Privy Council Appeal No. 33 of 1980

Roger John Massie Dunlop – – – – – *Appellant*

v.

The Council of the Municipality of Woollahra – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD FEBRUARY 1981

Present at the Hearing:

LORD DIPLOCK

LORD SIMON OF GLAISDALE

LORD EDMUND-DAVIES

LORD SCARMAN

LORD BRIDGE OF HARWICH

[*Delivered by* LORD DIPLOCK]

The action in which this appeal to Her Majesty in Council is brought by the unsuccessful plaintiff (" Dr. Dunlop ") is the sequel to a previous action between the self-same parties tried before Mr. Justice Wootten, in which the plaintiff was successful, *Dunlop v. The Council of the Municipality of Woollahra* [1975] 2 N.S.W.L.R. 446. From that judgment the defendant (" the Council ") did not appeal. Both that action and the present action arose out of two resolutions which the Council passed on 10 June, 1974, in purported exercise of their powers under section 308 and 309 respectively in Part XI of the Local Government Act, 1919, to fix a building line for Dr. Dunlop's property at No. 8 Wentworth Street, Point Piper, and to regulate the number of storeys which might be contained in any residential flat building erected on that property.

In the first action Dr. Dunlop sought and obtained from Wootten J. on 26 September, 1975, declarations that each of the resolutions was invalid and void—the resolution fixing a building line because a procedural requirement as to giving notice to Dr. Dunlop had not been satisfied, the resolution regulating the number of storeys because it was *ultra vires*. The judge expressly rejected Dr. Dunlop's allegation that in passing the resolutions the Council were not acting *bona fide*.

In the instant case, which was tried by Yeldham J., Dr. Dunlop claimed to recover from the Council damages which he alleged he had sustained as a result of the invalid resolutions during the period from the passing of the resolutions on 10 June, 1974 to 25 October, 1975, this being the last day on which the Council might have appealed against the judgment

of Wootten J. In the present action the Council are estopped from contending that either of the resolutions was valid, since those were issues that had been decided against them by the judgment in the previous action against which they had not appealed. Dr. Dunlop in his turn is prevented, by a similar issue estoppel, from asserting that in passing the resolutions the Council were acting *mala fide*. This being so he put his cause of action arising from the passing of the invalid resolutions in three different ways: (1) as trespass on the case within the principle laid down in *Beaudesert Shire Council v. Smith* (1966) 120 C.L.R. 145 (" the *Beaudesert* claim "); (2) as negligence and (3) as abuse of public office. Yeldham J. held that Dr. Dunlop had no right of action sounding in damages under any of these three heads. He accordingly dismissed the action and gave judgment for the Council. It is against this judgment that the instant appeal is brought.

The relevant facts up to the date of the resolutions are set out in extensive detail in the judgment of Wootten J. They are summarised again in the judgment of Yeldham J., which contains a detailed statement of the relevant facts subsequent to that date. Their Lordships will accordingly content themselves with as brief a summary as is compatible with a proper understanding of the ways in which the three causes of action relied upon by Dr. Dunlop were put and the reasons why Mr. Justice Yeldham rejected each of them.

The area in which Wentworth Street is situate is subject to the provisions of the Woollahra Planning Scheme Ordinance prescribed by the Governor under Part XIIA of the Local Government Act, 1919. Under this Scheme the Council was the responsible authority. Point Piper was in an area which was zoned for use for residential purposes. The residential zones under the Scheme are divided into classes according to the nature of the development permitted (*a*) without the approval of the responsible authority, (*b*) only with its approval and (*c*) not at all. Any development which involved building, however, before it was undertaken would require the approval of the Council, not in its capacity as responsible authority under the Scheme, but as council of the area for the purposes of Part XI of the Local Government Act, 1919 which is headed Building Regulation. It is convenient to speak of approval by the Council given as responsible authority under the Scheme as " planning permission " and approval given by it under Part XI of the Act as " building permission ".

