IN THE COURT OF APPEAL [1993] QCA 557

SUPREME COURT OF QUEENSLAND Appeal No. 150 of 1993

Brisbane

Before The Chief Justice
Mr Justice Davies
Mr Justice Mackenzie

[Kangaroo Point East Association Inc. v. Balkin]

BETWEEN:

KANGAROO POINT EAST ASSOCIATION INC.
(Applicant) Appellant

AND:

GARY CAMPBELL BALKIN and LOLA ANN BALKIN
(Respondents) Respondents

REASONS FOR JUDGMENT - THE CHIEF JUSTICE AND DAVIES J.A.

Judgment delivered 22/12/1993

This is an appeal against a judgment of the Planning and Environment Court refusing to declare that the respondents, in their use of identified land, were subject to the restrictions and provisions of the Town Plan for the City of Brisbane. The respondents are the lessees of that land from the Commonwealth pursuant to a 99 year lease at a nominal rent. The appellant is an association formed to preserve and promote the qualities, characteristics and conditions of the area in which the subject land is situated. The land has on it a large 19th century house of some historical interest which is listed on the register of the National Estate. Until approximately May 1988 the house and

land were occupied by the Commonwealth for public purposes.

Under the lease the respondents covenanted with the Commonwealth:

> "(14) Use of Premises.
> To use the Premises for purposes to which the Lessor has given its consent in writing provided that such consent shall not be unreasonably withheld provided that the use is compatible with the National Estate significance of the Premises.
>
> ...
>
> (31) To Comply with Statutes
> To comply with all statutes, ordinances, proclamations, orders or regulations affecting or relating to the Premises or trading thereon and with all requirements which may be made or notices or orders which may be given by any governmental, semi-governmental, city, municipal, health, licensing or other authority having jurisdiction or authority over or in respect of the Premises and to keep the Lessor indemnified in respect of all such matters referred to in this sub-clause. If any statute, ordinance, proclamation, order, regulation or requirement, notice or order given by any governmental, semi-governmental, city, municipal, health, licensing or other authority does not apply to the Premises or to the Lessee because the Lessor is immune and not subject thereto the Lessee shall comply with that statute, ordinance, proclamation, order, regulation, requirement, notice or order as if the legal ownership of the freehold in the Premises was vested in the Lessee."

On 31 May 1988, the day on which the lease was executed, the Commonwealth consented to the proposed use of the premises for the purposes of a detached house, licensed restaurant and reception area. By letter dated 7 September 1993, after the decision the subject of the appeal was given, the Commonwealth consented to a proposed change of use to office accommodation.

The present Town Plan for the City of Brisbane came into effect on 13 June 1987. Pursuant to it the subject land was zoned Special Uses (Commonwealth Government). The Plan did not purport to restrict the use to which the land could be put.

By Order in Council of 13 December 1990 the Town Plan was relevantly amended by the Kangaroo Point Peninsula Development Plan. That Plan was gazetted on 15 December 1990 and pursuant to s. 4(2) of the City of Brisbane Town Planning Act 1964 thereby had the force of law.

The Development Plan provides specifically for the development of the subject land. In cl. 3.3.2 it is said of the house on the subject land and of some other cottages in the neighbouring area:

> "These buildings are of significant heritage value and add to the unique character of this precinct. Encouragement is provided for the retention of these buildings in the Table of Development for Precinct 3.
>
> Specifically the Table of Development permits a range of alternative uses to be carried out in these buildings with the consent of the Council.
>
> In considering any application for alternative uses for these buildings, care will be taken to ensure that the residential amenity of adjacent areas is not impaired. In this respect, particular attention will be paid to:
>
> (i) the effect of any likely traffic increase;
> (ii) any noise likely to be created by the development;

(iii) any adverse visual impact; and
(iv) the effect on privacy of adjoining sites.

Any alterations, repairs, or additions to these historic buildings should be in keeping with the original architectural style."

The table of development then sets out a number of uses which would be prohibited on the subject land. Some exceptions are stated where the use would be in an existing building or a modified existing building on the subject land. These, which under the Plan would require permission of the Council, include business premises and restaurant. The respondents have indicated that they do not intend to apply to the Council for permission to use the land for any purpose permitted by the Commonwealth.

