IN THE PRIVY COUNCIL No. 33 of 1980

ON APPEAL FROM THE SUPREME COURT
NEW SOUTH WALES
IN CAUSE NO. S 4347 OF 1976

BETWEEN:

ROGER JOHN MASSIE DUNLOP

Appellant

AND:

THE COUNCIL OF THE MUNICIPALITY OF WOOLLAHRA

Respondent 10

CASE FOR THE RESPONDENT

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A. HISTORY:

1. This appeal is an appeal from an order of the Supreme Court of New South Wales (Common Law Division - Yeldham J.) made on 28 July 1978 whereby his Honour entered a verdict in favour of the defendant, with costs. The reasons for judgment deal with, and reject, the three alternative bases of liability argued by the plaintiff. In the view he took it was unnecessary for his Honour to consider arguments put by the defendant denying any causal relationship between the causes of action relied upon and the damage alleged and arguing that the damage alleged was too remote. p.225 20 pp.206-224

2. The appellant resided at, and had an interest in, a property known as 10 Wentworth Street,

Point Piper in the Municipality of Woollahra. The adjoining property, No.12 Wentworth Street, was owned by a Mr. Howarth. p.206.20

3. On 19 December 1972 the appellant purchased the adjoining property No.8 Wentworth Street, Point Piper for the sum of $500,000.00 (Ex.A). pp.44-53 The full amount of the purchase price was borrowed by him from the Bank of New South Wales. The intention of the plaintiff was to take steps, with Mr. Howarth and the trustee of No.10 Wentworth Street, to develop the three properties p.206.20 to maximum advantage.

4. On 11 January 1973 the appellant entered into a contract with Blackburn Developments No.25 Pty. Limited ("Blackburn") for the sale of No.8 Wentworth Street, Point Piper for $670,000.00. (Ex.B). pp.54-64

5. The contract was conditional upon the purchaser obtaining development (planning) consent from the respondent in relation to the erection of a home unit building on the properties 8, 10 and 12 Wentworth Street on or before 4 June, 1973. This date was later extended to 25 December 1973 p.61.10 by a deed of variation (Ex.B) dated 11 February 1974 pursuant to which Blackburn covenanted to

appeal against any unfavourable decision of the respondent, in which event time was to be further extended. p.64

6. On 2 February 1973 Blackburn submitted a development application to the respondent (Ex.D). pp.65-77 The application contemplated two eight storey buildings each rising to a maximum height of 235.5 feet above standard datum and containing a total of thirty eight residential units.

7. The land was subject to the provisions of the Woollahra Planning Scheme pursuant to which it was included in a Residential 2(C) zone. In this zone a residential flat building of any type could, with the consent of the respondent, be erected. However, clause 44(5), which applied to the land, imposed a maximum height of 235.5 feet above standard datum. p.206.40 p.207.05

8. The development application was refused by the respondent on 10 September, 1973. Blackburn appealed to the Local Government Appeals Tribunal against the respondent's decision. On 6 May 1974 the Tribunal dismissed the appeal. (Ex.Q). pp.142-152 The reasons for decision related to the character of the proposed development particularly having regard to the development on the adjoining land and in the locality and the size and shape of

the proposed development on the parcel of land to which it related. It was said to be a gross overdevelopment. The Tribunal indicated a view that any development of the land should not exceed a population density of 70 to 75 persons per acre. p.151.15 p.151.28

9. On 23 May 1974 Blackburn rescinded its contract with the appellant and also with the owners of the adjoining properties. p.29.05

10. On 27 May 1974 the Town Planning Committee of the respondent considered a report from the Deputy Town Clerk (Ex.M) which contained an advice from the respondent's solicitors and a report from the Principal Planning Officer of the respondent (Ex.N). The solicitors' advice referred to the possibility of council exercising its powers under s.309(4) of the Local Government Act to regulate the number of storeys in any new building on the land. It went on to advise that any such action must be based upon strong planning grounds and it pointed out that the Local Government Appeals Tribunal had adopted the view that it, the Tribunal, could vary such a resolution upon appeal. The Principal Planning Officer recommended a maximum floor space ratio of 0.6-0.7:1. The appellant, with his mother, his architect pp.124-130 pp.128-130 pp.131-132 p.130.30 p.132.15

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Mr. Phillips and Mr. Howarth attended the meeting. The appellant and Mr. Howarth addressed the Committee and answered questions. The Committee resolved to call for a report to its next meeting on the regulation of the number of storeys. p.127.30

