

HIGH COURT OF AUSTRALIA

JAGOT J

GOVERNMENT OF THE RUSSIAN FEDERATION PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA DEFENDANT

Government of the Russian Federation v Commonwealth of Australia

[2023] HCA 20

Date of Hearing: 26 June 2023

Date of Judgment: 26 June 2023

C9/2023

ORDER

- 1. The application filed 23 June 2023 be dismissed.*
- 2. The costs of the application filed 23 June 2023 be costs in the cause.*

Representation

E A J Hyde with M F Caristo for the plaintiff (instructed by Nelson & Hill Lawyers)

T M Begbie KC with E H I Smith for the defendant (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Government of the Russian Federation v Commonwealth of Australia

Injunctions – Interlocutory injunctions – Where plaintiff's lease of land terminated by operation of *Home Affairs Act 2023* (Cth) ("Act") – Where plaintiff seeks declaration of constitutional invalidity of Act on ground Act not supported by head of legislative power and contrary to s 51(xxxi) of *Constitution* – Where plaintiff seeks alternative declaration that operation of Act results in acquisition of property to which s 51(xxxi) of *Constitution* applies from plaintiff otherwise than on just terms, such that Commonwealth liable to pay reasonable amount of compensation to plaintiff – Whether plaintiff established prima facie case or serious question to be tried – Whether, on balance of convenience, compelling circumstances existed supporting interlocutory injunction to restrain enforcement of statute.

Words and phrases – "acquisition of property", "balance of convenience", "compelling grounds", "material change in circumstances", "national security interests", "on just terms", "prima facie case", "serious question to be tried".

Constitution, s 51(xxxi).

Home Affairs Act 2023 (Cth), ss 5, 6, 7.

JAGOT J.

A new Act

1 On 15 June 2023 at 4.26 pm, a statute, the *Home Affairs Act 2023* (Cth) ("the Act"), commenced. That statute has three substantive provisions. The first, s 5, provides that:

"A relevant lease, and any legal or equitable right, title, interest, trust, restriction, obligation, mortgage, encumbrance, contract, licence or charge, granted or arising under or pursuant to a relevant lease, or in dependence on a relevant lease, is terminated by force of this section on the commencement of this section."

2 A "relevant lease" is defined in s 4 of the Act to mean:

"... any lease owned or held in respect of the land at the commencement of this Act."

3 "Land" is defined to mean:

"Block 26, Section 44 in the Division of Yarralumla, as delineated on Deposited Plan Number 10486 in the Office of the Registrar of Titles at Canberra in the Australian Capital Territory."

4 Section 6(1) of the Act provides that:

"If the operation of this Act would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person."

5 Section 6(2) provides a mechanism for the determination of that amount of compensation by proceedings in either the High Court of Australia or the Federal Court of Australia.

6 Section 7(1) provides that:

"Subject to subsection (3), this Act:

- (a) has effect despite any other law of the Commonwealth or of a State or Territory (whether written or unwritten)".

7 Section 7(3) provides that:

"Nothing in this Act affects the status of the land as National Land under section 27 of the *Australian Capital Territory (Planning and Land Management) Act 1988*."

8 By s 7(2), it is specified that "[w]ithout limiting subsection (1), this Act has effect despite" any provision of a series of other Acts and Ordinances, including, relevantly:

"(c) the *Consular Privileges and Immunities Act 1972*;

(d) the *Diplomatic Privileges and Immunities Act 1967*;

(e) the *Foreign States Immunities Act 1985*".

The GRF's case

9 On 23 June 2023, the Government of the Russian Federation, which I will refer to as the "GRF", filed a summons, a notice of a constitutional matter, and an interlocutory application. In the summons, the substantive relief sought is a declaration of constitutional invalidity of the Act. It is alleged that the Act is not supported by a head of legislative power and is contrary to s 51(xxxi) of the *Constitution* by reason of an alleged failure to provide for the acquisition of property only on just terms. The alternative relief sought is a declaration that the operation of the Act results in an acquisition of property to which s 51(xxxi) of the *Constitution* applies from the GRF otherwise than on just terms, such that the Commonwealth is liable to pay a reasonable amount of compensation to the GRF.

