament in which the Special Act was passed.

(2) The value of the land shall be assessed without reference to any increase in value arising from the proposal to carry out the public purpose.

36. Subject to this Act, a disputed claim for compensation may be determined as follows :—

- (a) By agreement between the Minister and the claimant ; or
- (b) By an action for compensation by the claimant against the Commonwealth ; or
- (c) By a proceeding in a Federal or State Court on the application of the Minister.

40. Compensation shall bear interest at the rate of three per centum per annum from the date of the acquisition of the land, or the time when the right to compensation arose, until payment thereof is made to the claimant or until the amount thereof has been deposited in the Treasury.

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Provided that, where the compensation awarded in an action for compensation, or determined in a judicial proceeding, is not more than the amount offered by the Minister in satisfaction of the claim for compensation, the compensation shall only bear interest to the date when the offer of the Minister is communicated to the claimant."

The appellant moved for an injunction restraining the respondents from selling, disposing, leasing, further altering, demolishing, or otherwise dealing or interfering with the land or buildings, and by an order made by *Williams J.*, this motion was referred to the Full Court of the High Court for hearing at the same time as the demurrer in the action.

At the hearing before the Full Court the appellant maintained that the Act was invalid as failing to provide just terms of compensation and was therefore ultra vires s. 51 (xxxi.) of the Constitution, which empowers the Commonwealth to acquire property on just terms. It was argued that s. 29 (1) of the Act, since it required that the land should be valued at a date anterior to the date of acquisition, did not give the owner just terms; it was argued also that s. 28 (1) (a) failed to provide for the assessment of compensation on the basis of the value of the land to the expropriated owner. The provisions of s. 40, that compensation should bear interest at the rate of three per cent from the date of acquisition until payment, were attacked on the ground, *inter alia*, that a fixed rate of interest which disregarded the fluctuations of interest rates was unjust. It was also said that the failure to make moneys legally available for the payment of compensation, so that the actual payment to the expropriated owner was dependent on Parliamentary application was unjust. The respondents maintained that the Act in its entirety was within the power conferred by s. 51 (xxxi.) and valid. The Full Court allowed the demurrer, dismissed the motion for injunction and dismissed the action (1). The Chief Justice and *Starke*, *Dixon* and *McTiernan JJ.* rejected all the submissions for the appellant. *Williams J.*, who concurred on all other points, held that s. 29 (1) of the Act did not provide just terms because it fixed a date anterior to the acquisition of the land as the date on which the value should be ascertained, but that by the operation of s. 15A of the *Acts Interpretation Act* 1901-1934, s. 29 (1) was severable. He therefore was of opinion that the demurrer should be overruled and that the motion for an injunction should be dismissed.

An application for special leave to appeal was thereafter presented to His Majesty in Council, and leave was granted as to the following

questions:—viz. “(a) whether the petitioner is entitled to be compensated under s. 29 (1) of the *Lands Acquisition Act* 1906-1936 or upon a common law basis (i.e. whether s. 29 (1) is ultra vires or not) and (b) as to the principle upon which such compensation is to be given; but not as to the question whether the actual acquisition under the said Act is invalid.”

Under the order it is open to the appellant to maintain, and it is in fact submitted in the appellant's case, that ss. 28 and 29 (1) do not provide just terms for the assessment of compensation and that s. 40 does not provide just interest on the compensation due to the appellant.

The respondents maintain that the attack on these sections as in excess of the power conferred on the Commonwealth by s. 51 (xxxi.) involves an *inter se* question and that an appeal to His Majesty in Council is by virtue of the provisions of s. 74 of the Constitution incompetent without a certificate of the High Court. The question for decision is the same as that dealt with by their Lordships in the *Nelungaloo Case* (1). It was there decided that any question whether the Commonwealth had exceeded the powers conferred on it by s. 51 was an *inter se* question. It was decided also that, though the appellant might have succeeded in the appeal without obtaining a determination on the *inter se* question, yet unless he acquiesced in the High Court's determination upon it or obtained a certificate from the High Court, the jurisdiction of His Majesty in Council was excluded. In the present case the appellant has not obtained a certificate and has not acquiesced in the High Court's decision on the validity of the impugned sections, and their Lordships must therefore refuse to entertain the appeal.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. The appellant must bear the costs of the appeal.

Appeal dismissed. Appellant to pay the costs of the appeal.

Solicitors for the appellant, *Laurence & Laurence*, by *Kimbers, Williams, Sweetland & Stinson*.

Solicitors for the respondents, *K. C. Waugh*, Crown Solicitor for the Commonwealth, by *Coward, Chance & Co.*

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