Privy Council Appeal No. 18 of 1977

Brisbane City Council and Myer Shopping Centres Pty. Ltd. – – – – – – – – – *Appellants*

v.

Her Majesty's Attorney General for the State of Queensland (at the relation of Arthur Thomas Scurr and William Percival Boon) – – – – *Respondent*

FROM

THE SUPREME COURT OF QUEENSLAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD MAY 1978

Present at the Hearing:

LORD WILBERFORCE
LORD HAILSHAM OF SAINT MARYLEBONE
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
SIR JOHN PENNYCUICK

[*Delivered by* LORD WILBERFORCE]

These consolidated appeals are from the Full Court of the Supreme Court of Queensland, which by a majority affirmed a judgment of Hoare J. in the Supreme Court. A declaration was made by the learned judge that certain land at Logan Road, Mount Gravatt, Brisbane, owned by the Brisbane City Council, and which the Council had contracted to sell to the appellants, Myer Shopping Centres Pty. Ltd., was subject to a valid and enforceable charitable trust, so that the Council was not free to sell it. The issues raised are:

1. whether the Council holds the land on a charitable trust;
2. whether the respondent is precluded by laches from asserting that the land is so held;
3. whether the issue whether the land is so held is "res judicata" (using this expression in an extended sense) as between the parties to this present litigation.

The land in question is about 20 acres in extent: the Council is the registered proprietor for an estate in fee simple. Before the land was acquired by the Council, in 1938, the registered proprietors were two persons as Trustees for the members of the Mount Gravatt Agricultural, Horticultural and Industrial Association. This unincorporated body has at various times also been known as the Mt. Gravatt Agricultural Horticultural and Industrial Society, the Mt. Gravatt A.H. & I. Society and the Mt. Gravatt Show Society: their Lordships will

refer to it as "the Show Society", or "the Society". It appears to have had no defined objects or constitution: its main function however was to operate a showground on the land and to conduct there each year a District Show. In 1938 the land was subject to a mortgage in favour of the Bank of New South Wales securing a debt of £450 with interest. It was clear at that time that the Show Society was in financial difficulties such as would prevent it from continuing to use the land as a showground. It therefore entered into negotiations with a view to persuading the Council to take it over. There was a deputation to the Lord Mayor in September 1937 and this was followed by a number of communications and resolutions passed by the Council and the Society. The first discussions, recorded in a memorandum from the Office of the Lord Mayor, focused on the advantages to the City and to the Society which would follow from transfer of the land to the City. The Society on its side desired that the Bank mortgage should be discharged, that the City should undertake to level and improve the show ring, and that the Show Society should be granted the free use of the showground for two weeks in each year, when it should be used entirely for the purpose of holding the District Annual Show. The City for its part would gain a Park area in a district where none then existed, and would hold the ground "in perpetuity" as a recreation reserve and showground. Proposals on these lines were referred to the Finance Committee of the Council which reported in favour of their adoption, and a resolution of the Council recorded in a minute dated 19th October 1937, accepted the Committee's report. This was followed by a letter from the Town Clerk to Mr. W. H. Clarke, one of the Trustees for the Society, dated 25th October 1937, the relevant part of which is as follows:—

> "In reply I have to inform you that provision is to be made in the estimates for the next financial year for a sum, not exceeding £450, for the liquidation of the overdraft on the property, the Council to then take over the fee simple of the land under the following conditions:—
>
> (*a*) The area to be set apart permanently for Showground, park and recreation purposes;
>
> (*b*) The Show Ring to be levelled off;
>
> (*c*) The Show Society to be granted the exclusive use of the Ground without charge for a period of two weeks in each and every year, for the purposes of and in connection with the District Annual Show".

At the Annual General Meeting of the Society held on 15th December 1937 the Council's proposals were approved, and on 20th September 1938 the land was transferred to the Council and the mortgage paid off.

