Lopez v City of Brighton [1982] VicRp 35; [1982] VR 369 (2 September 1977)

LOPEZ v CITY OF BRIGHTON

SUPREME COURT OF VICTORIA

FULLAGAR, J

5 August, 02 September 1977

Fullagar, J: This is the return of a summons for interlocutory injunctions, interim injunctions having been granted by Mr. Justice Lush on 3 August by orders in which he directed, inter alia, that the plaintiffs serve on that day a summons for interlocutory injunctions returnable on 5 August.

The hearing of the summons commenced before me on Friday 5 August and on that day I extended the interim injunctions of 3 August until after the hearing and determination of the summons or further order. The hearing before me occupied nearly three days, at the end of which I reserved my decision.

In my opinion the summons for interlocutory injunctions should be dismissed with costs.

What the plaintiffs have sought to do by interlocutory injunction is to restrain until trial the vendor (the City of Brighton) and the purchasers (the defendants Nedaalah Pakravan and his wife Nandukht Dughgan Manshdi) from proceeding further under a written contract of sale purportedly made between the vendor and the purchasers on 30 June 1977, and to restrain until trial the vendor from transferring the land, and to restrain until trial the defendant Registrar of Titles from registering any transfer of the land, the subject of the contract of sale. In view of some of the arguments put before me, I should perhaps point out that Mr. Pakravan and Mrs. Manshdi have been at all material times lawfully married to one another, but by the custom or rules of their religion the wife does not take the name of the husband. The land was originally acquired by the City of Brighton for the purposes of a library but is apparently no longer required for those purposes.

Each of the two plaintiffs is a ratepayer and a Councillor of the City of Brighton, and the plaintiff Mrs. Lopez is the Mayoress of the City and the Chairwoman of the Council of the City. I shall proceed upon the footing that each of the two plaintiffs is also an inhabitant of the City of Brighton. The defendants are the City of Brighton (to which I shall refer as "the corporation") and the Registrar of Titles and the two purchasers aforesaid.

It was asserted from the bar table, and it receives some support from the evidence, that the "real reason" why the plaintiffs have sought to prevent the transfer by the municipality of the disputed lands is that the plaintiffs, and (it is said) at least 2000 other ratepayers of the City of Brighton, are of opinion that the "library land" should be put to use as parkland for the benefit of all the citizens of Brighton rather than be sold as residential land. It seems that this suit (the third issue by the plaintiffs in a period of a few months) is only one aspect of a campaign by the plaintiffs and perhaps others to prevent the alienation for private residential purposes of what is in their opinion potential parkland, and I do not for one moment doubt the sincerity of the plaintiffs. But of course this Court cannot decide the case upon any considerations of whether or not use as parkland is preferable or better or wiser, or of greater benefit to the local citizens, than sale for residential purposes. To this Court all such considerations are in my opinion irrelevant, and the summons falls to be decided upon the application of ordinary principles of law and of equity. For reasons given later, I respectfully but absolutely reject the "high constitutional principle" asserted by Lord Denning, MR in R v Greater London Council; Ex parte Blackburn, [1976] 3 All ER 184; [1976] 1 WLR 550, at p. 559, and I am of opinion that the alleged principle is not the law in Victoria or in Australia generally, and that it is not now the law even in England.

By the contract of sale the corporation sold to the purchasers, "all that piece of land being part of Dendy's Crown Special Survey Parish of Moorabbin County of Bourke and being the whole of the land more particularly described in certificates of title Vol. 8501 Folio 940 Vol. 8654 Folios 001 and 002, and Vol.3128 Folio 530, together with all buildings and improvements thereon being the premises known as 39 Carpenter Street Brighton".

At the place of signature, alongside the printed words:--

Vendor(s) or Agent appear the signatures of two Councillors (each beside the typed word "Councillor") and the signature of the Town Clerk above the typed words "Town Clerk of the City of Brighton". The contract is in the form of the 1964 copyright Contract of Sale.

