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SPONG v. SPONG.

Rich J.

The facts in this case to which the Chief Justice has referred establish the existence of such a fiduciary relation as justified *Hood* J. in inferring undue influence. The evidence given on behalf of the defendant does not, in my opinion, rebut that presumption.

The respondent undertaking at the appellant's costs to do all necessary acts to reinstate the lease of 1*st December* 1909 *for the residue of the term thereof, appeal dismissed with costs.*

Solicitor, for the appellant, *Charles Barnett.*
Solicitor, for the respondent, *C. J. McFarlane.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (ON THE RELATION OF BRADLEY) . . . . . PLAINTIFF, } APPELLANT;

AND

THE MAYOR &c. OF THE CITY OF GEELONG AND OTHERS . . . DEFENDANTS, } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 7, 8.

Local Government—Power of corporation—Contract—Expenditure—Condition precedent—Estimate of expenditure—Rate—Geelong Corporation Act 1849 (*N.S.W.*) (13 *Vict. No.* 40), *sec.* 5—*Melbourne Corporation Act* 1842 (*N.S.W.*) (6 *Vict. No.* 7), *secs.* 1, 67, 98.

Griffith C.J., Barton, Gavan Duffy, Powers and Rich JJ.

The respondents, a municipal corporation, were governed by the Act 6 Vict. No. 7 (N.S.W.), sec. 67 of which provides that the annual income of the corporation from property or dues shall be carried to an account called

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the "town fund," which is to be applied towards various specified purposes, including "the expense of purchasing or erecting and maintaining the corporate and other buildings which may belong to the said corporation, and towards the payment of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act." The section then provides that the Council of the corporation "is hereby authorized and required from time to time to estimate as correctly as may be what amount in addition to such fund will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this Act." It then goes on to provide that in order to raise the amount so estimated the Council is "authorized and required from time to time" to levy a rate.

Held, that the respondents had authority to enter into a contract for the purpose of altering a building purchased by them and adapting it for use as a town hall.

Held, also, that the estimate required by sec. 67 to be made is limited to an estimate of the amount which will become payable during the year for which the rate is to be levied, and therefore that the fact that the Council had not made an estimate of the amount proposed to be expended in making such alterations was not a bar to the Council entering into the contract to make them, or expending money upon making them out of any surplus funds in hand or moneys raised by way of loan under sec. 98.

Decision of the Supreme Court of Victoria: *Attorney-General (ex relatione Bradley)* v. *Mayor &c. of Geelong*, (1914) V.L.R., 545; 36 A.L.T., 102, affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by the Attorney-General for Victoria, on the relation of William Warrington Bradley, against the corporation of the City of Geelong and the members of the Council of that corporation, in which by the statement of claim it was alleged (*inter alia*) that the Council had on 23rd February 1914 passed a resolution purporting to authorize the calling of tenders and entering into a contract for the alteration of a building which the corporation had purchased so as to adapt it to the purposes of a city hall, municipal chambers, &c., which work a sub-committee had estimated would cost about £11,990; that advertisements calling for such tenders, stating that they would close on 29th June 1914, had been subsequently published; that on 23rd February 1914 the Council had published an estimate of revenue and expenditure for the year 1914 which contained no provision for expenditure in

connection with the above-mentioned alterations, and that the Council had levied a rate based on such estimate. The plaintiff claimed a declaration that the defendants were not authorized by the Acts of Parliament relating to the defendant corporation to enter into any contract for the carrying out of the proposed alterations or to expend any part of the town fund of the defendant corporation upon them, and an injunction restraining the defendants from accepting any tender or entering into any contract for carrying out the work or expending any of the town fund upon it.

The plaintiff moved for an interlocutory injunction in terms of the injunction claimed by the statement of claim. The motion having been referred to the Full Court was dismissed: *Attorney-General (ex relatione Bradley)* v. *Mayor &c. of Geelong* (1).

From that decision the plaintiff now, by leave, appealed to the High Court.

Mitchell K.C. and Sir *William Irvine* K.C. (with them *Sanderson*), for the appellant. The respondents have not expressly given to them a general power to enter into contracts. Any implied power they may have can only be exercised subject to conditions. Under sec. 67 of the Act 6 Vict. No. 7 the power to incur liabilities cannot be exercised without first making an estimate of the proposed expenditure: *Woods* v. *Reed* (2); *Attorney-General* v. *Mayor &c. of St. Kilda* (3); *Attorney-General* v. *Shire of Kyneton* (4); *Attorney-General* v. *Shire of Wimmera* (5); *Baroness Wenlock* v. *River Dee Co.* (6); *Halsbury's Laws of England*, vol. VIII., p. 359, note. The expenditure referred to in sec. 67 is limited to the year in respect of which the estimate is made, and the section cannot impliedly authorize a contract to be made which will involve payments in future years. Otherwise the respondents might render themselves liable for money as to which they should exercise their power of borrowing under sec. 98.

Starke (with him *Latham*), for the respondents. Sec. 1 of 6

(1) (1914) V.L.R., 545; 36 A.L.T., 102.
(2) 2 M. & W., 777.
(3) 6 W.W. & aB. (Eq.), 141.
(4) 1 V.L.R. (Eq.), 269.
(5) 6 V.L.R. (Eq.), 24; 1 A.L.T., 125.
(6) 10 App. Cas., 354.

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Vict. No. 7 not only gives a status but grants a capacity, and involved in that capacity is the power to do what the respondents are doing here. Sec. 67 puts no restriction upon that power. The only effect sec. 67 might have would be to invalidate a rate made for the purpose of making any payments under the proposed contract if no estimate were first made. But any money in the town fund including any excess of rates and money borrowed under sec. 98 might be used for such payments. [They were stopped.]