It is necessary to refer to four other matters in connection with the transfer. First, in the correspondence which followed the letter of 25th October 1937, there were proposals to vary the terms in certain details, including the period for which the Show Society should have exclusive use of the showground, but these were inconclusive, and, in their Lordships' opinion, nothing occurred which amounted to an effective variation of the terms set out in the letter. Second, although a draft was prepared of a formal agreement between the Council and the Society, this was not proceeded with. Third, although a suggestion was made for an express definition of trusts upon which the Council should hold the land, this too was not proceeded with. Fourth, in a letter from the Town Clerk of 24th August 1938 which preceded the transfer of the land to the Council, it was stated that the Council

undertook to hold the land for the purposes of a Public Park, Recreation Reserve, or Show Ground, " or other purposes not inconsistent therewith ". This letter did not however purport to make or record any fresh proposals beyond those already agreed, and their Lordships do not regard it as varying or extending the terms on which the Council was to acquire and hold the land: indeed it could not do so in the absence of formal action by the Council. The words " other purposes not inconsistent therewith ", if not mere verbiage, can only refer to purposes purely ancillary to those already stated in the letter of 25th October 1937. It is these terms which their Lordships now proceed to consider.

The first question is whether the Council acquired the land as Trustees upon any trust. To create a trust no formal words are required once the intention is clear. The relevant intention, if a trust is to be held to be created, must be that the Council's legal ownership of the land is to be held beneficially, in the case of a private trust, for ascertained persons, or in the case of a permanent public trust, for charitable purposes. Their Lordships are clearly of opinion that para. (*a*) of the letter of 25th October 1937, stating that the area is

(i) " to be set apart "

(ii) " permanently "

(iii) " for [specified] purposes ",

are words entirely appropriate for, and only consistent with, an intention to create a trust binding the land in the Council's ownership. There is nothing in paras. (*b*) and (*c*) inconsistent with the existence of a trust. Para. (*b*) simply creates a contractual obligation on the part of the Trustee, as one of the terms, *i.e.* part of the consideration upon which it acquired the land,—it has the same status as the agreement to liquidate the overdraft of £450, an amount which was clearly inferior to the value of the land. Para. (*c*) defines one of the methods by which the use of the area for showground purposes is to be carried out. Their Lordships agree with the majority of the Full Court in considering that this paragraph is incidental to para. (*a*)—it amounts, in effect, to a partial definition of the purposes referred to in para. (*a*) by means of an obligation to allow the Society to use the land for the purposes of the District Annual Show. It becomes, in the end, necessary to consider whether the trust declared in para. (*a*), one of the means of implementing which is spelled out in para. (*c*), is valid or invalid. This is the central issue in the present case.

It is common ground that the trust is only a valid charitable trust if it falls within the fourth class of charitable purposes defined in *Pemsel's* case as a trust beneficial to the community within the spirit and intendment of the preamble to 43 Eliz.1 c.4. The lack of precision of the latters' words has to be made good by reference to decided authorities which, as has been said, are legion and not easy to reconcile (*Williams' Trustees v. I.R.C.* [1947] A.C. 447, 455). It has been said in the Court of Appeal in England (*Council of Law Reporting v. Attorney General* [1972] 1 Ch.73, 88 per Russell L.J. and endorsed by the other members of the Court) that, if a purpose is shown to be beneficial to the community or of general public utility, it is prima facie charitable, an approach which might help to simplify the law, but this doctrine, even assuming it to be established in the law of England, does not yet seem to have been received in Australia—see *Incorporated Council of Law Reporting (Q) v. F.C.T.* (1971) 125 C.L.R. 659, 666–7 per Barwick C.J. Their Lordships will therefore follow the route of precedent and analogy in the present appeal.

The task of the Court is made no easier by the lack of precise evidence as to the normal activities which should be understood as associated with showgrounds in Queensland. Even as regards the use made of the Mount Gravatt ground by the Show Society, before transfer to the Council, which might have been expected to throw some light upon the purposes to which the Council was to put the land, the evidence, such as it is, is meagre and not easy to interpret.

