

No. 20 of 1952

(14)

IN THE HIGH COURT OF AUSTRALIA

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McKAY

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V.

THE COMMONWEALTH OF AUSTRALIA & ANOTHER

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REASONS FOR JUDGMENT

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ORIGINAL

Judgment delivered at MELBOURNE

on WEDNESDAY, 15th OCTOBER, 1952.

McKAY

v.

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER

JUDGMENT

FULLAGAR J.

McKAY

V.

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER

JUDGMENT

FULLAGAR J.

The position with regard to this building at 300 King Street is highly unsatisfactory from every point of view, but as far as the present application is concerned, I think, on the whole, that I ought to grant an interlocutory injunction.

I was disposed yesterday to think that what the defendants were doing amounted to no more than exercising rights of possession which they obtained by virtue of the warrant which I signed in November, 1950. However, I decided to inspect the premises, and, looking at the evidence in the light of what I saw, I have considerable doubt as to whether that warrant authorised the placing of the Commonwealth in possession of the drive or carriage-way, as I prefer to call it. It is described as an "inner lane" in the plaintiff's affidavit. It is not at all clear to me that that drive or carriage-way is part of the ground floor.

There is evidence on which I think I could find that the Commonwealth did, in fact, enter into possession of the drive or carriage-way and was, in fact, in possession in January, 1952. The plaintiff, however, alleges that de facto possession, if it exists, is wrongful as against the person whom he claims to be his landlord. Litigation is at present proceeding between that person and the Commonwealth as to the validity of the acquisition by the Commonwealth of the whole of the premises. The Commonwealth has the carriage of that litigation, and to that extent is master of the situation.

The attack upon the validity of the acquisition seems to be based upon two main grounds. The first relates to the form of the notification in the Gazette, which is required by Section 15 of the Lands Acquisition Act. The second alleges, in effect, want of bona fides, and asserts that the land was not, in fact, required for any public purpose. The second ground (if it be open in law, which I doubt) is not supported by any evidence before me, and it is plain that the burden of proof rests on one who challenges the acquisition. I am not, however, prepared to say that either ground is plainly unarguable, though I express no opinion whatever upon it. If I refuse the interlocutory injunction and it should ultimately be held that the Commonwealth is not the legal owner of the premises, the plaintiff will have suffered irreparable damage in

the sense in which that expression is used in cases of this kind. In all the circumstances, such a refusal would, in my opinion, be wrong. Since the use of the lift is essential to the plaintiff's use of the premises, I think, on the whole, that the injunction should relate to the use of the lift as well as the use of the carriage-way and the doors.

I have not been unmindful of the possibility that the injunction may delay the execution of works of public importance. There seems, however, to be a complete absence of any evidence that it is likely to have any such effect. I have taken into consideration the fact that there has been serious delay on the part of the persons challenging the acquisition, but I think that there has been very considerable delay on the other side also. I have regarded it as a consideration of some importance that the plaintiff has been in actual possession for some nine months of the premises which he claims to be entitled to occupy.

The injunction will be continued until the hearing of the action or further order. A motion to discharge it may, of course, be made at any time. The costs of this application and of the application made to me last week will be costs in the cause.

HIS HONOUR : Are you satisfied with the form of the injunction in this case Mr. Harris?

MR. HARRIS : No, I was going to ask Your Honour.

HIS HONOUR : I perhaps rather hastily granted the injunction in the terms of your writ, but I was looking at it yesterday, and I am not sure that I like it. In the first place, I do not think the injunction should use the word "trespassing" at all, and the injunction should go against doing particular things, and so the injunction must leave out paragraph (a) and the reference to trespassing. Now paragraph (b) refers to blocking up the doorway "or in any way.....side doorway". I think that is quite satisfactory, except I think it might be plainer if the word "right" was omitted and it was referred specifically to the lifts.

MR. HARRIS : It is interfering with the plaintiff's ingress and egress.

HIS HONOUR : Preventing or in any way interfering with the plaintiff in his use of the lift. Well, of course, what he is entitled to is reasonable use of the lift for the purposes of his business.

MR. HARRIS : If the word "right" was omitted.

