HIGH COURT OF AUSTRALIA

GUMMOW ACJ,
HAYNE, HEYDON, CRENNAN AND BELL JJ

CUMERLONG HOLDINGS PTY LTD APPELLANT

AND

DALCROSS PROPERTIES PTY LTD & ORS RESPONDENTS

Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd [2011] HCA 27
3 August 2011
S120/2011

ORDER

1. Appeal allowed.

2. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made 2 September 2010, and in place thereof order that:

(a) the appeal be allowed;

(b) the first and second respondents pay the appellant's costs of the appeal to the Court of Appeal up to and including 11 July 2010 and the third respondent pay the appellant's costs thereafter;

(c) set aside order 3 of the orders of Smart AJ of the Supreme Court made 30 October 2009, and in place thereof:

(i) declare that the change expressed by LEP 194 to the zoning of the land of the appellant, identified as Lot 1 in DP302605, does not have effect to suspend the operation of the restrictive covenant burdening the land of the third respondent, identified as Lot 103 in DP834629; and

(ii) order that the third respondent be restrained, by itself, its servants and agents, from using or permitting the use of Lot 103 in DP834629 for any hospital, or any ancillary or associated purpose, contrary to the restriction imposed by instrument registered on 10 November 1993 pursuant to s 88B of the Conveyancing Act *1919 (NSW);*

(d) amend order 4 of the orders of Smart AJ made 30 October 2009 by deleting "Plaintiff pay the defendants' costs of these proceedings" and substituting "First and second defendants pay the plaintiff's costs of these proceedings".

3. The third respondent is to pay the appellant's costs of the appeal to this Court.

On appeal from the Supreme Court of New South Wales

Representation

P J McEwen SC with S B Nash and N M Eastman for the appellant (instructed by Allsop Glover)

B W Walker SC with P Kulevski for the third respondent (instructed by Robert Napoli & Co Solicitors)

Submitting appearance for the first and second respondents

J E Griffiths SC with C C Spruce appearing as amicus curiae on behalf of the Minister for Planning and Infrastructure (instructed by Department for Planning)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd

Local government – Town planning – Proprietary rights – Suspension of proprietary rights by planning instrument – Ku-ring-gai Local Environment Plan No 194 ("LEP 194") amended Ku-ring-gai Planning Scheme Ordinance ("Ordinance") to effect rezoning of certain land – Purported effect of rezoning was to render unenforceable a restrictive covenant which burdened land owned by third respondent for benefit of land owned by appellant – Section 28 of *Environmental Planning and Assessment Act* 1979 (NSW) required that planning instrument which rendered unenforceable a restrictive covenant be approved by Governor acting on advice of Executive Council – Whether LEP 194 "provide[d] that" restrictive covenant "shall not apply" – Whether restrictive covenant unenforceable where failure to comply with s 28 when amending Ordinance.

Words and phrases – "environmental plan", "environmental planning instrument", "provide", "regulatory instrument".

Environmental Planning and Assessment Act 1979 (NSW), s 28.
Local Government Act 1919 (NSW), Pt XIIA.

1 GUMMOW ACJ, HAYNE, CRENNAN AND BELL JJ. This litigation concerns a dispute between owners of neighbouring parcels of land in the vicinity of the intersection of Werona Avenue and Stanhope Road, Killara. This suburb is in the municipality of Ku-ring-gai on the North Shore of Sydney. The title to the parcels of land is held under the provisions of the *Real Property Act* 1900 (NSW), and so may be described as Torrens title.

2 Dalcross Holdings Pty Limited ("the second respondent") operated a private hospital on one lot ("Lot 101"), and proposed to extend that activity to an area bounded by the corner of Stanhope Road and Werona Avenue. This area includes a lot in DP834629 ("Lot 103") which adjoins Lot 101. Dalcross Properties Pty Limited ("the first respondent") was the registered proprietor of Lot 103 when the litigation commenced. Both Lot 101 and Lot 103 front Stanhope Road. Cumerlong Holdings Pty Limited ("the appellant") is the registered proprietor of a lot in DP302605 ("Lot 1") which fronts Werona Avenue and has a rear boundary with Lot 101.

3 Section 88B of the *Conveyancing Act* 1919 (NSW) provides, among other things, for the creation of restrictions on the use of Torrens title land, upon the registration of plans containing the required covenants. By force of s 88B and the registration of DP834629 on 10 November 1993, certain land which includes Lot 1 has the benefit of the restrictions imposed upon parcels of land which include Lot 103. It has been accepted in the litigation that the terms of the restriction prevent the use of Lot 103 for hospital and medical purposes.

