10/1981

IN THE PRIVY COUNCIL No. 33 of 1980

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

COMMON LAW DIVISION

IN PROCEEDINGS NO. 4347 of 1976

BETWEEN :-

ROGER JOHN MASSIE DUNLOP Appellant

- AND -

THE COUNCIL OF THE MUNICIPAL OF WOOLLAHRA Respondent

CASE FOR THE APPELLANT

STEPHEN JAQUES & STEPHEN
50 Bridge Street,
SYDNEY. N.S.W. 2000

By Their Agents

REYNOLDS PORTER CHAMBERLAIN AND CO.
Chichester House
278-282 High Holborn,
LONDON WC1V 7HA

INTRODUCTION

RECORD

1. This appeal is brought, pursuant to leave granted by the Supreme Court of New South Wales, from a final judgment of the Common Law Division of that Court given by the Honourable Mr. Justice Yeldham on 28th July, 1978, dismissing an action brought by the Appellant (as Plaintiff) against the Respondent
P.225 (as Defendant), and from the order as to costs made on that date.

2. In his action, the Appellant claimed damages for losses suffered in consequence of two invalid resolutions of the
P.174 Respondent ('the Resolutions') passed on 10th June, 1974, in purported exercise of its powers under respectively sections 308(1) and 309(4) of the Local Government Act, 1919 (New South Wales) ('the Act'). On 26th September, 1975, in the Equity Division of the Supreme Court of New South Wales, the Homourable Mr. Justice Wootten had declared the Resolutions to
P.211 be invalid: Dunlop.v.The Council of the Municipality of
1.36 Woollahra (1975) 2 N.S.W.L.R. 446 ('Dunlop No.1'). The resolution under s.308(1) of the Act had been so declared for lack of fairness at common law towards the Plaintiff (Appellant) in the exercise of the statutory power of the Defendant (Respondent), and the resolution under s.309(4) of the Act for inconsistency in its operation with the statutory prescriptions of clause 44(5) of the Woollahra Planning Scheme Ordinance No. 387 of 1972 ('the Ordinance'), which inconsistency is not permissible by reason of clause 73(1) of the Ordinance.

P.212 3. In his action for damages, the Appellant alleged that he
1.31 suffered financial losses owing to the consequential delay caused to his project for the development of his land, between the date of the Resolutions and 25th October, 1975, the latter being the last day upon which the Respondent might have appealed against the decision of Wootten J.

RECORD

4. The bases upon which the Appellant claimed to be entitled to an order for damages against the Respondent were threefold, as the Appellant relied upon three separate causes of action before Yeldham J.

P.15 1.3 5. First, the Appellant relied upon a right of action upon the case derived from the principle enunciated by the High Court of Australia in Beaudesert Shire Council v Smith (1966) 120 C.L.R. 145 ('Beaudesert'), that he had suffered loss as the inevitable consequence of the unlawful, intentional and positive acts of the Respondent in the passing of the resolutions which had been declared to be invalid by Wootten J.

P.15 1.22 6. Secondly, the Appellant relied upon a right of action upon the case for abuse by the Respondent of its public office, which abuse had amounted to misfeasance in office and to a breach of its duty under clause 6(2) of the Ordinance to administer the Ordinance according to its terms.

P.15 1.6 7. Thirdly, the Appellant relied upon a right of action for breach by the Respondent of a duty owed to the Appellant pursuant to the Act, (Parts XI and XIIA) to administer the provisions of the Act and Ordinance made thereunder and in the alternative, for breach by the Respondent of a duty to perform such duties with reasonable care and in a responsible manner.

PRINCIPAL SUBMISSIONS OF THE APPELLANT IN THIS APPEAL

8. The principal contentions which the Appellant proposes to advance on the hearing of the appeal are, in outline, as follows:

(a) that on the application of the principle in Beaudesert to the claim of the Appellant against the Respondent, the Respondent was liable to compensate the Appellant for the

RECORD

financial losses which were the subject of that claim as the said financial losses were the inevitable consequence of the invalid and unlawful administrative action of the Respondent in purporting to pass the Resolutions;

(b) that the Respondent was liable to compensate the Appellant for the financial losses for abuse of the public office of the Respondent amounting to misfeasance in purporting to pass the Resolution under s.309(4) of the Act which if valid would have been and was intended to be discriminatory in its operation against the Appellant in the development of his land, (Dunlop No.1 at 497) in view of the existence of the relevant prescription in clause 44(5) of the Ordinance which was binding upon the Respondent;

(c) that in passing the Resolutions the Respondent was liable to the Appellant for breach of its duty to the Appellant pursuant to the Act and the Ordinance to administer the said legislation in accordance with the law;

(d) that in view of the existence of the relevant and binding prescription in clause 44(5) of the Ordinance which defined the limits of the permissible height of a building on land within the part of the municipality in which the land of the Appellant was situated, the Respondent had at least constructive knowledge that the Resolution under s.309(4) of the Act was invalid as being inconsistent with clause 44(5) of the Ordinance.