10 The interlocutory application seeks interim relief pending the determination of the application for declarations as to the invalidity or otherwise of the Act. The GRF, through its counsel, offers a series of undertakings, in effect being: (a) the usual undertaking as to damages; (b) to pursue the proceeding "in a timely manner for ... its expeditious resolution"; (c) to maintain and keep the Land in a good condition and "bear full responsibility for any damage to the Land or its improvements and for any injury or loss suffered by any entrants to the Land on or after 16 June 2023"; (d) to indemnify the Commonwealth "in relation to any claims against" the Commonwealth for any such damage or injury or loss; (e) to "not carry out any further work on the Land ... other than carrying out general maintenance ... without the [Commonwealth's] prior written approval"; and (f) not to "remove any items or chattels from the Land other than that required to maintain and keep the Land in good condition".

11 On the basis of those undertakings, the GRF seeks an interim order that the Commonwealth, by its servants and agents, be restrained, until further order of the Court, from:

3.

- "(a) re-entering the Land; and
- (b) taking any steps to re-lease the Land."

12 In communications between the parties before the hearing this morning, the Commonwealth stated to the GRF that in order to preserve the utility of any final orders that this Court may make, the Commonwealth will not re-lease the Land before the challenge to the validity of the Act is resolved, or remove, damage or destroy any buildings on the Land. It is apparent that this offer by the Commonwealth is not to the satisfaction of the GRF, which continues to press for the interim orders. It is apparent from this that the real dispute between the parties is that the GRF wishes to remain in possession of the Land pending the determination of its challenge to the validity of the Act.

13 The GRF relies on two affidavits. The first affidavit is of Dr Alexey Pavlovsky, who is the Ambassador of the Russian Federation in Australia and has held this role since 20 May 2019. Dr Pavlovsky provides information about the lease of the Land which was granted to the Embassy of the Russian Federation in Australia in or about 2008. Dr Pavlovsky also deposes to the construction works which have been carried out on the Land – in short, the first stage works have been completed, which includes the construction of the consular building and security checkpoint, as well as a new transformer substation and on-site utilities, the completion of cladding of a perimeter fence, and landscaping works. Stage two has not yet been constructed. Stage two would include the construction of the Embassy building.

14 There is evidence in Dr Pavlovsky's affidavit that in 2022 the National Capital Authority issued a purported termination of the lease. This led to proceedings in the Federal Court of Australia, in which the GRF challenged the termination of the lease. Those proceedings were resolved by consent. Pending the resolution of those proceedings, the GRF, by agreement with the Commonwealth, remained in possession of the Land.

15 According to Dr Pavlovsky, the GRF has expended approximately US\$5.5 million on construction works and has at all times had a presence on the Land and closely supervised the construction works being undertaken on the Land to ensure the integrity of the Embassy complex once it is constructed. Dr Pavlovsky deposes to the fact that:

"The GRF wishes to maintain possession of the Land pending the outcome of the High Court proceedings to ensure the integrity and security of the consular building and the embassy complex."

16 According to Dr Pavlovsky:

"In the event that:

- a. the Commonwealth were to retake possession of the Land pending the outcome of the proceedings before the High Court; and
- b. the GRF is successful in the proceedings"

the GRF would then be "highly likely to demolish the improvements already constructed on the Land to protect its interests".

17 The other affidavit on which the GRF relies is from a solicitor for the GRF, who has attached a newspaper article published on the Sydney Morning Herald website at about 10.22 am, which contains a quote:

"Prime Minister Anthony Albanese says, 'a bloke standing on a bit of grass' on the site where the government cancelled the lease of a second Russian embassy in Canberra does not represent a national security threat."

18 Before the Act was passed and commenced, there was an Explanatory Memorandum prepared for the *Home Affairs Bill 2023* (Cth). It contains a statement as follows¹:

"The object of the Bill is to protect Australia's national security interests with regard to land within the area adjacent to Parliament House."

