McLaughlan Holdings Pty Ltd & Ors v Darwin City Council [1999] NTSC 145

PARTIES:

McLAUGHLAN HOLDINGS PTY LTD (ACN 009 598 878)
First Plaintiff

AND

STEPPES PTY LIMITED (ACN 009 642 817)
Second Plaintiff

AND

ATRIUM HOTEL PTY LTD (ACN 062 234 851
Third Plaintiff

AND

AYROCK INVESTMENTS PTY LTD (ACN 057 418 238)
Fourth Plaintiff

AND

CHARLES HORNER WRIGHT AND ROBYN NOELENE WRIGHT
Fifth Plaintiff

AND

GARRY CHARLES SLEEMAN, ROSS DONALD TREACY AND ROSS BLAKE DUNKLEY
Sixth Plaintiff

AND

TAPESTRY PTY LTD (ACN 009 649 656)
Seventh Plaintiff

AND

BRIGHT GULLY PTY LTD (ACN 053 440 592) AND MICHAEL WILLIAM AYRES
Eighth Plaintiff

AND

PETER GEOFFREY BROWN
Ninth Plaintiff

AND

O'NEILL NOMINEES PTY LIMITED (ACN 009 616 344) AND COLLESS NOMINEES PTY LTD (ACN 009 630 355)
Tenth Plaintiff

AND

RANDAZZO INVESTMENTS PTY LTD (ACN 009 614 877)
Eleventh Plaintiff

AND

SUSAN JANE PORTER
Twelfth Plaintiff

AND

LIVERIS NOMINEES PTY LTD
Thirteenth Plaintiff

AND

LEISURE INVESTMENTS PTY LTD AND BILIOARA PTY LTD (ACN 009 649 389)
Fourteenth Plaintiff

AND

ADHARA PTY LTD (ACN 009 599 599)
Fifteenth Plaintiff

AND

COLEMANS PROPERTIES 86 PTY LTD (ACN 009 616 451) AND COLEMANS PROPERTIES 88 PTY LTD
Sixteenth Plaintiff

AND

SPIKE (NT) PTY LTD (ACN 078 727 134)
Seventeenth Plaintiff

AND

TRAVELODGE (NT) PTY LTD
Eighteenth Plaintiff

v

DARWIN CITY COUNCIL
Defendant

TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. 72 of 1998 (9808330)
DELIVERED:	20 December 1999
HEARING DATES:	25 October 1999
JUDGMENT OF:	BAILEY J

CATCHWORDS:

Local government-powers and functions of local councils-Darwin City Council-levying a local rate-purpose of levying local rate-power of council to pursue activities for which the rate was levied-whether the council can declare a rate for the purpose of developing and marketing part of the municipality of Darwin-whether the council can apply funds recovered by rate to a company which has contracted with the council for this purpose-whether the resolution of the council complied with the requirements of the Act.

Local Government Act (1993) – ss.29, 58, 64, 69, 115, 117, 120, 121 and Schedule 2

Government Gazette No.32, 7 August 1996
Government Gazette No.36, 13 September 1989

REPRESENTATION:

Counsel:

Plaintiff:	J. Waters QC
Defendant:	B. Hayes QC and R. Bruxner

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	Cridlands

Judgment category classification:	B
Judgment ID Number:	bai99024
Number of pages:	21

IN THE SUPREME
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

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v

DARWIN CITY COUNCIL
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CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 20 December 1999)

Background

[1] For more than twenty years, the defendant Council has levied a local rate on the owners of property situated within a defined area of Darwin's Central Business District. The local rate is payable by affected owners in addition to rates levied by the defendant Council for general purposes. The purpose of the local rate in broad terms is to promote, develop and market the Darwin Central Business District.

[2] On 7 August 1996, the defendant Council gave public notice (Government Gazette No.32) that it had resolved to adopt revised boundaries for imposition of the 'City Promotion Local Rate', the effect of which was to increase the area (and correspondingly the number of property owners) of the Central Business District subject to the local rate.

[3] The Gazette notice of 7 August 1996 also advised that the proceeds of the City Promotion Local Rate would be applied to the General Fund of the

defendant Council "and used for the function of developing and marketing the Darwin Central Business District".

