

IN THE SUPREME COURT OF QUEENSLAND

No. 6395 of 1998

Brisbane

Before Justice Wilson

[Caloundra City Council v Minister for Natural Resources &
Ors]

BETWEEN:

THE COUNCIL OF THE CITY OF CALOUNDRA

Applicant

AND:

THE MINISTER FOR NATURAL RESOURCES

First Respondent

AND:

ROBERT LACK

Second Respondent

AND:

PIPI HOLDINGS PTY LTD

Third Respondent

REASONS FOR JUDGMENT - WILSON J

Judgment delivered 6 August 1999

CATCHWORDS:

ADMINISTRATIVE LAW - JUDICIAL REVIEW LEGISLATION -
COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY -
GROUNDS FOR REVIEW OF DECISION - OTHER GROUNDS -
application for review of Minister's decision not to
transmit Council's application for resumption of land to
Governor in Council - objection hearing not properly
constituted - whether Minister required to transmit the
application - decision of Minister not authorised by
enactment under which it was made.

Acquisition of Land Act 1967 s.9

Judicial Review Act 1991 s.20(2)(d)

REAL PROPERTY - RESUMPTION OR ACQUISITION OF LAND - POWERS OF RESUMPTION - UNDER STATUTE - CONDITIONS AND LIMITATIONS - PARTICULAR STATUTES - QUEENSLAND - resumption of land by Council under *Acquisition of Land Act* - objections to resumption of land - whether there was a properly constituted "delegate" to conduct objection hearing.

Carltona v Commissioner of Works and Ors [1943] 2 All ER 560, considered

Little v Minister for Land Management (1992) 77 LGRA 346, considered

Little v Minister for Land Management [1995] 1 Qd.R. 190, considered

O'Reilly v The Commissioners of the State Bank of Victoria (1982-83) 153 CLR 1, considered

Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services (1979) 2 ALD 86, considered

Acquisition of Land Act 1967 ss.5, 7(3)(e)(iii), 8,

Local Government Act 1993 ss. 4, 25, 386

Counsel: Mr PJ Favell for the applicant

Mrs D A Mullins SC for the 1st and 2nd respondents

Mr D G Russell QC with him Mr P G Bickford for the 3rd respondent

Solicitors: Quinn & Scattini as town agents for Garland Waddington for the applicant

B T Dunphy, Crown Solicitor for the 1st and 2nd respondents

Lang Hemming & Hall as town agents for Griffiths, McColm & Parry for the 3rd respondent

Hearing date: 7 April 1999

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1 This is an application for judicial review of a decision of the Minister for Natural Resources and/or Robert Lack (the General Manager of the Department of Natural Resources) not to seek Executive authority for the issue of a proclamation taking certain land at Caloundra for car parking purposes unless and until the applicant (the Council of the City of Caloundra) had forwarded the third respondent (Pipi Holdings Pty Ltd - the owner of the land) a fresh opportunity to have each ground of objection heard by its duly appointed delegate and a further application was made by the applicant.

2 Pipi Holdings Pty Ltd is the owner of certain land in Ormuz Avenue, Caloundra. By a document dated 26 April 1996, the applicant Council gave notice of its intention to resume the land for local government (parking) purposes,

and advised the third respondent that it was entitled to object to the resumption by notice in writing on or before 31 May 1996 and that if it stated in its objection that it wished to be heard in support of the grounds of the objection, it might appear and be heard "by the Council or its delegate" at a nominated time and place or another mutually agreed time.

3 Ultimately it was agreed that there should be an objection hearing on 3 October 1996. On that date the Council as a whole did not assemble, but present on its behalf were the mayor (Mr Dwyer), the chief executive officer (Mr Smith) and the Council's solicitor (Mr Waddington). Mr Dwyer arrived about 5 minutes after the meeting commenced and Mr Smith was present for only the first 10 or 20 minutes. Subsequently, a report of the hearing was prepared at the direction of the mayor. It was addressed to the chief executive officer and signed by the senior administrative officer, one Steve Linnane, and dated 6 February 1997.

