CASE NOTES

MUTUAL POOLS & STAFF PTY LTD v COMMONWEALTH OF AUSTRALIA[1]
GEORGIADIS v AUSTRALIAN AND OVERSEAS TELECOMMUNICATIONS CORPORATION[2]
RE DIRECTOR OF PUBLIC PROSECUTIONS; EX PARTE LAWLER[3]
HEALTH INSURANCE COMMISSION v PEVERILL[4]

ACQUIRING PROPERTY ON JUST TERMS

Introduction

On 9 March 1994 the High Court handed down four cases exploring the scope of s 51(xxxi) of the Constitution and the Commonwealth's legislative power to affect the property rights and financial interests of individuals on other than just terms. The cases provide a vehicle for the Court to examine the relationship between s 51(xxxi) and the other heads of legislative power, and the mechanics by which s 51(xxxi) operates as a constitutional guarantee. More significantly, the majority judgments in *Mutual Pools* and *Georgiadis* have severed the interpretation of 'acquisition of property' from common law notions of an acquisition, so that in certain limited circumstances a transfer of a financial benefit can represent an acquisition of property. Strong dissenting judgments in these cases by Justice Dawson draw a distinction between the notions of 'property' and 'value', and provide a useful conceptual basis for analysing legislative interference with private interests. The judgments also provide some interesting comments on the legislature's authority to extinguish or vary rights which have been created or enabled by federal statute.

Section 51(xxxi) as Constitutional Guarantee

In *Mutual Pools*, the plaintiff, a builder of in-ground swimming pools, challenged the validity of the Swimming Pools Tax Refund Act 1992 (Cth) (the 'Refund Act'). In 1992 the High Court held that legislation purporting to

[1] (1994) 119 ALR 577. High Court of Australia, 9 March 1994, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ (*Mutual Pools*).

[2] (1994) 119 ALR 629. High Court of Australia, 9 March 1994, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ (*Georgiadis*).

[3] (1994) 119 ALR 655. High Court of Australia, 9 March 1994, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ (*Lawler*).

[4] (1994) 119 ALR 675. High Court of Australia, 9 March 1994, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ (*Peverill*).

impose sales tax on the portion of swimming pools built in ground was invalid as being contrary to s 55 of the Constitution.[5] During the course of those proceedings, the Swimming Pool and Spa Association of Australia Ltd made an agreement with the Commissioner of Taxation to the effect that the sales tax would be paid pending the outcome of the case, but that if the challenge to the validity of the tax was successful, any tax paid would be refunded with interest. Following the decision that the tax was invalid, the Commonwealth Parliament enacted the Refund Act which provided that where the pool owner had borne the tax by way of a supplement on the price of the pool, the pool owner and not the pool builder was entitled to the refund. By this means, the Act extinguished the entitlement of a pool builder to a refund whenever the pool builder was considered not to have borne the tax liability. The plaintiff in *Mutual Pools* challenged the validity of the Refund Act on the basis that it effected the acquisition of its property without just terms contrary to s 51(xxxi) of the Constitution.

The Court was unanimous in upholding the validity of the Refund Act. Mason CJ, Deane and Gaudron JJ in a joint judgment, and Brennan and McHugh JJ each held that the Refund Act was a law with respect to taxation, and was therefore not a law for the purposes of s 51(xxxi). Dawson and Toohey JJ agreed, but on the alternative ground that the extinguishment of a debt owed by the plaintiff to the Commonwealth was not an acquisition of property. The majority judgments contain some of the most careful analysis yet given by the High Court of the relationship between s 51(xxxi) and the other grants of Commonwealth legislative power, and the manner in which the section can operate as a constitutional guarantee of property rights. Mason CJ commented that s 51(xxxi) is not solely or even primarily a guarantee of individual property rights. The sub-section was included to ensure that the Commonwealth had the power to acquire property compulsorily, particularly from the States.[6] The condition of 'just terms' was provided in order to prevent arbitrary exercise of this power. It is therefore significantly different in character to the Fifth Amendment to the United States Constitution, which provides for a direct prohibition on the 'taking' of property on unjust terms.

