[HIGH COURT OF AUSTRALIA.]

THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF BRUNSWICK . . } APPELLANT;
RESPONDENT,

AND

STEWART . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 20, 21; *Mar.* 28.

Rich A.C.J., Starke and Williams JJ.

Local Government—By-laws—Validity—Interpretation—Power to regulate and restrain—Ambit of power—Local Government Act 1928 (*Vict.*) (*No.* 3720), *sec.* 198 (1) (*a*).

The power given to municipalities by sec. 198 (1) (*a*) of the *Local Government Act* 1928 (Vict.) to make by-laws for the purpose of regulating and restraining the erection and construction of buildings, "or for any purpose in connection therewith," includes the power to make a by-law which (1) forbids the erection or alteration of a building until the builder has obtained the municipal surveyor's written permit to build (the surveyor being under a duty to give the permit on being satisfied that the provisions of the by-law relating to the presentation of plans and specifications have been complied with, and not being invested with an absolute discretion to grant or refuse the permit), and (2) forbids the erection or alteration of any building to be used or occupied, wholly or partly, as flats unless the building "do comply with the . . . conditions . . . (*c*) Such building shall not cover more than three-fifths of the area of the allotment of land on which it is erected. . . . (*e*) No such building shall be erected constructed or altered in an unsewered area."

Decision of the Supreme Court of Victoria (*Lowe* J.) reversed.

APPEAL from the Supreme Court of Victoria.

Elma Stewart, of 24 Albion Street, Surrey Hills, a ratepayer of the Municipality of the City of Brunswick, obtained an order nisi in the Supreme Court of Victoria, calling upon the municipality to show cause why clause 3 of Part II. of its by-law No. 53 should not

be quashed on the ground that it was *ultra vires* the council of the municipality, and why clauses 1, 2 and 5 of by-law No. 90 of the municipality should not be quashed on the grounds that the said clauses and each of them were *ultra vires* the council of the municipality and/or uncertain.

Sec. 198 (1) of the *Local Government Act* 1928 provides, so far as relevant, as follows :—" The council of every municipality with the approval of the Governor in Council may make by-laws for the following purposes or any of them or for any purpose in connexion therewith :—(*a*) Regulating and restraining the erection and construction of buildings, erections or hoardings or of fences abutting or within ten feet of any street or road."

Clause 3 of by-law No. 53 provided : " No builder shall commence any building erection structure or any addition or alteration to any building erection or structure without having first obtained from the surveyor a written permit for the commencement of same or without having first paid the town clerk or any other officer appointed by the council for that purpose such fees as are provided therefor by this by-law." By-law No. 53, of which the foregoing formed part, is the building by-law of the municipality, and consists of a great number of provisions to regulate the building and erection of buildings within the municipality, the effect of which, so far as material, appears from the judgments hereunder.

Clauses 1, 2 and 5 of by-law No. 90, so far as material, were as follows :—" 1. No person shall erect or construct or cause to be erected or constructed any residential flats or any building to be used or occupied wholly or in part as flats nor alter or adapt an existing building to be used or occupied wholly or in part as flats unless such building or buildings when so erected or altered do comply with all the following conditions :—(*a*) Such building or buildings shall be constructed of brick stone concrete or other hard fire-resisting material approved by the surveyor. (*b*) The height of such building shall not be less than two stories nor more than three stories. (*c*) Such building shall not cover more than three-fifths of the area of the allotment of land on which it is erected. (*d*) No flat shall contain a dwelling room of less superficial area than 120 square feet and no such room shall have a smaller dimension than 9 feet. (*e*) No such building shall be erected constructed or altered in an unsewered area. (*f*) Each flat must be in itself a complete dwelling of not less than 800 square feet floor area and shall be provided with all necessary lavatory and sanitary accommodations as may be required in dwelling houses. (*g*) Each flat must have a separate entrance to the open air for the use of the occupants thereof. . . .

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(*j*) Where there is access to any flats through the inside the porch and any stair-landing shall have a total floor area of not less than 64 square feet and the floors of such landings shall be constructed of reinforced concrete of such thickness as may be approved by the surveyor. . . . (*l*) The distance of such building from the building line of the street shall be not less than 10 feet and from any other boundary 2 feet 6 inches. Such distances shall be measured from the point of the greatest projection of the building including eaves. 2. 'Flat' means a suite of two or more rooms occupied or designed or intended or adapted to be occupied as a separate domicile. 'Residential flats' means a building more than one story in height which contains two or more flats. . . . 5. If any person after the coming into force of this by-law erects or constructs adds to or alters or causes to be erected constructed added to or altered any building erection or structure that is erected or used or adapted for use contrary to the provisions of this by-law the council may—(*a*) Give to the owner of such building a notice in writing," &c.

