REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

SHEPPERD . . . . . APPELLANT;
PLAINTIFF,

AND

THE COUNCIL OF THE MUNICIPALITY OF RYDE . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1951. SYDNEY, *Nov.* 28-30.

1952. MELBOURNE, *March* 11.

Dixon, McTiernan, Webb, Fullagar and Kitto JJ.

Council—Housing scheme—Sale of land—Plan of subdivision—Contract—Incorporation in contract—Park—Representation—Statement of intention—Collateral promise or warranty—Interlocutory injunction—Local Government Act 1919-1951 (*No.* 41 *of* 1919—*No.* 46 *of* 1951), *ss.* 4, 344 (1), 347, 348 (1), 496, 518, 518A.

A local government council issued a pamphlet in which it stated that its housing programme provided for the erection of 2,500 attractive homes planned and orientated to suit local conditions and constructed on modern subdivisions complete with all services, children's play areas, park areas street beautification, roads, footpaths, &c. Having been supplied by a housing officer of the council with a copy of the pamphlet and an application form, the plaintiff made a formal application for a house and received from the town clerk a letter in which he was offered a dwelling which upon inspection he found to be opposite two park areas. During a discussion with the housing officer the plaintiff spoke of the attraction the parks meant for him and the officer pointed on a plan to the two pieces of land and said they would both be park areas. A few days later the plaintiff informed that officer that he would buy the house, again mentioning the parks. The council agreed that he should have the house, and a contract for the sale thereof to the plaintiff

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was executed by both parties. Some days later the plaintiff entered into occupation. About a year later the council resolved that among other areas the said two park areas should be subdivided and that houses should be built on the allotments. The plaintiff filed a statement of claim. A motion by him for an interlocutory injunction was dismissed by the Supreme Court of New South Wales on the ground that there was not any contract to carry out the plan embodying the housing project and that no basis could be found for an injunction in estoppel, because there was not any representation as to an existing fact. On appeal by the plaintiff,

Held (1) that although to obtain such an injunction the appellant must make a prima-facie case in support of the existence of the right he sought to enforce or protect, he was not required finally to establish the issues upon which the existence of that right depended; and (2) that the appellant had made out a prima-facie case of a collateral if not of an implied promise or warranty on the part of the council that the areas in question would be used as a park or parks and not otherwise, therefore the appeal should be allowed and an interlocutory injunction granted.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.): *Shepperd* v. *Ryde Municipal Council* (1951) 69 W.N. (N.S.W.) 49; 18 L.G.R. 98, reversed.

APPEAL from the Supreme Court of New South Wales.

In a suit brought in the equitable jursidiction of the Supreme Court of New South Wales by Cecil Leslie Maurice Shepperd, temporary officer in the Royal Navy, against the Council of the Municipality of Ryde, the statement of claim was substantially as follows:—

1. Prior to and at the time of the grievances thereinafter alleged the defendant had authorized and was carrying out a building scheme known as No. 4 Housing Project on lands wholly situate within the Municipality of Ryde. In connection with the building scheme the defendant prepared and published plans and descriptive brochures for the information and guidance of intending purchasers.

2. For the purposes of that building scheme the defendant had acquired large areas of land in the municipality and had subdivided some of those areas of land and had created works thereon. Upon certain of the subdivided lands the defendant had erected houses and on certain other parts of those lands the defendant had provided and proposed to provide parks and other amenities.

3. Prior to the date of a certain agreement referred to later herein the defendant by its servants and agents represented to the plaintiff that Housing Project No. 4 would be completed by the defendant in accordance with certain plans and specifications then produced to the plaintiff.

4. That representation was made with the object and intention that the plaintiff should purchase from the defendant a house erected by the defendant on one of the subdivisional blocks in Housing Project No. 4.

5. Prior to the said agreement the defendant by its servants and agents represented to the plaintiff that if the plaintiff would agree to become the purchaser from the defendant of Lot 85 in Perkins Street in Housing Project No. 4, an area of land, designated on a plan then produced to the plaintiff and marked with the word " Park " and being land substantially opposite to Lot 85, would be created and maintained by the defendant as a park.

