HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

SOUTH SYDNEY CITY COUNCIL PLAINTIFF

AND

PALIFLEX PTY LIMITED DEFENDANT

South Sydney City Council v Paliflex Pty Limited [2003] HCA 66
12 November 2003
S270/2003

ORDER

1. *Cause remitted to the Supreme Court of New South Wales for the making of orders conformably with the reasons of this Court.*

2. *Paliflex Pty Limited to pay the costs of South Sydney City Council and the Attorney-General for New South Wales of the removal application and of the cause in this Court.*

Representation:

I Mescher for the plaintiff (instructed by Pike Pike & Fenwick)

N C Hutley SC with G A Moore, N Perram and K M Richardson for the defendant (instructed by Brock Partners)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth of Australia with G Witynski and N L Sharp intervening on behalf of the Attorney-General of the Commonwealth of Australia (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with I Mescher intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

C J Kourakis QC, Solicitor-General for the State of South Australia with C Bleby intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

P J Hanks QC with S G E McLeish intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

South Sydney City Council v Paliflex Pty Limited

Constitutional law (Cth) – Exclusive powers of Commonwealth Parliament – Place acquired by Commonwealth for public purposes – Subsequent State law – Whether State law applied to place on enactment – Whether State law valid on enactment – Subsequent disposition of place by Commonwealth – Whether State law applied to place after disposition – Whether State law valid in application to place after disposition – Whether imposition of local government rates and charges under State law in respect of place enforceable – Constitution, s 52(i) – *Local Government Act* 1993 (NSW).

Local government – Council – Rates and charges – Place acquired by Commonwealth for public purposes – Subsequent State law – Whether State law applied to place on enactment – Whether State law valid on enactment – Subsequent disposition of place by Commonwealth – Whether State law applied to place after disposition – Whether State law valid in application to place after disposition – Whether imposition of rates and charges under State laws in respect of place enforceable – Constitution, s 52(i) – *Local Government Act* 1993 (NSW).

Constitution, s 52(i).
Local Government Act 1993 (NSW).

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY AND HAYNE JJ. By order made on application by the Attorney-General for New South Wales pursuant to s 40(1) of the *Judiciary Act* 1903 (Cth), a Justice of this Court removed a cause pending in the Supreme Court of New South Wales, Common Law Division. In that cause, South Sydney City Council ("the Council") sought orders setting aside orders made in the Local Court of New South Wales. The Local Court had given judgment for the defendant, Paliflex Pty Ltd ("Paliflex"), in an action by the Council to recover rates and charges levied on the property at 97 Elizabeth Bay Road, Elizabeth Bay ("the Land") for the year ended 30 June 2001. The Council also sought to recover the balance of rates and charges incurred prior to 1 July 2000 and rates and charges incurred for the period 1 July 2001 to 30 June 2002 with respect to the Land. The charges were identified as Domestic Waste Management Charges. The Council also claimed interest from 1 July 2000. The rates and charges were imposed pursuant to the provisions of the *Local Government Act* 1993 (NSW) ("the LG Act").

2 Paliflex successfully resisted the claim in the Local Court on constitutional grounds. It was conceded by the Council that the rates and charges were a tax. The magistrate followed the reasoning of the Court of Appeal in *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)*[1], but with a critical qualification. It was conceded by the Council that the LG Act was not a law to which the Mirror Taxes Legislation[2] applied. Without that legislative assistance, the reasoning of the Court of Appeal was taken as indicating that s 52(i) of the Constitution had conferred an exclusive federal legislative power with respect to the Land upon which the LG Act had trespassed.

3 The history of the ownership of the Land by the Commonwealth is given in the reasons in the appeal in *Paliflex Pty Ltd v Chief Commissioner of State Revenue*[3] which was heard with the cause removed. These reasons should be read with those in that appeal.

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1 2002 ATC 5,015.

2 *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth), *Commonwealth Places (Mirror Taxes Administration) Act* 1998 (NSW).

3 [2003] HCA 65.

4 It is necessary to say something of the relevant provisions of the LG Act. This was enacted in 1993 at a time when the Land was owned by the Commonwealth. The transfer to Paliflex was registered on 4 February 1998.

5 Section 554 of the LG Act states:

> "All land in an area is rateable unless it is exempt from rating."

The general provision is that "the owner" for the time being of land on which a rate is levied is liable to pay the rate to the council (s 560(1)).