The course of the litigation

4 By suit in the Equity Division of the Supreme Court of New South Wales, the appellant sought to enjoin the proposed development on the ground that it contravened the restriction on use imposed upon Lot 103. On 30 October 2009, the suit was dismissed by Smart AJ. On 28 June 2010, Australasian Conference Association Ltd ("the third respondent") acquired both Lot 101 and Lot 103 and is the present registered proprietor thereof. Thereafter, on 2 September 2010, an appeal by the appellant to the Court of Appeal was dismissed by majority (Tobias and McColl JJA; Handley AJA dissenting)[1].

5 By special leave granted on 11 March 2011, the appellant appeals to this Court. The first and second respondents entered submitting appearances and the opposition to the appeal was conducted by the third respondent. At the hearing,

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1 *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2010] NSWCA 214.

leave was granted to the Minister for Planning and Infrastructure to appear as amicus curiae. Such leave had been granted at trial and in the Court of Appeal.

The nature of the dispute

6 The successful opposition to the appellant's case was based upon the operation of planning legislation and instruments made thereunder on what otherwise would be the enjoyment and enforcement by the appellant of its proprietary rights, being the benefit attached to its Lot 1 of the restrictions upon the use of Lot 103. The appellant challenges the reliance by the third respondent upon operation of the planning legislation and instruments made thereunder to defeat its suit for equitable relief.

7 This dispute illustrates several points of general significance. It may be true to say that State planning legislation "is concerned with land as a topographical entity, indifferently to its proprietorship"[2], and that this may entail interference with private property rights[3]. But legislation which operates to mitigate the extent of that interference, by prescription of a particular manner and form for the making of planning instruments, should be read in light of that purpose of mitigating the derogation of private rights[4].

8 On 27 August 2008, Ku-ring-gai Municipal Council approved a development application by the second respondent by granting a development consent to the construction on land including Lot 103 of, among other things, an extension of the hospital erected upon Lot 101. The majority of the Court of Appeal based its decision to refuse to grant an injunction to enforce the restrictive covenant upon the proposition that effect was given to the development consent by the terms of cl 68(2) of the Ku-ring-gai Planning Scheme Ordinance ("the Ordinance") as it stood after the changes to the relevant zoning of the land made by the Ku-ring-gai Local Environment Plan No 194 ("LEP 194"). LEP 194 had been gazetted on 28 May 2004.

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2 *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2002) 55 NSWLR 446 at 449; reversed on other grounds: *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472; [2004] HCA 59.

3 *Owens v Longhurst* (1998) 9 BPR 16,731 at 16,732.

4 See *Application of Thompson* unreported, Supreme Court of New South Wales, 25 October 1993 at 4 per McLelland CJ in Eq.

9 Clause 2 of LEP 194 had as its stated aim: "to rezone land to facilitate the development of multi-unit housing and increase housing choice". Clause 3 applied the plan to certain areas within the municipality, including the land the subject of this dispute, and made changes to the zoning system provided by the Ordinance. Clause 4(a) stated that LEP 194 amended the Ordinance as set out in Sched 1. The result was that, if LEP 194 was otherwise effective in its terms, it and the Ordinance were to be read in combination[5].

10 Schedule 1 of LEP 194 did not amend the terms in which cl 68(2) of the Ordinance was expressed, but it otherwise amended the Ordinance by creating a new zone of land (Zone No 2(d3)) and altering the existing zoning of certain land which included the land in question. The result was that LEP 194 supplied a changed factum upon which cl 68(2) operated. Clause 68(2) in its terms excluded from its operation land in zones it listed, including Zone No 2(b), but this left cl 68(2) to operate in respect of land in zones not so specified. The effect of the changes made by LEP 194 was to remove the land burdened by the restrictive covenant from Zone No 2(b), which was listed as an excluded zone in cl 68(2), and to place that land in Zone No 2(d3), a zone which was not listed in, and so was not excluded from, cl 68(2).

11 After the changes made by LEP 194, cl 68(2) now operated in respect of land within Zone No 2(d3), including the land the subject of this litigation. Clause 68(2) relevantly reads:

> "the operation of any covenant, agreement or instrument imposing restrictions as to the erection or use of buildings for certain purposes or as to the use of land for certain purposes is hereby suspended to the extent to which any such covenant, agreement or instrument is inconsistent with any provision of this Ordinance or with any consent given thereunder."