19 The Second Reading Speech for the Act records that the Bill establishes "an act for the termination of the lease held by the government of the Russian Federation on a parcel of land adjacent to Parliament House", and that "[t]his action does not preclude the Russian Federation from a diplomatic presence here in Canberra, which they maintain at their existing premises, in Griffith, Australian Capital Territory. The termination of the lease has no impact on their Griffith site. This legislation is consistent with Australia's obligations under international law."²

20 The submissions made on behalf of the GRF are to the effect that the Act is not supported by a Commonwealth head of power because it is, in substance, a law with respect only "to the 'relevant lease'" or, more generally, is "a law with respect to property" in circumstances where the Commonwealth does not have a constitutional head of power as to either the relevant lease or property more

1 Australia, House of Representatives, *Home Affairs Bill 2023*, Explanatory Memorandum.

2 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 June 2023 at 1.

generally; and further, that the termination of the relevant lease by the Act "is not for a purpose in respect of which the Parliament has power to make laws". Otherwise, the GRF submits that the Act is contrary to s 51(xxxi) of the *Constitution* because by terminating the lease the Commonwealth acquired property and therefore just terms must be provided for the Act to be valid and, at present, the Act does not provide for just terms because s 6(1) is conditional. The section provides only that "[i]f the operation of this Act would result in an acquisition of property" then "the Commonwealth is liable to pay a reasonable amount of compensation".

21 The GRF also submits that this Court should grant it the interim relief because the balance of convenience and interests of justice favour that grant. In this regard, the GRF relies on the affidavit of Dr Pavlovsky to the effect that if it does not remain in possession of the Land, the GRF "will necessarily incur great expense demolishing the improvements and undertaking replacement construction works" which will also absorb further time under its lease. On the other hand, according to the GRF, the Commonwealth will suffer no prejudice because on the last occasion when the lease was purported to have been terminated, the GRF was allowed to remain in possession of the Land. The GRF submits that there has been no change in circumstances between the purported termination of the lease and the present day.

22 In its submissions, the GRF emphasises that: in truth, this is a dispute between two parties; there would be no public detriment occasioned by it remaining in possession of the Land pending the outcome of the dispute; the undertakings it proffers ensure that the status quo would be maintained; the Prime Minister has already stated that there was no security risk from a person remaining on the Land; and, as I have already mentioned, the GRF considers it would have to demolish the buildings on the Land if the Commonwealth were to take possession and the GRF was ultimately successful in its challenge to the validity of the Act.

23 The GRF further submits that it is important that the Land remained National Land, that is, land available to be leased for embassy purposes. According to the GRF, this, amongst other things, demonstrates that the Act does not relate to any public purpose of the Commonwealth, thereby supporting the GRF's case that there is no support for the Act in any relevant head of Commonwealth power. It also submits that no explanation had been proffered for the apparent change in the Commonwealth's position from that in 2022 where, despite a purported termination of the lease, the Commonwealth was willing to enable the GRF to remain in possession of the Land pending the determination of the proceedings, thereby preserving the status quo.

Consideration

24 The difficulty for the GRF in relation to the current application is that there has been a material change in circumstances between 2022 and the present date. The material change in circumstances is the commencement of the Act itself, which provides, by legislation, for termination of the lease.

25 The Commonwealth has provided detailed written submissions in support of its position that the interlocutory application should be refused both because the GRF has failed to establish a prima facie case or a serious question to be tried, and because there are no compelling circumstances that would support an interlocutory injunction to restrain the enforcement of a statute.

26 As the Commonwealth has pointed out, in order to establish a prima facie case, the GRF must show that it has a sufficient likelihood of success to justify the preservation of the status quo pending the trial, and the required strength of that likelihood of success depends, at least in part, upon the nature of the rights that the GRF seeks to assert and the practical consequences likely to flow from the orders sought³.

27 *Australian Broadcasting Corporation v O'Neill*⁴ refers to the decision of Mason A-CJ in *Castlemaine Tooheys Ltd v South Australia*⁵ in respect of interlocutory injunctions pending the determination of the validity of legislation. In *Castlemaine Tooheys Ltd*, Mason A-CJ said⁶:

"The decisions in this Court to which I have already referred demonstrate that there are a variety of situations in which the Court, on a proper balance of convenience, will restrain enforcement of a statute in aid of a plaintiff's constitutional right. In arriving at a balance of convenience the Court will take into account the seriousness of the conduct enjoined by the statute and the damage to the public interest that may be caused by restraining its enforcement. And in some cases the balance of convenience may be affected by the Court's perception or evaluation of the strength of the plaintiff's case for invalidity. But, subject to these qualifications there can be no reason to doubt the correctness of the general thrust of the comments in the passage which I have quoted. In the absence of compelling grounds,

3 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 81-82 [65].

