

LAND COURT OF QUEENSLAND

CITATION: *Kelsall v. Brisbane City Council* [2009] 0148

PARTIES: Fay Marie Kelsall, Paul Anthony Kelsall and Eunice Ying Teng Kelsall
(Applicants)
v.
Brisbane City Council
(Respondent)

FILE NO: AQL016-08 (formerly A2008/0016)

DIVISION: Land Court of Queensland

PROCEEDING: Application

DELIVERED ON: Ex Tempore 1 October 2009

DELIVERED AT: Brisbane

HEARD AT: Brisbane

MEMBER: Mr RS Jones

ORDER: **The application is dismissed.**

APPEARANCES: Mr PA Kelsall appeared on behalf of the Applicants
Mr D Quayle (instructed by Brisbane City Council
Legal Practice), for the Respondent.

HIS HONOUR: I'm going to give my reasons in respect of this application and I reserve the right to tidy them up in final form should the matter go anywhere else. Anyway, subject to that reservation, I will continue.

The matter I have to deal with today is an application by the owners of certain lands resumed by the Brisbane City Council for road purposes. The application is to have the proceedings presently before the Land Court stayed pending the outcome of proceedings in the Supreme Court, which I will come to in more detail in a moment.

A very brief history of this matter is that on or about June 2006, the applicants' land was resumed by the council for certain roadworks said to be associated with the Airport Link Project. As of today, presently constructed on the resumed land or part of the resumed land is a service road and part of the widening of Lutwyche Road. In the circumstances of this application, it is not necessary to go into any detail about how this Court became seized of a claim for compensation for the land resumed, but since about May 2008 this Court, with little success, has sought by way of orders and directions to progress the hearing of the claim for compensation.

It is fair to say that since this matter has been before this Court, the claimants have always maintained that the resumption of their land was unlawful. In this regard, proceedings of a criminal or quasi-criminal nature seemed to have been brought in the Magistrates Court. The applicants failed in those proceedings and there is now an appeal to the District Court against the decision of the presiding magistrate in those proceedings. As I understand it, that appeal is to be dealt with on 19 October 2009. I have some understanding of the proceedings in the Magistrates Court and the District Court and I do not consider that the existence of those proceedings in any way would justify the granting of a stay.

Returning then to the proceedings in the Supreme Court, as I understand it they came about in this way: because of the claimants' attitude to the resumption and their refusal to accept any advances against compensation, the Brisbane City Council, in or about August 2009 brought proceedings in the Supreme Court to have an amount of compensation paid into that Court pursuant to the Acquisition of Land Act. That application was successful and the council has paid into the Supreme Court - or given a blank guarantee, I'm not certain of the exact details, but, in any event, a payment in the Court of an amount exceeding three million dollars. That amount, as I understand it, is meant to represent compensation not only for the land owned by Mr Kelsall but also for that land in which his mother is also interested.

The proceedings concerning the payment into Court of these moneys were under Supreme Court file number S8737 of 2009. Using that same number, the applicants have commenced proceedings in the Supreme Court seeking the following relief:

- “(1) to stay the proceedings in the District Court 1827/09 until such a time that there has been an outcome in the Supreme Court due to the Brisbane City Council’s application S8737/2009;
- (2) to stay the proceedings in the Land Court, A2008/0016, until such a time that there has been an outcome in the Supreme Court due to the Brisbane City Council’s application S8737/2009;
- (3) Section 17 of the Acquisition of Land Act 1967;
- (4) Section 408C of the Queensland Criminal Code Act 1899;
- (5) Section 2A(1) of the Queensland Crimes Amendment No. 3 of 1995;
- (6) proceeds of Crimes Act 2002.”

This application, as I understand it, is to be dealt with in January 2009. However, as a consequence of matters which were raised only moments ago, it may be that that matter is dealt with in February, but, in any event, whether it is January or February 2010 is neither here nor there.