The order nisi came on for hearing before *Lowe* J., who ordered it be made absolute and that the above-mentioned clauses be quashed, on the ground that the by-laws did not come within the ambit of sec. 198 (1) (*a*) of the *Local Government Act* 1928 (Vict.).

The municipality appealed, by special leave, to the High Court.

Ham K.C. (with him *Ellis*), for the appellant. As to by-law 53, *Lowe* J. has separated clause 3 out of the by-law independently of everything else and declared it invalid. He has misconstrued *Swan Hill Corporation* v. *Bradbury* (1). The by-law construed there was different in form. This by-law is not a universal suppression; it merely regulates the erection and construction of buildings. There is nothing wrong generally with the by-law, and it is not a proper test of its validity to pick out one clause and examine it separately. One must look at the whole by-law. It is then apparent there is nothing contained in the by-law which was outside the powers conferred on the municipality. The decision in *Bradbury's Case* (1) is explained by *Dixon* J. (2). He treated the by-law there as a substantial power to prohibit building of any description. As to by-law 90, it is justified under the powers conferred by sec. 198 (1) (*a*) and (3) of the *Local Government Act*. The clauses here are severable. They are not so interwoven as to alter the enactment if a part should be severed (*Olsen* v. *City of Camberwell* (3)). These clauses do not prohibit, but regulate.

(1) (1937) 56 C.L.R. 746.

(2) (1937) 56 C.L.R., at pp. 756, 757.

(3) (1926) V.L.R. 58.

Hudson K.C. (with him *D. M. Campbell*), for the respondent. As to by-law No. 53, the construction and effect of it cannot be distinguished from that considered in *Swan Hill Corporation* v. *Bradbury* (1). The power is contained in sec. 198 (1) (*a*) of the *Local Government Act* 1928. This by-law goes outside that power, because the effect of clause 3 is to permit the council to prohibit absolutely in any case in which it may think fit. The clause is a complete denial of the individual's right to build. The exercise of the powers under the by-law is not controlled by any tests set out in the by-law, and the permit required may be withheld, arbitrarily or at the discretion of the council. Clause 3 is the overriding provision in the by-law No. 53, like the clause quashed in *Bradbury's Case* (2). As to by-law No. 90, the essence of a by-law under sec. 198 (1) and sec. 198 (3) (*a*) (ii) of the *Local Government Act* is that the class of buildings to which it applies should be defined with reasonable certainty. No class is constituted and specified in this by-law. A class involves a classification by reference to some common features or characteristics which the buildings themselves possess, and which enable those falling within the class to be identified. If a building is erected, then one should be able to say whether or not it falls within the class, and whether or not an offence has been committed. Subsequent user cannot be one of the criteria ; features in the building must be distinguished.

[WILLIAMS J. referred to *Attwood* v. *Lamont* (3), approved by *Long Innes* J. in *Marquett* v. *Walsh* (4).]

The blue-pencil rule cannot be used to sever the definition section out of this by-law. It would be a different piece of legislation, as the subject matter would be changed.

[STARKE J. referred to *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (5).]

The definition of flat, moreover, is unreasonable, because it imposes restrictions which the legislature could not be supposed to have given the council power to impose. It would prevent a landowner from building any four-roomed building which might reasonably be used as two residences. The test is the state of mind of the builder, and is not a characteristic of the building. Two buildings identical in structure may fall into different classes, and the essence of a class is that such buildings shall fall into the same class. The definition is also uncertain. Is the use intended by the building owner or the builder to be considered ? The definition is both unreasonable and uncertain because it is impossible for the ordinary man

(1) (1937) 56 C.L.R., at pp. 755, 756, 763.
(2) (1937) 56 C.L.R., at p. 750.
(3) (1920) 3 K.B. 571, at p. 577.
(4) (1929) 29 S.R. (N.S.W.) 298, at p. 311.
(5) (1939) 61 C.L.R. 735, at pp. 772, 773.

