

United Nations non-self-governing territories - Cocos (Keeling) Islands - Act of self-determination - compulsory acquisition of land of former land-owner of territory - whether acquisition for 'public purpose' - the law of Australia

Clurries-Ross v. Commonwealth of Australia (1984) 55 ALR 609 (High Court of Australia, Gibbs C.J., Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.)

The facts: - The plaintiff was the former land-owner of the whole of Cocos (Keeling) Islands, a United Nations non-self-governing territory transferred from the United Kingdom to Australia in 1955. In 1978 the Commonwealth purchased from the plaintiff all his land on the Islands with the exception of the land on which his house and garden were situated. The agreement gave the plaintiff and his family certain rights of access to the foreshore and other land on the Islands. In 1980 a United Nations Visiting Mission recommended that further steps be taken to assist the Cocos Malay population of the Islands (brought there by the plaintiff's forebears and predecessors in title) to achieve greater economic and political independence from the plaintiff.

The Lands Acquisition Act 1955 (Cth) empowers the Commonwealth to compulsorily acquire land 'for a public purpose' on the payment of 'just terms' to be assessed under the Act. The Commonwealth intended to institute, but had not yet instituted, procedures to acquire the remainder of the plaintiff's land on the Islands under the Act. Its purpose in doing so was not to use the land for any specific purpose, but effectively to exclude the plaintiff and his family from the Islands. A United Nations-supervised Act of Self-Determination on the Islands was pending (it resulted, after the present proceedings had been commenced, in a vote for the integration of the Islands into metropolitan Australia).

The plaintiff sought a declaration inter alia that the proposed acquisition was not for a 'public purpose' within the meaning of the Act.

Held: (6-1, Murphy J. dissenting) The term 'public purpose' in the Act meant only public purposes involving the specific use, active or passive, of the land in question: it did not extend to authorize action merely depriving the former owner of the land, thereby achieving some more remote public purpose.

The majority judgement, having reached its conclusion on the literal interpretation of the Act, commented (at 614) that;

We have been at pains to stress in this judgement that the political or social desirability or otherwise of the deprivation of the plaintiff of his home is irrelevant to the proceedings in this court. The questions for this court on the demurrer are questions of law. It would be an abdication of the duty of this court under the Constitution if we were to determine the important and general question of law which the demurrer has raised according to whether we personally agreed or disagreed with the political and social objectives which the Minister sought to achieve. That general question, translated into human terms, is whether a Commonwealth Act conferring a power to acquire land for a public purpose entitles the Executive to deprive any citizen of his home not because of a need of it for any active or passive purpose but so as to achieve some more remote purpose of the Commonwealth by forcing him to leave the locality in which he lives. As a matter of constitutional duty, that question must be considered objectively and answered in this court as a question of law and not as a matter to be determined by reference to the political or social merits of the particular case. We have so considered and determined it.

By contrast, Murphy J. (at 615-7) said:

Briefly the plaintiff claims that the purpose for which the land is intended to be acquired is:-

- (a) to bring about the exclusion of the plaintiff and his family from the Cocos (Keeling) Islands and to force him and his family into exile from their home therein;
- (b) by so doing, to prevent the plaintiff and his family from voting in and seeking to influence the voting of other persons in any expression of an Act of Self-Determination by the inhabitants of the Cocos Islands pursuant to the policies of the General Assembly of the United Nations as spelled out in the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in General Assembly Resolution 1514 (xv) of 14 December 1960 or otherwise.

The plaintiff claims that this is not a public purpose. There has been no recommendation to the Governor-General for acquisition of the land and therefore no statement of an approved public purpose by the Governor-General. The defendant Commonwealth and the Ministers state in the defence that the purpose is "political, social and economic advancement of the peoples of the Territory of Cocos (Keeling) Islands" and that is the basis upon which they intend to acquire the land. They demur, however, on the ground that, even if the claim by the plaintiff about purpose were correct, this would not entitle the plaintiff to succeed. It is notorious that for the purposes of the Act of Self-Determination the

islanders.....

islanders on the Cocos (Keeling) Islands had requested that the plaintiff be kept off the islands and the court was informed that before the demurrer was argued, the Act of Self-Determination by the islanders had occurred. In my opinion this point of the demurrer is hypothetical, premature (as no recommendation has been made to the Governor-General), and now moot (the Act of Self-Determination has occurred) and should not be decided. However, as the majority has dealt with it, I will set out my views, assuming, as is necessary on a demurrer, that the facts are as alleged by Mr Clunies-Ross.

The majority says that the political and social desirability or otherwise of the exclusion of the plaintiff and his family from the Territory of Cocos (Keeling) Islands is irrelevant to the proceedings in this court. I disagree. Of course, capricious acquisition of a citizen's home would not be "for a public purpose". That is not the case here. If political and social considerations indicate a rational public purpose for the acquisition of the land, then under the Act, the Commonwealth is entitled to acquire it with just compensation.

The United Nations Declaration referred to by the plaintiff stated that the General Assembly was conscious "of the need for the creation of conditions of stability and wellbeing and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples" and recognized "that the peoples of the world ardently desire the end of colonialism in all its manifestations". The Assembly therefore "solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations" and declared that "all peoples have the right to self-determination . . . to freely determine their political status and freely pursue their economic, social and cultural development" and further that "immediate steps shall be taken . . . to transfer all power to the peoples of . . . [dependent] territories, without any conditions or reservations, in accordance with their freely expressed will and desire".

Pursuant to the Declaration, a United Nations Mission visited the Cocos (Keeling) Islands in 1974. It reported that "in taking note of Mr Clunies-Ross' concept of self-government, [the Mission] deplores the fact that it does not allow for the true and free expression of the wishes of the population of Home Island". The Mission stated that it "had the impression that he [Mr Clunies-Ross] was not prepared to abandon the anachronistic, feudal relationship between himself and the Cocos Malay community" and that it was aware "that the breaking down of a relationship of a feudal nature will be a difficult task". The Visiting Mission considered that the Australian Government "should be encouraged to intensify its efforts . . . to proceed by stages with the task of separating the community from the Estate" (paras 206-7).

A further Visiting Mission reported in 1980 that the Cocos Malay community had: "become more independent [of Mr Clunies-Ross] in both its political and social life. Nevertheless, some degree of interdependence, in particular in the economic field, still exists between the two owing to the fact that Mr Clunies-Ross retains a prominent place in the life of the community, thereby creating uneasiness on the islands. The view was expressed that this interdependence should be discontinued. The Mission

is of the opinion that the administering power should take necessary steps to deal with this matter effectively" (para 201).

5 If, as claimed, the purpose of acquisition by the Commonwealth and the
Ministers would be to take the former feudal manor, to remove the former
feudal overlord and his family, in order that they should not participate in
and influence an Act of Self-Determination by the inhabitants of the island,
10 I find no basis on which the court can properly conclude that it would not
be for a public purpose, irrespective of all political and social considerations
which might persuade the Ministers and the Governor-General that it
would be for a public purpose. It would be open to the defendants to take
the view that if a free Act of Self-Determination was to be achieved, it
would be necessary to exclude the plaintiff and his family.

15 It was open to the defendants to decide that acquisition of the former
feudal manor to extinguish the taint of feudalism and colonialism from an
island territory, was for a public purpose. The history of eminent domain
shows that a classic public purpose for acquisition of land has been to
eradicate feudal incidents and relics. Whether the court agrees with the
political and social considerations which lead to such an opinion is not
20 relevant. The merits of the opinion are for the government, not the court,
unless it would be irrational to regard the acquisition as one for a public
purpose.