

# SUPREME COURT OF QUEENSLAND

CITATION: *Kelsall & Anor v The State of Queensland & Anor* [2011] QSC 321

PARTIES: **PAUL ANTHONY KELSALL and EUNICE YING TENG KELSALL**  
(applicants)  
v  
**THE STATE OF QUEENSLAND**  
(first respondent)  
and  
**BRISBANE CITY COUNCIL**  
(second respondent)

FILE NO: 5762 of 2011

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 21 October 2011

DELIVERED AT: Brisbane

HEARING DATE: 17 October 2011

JUDGE: Philippides J

ORDER: **Application dismissed**

CATCHWORDS: *Acquisition of Land Act 1967* (Qld); s 41  
*Statutory Instruments Act 1992* (Qld); s 7, s 21  
*Transport Infrastructure Act 1994* (Qld); s 105C(2), s 544  
*Transport Planning and Coordination Act 1994* (Qld); s 3, s 25, s 26A, s 28D(1), s 28D(3)

*Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133  
*Sydney Municipal Council v Campbell* [1925] AC 338  
*Werribee Council v Kerr* (1928) 42 CLR 1

REAL PROPERTY – RESUMPTION OR ACQUISITION OF LAND – where Brisbane City Council issued Notices of Intention to Resume two lots of land under the *Acquisition of Land Act 1967* – where the Notices identified the *Brisbane City Council* as the construction authority and the purpose of the resumption as being for “a purpose incidental (road) to an approved tollway project, namely the North-South Bypass Tunnel Project” – where the project was an “approved

tollway project” within the meaning of the *Transport Infrastructure Act 1994* – where the lots were the subject of “Change of Purposes Declaration Notices” under s 26A *Transport Planning and Coordination Act 1994* – whether the “Change of Purposes Declaration Notices” were valid.

COUNSEL: KC Fleming QC with PR Smith for the applicants  
MS Hinson SC for the first respondent  
GJ Gibson QC with DA Quayle for the second respondent

SOLICITORS: Harding Lawyers for the applicants  
Crown Law for the first respondent  
Brisbane City Legal Practice for the second respondent

**PHILIPPIDES J:**

- [1] The applicants seek orders that Change of Purpose Declaration Notices published on 8 January 2010 in relation to Lots 70 and 71 on SP108227, being land located at Lutwyche Road, Windsor are invalid.
- [2] The following facts are not in dispute:
  - Prior to 2006, the applicants, Paul Anthony Kelsall and Eunice Ying Teng Kelsall were the owners of Lots 70 and 71.
  - On 14 February 2006, the Brisbane City Council (the Council) issued separate Notices of Intention to Resume Lots 70 and 71 under the *Acquisition of Land Act 1967 (ALA)*. The *ALA* notices identified the Council as the constructing authority, and the purpose of the resumption as being for “a purpose incidental (road) to an approved tollway project, namely the North-South Bypass Tunnel Project”.
  - The North-South Bypass Tunnel Project was an “approved tollway project” within the meaning of s 105C(2) of the *Transport Infrastructure Act 1994 (TIA)* and, by operation of s 544 *TIA*, it was “taken to be an approved tollway project” for the Council. The Council was empowered to acquire land for an “approved tollway project” under the *TIA* by s 28D(1) *Transport Planning and Coordination Act 1994 (TPCA)*, including by taking land under the *ALA*: s 28D(3) *TPCA*.
  - Lots 70 and 71 were acquired by the Council pursuant to a Taking of Land Notice (No 1028) 2006 made on 29 June 2006 and published in the Queensland Government Gazette on 30 June 2006. The land was stated therein to be taken “for a purpose incidental to the purpose of an approved Tollway Project, namely, the North-South Bypass Tunnel Project, in particular road” as from 30 June 2006 and to be vested in the Council as “constructing authority” for an estate in fee simple. There is no dispute that the lots were thereby validly taken.
  - Lots 70 and 71 were then the subject of “Change of Purpose Declaration Notices” made under s 26A of the *TPCA* and published in the Gazette on 8 January 2010. In respect of Lot 70, by Change of Purpose Declaration Notice (No 1958) 2010, it was declared that the land taken by Taking of Notice (No 1028) 2006 “is now required for additional transport purposes of: a road transport purpose for the Airport Link

Project and busway transport purposes for the Northern Busway (Windsor to Kedron) Project and is therefore taken for those purposes”. In respect of Lot 71, by Change of Purpose Declaration Notice (No 1961) 2010, it was declared that the land taken by Taking of Notice (No 1028) 2006 “is now required for the additional transport purpose of: a road transport purpose for the Airport Link Project and is therefore taken for that purpose”.