6. By agreement in writing dated 2nd June 1950, between the plaintiff of the one part and the defendant of the other part the defendant agreed to sell and the plaintiff agreed to buy on the terms and conditions set forth therein Lot 85 and the house erected thereon, the said lot being described therein as part of Housing Project No. 4.

7. That agreement was executed by the plaintiff on the faith of representations alleged in pars. 3 and 5 of the statement of claim.

8. The plaintiff had recently ascertained and it was the fact that the defendant threatened and intended and would unless restrained by the order and injunction of the Court subdivide the said area referred to as a " Park " and erect a dwelling house on each of the lots so subdivided.

9. The plaintiff had requested the defendant to divert from its alleged threatened and intended acts, but the defendant had neglected and refused and still neglected and refused to desist as requested.

10. Unless the defendant was restrained by the order and injunction of the Court the plaintiff would suffer serious loss and damage.

The plaintiff claimed (a) that the defendant by its officers, servants and agents be restrained from using or permitting to be used for any purpose other than that of a park, the area of land bounded by Perkins Street and Driver Street, and being the land shown on a certain plan prepared by the defendant for the purposes of Housing Project No. 4 as bounded by those streets and thereon described as " Park "; (b) an order for costs ; and (c) such further or other relief as the nature of the case might require.

Those orders were claimed by the plaintiff on a motion, of which notice had been given, brought before the Chief Judge in Equity for an interlocutory injunction.

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An affidavit made by Shepperd in support of the motion was to the following effect. In or about November 1949, Shepperd visited the defendant's council chambers and there interviewed a Mr. Henderson, a clerk employed in the defendant's housing department. He told Henderson that he had come in connection with the signal by the Council to the navy that six houses in the Council's building project had been allocated for purchase by navy personnel. Shepperd said that he wished to purchase a home and asked where the houses were and what were they like. Henderson told him that " the houses are contained in Project No. 4 which we are building and you will have to fill in one of these forms first ". Shepperd took one of the forms and also received from Henderson a brochure entitled " Group Housing ". The brochure contained considerable information concerning the " Ryde Council Housing Scheme ", including building sites, planning and design, advantages of group planning and tenders, instalments for repayment of loans, interest rates and special advantages to home purchasers. It was stated in the brochure, *inter alia*, that " this municipal housing programme provides for (a) the erection by the Council of 2,500 attractive homes planned and orientated to suit local conditions and constructed on modern subdivisions, complete with all services, children's play areas, park areas, street beautification, roads, footpaths, &c. and in some instances, shopping centres ". On 2nd December 1949, Shepperd made a formal application in writing to the Council on one of the forms for the purchase of a house on Project No. 4 and on 6th January 1950, he again visited the council chambers and had a further conversation with Henderson. Henderson took Shepperd by car to Project No. 4 and they inspected a house in Driver Street, but on the following day Shepperd informed Henderson that " the house in Driver Street is not what I wanted ". On or about 13th April 1950, Shepperd received a letter from the town clerk intimating that Lot 85, Perkins Street, West Ryde, on Project No. 4, was available and as a result Shepperd and his wife inspected Lot 85 on the following Sunday. During an interview at the housing branch on 19th April 1950, Shepperd said to Henderson " My wife and I are interested in Lot 85 ", and in response to a request Henderson produced a plan of the Housing Project No. 4 subdivision, pointed out Lot 85, and gave to Shepperd a piece of tracing paper. Upon that paper Shepperd made a rough tracing from the copy of the plan so produced and marked in the two park areas facing Lot 85. Whilst sitting at a table tracing the plan Shepperd said to Henderson " the parks facing me are just what I wanted as I have lived in cities in England all