Notwithstanding the somewhat obscure wording of the application which I have read out above, at its heart is the applicants’ desire to seek to have the Supreme Court declare that the resummptions underlying the proceedings in this Court unlawful. I am prepared to read the Supreme Court application in that way.

The applicants want the Land Court proceedings stayed until the Supreme Court proceedings have been disposed of. When pressed as to the reasons why the stay should be granted, Mr Kelsall, in essence, gave two grounds or reasons: first, to protect his right to a fair trial of the Supreme Court proceedings; second, that if he is successful in the Supreme Court, then the compensation claim in this Court would become effectively redundant and the proceedings would change from a claim for compensation - probably under section 20 of the Acquisition of Land Act - to a claim for loss or damage. In respect of this last matter, it would appear that Mr Kelsall purports to rely on section 17(4) of the Acquisition of Land Act.

As to the first of these matters, Mr Kelsall did not attempt to articulate how his proceedings in the Supreme Court might be jeopardised or prejudiced if the Land Court proceedings were to continue. I do not consider there to be any real risk that the applicants would be denied a fair

hearing in the Supreme Court if the Land Court proceedings were to continue. Accordingly, I reject this as a valid ground of complaint.

Turning to the second matter, it is true that if the applicants were successful in having the resumptions declared unlawful, much, if not most, of the steps taken prior to the determination of the Supreme Court proceedings might become redundant. In my mind, this requires a consideration of two issues: first, what the prejudice to the applicants might be if the steps taken in the Land Court were to become redundant and, secondly, what are the prospects of the applicants succeeding in the Supreme Court.

Again, Mr Kelsall, despite several attempts, was not able to articulate just what the prejudice the applicants would suffer if the Land Court proceedings were made redundant. However, one can readily imagine that there would be cost ramifications, including expert and possibly legal costs wasted or thrown away if that were to occur. No attempt was made to quantify what these expenses might amount to, but, again, it would be not hard to imagine that some thousands of dollars might be involved. In response to this, Mr Quayle submitted that if the resumptions - in his opinion, as remote as that possibility might be - were found to be unlawful, then most, if not all, of those costs associated with the redundant proceedings in this Court would be recoverable either by way of damages or some other form of relief flowing from the findings that the resumptions were unlawful.

I am inclined to accept what Mr Quayle has to say about this and that that factor, combined with the lack of any probative support for the applicants' position on this issue, leads me to conclude that this ground does not provide sufficient justification to bring it to stay.

Turning then to the prospects of the applicants being successful in the Supreme Court, Mr Kelsall says that the reasons why the resumptions are unlawful are that, first, the land was not required for the work said to underlie the resumption; second, there were breaches of the Acquisition of Land Act and, in particular, the applicants' rights or objection to the resumption; third, failure of due process on the part of the Brisbane City Council and, in particular, in respect of its formal resolution processes. Underlying or at the heart of all these claims are allegations or assertions of crimes or other unlawful behaviour on the part of numerous people, including the Lord Mayor and, as I understand it, all the councillors making

up the Brisbane City Council. Other significant parties would also be involved, as I understand it, including possibly some Ministers of the Crown.

In this context, in a part of the supporting material to the Supreme Court proceedings, the applicants allege in a document dated 10 August 2009 in part [quote]: “This application is due to the fraudulent act that led the application the Brisbane City Council made to Robert Price of Main Roads and Transport, Spring Hill on 15 May 2006 and then represented on 31 May 2006. In the application to Robert Price, the Brisbane City Council had stated by resolution on 9 May 2006 the Brisbane City Council, as a majority, that the Kelsall Family properties are required for the North-South Bypass Tunnel for the purpose of road which led to the loss of the Kelsalls’ properties due to the gazettal notice 30 June 2006. This act that led to the application is in a fraudulent nature and misled the State Government Minister for Transport and Main Road Paul Lucas, who then misled the Queensland Governor Quentin Bryce. The Brisbane City Council (fraudulent) act/application falls under the jurisdiction of the Queensland Criminal Code Act 1899 section 408C - Fraud.”