4 At its meeting on 10 April 1997 the Council considered the report and by a majority of 6-5 (the Mayor casting a deliberative vote) it resolved:

"That Council make application to the State Government for the proclamation of the resumption of Lots 7, 8 and 9 RP52962 and Lot 1 RP120196, Parish of Bribie for Local Government (Parking) Purposes."

5 The Council submitted an application for resumption to the Minister (the first respondent) dated 15 April 1997. Subsequently there was correspondence between the Department of Natural Resources and the Council. By letter dated 7 May 1998 Mr Lack advised the third respondent that the Minister had signed an Executive Council minute recommending the resumption of the land, and that it was anticipated that the minute would be furnished to the Governor in Council at the Executive Council meeting on 21 May 1998.

6 By letter dated 12 May 1998 the third respondent's solicitors requested the Minister immediately to withdraw the signed Executive Council minute:

"... on the basis that proper required procedures under the Local Government Act 1993 have not been adopted by the Local Authority as a result of which the Application to your Department for Resumption is invalid.

We refer to Section 386 of the Local Government Act 1993 which provides that a Local Authority may, by resolution, delegate its powers under the Act. Subsection 4 of the same Section requires that 'all delegations made by a Local Government must be recorded in a Register of Delegations kept by its Chief Executive Officer'.

Subsection 6 of the Section 386 of the Local Government Act provides that such Register is open to inspection and we advise that both Mr Gerry Bell and the writer did today attend the offices of Caloundra City Council and through its administrative officer, Mr Steve Linnane, we did both duly search the Register which search reveals that no Delegation to the Mayor was made by the Local Authority to hear our client's objection, pursuant to Section 8(1) and Section 8(2)(b) of the Acquisition of Land Act 1967.

In those circumstances the Objection Hearing which took place at the offices of the Caloundra City Council on the 3rd day of October 1996 did not comply with the aforesaid legislation as a result of which it and any subsequent processes are entirely ultra vires.

In those circumstances our client Company through its director, Mr Gerry Bell, requests that the Minister for Natural Resources, Mr Lawrence Springborg, immediately take steps to withdraw his endorsement of the Council's Application and cease action towards publication in the Gazette, until our abovementioned assertion of illegality has been fully investigated by him pursuant to his power under Section 9(5) of the Acquisition of Land Act 1967.

It is our submission that under the last mentioned Section of the *Acquisition of Land Act* the Minister has a responsibility to ensure that the Local Authority has, in all respects, strictly followed all procedural steps required by appropriate legislation, which has not

occurred in this instance as a result of the failure by the Local Authority to pass a resolution delegating power to the Mayor, Mr Des Dwyer, to conduct the Objection Hearing.

The Objection Hearing which was attended by the writer was heard by the Mayor only as a representative of the Local Authority but also in the presence of its Solicitor, Mr Ken Waddington of Garland Waddington, Solicitors, Maroochydore.

As the Resumption process is legally defective in a material particular, we submit that the Minister has no option, subject to him confirming our abovementioned assertion, but to refuse the Local Authority's Application for Resumption."

7 By letter dated 15 May 1998, the second respondent advised the applicant:

"... that Executive Authority for the issue of a Proclamation taking the land will not be sought unless and until Council has afforded the owner a fresh opportunity to have each ground for objection heard by its duly appointed delegate and a further application is made by Council."

8 By letter dated 12 June 1998, Mr Lack gave the following reasons for the decision:

"The provisions of Section 8 of the *Acquisition of Land Act 1967* were not satisfied in that:

- a delegate to hear the objection under the Acquisition of Land Act may not have been appointed or properly appointed,
- if a delegate was appointed, the delegate of the constructing authority did not properly hear and consider all the grounds of objection as the delegate left the objection hearing part way through the hearing
- if the delegate was appointed and left the objection hearing part way through the hearing the delegate

could not properly provide a report to the Council on the hearing."