Mitchell K.C., in reply. The injunction should in any event go as to expending any money until provision has been made for the expenditure by an estimate.

GRIFFITH C.J. This is an action brought by the Attorney-General for Victoria at the instance of a ratepayer of the City of Geelong for an injunction to restrain the corporation of that city from entering into a contract for carrying out certain alterations and improvements in a building recently purchased by them in order to convert it into a town hall and municipal offices, and from expending any part of the town fund for that purpose. We are told that it is estimated that the proposed alterations will cost about £11,000 or £12,000. It is contended that the respondents have no power to enter into such a contract at all, and alternatively that they have no such power under the existing circumstances, that is, until certain preliminary conditions have been complied with.

The respondents were incorporated under an Act of New South Wales passed in 1849, 13 Vict. No. 40, by which the provisions of the Act 6 Vict. No. 7, by which the corporation of Melbourne was created, were adopted.

The rule as to the extent of the powers of corporations created by Act of Parliament was settled by the cases in the House of Lords of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1) and *Attorney-General* v. *Great Eastern Railway Co.* (2), as was pointed out by Lord *Halsbury* L.C. in *London County Council* v. *Attorney-General* (3). The rule there laid down is shortly stated

(1) L.R. 7 H.L., 653. (2) 5 App. Cas., 473.
(3) (1902) A.C., 165, at p. 167.

by Lord *Watson* in *Baroness Wenlock* v. *River Dee Co.* (1) as follows:—"Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions." The appellant's argument in this case is founded upon sec. 67 of the Act, which provides that the annual income of the corporation from property or dues shall be carried to an account called the "town fund," which is to be applied towards various specified purposes, including "the expense of purchasing or erecting and maintaining the corporate and other buildings which may belong to the said corporation, and towards the payment of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act." Stopping there for a moment, it appears by reasonable, and indeed necessary, implication that, since the "town fund" may be lawfully applied in paying the expenses of purchasing or erecting corporation buildings, which certainly include a town hall, the corporation have power either to purchase or to erect such buildings. In the case of purchase this power necessarily implies a power to enter into a contract of purchase, in which the payment of the price need not necessarily be by cash in a lump sum, but may be extended over a term of years. So in the case of erection it is a reasonable, if not necessary, implication that the corporation may adopt the usual methods adopted by persons who desire to have a building erected for themselves, of which calling for tenders and entering into a contract with builders is a familiar instance. Nor is there any doubt that this was an equally familiar method in Australia in 1842, and in England in 1835 when the Act 6 Will. IV. c. 76, from which sec. 67 is taken, was passed. It is not disputed that a power to purchase or erect corporation buildings includes a power to make a purchased building better adapted to the

(1) 10 App. Cas., 354, at p. 362.

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Griffith C.J.

purposes of a town hall. The objection to the power to make a contract for such a purpose in the abstract therefore fails.

The alternative objection depends upon other provisions of sec. 67, which goes on to provide: "and the said Council is hereby authorized and required from time to time to estimate as correctly as may be what amount in addition to such fund will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this Act." In order to raise the amount so estimated the Council is then authorized to levy a rate. The intention of the English Act was apparently to introduce in a modified form the parliamentary system of estimates and to require the estimates of expenditure to be approved before levying a rate to defray it.

In *Woods* v. *Reed* (1) it was held on the construction of these provisions that a town council had no power to levy a retrospective rate. The rate the validity of which was there in question was a rate to defray expenditure which had been payable in preceding years, and the Court of Exchequer thought that that was not consistent with the section. The substance of the provision is to require that approved estimates of expenditure shall precede the levying of a rate. In the present case no estimates of expenditure comprising the probable expenditure under the proposed contract have been approved by the defendants, and it is contended that this omission is a bar to the exercise of any power which they otherwise might have to enter into the contract. It is, however, tolerably clear that the estimate of expenditure, which is to be made from time to time, is an estimate for the year for which the rate is to be levied, and that, as in the case of parliamentary estimates, it need not include anything more than the estimated amount which will become payable during that year. When this is borne in mind it appears clear that the provision is irrelevant as well to the exercise as to the existence of the power. *Non constat* that any expenditure that may need to be made during the present year will have to be defrayed from rates at all. The defendants may have in hand surplus funds sufficient to defray it, or they may raise the money by way of loan under sec. 98 of the Act. The fullest

(1) 2 M. & W., 777.

effect, therefore, that can be given to the argument is that the defendants will not be authorized to levy a rate for the purpose of defraying any expenditure under the contract during the present year until they have formally adopted an estimate of that expenditure. It would be futile to grant an injunction for such a purpose.

I should add for myself that the case of *Woods* v. *Reed* (1) does not decide that no money can be lawfully expended by a town council before the estimate has been adopted. Expenditure begins on 1st January, whereas the estimate will not in all probability be adopted until a much later date. The whole year is to be taken together, and the rate for the year is to defray the expenditure for the year, whether incurred before or after the estimate is formally adopted.

For these reasons I think that the appeal fails.

BARTON J. I concur.

GAVAN DUFFY J. I agree that the appeal should be dismissed.

POWERS J. I concur.

RICH J. I concur.

Appeal dismissed with costs.

Solicitor, for the appellant, *James Wighton.*
Solicitors, for the respondents, *Harwood & Pincott.*

B. L.

(1) 2 M. & W., 777.