11. On 10 June 1974 the Town Planning Committee considered a further report from the Principal Planning Officer (Ex.O) and a further report from the Deputy Town Clerk (Ex.P). The report from the Principal Planning Officer discussed the most desirable form of development of the site and recommended that council resolve to limit the number of storeys on the land and to fix building lines. pp.133-138 pp.139-141 p.136.5

12. Upon the recommendation of the Town Planning Committee the respondent at its meeting on 10 June 1974 resolved (inter alia) to regulate the number of storeys in any residential flat buildings erected on properties Nos.8, 10 and 12 Wentworth Street and to fix certain building lines. (Ex.U). pp.174-175

13. Following the rescission of contract by Blackburn the appellant had no arrangements with an alternative developer. Thereupon he engaged an architect, Mr. Clark Phillips, to confer with officers of the respondent and to prepare plans in an endeavour to design a development which p.33.10

would be approved by the respondent. Development plans comprising town houses and in part a three storey development were drawn but before the end of June 1974, the appellant abandoned those plans as providing an insufficient financial return. p.35.20

14. Thereafter the appellant instituted a suit in the Supreme Court of New South Wales claiming declarations as to the invalidity of the resolutions of 10 June, 1974.

15. On 24 November, 1974 Mr. Phillips made application to the respondent on behalf of the appellant for development consent for an eight storey residential flat building with a height of 235.5 feet above standard datum. Plans for this development had been prepared over the preceding two or three months. The application was lodged on the advice of counsel and was one requiring modification, in the eyes of the appellant. pp.29.40 p.36.15 p.37.30

16. On 2 January 1975 the respondent, as required under the scheme ordinance, referred the application to the State Planning Authority. Thereafter a number of letters were written by the respondent to the Authority but it was not until 4 July 1975 that that body (by then reconstituted as the Planning and Environment Commission) wrote indicating p.36.30

concurrence, but with reservations. One reservation related to the scale of the proposed building (Ex.S). p.168.10

17. The application was the subject of a report by a development officer of the respondent to the Building & Health Committee of 7 July, 1975. By pp.162-171 resolution of 14 July 1975 the application was refused. p.171 Mr. Phillips was notified of this decision, p.122 and the reasons therefor, but the appellant chose p.37.35 not to appeal against the decision. Of the twelve reasons for refusal one only (No.6) referred to the resolutions of 10 June, 1974. pp.172-173

18. The proceedings for a declaration of invalidity came before Wootten J. on 28 July, 1975, judgment being given on 26 September, 1975. Wootten J. made a declaration in the following terms:-

"THE COURT DECLARES that -

1. The purported resolutions of the defendant referred to in paragraph C1 and 2 of the defendant's letter dated 12 June 1974 and set forth in the Schedule hereto be declared null and void.

THE COURT ORDERS that -

2. The defendant pay the plaintiff's costs.

SCHEDULE

"C. 1. THAT the Council, under the provisions of Section 309(4) of the Local Government Act, 1919, regulate the number of storeys

in any residential flat buildings erected on properties Nos.8, 10 and 12 Wentworth Street, Point Piper, or any one or combination of storeys at no more than three.

2. THAT the Council, under the provisions of Section 308 of the Local Government Act, 1919, fix a building line relating to properties Nos.8, 10 and 12 Wentworth Street, Point Piper, in accordance with the plan accompanying the Town Planning Committee report of 10th June, 1974, and providing for setbacks from Wentworth Street ranging from 60' along the eastern boundary of property No.8 to 45' between properties 8 and 10, to 35' between properties 10 and 12, and 35' to the western boundary of No.12, being part annexure "B" to Affidavit of J.M. Dunlop sworn 25 November 1974 and filed herein." p.97

The reasons for judgment of Wootten J. are reported: Dunlop v. Woollahra Municipal Council (1975) 2 N.S.W.L.R. 446.