my life and I want a bit of space around me ", to which Henderson replied " I am sure the house is just what you want " and, walking to the table, he pointed with his finger and said " these will be two park areas and there will also be some shops in the Project ". Upon completing the rough tracing Shepperd said to Henderson " I think I will take it but I want to show the plan to my wife this evening and I will let you know ". On the following day Shepperd and his wife visited Lot 85 having reference to the abovementioned plan. Whilst there were certain features of the house that did not entirely meet with their approval both of them decided that, on account of the nice view and the parks opposite, they would purchase it. On 24th April 1950, Shepperd went to the Council's office and said to Henderson " Although the house is not entirely to the satisfaction of my wife and myself we like the view very much and in view of the fact that there are going to be parks in front of us and the kitchen has a view over the parks and a woman usually spends the best part of her time in the kitchen we have decided that we are going to have it ". Henderson replied " I think you will be very pleased about it and I think it will suit you very well ". Their desire to purchase Lot 85 was conveyed to the town clerk by letter dated 25th April 1950, and two days later Shepperd paid to an official of the Council the sum of £100 as deposit in respect of Lot 85. By letter dated 1st May 1950, the town clerk referred to Lot 85 and informed Shepperd that " the abovementioned cottage " had been allocated to him and was " now approaching completion " and on 10th May, by letter to Shepperd the town clerk confirmed " arrangements made with you for the sale of a brick cottage erected on Lot 85, Perkins Street, West Ryde ", the tentative selling price for the land and building being fixed at £3,155 and details as to the payment thereof were shown in the letter.

An agreement for the sale by the Council to Shepperd of Lot 85 in the Council's Housing Project No. 4, together with the buildings erected thereon was signed by Shepperd on 2nd June 1950, and the seal of the Council was affixed thereto on 21st June 1950 pursuant to a resolution of the Council passed on 11th January 1950. Clause 1 of the agreement was in the following terms: " Subject to the terms and conditions hereinafter contained the Vendor shall sell and the Purchaser shall purchase ALL THAT piece of land situated in Perkins Street at West Ryde in the Parish of Hunter's Hill, County of Cumberland, State of New South Wales, part of the Vendor's Housing Project No. 4 and being Allotment No. 85

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Section No.....Volume....Folio.... together with the buildings erected thereon . . . at a price to be ascertained as provided in Clause A set out in the Addendum hereto, to be paid (*scil.* as) hereinafter mentioned ". It was further provided that the sale price should be the cost to the Council of the land and improvements thereon, such cost being based on the cost and/or value of the land, proportion of street improvements, architect's fees and administration expenses. The estimated selling price was shown as £3,155, and it was a term of the agreement that " on the signing of this contract the Purchaser shall pay to the Vendor a cash deposit of " £1,300. Having been advised by the town clerk by letter that the cottage on Lot 85 was available for occupation Shepperd, on 13th June 1950, entered into possession of the property and had resided there continuously ever since. A plan prepared with the authority of the Council showed areas fronting Perkins Street and Driver Street and opposite Lot 85 marked " Park ". At the date of the affidavit those areas had not been constructed as a park. By resolution passed on 8th August 1951, the Council decided to subdivide the land designated " Park " on Housing Project No. 4, and upon completion of the subdivision to build houses thereon. Upon the receipt of a letter of protest forwarded by a solicitor on behalf of Shepperd and other purchasers of Lots on Housing Project No. 4, the Council re-affirmed " its previous decision to house the said sixteen (16) lots with the exception that it is not proposed to erect cottages on the area at the corner of Driver Street and Perkins Street and referred to on the plan as lots 1 and 2. That it is proposed to erect cottages on lots 3 to 12 inclusive, which will have frontage to Perkins Street, Driver Street and Mirrool Street and that it is proposed to erect cottages on land . . . referred to on the plan as lots 13 and 14 ". The said " sixteen (16) lots " were lots upon which the Council proposed to erect the houses and those lots were comprised within the area described as " Park " referred to above. If the Council was permitted to proceed with its intention of building houses on the area designated as a park, Shepperd feared that the amenities relating to the use and enjoyment of his home, and on the faith of which he bought his home, would be seriously reduced and the value thereof seriously impaired.

The town clerk deposed in an affidavit that Henderson had since 7th November 1949, been employed as clerical assistant to the Council's housing officer. His duties were, *inter alia*, to attend to enquiries by prospective purchasers of houses from the Council; to list applications and when houses became available for allocation to purchasers to submit a name or names from that list to the housing

officer and the mayor for approval before submission to Council for allocation of a house; and to take prospective purchasers to inspect houses. He was not authorized to enter into contracts on behalf of the Council by resolution of the Council or otherwise howsoever.