[4] It is not a matter of dispute that on 29 July 1994 the defendant Council had entered into an agreement with a company known as Darwin City Heart Promotions Ltd ("DCHP"). The objects of that company, which are referred to in detail later in these reasons, were limited to the promotion, marketing and development of Darwin Central Business District (referred to in the company's objects as the "City Centre"). Under the agreement, the defendant Council was obliged to pay over to DCHP all monies received from the City Promotion Local Rate (less a 4% 'administration fee').

[5] Each of the plaintiffs is an owner of property situated within the revised boundaries of the area affected by the City Promotion Local Rate.

[6] By a writ filed on 21 April 1998, the plaintiffs commenced proceedings which challenge the defendant Council's power or authority to pursue the activities (development and marketing of the Darwin Central Business District) for which the City Promotion Local Rate was levied. The plaintiffs sought a declaration that the local rate is void. In the alternative, the plaintiffs sought a declaration that waivers of the local rate purportedly granted to certain owners of residential premises situated within the levy area are void and that the relevant amount payable as a local rate by such owners is recoverable by the defendant Council.

[7] On 2 July 1999, Riley J ordered that certain questions be tried as preliminary issues before the trial of the proceeding.

The Questions

[8] The questions ordered to be tried as preliminary issues are in the following terms:

> "(1) Does the Defendant have the power to:
>
> (i) declare a rate pursuant to Section 69 of the *Local Government Act* (1993) for the purpose of 'developing and marketing' part of the municipality of Darwin (as defined in the declaration)?
>
> (ii) apply the whole of the funds recovered by such a rate (less a 4% administration fee) to a company incorporated by guarantee known as Darwin City Heart Promotions Limited which has contracted with the Defendant to:
>
> (a) promote and market the City Centre and the services and facilities available within the City Centre;
>
> (b) initiate, develop and implement policies as it considers conducive to the promotion, development and best interest of the City Centre and to lobby government and other bodies in relation to such policies;
>
> (c) co-ordinate and encourage co-operation between the building owners, retailers, providers of professional services and other users of facilities within the City Centre, government, civic and other authorities for the purpose of improving the City Centre and its facilities?
>
> and to use the whole of the said funds accordingly?

(2) Did the Defendant's resolution dated 30 July 1996, in the following terms:

> Further, the amount which Council intends to raise for City Promotion purposes by way of rates is $747,919.12 and, further, that a City Promotion Local Rate of 0.65205% will be levied on the owners of property of the Unimproved Capital Value of all rateable land within the specified part of the municipality. The City Promotion Local Rate will be levied for a number of complete financial years yet to be determined but specifically for the year ending 30 June 1997. Proceeds of the City Promotion Local Rate will be applied to the General Fund of Council and used for the function of developing and marketing the Darwin Central Business District. Appeals against an assessment of a City Promotion Local Rate may be made in accordance with Section 63 of the Local Government Act.

comply with the requirements of s 69(3)(b) and (c) of the *Local Government Act* 1993?"

Question 1(i)

[9] The first question addresses the power of the defendant Council to declare a local rate pursuant to s.69 of the *Local Government Act* ("the Act") for the purpose of "developing and marketing" part of the municipality of Darwin.

[10] The relevant part of the municipality of Darwin is the revised area for imposition of the City Promotion Local Rate defined in the Government Gazette No 32 of 7 August 1996 (see Agreed Book of Documents ("AB") p.8). It is not necessary to reproduce the defined boundaries of the levy area for present purposes. The area is referred to in these reasons as the "CBD" or "levy area" (and in relation to DCHP, the "City Centre").

[11] The defendant Council's Gazette Notice states that:

> "Proceeds of the City Promotion Local Rate will be …used for the function of developing and marketing the Darwin Central Business District" (AB p.8).