Section 52(i) of the Constitution confers on the Commonwealth Parliament exclusive power to make laws with respect to places acquired by the Commonwealth for public purposes. It was not in dispute that, until 31 May 1988, the subject land was a Commonwealth place, using that composite phrase for the longer phrase "place acquired by the Commonwealth for public purposes". Indeed, prior to that date the Town Plan did not purport in any way to restrict the use to which that land could be put. The question before this Court is whether the Development Plan restricts the use to which the subject land may be put by the respondents.

As Menzies J. pointed out in Attorney-General (N.S.W.) v. Stocks & Holdings (Constructors) Pty Ltd (1970) 124 C.L.R. 262 at 275, if the words of s. 52(i) "all places acquired by the Commonwealth for public purposes" were construed literally land would remain within that description notwithstanding its disposal by the Commonwealth and its acquisition by another. That section has consequently been read down in accordance with its evident purpose to include only land which, at the time State legislation is enacted, is owned, or at least possessed, by the Commonwealth: Stocks & Holdings at 266-7, 269, 275-6, 280-1 and 284-5. Only one member of the court in that case, Windeyer J., considered whether that section would apply if the Commonwealth, instead of disposing of the land entirely, surrendered exclusive possession of it and if, as well, the land ceased to be used for public purposes. His Honour said, at 281:

> "It may be that the same result would follow not only if the Commonwealth relinquished entirely its ownership of a place, but also if it surrendered exclusive possession of it for a term of years, and it was no longer used for public purposes. But it is not necessary to consider in this case whether that would be so; for here the subject land was transferred absolutely."

It was submitted by the appellant that, upon execution of the lease, the land ceased to be used for public purposes. The Solicitor-General, who intervened on behalf of the Commonwealth Attorney-General, submitted that the land continued to be used for a public purpose, principally because of a covenant in the lease by the respondents that they would preserve the premises

in their existing style and conserve their significance as part of the National Estate under the Australian Heritage Commission Act 1975 (Cth). In my opinion such an obligation does not impose a public purpose on the use of the land. I think that the lease and the contemporaneous consent executed by the Commonwealth indicate that the land was thenceforth intended to be used for other than public purposes. In the view which I reach that does not matter. But it means that the precise question considered by Windeyer J. in the above passage arises for decision here.

That is the first question that was argued in this case. However, the respondents and the Commonwealth submitted that whether or not the subject land was a Commonwealth place at the time of gazettal of the Development Plan, that Plan could not apply to the subject land because that would infringe the Commonwealth's immunity from State legislation. It is convenient to deal first with the submission that, at the relevant time, the subject land was a Commonwealth place and, if it was, to consider the effect of s. 4 of the Commonwealth Places (Application of Laws) Act 1970 (Cth).

Both sides sought to derive some assistance from the judgment of Barwick C.J. in Stocks & Holdings at 266. The Commonwealth relied on the statement of his Honour that s. 52(i) supported all laws of the Commonwealth with respect to a place acquired

for public purposes so long as it remained in the ownership or possession of the Commonwealth, for the contention that a place owned by the Commonwealth remained a Commonwealth place notwithstanding the relinquishment by it of possession of that place. The appellant, on the other hand, relied on the following statement by his Honour, that any law of the Commonwealth made pursuant to s. 52(i) with respect to a place would cease to operate when the Commonwealth's ownership or possession ends, for the contention that a place owned by the Commonwealth ceases to be such a place upon relinquishment by it either of ownership or possession. However, the two statements can be reconciled only if his Honour was speaking, on the one hand of places which became Commonwealth places by ownership and, on the other, places which became Commonwealth places by possession. It is unnecessary for the purpose of this case to decide whether the Commonwealth can acquire a place for the purpose of s. 52(i) merely by acquiring possession. See contra per Windeyer J. in Worthing v. Rowell & Muston Pty Ltd (1970) 123 C.L.R. 89 at 124 and Gibbs J. in Bevelon Investments Pty Ltd v. Melbourne City Council (1976) 135 C.L.R. 530 at 541; see also Bevelon at 536, 545, 549, 550.

