Judgment 11 of 1978

IN THE PRIVY COUNCIL NO. 18 of 1977

ON APPEAL

FROM THE SUPREME COURT OF QUEENSLAND

BETWEEN:

BRISBANE CITY COUNCIL and
MYER SHOPPING CENTRES PROPRIETARY
LIMITED — Appellants (Defendants)

- and -

HER MAJESTY'S ATTORNEY GENERAL FOR
THE STATE OF QUEENSLAND (AT THE
RELATION OF ARTHUR THOMAS SCURR
and WILLIAM PERCIVAL BOON) — Respondent (Plaintiff)

CASE OF RESPONDENT

Introduction

1. The principal questions raised by this appeal are:

(1) Whether the Appellant Council holds land known as the Mount Gravatt Showground on a charitable trust;

(2) Whether the Respondent Plaintiff is precluded by laches from asserting that the said land is so held;

(3) Whether the issue as to whether the said land is so held is res judicata as between the parties

The facts and background to the dispute

p.40 1.17)
p.235 1.15)
p.151 1.15 to p.153
pp.131 to 135
p.171 1.20
p.178
p.109 1.10
p.127 1.16
p.135 1.35

2. From the year 1915 the land in question was used as a showground and in 1919 it was transferred to trustees for the Mt. Gravatt Progress Association. In 1938 the appellant Council took over the property on conditions including that it would be "set apart permanently for showground, park and recreation purposes"; all the judges so far have accepted that and found an intention to create a trust.

3. Between 1938 and 1970, apart from the manner of user of the land, some events occurred which suggested that the appellant Council was conscious of its obligations. The evidence disclosed that the Mt. Gravatt Agricultural, Horticultural and Industrial Society (commonly called the Show Society) acted as caretaker for the appellant Council for many years. The appellant Council leased the land to the Society at a rental of £5.0.0. a year for seven years from 1st July 1954 and provisions of that lease appeared to recognise the public's rights. So did the provisions of a further lease for seven years which succeeded it.

p.146 1.48
p.215 1.22
p.217
p.220 1.10-30
p.225
p.228 1.14-31

4. Further, in 1954, according to the evidence of Sir Alan Mansfield, representatives of the Show Society saw the Town Clerk who said that the grounds "constituted a park or recreation ground... and consequently the public had rights".

p.144
p.145 1.37

5. The Town Clerk in that interview ventured the opinion that there was "little difference between a trusteeship comprising members of this Society and one comprising the City Council and stated that it is better for the Council to retain trusteeship of these grounds".

p.146 1.37

6. At the expiration of the second lease in January 1970, the Property and Insurance Officer of the appellant Council made a report to the Town Clerk referring to the basis on which the land had been taken over initially as a local park and recreation ground at a minimum cost" and setting out the conditions on which it had been acquired. Further, the Manager of the Department of Parks objected in writing to the proposed development "as it takes this public land away from the people forever".

p.235
p.236 1.40
p.263 1.30

7. However, after the second lease mentioned

above ran out the Council did not renew it and decided to sell the land as a shopping centre, for $1,010,000.

8. The Attorney-General at the relation of one of the present relators sued the appellant Council in the Supreme Court of Queensland, attacking the sale, but without success. In those proceedings, heard in 1972, the plaintiff attempted to interrogate about, inter alia, the question whether there was a trust but the interrogatory was objected to. p.71 l.40 p.269 l.5

9. There was also litigation concerning town planning aspects of the matter, in which the appellants were ultimately successful. In that litigation the appellants succeeded in resisting efforts to enquire into whether the Council was obliged to hold the land under a trust. p.247 l.17 p.250 l.24 p.252 l.15-p.253 l.5 p.258 l.11-39

10. It was apparently not until late in 1975 that the relator Mr. Scurr, who had suspected the existence of a trust, obtained the necessary documents to establish the facts. The writ in this action was issued in March 1976 and in August of that year the appellants applied to Mr. Justice Lucas to strike the statement of claim out on the ground that the matter was res judicata. It was there argued on behalf of Counsel for the second appellant, Myer Shopping Centres Pty. Ltd., that the question whether the land was subject to a public charitable trust had already been litigated. In that application Lucas J. held that it was reasonable to conclude "that at the time at which the first action was instituted and tried the relator had no sufficient knowledge of the existence of a trust to enable him to raise it as an issue in that action". p.66 l.24 p.114 l.1 p.259 l.16

11. No-one was called by or on behalf of the appellants to prove whether either of them believed it to be lawful that the land should be sold for use as a shopping centre, but it will be respectfully submitted that the appellant Council, at least, had in its possession documents which should have made it seem improbable that such a sale was lawful.