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to say what his duties and obligations are. There may be clear cases where the buildings fall within the definition, but there are many which may or may not fall within it, depending on the intended user by either the builder or the building owner. Alternatively, the words " nor alter or adapt any existing building to be used or occupied wholly or in part as flats " are in excess of the power, and to this extent clause 1 is invalid. Sec. 198 (1) of the *Local Government Act* 1928 must be confined to buildings not in existence when the by-law came into operation, and does not extend to alteration of existing buildings. The acts of erecting and constructing buildings must be the ones regulated. Construction refers to the type of material used (*Ingwersen* v. *Borough of Ringwood* (1)). [Counsel referred to the *Local Government Act* 1928, sec. 197 (5) (*b*) and Thirteenth Schedule, Part I., clauses 30 and 33.] Whether sec. 198 (1) extends to alterations of existing buildings or not, sec. 198 (3) (*b*), (*c*) and (*d*) are confined to buildings and dwellings erected after the coming into operation of the by-law. In so far as clause 1 of by-law 90 depends on these sub-sections, the clause must fail as to alterations to existing buildings. The sub-clauses *a*, *b*, *c*, *e*, *f* and *j* are bad because they are oppressive and unreasonable (*Ingwersen* v. *Borough of Ringwood* (2) ; *R.* v. *Broad* (3) ; *Dewar* v. *Shire of Braybrook* (4)). As to the existing prescription of areas, this is in excess of power and is invalid and also void for uncertainty (*Shaw* v. *City of Essendon* (5) ; *Stewart* v. *City of Essendon* (6) ; *Corless* v. *City of Richmond* (7) ; *Wansbrough* v. *City of Camberwell* (8)). " Allotment " of land is quite an uncertain quantity. How is it to be determined : by ownership, fences, or plan of subdivision ? It is not a regulation of the act of building to prohibit building in a particular area. *Country Roads Board* v. *Neale Ads Pty. Ltd.* (9) was decided upon a power to prohibit. If any portion of clause 1 is invalid, then the whole by-law must go (*Olsen* v. *City of Camberwell* (10)). Is the by-law with the invalid portion omitted so substantially different, as to the subject matter dealt with, that the by-law making authority would not have enacted it ? The difficulty is in finding some test for determining whether the authority would have enacted the valid portion (*In re By-Law No. XXIII. of the Corporation of the Town of Glenelg* ; *Ex parte Madigan* (11)). The provisions in all the sub-clauses in this by-law are so interwoven that, if you remove one,

(1) (1926) V.L.R. 551.
(2) (1926) V.L.R., at p. 558.
(3) (1915) A.C. 1110, at p. 1122.
(4) (1926) V.L.R. 201, at p. 205.
(5) (1926) V.L.R. 461, at p. 465.
(6) (1924) V.L.R. 219.
(7) (1924) V.L.R. 408.
(8) (1925) V.L.R. 19.
(9) (1930) 43 C.L.R. 126.
(10) (1926) V.L.R. 58.
(11) (1927) S.A.S.R. 85, at pp. 92, 96, 105.

then you alter the whole subject matter of the by-law. The blue-pencil test is not the test. There are many reasons why the test in contract is not applied to by-laws. The rule in contract is set out in *Halsbury's Laws of England*, 2nd ed., vol. 32, p. 429. Even on that test here, the by-law could not be severed.

Ham K.C., in reply. The words "regulating and restraining the erection and construction of buildings erections or hoardings" do not apply to new buildings only (*Hoddinott* v. *Newton Chambers & Co. Ltd.* (1)). Allotments must be set out on the plan of subdivision (sec. 568 (2) (*a*) (i) and sec. 558 (1) of the *Local Government Act* 1928). The sub-clause in clause 1 of by-law 90 is severable. In *Melbourne Corporation* v. *Barry* (2) there was a complete prohibition.

Cur. adv. vult.

Mar. 28.

The following written judgments were delivered :—

RICH A.C.J. This is an appeal from a judgment of *Lowe* J. quashing clause 3 of Part II. of by-law 53 and clauses 1 and 5 of by-law 90 of the City of Brunswick.