19. In April 1976 the appellant retained new architects Messrs. Byrnes, Smith & Associates. On 27 July 1976 that firm submitted a fresh application, for a seven storey building containing 20 flats with a floor space ratio of 0.86:1, to the respondent. p.38.40 The respondent obtained the concurrence of the Planning and Environment Commission and, in December 1976, granted development consent. The building the subject of this application was the first building which was, in the eyes of the appellant, acceptable in terms of design. p.39.40

20. The appellant did not immediately implement

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the consent granted in December 1976. Instead he put the property No. 8 Wentworth Street on the market. On 18 August 1977 he entered into a contract to sell the property to Berbella Pty. Limited for $450,000.00 (Ex.G). p.39.45 pp.81-96

B. THE APPELLANT'S CLAIM

21. The appellant claims damages for losses he alleges he suffered in consequence of the resolutions passed by the respondent on 10 June, 1974 which were held by Wootten J. to be invalid. The damage is said to have been suffered between 10 June, 1974 and 25 October, 1975 being the last day on which the respondent might have appealed against the decision of Wootten J. p.212.30

22. The claim contended for at the trial comprised the following:

$112,431 being the amount incurred for interest and charges in relation to finance for the purchase of the property.

$10,512 being costs and disbursements of the proceedings before Wootten J.

$14,635 being Land Tax in respect of the relevant period.

$671 Municipal rates

$400 Water rates

$750 Architect's fees for Mr. Phillips

Plus interest on each of these amounts pursuant to section 94 of the Supreme Court Act, 1970. A sum of $7,500, it was conceded, should be deducted from any sum recovered being the rental received from the property during the relevant period. p.212.40

C. THE APPELLANT'S CAUSES OF ACTION

23. The first alleged cause of action was based upon the decision of the High Court of Australia in Beaudesert Shire Council v. Smith (1966) 120 C.L.R. 145 and was pleaded as follows:

"9. On 10th June 1974 the defendant unlawfully and intentionally passed certain resolutions in respect of premises 8-12 Wentworth Street, Point Piper and each of them which purported to have the effect of limiting the number of storeys of buildings on the said land to three and also purported to fix certain boundary set-backs in respect of buildings to be erected on the said land.

10. The said resolutions were passed by the defendant for the mala-fide and ulterior purpose of preventing development on premises 8-12 Wentworth Street in accordance with the parameters laid down by the Local Government Appeals Tribunal from dealing with any further application and appeal in accordance with the prescribed Woollahra Planning Scheme Ordinance and also to prevent development on any of the said premises for purposes permissible under the prescribed Woollahra Planning Scheme Ordinance.

11. The resolution as to the number of storeys on the land was contrary to the Council's prescribed planning scheme ordinance.

12. The resolution as to the boundary set-backs was unlawful being in breach of the defendant's duty to act fairly as required by the Local Government Act.

13. The plaintiff suffered loss as the inevitable consequence of the unlawful intentional and positive acts of the defendant referred to in and about the passing of the said resolutions in that inter alia he was delayed in putting his land to its highest and best economic use and also had to pay interest, expenses, and legal costs until such time as the unlawful resolutions referred to above were set aside by the Supreme Court." pp.14-15

24. The second alleged cause of action was said to arise out of a principle that an action on the case would lie against a public official or body for misfeasance in office, without malice. It was pleaded as follows:

"15A. Further, in the alternative, the defendant was a public corporate body which occupied a public office and was incorporated by a public statute and which had power to and did exact revenue from rate-payers in its area under the Local Government Act to enable it to perform its public duties and the defendant abused its said office and public duty under the said Statute by purporting to pass each of the said resolutions with the consequence that damage was occasioned to the plaintiff." p.25

25. The third cause of action relied upon was negligence and was pleaded as follows:

"14. Alternatively to 13 and 15 below, the plaintiff says that the defendant was under a duty to the plaintiff pursuant to the Local Government Act, Parts XI and XIIA to administer the provisions of the Act and Ordinances made thereunder, in accordance with law, and in breach of this duty, in passing the said unlawful

resolutions, the defendant failed to perform its said duty, whereby the plaintiff suffered the loss and damage referred to in paragraph 13 above.

15. Further, in the alternative to paragraphs 13 and 14 above, the defendant was under a duty to the plaintiff to perform its duties under Part XI with the building and development controls with respect to the said land, in a reasonable, careful and responsible manner but the defendant in and about passing the said resolutions acted unreasonably, negligently and irresponsibly whether the plaintiff suffered the loss and damage referred to in paragraph 13 above." p.15

D. RESPONDENT'S SUBMISSIONS IN RESPECT OF FIRST CAUSE OF ACTION

26. Beaudesert Shire Council v. Smith (1966) 120 C.L.R. was wrongly decided.

a) Unless read down, the principle stated by the Court at p.156 is inconsistent with accepted principles of tortious liability. It would create a parasitic tort available whenever a person suffers a loss as the inevitable result of an intentional unlawful act of another.