The classes of residential zones under the Scheme which are relevant for present purposes are those numbered 2(*a*), 2(*b*) and 2(*c*). Dr. Dunlop's property in Wentworth Street formed part of a small triangular area that was zoned 2(*c*), but was surrounded by areas that were zoned 2(*a*). The relevant difference between these Zones is that in Zones 2(*a*) and 2(*b*), buildings containing residential flats that are more than three storeys high are absolutely prohibited, whereas in Zone 2(*c*) residential flat buildings of more than three storeys may be erected but only with the planning permission of the Council, and subject to the proviso that in that part of the Zone 2(*c*), in which Wentworth Street is situated, their total height above sea level does not exceed 235·5 feet.

The Scheme came into operation in December, 1972, and in the same month Dr. Dunlop, who had an interest in No. 10 Wentworth Street under a family trust, bought the next door property, No. 8, with a view to selling it for development in conjunction with No. 10 and No. 12, which was owned by a Mr. Howarth. In January, 1973, Dr. Dunlop, the trustees of No. 10 and Mr. Howarth entered into conditional contracts with a development company for the sale of these three properties, the condition being that within a limited time planning permission should have been obtained for the erection on the three

properties of a multi-storey flat building. An application for planning permission to erect two eight-storey tower buildings was made by the development company in February, 1973. Planning permission was refused by the Council in September, 1973. Against that refusal the development company appealed to the Local Government Appeals Tribunal under Part XIIB of the Local Government Act, 1919. The appeal was dismissed by that tribunal on 6 May, 1974 and the development company rescinded its contract with Dr. Dunlop and the other vendors on 23 May, 1974.

In rejecting the appeal on the grounds that the development company's proposal for two eight-storey buildings would be an over-development of the site, that it would be out of keeping with the existing character of Wentworth Street and that the provisions for car parking were unsatisfactory, the Tribunal indicated its opinion that some residential flat development on a reduced scale should be allowed and that this need not be limited to three storeys.

On receipt of this decision the Council were advised by their solicitor that if upon sound planning grounds they wanted to limit flat buildings erected on Nos. 8, 10 and 12 Wentworth Street to a maximum of three storeys they should, as the council of the area, exercise their power under section 309(4) of the Local Government Act, 1919, to regulate the number of storeys in any residential flat building on those properties at no more than three. The Council's Planning Officer supported this proposal upon planning grounds and repeated a recommendation that she had made previously that, in the same capacity as the council of the area, they should exercise their powers under section 308 to fix an appropriate building line for the three properties.

These recommendations were accepted and at a meeting of the Council on 10 June, 1974, the two resolutions complained of were passed. At some time before this date there had been a meeting between Dr. Dunlop and representatives of the Council at which his future plans for the development of his property were discussed. He was then informed of the Council's proposal to exercise its power under section 309(4), but no specific mention was made of any proposal to fix a building line under section 308.

On being notified of these resolutions by the Council Dr. Dunlop employed an architect to examine whether a development involving flat buildings limited to three storeys would be worthwhile from the financial point of view having regard to the price that he had paid for No. 8 Wentworth Street. By the end of June, 1974, the architect advised him that it would not, and shortly after Dr. Dunlop started his first action against the Council for declarations that the two resolutions were invalid upon the ground that he was entitled to prior notice of the Council's proposal to pass the resolutions and an opportunity to put his case against them, which he alleged was not afforded him, and, in the case of the resolution regulating the number of storeys, that it was void upon the additional ground that it was *ultra vires* because it was inconsistent with Clause 44 of the Woollahra Planning Scheme Ordinance. This action came on for hearing in July, 1975, and, as already mentioned, judgment in Dr. Dunlop's favour was given on 26 September, 1975.

In the meantime while that action was still pending Dr. Dunlop on 24 November, 1974, submitted a fresh application to the Council for planning permission for the erection of a residential flat building of eight storeys on No. 8 Wentworth Street alone. This application was refused by the Council by resolution of 14 July, 1975. Twelve reasons were given for this refusal of which only one, the sixth, was based upon the Council's resolutions of 10 June, 1974. Against this refusal

Dr. Dunlop did not exercise his right of appeal to the Local Government Appeal Tribunal, because he recognised that independently of the resolutions of 10 June, 1974, there were other respects in which the development proposed in this application was unsatisfactory.