[12] The Gazette Notice also expressly states that the City Promotion Local Rate is imposed pursuant to s.69 of the Act. Sub-section (1) of s.69 relevantly provides:

> "(1) Subject to this section, a municipal council may, at a meeting referred to in section 64(1) or at any other meeting, by resolution declare a local rate and it may declare that the rate be based on the assessed value of the ratable land within -
>
> (a) a specified part of its municipality for the purpose of -
>
> (i) defraying the expense of or in relation to the performance of a function of the council within that part of its municipality; or
>
> (ii) repaying, with interest, an advance made to, or debt incurred or loan raised by, the council in relation to the performance of a function of the council within that part of its municipality,
>
> where, in the opinion of the council, the performance of that function is, or would be, of special benefit to the ratepayers of that part".

[13] It is clear from the terms of this provision that a local rate can only be declared to support "a function of the council".

[14] The functions of a municipal council, such as the defendant Council, are dealt with in s.121 of the Act:

> "(1) A municipal council has the functions given to it by or under this or another Act.

(2) In relation to the functions of local government specified in Schedule 2, the Administrator shall, as soon as practicable after a municipality is constituted under section 29, by notice in the Gazette, declare that the council of the municipality has:

(a) only those functions of local government specified in the notice; or
(b) all the functions of local government other than those specified in the notice,

and, subject to subsection (3), the council has those functions accordingly.

(3) A function of local government referred to in subsection (2) may be subject to such conditions, if any, as the Administrator thinks fit and specifies in the notice under that subsection.

(4) A notice under subsection (2) may, by notice in the Gazette, be amended, extended or repealed by the Minister."

[15] By Government Gazette No.36, 13 September 1989, the Administrator declared that the defendant Council has all the functions of local government as specified, from time to time, in Schedule 2 of the Act, other than the functions of 'Town Planning' and 'Building' (AB p.4-5). Schedule 2 of the Act lists 53 functions of municipal councils.

[16] Aside from s.121 and Schedule 2, s.115 and s.120 are relevant to the defendant Council's functions. These provisions are in the following terms:

"115. Subject to this Act, a council -

(a) has the power to do all things necessary or convenient to be done for, in connection with or incidental to; and

(b) may do anything which is not otherwise unlawful for,

the purpose of performing its functions.

> 120. A council, in the performance of its functions, is charged with the peace, order and good government of its council area and has the control and management of that good government."

[17] For the plaintiffs, Mr Waters QC submitted that none of the functions granted to the defendant Council and listed in Schedule 2 to the Act either refers to or contemplates "developing and marketing" within a particular part of the defendant Council's municipal area or at all. Further, in his submission, neither s.115 or s.120 of the Act is effective to increase the defendant Council's powers as both these provisions are expressly limited to and qualified by whatever functions have been granted to a particular council.

[18] In addition to submissions that the defendant Council's declaration of a local rate for the purpose of "developing and marketing" the CBD was *ultra vires* the functions granted to the Council, Mr Waters sought to attack the City Promotion Local Rate on a number of other grounds. In particular, it was submitted that the local rate was discriminatory by benefiting one group of ratepayers as against others or in its application to one group of ratepayers but not others. Examples were also given of what, allegedly, funds raised by the City Promotion Local Rate had been used for in an effort to demonstrate that such expenditure did not amount in fact to development or marketing of the CBD. It was also pressed that the defendant Council's decision to waive payment of the local rate by certain owners of residential property situated within the levy area in some way called into question the validity of the local rate. I do not consider that it is necessary to canvass

such submissions for present purposes. The first aspect of preliminary question no.1 is a narrow one, directed only to the defendant Council's power to declare the City Promotion Local Rate. It is not concerned with how funds raised by the local rate might have been used or whether the defendant Council has exceeded its powers in exempting owners of a certain type of property who might otherwise have been liable to pay the local rate. Similarly, the allegedly discriminatory nature of the local rate cannot be a valid basis for objection having regard to the terms of section 69 of the Act (which expressly confers power on the defendant Council to declare a local rate confined to a specified part of its municipality for the purpose of carrying out a function within that part of the municipality).

[19] The issue is simply whether the defendant Council has power to declare a local rate for the purpose of "developing and marketing" the CBD.