(e) that the Respondent was liable to the Appellant for the breach of its paramount statutory obligation in the exercise of its planning functions as laid down in clause 6(2) of the Ordinance to carry into effect and enforce the provisions of the Ordinance on substantive and procedural subject-matters contained therein in that it

RECORD

purported to preclude absolutely in advance of a Development Application foreshadowed by the Appellant in respect of his land the operation of clause 44(5) of the Ordinance defining the permissible limit of the height of any building which the Appellant may have proposed in such a Development Application;

(f) that the Respondent was liable to the Appellant for breach of its duty to the Appellant at common law to exercise its power under s.309(4) of the Act with reasonable care and responsibility so as not to exceed the ambit and operation of the said power and thereby cause foreseeable financial losses to the Appellant.

(g) The Appellant had relied on the prescription in clause 44(5) of the Ordinance in planning the development of his land and was forced to challenge the validity of the Resolution of the Respondent in purported exercise of its power under s.309(4) of the Act.

APPLICATION OF THE PRINCIPLE IN BEAUDESERT

9. As appears from the reasons for judgment given by Yeldham J. the action of the Council in passing the Resolutions was positive and intentional. However the Resolutions were also unlawful, for the following reasons:

P.214 l.31

(a) the term 'unlawful' was used by the High Court in Beaudesert as the description for an invalid administrative action by the Beaudesert Shire Council. In this respect the analogy between the action of the Beaudesert Shire Council and the action of the Respondent in the passing of the Resolutions is clear and direct.

(b) Beaudesert was a case in which the defendant Council was held liable to the plaintiff owner of land for the

RECORD

consequences of its administrative action which it had no right to take, i.e. taking gravel from the bed of the river without the requisite statutory permission. Similarly the Respondent had no right to exercise the powers under s.308(1) and s. 309(4) of the Act.

10. The distinction made by Yeldham J. between 'unlawful' and 'devoid of legal effect' is without meaning. Specifically, Yeldham J. was in error in using the term 'illegal' for the term 'unlawful' in order to find a favourable definition in support of the meaning which his Honour ascribed to the term 'unlawful' when finding against the Appellant. Yeldham J. also placed some reliance on the decision of the Honourable Mr. Justice McInerney in Grand Central Car Park v Tivoli Freeholders (1969) V.R.62 as support in reaching his decision on the meaning of the term 'unlawful'. This case is not in point on the meaning of the term as enunciated in Beaudesert as McInerney J. distinguished Beaudesert on the basis that the facts of the case before him involved a breach of statutory duty.

P.216 1.4

P.216 1.17

11. There is further authority for the proposition that an invalid administrative action is 'unlawful' in Roberts v Hopwood (1925)A.C.578 per Lord Buckmaster at 585 and per Lord Atkinson at 596.

12. The inevitable consequence of the administrative action of the Council in passing the Resolutions was that the Appellant would suffer pecuniary losses, as the administrative action gave rise to financial liabilities in that he was delayed in putting his land to its highest and best economic use. These financial liabilities were both immediate and inevitable as there was no statutory right of appeal vested in the Appellant against the action of the Respondent pursuant to the Resolution passed under s.309(4) of the Act. (Dunlop No.1 at 487)

RECORD

13. In Kitano v The Commonwealth (1974) 129 C.L.R. 151, ('Kitano') the High Court continued its adherence to the principle in Beaudesert. The case came before the High Court in its original jurisdiction and the Honourable Mr. Justice Mason holding that he was bound by Beaudesert proceeded to analyse the terms of the principle, albeit distinguishing it from the facts of Kitano (at 174).

In Kitano on appeal to the Full High Court, the pronouncements and reasoning of Mason J. were accepted in their entirety (at 176).

14. Your Lordships ought not to overrule, depart from, or not follow a common law principle pronounced by the High Court of Australia as

(i) Your Lordships have recognised that the common law may develop differently in the various Commonwealth countries, Australian Consolidated Press Ltd. v.Uren (1969) 1 A.C. 590 at 641-4.

(ii) Your Lordships have shown recognition of the part which the High Court of Australia has to play in deciding what should be Australian law, Geelong Harbor Trust Commissioners v Gibbs Bright & Co (1974) A.C.810 at 820-1.

(iii) The common law of Australia is not now necessarily the same as common law of England - Mutual Life and Citizens Assurance Co. Ltd v Evatt (1972) 122 CLR 556 at 563; Cooper v Southern Portland Cement Ltd (1972) 128 C.L.R.427 at 438.