12 Before LEP 194, cl 68(2) had not operated to "suspend" the operation of the restrictive covenant burdening Lot 103. In using the term "suspended", cl 68(2) appears to contemplate that if the relevant development consent later became inoperative for some reason, the suspension would cease and the covenant would again be enforceable according to its terms. The Minister contended that this meant that the rights the appellant enjoyed under the restrictive covenant were placed no more than in abeyance, which might be

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5 See *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463; [1995] HCA 44.

infinite or indefinite. This may be so, but that abeyance represents a serious inroad upon the property rights of the appellant[6].

The history of the Ordinance

13 The Ordinance was a scheme prescribed in 1971 pursuant to powers conferred on the Governor (exercisable on the recommendation of the Minister) by Pt XIIA (ss 342A-342AT) of the *Local Government Act* 1919 (NSW) ("the 1919 Act"), in particular by s 342KD. Section 342G(4) provided that a scheme might "suspend", either generally or in any particular case or class of cases, the operation of any covenant or instrument "to the extent to which that provision is inconsistent with any of the provisions of the scheme". This provided the foundation for cl 68(2) of the Ordinance when it was prescribed.

14 Division 9 (ss 342AC-342AE) of the 1919 Act made provision for compensation to those with an estate or interest in land injuriously affected by a prescribed scheme[7]. However, s 342G(4) also provided for the suspension by a scheme of the operation of any other provision of the 1919 Act (thus including Div 9) to the extent of its inconsistency with any of the provisions of the scheme. The statutory provision for compensation was not carried into the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act"), and different methods were provided for the making of planning instruments. Parts XIIA and XIIB of the 1919 Act were repealed with effect from 1 September 1980 when the EPA Act came into force[8].

The EPA Act, s 28

15 LEP 194 is expressed to have been made by the Minister under the EPA Act. However, by the force of transitional provisions[9], the Ordinance became a

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6 See Pounder and Butt, "Planning Principles vs Private Property Rights: Environmental Planning and Assessment Act 1979 (NSW), s 28", (2004) 78 *Australian Law Journal* 560.

7 See *Bingham v Cumberland County Council* (1954) 20 LGR 1; *Baker v Cumberland County Council* (1956) 1 LGRA 321.

8 *Miscellaneous Acts (Planning) Repeal and Amendment Act* 1979 (NSW), Sched 1.

9 *Miscellaneous Acts (Planning) Repeal and Amendment Act* 1979 (NSW), Sched 3, cl 2. See *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472 at 486 [38].

"deemed environmental planning instrument" and thus an "environmental planning instrument" as defined in s 4 of the EPA Act. Thereafter, and contrary to submissions by the Minister, the Ordinance derived its statutory support not from the 1919 Act but from the EPA Act.

16 As the EPA Act stood when LEP 194 was made in 2004, Pt 3 (ss 24-74) was headed "Environmental planning instruments"[10]. Division 1 (ss 24-36) of Pt 3 was headed "General". Section 24 provided that an environmental planning instrument might be made in accordance with Pt 3 for the purposes of achieving any of the objects of the statute. Division 4 of Pt 3 (ss 53-72) was headed "Local environmental plans", and s 70 conferred power upon the Minister to make such a plan. Division 4 is relied upon in submissions by the third respondent and by the Minister to support the making of LEP 194.

17 However, the appellant refers to the specific provision made in s 28, which is in Div 1, not Div 4. Section 28, as it stood when LEP 194 was made, provided:

> "(1) In this section, ***regulatory instrument*** means any Act (other than this Act), rule, regulation, by-law, ordinance, proclamation, agreement, *covenant or instrument by or under whatever authority made*.
>
> (2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, *an environmental planning instrument may provide that*, to the extent necessary to serve that purpose, *a regulatory instrument specified* in that environmental planning instrument *shall not* apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.
>
> (3) A provision referred to in subsection (2) *shall have effect according to its tenor*, but only if the Governor has, before the making of the environmental planning instrument, approved of the provision.
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> (4) Where a Minister is responsible for the administration of a regulatory instrument referred to in subsection (2), the approval of

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10 Part 3 thereafter was substantially amended by the *Environmental Planning and Assessment Amendment Act* 2008 (NSW), but the effect of Sched 6 to the EPA Act as it thereafter stood was to continue in force the Ordinance and LEP 194.

the Governor for the purposes of subsection (3) shall not be recommended except with the prior concurrence in writing of that Minister.

(5) A declaration in the environmental planning instrument as to the approval of the Governor as referred to in subsection (3) or the concurrence of a Minister as referred to in subsection (4) shall be prima facie evidence of the approval or concurrence." (double emphasis in original; other emphasis added)

The reference to the Governor, by force of s 14 of the *Interpretation Act* 1987 (NSW), is to be read as a reference to the Governor with the advice of the Executive Council.

