High Court reinforces private land owners' rights

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Councils throughout New South Wales have wide powers of compulsory acquisition for the purpose of exercising any of their functions. The legislature put a fetter on councils' power of compulsory acquisition: councils may not acquire land by compulsory process without the approval of the owner of the land if it is being acquired for the purpose of resale. The question then turns on the meanings of "sale" and "purpose" in dealing with complex agreements. This article reviews two cases that were ultimately determined by the High Court, which held Parramatta Council's proposed compulsory acquisitions of land to be unlawful, thus upholding private landowners' rights. The article also reviews the subsequent legislative amendments by the New South Wales Parliament, which were promulgated to overcome the decision of the High Court.

On 2 April 2009, the High Court of Australia handed down its decision in *R&R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 165 LGERA 68.

FACTS

On 1 June 2007, Parramatta Council sent Proposed Acquisition Notices (pursuant to s 12 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (Just Terms Act)) to the owners of land in a block in the Parramatta city centre bounded by Smith, Darcy, Church and Macquarie streets. The acquisitions were related to the redevelopment of the block, which was to be called the "Civic Place" upon completion.

The redevelopment was to be carried out under a Public Private Partnership (PPP) made pursuant to s 400I of the *Local Government Act 1993* (NSW) (LG Act) between Council and two companies: Grocon (Civic Place) Pty Ltd, and Grocon Constructors Pty Ltd (together referred to as "Grocon"). The Civic Place development is a $1.6 billion development. The PPP was to be effected by a Development Agreement dated 21 July 2006 (Agreement) between the Council and Grocon.

Under the Agreement, the Council would transfer certain parts of the acquired lands to Grocon and receive substantial financial payments and other consideration from Grocon ("money and monies worth"). Two owners – R&R Fazzolari Pty Ltd (Fazzolari) and Mac's Pty Ltd (Mac's) – challenged the proposed acquisitions in the Land and Environment Court of New South Wales (LEC) as being for the purpose of resale, and therefore falling within the constraint on acquisition imposed by s 188(1) of the LG Act. Biscoe J in the LEC held the proposed acquisitions to be unlawful. The Council appealed to the Court of Appeal of New South Wales and, on 11 June 2008, the court unanimously allowed the appeals and set aside the declarations and orders in the LEC.

On 26 August 2008, Fazzolari and Mac's were granted special leave to appeal against the decisions of the Court of Appeal. On 2 April 2009, the High Court upheld the appeal setting aside the orders of the Court of Appeal, reinstating the orders in the LEC, and making cost orders in each jurisdiction in favour of Fazzolari and Mac's.

LEGAL ISSUES

The relevant consideration in this matter was the proper construction and application of s 188(1) and (2)(a) of the LG Act. However, the power for a local council to acquire land is found in s 186 of the LG Act. The provisions are as follows:

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186 For what purpose may a Council acquire land?

(1) A Council may acquire land (including an interest in land) for the purpose of exercising any of its functions.

(2) Without limiting subsection (1), a Council may acquire:

(a) Land that is to be made available for any public purpose for which it is reserved or zoned under an environmental planning instrument; or

(b) Land which forms part of, or adjoins or lies in the vicinity of, other land purposed to be acquired under this Part.

(3) However, if the land acquired is, before its acquisition, community land vested in a Council, the acquisition does not discharge the land from any trusts, estates, interests, dedications, conditions, restrictions or covenants that affected the land or any part of the land immediately before that acquisition.

…

188 Restriction on compulsory acquisition of land for resale

(1) A Council may not acquire land under this part by compulsory process without the approval of the owner of the land if it is being acquired for the purpose of re-sale.

The constraint is qualified by s 188(2)(a):

(2) However, the owner's approval is not required if:-

(a) the land forms part of, or adjoins or lies in the vicinity of, other land acquired at the same time under this Part for a purpose other than the purpose of re-sale.

The term "function" in s 186 includes "a power, authority and duty".