12. Numerous arguments have been advanced to date on behalf of one or other of the appellants, but the principal arguments appear to be three, namely

whether any trust created was charitable, whether the plaintiff was precluded by laches, and whether the matter was res judicata.

CHARITABLE TRUST

13. The assertion that any trust created was not a charitable one was based mainly on the presence of the word "showground". Although there is in force in Queensland a provision, namely s.104 of the Trusts Act 1973, which validates trusts which include non-charitable as well as charitable purposes, that provision does not apply to trusts declared before the commencement of the Act. Hoare J. held that there was a charitable trust and the majority of the Full Court agreed with that
p.136 l. 38 view. D.M. Campbell J. held that: "It would not have occurred to me to doubt that a gift of land to a city town or shire for 'showground, park and recreation purposes' was a charitable gift". D.M. Campbell J. particularly relied on Monds -v- Stackhouse (1948) 77 CLR 233 and Schellenberger -v- The Trustees Executors and Agency Co. Ltd. (1952) 86 CLR 454.

14. It will be respectfully submitted that these decisions of the High Court of Australia and the cases mentioned in them tend to support the view taken by the Supreme Court. In Monds -v- Stackhouse (supra) Latham C.J. in upholding a gift to the corporation of a city, expressed the view, as we understand the judgment, that a gift to a city for the purpose of providing a public hall is charitable (p.242). Dixon J. said -

> "Indeed any bequest to be applied in the improvement of a city in accordance with the powers of the municipal corporation for the benefit of the inhabitants appears to be charitable ..." (p.246)

Somewhat similar views were expressed in Schellenberger -v- The Trustees, Executors and Agency Co. Ltd. (supra) which was a trust for the "beautification and advancement of the township of Bunyip". The joint judgment of the High Court of Australia there held:

> "We would regard it as plain that what the testator has in mind is the provisions of physical things within a particular locality,

> which, because they have an element of beauty, or for some other reason, will tend to the general benefit or advantage of the small community dwelling in that locality, and so 'advance' it as a community. Such trusts have been uniformly held to be charitable". (p.459)

15. Stable J. who in the present case dissented on this point said that "... there was no definitive evidence of the scope of the activities associated with a 'showground' ...". Stable J. then went on to refer to a dictionary definition of the word "show" - p.129 l.18

> "... which is 'annual exhibition of livestock, produce etc. with ring events, sideshows etc. usually lasting several days'. This seems to me to be a fairly apt description of an event with which most of us are more or less familiar. The showground logically would be the venue for such activities". p.129 l.24

It will be respectfully submitted that if evidence was necessary as to the meaning of the ordinary Australian word "showground" there was ample such evidence. Stable J. concluded this passage by saying:

> "The expression relied on as constituting an obligation of trust is in my view too vague and uncertain to satisfy the onus of showing that it falls within the statute". p.129 l.34

The reference to vagueness and uncertainty brings to mind the decision of the House of Lords in Inland Revenue Commissioners -v- Baddeley 1955 A.C. 572 on which the appellants placed some reliance below. It will be respectfully submitted that the word "showground" can be argued to be uncertain in meaning only in the sense that a considerable variety of activities might ordinarily take place on a showground - likewise in a park, recreation ground, or public hall. The show which used to be held annually at the showground was "very similar to any other show" but even if that had not been so, the word "showground" has enough precision to avoid the result that the trust is destroyed. For example, it is used in the Queensland Local Government Act as identifying a category of land exempt from rates: Local Government Acts Section 24(1)(i)(c). There are Australian cases on the p.58 l.16

rateability of showgrounds, which appear to assume that the word "showground" has meaning; see Australian Digest Vol.17 Col.1195 (1st Ed.).

16. It might also be argued by the appellants that the reference in sub-paragraph (c) of the relevant Council resolution, and in the letter written in consequence thereof, to the Show Society's having exclusive use of the ground for two weeks each year was invalidating. The majority in the Full Court thought this an incidental matter and Stable J. did not deal with the point specifically. In one sense, the argument about the two weeks' annual user is academic, in that the Society became incorporated in 1962 and there was no evidence that the incorporated society acquired any right to use of the ground, nor is it easy to see how it could have done so.

p.169 1.24
p.171 1.24
p.136 1.20
p.61 1.40

17. As to the question of "incidental" matters, the respondent respectfully refers to the views of the High Court of Australia in Congregational Union of N.S.W. -v- Thistlethwayte 87 CLR 375. That case concerned in part a gift for the Congregational Union of New South Wales whose objects included "(3) united action for the creation, maintenance and improvement of our educational, religious, and philanthropic agencies" and "(4) the preservation of civil and religious liberty" (p.441). The High Court appears to have held the view that object (3) would not in itself be charitable and assumed that object (4) would not be, either. But the Court held (p.442) that the Union was a charity "even if some of its incidental and ancillary objects, considered independently, are non-charitable. The main object of the Union is predominantly the advancement of religion... The fundamental purpose of the Union is th advancement of religion".