The fact that s 51(xxxi) takes the form of a positive grant of additional legislative power which is subject to the condition of 'just terms' and limited by the restriction of 'for any purpose for which the Parliament has power to make laws', makes an examination of s 51(xxxi) a circuitous affair. The guarantee arises by implication from a rule of construction. As the power under s 51(xxxi) is confined by an express restriction, it is assumed that no other head of legislative power may confer a like power to acquire property without also being subject to that restriction.[7] As this effect of s 51(xxxi) arises indirectly and by implication it is subject to displacement by necessary implication from any other

[5] *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450.
[6] *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290-1 (Dixon J).
[7] *Mutual Pools* (1994) 119 ALR 577, 585 (Mason CJ) and 599 (Deane and Gaudron JJ).

grant of legislative power. The Court has held over the years that a number of specific grants of legislative power by necessary implication authorise the acquisition of property on other than just terms. Taxation is perhaps the most obvious, as the notion of tax is inimical to the concept of *quid pro quo* implied by 'just terms'.[8] Other examples include provisional tax,[9] the forfeiture of illegally imported goods in the hands of an innocent third party,[10] the imposition of pecuniary penalties in civil proceedings,[11] the acquisition of property from subjects of enemy powers,[12] the vesting of a bankrupt's estate in an official Receiver or Trustee,[13] and the condemnation of a prize.[14] Mason CJ groups these either as laws imposing taxation, or laws providing a means of resolving or adjusting competing claims, obligations or property rights of individuals as an incident of statutory regulation of their relationship. Where the purpose of the law is to resolve such competing claims, he held that it is not possible to regard it as a law for the purpose of the acquisition of property within the meaning of s 51(xxxi).[15]

No general test emerged from the judgments as to whether and in what circumstances a grant of specific legislative power excludes by necessary implication the operation of s 51(xxxi). Brennan J suggested that acquisition without just terms must be 'a necessary or characteristic feature' of a means prescribed for the achievement of an objective falling within a head of power.[16] Deane and Gaudron JJ approached the problem from the other direction. They held that the s 51(xxxi) condition will not be triggered unless it is susceptible to independent characterisation as a law with respect to the acquisition of property.[17] While acquisition of property need not be the sole or dominant character of the law to fall within s 51(xxxi),[18] it must be more than a mere incidental consequence of some legitimate regulatory purpose.

In *Lawler* the Court had no difficulty applying these principles to reject unanimously a challenge to the validity of the Fisheries Management Act 1991 (Cth). The applicants were the owners of a New Zealand registered vessel found fishing illegally in Australian waters. The applicants appealed from an order of a magistrate that the vessel be forfeited under s 106 of that Act. They contended that as they were innocent of the illegal use of the vessel by its lessees, the forfeiture order amounted to an acquisition of their property without just terms. The Court held that forfeiture of property was within the fisheries power under s 51(x) of the Constitution, and was sufficiently adapted to that end so as not to

8 *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509.
9 *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246, 263.
10 *Burton v Honan* (1952) 86 CLR 169, 180-1.
11 *R v Smithers; Ex parte McMillan* (1982) 152 CLR 477, 487-9.
12 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 373.
13 Ibid 372.
14 Ibid 372-3.
15 *Mutual Pools* (1994) 119 ALR 577, 587.
16 Ibid 593.
17 Ibid 601.
18 Ibid 600.

fall within the terms of s 51(xxxi). The Court was adamant that s 51(xxxi) had no possible application to fines and forfeitures, which are means adopted by the legislature to ensure compliance with regulation of fisheries, irrespective of the drastic nature of that measure when applied against innocent third parties.

What Constitutes an Acquisition of Property?

The most innovative aspect of these cases is the new elasticity given to the notion of 'acquisition' by the majority judgments in *Georgiadis*. In this case the plaintiff brought a challenge to the Commonwealth Employee's Rehabilitation and Compensation Act 1988 (Cth) ('the Act') on the ground that it was invalid in so far as it purported to remove without just terms his right of action in tort against the Commonwealth for injuries sustained in the course of employment. Section 44(1) of the Act provides that 'an action or other proceeding for damages does not lie' against a Commonwealth authority in certain circumstances, where that action vested before the commencement of s 44.

It is well established that a common law right of action can be classed as property for the purpose of s 51(xxxi). As a constitutional guarantee, s 51(xxxi) is given a generous interpretation.[19] Its reference to property is not confined to interests recognised at common law or in equity, but extends to 'innominate or anomalous interests',[20] to 'every species of valuable right and interest including ... choses in action',[21] and, significantly in this case, 'money and the right to receive a payment of money'.[22] Similarly, assignability is not a necessary characteristic of property as the term is used in s 51(xxxi).[23] All members of the Court therefore accepted as a matter of course that the right to bring an action in tort against the Commonwealth constituted property.