The parcel of land accurately referred to by reference to the above four certificates of title is a parcel on the corner of Carpenter Street and Black Street, Brighton, but the reference to 39 Carpenter Street, Brighton may cause some confusion. It is clear that the corporation intended at all material times to sell the land in the four certificates of title, and it is convenient to refer to the whole of the land in the four certificates as "39 Carpenter Street", and it is clear that that land is on a street corner and has a frontage of 66 feet [20.2 metres] to Carpenter Street and a frontage of 132 feet [40.2 metres] to Black Street. Part of this land, being all the land described in certificate of title vol.3128 Folio 530, has no frontage to Carpenter Street but has a frontage of 46 feet [14 metres] to Black Street by a depth of 66 feet. It is clear that this smaller portion of the whole is sometimes called "number 20 Black Street" and that the larger portion of the whole (the land in the other three certificates) is sometimes called "number 39 Carpenter Street". However, as it is so clear that the Council at all material times intended to sell all the land in the four certificates of title, and as confusion in these reasons should be as far as possible avoided, I shall when referring to the whole composite parcel in all four certificates speak of "the subject land" or of 39 Carpenter Street, and I shall speak of the land in the three certificates of title as "the corner block" and of the land in the one certificate of title as "20 Black Street".

The land known as 20 Black Street is, as above stated, comprised in the one certificate of title, vol.3128 Folio 530, and that certificate shows that the corporation is the registered proprietor of an estate in fee simple in the whole of the land being 20 Black Street. The balance of the subject land, being the corner block, is, although the corporation is the sole owner of the fee simple in it, the subject of the remaining three certificates of title. Of these three certificates of title, Folio 940 shows the corporation is the registered proprietor "of an estate in fee simple in one equal undivided half part or share of all that piece of land" being the corner block, whilst each of Folios 001 and 002 shows the corporation as the registered proprietor "of an estate in fee simple in one equal undivided fourth part or share of all that piece of land".

The main significance of all these title particulars is as follows. The corporation acquired the whole of the subject land, together with other contiguous land fronting Carpenter Street, in about 1971 for the purposes of a new central library pursuant to a resolution of 23 August 1971. On 28 March 1977 it resolved that "the land at the corner of Black/Carpenter Streets" be sold by public tender and that application be made to the Governor in Council for his consent, thereby rendered necessary to the proposed sale: see s236 of the Local Government Act 1958. On or about 27 April 1977 the corporation obtained a written consent of the Governor in Council, signed by His Excellency, and a copy of this consent is interleaved in the contract, but it consents. "to the Council of the City of Brighton selling and conveying the lands described in Certificates of Title vol. 6279 Folio 733, vol.9004 Folio 582, vol.3743 Folio 443, vol.4258 Folio 464, vol.8501 Folio 940 and vol.3128 Folio 530".

The land in Folios 733, 582, 443 and 464 have nothing to do with the contract of sale of the present case, and it will suffice to say that the Council did not accept any tenders in respect of any of the land described in those four folios; and the point about the consent is that it omits all reference to certificates of title vol. 8654 Folios 001 and 002.

One of the numerous arguments put forward for the plaintiffs to support the injunction claimed was that in respect of the corner block the consent did not extend to the sale of more than an estate in fee simple in one equal undivided half part or share of the land, whereas by the contract the corporation purported to sell the whole interest in fee simple in the corner block (as well as in 20 Black Street), and that the contract was thus made ultra vires and/or illegal and/or void by reason of s236 of the Local Government Act 1958. It was further contended that any transfer pursuant to the contract would be likewise ultra vires and/or illegal and/or void. This part of the case of the plaintiffs therefore wears the aspect of a suit to prevent unauthorized alienation of its land by a **municipal corporation**.