18. Generally as to the whole question of whether the land was held for purposes which are in law charitable, it is respectfully contended that the law would not lightly hold that the basis on which the Council, so long ago, acquired the land had no legal validity; Tudor on Charities (6th Ed.) pp.188, 194 and 195.

LACHES

p.114 1.1

19. Hoare J. held that the relator Scurr did not know of the relevant minutes of the Brisbane City

Council until October 1975. He also held that the appellants "knew that Scurr was trying to obtain information which might disclose the existence of the trust". D.M. Campbell J. in the Full Court said: p.114 l.34

> "I do not think there has been any delay, but if there has I would agree that the delay is not such as would make it practically unjust, to use Sir Barnes Peacock's phrase in Lindsay Petroleum -v- Hurd ... to allow a trust of a public character such as this to be enforced". p.139 l.27

Stable J. made no reference to this defence.

20. The relator Scurr, who appears to be the moving spirit on the respondent's side, gave evidence but no suggestion of bad faith or deliberate delay was made to him by either appellant. If, as seems to be the case, his legal advisers were in error in not searching the Council minutes, it is respectfully submitted that it is hindsight which magnifies the fault, now that the truth is known, namely that the Council's obligation is plainly stated in its own minutes. The failure to obtain the documents evidencing the trust was caused, not only by an error on the part of Scurr's legal advisers, but by the successful resistance of the appellant to disclosure of the relevant documents. It should not have been too much to expect that a public body such as the appellant Council, or even a very large company such as the other appellant, should for its own purposes have wanted to be sure that the alienation of this apparently public space was lawful, rather than being content with obstructing citizens' attempts to bring out the circumstances in which the Council acquired the land.

21. There was direct evidence that the appellant Council had means of knowledge of the trust easily available at material times, and in particular in 1970. The appellant company gave no evidence whatever and its state of mind concerning the land and the reason for any action or inaction on its part, remain a matter of conjecture except insofar as inferences may be drawn from its conduct in earlier litigation. Indeed the only evidence called on behalf of either appellant was that of the witness Hackwood who appeared to have had nothing to do with the matter at all. If it be material, no evidence was called that the appellant Council was under any binding obligation to apply the purchase price or any part thereof in expenditure on another park, or that it had a present intention of doing so. p.93 l.38 - p.94 l.4

RES JUDICATA

22. Lucas J. held that in the earlier litigation before him the question of a trust was not raised. If that be accepted, then the issue becomes whether the failure there to allege a trust (in effect) destroyed it.

23. It will be respectfully submitted that a strong case indeed would be needed to release the trustee of a public charitable trust from his obligations, merely on the ground that he has successfully kept away from view the documents which disclose them.

24. It will be respectfully submitted that the weight of authority is against the appellant's contention, one important case on the point being Vitosh -v- Brisbane City Council 93 CLR 622. There Vitosh brought an action for a mandamus to compel the exercise of the Council's discretion in his favour pursuant to power given by a purported resolution of the Council. The first action was brought on the basis that the resolution was valid and in the course of it the court so held. The action for a mandamus having failed, Vitosh brought a second suit in which he claimed and got a declaration that the resolution was invalid; the High Court held that he was not estopped by "having proceeded on the assumption that he was bound by the resolution under the ordinance".

25. It will be respectfully submitted that the present case is stronger, for here the attack on the sale made in the earlier litigation did not assume in favour of the Council that it held free of any trust.

CONCLUSION

26. It will be respectfully submitted that the appeals should be dismissed for the following among other REASONS:

(a) Because the Council acquired the land subject to an obligation to set the land apart permanently for certain purposes.

(b) Because those purposes are charitable and the law will enforce the obligation as a trust.

(c) Because it was not shown that any delay on the part of the respondent was such as to mislead the appellants or otherwise make it unjust that the trust should be enforced.

(d) Because the judgment of Lucas J. in the litigation in 1972 did not have the effect of preventing a suit by the Attorney-General for enforcement of the trust, when evidence demonstrating its existence was discovered.

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C.W. PINCUS

J.G.C. PHILLIPS

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CASE OF RESPONDENT

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