The method of approach to the determination of the validity of by-laws or regulations has been discussed in many cases. Shortly stated, one first construes the statute under which the by-laws purport to be made, and then interprets them to ascertain if they are within the ambit of the statute. The material provision of the relevant statutes in the case of the by-laws in question is sec. 198 (1) (*a*) both of the *Local Government Act* of 1903 and that of 1928. This provision empowers a council with the approval of the Governor in Council to make by-laws for the following purposes or any of them or for any purpose in connection therewith : "Regulating and restraining the erection and construction of buildings, erections," &c. In passing I would observe that the fact that the by-law must be approved by the Governor in Council does not deter courts from ascertaining its validity : Cf. *Criterion Theatres Ltd.* v. *Sydney Municipal Council* (3) ; *Municipal Council of Sydney* v. *Campbell* (4). In the construction of the words I have quoted from the statute I adhere to what I said in *Swan Hill Corporation* v. *Bradbury* (5), to the effect that a power to regulate and restrain does not include a power of prevention, suppression or total prohibition. "There is a marked distinction to be drawn between the prohibition or prevention of a

(1) (1901) A.C. 49, at pp. 53-54, 57.
(2) (1922) 31 C.L.R., at p. 176.
(3) (1925) 35 C.L.R. 555, at pp. 564, 565.
(4) (1925) A.C. 338.
(5) (1937) 56 C.L.R., at pp. 755, 756.

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trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed" (*Municipal Corporation of City of Toronto* v. *Virgo* (1)).

On this basis I turn to consider the by-laws attacked. By-law 53, Part II., clause 3, is not an independent provision, but forms part of and must be read with the whole by-law. If so read, it does not give the surveyor any right to prohibit the erection of a building, but only prevents a builder from commencing a work until the surveyor has approved of the plans—he being bound to do so if the plans comply with the requirements of the by-laws. The clause in question does not, therefore, prohibit, but merely regulates, building. It purports to ensure that a building shall comply with the provisions of the by-law by enabling the surveyor to ascertain that its provisions are being observed.

By-law 90, clause 1, sub-clauses *c* and *e*, are also attacked. Sub-clause *c* is justified by the Act of 1928, sec. 198 (1) (*a*), and also by sub-sec. 3 (*b*). Sub-clause *e* is authorized by sec. 198 (1) (*a*), as it is not a general prohibition against erecting buildings in unsewered areas, but only a particular type of building, viz., flats which are unsuitable to such areas. The learned primary judge also held that clause 5 of this by-law was void as a result of his view that clause 1 was void. As I am of opinion that clause 1 is valid, it follows that I consider clause 5 is valid. I find it unnecessary to discuss at length the clauses of by-law 90, as I am in substantial agreement with what my brother *Williams* has said about them.

In my opinion all the clauses attacked are valid and the appeal should be allowed. According to the undertaking given when special leave was granted the appellant must pay the respondent's costs.

STARKE J. Appeal by special leave from a decision of the Supreme Court of Victoria quashing two by-laws—numbered 53 and 90—of the City of Brunswick. These by-laws were passed and confirmed by the Governor in Council under the provisions of the *Local Government Acts* in force before the passing of the *Local Government Act* 1938, sec. 11, which gave enlarged powers to municipal authorities. Special leave to appeal was nevertheless granted by this court.

By-laws must be *intra vires*, that is, within the powers under which they purport to have been made, and must be certain, reasonable, and not repugnant to the general law. The question whether a by-law is within power may, it seems, be sometimes ascertained by

(1) (1896) A.C. 88, at p. 93.

" natural and instinctive interpretation based upon ordinary experience of the use of English terms and due reflection upon the character and implications of the subject matter " (See *Swan Hill Corporation* v. *Bradbury* (1)), but in any case the court should have regard to the body entrusted with the power, and the language in which the power is expressed and the subject matter with which the body has to deal: See *Bradbury's Case* (2). Generalities such as these are not very helpful to by-law making authorities. It might perhaps have been better if the courts had examined the topics of regulation entrusted to public authorities and, when it appeared that a regulation was upon a topic of regulation entrusted to an authority, then to concede the validity of all regulations upon that topic which, within reason, were appropriate and adapted to the purpose of regulating the subject matter and were not prohibited by law. But nevertheless some practical results have been achieved, notwithstanding the generality of the proposition upon which the courts proceed.