[20] For the defendant Council, Mr Hayes QC noted that (subject to exceptions not relevant for present purposes) a municipal council, such as the defendant, is required by s.58 of the Act:

> "…to rate all land within its municipality for the purpose of raising money to be spent for or in relation to the performance of its functions."

[21] Mr Hayes submitted that the functions granted to the defendant Council pursuant to s.121 of the Act (listed in Schedule 2) combined with the power in s.115 ("to do all things necessary or convenient…. for the performance of such functions") and the responsibility given to the defendant Council for

the "peace, order and good government" of its municipal area in the performance of such functions (s.120) empowered the defendant Council to spend money which it was required to raise by rates on the development and marketing of Darwin. In his submission, the defendant Council has the power to promote and market Darwin throughout the Northern Territory, interstate and overseas.

[22] In Mr Hayes' submission, it would be unrealistic to suggest that the defendant Council was acting *ultra vires* in spending money raised by rates to develop, promote and market Darwin. In this regard, Mr Hayes acknowledged that the functions listed in Schedule 2 to the Act (which had been granted by the Administrator to the defendant Council) made no express reference to "development and marketing". However, in his submission, to approach Schedule 2 by seeking such a precise formulation of functions would be entirely at odds with the Act's provision that a council, in the performance of its functions "is charged with the peace, order and good government of its council area and has the control and management of that good government"(s.120). The functions listed in Schedule 2 of the Act which have been granted to the defendant Council include, *inter alia*:

- Tourism
- Municipal Administration
- Commercial Undertakings
- Community and Social Development
- Arts and Cultural Development and;
- Land Development Schemes.

[23] In the submission of Mr Hayes it could not sensibly suggested that functions of these descriptions would not encompass development and marketing of the defendant Council's municipal area. Once that proposition was accepted, Mr Hayes submitted, then s.69 of the Act empowered the defendant Council to declare a local rate confined to a specified part of its municipality for the performance of such functions within that part of its municipality.

[24] I consider, that the submissions made on behalf of the defendant Council are undoubtedly correct. Acceptance of the plaintiffs' submissions would mean that development and marketing of Darwin was no part of the defendant Council's functions. This would have the startling consequence that neither the defendant Council nor any other municipal council could spend its rate revenue on the promotion, marketing or development of its municipal area to enable that area to progress economically, socially, environmentally or culturally. Nor could a municipal council spend its rate revenue on promotion and marketing to encourage persons to take up residence in its area or tourists to visit its area. Such an absurd result would be contrary to the practice of local government followed for decades and be contrary to the intent of the Act which is expressed in its long title to be, *inter alia*:

> "…to continue to provide for the constitution of municipalities …and for the election of self-governing authorities to control municipalities …, to provide for a similarity of power and functions between self-governing authorities, and for other purposes."

[25] I do not consider that the absence from Schedule 2 to the Act of any express reference to "development and marketing" assists the case for the plaintiffs. The specific functions referred to by Mr Hayes (para. 22 above) on any reasonable approach to construction would include "development and marketing" directed at promoting their subject-matter. However, I do not consider that a municipal council's role in developing and marketing its area need be confined to the examples referred to by Mr Hayes. The concept of "development" is sufficiently broad to be a part of any of the functions listed in Schedule 2. Similarly, I would not confine "marketing" to the six functions cited by Mr Hayes. For example, all other functions listed in Schedule 2 would or might include "marketing" as an element of their subject matter to the extent that a municipal council wished to make it known to potential users what services it provided or were available in its area.

[26] While I am firmly of the view that "development and marketing" are functions of a municipal council under the Act, I consider it is equally clear that the defendant Council has power to declare a local rate pursuant to s.69 of the Act to carry out such functions in a specified area of Darwin – and, in particular, the CBD. S.69(1) of the Act empowers a municipal council to declare a local rate within

> "(a) *specified area* of its municipality for the purpose of –

(i) defraying the expense of or in relation to the *performance of a function* of the council *within that part of its municipality*;". (emphasis added)

[27] It follows that as "development and marketing" is a function of the defendant Council generally, the defendant Council has the power to declare a local rate to pay for the expense of performing that function within a specified part of its municipality.