18 The appellant points to the requirement in s 28 for approval by the Governor. It is not disputed that the procedures found in s 28 were not observed with respect to the creation of LEP 194. The appellant characterises s 28 as supplying a "brake" upon the power of the Minister to act alone under Div 4 to provide for the suspension of private rights, such as those under a restrictive covenant.

19 The first question is whether the procedures detailed in s 28 were permissive rather than mandatory. The second is whether, in any event, s 28 had been engaged in the making of LEP 194.

20 As to the first question, the third respondent accepts that an amendment to cl 68(2) which answered the description in s 28 would need to satisfy what the appellant relies upon as the "protection provisions" of s 28. That is to say, s 28 is an example of a particular regime which, where it applies, excludes the broader provisions (here, in Div 4) which might otherwise be engaged[11].

21 Something should be said respecting the phrase in s 28(3) "shall have effect according to its tenor". It may be accepted that "tenor" may identify no more than the meaning of words actually used in an instrument. But it may also identify the effect or drift of a provision, and the phrase in which "tenor" appears in s 28(3) makes it plain that this is how it is to be read in s 28(3).

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11 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; [1932] HCA 9; *Bruton Holdings Pty Ltd (In liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346 at 353 [17]; [2009] HCA 32.

22 The restrictive covenant binding Lot 103 in favour of the appellant's Lot 1 plainly is a "regulatory instrument" within the meaning of s 28(1). LEP 194 is an "environmental planning instrument" because it is a "local environmental plan" which was made by the Minister under s 70 of the EPA Act. This follows from the definitions in s 4. The Ordinance also, as indicated above, is an "environmental planning instrument".

Conclusions

23 The appeal should succeed. Within the meaning of s 28(2), LEP 194 is an environmental planning instrument which, by its engagement with the provisions of the Ordinance, including cl 68(2), provides and specifies that, to the extent necessary to serve the purpose of enabling development to be carried out in accordance with LEP 194, the restrictive covenant of which the appellant's land has the benefit shall not apply to the land which it is sought to develop and use for the purposes of a hospital. But LEP 194 cannot have this effect because approval, as required by s 28(3), was not given.

24 LEP 194 did so provide and specify with respect to the suspension of the restrictive covenant in question because, as Handley AJA put it[12], that was a necessary result of the making of LEP 194. This conclusion is contrary to the view of the majority in the Court of Appeal that s 28(3) is only engaged if there be in LEP 194 a statement in terms that a category of regulatory instrument, which includes the restrictive covenant, is not to apply to any development permissible under LEP 194.

25 Some analogy with respect to the use of the term "provide" in s 28(2) is supplied by the construction which has been given to the power given to the Parliament to make laws with respect to "matters in respect of which [the] Constitution makes provision until the Parliament otherwise provides" (s 51(xxxvi))[13]. In *King v Jones*[14], Barwick CJ rejected what he understood to be

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12 *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2010] NSWCA 214 at [79]-[80].

13 There are twenty-two provisions in the Constitution to which s 51(xxxvi) applies: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 647-648.

14 (1972) 128 CLR 221 at 240; [1972] HCA 44.

the submission that, in order to "otherwise provide", the Parliament must make a law which in terms refers to the matter elsewhere in the Constitution, so as to expressly displace it; rather, it was enough that the result of the law, "of necessity", displaced the provision.

Orders

26 The appeal should be allowed, and the third respondent should pay the appellant's costs of the appeal to this Court.

27 The orders of the Court of Appeal should be set aside. In place thereof, the appeal to the Court of Appeal should be allowed, and the first and second respondents should pay the appellant's costs of that appeal up to and including 11 July 2010 (when it appears the third respondent was joined) and the third respondent should pay those costs thereafter.

28 Order 3 of the orders of Smart AJ made 30 October 2009 should be set aside and in place thereof there should be an order:

(a) declaring that the change expressed by LEP 194 to the zoning of the land of the appellant, identified as Lot 1 in DP302605, does not have effect to suspend the operation of the restrictive covenant burdening the land of the third respondent, identified as Lot 103 in DP834629; and

(b) that the third respondent be restrained, by itself, its servants and agents, from using or permitting the use of Lot 103 in DP834629 for any hospital, or any ancillary or associated purpose, contrary to the restriction imposed by instrument registered on 10 November 1993 pursuant to s 88B of the *Conveyancing Act* 1919 (NSW).