One of several answers put forward by Mr. Merralls for the corporation was that the expression in the written consent, "lands described in Certificates of Title" referred not to the estates or interests in land described in the certificates but to the several parcels of land (that is to say, soil and improvements thereon) the estates or interests in which were particularized in the certificates. This answer drew some support perhaps from the fact that s236, rendering the consent necessary, itself refers to "lands" as being something in respect of which the relevant estates are held. But I am of opinion that the proposition must be rejected. In my opinion the natural meaning of the words of the consent in writing, "hereby consent to the Council ... selling and conveying the lands described in Certificates of Title" (etc)--is a consent to the sale and conveyance by the Council of all the interests in land

described in the certificates. I observe that statutory powers of compulsory acquisition of "land" or "lands" have been construed as powers of acquisition, on separate occasions if desired, of various estates or interests in soil and improvements: cf. Roberts v Board of Land and Works, [1965] VicRp 39; [1965] VR 265, at pp. 273-4.

It follows in my opinion that the plaintiffs are correct in their contention that at the time of the contract of sale there was no consent of the Governor in Council to the sale by the corporation of the whole of the corporation's interest in the corner block, but only a consent to the sale and conveyance of one undivided half interest in an estate in fee simple in the land.

It was said on behalf of the defendants that the omission is capable of being remedied ex post facto, by the Governor in Council consenting now to the sale of the subject land by the already-extant contract and to the conveyance of the subject land in the future pursuant to the contract. This proposition was put by way of assertion rather than by reliance upon reported authority, and it is unsatisfactory to have to decide in interlocutory proceedings points that appear from the contentions of the parties to be points of first impression. However, I reject the submission that s236 contemplates ex post facto consent: Gilby v Rush, [1906] 1 Ch 11. But I see no reason in theory why the Governor in council could not, as a matter of law, effectively consent now to a conveyance by way of sale of the whole of the land in all the relevant Certificates of Title. It need not be pursuant to the old written contract of sale at all, if the corporation were to transfer all the intended interests in land to the defendants Pakravan and Manshdi in exchange for a lump sum of money in cash being a total purchase price, that would be both a conveyance and a sale and, provided the Governor in Council assented to the transaction before it took place, so that it took place "with" the required consent, there would be no apparent excess of power by the corporation in so conveying.

Whether this could be done as a matter of practice, however, I do not pause to consider. Doubtless it would require a meeting and a resolution.

For the reasons given I consider that the plaintiffs make out a strong prima facie case that the contract of sale is ultra vires of the corporation and at least voidable by it, and any transfer by the corporation without fresh resolutions and a fresh consent would likewise be ultra vires of the corporation and at least voidable by it. I am prepared to assume (without deciding) that the transfer, without a fresh consent, would be an illegal act prohibited by the Local Government Act 1958 by necessary implication. Upon even this footing however, I accept the primary contentions for the defendant corporation that any wrong committed by the corporation, either by contracting in the past or conveying in the future, was or would be a public wrong and not a private wrong, that neither of the plaintiffs, whether as inhabitant or corporator or ratepayer or councillor or Mayoress, has had any private right of his or hers interfered with, and that neither of the plaintiffs has suffered any special damage peculiar to himself or herself as distinct from a "share of damage" as member of the public, and that each of the plaintiffs is in no danger of having a private right interfered with or of suffering special damage, and that therefore the plaintiffs have no locus standi to bring against the corporation any action in respect of its past or threatened acts unless the Attorney-General is a plaintiff.

The trusts upon which the corporation holds all the relevant land are clearly public trusts, and any breach of trust with respect thereto, such as selling or conveying

without requisite consents or resolutions or meeting-procedures, constitutes a dereliction only of public duty and an injury only to the public.

There is and has been for much longer than 100 years a clear general rule of English law that an action to restrain an injury to the public can be brought only by the Attorney-General, either on his own motion or at the relation of a member or members of the public. In respect of such an injury an individual can sue without the Attorney-General being a plaintiff in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with, and secondly where, although no private right of the plaintiff is interfered with, nevertheless the plaintiff in respect of the contravened right of the public suffers special damage peculiar to himself over the above what he suffers as a member of the public: see Williams' Supreme Court Practice, vol 2, p. 2194 para.[50.6.22]. I leave aside for the moment the complaint of the plaintiffs (later dealt with) that they were wrongfully excluded from a meeting of the Council of the corporation on 30 June 1977 at which resolutions were passed purporting to accept Mr. Pakravan's tender and purporting to authorize execution of a contract of sale to him. Leaving that aside for the moment, I am clearly of opinion that in none of the alleged actions or omissions of the corporation was any private right of the plaintiffs or either of them interfered with, and clearly of opinion that neither of the plaintiffs has suffered, or is in the remotest danger of suffering, any special damage, peculiar to himself or herself, from any possible interference here with public right. Subject therefore to the temporarily expected matter, the plaintiffs have no locus standi to bring the action against the corporation, and they have no cause of action at all against the defendants independent of a cause of action against the corporation; the matters of which they complain against the corporation, including the compliants quia timet, are justiciable by the Court only in an action brought by the Attorney-General, either simpliciter or on the relation of other members of the public.