HIS HONOUR : I think that will be understood clearly enough. What is intended is that he has a reasonable right to use the lift for the purposes of the business he carries on in the basement. Well now, I have never thought that an injunction ought to go against the

Commonwealth, though I have seen many injunctions that do. I think the order should be directed against the Minister of State of the Commonwealth for the Interior and his officers, servants and agents and all officers, servants and agents of the Commonwealth.

MR. HARRIS : If your Honour pleases.

HIS HONOUR : I think that covers everything.

MR. FROST : I think it is desirable that everything should be defined at this stage now that your Honour has allowed the plaintiff to use the door and the lift. Now, I take it that what was in my learned friend's mind was the use of the cart dock in the internal lane. I do not know whether it was or it wasn't. In any event, if it is in Your Honour's mind that the plaintiff should be allowed to use the cart dock in the internal lane then that should be added to it, and I put it for this reason, Sir, that questions of time arise. For example, up to date the cart door on the ground floor has been always closed at 4.30 but the plaintiff has verbally communicated to the officers of the Commonwealth that whereas before half past 4 was the time, he wants the door open till half past 5, and we envisage further trouble now.

HIS HONOUR : I would not grant an injunction that would give him any further right than he has been actually exercising up to this time; nothing whatever beyond that.

MR. HARRIS : That is so. In the circumstances I would respectfully submit to Your Honour because these rights

should be defined, that the plaintiff be given the right to use the internal lane between the hours which in fact have been used before for the purposes of his business.

HIS HONOUR : Yes, I would think that would be very sound.

MR. HARRIS : If your Honour pleases, in paragraphs 1(b) and (c), which are based on the writ, what the Commonwealth specifically threatened to do was to lock up this door and the lift.

HIS HONOUR : Perhaps you Mr. Frost and Mr. Harris could agree on the precise form of the order.

MR. FROST : Perhaps I would like to suggest that the plaintiff be entitled to use the cart dock for the purposes of ingress and egress between the hours that in fact it has been open in the past.

HIS HONOUR : It would be even better, if it could be done, to state the hours. What have been the hours? 9.30 to 4.30?

MR. FROST : I think it is earlier than 9.30.

MR. HARRIS : I am instructed only so far as the front door is concerned, it has not been open after 4.30 on the occasions that we have desired to use it. After that we have instructions that we lock it after we have finished.

HIS HONOUR : The hours during which it has been customary for the door to remain open.

MR. HARRIS : The door referred to is not the front one.

HIS HONOUR : What at present you are referring to is the main outer door at King Street? That will have to be made clear. There is an ambiguity about the word "doorway".

MR. FROST : For the purposes of use for ingress and egress.

HIS HONOUR : Of the doorway at King Street between the hours during which it has been customary for the door to remain open. And blocking up the other doorway. That will have to be described. Blocking up the doorway leading from the cart dock to the basement.

MR. FROST : Actually, there are a number of doors to the basement.

HIS HONOUR : To the premises occupied by the plaintiff. Very well.

MR. HARRIS : Just with regard to the wording in relation to the front door, I think it is desirable to make it clear that it is not only the plaintiff himself but the plaintiff's servants and customers.

HIS HONOUR : Yes.

MR. HARRIS : If we are going to have everything defined in this, it is not only the door which he goes through but he also uses the cart dock.

HIS HONOUR : Yes, for the purposes of ingress and egress to and from his premises. I think the parties should be reasonable about this. No trouble should arise as to the actual working out of this order. I think your client should consider himself very fortunate, and, if

there were any attempt to abuse his rights I would consider an application to discharge the injunction at any time. There is one thing I want to ask as a matter of curiosity - is the Certificate of Title to this land now in the Commonwealth's name?

MR. FROST : I understand not, Your Honour.

HIS HONOUR : Yes, there is a provision in the Lands Acquisition Act for registration of the title in State Registries, but that has not been done.

MR. FROST : That section in the Act has been held to be invalid.

HIS HONOUR : Oh! is it? I did not know.

MR. FROST : That may be so. In any event, Your Honour, the Commonwealth is not yet registered.

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