Question 1(ii)

[28] The second aspect of the first question to be tried as a preliminary issue concerns the validity of the defendant Council's agreement with DCHP under which the whole of the funds raised by the City Promotion Local Rate (less a 4% administration fee) is paid to DCHP and is to be used in accordance with DCHP's objects.

[29] Clause 3.1 of the agreement between the defendant Council and DCHP is in the following terms (AB p.33):

"3.1 In consideration of the payment by the Council to the Company of the amount received by the Council for and on account of the Local Rate, the Company covenants and agrees to:

3.1.1 promote and market the City Centre and the services and facilities available within the City Centre;

3.1.2 initiate, develop and implement policies as it considers conducive to the promotion, development and best interests of the City Centre and to lobby government and other bodies in relation to such policies;

3.1.3 co-ordinate and encourage co-operation between building owners, retailers, providers of professional services and other users of facilities within the City Centre, government, civic and other authorities for the purpose of improving the City Centre and its facilities,

and to utilise the payments received from the Council pursuant to this Agreement in undertaking such works and pursuing such objectives provided that the Company shall not undertake any action or do anything contrary to the policies of the Council as determined from time to time."

[30] DCHP is a company limited by guarantee. DCHP's Articles of Association (AB p.16-31) provide its members are to comprise (AB p.17-18) property owning members (persons and companies who own rateable land in the CBD), trader members (persons who carry on business on or at rateable land in the CBD) and other members (the defendant Council and bodies who in the opinion of DCHP's board are representative of the interests of some or all of the property owning members and trading members). DCHP's board of directors comprises (AB p.23) four persons appointed annually by the property owning members, four persons appointed annually by the trader members, two nominated representatives of the defendant Council and one person appointed annually by the other members.

[31] The Memorandum of Association of DCHP (AB p.10-13) provides (clause 2) for the objects of the company in similar terms to clauses 3.1.1, 3.1.2 and 3.1.3 (set out at para 29 above) of the agreement between the defendant Council and DCHP. In addition it is an object of the company: "To carry

out such other functions affecting or relating to the City Centre" (clause 2(d)). Clause 4 of the Memorandum relevantly provides:

> "(a) It is acknowledged that the principal source of income for the Company is to be derived from the City Promotion Local Rate levied by the Council and to be paid by the Council to the Company;
>
> (b) The whole of the income and property of the Company whencesoever derived shall be applied solely towards the promotion of the objects of the Company as set forth in this Memorandum of Association…".

[32] For the plaintiffs, Mr Waters submitted that DCHP's objects are unreasonably vague and limited to promotion and marketing of CBD businesses. He further submitted that the arrangement under which the defendant Council passed the whole of the funds raised by the City Promotion Local Rate to DCHP contravened the principle that an authority entrusted with a function is (generally) required to perform that function itself and is not permitted to delegate its performance to another (*delegatus non potest delegare*). Mr Waters stressed that the defendant Council's declaration of the City Promotion Local Rate (AB p.8) stated:

> "Proceeds of the City Promotion Local Rate will be applied to the General Fund of Council and used for the function of developing and marketing the Darwin Central Business District."

[33] In the submission of Mr Waters, the declaration misstates the defendant's Council's intentions in failing to refer either to the agreement under which the entire funds raised by the local rate (less a 4% administration fee) would be passed to DCHP or to that company's limited objects of marketing, but

not developing the CBD. In support of his submissions, Mr Waters referred to a number of authorities concerned with unreasonable exercise of discretion by local government authorities and delegations of powers or functions by such authorities which have been held *ultra vires*. For reasons which will become apparent, I do not consider it is necessary to canvass such authorities.

[34] Mr Hayes submitted that the contract between the defendant Council and DCHP was entered into pursuant to section 117 of the Act:

> "…a council may enter into contracts for the purposes, and in the course, of carrying out its functions."

[35] It was submitted that no question of delegation of the defendant Council's functions arose. In Mr Hayes' submission, once it was established that "developing and marketing" the CBD was a function of the defendant Council, it was for the Council to determine how it would expend the proceeds of the City Promotion Local Rate in carrying out that function. Section 117 of the Act permitted the defendant Council to carry out its functions by contracting with others – and here the defendant Council had chosen to adopt that course in preference to "developing and marketing" the CBD itself.