These conclusions of law in relation to suits against local government corporations are in my opinion compelled by a line of reported decisions which includes the following: Evan v Corporation of Avon (1860) 29 B 144, at pp. 150 and 152; [1860] EngR 1136; 54 ER 581, at pp. 584 and 585; Bradford v Municipality of Brisbane (1901) 11 QLJ 44 (a decision of Sir Samuel Griffith); Watson v Mayor of Hythe (1906) 22 TLR 245; Weir v Fermanagh County Council (1913) 1 IR 193; Qurban v Attorney-General, [1928] SAStRp 75; [1928] SASR 457. The last two cases are most especially informative and clear. The somewhat curious case of Dobson v Shire of Ferntree Gully (1891) 17 VLR 606 should not in my view be treated as inconsistent with the other authorities; I would respectfully agree with Piper, J, who decided Qurban v Attorney-General, supra, that Dobson's Case "in any case is not an authority on a point not mentioned in it". If Dobson's Case were in truth an authority against my conclusion, then I would decline to follow it upon the footing that, so construed, it would be clearly demonstrated to be wrong in principle by the other and later cases to which I have referred.

To adapt to the present case the words of the Lord Chief Baron Palles in Weir's Case, supra, at p. 198, the suit here is to enforce the trusts relating to the corporation's property and to restrain its misapplication or misalienation, and the trust so sought to be enforced is in my opinion plainly a public one. The Lord Chief Baron then proceeded: "The rule in relation to such a suit is unquestioned; the plaintiff, or at least one of the plaintiffs, must be the public, represented by the Crown, which sues by its officer the Attorney-General. In other words, before our Judicature Act, the suit should have been by information, or by information and bill,

and not by bill merely. This rule is adopted from the common law which in the case of an injury to the public--as for instance a ditch being made a athart a public way--gave for remedy originally 'presentment in the leet' for which, later on, the present practice of indictment was substituted; unless to use the words of Lord Coke 'Any man has a particular damage, as if he and his horse fall into the ditch whereby he received hurt and losse, then for this special damage, which is not common to others, he shall have an action on his case'; and the reason of the rule is declared by the Lord Coke to be 'for the avoiding of the suits, for it any one man might have an action, all men might have the like'".

In the same case, at p. 205, Lord Justice Holmes said: "The County Council and the Rural District Council have been called into existence by statute for the purpose of performing many public duties in the County and District, of which not the least important are the maintenance of old roads and the making of new ones. In performing these duties in the manner provided or contemplated by the statute, and the orders and rules made thereunder, they would incur no liability; but they may act in violation or in excess of their authority, in which case the law supplies a remedy to the persons injured thereby. It is, I think, well settled that the nature of the remedy depends upon the character of the injury. If the illegal act causes damage to an individual such as a trespass to his land, he can sue the Council in the same way as he can proceed against any other trespasser; but if the alleged injury is one common to the public generally, or to a special class of the public, the practice has been that the Attorney-General is put in motion by one or more of such public or class to vindicate their rights; and I am of opinion that this is the only legal method in which such rights can be enforced."