15. Your Lordships have recently recognised that where the High Court of Australia and your Lordships' Board now have concurrent final appellate jurisdiction, your Lordships should give to decisions of the High Court the same respect as your

RECORD

Lordships give to your own previous decisions: Max Cooper and Sons Pty. Ltd v Sydney City Council (1980) 54 A.L.J.R. 234, at 237-238.

ABUSE OF PUBLIC OFFICE

16. In Wood v Blair & Anor (unreported, 4th July 1957), the Court of Appeal referred to the judgment at first instance of Mr. Justice Hallett who held that a cause of action existed where a person had suffered damages as a consequence of an invalid official action which amounted to an abuse of public office, without the necessity for that person to establish that the public officials who had taken that action had been motivated by malice or had prior knowledge of the invalidity of the action. Yeldham J. was correct in stating that in Wood v Blair, the existence of the cause of action had been assumed by the Court of Appeal and that its decision had been confined to questions of damages. However the decision of Hallett J. at first instance is still authority for the proposition that such a claim is sustainable without malice or prior knowledge of the invalidity of the action.

P.217 1.6

17. If it be necessary for the Appellant to establish, in order to sustain his claim for damages for abuse of public office in respect of the invalid official action taken by the Respondent in passing the Resolution under s.309(4) of the Act, that the Respondent had knowledge or had the means of knowing that the terms of the Resolution would be invalid, it is submitted that the Appellant has shown that the Respondent by its officers had or should have had sufficient knowledge of the provisions of the Ordinance to justify the inference that the operation of the Resolution under s.309(4) would have been inconsistent with the express and clear provisions of clause 44(5) of the Ordinance. See the dissenting judgment of Lord Justice Denning (as he then was) in Abbott v Sullivan (1952) 1 K.B. 189, at 200-201.

P.220 1.9

P.3 124-136 242-263 291-310

RECORD

18. Even if the Appellant has not established that the Respondent had or should have had knowledge that the terms of the Resolution passed under s.309(4) of the Act would be invalid it is submitted that the purpose or object of the Resolution under s.309(4) of the Act was to frustrate the Appellant from any appeal to the Local Government Appeals Tribunal when the Appellant carried out his intention to submit a Development Application to the Respondent in respect of his land.

19. Alternatively the Respondent was in breach of its public duty to administer the Act and the Ordinance and specifically, the Respondent abused its office and public duty under clause 6(2) of the Ordinance in passing the terms of the Resolution under s.309(4) of the Act. Clause 6(2) of the Ordinance imposed a direct obligation on the Respondent itself to observe all the provisions of the Ordinance including clause 44(5) of the Ordinance which defined substantively the limits as to height of height of proposed buildings on the land of the Appellant and within which he was now conditionally permitted to build by the Ordinance. (Dunlop No.1 at 492)

BREACH OF A COMMON LAW DUTY TO TAKE REASONABLE CARE IN THE EXERCISE OF STATUTORY POWER

P.220-223 20. Yeldham J. failed adequately to consider in a systematic way the conventional and interrelated issues raised by the claim of negligence at common law. These are:-

(i) the existed or non-existence of a duty of care in the exercise of the statutory power;

(ii) the content of such a duty if it did exist; and

(iii) whether or not there had been a breach of duty as measured by the specific facts surrounding the passing of the Resolution under s.309(4) of Act and as established in the evidence.

RECORD

21. The starting-point for the consideration of the duty of care issue is the statement of Lord Wilberforce in Anns v. London Borough of Merton (1977) 2 ALL E.R. 492, that (at 498-9)

> "Through the trilogy of cases in this House, Donoghue v Stevenson, Hedley Byrne & Co. Ltd v Heller & Partners Ltd and Home Office v Dorset Yacht Co, Ltd, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist"

This case is also authority for the proposition that a duty of care may arise out of the exercise of statutory powers of a local government authority whether or not within its area of discretion. These propositions have also been recognised in the recent New Zealand Court of Appeal decision, Takaro Properties v Rowling (1978) 2 N.Z.L.R. 314 ('Takaro')

22. The Respondent invested with statutory authority was under a common law duty to inform itself and to understand the ambit and operation of its statutory powers under s.309(4) of the Act. Specifically the Respondent was negligent in misunderstanding or in being ignorant of the law relating to the existence and the exercise of its powers by failing to take into account the legal implications of what it was purporting to do by passing the terms of the Resolution under s.309(4) of the Act: See Takaro at 321-322.

23. It is submitted that the passing of this Resolution by the Respondent constituted a negligent and invalid action on its part and was not merely a negligent and invalid statement

RECORD

of the terms of the Resolution.

P.1 P.3-7 239-263 264-275 291-310

24. The Respondent has not established that it applied its mind to the legal implications of its course of action in passing the terms of this Resolution and specifically as to the interaction of s.309(4) of the Act with clauses 73(1) and 44(5) of the Ordinance.