9 The applicant Council was a "constructing authority" within the meaning of *Acquisition of Land Act 1967*. By s.9 of that Act:

"(3) If within the time stated in the notice of intention to resume no objection is made or if, after due consideration of all objections, the constructing authority is of opinion that the land in question is required for the purpose for which it is proposed to be taken, the constructing authority may apply to the Minister that the land be taken as prescribed by this section."

(3A) Such application shall be made within 12 months after the date of the notice of intention to resume and not thereafter.

(4) Such application shall contain or be accompanied by -

- (a) a copy of the relevant notice of intention to resume and of any further notice amending the same served under section 7;
- (b) where the land is not described in the notice of intention to resume as mentioned in section 7(3)(b)(i) - a copy of a plan of survey of the land certified as accurate by an authorised surveyor;
- (c) a list of the names and addresses last known to the constructing authority of all persons who to the knowledge of the constructing authority are entitled pursuant to section 18 to claim compensation;
- (d) a statement as to those of the persons mentioned in paragraph (c) who have not been served with the notice of intention to resume and, a further statement setting out in relation to every such person, the manner in which such service was attempted and the reasons for failure to effect it;
- (e) a statement whether or not any person objected in terms of the notice of intention to resume and, in the case of such an objection or objections, the name or names of the objector or objectors, a copy of every

objection, and a report by the constructing authority thereon.

(5) The Minister may require any constructing authority to furnish, within a time specified by the Minister, such further particulars and information as the Minister deems fit with respect to an application under this section.

(6) The Governor in Council shall consider every application made to the Minister under this section, including all statements and documents or copies of documents accompanying the application and, if satisfied

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- (a) that the land in question or any part thereof may be lawfully taken for the purpose for which it is proposed to be taken and should be so taken; and
- (b) that the constructing authority has done and taken reasonable things and steps for the purpose of complying with the requirements of sections 7 and 8 and, where the notice of intention to resume has not been served upon the owner as defined in section 7(6), that such failure was due to circumstances beyond the control of the constructing authority;

the Governor in Council may, by proclamation published in the gazette, declare, that the land in question or, as the case may be, such part, particulars whereof shall be contained in or annexed to the proclamation, is taken for the purpose therein mentioned as from the date of the publication in the gazette of the proclamation."

10 Under subs. (6) the Governor in Council is bound to consider "every application made to the Minister". It is implicit in s 9 that once the requirements of sub-ss (4) and (5) are satisfied the Minister must forward the application to the Governor in Council. In some cases it may well be appropriate for the application to be accompanied by a recommendation against its approval. It is for the Governor in Council, and not the Minister, to decide whether the requirements of ss 7 and 8 have been satisfied.

11 Accordingly, I consider that the first and/or second respondent's decision not to transmit the application "unless and until" the third respondent had been afforded a fresh opportunity to have each ground of objection heard by a duly appointed delegate of the applicant and a further application was made was contrary to law in that:

"that the decision was not authorised by the enactment under which it was purported to be made."

See *Judicial Review Act* s.20(2)(d).

12 In compliance with s.7(3)(e)(iii) of the *Acquisition of Land Act* the notice of intention to resume advised the third respondent that if it wished to be heard in support of the grounds of its objection, it might "appear and be heard by the Council or its delegate" at the time and place specified in the notice. Section 8 deals with the constructing authority's obligations in relation to objections. It provides:

"Dealing with objections

8.(1) A person entitled to be served with a notice of intention to resume land who has objected as prescribed to the taking shall not be entitled to be heard in support of the grounds of the objection unless the person stated in the objection that the person desired to be so heard and appears, in person or by counsel, solicitor or agent, at the time and place specified in the notice.

(2) The constructing authority shall consider the grounds of objection to the taking of any land and -

- (a) if the objector has been heard by the constructing authority - the matters put forward by the objector in support of such grounds; or
- (b) if the objector has been heard by the delegate of the constructing authority - the report thereon of such delegate.

(2A) If upon such consideration, the constructing authority is of opinion that the resumption should be discontinued or that the notice of intention to resume should be amended, the constructing authority may discontinue the resumption or amend the notice of intention to resume.