In the same case at p. 208, Lord Justice Cherry said of Evan v Corporation of Avon, supra: "That case was decided in 1860, now more than 50 years ago, and its authority has never, so far as I can ascertain, been since questioned. The practice has invariably been to institute such suits in the name of the Attorney-General, at the relation of the person or persons who are interested in the matter. If the plaintiff is right in this case, the Attorney-General was in all these cases an unnecessary party. It is true that there is not to be found in the reports any express decision by the Court of Appeal, or any higher tribunal, that such an action as the present is not maintainable at the instance of an ordinary ratepayer, who does not allege any interest or liability to damage other than what is common to him and all the other ratepayers in the district. This is probably, however, because it has never been argued before such a Court that the action lies. In two cases, to which we have been referred, actions such as the present one were sought to be maintained by individual ratepayers, but in both instances they failed."

In the present case counsel for the plaintiffs relied upon their several characters as inhabitants (and thus corporators as provided by s8 of the Local Government Act 1958), as ratepayers, as Councillors and (in the case of Mrs. Lopez) as Mayoress and Chairwoman of the Council. That the character of inhabitant and corporator gives no sufficient special interest or damage has been decided by Mr. Justice Warrington in Watson v The Mayor of Hythe, supra, applying the reasoning of Sir John Romilly, MR in Evan v Corporation of Avon, supra. That the character of ratepayer is insufficient was decided by the Court of Appeal in Ireland in Weir's Case, supra, and by Stirling, J in England in Holden v Corporation of Bolton (1866) 3 TLR 676. It is in my opinion quite clear on principle that neither membership of nor chairmanship of the Council of the corporation can take either of the plaintiffs out of the rule in the circumstances of the present case.

Mr. Merkel, who appeared with Liddell, QC, for the plaintiffs, referred me to the case of Bradbury v Enfield London Borough Council, [1967] 3 All ER 434; [1967] 1 WLR 1311, but locus standi does not seem to have been there argued or decided. However, he also referred me to the recent decision of the English Court of Appeal in R v Greater London Council; Ex parte Blackburn, [1976] 3 All ER 184; [1976] 1 WLR 550. In that very remarkable case the applicants, who were a husband and wife living together with their children in Chiswick (which is within the area and "jurisdiction" of the defendant corporation), and were thus qualified as "citizens, ratepayers and parents" as stated in the headnote, had obtained leave from the Divisional Court to apply for an order of prohibition against the corporation to prevent it from exercising its film-censorship powers in accordance with a test of obscenity which was wrong in law, and from delegating its film-censorship powers to the British Board of Film Censors. The conduct of the Council which it was thus sought to proscribe had apparently resulted in the past in the public showing, by others, within the municipal area of pornographic cinematograph films. On appeal, the Master of the Rolls (Lord Denning) described those films as "grossly indecent", and as "an offence against the common law of England", epithets suggestive to an Australian lawyer that their publication was a public wrong which could be not merely punished but also enjoined at the suit of the Attorney-General. Indeed, the report directly suggests the publication was a breach of the criminal law. Lord Denning said at [1976] 3 All ER p. 192; [1976] 1 WLR pp. 559-60 that the plaintiffs had made out their case because the corporation in exercising their censorship powers, "have been applying a test which is wrong in law. If they continue with their present wrong test and in consequence give their consent to films which are grossly indecent, they may be said to be aiding and abetting a criminal offence. In these circumstances, this Court can and should issue an order of prohibition to stop them."

On the question of locus standi, Lord Denning held that the male plaintiff had a sufficient interest because "Mr. Blackburn is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films". His Lordship held that there was a high constitutional principle, stated by himself in McWhirter's Case [1973] 1 All ER 689, and re-stated in slightly different terms as follows in Blackburn's Case at [1976] 3 All ER p. 192; [1976] 1 WLR p. 559: "I regard it as a matter of high constitutional principle that if there is good ground for supposing that a Government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any of those offended or injured can draw it to the attention of the Courts of law and seek to have the law enforced, and the Courts in their discretion can grant whatever remedy is appropriate."

Stephenson, LJ held there was locus standi in the plaintiffs in one sentence:

"They live in the Council's jurisdiction and have locus standi, Mrs. Blackburn is a ratepayer."

Bridge, LJ said: "I agree that Mrs. Blackburn has sufficient locus standi, as a ratepayer."