Also, similar assertions are made in an undated document which, as I understand it, is also in support of the application to the Supreme Court. This document says in part [quote], “We do have the right under the Queensland Criminal Code Act 1899 against the Brisbane City Council for criminal activity against the Kelsall Family. Under the Acquisition of Land Act 1967, the Kelsall Family has the right to claim compensation against Transport and Main Roads as per Queensland Government Gazette Notice No. 44, Friday 30 June 2006 (and) also has the right under the Queensland Criminal Code Act 1899 against the State Queensland Government, namely Paul Lucas who was, at that time, the Minister for Main Roads.” I have not seen any material which suggests that any of the persons named by the applicants have behaved in a criminal or unlawful manner.

Turning to each of the aforesaid matters in turn, no probative material has been put before me to show that the land was not resumed for the proper purpose. In this context it was not explained how the roadworks actually undertaken on the resumed land were not a part of the scheme underlying the resumption. Second, despite Mr Kelsall being given a number of opportunities to do so, he did not otherwise attempt to articulate in any useful way how his or his mother’s rights under the Acquisition of Land Act were denied and, in particular, the

rights to object to the resumption were denied. As to the third matter, again it was not sufficiently explained how the Brisbane City Council's resolution process was flawed.

Without being able to finally decide the question, after considering all of the material before me and the arguments and propositions advanced on behalf of the applicants today, I have reached the conclusion that, on that material, the prospects of the application to the Supreme Court being successful are so extremely poor as to be essentially void of any merit. This is a clearly irrelevant consideration in any stay proceedings. See, for example, *Cook's Construction Pty Ltd v. Stork Food Systems Australasia Pty Ltd* 2008 2QR 453 at paragraph 13 per Keane J.; also *Kostopoulos & Ors.*, an unreported judgment of the *Court of Appeal* 26 August 2005 No. 3985 and 4927 of 2005. That I consider the prospects of success in the Supreme Court to be so extremely poor ought be enough to dispose of this application, but there are other factors that I consider to be relevant. None of these factors are decisive in themselves, but they tend to reinforce my decision to refuse the stay application.

These reasons are: first, it has not been shown how the applicants would suffer any material and irredeemable harm if the stay is refused; second, I consider the applicants have failed to pursue their relief in the Supreme Court with an appropriate degree of meaningful purpose. A review of the transcripts before this Court shows that as early as May 2008 the lawfulness of the resumption was the major issue for the applicants and that Supreme Court proceedings were then under consideration. I did not find Mr Kelsall's attempts to explain the delays between May 2008 to at or about August 2009 when Supreme Court proceedings challenging the lawfulness of the resumption were in fact initiated to be particularly convincing; third, absent sufficient justification to the contrary, the respondent is entitled to have the proceedings in which it is involved dealt with in a reasonable and effective way.

For the reasons given, the application is refused and I will hear from the parties as to the issue of costs and to the form of any further orders that ought be made by this Court.

Can I say as a rider: in addition to the proceedings in this State to which Mr Kelsall has referred in the substantive hearing today, immediately before handing down this decision he also informed me of other litigation in which he is involved, all of which, no doubt, will put some strain on his resources in having to deal with the Land Court proceedings. However, in my opinion I do not consider that that reason, even combined with all the other matters that

have been considered, is sufficient to grant the stay. However, I would observe that it is something which well might have to be argued and considered in framing any future orders of the Court. Mr Quayle, that's something we are going to have to deal with as a matter of reality.

MR QUAYLE: Yes, Your Honour.

MR JONES: As we've already discussed, what I don't want to do is make orders that are just going to be breached and, also, I do think that we need to be alert to and have regard to Mr Kelsall's somewhat unfortunate set of circumstances.

The formal order that I will make now is that the application is dismissed.

As I have said, I will now hear about costs, but, as I understand it, you're not pressing today for either the reserved costs of the previous hearing or the costs of today?

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