[36] I consider the submissions on behalf of the defendant Council are correct. I have already indicated that "development and marketing" of the CBD is a function of the defendant Council under the Act. Section 117 of the Act provides the Council with power to carry out its functions through

contracting with others. In the present case it has chosen to contract with DCHP. There is nothing in the agreement between the defendant Council and DCHP to suggest that the Council has given DCHP the exclusive responsibility for its function of developing and marketing the CBD. The arrangement with DCHP is no different in principle from the defendant Council engaging an independent contractor to carry out its function of garbage disposal. The defendant Council has elected to perform an administrative function by contract and section 117 of the Act provides it with clear authority to do so.

[37] I add that there is no substance in the criticisms made on behalf of the plaintiffs that it was in someway misleading for the defendant Council not to have referred to its contract with DCHP in its declaration of the City Promotion Local Rate or that the objects of that company are unreasonably vague or limited to promotion and marketing (but not development) of the CBD. As to the first criticism, it cannot seriously be suggested that the defendant Council is required to disclose all contractual arrangements for carrying out its functions in a declaration of rates. The declaration of the City Promotion Local Rate (AB p.7) also levied a rate throughout the municipality for "general purposes". The declaration includes no details of contracts under which the defendant Council intended to carry out its various functions (involving the expenditure of more than $17 million) – and nor would any such details be required or expected under the provisions of the Act.

[38] The criticism that DCHP's objects are limited to the promotion and marketing of CBD businesses is also without foundation. The company's objects (AB p.10) refer to promoting and marketing "services and facilities" (not businesses) and clause 2(b) of those objects expressly refers to, *inter alia*, the implementation of policies conducive to the development and best interests of the City Centre. In my view, the objects of DCHP are consistent with the defendant Council's function of developing and marketing the CBD.

Question 2

[39] The second question to be tried as a preliminary issue raises the issue of whether the defendant Council's declaration of the City Promotion Local Rate complied with s.69(3)(b) and (c) of the Act. These provisions are in the following terms:

> "The resolution by which a local rate is declared shall specify –
>
> (a) ……
>
> (b) the class of owner or occupier on which the local rate is levied;
>
> (c) the number of complete financial years for which the local rate will be payable;".

[40] The defendant Council's declaration of the City Promotion Local Rate referred to the Council's intention that the rate:

> "… will be levied on the owners of property on the Unimproved Capital Value of all rateable land within the specified part of the municipality."

[41] The terms of the declaration are unambiguous. The local rate is to be levied against all the owners of rateable land within the (defined) boundaries of the levy area. Accordingly, "the class of owner" (required to be specified by s.69(3)(b)) is "all the owners" of rateable land within the levy area. Mr Waters for the plaintiffs did not seek to argue to the contrary or otherwise submit that the defendant Council's declaration was in breach of s.69(3)(b) of the Act.

[42] The declaration also states that:

> "The City Promotion Local Rate will be levied for a number of complete financial years yet to be determined but specifically for the year ending 30 June 1997".

[43] Mr Waters submitted that while the declaration was unambiguous in including the year ending 30 June 1997, the declaration did not specify in accordance with s.69(3)(c) "the number of complete financial years for which the local rate will be payable". For the defendant Council, Mr Hayes submitted that while the declaration was effective in terms of s.69(3)(c) for the year ending 30 June 1997, he conceded that "there might be a problem" if no new declaration was made for the subsequent year(s). I consider that concession was made correctly, but in terms of the year ending 30 June 1997, there is no doubt that s.69(3)(c) of the Act was met by identifying that

the number of financial years for which the local rate will be payable is (not less than) one.

Answers to Preliminary Questions

[44] For the reasons stated above, the questions ordered to be tried as preliminary issues are answered as follows:

(1) (i) Yes

(ii) Yes

(2) Yes

[45] The plaintiffs are to pay the defendant Council's costs. Such costs are to include the fees of senior and junior counsel and are to be taxed in the absence of agreement.