Order 4 should be amended by deleting "Plaintiff pay the defendants' costs of these proceedings" and substituting "First and second defendants pay the plaintiff's costs of these proceedings".

29 HEYDON J. The power to suspend restrictive covenants granted in 1971 by cl 68(2) of the Ku-ring-gai Planning Scheme Ordinance, made under s 342G(2) of the *Local Government Act* 1919 (NSW), was potentially capable of interfering adversely with proprietary rights of the kind which the appellant later acquired. The position of persons who had those proprietary rights, however, was protected by ss 342AC-342AE of the *Local Government Act*, which provided for compensation.

30 When the relevant part of the *Local Government Act* was repealed with effect from 1980, those of its sections which provided for compensation were not replaced, but s 342G(2) was replaced by sub-ss (2) and (3) of s 28 of the *Environmental Planning and Assessment Act* 1979 (NSW)[15].

31 The restrictive covenant created on 10 November 1993 benefiting the appellant's land was a proprietary right of the appellant.

32 The purported suspension of the appellant's restrictive covenant was effected by the combined operation of cl 68(2) and the making of Local Environment Plan 194 with effect from 28 May 2004. That suspension, if it took place, did not cause the total destruction of the restrictive covenant, but it affected it adversely.

33 In *Marshall v Director General, Department of Transport* Gaudron J (Hayne J concurring) said[16]:

> "Although the rule that legislative provisions are to be construed according to their natural and ordinary meaning is a rule of general application, it is particularly important that it be given its full effect when, to do otherwise, would limit or impair individual rights, particularly property rights. The right to compensation for injurious affection following upon the resumption of land is an important right of that kind and statutory provisions conferring such a right should be construed with all the generality that their words permit."

And McHugh J said that legislation dealing with compensation for the compulsory acquisition of land[17]:

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15 The provisions are set out at [17].

16 (2001) 205 CLR 603 at 623 [38]; see also at 634 [67]; [2001] HCA 37.

17 (2001) 205 CLR 603 at 627 [48] (footnote omitted).

> "is intended to ensure that the person whose land has been taken is justly compensated. Such legislation should be construed with the presumption that the legislature intended the claimant to be liberally compensated."

34 The present case does not concern the resumption of land, but it does concern something similar – governmental action pursuant to legislative power which affects proprietary rights in land adversely. And sub-ss (2) and (3) of s 28 do not provide for compensation, but they replace legislation which did provide for compensation. The principles stated in *Marshall v Director General, Department of Transport* apply as fully to the present case as they do to legislation providing for compensation for the resumption of land. Sub-sections (2) and (3) should be construed generously and liberally because they are protective of the interests of those whose property rights may be damaged by an environmental planning instrument.

35 The protective function of s 28(3) ensures that before an environmental planning instrument enabling development to be carried out can contain a provision that a covenant does not apply to the development, a certain procedure must be carried out. By reason of s 14 of the *Interpretation Act* 1987 (NSW), the procedure requires Ministers to advise the Governor to approve the provision, and it requires that that approval be given formally, in a meeting of the Executive Council. If Ministers are determined to pursue a particular course, the procedure may not be much protection. But it is some protection, and in many circumstances it will be a significant protection.

36 If s 28(2) is read narrowly, to require precision and specificity in what the environmental planning instrument provides, s 28(3) will also be narrow in its operation, and will afford relatively little protection to those enjoying covenants. The more widely s 28(2) is read, the fuller the protection afforded by s 28(3).

37 The majority of the Court of Appeal of the Supreme Court of New South Wales may be said to have construed s 28(2) narrowly by requiring that there be a statement "in terms" in the environmental planning instrument that the restrictive covenant will not apply, and by holding that it was not enough that the environmental planning instrument would have "that effect".

38 Handley AJA, on the other hand, considered that it was sufficient that the environmental planning instrument had the necessary and intended result of suspending the restrictive covenant. He pointed out that sub-ss (2) and (3) of s 28 provide some protection for persons having the benefit of what can be the important and valuable proprietary rights of restrictive covenants. He also pointed out the unattractiveness of a construction which would permit the Executive to avoid compliance with s 28(3) by mere drafting devices. The construction of Handley AJA is to be preferred, for the reasons he gives. On that construction, the prior approval of the Governor, acting on the advice of the

Executive Council, was necessary. It was not obtained. Hence the appellant's restrictive covenant was not suspended by Local Environment Plan 194.

39 The appeal should be allowed with costs. The appellant should have its costs at trial and in the Court of Appeal. An appropriate declaration should be made and an injunction granted.