Private property rights, although subject to compulsory acquisition by statute, have long been largely protected by the common law. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights.[1] Compulsory acquisition only arises under statute. The common law caution to the legislature:

> in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights. It was expressed by Griffith CJ in *Clissold v Perry* [(1904) 1 CLR 363; [1904] HCA 12], a land resumption case thus:
>
> > "In considering this matter it is necessary to bear in mind that it is a general rule to be followed in the construction of Statutes such as that with which we are now dealing, that they are not to be construed as interfering with vested interests unless that intention is manifest."[2]

The first question to be addressed was whether the proposed transfer (Fazzolari and Mac's to Council and then, through a set of complex dealings, to Grocon), coupled with the proposed payments to Council, would constitute a "resale" of the land within the meaning of that term in s 188(1). Council argued that it did not.

The High Court, at [49] per French CJ, considered:

> [T]he relevant ordinary meaning of the word "sale" is:
>
> > "the exchange of a commodity for money or other valuable consideration."
>
> This Court in *Chan v Dainford Ltd* in construing s 71 of the *Property Law Act 1974* (Qld) observed:
>
> > "The primary meaning of sale is an exchange of property, the subject of the sale, for money."
>
> That cannot be taken to exclude the possibility that a sale of land may involve its transfer for money and/or other valuable consideration.

The Agreement between Council and Grocon required the Council, as a condition precedent, to transfer Fazzolari and Mac's land to Grocon. In consideration of Council performing its obligations under the Agreement, it was to receive money and other benefits from Grocon. Council argued that no part of the consideration by Grocon to Council was allocated to receipt by Grocon of Fazzolari and Mac's property.

[1] *R&R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 165 LGERA 68 at [41] per French CJ.

[2] *R&R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 165 LGERA 68 at [42] per French CJ.

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The High Court held against Council, and held that the land was to be transferred, along with other land, in exchange for money and other consideration. The land was therefore the subject of a "resale" by the Council within the meaning of s 188. The High Court further held that it is inescapable that resale was one of the purposes of the proposed acquisitions, albeit it was said to have been in aid of the larger purpose of the redevelopment of the Civic Place in Parramatta.

Council had argued that the public purpose of the compulsory acquisition was for the urban renewal of part of Parramatta's CBD. The court, at [52] per French CJ, considered whether, for the purpose of resale, it was necessary to attract the constraint:

> imposed by s 188(1) that the purpose be:
> (i) the sole purpose; or
> (ii) the dominant purpose; or
> (iii) a substantial purpose;
>
> or whether it sufficed that a purpose of re-sale be one among a number of purposes of the acquisition.

The High Court, at [57] per French CJ, considered this question, and it upheld the Appellant's argument that:

> [I]t was the purpose of acquisition of each owners "lot" which had to be characterised in order to know whether the power could be exercised regardless of the owners consent.

The High Court, at [96] per Gummow, Hayne, Heydon and Kiefel JJ, further held:

> [T]he development of Civic Place for which the appellants land was to be acquired is for the *development as the Council and Grocon stipulated in the development agreement*. Stating the purpose of the acquisition as being to implement the Master Plan or to develop Civic Place or at some other similar level of generality, must not be permitted to obscure the fact that when the acquisitions were proposed, a precise form of development had been agreed. Very particular terms governing both acquisition and disposition of the appellants' land had been stipulated in the development agreement.

Council's second line of argument was under s 188(2)(a) that Council was authorised to compulsorily acquire land that adjoins or lies in the vicinity of other land the Council acquires at the same time under the LG Act for a purpose other than a purpose of resale. The "other land" referred to by Council was the compulsory acquisition of Darcy and Church streets, both streets already owned by Council.

Both Darcy and Church streets are public roads. *The Roads Act 1993* (NSW) provides:

> **145 Roads authorities own public roads**
> (1) All freeways are vested in fee simple in the RTA.
> (2) All Crown roads are vested in fee simply in the Crown as Crown land.
> (3) All public roads within a Local Government area (other than freeways and Crown roads) are vested in fee simple in the appropriate roads authority.
> (4) All public roads outside a Local Government area (other than freeways and Crown roads) are vested in fee simple in the Crown as Crown land.
>
> **146 Nature of ownership of public roads**
> (1) Except as otherwise provided by this Act, the dedication of land as a public road:
> …
> (e) does not authorise the owner of the road to dispose of any interest (other than an easement or covenant) in the land.

