[HIGH COURT OF AUSTRALIA.]

THE MAYOR, COUNCILLORS AND BURGESSES OF THE TOWN OF WILLIAMSTOWN . . . . . Appellants;
Plaintiffs,

AND

BOX . . . . . Respondent.
Defendant,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 21, 24, 25, 27.

Isaacs, Higgins and Gavan Duffy JJ.

Local Government—Municipality—Contract—Formation—Contract barring action—Test case—Evidence.

In an action by a municipality against an owner of land abutting on a street set out on private land to recover part of the cost of making the street, the defendant alleged, as an answer to the claim, an agreement between the municipality and him that the question of his liability should depend on the result of an action brought by the municipality against another owner of land abutting on the same street, and that that action had been decided in favour of that other owner.

Held, by *Isaacs* and *Higgins* JJ., that the evidence did not establish any such agreement as that alleged binding upon the municipality.

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

In an act on brought in the County Court at Melbourne by the Mayor, Councillors and Burgesses of the Town of Williamstown (hereinafter called the Municipality) against Percy Harold Box, the plaintiffs by their plaint demanded from the defendant the sum of £16 17s. 4d., being the amount apportioned by the Council of the

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Municipality as payable by the defendant and for which he was liable on the scheme of distribution adopted by the Council of the cost of constructing a street known as Home Road and set out on private property, on which the defendant's land abutted; and also £2 15s. 9d. for interest on that sum at the rate of 6 per cent. per annum, as provided by sec. 533 of the Local Government Acts of 1903 and 1915, between 26th May 1914 and 26th May 1917. Alternatively, the plaintiffs demanded from the defendant the sum of £4 4s. 6d., being three yearly instalments of £1 8s. 2d. each, for the years ending 17th February in each of the years 1915, 1916 and 1917, of a special improvement charge due on the defendant's property for constructing the street known as Home Road, and being the proportion due by him of the total amount of the charge due on the property, namely, the sum of £16 17s. 4d.; and also £2 15s. 9d. for interest on the sum of £16 17s. 4d. at the rate of 6 per cent. per annum, as provided by Part XII. of the Local Government Acts of 1903 and 1915 between 17th February 1914 and 19th June 1917. By his defence the defendant challenged the validity of the scheme of distribution and of the special improvement charge, alleging (*inter alia*) that Home Road was a public highway and was under the care and management of the Council of the Municipality, and that certain formalities had not been complied with. He also alleged as to each of the alternative claims that it was agreed between the plaintiffs and the defendant that the question of the defendant's liability should be governed by the decision in a test case of Mayor &c. of Williamstown against Spear, and that such case was decided in favour of the defendant Spear by the Full Court of the Supreme Court. (See *Spear* v. *Williamstown Corporation* (1).)

As to the alleged agreement it appeared that a body called the Newport Special Improvement Charge Committee had been formed to contest the liability of the persons affected by the special improvement charge in question in this action. This Committee comprised almost all of the owners of land abutting on Home Road and River Street, which were the streets with the construction of which the scheme of distribution and the special improvement charge dealt, and the defendant Box was its secretary. The facts relied upon as

(1) (1916) V.L.R., 96; 37 A.L.T., 170.

evidencing the alleged agreement between the plaintiffs and the defendant are sufficiently set out in the judgment of *Isaacs* and *Higgins* JJ. hereunder.

The learned Judge of the County Court gave judgment for the plaintiffs upon the first of the two alternative claims, and he also found that there was an agreement between the parties which, in the events which had happened, barred the second of those claims. From that decision the defendant appealed to the Supreme Court, and the Full Court allowed the appeal, holding that the agreement extended to and barred both of the alternative claims.

From that decision the plaintiffs now, by special leave, appealed to the High Court. Towards the close of the arguments in the High Court the Court intimated that, in the event of their deciding that there was no binding agreement as alleged by the respondent, in their opinion it would be advisable for the parties to consent to judgment being given for the appellants upon the second alternative claim. In accordance with that intimation the parties consented to such a judgment being given. It therefore became unnecessary for the Court to deal with the question of the liability of the respondent apart from the alleged agreement. The arguments upon that question are consequently not material to this report.