4 (2006) 227 CLR 57 at 82 [66].

5 (1986) 161 CLR 148.

6 (1986) 161 CLR 148 at 155-156.

7.

it is the duty of the Court to respect, indeed, to defer to, the enactment of the legislature until that enactment is adjudged ultra vires."

28 In this case, the enactment of the legislature, the Act, provides for immediate termination of the lease. The balance of convenience is affected by the perceived strength of the prima facie case. I do not perceive the GRF's case for invalidity of the Act to be a strong one. Indeed, it is difficult to identify a serious question to be tried in circumstances where there are several constitutional heads of power which, prima facie at least, would appear to provide ample support for the terms of the Act. These include s 122 of the *Constitution*, s 51(xxix) of the *Constitution* with respect to "external affairs", and, of course, s 51(xxxi) itself.

29 As the Commonwealth has also submitted, insofar as the GRF relies on a proposed absence of just terms, it is difficult to understand that proposition merely from the conditional character of s 6(1) of the Act. Section 6(1), in terms, provides that if there has been such an acquisition of property, then reasonable compensation will be paid. In these circumstances, my preliminary evaluation is that the case for relief is, as I have said, difficult to understand on the basis of the submissions that have been put to date.

30 Be that as it may, there is also the problem that the GRF does not confront the reality of the fundamental change in circumstances between the position in 2022 when the Commonwealth permitted the GRF to remain in possession of the Land, and the position as at today's date. The change in circumstances is the legislative action that the Commonwealth has taken through the provisions of the Act to terminate the lease in the clearest possible terms.

31 In those circumstances, I accept the submission for the Commonwealth that, based on the reasoning of Mason A-CJ in *Castlemaine Tooheys Ltd*, there would need to be compelling grounds in order to grant the GRF the relief it seeks in its application.

32 In respect of the other issues which the GRF has raised, I also accept the submission for the Commonwealth that the evidence provided in relation to what is described as the "integrity and security" of the buildings is too vague and nebulous to provide any particular evidence of irreparable damage to the GRF. I accept also that insofar as this might be recourse to some kind of submission about the GRF's own national security interests, the Court cannot purport to balance the weight between what might be the national security interests of the GRF and what might be the national security interests of the Commonwealth⁷.

7 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 46-47.

33 In any event, it seems to me that this is, as it were, "by the by" in that the GRF has not referred to anything other than its desire to maintain the "integrity and security" of its buildings. There is no meaningful evidence to explain why the GRF takes the view that it would need to destroy the buildings and, as the Commonwealth has submitted, if that ultimately turns out to be the case then that is a decision wholly within the control of the GRF. Further, the evidence is clear that this (the possible destruction of the buildings) assumes that the GRF would be successful in the overall proceedings and therefore involves a contingency.

34 Overall, however, effect must be given to the clear provisions of the Act in which the Parliament has made the decision to terminate the lease and all interests without any temporal delay or other reservation of rights. In these circumstances, it is the terms of the Act itself which both constitute the radical change in circumstances from the previous position and indicate that there is no proper foundation for the granting of the interlocutory injunction as sought by the GRF.

35 For these reasons, I accept the submissions of the Commonwealth that the interests which the GRF has identified in its affidavits and otherwise through the submissions put on its behalf are plainly outweighed by the interest in not preventing the operation of the Act, the sole function of which is to terminate the GRF's interests in the Land, according to the Explanatory Memorandum and Second Reading Speech, for national security reasons. It is immaterial that those reasons are not referred to in terms on the face of the Act.

36 As the Commonwealth has further submitted, it is not to the point that the Commonwealth may not have identified an immediate purpose for which it requires the Land, given that the Commonwealth has a clear sovereign interest in being able to determine that the Land will not be occupied by the GRF, and has done so in the provisions of the Act.

37 In these circumstances, the appropriate orders which should be made are that:

1. The application filed 23 June 2023 be dismissed.
2. The costs of the application filed 23 June 2023 be costs in the cause.

