

Property Law Update

Winter 2009

High Court reinforces private land owners' rights

by Maureen Peatman, Partner

On 2 April 2009 the High Court handed down its decision in *R & R Fazzolari Pty Ltd, and Mac's Pty Ltd –v– Parramatta City Council and the Minister Administering the Local Government Act of NSW [2009] HCA 12*. Maureen Peatman represented both Appellants, R&R Fazzolari Pty Limited and Mac's Pty Limited in the High Court.

Background

On 1 June 2007 Parramatta Council sent proposed acquisition notices 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 "Civic Place". The Civic Place development is a \$1.6 billion development.

The redevelopment was to be carried out under a Public Private Partnership ("PPP") made under the *Local Government Act 1993 (NSW)* ("LGA") between Council and 2 companies owned by Danny Grollo, Grocon (Civic Place) Pty Ltd and Grocon Constructors Pty Ltd (together referred to as "Grocon").

The PPP was to be effected by a development agreement between the Council and Grocon.

Under the agreement, the Council would transfer certain 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 & Environment Court of NSW as being for re-sale, and therefore falling within the constraint on acquisition imposed by section 188(1) of the LGA.

The Land & Environment Court held the proposed acquisitions to be unlawful. Declarations were made and injunctive relief was granted.

The Council appealed to the Court of Appeal of NSW and the Court of Appeal unanimously allowed the appeals and set aside the declarations and orders in the Land & Environment Court.

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

Legal Issues

Powers of compulsory acquisitions are given to Council pursuant to s186 of the *Local Government Act* (LGA) to "acquire land ... for the purpose of exercising any of its functions". In the case of a compulsory acquisition, that power is constrained by s188(1) which provides:-

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:

- (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.*

Private property rights, although subject to compulsory acquisition by statute, have long been protected by the Courts in Australia. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights. 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 (*continued on page 2*)

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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.

Would the proposed transfer constitute a “re-sale”?

The first question to be addressed in this case 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 “re-sale” of the land within the meaning of that term in s188(1). Council argued that it did not.

The development agreement between Council and Grocon required the Council to transfer Fazzolari and Mac’s land to Grocon. Council was to receive money and other benefits from Grocon for performing its obligations. Council argued that no part of the consideration by Grocon to Council was allocated to receipt by Grocon of Fazzolari and Mac’s property. The High Court found against Council and held that the land was to be transferred, along with other land, in exchange for money and other consideration (“money and monies worth”). The land was therefore to be subject of a “re-sale” by the Council within the meaning of s188. The High Court further held that it is inescapable that re-sale was one of the purposes of the proposed acquisitions, even if it was in aid of the larger purpose of the redevelopment of Civic Place in Parramatta.

Purpose of compulsory acquisition was for urban renewal

Council had argued that the public purpose of the compulsory acquisition was for the urban renewal of part of Parramatta’s CBD. The Court considered

whether for the purpose of re-sale it was necessary to attract the constraint imposed by s188(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 considered this question could distract from a consideration of the purpose of the acquisition of the particular land to be acquired. It held that because the compulsory acquisition of land for re-sale will almost always be supported by reference to some larger public purpose, it cannot be a necessary condition of the application of s188(1) that the purpose of re-sale be the sole or even dominant purpose of the acquisition. It should suffice that it is a substantial, i.e. non trivial purpose.

Council’s second line of argument

This was under s188(2)(a) that Council was authorised to compulsorily acquire land that adjoins or lies in a vicinity of other land the Council acquires at the same time under the LGA for a purpose other than a purpose of re-sale.

The “other land” referred to by Council was the compulsory acquisition of Darcy Street and Church Street, both streets already owned by Council. The development agreement between Council and Grocon required Council to compulsorily acquire the land, so that the streets ceased to be public roads and Council would then be free to transfer part or all of Darcy or Church Street to Grocon – various parts of both streets were required to be transferred under the development agreement.

Council purposely held back the compulsory acquisitions of both Darcy and Church Streets so that 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 re-sale question, could rely upon the exception of land adjoining or lying in the vicinity of under s188(2)(a).

The High Court held that the *Local Government Act* gave no power to Council to compulsorily acquire its own land (in this case 2 public roads), and that the power of compulsory acquisition for Council of its roads arose under s7B of the *Land Acquisition (Just Terms Compensation) Act 1991*. As the compulsory acquisition of Darcy Street and Church Street would not fall under the *Local Government Act*, but rather under s7B above, then the Council could not rely upon the exception in s188(2)(a) to compulsorily acquire land which “adjoins or lies in the vicinity of” other land compulsorily acquired by Council.