Menzies J., with whose reasons in this respect Walsh J. agreed, construed the phrase "all places acquired by the Commonwealth for public purposes" as meaning "all places being property of the Commonwealth which have been acquired by the Commonwealth

for public purposes": at 276; and compare Barwick C.J. at 267. On this construction, whilst land acquired for public purposes remains in the ownership of the Commonwealth it is within the operation of s. 52(i) notwithstanding the granting of a lease and the cessation of use for public purposes. That construction is inconsistent with the dictum of Windeyer J. in Stocks & Holdings at 280 that the exclusive power of the Commonwealth with respect to a place it has acquired subsists only so long as it holds the place for that purpose.

In my view, it is sufficient for the operation of s. 52(i) in this case that the subject land was acquired by the Commonwealth for a public purpose and that it remains property of the Commonwealth.

Section 4 of the Commonwealth Places (Application of Laws) Act 1970 relevantly provides:

> "(1) The provisions of the laws of a State as in force at a time (whether before or after the commencement of this Act) apply, or shall be deemed to have applied, in accordance with their tenor, at that time in and in relation to each place in that State that is or was a Commonwealth place at that time.
>
> (2) This section does not:
>
> (a) extend to the provisions of a law of a State to the extent that, if that law applied, or had applied, in or in relation to a Commonwealth place, it would be, or have been, invalid or inoperative in its application in or in relation to that Commonwealth place otherwise than by reason of the operation of section 52 of the Constitution in relation to Commonwealth places;

..."

Applied in accordance with its tenor, the Development Plan would restrict the uses to which the subject land could be put. However, the respondents and the Commonwealth contended that sub-s.(2)(a) excepts its operation to the subject land because to apply it would infringe Commonwealth immunity from State legislation.

There is no doubt that, at least since The Commonwealth v. Cigamatic Pty Ltd (In Liq.) (1962) 108 C.L.R. 372, the Commonwealth is not bound by a State statute. There is a judicial difference of opinion as to whether that immunity is limited to the exercise of prerogative or constitutional rights (Cigamatic per Menzies J., with whom Kitto and Owen JJ. agreed at 389; see also Stocks & Holdings at 271, 286, 288) or not (Cigamatic per Dixon C.J., with whose judgment Kitto and Owen JJ. agreed, at 378; see also The Commonwealth v. Bogle (1953) 89 C.L.R. 229 at 259-260, Australian Postal Commission v. Dao (1985) 3 N.S.W.L.R. 565 at 593-5). In view of the conclusion which I have reached, it is unnecessary for me to express a preference for one or other of the competing views. I am prepared to assume that the immunity is of a general kind. The question then is whether the Development Plan purports to bind the Commonwealth in the exercise of some right or power or the performance of some duty: Australian Postal Commission v. Dao at

596.

It is true that the Development Plan may prevent the respondent lessees from using the subject premises for purposes which may be permitted by the Commonwealth as lessor. But that does not affect any right or power or obligation of the Commonwealth. Indeed, it may be doubted whether, in view of cl. (31) of their covenants, it affects any right of the respondents as lessees; that clause obliges them to comply with the Development Plan whether or not Commonwealth immunity affects its application to the land or to them.

The Solicitor-General for the Commonwealth submitted that the time to test the question whether any right or obligation of the Commonwealth is affected is the time before the Commonwealth granted the lease, not the time when the Development Plan became law. I do not agree. It is true that if the Development Plan had been in existence before the Commonwealth granted the lease, it could not have affected the Commonwealth's use of the land including the terms upon which it could have leased it or transferred it (Commonwealth v. Bogle at 260); nor could it have declared in advance the uses which may be made of the land by any lessee or purchaser from the Commonwealth (Stocks & Holdings at 289). Any provision purporting to do so would plainly affect the Commonwealth's rights, in the first case directly, in the second indirectly. Nor would the Development Plan in the

present case affect the Commonwealth's use of the land if, for any reason, the lease should terminate and the Commonwealth resume possession of the land.

The terms of the lease show that the Commonwealth's rights and obligations with respect to the land during the term of the lease will be unaffected by the Development Plan. Clause (31) of the respondents' covenants envisages that, at some time after the grant, legislation such as the Development Plan may purport to affect the use of the land and, subject to their other obligations contained in the lease, including preservation of the premises, that clause obliges the respondents to comply with that legislation. It was not suggested, nor could it have been, that compliance by the lessees with the Development Plan would affect any right or obligation of the Commonwealth under the lease.

For these reasons I conclude that the Development Plan does not, in its control of the respondent lessees in the use of the subject land, affect the Commonwealth in the exercise of any right or power or the performance of any duty.