Prima facie, a power to regulate or to regulate and restrain a subject matter does not authorize prohibiting it altogether or subject to a discretionary licence or consent (*Municipal Corporation of City of Toronto* v. *Virgo* (3); *Co-operative Brick Co. Pty. Ltd.* v. *Mayor &c. of the City of Hawthorn* (4); *Melbourne Corporation* v. *Barry* (5); *Bradbury's Case* (6)). But, as might have been expected, this proposition cannot be universally applied (*Slattery* v. *Naylor* (7)). Again, under a power to regulate and prohibit a particular subject matter, by-laws prohibiting certain acts unless the consent of a public authority be given are upheld (*Country Roads Board* v. *Neale Ads Pty. Ltd.* (8)).

The by-law No. 53 was made under the powers discussed in *Bradbury's Case* (6). It provides, in substance, that no builder shall commence any building without first delivering at the office of the building-surveyor of the municipality notice of his intention to commence building three days before so commencing, and producing to the surveyor properly prepared plans and specifications of such building, and that no builder shall commence any building without first having obtained from the surveyor a written permit for the commencement of the same. The surveyor is required, upon the receipt of any such notice, to survey any such building and cause all provisions of the by-law to be duly observed. The by-law goes

(1) (1937) 56 C.L.R., at p. 755.
(2) (1937) 56 C.L.R., at pp. 761, 763, 766.
(3) (1896) A.C. 88.
(4) (1909) 9 C.L.R. 301.
(5) (1922) 31 C.L.R. 174.
(6) (1937) 56 C.L.R. 746.
(7) (1888) 13 App. Cas. 446.
(8) (1930) 43 C.L.R. 126.

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on to provide an exhaustive building specification, in many instances requiring the approval or satisfaction of the surveyor. Thus, Part VII., clause 1, requires that every external party and cross wall constructed of brick, stone, concrete, or reinforced concrete or other similar material approved of by the surveyor shall be properly handled and solidly put together with mortar. And in Part XIV., Enforcement of By-law and Penalties, there is, in clause 2, an important provision: "If any builder or owner disagrees with any decision of the surveyor as to any matter or thing arising under the by-law, he may, on giving notice in writing thereof to the surveyor and on payment to the treasurer of the sum of £2 2s., have the question referred to an architect of known ability appointed by the council and one appointed by the Governor in Council, and the said architects in case of disagreement may call in a third architect of known ability and the decision of any two of such architects shall be final and conclusive and binding in all respects on the parties."

It thus appears that the by-law does not invest the surveyor with a power of prohibiting building altogether or subject to a discretionary licence or permit or consent. The provisions of the by-law do not commit the grant or refusal of a permit to build to the discretion or arbitrary and capricious authority of the surveyor, but give him an authority merely to examine and satisfy himself that the by-laws are being complied with, subject even then to the arbitrament of an independent and skilled body of architects. Despite *Bradbury's Case* (1), by-law 53 appears to me within the power to regulate and restrain the erection and construction of buildings.

By-law No. 90, which was also made under the provisions of the *Local Government Act* 1928, was also quashed on the ground that two of its clauses were beyond power. The by-law provides that no person shall erect or construct or cause to be erected any residential flats or any building to be used or occupied wholly or in part as flats nor alter or adapt any existing building to be used or occupied wholly or in part as flats unless such building or buildings when so erected or altered comply with all of twelve conditions which follow. The two upon which the decision was based were :—(*c*) Such building shall not cover more than three-fifths of the area of the allotment of land on which it is erected. (*e*) No such building shall be erected constructed or altered in an unsewered area.

The power given by sec. 198 is "to make by-laws for the following purposes or any of them or for any purpose in connexion therewith," the first of which is regulating and restraining the erection and construction of buildings. And without restricting the generality

(1) (1937) 56 C.L.R. 746.

of the powers conferred by this section, by-laws may provide for a large variety of matters mentioned in sub-sec. 3; e.g., height, ventilation, and exits to buildings, the minimum area, depth, and width upon which dwellings may be erected, and so forth. And in sec. 197 there is power to make by-laws for the purpose of regulating sewerage and drainage. Very extensive powers are thus conferred upon municipal authorities.

I agree that none of the powers enumerated in sec. 198 (3) warrant the condition that no building shall cover more than three-fifths of the area of the allotment of land on which the building is erected. But in my opinion it is a condition for the purpose of regulating or restraining the construction of buildings or for a purpose in connection therewith. It appears from sub-sec. 3 that prescribing minimum areas, widths, depths, &c., are treated as within the ambit of building regulations, and to prescribe that a building shall not cover more than a given area regulates or restrains the erection or construction of building or is for a purpose in connection therewith.