- [3] It was common ground that when the Council took the land in 2006, it was for a proper purpose, and also that, when the Change of Purpose Declaration Notices (“Purpose Declaration Notices”) were gazetted on 8 January 2010, the Council was not authorised, or required, to carry out the construction of either the Airport Link Project or the Northern Busway (Windsor and Kedron) Projects, the Council not being the constructing authority for either of those two projects.
- [4] The question raised on the application concerns the validity of the Purpose Declaration Notices which in turn requires a consideration of the interpretation of s 26A *TPCA*, which enabled the Minister, by Gazette Notice, to declare that “land is required for another stated transport purpose”.
- [5] In contending that the Purpose Declaration Notices were invalid, the applicants framed the question for determination as whether, since land can be taken only for a proper purpose (in this case pursuant to s 28D *TPCA*), it could be “required for another stated transport purpose” which was not within the statutory authority or responsibility of the acquiring body, here the Council. That is, could the Council, as owner of the acquired land, allow another constructing authority to “acquire” the land for its purposes.

### **The applicants’ submissions**

- [6] The applicants, citing *Sydney Municipal Council v Campbell* [1925] AC 338 at 343 and *Werribee Council v Kerr* (1928) 42 CLR 1 at 8, 30, 36, 37, sought to anchor their argument in the proposition that a local authority can take land only for a proper local government purpose. Thus, in the case of a tollway, s 105C of the *TIA* gave the Minister for Transport a specific power to approve a tollway upon application by a local authority and s 544 dealt specifically with the North-South Bypass Tunnel, taking it to be approved, as if the Minister had given written notice to the Council under s 105C(2). This gave effect to the principle in *Werribee Council* that there be a proper basis for acquisition and then retention. But the applicants questioned the power of Council to retain land upon the Purpose Declaration Notices being made as it was said they were made for a purpose which is not a lawful Council purpose. However, s 26A *TPCA* did not allow for the acquiring body to be changed.
- [7] In support of its submissions, the applicants pointed to the scheme of Part 4 of the *TPCA* which dealt, inter alia, with property required for “transport purposes”. Section 25 gave the Chief Executive power to deal with property for the purposes of transport, but nowhere was the Chief Executive given power to deal with local government land. Section 26A was to be read in that context so that land taken for one purpose could, by Gazette, be declared to be required for another purpose, but only where it was land taken for State purposes.

- [8] Moreover, the applicants argued that the Council could not “take land for one legitimate purpose, find that it is superfluous in time for that purpose, and then not comply with the *ALA*”. The *TPCA* did not address that situation. Section 41 of the *ALA* required the constructing authority to offer back land no longer required to a former owner within seven years of acquisition. It was common ground that that had not happened, rather the Minister, by Gazette, declared the land was required for another stated purpose.
- [9] The applicants’ contentions in relation to the Purpose Declaration Notices made under s 26A *TPCA* thus appear to be that they were invalid because they:
- were made because the land was no longer required by the Council.
  - were not made with respect to “transport land” within s 26A.
  - had the effect of changing the constructing authority which resumed the land pursuant to the *ALA* from the Council to the State.
  - authorised the Council to be, and indeed required the Council to become the constructing authority for the Airport Link Project and for the Northern Busway (Windsor to Kedron) Project instead of the State.
  - in fact purported to effect an acquisition of the land contrary to s 26A.
- [10] I should note immediately that as to the contention that the land was no longer required by the Council, that issue is addressed in the affidavit of Mr Buyers and counsel for the applicants conceded that there was no evidence before the court that contradicted Mr Buyers’ evidence.

### Discussion

- [11] Section 26A *TPCA* provides as follows:
- “26A Changing requirement for transport land**
- (1) This section applies to transport land taken under the *Acquisition of Land Act 1967* for a particular transport purpose.
  - (2) The Minister may, by gazette notice under this Act, declare that the land is required for another stated transport purpose.
  - (3) The land is taken to have been acquired for the other transport purpose from the day the declaration is published in the gazette.
  - (4) The *Acquisition of Land Act 1967*, section 41 does not apply to the land because of the change of purpose.
  - (5) This section does not affect any right of a person to compensation because of the acquisition.
  - (6) To remove doubt, it is declared that a declaration under subsection (2) –
    - (a) is not an acquisition of the land; and
    - (b) does not give a right to compensation.”
- [12] As counsel for the first respondent submitted, s 26A, contains three operative parts; the first part is a conferral of power on the Minister under s 26A(2), the second part is a statement of the field of operation within which that power may be exercised and the third part specifies the consequences of the exercise of the power.
- [13] In respect of the power in s 26A(2), it only applies where land:

- (a) is “transport land”,
- (b) was taken under the *ALA*,
- (c) was taken for a “transport purpose”.