It was submitted by the Attorney-General for the Commonwealth that the Development Plan operated in rem. To the extent that that is a question of construction it is irrelevant, though even as a question of construction the correctness of the submission

may be doubted: see Local Government (Planning & Environment) Act 1990, s. 2.21 and its predecessor City of Brisbane Town Planning Act 1964, s. 7A. The relevant question is one of power and it is within power in its binding effect on the use of the subject land except to the extent that it affects rights, powers or obligations of the Commonwealth.

Finally, the Commonwealth sought to infer from the provisions referred to in the preceding paragraph a statutory intention that lessees from the Crown in right of the Commonwealth should not be bound by the Plan. However, not surprisingly, neither provision purports to deal at all with Commonwealth Crown land. No more specific intention can be inferred from its failure to do so.

I would therefore allow the appeal and make the declaration sought.

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BETWEEN:

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(Applicant) Appellant

AND:

GARY CAMPBELL BALKIN and LOLA ANN BALKIN
(Respondents) Respondents

THE CHIEF JUSTICE
DAVIES J.A.
MACKENZIE J.

Judgment delivered 22/12/1993

JOINT REASONS FOR JUDGMENT OF THE CHIEF JUSTICE AND DAVIES J.A., MACKENZIE J. DISSENTING.

APPEAL ALLOWED WITH COSTS. SET ASIDE THE JUDGMENT BELOW AND IN LIEU THEREOF DECLARE THAT THE RESPONDENTS IN THEIR USE OF THE LAND DESCRIBED AS LOT 10 ON REGISTERED PLAN NO. 135198 IN THE COUNTY OF STANLEY, PARISH OF SOUTH BRISBANE, CITY OF BRISBANE ARE SUBJECT TO THE RESTRICTIONS AND PROVISIONS OF THE TOWN PLAN FOR THE CITY OF BRISBANE.

CATCHWORDS: **LOCAL GOVERNMENT - TOWN PLANNING - Appellant sought declaration that respondents subject to Brisbane Town Plan in use of land - Land originally occupied by Commonwealth for public purposes then leased to respondents - Respondents covenanted to use premises for purposes to which Commonwealth consented**

provided compatible with National Estate listing - Further covenanted to comply with all ordinances affecting the land even where Commonwealth immune - Whether land still a Commonwealth place - Whether Town Plan purports to bind Commonwealth in exercise of some right or power or performance of some duty

CONSTITUTIONAL LAW - COMMONWEALTH PLACES - COMMONWEALTH IMMUNITY FROM STATE LAWS - Appellant sought declaration that respondents subject to Brisbane Town Plan in use of land - Land originally occupied by Commonwealth for public purposes then leased to respondents - Respondents covenanted to use premises for purposes to which Commonwealth consented provided compatible with National Estate listing - Further covenanted to comply with all ordinances affecting the land even where Commonwealth immune - Whether land still a Commonwealth place - Whether Town Plan purports to bind Commonwealth in exercise of some right or power or performance of some duty

Commonwealth Constitution, s. 52(i)
Commonwealth Places (Application of Laws) Act 1970 (Cth), s. 4
City of Brisbane Town Planning Act 1964, ss. 4(2), 7A
Local Government (Planning & Environment) Act 1990, s. 2.21

A-G (NSW) v. Stocks & Holdings (1970) 124 CLR 262
Australian Postal Commission v. Dao (1985) 3 NSWLR 565
Bevelon Investments Pty Ltd v. Melbourne C.C. (1976) 135 CLR 530
Commonwealth v. Bogle (1953) 89 CLR 229
Commonwealth v. Cigamatic Pty Ltd (1962) 108 CLR 372
Worthing v. Rowell & Muston Pty Ltd (1970) 123 CLR 89

Counsel: R. Hanson Q.C. with him Mr J.D. McKenna for the Appellant

C. Brabazon Q.C. for the Respondents
G. Griffith Q.C. with him Mr C. Staker for Intervener

Solicitors: Carter Newell for the Appellant
Peter Channell & Associates for the Respondents
Attorney-General of the Commonwealth for Intervener

Date(s) of Hearing: 27 and 28 October 1993

THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 150 of 1993

Brisbane

Before The Chief Justice
Davies JA
Mackenzie J

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BETWEEN:

KANGAROO POINT EAST ASSOCIATION INC.