The condition, *e*, that no building shall be erected in an unsewered area is not, I agree, within the power to regulate sewerage and drainage within the meaning of the provision in sec. 197. But it seems to me a very necessary provision regulating the construction of buildings, or at least a purpose in connection therewith.

It was also argued before this court that the by-law is beyond power for other reasons or is uncertain, that is, does not contain adequate information as to the duties of those who are to obey it (*Kruse* v. *Johnson* (1)), or is unreasonable, that is, in this connection, so oppressive or capricious that no reasonable mind can justify it (*Slattery* v. *Naylor* (2); *R.* v. *Broad* (3); *Widgee Shire Council* v. *Bonney* (4); *Kruse* v. *Johnson* (5)).

Thus, it was said that the provision that no building should be altered nor any existing building adapted for use as flats unless certain conditions were complied with was beyond power because it did not regulate or restrain the erection or construction of any building or construction nor was it for any purpose in connection therewith. This contention cannot be supported. Changing or altering the structure of a building is merely building over again, reconstructing a building.

Also, that the by-law did not define any class of building to which it applied. The point of the objection, so far as I followed it, was based upon the definition of the word " flat " in the by-law. " Flat "

(1) (1898) 2 Q.B. 91, at p. 108.
(2) (1888) 13 App. Cas. 446.
(3) (1915) A.C., at p. 1122.
(4) (1907) 4 C.L.R. 977.
(5) (1898) 2 Q.B., at p. 99.

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means a suite of two or more rooms occupied or designed or intended or adapted to be occupied as a separate domicile. Any suite of two or more rooms whatever, so it was suggested, occupied or intended to be occupied as a separate domicile constituted a flat. And consequently no class of building was described to which the by-law applied. But I think the by-law is dealing with outward things or appearances, and not with the thoughts or intentions of persons: dealing with them objectively and not subjectively. So construed, the by-law seems to me unobjectionable.

Other objections were made to the following conditions of the by-law because of uncertainty or unreasonableness:—(*a*) Such building or buildings shall be constructed of brick, stone, concrete or other hard fire-resisting material approved by the surveyor. There is nothing uncertain about the terms of the condition, but they are so absolute that they may be oppressive. Buildings such as flats must have doors, windows, and other amenities. The by-law says nothing to the contrary. It is dealing with the material of which a building is constructed. And its generality is limited in some respects by the provision of other conditions, notably *h* and *k*. It was urged for the municipality that any practical builder would understand that the condition applied only to the external walls of buildings. The collocation of the words brick, stone, concrete or other hard fire-resisting material, coupled with the other conditions to which I have referred, were relied upon in support of this view. But it appears to me rather a forced interpretation, and leaves the construction of such important parts of a flat building as stairways and roofs at large. It is one thing to say that the provision is drastic, and another to affirm that it is so capricious and oppressive that no reasonable mind can justify it. It was passed by a representative body and approved by the Governor in Council. I doubt if *Ingwersen's Case* (1) gives sufficient weight to this consideration. In my opinion, the condition is not unreasonable in any relevant sense. (*f*) Each flat must be in itself a complete dwelling of not less than 800 square feet floor area and shall be provided with all necessary lavatory and sanitary accommodation as may be required in dwelling houses. The objection is that the condition is uncertain because "a complete dwelling" is not defined. But "a complete dwelling," as used in this by-law, is one that embraces all the requisite parts of a dwelling of not less than 800 square feet floor area. It is, of course, a question of fact whether that standard has been observed in any given case. This objection fails.

(1) (1926) V.L.R., at p. 558.

No other conditions were the subject of argument, and therefore no other require consideration.

In my opinion, by-law No. 90 is not beyond power, uncertain, or unreasonable. Consequently this appeal should be allowed, the order of the Supreme Court set aside, and the order nisi to quash discharged.

WILLIAMS J. This appeal involves the determination of the validity of clause 3 of Part II. of by-law 53, dated 28th September 1914, of the City of Brunswick, passed under the provisions of sec. 198 of the *Local Government Act* 1903, and the whole of by-law 90, dated 23rd July 1933, passed under the provisions of sec. 198 of the *Local Government Act* 1928.