In April, 1976, some six months after the judgment of Wootten J. and the expiry of the Council's time for appealing from it, Dr. Dunlop engaged a fresh architect who on 27 July, 1976, submitted to the Council a fresh application for planning permission in respect of No. 8 Wentworth Street alone. This application was for a seven-storey building containing residential flats. The Council approved this application in December, 1976. Dr. Dunlop then put the property No. 8 Wentworth Street upon the market; but he was unable to find a buyer for it at a price that he was willing to accept until 18 August, 1977.

By then Dr. Dunlop had started his second action against the Council, in which this appeal is brought. In each of the three ways in which he puts his cause of action against the Council proof of actual damage resulting from the conduct complained of is an essential element in the cause of action. To succeed on the *Beaudesert* claim the damage suffered must also be the " inevitable consequence " of such conduct. The only act of the Council relied upon as resulting in actual damage to Dr. Dunlop is the passing of the two resolutions on 10 June, 1974. He makes no complaint about the refusal of his application for planning permission lodged in November, 1974. Before examining the ways in which his cause of action is pleaded it is, in their Lordships' view, convenient to consider briefly what would have been the legal effect upon his property of the two resolutions if they had been valid.

Part XI of the Local Government Act, 1919, dealing with Building Regulation is earlier in date than Part XIIA dealing with Town and Country Planning Schemes. For the most part it is concerned with the need to obtain the specific approval of the council of an area for the erection or alteration of a particular building but it does, by section 308, confer upon the council of an area a more general power to fix building lines for any part of its area, and, by section 309, a power to obtain proclamations declaring parts of its area to be residential districts, and also to regulate the number of storeys which may be contained in flat buildings erected anywhere in its area. Planning Schemes made under Part XIIA may (though they need not do so) contain provisions which have the same effect as the fixing of a building line, or the regulating of the number of storeys which may be contained in residential flat buildings. The effect of building lines and regulation of the number of storeys is restrictive only; they confer no positive right upon the owner of any property to build up to the building line or up to the maximum number of storeys. He still requires specific planning permission and building permission to do this on his particular property, and such permission may be withheld. *Prima facie* restrictions imposed by the council of an area under sections 308 and 309 and those imposed under a Planning Scheme are cumulative. The development for which the owner of the property applies for building permission must comply with both; section 310(*a*) so provides. Section 342(G.)(4), however, provides that a Scheme made under Part XIIA may (though it need not do so) suspend the operation of any provision of the Act, including sections 308 and 309, to the extent that the provision or any action taken under it is inconsistent with any of the provisions of the Scheme.

The effect of the resolutions, if valid, would thus have been to impose upon the development of Nos. 8, 10 and 12 Wentworth Street, restrictions additional to those contained in the Scheme itself: and although the Council could remove them at any time at or before an application for building permission was sought, their Lordships would accept that

the existence of valid regulations in the terms of those passed by the Council on 10 June, 1974, would reduce the market value of No. 8 as land ripe for development.

However, by the end of September, 1975, the resolutions had been held by Mr. Justice Wootten to be invalid; but Dr. Dunlop did not sell No. 8 Wentworth Street until some two years after their invalidity had been established and the value of his property restored. His claim for damages was accordingly based on the contention that during the period between the passing of the resolutions and the date on which the declaration of their invalidity by Wootten J. was no longer subject to appeal, he was deprived of the opportunity of selling his property at its true value. The property had been bought by him on overdraft and he claims as damages monies paid during that period by way of interest on the overdraft and rates and taxes on the property, together with a small sum paid to his architect for examining whether a viable development of the property in conformity with the resolutions was possible.

Mr. Justice Yeldham did not find it necessary to decide whether Dr. Dunlop had proved that he had in fact suffered any damage, even upon this basis. The bottom had dropped out of the property market in 1974 and he did not in fact find a purchaser at a price that he was willing to accept until August, 1977, despite the continuing overdraft charges and rates and taxes. The learned judge was satisfied that even if some *damnum* could have been established it would have been *damnum sine injuria*. Since, as will appear, their Lordships agree with him that no actionable wrong on the part of the Council had been established, they do not find it necessary to decide whether or not the persuasive argument on behalf of the Council that Dr. Dunlop failed to prove that he had suffered any damage, let alone any inevitable damage, as a result of the passing of the resolutions, ought to be accepted.