The Council is the "appropriate roads authority" for Darcy and Church streets, but that ownership is fettered under s 146(1)(e) as the Council is not authorised as the owner of the roads to dispose of any interest (other than an easement or covenant) in the land. Although Darcy and Church streets vest in the Council in fee simple, the Agreement obliged the Council to acquire Darcy and Church streets by compulsory process. The facility for Council to acquire its own road lies in s 7B of the Just Terms Act, which provides:

> An authority of the State that is authorised by law to acquire land by compulsory process in accordance with this Act may so acquire the land even if the land is vested in the authority itself.

Upon compulsory acquisition of Church and Darcy streets, Council would then be free to transfer part or all of Darcy Street or Church Street to Grocon, which it was required to do under the Agreement. Council purposely held back the compulsory acquisitions of both Darcy and Church streets so that

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they would take place on the same day as Council compulsorily acquired the Fazzolari and Mac's land so that Council, if it failed on the resale question, could rely upon the exception of land adjoining or lying in the vicinity of, under s 188(2)(a). Indeed, to date, Council has postponed the compulsory acquisition of Darcy and Church streets in order to fall within the exception of s 188(2)(a) – that is, Council has postponed those compulsory acquisitions taking place for several years so far.

The High Court held that the LG Act gave no power to Council to compulsorily acquire its own land (in this case two public roads), and that the power of compulsory acquisition for Council of its land arose under s 7B of the Just Terms Act. As the compulsory acquisition of Darcy and Church streets would not fall under the LG Act, but rather under s 7B above, then the Council could not rely upon the exception in s 188(2)(a) to compulsorily acquire land that "adjoins or lies in the vicinity of" other land compulsorily acquired by Council.

> A consequence of the Council acquiring the two streets by compulsory process would be that each street would cease to be a public road. Upon each street ceasing to be a public road, the Council would be freed from the limitation on its powers now provided by s 146(1)(e) of the *Roads Act 1993* (NSW) – that its ownership of the two streets does not authorise the Council to dispose of any interest in the land other than an easement or covenant.[3]

Conclusion

The High Court reinforced a private landholders right to retain ownership of his/her land. If Council had compulsorily acquired the land and built a library or Council chambers on the land (both facilities were being built elsewhere on the Civic Place site), then neither Fazzolari nor Mac's would have had a case to prevent the compulsory acquisitions taking place. However, in this case, Council was compulsorily acquiring land from a private landholder to transfer it for money or monies worth to another private landholder so that Grocon could develop it (44 storeys above ground level and four storeys below ground level) and sell the development for profit.

But then the New South Wales Parliament stepped in…

The *Land Acquisition Amendment Bill* was passed on the 17 June 2009 in relation to the Compulsory Acquisition of Land, it amended s 7 of the Just Terms Act to read:

> 7(1) This Act does not empower an authority of the State to acquire land if it does not have the power (apart from this Act) to acquire the land.
>
> 7(2) The power of an authority of the State to acquire land under another Act is affected by Sections 7A, and 7B of this Act. Any such acquisition to which sections 7A or 7B applies remains, for all purposes, an acquisition of land under and subject to that other Act.
>
> …
>
> 7B An authority of the State that is authorised by law to acquire land by compulsory processing in accordance with this Act may so acquire the land even if the land is vested in the authority itself.

And further passed:

> **Restriction on Compulsory Acquisition of Land by Council's for Resale**
>
> Before approval is given to the acquisition of land by a Council for the purposes of resale without the owners approval because of an acquisition at the same time of other land vested in the Council as referred to in section 188(2)(a) of the *Local Government Act 1993*, the Council must provide a written explanation to the Minister Administering that Act as to the purpose (not being the purpose of resale) for which the other land is vested in the Council is being wholly or partly compulsory acquired.

According to the government's press release, the need for the Bill arose as a result of the decision of the High Court in Fazzolari and Mac's. The legislation appears to have been drafted as a result of [115] of the High Court judgment, which states:

> Section 188(2)(a) stands as an exception to the requirement of s 188(1) that the approval of the owner of the "land" is required "if it [the land] is being acquired for the purpose of resale". As noted earlier, it is not necessary to decide in these cases whether "the purpose of resale" that is mentioned in s 188(1)

[3] *R&R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* (2009) 165 LGERA 68 at [103] per Gummow, Hayne, Haydon and Kiefel JJ.