H. I. Cohen, for the appellants. There was no agreement which bound the appellants not to take the present proceedings against the respondent. The agreement which the evidence proves is vague and indefinite as to parties and subject matter, and as to the extent to which it was to be binding. There was no consideration for it. It is not sufficient that the parties agreed that there should be a test case, but it must be shown of what that case was to be a test (*Bennett* v. *Lord Bury* (1); *Amos* v. *Chadwick* (2)). A test case does not necessarily mean a case the decision in which will be binding upon all parties. The agreement was not made in such a manner as to bind the appellants. The powers of a municipality to make a contract must be found in the Statute creating it (*Baroness Wenlock* v. *River Dee Co.* (3)). This agreement was not within sec. 455 or sec. 458 of the *Local Government Act* 1915.

(1) 5 C.P.D., 339. (2) 4 Ch. D., 869. (3) 36 Ch. D., 674.

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Schutt, for the respondent. There was an agreement binding on the appellants and the Committee, of which the respondent was a member, that one case should be proceeded with in respect of each street, and the case in respect of Home Road was proceeded with and decided against the Municipality. The question of the fact of the agreement being made was decided in the County Court, and there was no appeal from that decision. It became then a question of law on the findings of the County Court Judge, whether the agreement applied to the distribution charge as well as to the special improvement charge. On that question the decision of the Supreme Court was right. A municipality, being created a corporation by sec. 8 of the *Local Government Act* 1915, has all the powers of a corporation at common law except so far as those powers are limited by the Act. One of those powers is to make a contract for the purpose of compromising litigation (*Attorney-General* v. *Gaskill* (1); *Halsbury's Laws of England*, vol. XIX., p. 268; *Williams* v. *Barmouth Urban District Council* (2)).

[ISAACS J. referred to *Burgess* v. *Northwich Local Board* (3).

[HIGGINS J. referred to *In re Norwich Provident Insurance Society*; *Bath's Case* (4).]

H. I. Cohen, in reply.

Cur. adv. vult.

March 27. The judgment of ISAACS and HIGGINS JJ., which was read by ISAACS J., was as follows :—

This is an appeal from a decision of the Supreme Court directing a judgment for the respondent. The appellant Municipality sued the respondent to recover moneys alleged to be due under the *Local Government Act*. The Municipality had two alternative claims, one being rested on a scheme of distribution under Part XVIII. of the Act and the other on a special improvement charge under Part XXXVI. The action was originally tried in the County Court, where judgment was given on the first alternative claim, the learned Judge holding also that there was an agreement which in the

(1) 22 Ch. D., 537.
(2) 77 L.T., 383.
(3) 6 Q.B.D., 264, at p. 276.
(4) 8 Ch. D., 334.

events that had happened barred the second alternative claim. The present respondent, Box, appealed to the Supreme Court, which held that the agreement extended to both claims and barred both.

After considerable argument in this Court, the parties have very wisely, both for themselves and for others concerned, agreed, if the Court thinks there is no binding agreement as alleged, to settle the litigation between themselves on the terms to be presently stated. And as there are somewhere about 120 to 130 persons against whom similar claims may be made, and in view of the great desirability of ending litigation and disputes that have been extending over several years, we think it is our duty to express authoritatively the definite opinion we have formed on the question of the agreement. There have been two different findings by the two Courts, and the real meaning and effect of what took place with regard to it has been so much a matter of controversy and doubt that we feel it would be an encouragement to further litigation if we were to refrain from expressing authoritatively our view, seeing how thoroughly and exhaustively it has been contested and argued.