Their Lordships accordingly now turn to the paragraphs of the Statement of Claim which contain the three different ways in Dr. Dunlop's cause of action is put. [Paragraph 10 has been omitted; it contained an allegation of *mala fides* which was not open to Dr. Dunlop because of the issue estoppel resulting from Mr. Justice Wootten's judgment, and was very properly abandoned.]

> "9. On 10th June 1974 the defendant unlawfully and intentionally passed certain resolutions in respect of the 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.
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> 11. The resolution as to the number of storeys on the land was contrary to the Council's prescribed planning scheme ordinance.
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> 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.
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> 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.
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> . . . . . .

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 Parts XI and XIIA of the Local Government Act in dealing with 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 whereby the plaintiff suffered the loss and damage referred to in paragraph above.

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 ratepayers 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."

The Beaudesert claim

Paragraph 13 is clearly based upon the words used by the High Court in *Beaudesert Shire Council v. Smith* (ubi sup. 156) to lay down a broad principle of law which the three members of the court considered could be extracted from eight English cases, mostly old, which they had previously cited:

> ". . . it appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other."

Their Lordships understand that they are not alone in finding difficulty in ascertaining what limits are imposed upon the scope of this innominate tort by the requirements that in order to constitute it the acts of the tort-feasor must be " positive ", having as their " inevitable consequence " harm or loss to the plaintiff and, what is crucial in the instant case, must be " unlawful ". The eight cases referred to as a solid body of authority for the proposition appear to be so miscellaneous in character that they throw no further light upon the matter. Nor, although *Beaudesert* was decided some fourteen years ago, has it been clarified by judicial exegesis in the Australian courts: nor followed in any other common law jurisdiction. It has never been applied in Australia in any subsequent case. In *Kitano v. The Commonwealth* (1973) 129 C.L.R. 151 Mason J., whose reasons for judgment were later adopted by the Full Court, expressed the view that an act done in breach of a statutory duty in respect of which the statute neither expressly nor by implication provides a civil remedy in damages, is not necessarily " unlawful " within the meaning of the *Beaudesert* principle although it clearly is unlawful in the ordinary sense of that term. A plaintiff, said Mason J. at p.175, " must show something over and above what would ground liability for breach of statutory duty if the action were available "—but what that something more was he did not attempt to identify. He held that the plaintiff, Kitano, did not bring himself within the *Beaudesert* principle because *inter alia* " he had not succeeded in showing that the act was tortious (and not merely a contravention of the statute)". In *Grand Central Car Park v. Tivoli Freeholders* [1969] V.R. 62, McInerney, J. held that carrying on a trade without a permit in contravention of a statute did not fall within the epithet " unlawful " in the formulation of the *Beaudesert* principle.

In the instant case Mr. Justice Yeldham did not find it necessary to embark upon a general consideration of what kinds of act were intended

by the authors of the judgment in *Beaudesert* to be included in the expression " unlawful ". The only acts relied on were the passing of two invalid resolutions, so what he was concerned with, and what their Lordships are concerned with, was a specific question: whether an act which in law is null and void and so incapable of affecting any legal rights, is, *for that reason only,* included in that expression. The learned judge found no difficulty in answering that question in the negative. He pointed out that in the *Beaudesert* judgment the principle is stated twice, once before the citation of the old authorities relied on (at p.152) and once after (at p.156) and that in the earlier statement the word " unlawful " is replaced by " forbidden by law ". He went on to cite a number of English cases in which the distinction between unlawfulness or illegality on the one hand and invalidity on the other is clearly drawn. Of these their Lordships need only mention *Mogul Steamship Company Limited v. McGregor, Gow & Co.*, both in the Court of Appeal (1889) 23 Q.B.D.598 and in the House of Lords [1892] A.C.25. The rejection of one of the appellant's arguments in that case turned on this very distinction.