The High Court has reinforced a private land holders right to retain ownership of their 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 land holder (Fazzolari and Mac’s) to transfer it for money or monies worth to another private landholder (Grocon) so that Grocon could develop it (44 storeys above ground level and 4 storeys below ground level) and sell the development for profit.

What happened next

The NSW State government has subsequently passed legislation linking the power of Councils to compulsorily acquire their own roads from s78 of the *Land Acquisition Act* back to s188(2)(a) of the *Local Government Act*. This means that any local council in NSW can compulsorily acquire its own roads and then compulsorily acquire land adjacent to, or in the vicinity of, those council owned roads. The amendments will allow councils to “compulsorily” fictitiously buy up their own roads, and then compulsorily buy up private owner’s adjacent land, transfer that adjacent land to a joint venture partner (i.e. a private developer) pursuant to a Public Private Partnership, and then sell it at a profit.

New laws on vegetation clearance

by Alistair Cowan, Lawyer

During the Queensland November 2008 election campaign, now elected Premier Anna Bligh announced that if the Australian Labor Party were re-elected, a moratorium would be placed on the clearing of all native vegetation within 50 metres of a watercourse in certain areas. This statement has now been enshrined in the *Vegetation Management (Regrowth Clearing Moratorium) Act 2009*.

The Act places a moratorium on the clearing of:

- all native vegetation within 50 metres of a watercourse in priority recatchments of the Wet Tropics, Burdekin and Mackay-Whitsunday Regions; and
- endangered regrowth vegetation in rural areas across the State on freehold and agricultural grazing State leasehold land.

The Act, assented to on 23 April 2009 has a retrospective action and

is deemed to have commenced on 8 April 2009. The moratorium on clearing will therefore be deemed to have commenced on that date and will continue for a period of 3 months until 7 July 2009 with an option to extend the moratorium for a further 3 months at the Chief Executive's absolute discretion.

The specific areas affected will be identified in "Moratorium Maps" and "Property Maps of Assessable Vegetation" ("PMAV's") to be prepared by the Department of Environment and Resource Management.

No permits to clear such vegetation will be issued during the moratorium period. Approved Development Applications involving any clearing of native vegetation in areas included in a Moratorium Map will be deemed to have been improperly made. The Act will prevail over the *Integrated Planning Act 1997* (Qld) to the extent of any inconsistency.

Developers may seek an exemption from the actions of the Act from the Chief Executive, however such exemptions will be granted at the Chief Executive's absolute discretion.

The Supreme Court is deemed not to have jurisdiction to hear appeals against the Chief Executive's decision in relation to including land in a Moratorium Map or PMAV. Appeals against decisions made by the Chief Executive in relation to the granting of exemptions may only be heard by the Magistrates or District Courts.

Hefty fines apply to those caught breaching the provisions of the Act. All developers should carefully check the Act prior to commencing any clearing to ensure that they do not run foul of its provisions.

It will be interesting to see if the other States follow suit.

The *Land Tax Management Act*

by Ned Boyce, Partner

In New South Wales the *Land Tax Management Act* provides that if a tenant leases a property which is owned by the Crown or a Local Council or County Council the tenant is, for land tax purposes, deemed to be the owner of that part of the land leased from the Crown or Council.

The same position applies in Victoria, unless the tenant is exempted from paying land tax by exemption provisions contained in the *Land Tax Act* e.g. if the tenant is a non-profit or sporting organisation.

This provision enables governments to assess land for land tax which would otherwise be exempt from land tax. Unfortunately tenants are not always

made aware of this provision which can lead to an unfortunate surprise some time into the term of the lease. In particular, the Office of State Revenue in New South Wales has recently been contacting tenants of Crown land or Council owned land, which has resulted in the issue of assessments for the current land tax year and depending upon when the lease was entered into, up to 4 earlier land tax years.

If you propose to enter into a lease from the Crown or from a local council, ensure that you establish at the time of the negotiation of the terms of the lease, the value of the land so that you can determine the likely land tax that you will be required to pay during the term of the lease.



Essential safety measures and leases

by Bill Hazlett, Partner

Essential Safety Measures requirements (“ESMs”) affect both landlords and tenants. There are penalties for non-compliance and liability risks for injuries and losses resulting from breach, which means that it is essential to understand and incorporate provisions dealing with ESMs into a lease.