Thus if A by a positive act breaks his contract with B and, as a result, C sustains loss C could recover from A. The stated principle offends the doctrine of privity of contract. Similarly, as inevitability does not necessarily include foreseeability (see Re Polemis (1921) 3 K.B. 560) the stated principle

appears inconsistent with the test of foreseeability for tortious liability. As stated, the Beaudesert principle does not require knowledge of the unlawfulness, lack of reasonable care, foresight of the consequences, malice, bad faith or any other fault element. The effect of the stated principle is that persons become insurers against the effects of their unlawful acts in respect of consequences neither intended nor foreseen and, perhaps, even in relation to people whom they could not reasonably have foreseen as being affected by those acts.

b) The authorities relied on by the High Court do not in fact support a proposition as broad as that stated by it. Those cases each involved a deliberate interference with the rights of the plaintiff, with an intention thereby to injure him. The statement of principle enunciated by the High Court does not include any element of intent to injure. The extension of liability to cases of unintended injury (necessary for Smith to recover) was not supported by authority.

c) Beaudesert has been critically analysed by a number of academic writers: see Dworkin

and Harari, "The Beaudesert Decision - Raising the Ghost of the Action on the Case" 40 A.L.J. 296; Standish, 6 U.Melb. L.Rev. 225; Fleming "Law of Torts" (5th ed) 689. The respondent respectfully adopts those criticisms as submissions on this issue.

d) Beaudesert, in its enunciated form, has not been followed, to the knowledge of the respondent, in any other common law jurisdiction or in any subsequent Australian decision. The New Zealand Court of Appeal has declined to follow Beaudesert: Takaro Properties Ltd. v. Rowling (1978) 2 N.Z.L.R. 314 at pp.317.35, 328.50, 339.25.

27. Beaudesert is, in any event, distinguishable from the present case.

a) Both the facts of Beaudesert and the reasoning of the Court indicate that the statement of principle referred to an unlawful act akin to trespass: see p.152.6 and the cases subsequently cited. The word 'act' is appropriate to describe the action of the Beaudesert Shire Council and the actions of the defendants in the cited cases: a physical intrusion upon the plaintiff's activities.

It is inappropriate to describe a resolution of a local authority designed to regulate future development applications.

b) The mere making of the resolution did not adversely affect any legal right of the plaintiff. In a case where legislation requires the consent of a planning authority to proposed development an owner, in the absence of that consent, has no legal right to carry out development: Eaton and Sons Pty. Limited v. Warringah Shire Council (1972) 129 C.L.R. 270 at pp.276.6, 277.5, 293.8 (in relation to which the present facts apply a fortiori). It was argued below that the legal right breached by the passing of the resolutions was 'a legal right to insist that any proposal to develop his land should not be vitiated or frustrated by any invalid resolution passed without statutory or any other justification'. However, that proposition involves a contradiction in terms - a legal right cannot be vitiated or (legally) frustrated by a legally invalid act. The invalid resolution is a legal nullity. p.214.15

c) Yeldham J. decided the Beaudesert point adversely to the plaintiff because of a

perceived distinction between an unlawful act and a legally invalid act. The respondent respectfully adopts the reasoning of his Honour in this respect noting: pp.213-216

i) In Beaudesert itself the Court appears to have in mind an act which was unlawful because it was tortious, a breach of contract or a criminal act: see the words "forbidden by law" at p.152.7, the facts of the cases relied upon and the words "unlawful trespass" at p.156.4.

ii) In Kitano v. The Commonwealth (1974) 129 C.L.R. 151 Mason J. (whose judgment was affirmed by a Full Bench at p.176) construed the Beaudesert principle as requiring more than the mere contravention of a statute. Something such as a tortious act was required (p.175.1). Without that limitation Beaudesert would over-ride the authorities limiting rights of action for breach of statutory duties. In Kitano there was a positive act (the grant of a Certificate of Clearance) in breach of a statutory provision (s.122 of the Customs Act). Such an act is more readily classifiable as 'unlawful' than is an invalid resolution, a legal nullity.