Roper C.J. in Eq. dismissed the motion (*Shepperd* v. *Ryde Municipal Council* (1)).

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

F. G. Myers K.C. (with him *B. P. Macfarlan*), for the appellant. The plan of Housing Project No. 4 was incorporated into the contract, and a promise by the Council was implied that it would not depart from the plan (*North British Railway Co.* v. *Tod* (2); *Feoffees of Heriot's Hospital* v. *Gibson* (3); *Squire* v. *Campbell* (4); *Peacock* v. *Penson* (5); *In re Miller* (6); *Churton* v. *Walker* (7); *Bonthorne* v. *Backstrom* (8); *Burns* v. *Dilworth Trust Board* (9); *Rodgers* v. *King* (10); *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 391, note (*m*), and *Fry* on *Specific Performance*, 6th ed. (1921), pp. 438, 439). The brochure and the plan created a collateral contract by which the Council promised that in consideration of the appellant purchasing an allotment the Council would not use the lands shown as parks otherwise than as parks (*Martin* v. *Spicer* (11)).

C. McLelland K.C. (with him *R. M. Hope* and *J. H. Laurence*), for the respondent. The *Local Government Act* 1919-1951 (N.S.W.), gives councils wide powers of acquiring land for public purposes. If a council resumes land for the purpose of a park, it in effect holds the land as a trustee; but until the land is in fact opened as a park, the council is not bound to use it as such. When planning a general housing project a council may make provision for any of the general purposes mentioned in the Act. *Peacock* v. *Penson* (5) decided that the terms of a particular contract incorporated a promise to carry out in detail what was shown on a plan. Lord

(1) (1951) 69 W.N. (N.S.W.) 49; 18 L.G.R. 98.
(2) (1846) 12 Cl. & F. 722 [8 E.R. 1595].
(3) (1814) 2 Dow. 301, at pp. 311-313 [3 E.R. 873, at p. 877].
(4) (1886) 1 My & Cr. 459 [40 E.R. 451].
(5) (1848) 11 Beav. 355 [50 E.R. 854].
(6) (1886) 5 N.Z.L.R. 199.
(7) (1895) 15 N.Z.L.R. 601, at pp. 607, 610.
(8) (1912) 31 N.Z.L.R. 1095, at pp. 1098, 1099.
(9) (1925) 44 N.Z.L.R. 488, at pp. 501, 504-506).
(10) (1888) 4 W.N. (N.S.W.) 157.
(11) (1886) 34 Ch. D. 1; (1888) 14 App. Cas. 12, at pp. 19, 20.

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Langdale M.R. did not set up any independent principle as to the incorporation of plans into contracts, and *Bonthorne* v. *Backstrom* (1) and *Burns* v. *Dilworth Trust Board* (2) are based on the assumption that he did. The question in the present case is: what are the terms of the contract, and how far is the plan of the project incorporated into it? The plan merely depicts the project. The council is a local body having a duty to the whole of the locality; the details of the scheme may be changed to suit altered circumstances, although its general nature will not change. The plan is not part of the written contract, and the written contract does not contain any promise to use the land as a park. The reference in cl. 1 of the contract is merely for identification purposes, and does not operate to incorporate the project into the contract. The Council was merely indicating the best position for a park. There is not any evidence to suggest a collateral contract to make a park. Such collateral contracts must be rare, and an *animus contrahendi* on the part of both parties must be proved. Clauses 3 and 4 of Local Government Ordinance (N.S.W.) No. 23 require every contract to be made in writing, and the alleged collateral contract is not in writing. The Council in referring to a park was not promising to lay out a park, but was indicating that its then present intention was to do so.

F. G. Myers K.C., in reply. The expression "public park" as used in the *Local Government Act* 1919-1951 (N.S.W.), is referred to in s. 4 of that Act: see also ss. 340A, 344 et seq. and 518 of that Act.

Cur. adv. vult.

March 11, 1952.