25. Even if the Respondent for the exercise of its statutory powers under s.309(4) of the Act, was entitled to rely upon the advice of its solicitors that advice in the form of a letter to the Respondent dated 9th May, 1974 did not contain advice on the interaction of s.309(4) of the Act with clauses 73(1) and 44(5) of the Ordinance. This letter is irrelevant therefore to the issue whether or not the Respondent did apply its mind to the legal implications of the terms of this Resolution. (Dunlop No.1 at 487)

P.12

26. The Appellant raised monies to enable him to develop his land at all material times with full knowledge of the prescription as to permissible height of any building which could be erected on his land in accordance with clause 44(5) of the Ordinance. Following the decision of the Local Government Appeals Tribunal of 6th May 1974, the Appellant informed the Respondent by letter that he intended to lodge a Development Application within the guidelines laid down by the Local Government Appeals Tribunal with respect to the development of the land and within the terms of the Ordinance. Further the Appellant informed the Respondent in the same letter and verbally, that he had suffered severe financial hardship. At the date of the passing of the Resolution under s.309(4) of the Act, not only ought the Respondent to have known but in fact did know of the financial hardship which the Appellant had suffered in the course of seeking lawfully and regularly, approval to develop his land. The further losses suffered by the Appellant which were the subject of his claim against the Respondent for damages, arose as a direct and foreseeable

P.32 1.4 P.142-152 P.78 P.78 P.28 1.30

RECORD

consequence of the passing of this Resolution.

P.224 1.7 27. It is submitted that the justification put forward by Yeldham J. finally, in his decision that even if there had been a duty of care owed by the Respondent to the Appellant in respect of the Resolution passed under s.309(4) of the Act, a finding that there had been a breach of duty would in effect place the Respondent in the position of an "insurer", is a justification for His Honour's decision on policy grounds. The justification is unsupported by authority and, it is submitted, is insupportable in the context of an action for damages by a specific land owner who has suffered financial losses as a result of a wrongful exercise of a statutory power by a local authority where such an exercise is discriminatory against the Appellant as a member of a very small class of landowners. (see Dunlop No.1 at 478 and 479.)

BREACH OF STATUTORY DUTY OWED TO APPELLANT CONFERRING PRIVATE RIGHT OF ACTION FOR DAMAGES

P.15 1.10 28. This cause of action was pleaded in paragraph 14 of the Appellant's Further Amended Statement of Claim dated 7th April, 1978. It appears in terms not to have been considered or dealt with by Yeldham, J.

29. Clause 6(2) of the Ordinance passed pursuant to the Act, which Ordinance applied to and defined the powers, liabilities and functions of the respondent at the relevant times provided:-

> "The Council shall, subject to this Ordinance, be the responsible authority and shall be charged with the functions of carrying into effect and enforcing the provisions of this Ordinance relating to any

RECORD

power, authority, duty or function other than those enumerated in subclause (1)".

Subclause (1) contained no provision relevant for present purposes.

30. It is submitted that the obligation imposed upon the Respondent by such clause in relation to the exercise of a power as was conferred by s. 309(4) of the Act, when viewed in the light of Clause 44(5) of the Ordinance, was of such a nature that when such power was invalidly used to restrict the right of the Appellant to deal with his land such invalid exercise of power gave rise to a statutory cause of action for the benefit of the Appellant to recover damages for losses resulting therefrom.

31. Whilst the Appellant submits that such authority is distinguishable, the Full Court of the Supreme Court of New South Wales in Miller and Croak Pty. Ltd. v. Auburn Municipal Council, 60 S.R. (N.S.W.) 398, has ruled that an action for damages does not lie at the suit of an individual affected by the negligent performance of duties or exercise of powers by a local council under an Ordinance, passed pursuant to the Act. The Appellant submits that if not distinguishable, that case was wrongly decided. See also Bradley v. The Commonwealth, 128 C.L.R. 557 at, 575 and 576 and 586-594.

CONCLUSION

32. The Appellant respectfully submits that the judgment of His Honour Mr. Justice Yeldham was wrong and ought to be reversed and this Appeal ought to be allowed with costs for the following (amongst other)

REASONS

(a) That on the application of the principle in Beaudesert the Resolutions were unlawful and that the Appellant's losses were the inevitable consequence of the passing of the Resolutions by the Respondent;

(b) That the action of the Respondent in passing the Resolution under s.309 (4) of the Act amounted to an abuse of the public office of the Respondent amounting to misfeasance;

(c) That the Respondent in passing the Resolution under s.309(4) of the Act breached its common law duty to the Appellant and the Appellant's losses were the direct and foreseeable consequence of that breach;

(d) That pursuant to clause 6(2) of the Ordinance there was a statutory duty imposed on the Respondent, which duty the Respondent breached in passing the Resolution under s.309(4) of the Act, giving the Appellant the right to recover damages for his losses resulting therefrom.

A. B. SHAND