What is an Essential Safety Measure?

ESMs are generally the fire and life safety items installed within a building. These include fire fighting equipment, smoke detectors, fire isolated stairwells, emergency lighting, lifts, sprinkler systems and egress pathways.

The legislative regimes vary considerably between each state and territory in Australia. Each jurisdiction is quite different in terms of detail and terminology used. In some jurisdictions ESMs may extend to services which are designed to protect property. For example in Victoria ESMs are defined as any measure including item of equipment, form of construction or safety strategy required for the safety of persons using a building or public place of entertainment. Therefore ESMs can include air conditioning and other mechanical ventilation systems, power supplies, intercom systems and any other safety measures designed to protect the safety of persons.

Relevant Legislation

The table below left summarises the legislation governing ESMS in each state and territory.

Actions for landlords

Responsibility for ESM formulation and updating should remain with the landlord as it tends to be an annual requirement in the applicable jurisdictions. Landlords need to consider whether their leases:

- allow entry and inspection of the premises to ensure requirements of ESMs are being observed; and
- include provisions ensuring the tenant uses the property in a manner consistent with compliance.

Landlords about to enter into a new lease should ensure that the premises have been inspected, the ESMs determined and maintenance tasks dealt with prior to the commencement of the lease.

Maintaining ESMs can be costly

Can or should a landlord pass the ESM requirements onto the tenant in a lease? It depends on the type of lease:

1. Retail Leases

In all jurisdictions, retail lease legislation requires that landlords maintain all plant and equipment in the premises. These provisions override any covenants by the tenant to repair in the retail lease. So there is limited scope for imposing the obligation to maintain ESMs on the tenant under a retail lease (other than the clear egress requirement).

2. Commercial Leases

In most jurisdictions, a landlord can pass the requirements to the tenant. Usually, this would be by way of provisions requiring the tenant to carry out maintenance and repairs of the premises. But repair provisions commonly exclude structural repairs and give rise to debate about whether certain ESMs are of a

State	Legislation	Reporting Requirements
ACT	<i>Emergency Act 2004</i> State Policy - Essential Services Maintenance FS-05	Annual Verification Certificate
NSW	<i>Environment Planning and Assessment Act 1979</i> <i>Environment Planning and Assessment Regulation 2000</i>	Annual Fire Safety Statement
NT	<i>Fire and Emergency Act</i> <i>Fire and Emergency Regulations 2008</i>	N/A
Qld	<i>Building Act 1975</i> <i>Building Fire Safety Regulation 2008</i> <i>Fire and Rescue Services Act 1990</i> <i>Queensland Building Services Authority Act 1991</i> <i>State Penalties Enforcement Act 1999</i> <i>Aged Care Act 1997</i>	Annual Record of Maintenance
SA	<i>Building Act 1971</i> <i>Development Regulations 1993</i> <i>Ministers Specification SA 76</i>	Annual Certificate of Compliance with Maintenance Procedures for Essential Safety Provisions Annual Fire Safety Declaration (for approved providers in Aged Care)
Tas	<i>Building Act 2000</i> <i>Building Regulations 2004</i> <i>Fire Service Act 1979</i> <i>General Fire Regulations 2000</i>	Annual Maintenance Statement
Vic	<i>Building Act 1993</i> <i>Building Regulation 2006</i> (Part 12 Maintenance)	Annual Essential Safety Measures Report
WA	<i>Fire Brigade Act 1942</i> <i>Occupiers Liability Act 1985</i> <i>Local Government (Miscellaneous Provisions) Act 1960</i> <i>Building Regulations 1989</i> <i>Health Act 1911</i> <i>Health (Air Handling and Water Systems) Regulations 1994 – AS 3666 (1989)</i>	N/A

Essential safety measures and leases (cont)

structural nature. Repair provisions can be difficult to enforce and any breach by the tenant may also put the landlord in breach of the relevant legislation.

Some landlords include a provision in the lease which allows the landlord to recover the cost of maintaining ESMs from the tenant as part of outgoings. The landlord then has control of the statutory requirements at the tenant's cost.

Seek Advice

Typical maintenance and repair provisions in many leases may not consider the operation of the ESM legislation.

Many repair disputes can be avoided by ensuring that appropriate provisions are negotiated before the commencement of a lease.

Hunt & Hunt has prepared specific ESMs clauses to insert into leases and can provide advice on a landlord's or tenant's obligations in current or prospective lease agreements.