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> is to be understood as the "sole", the "dominant", or the "substantial" purpose in question. That is not necessary in these cases because the purpose of the acquisition of the Appellants' land was to put the Council in a position to fulfil its obligations to Grocon by reselling the Appellants' land to Grocon. But where, as is the case with both Darcy Street and Church Street, only part of the land is to be re-sold and part is to be retained by the Council, the better view may well be that the land comprising those streets is acquired for more than one purpose. The more natural meaning of s 188(2)(a) applied to such a case would appear to be that those streets, if they were "other land" acquired at the same time as the Appellants' land, were each acquired for a purpose other than the purpose of resale.

The court considered the effect of s 188(2)(a) as it stands as an exception to the requirement of s 188(1) that the approval of the owner of the land is required if the land is being acquired for the purpose of resale. The court considered where, as in the case of both Darcy Street and Church Street, only part of the land is to be resold (to Grocon) and part is to be retained by Parramatta Council, the better view may well be that the land comprising those streets is acquired for more than one purpose. The more natural meaning of s 188(2)(a) applied to such a case would appear to be that those streets, if they were "other land" acquired at the same time as Mac's and Fazzolari's land, were each acquired for the purpose *other than the purpose of resale*.

This is the whole point of the proposed legislation – that Parramatta Council can bypass the prohibition on "resale" as held by the High Court. It is a legal fiction that a council can only compulsorily acquire its *own* land pursuant to the power in s 7B of the Just Terms Act. The legislation moved the power of acquisition from the Just Terms Act, for council to compulsorily acquire its own land, to the LG Act, particularly s 188(2)(a).

This is a significant amendment to the Just Terms Act in that it will relate to all councils. Now all councils are able to compulsorily acquire their own roads (which they already own!) and then use the power in s 188(2)(a) to compulsorily acquire any land which forms part of, or adjoins, or lies in the vicinity of, councils' own land. This legislation enables councils throughout the State to enter into joint ventures with developers, and then compulsorily acquire their own lands, which would give them the right to acquire privately held land that adjoins or lies in the vicinity of councils' own land. The impact is obvious when one considers that the vast majority of roads are owned by councils.

The amendment "Restriction on Compulsory Acquisition of Land by Council's for Resale" makes absolutely no difference to the legislation. Section 187 of the LG Act already requires Ministerial consent prior to a proposed Acquisition Notice being issued. To write a further letter to the Minister gives no further protection to the private landholder. Occasionally, Ministers make mistakes.

In short, Parliament has given councils power to compulsorily acquire their own roads, and then compulsorily acquire land adjoining, or lying in the vicinity of, their own roads – without the constraint on councils' power of resale, as recently upheld in the High Court.

IS IT POSSIBLE TO CHALLENGE THE AMENDMENTS TO THE JUST TERMS ACT?

Possibly – *Durham Holdings Pty Ltd v the State of New South Wales* (2001) 205 CLR 399, where Kirby J (as he then was) discussed at [70]-[75] whether the derogation of private rights, as a result of this amending legislation, can be rightly categorized as an "extreme law". A constitutional challenge may be open against the State government for passing a law that is an extreme departure from fundamental rights.

> [72] Just as the available protections against extreme cases of discrimination and injustice do not arise in Australia from a comprehensive constitutional charter of civil rights, or from a binding treaty on fundamental rights given local legislative effect, nor do they arise from a belated attempt to assert for the common law (and the judges who expound and apply it) a role superior to legislation which judicial authority, legal history and political realities deny.
>
> [74] In Australia, the foundation for judicial protection against "extreme" derogation from fundamental rights lies, in part, in the presumptive principle of construction which judges, federal and State, regularly invoke. But it also lies in the provision of, and implication derives from the federal Constitution itself. Whereas the role of the common law, in the face of legislation, is "modest", the role

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> of the Constitution is substantial…Ultimately, a "law of the State", made by such a Parliament (meaning State Parliament) could only be a "law" of a kind envisaged by the Constitution. Certain "extreme" laws might fall outside that constitutional presupposition. [footnotes omitted]

The population of New South Wales has a high percentage of home ownership, and many people own investment properties of one sort or another. From the perspective of protecting private landholder's rights, this amending legislation may well be considered to be "extreme" – but that is an argument for another day.

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