- [14] As to the meaning of the term “transport land” it is defined in s 3 *TPCA* as land that:
- “(a) has been acquired for transport purposes or for an incidental or complementary purpose; and
  - (b) is required for –
    - (i) the operations of a transport GOC; or
    - (ii) franchised road or toll road purposes; or
    - (iii) the operations of a rail infrastructure manager as defined under the *Transport (Rail Safety) Act 2010* who is accredited under that Act; or
    - (iv) busway transport infrastructure or bus passenger services; or
    - (v) light rail transport infrastructure or light rail passenger services; or
    - (vi) a transport associated development.”
- [15] “Transport purpose” is defined in s 3 *TPCA* as including “any purpose for which the Minister is responsible”.
- [16] The lots in question were, as specified in s 26A(1), “transport land” within the meaning of that provision, in that
- (a) they had been acquired for a purpose incidental to a transport purpose (the land was taken for a purpose incidental to “the North-South Bypass Tunnel Project, in particular road”) and
  - (b) were required for toll road purposes (namely an approved tollway project being the North-South Bypass Tunnel Project: see s 105C(2) and s 554 *TIA*).
- [17] Counsel for the applicants advanced a construction of “transport land” which sought to restrict the meaning of that term by the definition of “transport purpose”; that is that “transport land” should be construed as meaning land acquired for transport purposes for which the Minister is responsible. Such a construction imports a restriction that ignores the fact that the definition of “transport purpose” is an inclusive one and requires that the word “including” in that definition be interpreted in a manner that is not intelligible. There is no basis for so confining the term. The term would also extend to transport purposes that fall within the functions and powers of local government.
- [18] The second precondition for the application of s 26A is also met; the lots were taken under the *ALA*. It is important to bear in mind that the *TPCA* envisages that land might be taken under the *ALA* by either a local authority (s 28D) or by the Chief Executive (s 25). There is nothing in s 26A which requires a distinction to be made between these circumstances of acquisition under the *ALA*; it does not differentiate between the identities of the initial acquiring authority under the *ALA*. Nor does it confine the exercise of the power to land acquired by one or the other.
- [19] The third requirement in s 26A (1) is also satisfied; the lots were taken under the *ALA* for a particular transport purpose, being the purpose stated in the Taking of

Land Notice. It is therefore tolerably clear in the present case that s 26A applies to Lots 70 and 71.

- [20] The Purpose Declaration Notices were notices compliant with s 26A(2). They contained declarations that the land is required for another stated transport purpose i.e. a purpose other than the particular transport purpose stated in the Taking of Land Notice.
- [21] In those circumstances, the consequences in ss 26A(3) to (6) operate, such that the declaration that the land is required for an additional purpose is not an acquisition of land and does not give rise to a right to compensation. The consequence which s 26A(3) attaches to the Purpose Declaration Notice is that the land is taken to have been acquired for the other transport purpose from the day the declaration is published. To the extent that making such a declaration might engage s 41 *ALA*, by virtue of the change of purpose, that consequence is precluded by the express exclusion of the application of that section.
- [22] As to the applicants' contention that Purpose Declaration Notices cannot effect a change in respect of the constructing authority and cannot authorise the Council to be the constructing authority for a project which is a State responsibility, I accept that by its terms s 26A only allows for the making of a declaration that land is required for another stated transport purpose. Section 26A does not authorise a notice which goes beyond that. However, the Purpose Declaration Notices do not do so.
- [23] As to the applicant's contention that the Purpose Declaration Notices seek to effect an acquisition of land, s 26A(6)(a) expressly provides that a declaration made pursuant to s 26A(2) is not an acquisition of land. The applicants point to the words in the Purpose Declaration Notices (that follow those stating that the land is required for an additional transport purpose) which state that the land "is therefore taken for that purpose". In my view, those words are to be understood as stating no more than what s 26A(3) provides to be the effect of a Purpose Declaration Notice; that is, that the land "is taken to have been acquired for the other transport purpose from the day the declaration is published in the gazette". The fee simple remains with the Council; there is no change in ownership effected by the Purpose Declaration Notices.
- [24] Moreover, as counsel for the first respondent submitted, the Purpose Declaration Notices are statutory instruments as defined by s 7 of the *Statutory Instruments Act* 1992 (*SIA*). Accordingly, s 21(1) of the *SIA* would apply so that the statutory instrument is to be interpreted as operating to the full extent of, but not to exceed, the power conferred by the authorising law. In that regard, the provision reflects the common law position as identified in *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 216 [229]-[230]. The Purpose Declaration Notices are therefore not to be construed as doing any more than s 26A(2) authorises. In particular, they are not to be construed as changing the constructing authority named in a Taking of Land Notice, or as authorising that constructing authority to undertake the other stated transport purpose for which the land is required under a s 26A notice, if that other purpose is not a purpose it is otherwise authorised to undertake. Accordingly, I accept the submissions of the respondents that the applicants' case, being founded on an erroneous construction of the notice and contrary to the mandate in s 21 *SIA*, must fail.

[25] The application is dismissed. I will hear submissions as to costs.