iii) The distinction between illegality and invalidity is well understood in the law: see the cases cited by Yeldham J. If Beaudesert is to survive it should be limited to the type of acts ("forbidden by law" i.e. illegal) which the High Court had in mind. It should not be extended to include invalid acts. The distinction is supported, in this context, by decisions in Australia (James v. The Commonwealth (1939) 62 C.L.R. 359 at p.366.7; Arthur Yates & Co. Limited v. Vegetable Seeds Committee (1945) 72 C.L.R. 37 at p.64.3; Campbell v. Ramsay (1968) 70 S.R. (N.S.W.) 327 at p.335.E), New Zealand (Takaro Properties at p.317.30, 324.25, 338.5), Canada (Welbridge Holdings Limited v. Greater Winnipeg (1970) 22 D.L.R. (3d) 470 at p.478.2; Berryland Canning Co. Ltd. v. The Queen (1974) 44 D.L.R. (3d) 568 at p.589), and England (Abbott v. Sullivan (1952) 1 K.B. 189 at p.200.9, 215.9. pp.215-216

iv) The resolutions were not void ab initio but void when so decided by a court: Calvin v. Carr (1979) 2 W.L.R. 755 at p.763; Hoffman La Roche v. Trade Secretary

(1974) A.C. 295; Central Canada Potash v. Saskatchewan (1978) 88 D.L.R. (3d) 609. It follows that, during the period in relation to which the claim is made (the validity of the resolutions not having been passed upon by the court) the resolutions are to be regarded as not being invalid. If, during that time, there was no invalidity then a fortiori there was no illegality.

28. The resolutions complained of were not such as inevitably to occasion damage to the appellant. By definition they were legal nullities. It was not inevitable that the appellant would proceed with any development still less any particular form of development. If he did decide to proceed with a development which conflicted with the resolutions, he might be refused consent on grounds quite independent of the resolutions: this in fact occurred in respect of the November 1974 application. In that case the resolutions themselves would occasion no damage. Legally, the appellant was free to ignore the invalid resolutions. In fact the Local Government Appeals Tribunal had power, in considering an appeal brought to it on other grounds to vary or rescind the resolutions. Local Government Act 1919 s.342 BF. Irrespective of any question of

inevitability as elaborated in section G below, the resolutions occasioned the appellant no damage in fact.

E. RESPONDENT'S SUBMISSIONS IN RESPECT OF SECOND CAUSE OF ACTION

29. The appellant argues that the resolutions of 10 June 1974 amounted to an actionable misfeasance of public office. The argument has to contend with a finding by Wootten J., when the question was directly in issue, that the respondent had not been guilty of bad faith in adopting the resolutions: (1975) 2 N.S.W.L.R. at pp.481-490 (the contrary not being contended before Yeldham J) and with a finding by Yeldham J. that the respondent, in adopting the resolutions had no knowledge of invalidity. This latter finding it is submitted p.220.10 was amply justified by the evidence. The appellant therefore must contend that the performance of an official act by a public officer, which is not supported by the law and which occasions damage, is itself a sufficient basis of liability. Such a wide rule would render meaningless the distinctions adopted by the courts in relation to the circumstances in which statutory authorities have a duty of care the breach of which gives rise to an action for negligence: see Section F

below. It is not supported by authority. With one possible exception, the cases in this area each involve some additional element justifying the title 'misfeasance'. Those cases divide into two categories:

(i) Cases where the plaintiff complains that the act complained of was actuated by malice towards him: e.g. Whitelegg v. Richards (1823) 2 B & C.45 (107 E.R. 300); David v. Abdul Cater (1963) 1 W.L.R. 543; Campbell v. Ramsay (supra); Smith v. East Elloe R.D.C. (1956) A.C. 736 at p.752.

(ii) Cases where the plaintiff establishes that the act complained of was known to be an abuse of office, either because it was known to be beyond power: e.g. Farrington v. Thomson (1959) V.R. 286; Roncarelli v. Duplessis (1959) 16 D.L.R. (2d) 689; or to be in breach of duty: e.g. Henly v. Mayor of Lyme (1828) 5 Bing.91 (139 E.R. 995); or to be based on falsity: e.g. Brasyer v. Maclean (1875) L.R. 6 D.C. 398 (see also (1874) 12 S.C.R. 206 esp. at pp.218-220).

Unless one of these elements is present (and none is present in this case) no action will lie: Takaro Properties (supra); O'Connor v. Isaacs (1956)

2 Q.B. 288 at pp.312-313, 363-364, 367. If Wood v. Blair (1957) Adm. L.R. 243 is to be treated as holding to the contrary it should be regarded as an erroneous response to a concession by counsel for the defendant and be over-ruled. The respondent refers to, and relies upon the argument in McBride, (1979) Cambridge Law Journal 323.