In our opinion there was no binding agreement at all. The whole arrangement, though very sensible and expedient from the standpoint of not launching one hundred and thirty actions at once before the position could be ascertained in one or two, was nothing more than a loose practical business arrangement. Not a word was said about the Council being bound. No doubt the owners felt desirous, and perhaps expressed their intention, of accepting individually the result of one thoroughly fought action. But as for the Council being bound, there is not a trace of any such expression in the evidence. The whole transaction was of the most informal character. No legal advice was taken as to the legality or form of such an agreement. No statement was made as to the points in dispute, whether total liability was denied, or whether the objection was to formalities. No questions were asked as to the authority to bind the various owners given by them to the members of the Committee who met the Finance Committee of the Council. It does not appear even now that all the owners were members of the Committee, or would be bound if the decision of *Spear's Case* had been the other way: and, worse than all, the one condition on which the supposed bargain rested, namely,

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what test action or actions should be brought, is of the most unsatisfactory and diverse character. As a basis for a loose business arrangement leaving room for subsequent consideration, it is understandable; as a strict condition for a most unusual and questionable bargain, it is extraordinary. The Town Clerk says he never heard of such a bargain. The witnesses for the defence give very vague testimony on the subject:—Lydiate says the arrangement was to take one or two from each street. Box says it was to summon one or two. Hoyle says it was to summon two, one only in each street. Bliss says it was to take one or two to represent the whole of the residents. Roger says it was one from each street, and make that do for the decision of the rest.

The report of the Finance Committee was made on 15th September 1914, and is found in Exhibit No. 8, and is as follows:—"The Committee report that a deputation consisting of Messrs. Box, Hoyle, Lydiate and Bliss waited upon them, and asked that, instead of prosecuting all the property owners in River Street and Home Road for the recovery of charges for constructing the streets, one case only be taken, when the result would be accepted by all. The Committee decided that at least two cases should be proceeded with, one in Home Road and one in River Street, and that a ballot of all the names should be taken to determine the persons to be proceeded against." Speaking of the property owners, it will be observed that it says they desired that "one case only be taken, when the result would be accepted by all"; but that the Committee decided that "at least two cases" should be proceeded with, one in Home Road and one in River Street. This recommendation, which is that "at least two cases" be proceeded with, was adopted by the Council; and this is the only pretence for saying the Council made the alleged contract. It is clear that to resolve that "at least two cases" be taken without even using or adopting the expression "test cases" does not support the defence set out.

The adoption of the report took place on 22nd September 1914, and it was decided to select the favoured objects of litigation by drawing names from a hat. Only one drawing took place, no distinction being made as to streets. It was—as it now appears—Spear's good fortune to have his name drawn. Another name was

also drawn, but, as that was the name of a widow, she was not proceeded against. What then seemed her good fortune is now, to say the least, questionable. In the end, Spear's was the only action gone on with. Having regard to the evidence adverted to, and to the newspaper report of 25th September 1914, it seems very clear that there was no intention of making a binding contract, but merely of coming to some interim businesslike and inexpensive way of dealing with the situation. What was done would enable the position to be cleared up sufficiently as to all aspects of both streets, and to enable everybody to come to a definite understanding or course of action. But that course of action was not finally determined beforehand. There was no such agreement as is set up.

The finding as to agreement being cleared out of the way, there remains only the question of liability, on the facts that occurred. As to this the parties have consented to the following order: (1) That the appeal be allowed; (2) that the judgment of the County Court be varied by substituting the second alternative and entering judgment in that Court for the amount claimed and interest under the claim in respect of the special improvement charge; (3) that each party shall bear its and his own costs respectively in all Courts. That renders it unnecessary to express any opinion on the many questions of law raised on the appeal.

GAVAN DUFFY J. read the following judgment:—

I assent to judgment being entered in accordance with the agreement of the parties. I shall say nothing more, because I do not desire to express an opinion which would have no judicial force.

By consent, appeal allowed; judgment of County Court varied by substituting the second alternative and entering judgment for the amount claimed and interest under claim in respect of the special improvement charge; each party to abide its and his own costs respectively in all Courts.

Solicitor for the appellants, *James Hall.*

Solicitors for the respondent, *D. H. Herald & Son.*

B. L.