However, the majority in *Georgiadis* also extended the meaning of 'acquisition' well beyond the usual legal understanding of that term. Earlier cases recognised the distinction between 'acquisition' and 'extinguishment' for the purposes of s 51(xxxi). In the *Dams* case, Mason J pointed out:

> it is not enough that [the] legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.[24]

In *Georgiadis*, by extinguishing the plaintiff's right to proceed in tort, the Commonwealth could not be said to have acquired for itself any corresponding right to proceed; the Commonwealth had merely obtained a financial benefit in the form of losing a potential liability in tort.

[19] *Georgiadis* (1994) 119 ALR 629, 632 (Mason CJ, Deane and Gaudron JJ), 641 (Dawson J) and 646 (Toohey J).

[20] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 349 (Dixon J).

[21] *Minister for State for the Army v Dalziel* (1944) 68 CLR 261, 290 (Starke J).

[22] *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 509.

[23] *Georgiadis* (1994) 119 ALR 629, 641 (Dawson J).

[24] *Commonwealth v Tasmania* (1983) 158 CLR 1, 145 (*Dams* case).

To avoid this obstacle the majority extended the notion of an acquisition. While acknowledging that it implied both a receipt and a divesting, they held that what is received need not 'correspond precisely with what was taken'.[25] The majority relied on the constitutional maxim that the legislature cannot do indirectly what it is forbidden to do directly.[26] Section 51(xxxi) therefore forbids legislation amounting to an 'effective' acquisition on other than just terms. The majority gave as an example legislation extinguishing an individual's right of action against the Commonwealth for payment for goods sold and delivered. If the legislature purports to extinguish that right of action, the effect would be that the Commonwealth acquires the goods on other than just terms.[27] By analogy, the plaintiff provided his labour as an employee of the Commonwealth on the basis that he would be entitled to damages at common law as well as under workers' compensation legislation if injured in the course of his employment. For the Parliament to extinguish the cause of action would be to evade a portion of the *quid pro quo* for the work performed. The Act is therefore 'in substance, if not in form, a law for the acquisition of causes of action against the Commonwealth'.[28]

The key principle to be extracted from the case is therefore that the Commonwealth may not extinguish a property right and gain a corresponding financial benefit in circumstances where that would amount to an effective acquisition of property. There were several formulations given of the necessary connection between the property extinguished and the financial benefit obtained. McHugh J described the connection as 'a corresponding benefit of commensurate value.'[29] Brennan J referred to 'a benefit precisely corresponding with the plaintiff's loss of its property.'[30] Deane and Gaudron JJ stated that:

> it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result.[31]

Using this concept of effective acquisition, the majority in *Georgiadis* held that the Commonwealth had effectively acquired the plaintiff's right of action by gaining for itself a reduction in a potential liability in tort precisely corresponding to the plaintiff's entitlement to damages.

Justice Dawson in his judgments in both *Georgiadis* and *Mutual Pools* was strongly critical of this approach. He conceded that effective acquisitions may be caught by s 51(xxxi), but only in so far as they involve the effective acquisition

[25] *Georgiadis* (1994) 119 ALR 629, 633 (Mason CJ, Deane and Gaudron JJ).
[26] *Wragg v New South Wales* (1953) 88 CLR 353, 387-8.
[27] *Georgiadis* (1994) 119 ALR 629, 634.
[28] Ibid 635.
[29] Ibid 650.
[30] *Mutual Pools* (1994) 119 ALR 577, 591.
[31] Ibid 597-8.

of actual property, not mere financial advantage.[32] These judgments provide a useful analytical framework for analysing the direction taken by the majority. His Honour drew an important distinction between the concepts of property and value. A financial advantage, whether in the form of the lessening of a liability or the receipt of money, is merely a gain of value, not of property. He dissented from the comment of the majority in *Australian Tape Manufacturers Association Ltd v Commonwealth*[33] that 'property' may extend to money, and cited Mill and Friedman to the effect that money is merely a unit of account — a medium rather than an object of exchange.[34] His Honour suggested that

> the distinction between a transfer of value and the acquisition of property is well established and is not dependent upon considerations of a constitutional nature. It is a distinction which was assumed by those responsible for the drafting of s 51(xxxi). Clearly, when that paragraph was added to the draft of the Constitution, what was envisaged was the acquisition of physical property, in particular land, and not the transfer of value.[35]