As Lord *Tomlin* pointed out in his speech in *Robert Baird Ltd.* v. *City of Glasgow* (1), it is necessary for the court in adjudicating upon the validity of such a question "first of all to consider the meaning of the statutory power which the corporation are affecting to exercise by making the by-laws; and, secondly, to consider the by-laws themselves and to determine whether, when examined, they contain any excess of the power as interpreted."

A by-law must be certain in the sense that it must contain adequate information as to the duties of those who are to obey (*Country Roads Board* v. *Neale Ads Pty. Ltd.* (2); *Robert Baird Ltd.* v. *City of Glasgow* (3); *Twickenham Corporation* v. *Solosigns Ltd.* (4)). It must not be unreasonable in the sense that it must not involve such oppressive or gratuitous interference with the rights of those who are subject to it as could find no justification in the minds of reasonable men (*Jones* v. *Metropolitan Meat Industry Board* (5); *Robert Baird Ltd.* v. *City of Glasgow* (6); and the authorities collected in the judgment of *Dixon* J. in *Williams* v. *Melbourne Corporation* (7)). Such an interference would be an abuse of power and therefore not within it.

It is necessary to remember that the legislature has left it to the judgment of councils acting bona fide to enact such by-laws, and the exercise of their discretion should not be lightly interfered with. In the case of by-laws made by public bodies, it was pointed out by Lord *Russell of Killowen* L.C.J. in *Kruse* v. *Johnson* (8), that such by-laws should be benevolently interpreted, and that credit should be given to those who have to administer them that they will be reasonably administered. The provisions of the by-laws which

(1) (1936) A.C. 32, at p. 41.
(2) (1930) 43 C.L.R., at p. 132.
(3) (1936) A.C., at p. 44.
(4) (1939) 3 All E.R. 246, at p. 251.
(5) (1925) 37 C.L.R. 252, at p. 261.
(6) (1936) A.C. 32.
(7) (1933) 49 C.L.R. 142, at p. 154.
(8) (1898) 2 Q.B., at pp. 98, 99.

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have been challenged must be approached in the light of these general principles.

The Supreme Court held that clause 3 and also certain provisions, namely, pars. *c* and *e* of clause 1, of by-law 90 were void, and that the effect of the invalidity of these paragraphs was to avoid the whole of clauses 1, 2 and 5 of the by-law. The power to enact these two by-laws depends almost entirely upon the general provision in sec. 198 (1) (*a*) of the Acts of 1903 and 1928, that a council with the approval of the Governor in Council may make by-laws for the purpose of regulating and restraining the erection and construction of buildings and erections. In *Swan Hill Corporation* v. *Bradbury* (1) this court held that a by-law which prohibited the erection of any building within the municipality unless with the approval of the council was not within this provision.

It was contended by the respondent that clause 3 gave the surveyor an absolute discretion to grant or refuse a permit and therefore empowered him to prohibit any building at all and that the clause was void for the reasons stated in the judgments in that case. This contention appears to me to be unsound. The clause must be construed in the context of the whole by-law, which lays down an elaborate code of requirements relating to the construction of buildings as a whole and their several component parts. The procedure laid down by the by-law is that the building owner must first lodge properly prepared plans and specifications of the proposed building (clause 1). The surveyor must then examine them, if necessary in conjunction with an inspection of the site, to see if they comply with the requirements of the by-law (clause 4). If and when the plans do so, he must approve of them, and, upon payment of the proper fees, issue the necessary permit to commence building (clause 3). This is the true construction of clause 3 when read in conjunction with clause 4. His duty to issue the permit would be enforceable by mandamus.

Clause 3 is, in my opinion, valid.

By-law 90 relates to the construction of residential flats or any building to be used or occupied wholly or in part as flats and the alteration or adaptation of any existing building to be used or occupied wholly or in part as flats. The definition of flats is as follows: "Flat" means a suite of two or more rooms occupied or designed or intended or adapted to be occupied as a separate domicile. "Residential flats" means a building more than one storey in height which contains two or more flats.

(1) (1937) 56 C.L.R. 746.

It was contended that the presence of the word "intended" in this definition was an attempt to regulate the user and not the construction of buildings, but it appears to me that the word is used in an objective sense and refers to buildings the planning of which shows an intention that they are to be constructed or adapted for use as flats and that all the somewhat awkward collocation of words in the definition means is that the by-law is to apply to the construction or adaptation of buildings containing suites of two or more rooms which are designed to be occupied as separate domiciles and therefore as flats.