Appellant

AND:

GARY CAMPBELL BALKIN AND LOLA ANN BALKIN

Respondents

REASONS FOR JUDGMENT - MACKENZIE J.

Judgment delivered 22/12/1993

I have had the opportunity of reading in draft form the joint judgment of the Chief Justice and Davies JA. The analysis of the earlier decisions and the issues isolated as ones raised by them is accepted as accurate. The point at which my views diverge from those expressed in the joint judgment is the proposition that the land is used for other than public purposes. The lease is predicated upon the premises being

part of the National Estate under the Australian Heritage Commission Act 1975. The mutual covenants, inter alia:-

(1) Refer to the premises' status as a place entered on the Register of the National Estate;

(2) Impose an obligation on the lessee

  (a) to preserve the premises in their present style and conserve their significance as part of the National Estate;

  (b) to give the Heritage Commission assistance to carry out its function; and

(3) Impose restrictions on the lessees' activities which may adversely affect the premises as part of the National Estate.

The appellant's submission was that upon execution of the lease the land ceased to be used for public purposes. The contrary submission in broad terms was that the Parliament of a State cannot lawfully prescribe the uses which might be made by the Commonwealth of its own property or the terms upon which the property might be let to tenants. More specifically it was submitted that if the Commonwealth can use its own property for any purpose for which it sees fit unfettered by State regulation, it must also be capable of letting others use the land for any purpose unfettered by State legislation. It was submitted that to enforce State planning legislation applying to Commonwealth land against a third party is to enforce such legislation against the Commonwealth by restricting the uses to

which the Commonwealth may permit its own land to be put, and that the fact that the Commonwealth has granted a lease to a third party is irrelevant.

It is not necessary to explore the full extent of the proposition in this case because in my opinion there is a clearly discernible continuing public purpose involved in leasing the premises to the respondents. The fact that, to achieve that purpose, the respondents will incidentally use the premises for their own purposes as part of the scheme to conserve the premises does not extinguish the use for public purposes. No wider formulation of the relevant principle than this is necessary for the purposes of the case. In my opinion, applying the test whether the Development Plan purports to bind the Commonwealth in the exercise of some right or power or the performance of some duty (Australian Postal Commission v Dao (1985) 3 NSWLR 565 at 596), the Development Plan has the effect of limiting the Commonwealth in the exercise of the power or duty to preserve the National Estate to the extent that it would potentially limit the lessees' ability to use the premises for purposes which were, in the Commonwealth's opinion, compatible with the National Estate significance of the premises (cl.14).

Therefore, the Development Plan does not, in my opinion apply of its own force to the respondents, use of the land. The provisions of s.4(2)(a) of the Commonwealth Places (Application of Laws) Act 1970 exclude the Development Plan from the operation of that law.

There remains for consideration the effect of cl.31 of the covenants. It has been assumed that, as between the Commonwealth and the lessees, cl.31 would as a matter of construction require the lessees to comply with the Development Plan irrespective of whether the Commonwealth is immune from the Plan's operation or not. In this connection, it is noted that in October, 1992 a document entitled "Notice of Intent" containing details of a proposal put to the Brisbane City Council in connection with the use of the premises as a restaurant and function centre was circulated in the neighbourhood. The Brisbane City Council considered the matter on the basis that it was unlikely that the Town Plan applied but that the application was made pursuant to the conditions of the lease. The application proceeded to the stage where it was considered by the Establishment and Co-ordination Committee of the Brisbane City Council and a recommendation that subject to conditions the Council would raise no objection to the proposal. According to the affidavit of Mr Pepper that recommendation was accepted by Brisbane City Council. That is no way decisive of the legal issues but it indicates the course of conduct followed by the respondents in relation to cl.31.

In my opinion any obligation upon the respondents to submit the application to the Brisbane City Council arises from the lease and not from the Development Plan itself. The proceedings in the Planning and Environment Court were for a declaration that the relevant land was subject to the

restrictions and provisions of the Town Planning Scheme for the City of Brisbane and an injunction restraining the respondents from using the land for purposes other than those permitted, without the prior approval of the Brisbane City Council. The appeal is against the order refusing those forms of relief.

In consequence of my view of the matter I would order that the appeal be dismissed with costs to be taxed.