McWhirter's Case itself is not directly in point on the question of locus standi. In that case, as in Blackburn's Case, not one of the long line of decisions from which I have selected six as decisive of the present case was either cited to the Court of Appeal or referred to by any of its members.

It has been indicated in the High Court of Australia that, as a general rule, a single judge of a State Supreme Court should follow the English Court of Appeal upon a point of law clearly decided by it which is not the subject of a decision by the State Full Court or the High Court of Australia. The present case is, in my opinion, an exception which proves the general rule.

In the first place the "high constitutional principle" asserted by the Court of Appeal in Blackburn's Case has no fixed content and leaves it to the individual judge to decide upon no fixed legal rules or criteria, whether the illegal activity is carried out in a way which "offends or injures thousands of Her Majesty's subjects." Secondly, the application of the alleged principle to Blackburn's Case itself appears to me (with respect) to run directly counter to a line of English and Irish decisions of high authority and convincing logic, and of impressive antiquity and undeniable uniformity. Thirdly, none of the relevant decisions on locus standi was either cited to the Court of Appeal or referred to by its members, and its members purported to decide the point by mere brief assertion of the alleged high principle. Fourthly, there are strong obiter dicta in the High Court of Australia which, whilst not purporting to decide the question, point strongly against the existence in Australia of the alleged constitutional principle, and strongly in favour of the necessity for the plaintiffs to show here, in circumstances like the present, some interest and damage peculiar to themselves and beyond that enjoyed or suffered in common with all other members of the public or of a section of the public. See for example Thompson v The Council of the Municipality of Randwick [1953] HCA 75; (1953) 90 CLR 449 especially at p. 456, and I reiterate that the judgment in the Queensland case above referred to of Bradford v Municipality of Brisbane (1901) 11 QLJ 44 was delivered by Sir Samuel Griffith who became Chief Justice of the High Court of Australia. Finally, Mr. Merralls for the defendant corporation referred me to the very recent decision of the House of Lords in Post Office Engineering Union v Gouriet, so far reported only in the "Times" newspaper of 27 July 1977, and the House of Lords in that case delivered a decision which in my opinion involves a rejection and overruling of the alleged high constitutional principle which had been asserted by the Court of Appeal. In the course of a speech trenchantly critical of the approach of the Court of Appeal in Gouriet's Case itself, Lord Wilberforce is reported to have said: "That it is the exclusive right of the Attorney-General to represent the public interest ... is not technical, nor procedural, nor fictional. It is constitutional. It is also wise."

(See now [1977] UKHL 5; [1978] AC 435, at p. 481).

In my opinion the plaintiffs in the present case have no locus standi to restrain the corporation from conveying all the land contracted to be sold, whether purportedly pursuant to the contract or otherwise, unless and until the Attorney-General joins as a plaintiff. Accordingly the plaintiffs make out no prima facie case for equitable relief. I do not think that this is a proper case to adjourn for a period to allow the plaintiffs to seek the joinder of the Attorney-General in this or a new action: the present plaintiffs have had ample opportunity to do that, as Mr. Merralls for the defendant corporation raised the argument of locus standi at the very threshold. See the last paragraph in the judgment of the Lord Chief Baron Palles in Weir's Case, [1913] 1 IR, at p. 203 and cf. the last paragraph of the judgment of Piper, J in Qurban's Case, [1928] SASR, at pp. 469-70, and the last paragraph in the judgment of Griffith, CJ all in Bradford v Municipality of Brisbane, supra.

[His Honour then went on to consider other grounds put forward by the plaintiffs for the injunctions sought, but held that they all came down in the end to an attempt to

prevent the misalienation of the **municipal corporation**'s property, and that the absence of locus standi was fatal to all of them and to the action as a whole.]

The orders of the Court will be:--

1. Summons for interlocutory injunctions dismissed.

2. Interim injunctions discharged.

Orders accordingly.

Solicitors for the plaintiffs: Kenna, Croxford and Co.
Solicitors for the defendant: CWK Pearson and Sons.