30. Yeldham J. was prepared to assume, without deciding, that the respondent was a "public officer" within the meaning of the authorities. p.219.45 This assumption is not justified. The test of "public officer" is whether the person concerned has been appointed to discharge a public duty, for reward. Typically, the type of person concerned has been an officer in the service of the Crown performing administrative duties. The only case known to the respondent in which the defendant has been a corporation is Henly v. Mayor of Lyme (supra) but that was an exceptional case in that the corporation had taken benefits under a Crown grant in return for undertaking the obligation the subject of the action. The obligation was the ministerial duty of repairing seawalls. The case, and all the other authorities, are far removed from the case of a local authority purporting to exercise quasi-legislative powers. The remedy for breach of

official duties by an elected authority is a political remedy.

31. If, contrary to the above, it is determined that an action for misfeasance of office would lie in the circumstances of this case the respondent contends that no damage flowed from the breach: see section G below.

F. RESPONDENT'S SUBMISSIONS IN RESPECT OF THIRD CAUSE OF ACTION

32. The respondent contends that the case fails to disclose any of the three elements necessary for the plaintiff to succeed in negligence:

a) a duty of care: see paras. 33-34 below;

b) breach: see para. 35 below;

c) consequential damage: see para. 36 below.

33. The circumstances in which the law will impute a duty of care in respect of the exercise of a statutory discretion have been recently considered in England: Dorset Yacht Co. v. Home Office (1970) A.C. 1004, Anns v. Merton London Borough Council (1978) A.C. 728, Dutton v. Bognor Regis U.D.C. (1972) 1 Q.B. 373; Ministry of Housing v. Sharp (1970) 2 Q.B. 223; Canada: Welbridge Holdings Limited v. Greater Winnipeg (supra), Berryland Canning Co. v. The Queen (supra);

Windsor Motors v. District of Powell River (1969) 4 D.L.R. (3d) 155, Bowen v. City of Edmonton (1977) 80 D.L.R. (3d) 501; New Zealand: Takaro Properties Limited v. Rowling (supra) and Australia; Hull v. Canterbury Municipal Council (1974) 1 N.S.W.L.R. 300, G.J. Knight Holdings Pty. Limited v. Warringah Shire Council (1975) 2 N.S.W.L.R. 796; L. Shaddock and Associates Pty. Limited v. Parramatta City Council (1979) 1 N.S.W.L.R. 566 (judgment pending on appeal to High Court against this decision). In each of these four countries a common approach has been adopted:

a) In not all cases is a statutory authority subject to a duty of care, enforceable by an action for negligence by a person in the position of neighbour, in respect of the exercise of a statutory duty. There is a fundamental distinction between "operational" functions which generally attract liability, and "discretionary" (Anns), "legislative" (Welbridge Holdings) or "policy" (Takaro) functions, which generally do not.

b) Operational functions are day to day mechanical functions (though they may involve some element of individual discretion - Anns p.754.D) generally carried out by subordinate

officers of the statutory authority e.g. the inspection of building works (Anns, Dutton), the proper processing of applications (Hull), the giving of information relating to zoning (Windsor Motors), proposed works (Shaddock) or financial liability (Sharp).

c) In relation to legislative, quasi-judicial ("discretionary" or "policy") functions there is no enforceable duty of care even though the breach is alleged to be procedural (Welbridge at p.478), or to stem from a failure to fully investigate fact and matters or to appreciate legal constraints (Berryland Canning). (Knight appears to be a decision to the contrary but, it is submitted, was wrongly decided). The Courts, as a matter of policy will not impute a duty of care in respect of errors of discretionary judgment committed to a statutory authority: Dorset Yacht Co. at pp.1031.A, 1037.F, 1067.G. Those policy considerations are apposite to the present issue. There are significant financial implications in making councils responsible for errors of judgment. Where the error relates to a misunderstanding of the legal position, of which the affected party ought equally to be aware, there is no justification for placing

the burden upon the rate-payers. Applicants for approvals may reasonably be expected to look after their own interests and to obtain all requisite legal advice.