Various paragraphs of clause 1 of this by-law were attacked on the ground that they were in excess of the powers conferred by the general provision and in some cases of certain particular provisions of the Act.

Clause 3 of the by-law provided that, save as modified thereby, all building regulations and by-laws of the City of Brunswick should apply to residential flats and flats therein. The requirements of par. *a* of clause 1 must therefore be determined in the light of the other paragraphs of the clause and of the general building provisions which regulate the details of the construction of the various component parts. It was contended that par. *a* would prevent a building designed for use as flats having wooden rafters, glass windows, or wooden window frames or doors. This is to place an extravagant construction on the paragraph. It is really dealing with the main external structure of the building, namely, the outer walls and roof. The construction of the inner walls and of the floors is regulated by par. *h*. The ordinary grammatical meaning of "rafter" is a wooden beam which forms part of the support of the roof, and the presence of rafters in buildings containing flats is recognized by this paragraph. Par. *a* therefore does not prohibit the addition of ordinary accessories such as wooden rafters, doors, or floors, glass windows, or usual types of ceilings which comply with the general building regulations.

The other two paragraphs of clause 1 which were mainly attacked were *c* and *e*. In the case of *c*, in addition to the general power, the Act, sec. 198 (3) (*b*), enables the council to prescribe the minimum area upon which any dwelling house might thereafter be erected. This particular provision only applies to buildings thereafter erected and not to existing buildings, but the particular provisions contained in sub-sec. 3 do not restrict the generality of the powers conferred by sub-sec. 1 (*a*), and this general power is sufficiently wide to authorize a council to prevent a building covering more than a certain area of the land on which it is to be built.

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It was contended that the sub-clause was uncertain because it did not prescribe what parcel of land was intended to be the unit of measurement, but there should not be any practical difficulty in determining this matter. Where a plan of subdivision exists the parcel of land would be the lot or lots in the subdivision on which the flats were to be erected. Where there was no such plan it would be necessary for the owner to allot a sufficient parcel of land for separate occupation as the land on which the flats were to be built. In any subsequent subdivision it would be necessary to retain this parcel as a separate occupation.

As to par. *e*.—This does not amount to a prohibition of building in an unsewered area but only to a prohibition of one particular class of buildings. It is justified by the width of the powers conferred by the words " regulate and restrain."

Pars. *g*, *j* and *l* were also attacked. They all appear to me to be within the scope of the power and not to be uncertain. It might seem to some minds unnecessary to insist upon separate entrances for each flat to the open air, under *g*, where there is an entrance through the inside under *j*, but it could not be said to be unreasonable in the sense already defined.

The by-law was attacked because it applied to the alteration of existing buildings for use as flats. Sec. 198 (1) (*a*) does not expressly refer to alterations, but it applies to all construction and erection of buildings. It would be a question of fact in each case whether the work to be done to an existing building to convert it into flats was construction. Any alteration of a structural nature would, generally speaking, amount to such construction, and it is difficult to see how a building could be converted into flats without construction taking place: See *Hoddinott* v. *Newton Chambers & Co. Ltd.* (1). Whenever such further construction of an existing building takes place, the council would have power to regulate and restrain it under the section. Clause 1 of the by-law contains the words " nor alter or adapt any existing building to be used or occupied wholly or in part as flats." Having regard to the practical impossibility of altering or adapting an existing building into flats without new construction taking place, I think their presence in the clause is justified and perhaps advisable to warn builders that the council intended the by-law to apply to the alteration or adaptation of existing buildings as well as the erection of new buildings for flats. If an old building could be converted into flats without construction taking place, such work would be outside the scope of the by-law even with these words in it.

(1) (1901) A.C. 49.

For these reasons I am of opinion that the whole of by-law 90 is valid, and no question therefore arises as to the severability of any invalid part.

In my opinion the appeal should succeed and those parts of the order of the court below which quashed clause 3 of Part II. of by-law 53 and clauses 1, 2 and 5 of by-law 90 should be set aside.

Appeal allowed. In accordance with undertaking given in order granting special leave appellant to pay respondent's costs.

Solicitors for the appellant, *W. E. Pearcey & Ivey.*
Solicitors for the respondent, *Pavey, Wilson & Cohen.*

O. J. G.