Of the purposes associated in para. (*a*) of the letter of 25th October 1937 with those of a showground, park or recreation purposes may be accepted as charitable purposes. "Recreation" was held to be a charitable purpose in *In re Hadden* [1932] 1 Ch. 133, a decision approved by members of the House of Lords at least as regards recreation in a park or garden in *I.R.C. v. Baddeley* [1955] A.C. 572, 589, 594–6, 615. However the ground on which such purposes as "park and recreation" purposes have been accepted as charitable, namely as conducing toward the health and wellbeing of the public, is not one which can easily be extended so as to cover "showground" purposes. If an element of public benefit is to be found in the latter, it must be sought in another direction. A closer analogy can be found in trusts for the promotion of agriculture. In England, a Society formed with the object of holding an annual meeting for the exhibition of farming stock, implements, etc. for the general promotion of agriculture was held to be established for a charitable purpose. Atkin L.J. said that a bequest for the general improvement of agriculture, "including, if you please, specific mention of the encouragement or holding of an agricultural show" would be a charitable bequest. (*I.R.C. v. Yorkshire Agricultural Society* [1928] 1 K.B. 611, 630.) This was accepted as correct by Barwick C.J. in *Incorporated Council of Law Reporting (Q) v. F.C.T.* ((1971) 125 C.L.R. 659, 669.):

> "Agriculture", he said, "partakes of that fundamental social quality which can give a charitable nature to a trust or purpose relating thereto which is beneficial to the community. So it would seem does horticulture."

—words which are flexible if slightly tentative. Is it, then, legitimate to extrapolate from such trusts as these to a trust for showground purposes? Or, reversing this question, is it possible to extract from the trusts stated in the present case a trust for the promotion of agriculture—including one for the holding of agricultural shows? The point of departure for this lies in the words "for . . . showground purposes".

"Showground" is a word of normal parlance—not a term of art requiring interpretation with expert assistance. It is a word to be interpreted by the judge, using his knowledge of the language, and his acquaintance with accepted applications of the word to situations arising in the normal life of the community in which he lives. Judicial knowledge is the knowledge of the ordinary wide-awake man, used by one who is trained to express it in terms of precision. The learned judges in the Courts below seem to have had no doubt as to the kind of purposes which would be accepted as included in "showground purposes".

> "It is . . . common knowledge that voluntary associations exist in scores of towns and districts of Queensland for the purpose of holding an annual 'show' or exhibition. The 'showground' is the area where that show or exhibition is held. . . . The activities of the 'shows' according to the evidence in this case are broadly similar. To the extent that there is an exhibition of agricultural and horticultural produce it would scarcely be disputed that this

> activity would probably operate to encourage agriculture and horticulture in the region and thus would be a charitable purpose ". (per Hoare J.)

Their Lordships note the cautious and qualified language used but nevertheless this is a positive finding as to the normal show of which, as the learned judge proceeds to find, the Mount Gravatt could be regarded as typical. In his view (and their Lordships agree) the evidence showed that the Show Society conducted an annual show at Mount Gravatt for many years—similar in type to the various agricultural shows held throughout the State. Such shows, as was that promoted at Mount Gravatt, were managed by voluntary associations—a circumstance which would both explain the lack of definite and clear-cut evidence as to the objects of the shows and also serve to indicate that they did not have a directly commercial purpose. All such shows, as the learned judge accepted, would include a number of miscellaneous activities, from the provision of food and drink to entertainments and " side shows " of various kinds and no doubt sale of agricultural products: but he was prepared to regard these as ancillary to the main purpose—" intended to assist in ensuring a successful show ".

In the Full Court, Campbell J. reached the same conclusion. Endorsing the opinion of Hoare J. as to the meaning of " showground " in Queensland, he said that the word was used in connection with land occupied by Show Societies throughout the State.

> " 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."

In so far as the learned judge is, in this passage, relying upon the public character of the Trustee to establish the charitable character of a stated purpose, their Lordships would not, with respect, follow him: where the purposes of the trust are expressed in plain language, the nature of the Trustee cannot be appealed to in order to impart a charitable character (*Dunne v. Byrne* [1912] A.C. 407, 410). The character of the expressed purposes must be decided on their own merits. The observations of Luxmoore J. in *In re Spence* [1938] 1 Ch. 96 at p. 102, to which the learned judge appeals, in their Lordships' opinion are out of line with other cases and are not authoritative. But the learned judge proceeds unequivocally to hold that the purposes expressed in the whole phrase " park, recreation or showground purposes " are beneficial to the community within the fourth category of charitable purposes—without specific reliance upon the promotion of agriculture. Their Lordships while not dissenting from this approach are of opinion that, in so far as the judgment of Hoare J. does place such reliance, it is on firmer ground.