6 However, rates and charges are made by resolution of the responsible council (s 535). They are levied on the land specified in a rates and charges notice by service of the notice (s 546) and are recoverable by the council as a debt in a court of competent jurisdiction (s 695). The contrast with the nature of the land tax impost, described in *Tooth & Co Ltd v Newcastle Developments Ltd*[4], will be apparent. Land tax is imposed and charged at a specified date by force of the statute and does not wait upon the issue and service of a notice of assessment.

7 The agreed facts upon which the action was tried in the Local Court disclose no attempt by the Council to levy rates and charges in respect of the Land whilst the Commonwealth was the owner of it. Without the taking by the Council of the steps required by ss 535 and 546 of the Act, it is difficult to see any foundation for a proposition that the LG Act "applied to" the Land whilst it was a Commonwealth place.

8 However that may be, the question of the "application" of the LG Act in that period may be determined on broader grounds. This is because s 4 of the statute provides:

> "This Act binds the Crown in right of New South Wales and, *in so far as the legislative power of Parliament permits*, the Crown in all its other capacities, except to the extent to which this Act otherwise provides." (emphasis added)

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4 (1966) 116 CLR 167 at 170.

The result is that the LG Act evinces a recognition of the limitation placed upon State legislative power by the Constitution. Those restraints include s 114 and s 52(i) and are discussed in the other *Paliflex* case.

9 There is an exemption provision in s 555(1)(a) which states:

> "The following land is exempt from all rates:
>
> (a) land owned by the Crown, not being land held under a lease for private purposes".

According to accepted doctrine, the term "Crown" includes the Crown in right of New South Wales but, in the context of s 555(1)(a), does not extend to the Commonwealth. That is because there is no imposition from which an exemption may be conferred. Section 555(1)(a) was not an exercise of legislative power with respect to the Land and did not trench upon the area marked out by s 52(i) of the Constitution.

10 Despite the concession in the Local Court that the charges were a tax, they stand in a different position. As the Attorney-General of the Commonwealth emphasised in his written submissions as an intervener in this Court, the charges probably have the constitutional character of a fee for service[5]. Section 496 of the LG Act provides:

> "(1) A council must make and levy an annual charge for the provision of domestic waste management services for each parcel of rateable land for which the service is available.
>
> (2) A council may make an annual charge for the provision of a domestic waste management service for a parcel of land that is exempt from rating if:
>
> (a) the service is available for that land, and
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> (b) the owner of that land requests or agrees to the provision of the service to that land, and
>
> (c) the amount of the annual charge is limited to recovering the cost of providing the service to that land."

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5 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133.

The person liable to pay a charge is identified by s 561 of the LG Act. This provides:

> "The person liable to pay a charge is:
>
> (a) the person who, if the charge were a rate and if the land on which the charge is levied were rateable in respect of that rate, would be liable under section 560 to pay the rate, or
>
> (b) the Crown in respect of land owned by the Crown, not being land held under a lease for private purposes."

11 Paragraph (a) of s 561 could not have applied to the Commonwealth because, if the charge had been a rate levied on the Land, that, for the reasons already given, would not have been effective and the Commonwealth would not have been liable to pay it. Nor would par (b) of s 561. The term "the Crown" used there has to be read with s 4 of the LG Act. That, as indicated, evinces an intention by the New South Wales Parliament not to trespass upon the exclusive preserve marked out with respect to the Land by s 52(i) of the Constitution.

12 For these reasons, the LG Act did not have any operation with respect to the Land whilst it was a Commonwealth place. Further, there was no invalidity encountered when rates and charges were imposed by the Council after the acquisition of the Land by Paliflex. For the reasons given in the *Paliflex* appeal, in its operation at that stage, the LG Act was not a law with respect to a place acquired by the Commonwealth for public purposes.

13 The cause should be remitted to the Supreme Court for the making of orders to give effect to the reasons for judgment of this Court. Paliflex should pay the costs of the Council and the Attorney-General for New South Wales of the removal application and the cause in this Court. Costs of the cause in the Supreme Court should be for that Court.

14 CALLINAN J. Subject to my reasons for judgment in *Paliflex Pty Ltd v Chief Commissioner of State Revenue*[6], I agree with the reasons, conclusion and orders proposed by Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ.

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6 [2003] HCA 65.