GST margin scheme changes

by Neil Malcolm, Senior Associate

Recent changes to the margin scheme rules mean that residential property developers using the scheme need to seek more detailed advice about whether the margin scheme can apply and consider increasing GST liabilities in their accounting estimates for new projects.

The new rules have applied since 9 December 2008.

Loophole closure

The new rules aim to prevent the artificial creation of margin scheme eligibility [*GST Act 1999* Division 75-5(3) (e)-(g)].

For example, let's assume under the previous regime A sells land to B on a straightforward taxable supply (plus GST) without application of the margin scheme. B contrives to sell the land to C as a going concern. C could then develop and sell the land using the margin scheme.

The new regime prevents C from selling under the margin scheme by looking back at the previous transaction between A and B. In the above example, as the transaction between A and B was a taxable supply, (with no application of the margin scheme), C cannot sell under the margin scheme.

However, 2 or more previous GST free sales may result in C being able to sell under the margin scheme, but any contrivance of the circumstances will probably fall foul of new anti-avoidance measures. The Commissioner has new powers to scrutinise the purpose of a taxpayer's choices made under the GST legislation (such as choosing to apply the margin scheme).

Wider margins

The new rules aim to recover value added by a previous owner resulting in wider margins, as per the *GST Act 1999* Division 75-11(5).

Let's assume A bought a block of land for \$350,000 GST free. A then sells the land to B for \$450,000. Suppose the sale is GST free because it is a going concern or the farmland concession applies. B then sells the property using the margin scheme to C for \$550,000.

Under the previous regime GST was calculated on the margin between the price B bought the land for and the subsequent sale price to C. That is to say, the margin was \$100,000. GST of 1/11th (\$9,090.90) would be remitted by B to the ATO.

Under the new regime the margin is now the difference between what C paid for the property and what A paid for the property. So the margin in this example is between \$350,000 and \$550,000. The margin is now \$200,000 and B has to remit \$18,181.81 to the ATO. Still better than 1/11th of the sale price, but as you can see the tax liability has doubled.

There is no retrospectivity in the legislation so developers who entered into contracts before 9 December 2008 can use the previous regime. For those in a position similar to the example above, there are likely to be practical and significant difficulties for B in actually finding out what A paid for the land in order for B to work out his GST liability. How is this to be ascertained if the terms of the contract A had with his supplier are commercial and in confidence and the amount paid in cash was not the total consideration for the deal? No doubt time will tell how the Commissioner proposes to apply the legislation in difficult circumstances such as these.

Last minute discounts on sale of land misleading financiers?

by Maria Townsend, Partner

A number of cases are coming before the courts where the sale price, which is set out in the contract for the sale of land and used by a purchaser to secure finance for the purchase, has been found to have been misrepresented by the vendor and purchaser, or has otherwise been misleading.

There is a growing practice of rebates being given by sellers at completion, based either on post contract negotiations or pre-contract negotiations which have not been represented in the contract. Where rebates are represented in the contract they are applied as a discount for early completion and subsequently the price is not representative of the true market value of the property.

Financiers that rely on a copy of the contract to verify the bona fide consideration for a sale, which appears to be at arm's length in order, are then fundamentally misled by these arrangements.

In one recent case the financier was able to sue successfully for misleading and deceptive conduct upon the representation on a contract for sale of land, where the purchase price was to be \$550,000 but the vendors accepted the sum of \$440,000 as final settlement of the purchase on completion (this being the full amount of the loan obtained from the financier).

The relevant misleading representations made to the financier by the vendors and purchasers were found to be:

1. the representation that \$550,000 was the amount to be paid (this was found to be misleading as the price was obviously fictitious because it bore no relationship to the market value and the vendor had also returned the deposit cheque);
2. the representation that \$550,000 was the market value (this representation was found to be misleading because of the valuation evidence that the market value at the time of contract was \$370,000).

Where there is authority within the contract for sale for discounts given and the financier is provided with a full copy of the contract, then there should be little concern. However, difficulty arises when the discounts are not contractually authorised and the financier relies on the contract alone as representing the true market price.

All parties involved in these non-contractually authorised discounts on sales of land should be very careful that they are not consciously involved in deceiving the financier and engaging in misleading and deceptive conduct. Especially where the quantum of the finance obtained means there is little or no equity in the property.

Hunt & Hunt recommends that financiers obtain independent valuations of the properties, they should not rely on the face value of the purchase price on the contracts. Financiers are also encouraged to insist that a full copy of the contract is obtained and not the front page only, as some appear content to accept.

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