Their Lordships are therefore, on the whole, in agreement with the majority of the Full Court in holding that a valid charitable trust was created as regards the land in 1937. If this is so, *i.e.* if the trusts declared in para. (*a*) of the letter of 25th October 1937 are valid as charitable trusts, their validity is not impaired by a provision which permits these trusts to be implemented, in part, by being placed at the disposition of private individuals. (See *Monds v. Stackhouse* (1948)77 C.L.R. 232.)

Their Lordships now consider the two particular defences put forward in the present case. The first is that of laches. There have been a number of proceedings relating to the land over a period of about six years. In 1970 application was made under the City of Brisbane Town

Planning Act 1964 by Myer for consent to the use of the land for a shopping centre, and notice of objection was given by the relator Scurr. There was an appeal to the Local Government Court by the relator Scurr and others which was carried to the Full Court and eventually to the High Court of Australia. Later, there was a further appeal by the relator and others to the Local Government Court in which judgment was delivered in December 1975.

In addition to these appeals there was an action brought in 1971 by the Attorney General on the relation of Scurr against the Brisbane City Council, in which Myer was joined as defendant: the issue was whether the Council had acted ultra vires in accepting Myer's tender and whether it had acted in bad faith.

In none of these proceedings was there raised the question of a charitable or other trust binding the Council. The reason for this was that until shortly before he brought the present action, the relator Scurr did not know of the Council minutes which recorded the transaction with the Society in 1937–38. He seems to have had some suspicion of the existence of a trust, and there was an application for discovery in the Local Government Court proceedings which the Council successfully resisted. It is true that he was entitled by law to inspect the Council's minutes, but failure to go through the records of 1937–38 can hardly be held against him. It is true also that being a member and in 1955 on the Committee of the Show Society—and later a vice President of it—he might have been able to inspect the latter's records, but he did not do so. In the course of his evidence at the trial no questions were put to him as to his knowledge or means of knowledge of the trust or why he did not take earlier action to ascertain whether it existed. The Courts below held that, on these facts, no case of laches was made out. Their Lordships agree and would only add that in addition to the factual weakness of the appellants' case they see serious legal difficulties in the way of asserting a defence of laches in proceedings against an express trustee who is still the legal owner of the trust property, and who holds the land on a trust for the benefit of the public. They consider it unnecessary however to enter upon these in this case.

The second defence is one of "res judicata". There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V.-C. in *Henderson v. Henderson* (1843) 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* [1926] A.C. 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Co. v. Dao Heng Bank* [1975] A.C.581. It was, in the judgment of the Board, there described in these words:

> ". . . there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings." (*l.c.*p.590)

This reference to "abuse of process" had previously been made in *Greenhalgh v. Mallard* [1947] 2 All E.R. 255 per Somervell L.J. and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an

abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.

In their Lordships' opinion there is no room for application of this doctrine here. To assert the existence of a trust (even assuming that it was known to exist) in the Local Government Court proceedings would have been entirely out of place. And the same is true of the earlier action in the Supreme Court. This, though a relator action, like the present, was in effect a ratepayers' action brought against the authority to restrain an alleged excess of power. The present is an action instigated by two members of the public asserting a right belonging to the public at large. It must be doubtful whether in these circumstances the necessary identity of parties between the two proceedings exists, but in any event it cannot be claimed that to bring the second after the first has failed involves any abuse of process. Furthermore, the fact that the relator who was ignorant of the trust would have had to search the records of the Council in order to discover its existence, and that he was to some extent obstructed by the Council in his attempt to obtain the relevant documents, makes this a totally unsuitable case for the introduction or admission of this defence. Their Lordships agree with the judgment of Lucas J. dated 9th August 1976 at an interlocutory stage of the present action.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

310532—2 Dd 119941 75 6/78

In the Privy Council

BRISBANE CITY COUNCIL AND MYER SHOPPING CENTRES PTY. LTD.

v.

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

DELIVERED BY

LORD WILBERFORCE

Printed by HER MAJESTY'S STATIONERY OFFICE
1978