

Grace Bros. Pty. Limited - - - - - Appellant

v.

The Commonwealth of Australia and another - - - Respondents

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1950

*Present at the Hearing :*

LORD SIMONDS

LORD NORMAND

LORD MORTON OF HENRYTON

LORD MACDERMOTT

LORD REID

[*Delivered by LORD NORMAND*]

This Appeal by special leave from a judgment of the High Court of Australia, is governed by the decision of *Nelungaloo Pty. Limited and The Commonwealth of Australia*.

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 the 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 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 section 51 placitum xxxi, and an alternative declaration that section 29 of the said Act was *ultra vires* of this same section and placitum. 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.

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.

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* of section 51 placitum xxxi of the Constitution, which empowers the Commonwealth to acquire property on just terms. It was argued that section 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 section 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 section 40, that compensation should bear interest at the rate of three per cent. from the date of acquisition until payment, was 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 section 51 placitum xxxi and valid. The Full Court allowed the demurrer, dismissed the motion for injunction and dismissed the action. 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 section 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 section 15A of the Acts Interpretation Act 1901-1934, section 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 section 29 (1) of the Lands Acquisition Act 1906-1936 or upon a common law basis (i.e. whether section 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 sections 28 and 29 (1) do not provide just terms for the assessment of compensation and that section 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 section 51 placitum xxxi involves an *inter se* question and that an appeal to His Majesty in Council is by virtue of the provisions of section 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. It was there decided that any question whether the Commonwealth had exceeded the powers conferred on it by section 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.

In the Privy Council

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THE COMMONWEALTH OF AUSTRALIA  
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DELIVERED BY LORD NORMAND

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