34. The functions committed to local councils under ss.308 and 309 of the Local Government Act 1919 fall within the second category, under the Anns dichotomy. The functions are committed to the elected council, and may be exercised so as to regulate a large number of individual properties: see Revel Pty. Limited v. Botany Municipal Council (1959) 4 L.G.R.A. 87 as to s.308, Tiernan v. Newcastle City Council (1954) 19 L.G.R. (NSW) 313 and Shellcove Gardens Pty. Limited v. North Sydney Municipal Council (1960) 6 L.G.R.A. 93 as to s.309 and per Wootten J. in (1975) 2 N.S.W.L.R. at p.484 as to the matters relevant for consideration in exercising these powers. Wootten J. regarded the powers as analogous to 'legislative action of a subordinate kind' (p.477), a categorization similar to that expressed (in relation to very similar facts) in Welbridge. Such a categorization necessarily involves the conclusion that there is no enforceable duty of care. This view is consistent with the tentative opinion expressed by Yeldham J. p.223-35.

35. Yeldham J. held that, assuming a duty of care,

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there had been no breach of duty by the respondent. p.233.40
This conclusion was correct. The respondent
refers to the following matters:

a) In relation to the s.308 resolution the council had advice from its Principal Planning Officer recommending such a resolution. The p.138.5 requirement for a hearing of persons affected by a s.308 resolution was not specified by legislation and, until the decision of Wootten J. in this case, had not been the subject of a judicial exigesis. The application of the rules of fairness and natural justice in cases of this nature has been much clarified since 1974: see White v. Ryde Municipal Council (1977) 2 N.S.W.L.R. 909, Twist v. Randwick Municipal Council (1976) 136 C.L.R. 106; Salemi v. MacKellar (1977) 137 C.L.R. 396. It is interesting to note the disagreement in White with Wootten J.'s analysis of the s.308 duty. Having regard to the lack of certainty even amongst lawyers it cannot cogently be argued that a local authority was guilty of negligence in failure properly to appreciate the procedural requirements. A mere mistake of law will not normally constitute negligence.

b) In relation to the s.309 resolution the council had the advice of its solicitors, deputy

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town clerk, and Principal Planning Officer. p.125.30
The proposed resolution had been notified to p.136.5
the appellant and his architect and other
interested people on 27 May 1974, two weeks
before: see finding of Wootten J. at (1975)
2 N.S.W.L.R. 480. Nobody had suggested any
inconsistency with cl.44 of the planning
scheme ordinance - a matter of admitting of
some argument (see Wootten J. at pp.490-492) 10
described by Yeldham J. as involving 'questions
of construction of some complexity'. The p.223.25
respondent should not be held to be negligent
simply because it failed to perceive the
inconsistency established before Wootten J.

36. For the reasons set out in section G below it is submitted that, assuming a duty of care and a breach of that duty, no damage flowed therefrom. Additionally, reliance is placed upon the fact that the alleged breach in respect of the s.308 20 resolution was readily curable. Damages are not an appropriate remedy for a failure to act fairly - the appropriate remedy is to require the procedural steps to be properly undertaken: see per Wootten J. at p.480.

G. RESPONDENT'S SUBMISSIONS IN RESPECT OF THE ALLEGED DAMAGE

37. The damage alleged by the appellant (see para. 22 above) fell into three categories:

a) "holding costs" (interest, land tax and rates) accruing during the period 10 June 1974 to 25 October 1975. These items totalled $128,137 but from this sum should be deducted $7500 for rental received leaving a net figure of $120,637;

b) costs and disbursements of the proceedings before Wootten J. $10,412;

c) architects' fees of $754.

Each of these categories are dealt with separately.

38. In relation to holding costs the respondent submits that there is no causal connection between the breaches alleged (and assumed for the purposes of this Section) and the incurring of those costs. The holding costs were:

a) a result of the facts that the appellant had elected to purchase No.8 Wentworth Street and to borrow the purchase price. Whilst he retained title he would continue to incur liability for rates and land tax - independently of any action which the respondent might take, or fail to take, in respect of any development

application or in respect of any resolution affecting his land. Similarly, whilst the appellant remained a debtor to the bank, he would continue to incur liability for interest. This liability attached independently of any breach of duty by the respondent;

b) in such circumstances it is only possible to argue a causal connection between the breaches alleged and payment of the holding costs if it is demonstrated that, in the absence of the breaches (i.e. assuming no resolutions of 10 June 1974) the appellant would have escaped this liability. Logically, liability could only be escaped by disposing of the land (and repaying the bank out of the proceeds of sale). The appellant could, presumably, have disposed of the land at any time but there is no evidence to indicate the price he could have obtained or to relate that price to the resolutions as distinct from the prevailing poor development climate. The appellant must argue that it was impracticable to sell unless and until he obtained a development consent. Such a case is consistent both with the course of conduct adopted by the appellant throughout the whole period 1973-1976 and his evidence. The argument then narrows down to p.34.5

the proposition that the invalid resolutions prevented a development approval, and therefore sale, during the period 10 June 1974 and 25 October, 1975. It faces these difficulties:

i) Logically and legally, an invalid resolution cannot preclude the exercise of a statutory discretion granting a consent.