Justice Dawson's comments are of great assistance in pinning down what the majority means when it refers to precisely corresponding benefits. Accountants and economists would be quite comfortable with the concept of a transfer of value. When a debt is extinguished by legislative intervention, the creditor loses value in the form of an asset, and the debtor gains value in the form of losing a liability. Value passes, and there is no doubt of the precisely corresponding nature of the two financial effects. However value is difficult to fit within any conventional legal understanding of the concept of property, and anomalies abound in any attempt to do so. For instance, the law recognises a difference between legislation which extinguishes a right of action, and legislation which merely bars the remedy.[36] Value is lost equally in either instance, but property is lost only in the former. It would perhaps have been more accurate for the majority to hold that s 51(xxxi) prohibits certain legislative acts which are *equivalent* to an acquisition of property, rather than which constitute an effective acquisition of property.

Nonetheless it is respectfully submitted that Justice Dawson's invocation of economic theory and the will of the Constitutional drafters is not sufficient answer to the majority's desire to strengthen the constitutional guarantee aspect of s 51(xxxi). It is broadly accepted that the Constitution is not frozen in time according to the original conception of its drafters, but is interpreted in the light of the needs and understanding of the times. The new concept of effective acquisition is simple enough to apply, and is not likely to intrude into many forms of governmental regulation which effect transfers of value.

32 *Georgiadis* (1994) 119 ALR 629, 642; *Mutual Pools* (1994) 119 ALR 577, 606.
33 (1993) 176 CLR 480, 509.
34 *Mutual Pools* (1994) 119 ALR 577, 606.
35 Ibid.
36 *Georgiadis* (1994) 119 ALR 629, 634 (Mason CJ, Deane and Gaudron JJ).

The Legislative One-Way Street

The other issue of interest tackled by the Court in this series of cases is the question of whether s 51(xxxi) can ever operate to prevent the legislature from extinguishing rights which it has itself granted. In *Peverill*, the respondent pathologist had succeeded in obtaining judgment from Burchett J in the Federal Court to the effect that the Health Insurance (Pathology Services) Amendment Act 1991 (Cth) was invalid. Burchett J found that the Act had the effect of reducing retrospectively the respondent's right to receive Medicare benefits under the Health Insurance Act 1973 (Cth), and that it was beyond power in effecting an acquisition of property without just terms.

The Court was unanimous in overturning this decision. It found that the right to receive the benefits was a mere statutory entitlement, and was not based on any antecedent property right recognised by general law.[37] It did not constitute property because a right to receive a benefit paid in discharge of a statutory duty is not susceptible to any form of repetitive or continuing enjoyment and cannot be converted into any other form of property.[38] It does not represent a debt owned by the individual as it can be enforced only by public law remedies to compel the performance of the statutory duty. As such, it was inherently susceptible to variation or cancellation by further statute without that statute having the character of a law with respect to the acquisition of property under s 51(xxxi). This result is not surprising; were this not the case, s 51(xxxi) would have the effect of placing the Parliament in a legislative one-way street, unable to retract the rights it has extended to individuals.

However, in *Georgiadis* and the context of actions in tort against the Commonwealth, the issue becomes more complex. In that case Toohey J dissented from the majority, in part on the ground that the right of action in tort against the Commonwealth was a creature of s 64 of the Judiciary Act 1903 (Cth). As such it was a statutory entitlement and inherently susceptible to variation. The majority judgment of Mason CJ, Deane and Gaudron JJ avoided the problem by holding that the cause of action arose under general law even if the right to proceed against the Commonwealth is properly identified as a statutory right.[39]

Justice Brennan gave the most convincing answer to the problem. He pointed out that while the Commonwealth's common law immunity from tort was removed by statute, so long as there is no immunity the causes of action created by common law are protected by s 51(xxxi).[40] The implication of this is that if Parliament were to make a general amendment to s 64 of the Judiciary Act, for instance by adding the words 'except in the case of causes of action arising from employment by the Commonwealth', that would not be characterised as a law

37 *Peverill* (1994) 119 ALR 675, 680 (Mason CJ, Deane and Gaudron JJ).
38 Ibid 685 (Brennan J).
39 *Georgiadis* (1994) 119 ALR 629, 634.
40 Ibid 639.

under s 51(xxxi). It is interesting to speculate what would be the result if Parliament were to add to s 64 the words 'except in the case of Mr Georgiadis'.

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