It is true, as Lord Halsbury pointed out in the above-cited case, that prior to 1892 the word " unlawful " had sometimes been used to describe acts that were void and incapable of giving rise to legal right or obligation; but this extended use of the expression he condemned as inaccurate and so far as their Lordships are aware it has not been used in that extended sense in any subsequent English judgments. Their Lordships have no doubt that in using the expression " unlawful " in *Beaudesert* the High Court intended it to be understood in what for the past ninety years has been its only accurate meaning. Their Lordships accordingly agree with Yeldham J. that Dr. Dunlop fails on his *Beaudesert* claim.

Negligence

The basis of Dr. Dunlop's allegation of negligence by the Council in passing the resolution regulating the number of storeys that might be contained in any flat building on Nos. 8, 10 and 12 Wentworth Street at not more than three, was that they owed him a duty to take reasonable care to ascertain whether such a resolution was within their statutory powers. The breach of this duty of care that was alleged was the Council's failure to seek proper detailed legal advice.

After discussing a number of Australian, English and Canadian cases Mr. Justice Yeldham felt considerable doubt, which their Lordships share, as to the existence of any such duty of care owed to Dr. Dunlop, but he found it unnecessary to go into this interesting jurisprudential problem since he was clear that even assuming the existence of such a duty no breach of it had been proved. The Council's resolution of 10 June, 1974, limiting the number of storeys was passed on the initiative and advice of their solicitors, as a lawful means of preventing the erection of residential flat buildings of more than three storeys on the properties in question if they were satisfied that this was desirable on planning grounds. What more could the Council be reasonably expected to do than to obtain the advice of qualified solicitors whose competence they had no reason to doubt? It is true that Mr. Justice Wootten held that the legal advice which the Council had received from their solicitors had been wrong; but it is only fair to the reputation of the solicitors, who gave it, to add that until that judgment made the matter *res judicata* between the parties, the question of law, which turned on the construction to be placed on two clauses in the Planning Scheme and in particular on whether or not a restriction upon the maximum number of storeys in residential flat buildings was inconsistent with a restriction upon the maximum height above sea level of all buildings, was an evenly balanced

one and, in their Lordships' view, to answer it either way at any time before that judgment, could not have amounted to negligence on the part of a solicitor whose advice was sought upon the matter.

As respects the resolution which purported to fix the building lines the only ground on which Mr. Justice Wootten held this to be void was because the Council had failed to give Dr. Dunlop the kind of hearing to which he was entitled before they passed it, and, in particular, because he should have been specifically informed, but was not, that the Council were contemplating exercising their powers under section 308 to fix building lines. This question too was not an easy one, as is shown by the fact that it took Mr. Justice Wootten twenty closely reasoned pages of his judgment and the citation of some two score of authorities to reach the conclusion that he did. Mr. Justice Yeldham held that failure by a public authority to give a person an adequate hearing before deciding to exercise a statutory power in a manner which will affect him or his property, cannot by itself amount to a breach of a duty of care sounding in damages. Their Lordships agree. The effect of the failure is to render the exercise of the power void and the person complaining of the failure is in as good a position as the public authority to know that that is so. He can ignore the purported exercise of the power. It is incapable of affecting his legal rights.

In agreement with Mr. Justice Yeldham their Lordships are of opinion that the claim in negligence fails too.

Abuse of Public Office

In pleading in paragraph 15A of the Statement of Claim that the Council abused their public office and public duty Dr. Dunlop was relying upon the well-established tort of misfeasance by a public officer in the discharge of his public duties. Yeldham J. rightly accepted that the Council as a statutory corporation exercising local governmental functions was a public officer for the purposes of this tort. He cited a number of authorities upon the nature of this tort, to which their Lordships do not find it necessary to refer, for they agree with his conclusion that, in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is capable of amounting to such " misfeasance " as is a necessary element in this tort. So, in their Lordships' view, the claim as framed in paragraph 15A also fails.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs.

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In the Privy Council

ROGER JOHN MASSIE DUNLOP

v.

THE COUNCIL OF THE MUNICIPALITY OF WOOLLAHRA

DELIVERED BY
LORD DIPLOCK

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