...."

In *Little v. Minister for Land Management* (1992) 77 LGRA 346 (Shepherdson J); [1995] 1 Qd R 190 (CA), the Court adverted to the significance of the objection hearing for both the constructing authority and the objector. Shepherdson J's decision that an objector was entitled to procedural fairness was not challenged on appeal, where argument centred on what was necessary to fulfil the requirement of procedural fairness in the particular case.

13 In the present case, the respondents argued that the objection hearing was flawed because there was no properly constituted "delegate" of the Council. It was common ground that there had been no resolution of the Council appointing someone as its delegate for this purpose.

14 "Delegate" is not defined in the *Acquisition of Land Act*. In *O'Reilly v The Commissioners of the State Bank of Victoria* (1982-83) 83 CLR 1 at 17, Mason J said:

"Delegation is not a parting with powers by the person who grants the delegation, but the conferring of authority to do things which otherwise that person would have to do for himself (*Huth v. Clarke* (1890) 25 Q.B.D. 391, at p. 395, per Wills J.)."

15 The function of the delegate under s 8 is to hear and report as an alternative to a hearing by the constructing authority itself. It is then for the constructing authority to consider the grounds of the objection and, unless it decides to discontinue the resumption or to amend the notice of intention to resume, to make an application to the Minister under s.9(3). That the delegate does not consider and/or make the application

to the Minister does not detract from the fact that he or she is doing something which otherwise the constructing authority would be required to do itself.

16 Of its nature, a local government must make decisions by resolution of the Council. Section 386¹ of the *Local Government Act* affords the mechanism for the appointment of a delegate for the purpose of the *Acquisition of Land Act*. It provides:

"Delegation by local government

386.(1) A local government may, by resolution, delegate its powers under a local government Act."

In my view, the *Acquisition of Land Act* which allows a local government to resume land for parking purposes (see s 5 and schedule 2) is "a local government Act", ie one under which a local government may exercise the jurisdiction of local government, which is to ensure the good rule and government of its territorial unit (*Local Government Act* ss 4, 25).

17 It was not seriously contended that the chief executive officer who left after at most 20 minutes was present as the delegate of the constructing authority. Rather, the applicant's submissions centred on the mayor who was present for all but the first five minutes or so and the solicitor Mr Waddington who was present throughout. It was submitted that the mayor, in his capacity as a councillor, had authority to conduct the hearing as the delegate of the Council. I do not accept that the definition of a councillor's role in s.177 of the *Local Government Act* extends to this. Nor do I accept that Mr Waddington's appointment as solicitor to the Council

1 There has been a re-numbering of the *Local Government Act* 1967. All section numbers refer to reprint 3 which was applicable at the time of the Minister's decision.

carried with it authority to act as a delegate for this purpose.

18 Counsel for the Council sought to invoke the principle in *Carltona Ltd v Commissioners of Works and Ors* [1943] 2 All ER 560 (that a public servant who acts in the name of the relevant Minister is simply that Minister's alter ego) in support of his argument that the hearing had been properly conducted. But, as Brennan J noted in *Re Reference under Section 11 of Ombudsman Act 1976 for an Advisory Opinion; Ex parte Director-General of Social Services* (1979) 2 ALD 86, there is a difference between a true delegate who decides a matter in his or her own name and a *Carltona* decision maker who uses the name of the principal. The present case is concerned with delegation and the *Carltona* principle is not relevant to it.

19 In short, I consider that there was no properly constituted "delegate" to conduct the hearing and that it was fundamentally flawed for that reason. Further, the report to the chief executive officer prepared at the direction of the mayor and signed by Mr Linnane (who was not even present at the objection hearing) could not satisfy the requirement for a report by such delegate. Nevertheless it was not for the Minister to refuse to transmit the application to the Governor in Council. He ought to have done so with a recommendation against the making of a declaration of resumption.

20 In all the circumstances, the decision under review must be quashed.

21 I will hear counsel on costs