ii) The Local Government Appeals Tribunal had, to the knowledge of the appellant, held that it had power to vary a s.309 resolution: see Hooker Home United Pty. Limited v. Ryde Municipal Council (1973) 1 L.G.A.T.R. 717. The appellant could have taken the whole matter, refusal of his development application and the 10 June resolutions, to the Tribunal for determination.

iii) The appellants argument must pre-suppose a development application which would, in the absence of the resolutions, have been approved. In fact at 10 June 1974 there was no current application and no plans or instructions to the architect for such an application. Plans for a building higher than three storeys were apparently first given to the architect in August-September 1974. The application was presented to

the respondent on 25 November 1974. p.36.5 It was promptly processed by the respondent but was delayed in the Planning and Environment Commission. The council was legally unable to make a decision until it received the opinion of the Commission: see Woollahra Planning Scheme Ordinance cl.36. That opinion was received on 4 July 1975. On 14 July the council refused the application by reference to 12 factors. Even on the appellants argument the earliest date at which it could be said that his holding costs were the product of the invalid resolutions would be the date upon which the council could have given a consent, in the absence of the resolutions. This date could not be before 14 July 1975.

iv) The council's refusal was not based only, or mainly, upon the resolutions of 10 June, 1974. These resolutions were merely one of 12 reasons for refusal. There is no reason to doubt that, irrespective of p.37.20 the resolutions, the application would have been refused. The holding costs would have continued to be payable. The reasonableness of council's refusal on

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the merits was conceded by the appellant in his evidence. p.37.25-35, p.39.05-40

v) The inference may be drawn that, in any event, the appellant would have experienced difficulties in achieving a prompt sale at a satisfactory price. It was a time when several developers had gone into receivership or liquidation. The appellant spoke of counting the viable developers on the fingers of one hand. In fact a development consent was obtained in December, 1976 (to the first application acceptable to the appellant in terms of design). The property was nonetheless passed in at an auction held in February, 1977. It was finally sold on 8 August, 1977 (i.e. almost two years after the decision of Wootten J.). p.33.40 p.34.25 p.39.35 p.39.45

Having regard to the above it cannot be said that the resolutions of 10 June 1974 were the cause of the expenditure on holding charges as claimed.

39. Wootten J. made an order in favour of the appellant in relation to the costs of the proceedings before him. That order indemnifies the appellant in relation to his costs, taxed as between party and party. The effect of this claim, having

regard to the undertaking not to enforce the costs order if this claim succeeds, is to obtain, in addition to the usual party-party costs, costs taxed as between solicitor and our client. Such a claim is covered neither by principle nor authority. Except in relation to well defined exceptional cases e.g. trustee cases the measure of costs indemnity is the party-party scale. The appellant already has this indemnity. Additionally, it cannot be said that the costs of the proceedings before Wootten J. were causally related to the resolutions. The invalid resolutions could have been ignored. Alternatively, the resolutions could have been dealt with in conjunction with a development appeal.

40. The architects fees related to the sketches prepared in June 1974 for town houses. The sketches were prepared to enable the appellant to consider the viability of a three storey development. He quickly decided that it was not economic. The appellant was aware of the council's desire to limit the development to three storeys. With or without a formal resolution it would be sensible for a developer to prepare sketches to enable him to examine the feasibility of the type of development favoured by the planning authority. It is often better to co-operate with such wishes

p.41.35

p.34.35

rather than be forced to suffer the delays of appeals. This minor expenditure may properly be regarded as a consequence of the known wishes of the council but not of its (assumed) tortious act.

41. The respondent therefore submits that, even on the assumption of a breach of duty, no damage has flowed from the breach. On this separate ground, the verdict for the defendant was correct.

H. SUBMISSION

42. The respondent submits that the appeal should be dismissed with costs.

REASONS

(i) There was no relevant duty by the respondent to the appellant.

(ii) There was no breach of duty by the respondent to the appellant.

(iii) No damage flowed from any breach of duty.

Murray Wilcox

P.D. McClellan