The following written judgments were delivered:—

DIXON, MCTIERNAN, FULLAGAR AND KITTO JJ. This is an appeal by leave from an order of *Roper* C.J. in Eq. refusing an interlocutory injunction. The interlocutory injunction which the plaintiff-appellant sought was to restrain the respondent Council from using or permitting to be used for any purpose other than that of a park an area of land in the plan of a municipal housing project which was described as a park.

Acting apparently in pursuance of s. 496 of the *Local Government Act* 1919-1948 (N.S.W.) the respondent Council put forward a building plan which it called the Ryde Council Housing Scheme. A pamphlet was prepared entitled "Group Housing by Ryde Municipal Council" setting out its attractive features. The

(1) (1912) 31 N.Z.L.R. 1095. (2) (1925) 44 N.Z.L.R. 488.

pamphlet opened with the statement that the municipal housing programme provided for the erection by the Council of 2,500 attractive homes planned and orientated to suit local conditions and constructed on modern subdivisions complete with all services, children's play areas, park areas, street beautification, roads, footpaths, &c. The separate sections of the scheme seem to have been called projects. That called " Housing Scheme Project No. 4 " consisted of a subdivision of a large area of land into streets, park areas and building allotments, of which there were about two hundred and thirty. The names of the streets, the numbered allotments and the sites of the parks were shown on a plan.

The plaintiff-appellant, who wished to buy a home, applied for information at the Council Chambers. An officer, who is described as the clerical assistant of the housing officer, gave him a copy of the pamphlet and a form of application. As a result he made a formal application for a home, and supplied the particulars which were required of him. The same officer, whose duties included taking prospective buyers to inspect houses, showed him one that was available. It did not suit the plaintiff but three months later the town clerk wrote offering him a dwelling erected upon Lot 85 of the Housing Project No. 4 fronting a street called Perkins Street. The plaintiff inspected it and found that opposite to the block there was a park. In fact there were two parks; for a street named Driver Street entered Perkins Street at an angle of about 120° opposite to Lot 85, enclosing on that side one piece of land denoted as a park, and on the side, where Driver Street made an acute angle with Perkins Street enclosing another smaller piece of land so denoted. Both the house and the prospect pleased the plaintiff and his wife. He called at the Council's housing branch and again saw the same officer. He told him that he was interested in Lot 85 and wished to see the plan of that part of the project. A copy of the plan of No. 4 Housing Project Subdivision was produced to him and he saw the two pieces of land marked " Park " opposite Lot 85. He asked to take a tracing of the material part and was supplied with paper for the purpose. He spoke of the attraction the parks meant for him and the officer pointed on the plan to the two pieces of land and said they would both be park areas. The plaintiff took the plan away to consult his wife and a few days later informed the officer that he would buy the house, again mentioning the parks. The Council agreed that he should have the house, which became available for occupation at the beginning of June 1950. A contract was made out and signed on 2nd June 1950. It embodied provisions for the calculation of the purchase money according to

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an addendum. The calculation was based on the value of the land, the cost of the building, a proportion of the cost of street improvement, architect's fees and administration expenses. The contract provided for a deposit of £1,500 and weekly payments consisting of principal and interest spread over a maximum period of thirty years. What is relevant to the question in this appeal is cl. 1 which contains the parcels. That clause said that subject to the terms and conditions thereinafter contained the vendor should sell and the purchaser should buy all that piece of land situated in Perkins Street, West Ryde in the Parish of Hunter's Hill County of Cumberland State of New South Wales part of the vendor's Housing Project No. 4 and being allotment No. 85 . . . together with the buildings erected thereon at a price to be ascertained as provided in the addendum and to be paid as thereinafter mentioned.

Within a fortnight of the contract the plaintiff entered into occupation of the house he had bought. Nothing was done to make the two areas more park-like; of that however he made no complaint. But about July 1951 the householders and owners of land in the Housing Project learned that the Council intended to subdivide the areas marked on the plan as parks. Through a solicitor they remonstrated, but on 8th August 1951 a resolution was passed by the Council that among other areas the two areas mentioned should be subdivided and that houses should be built on the allotments. A week later the resolution was slightly modified by a decision not to build on the exact corner allotments of this new subdivision, and in some other immaterial respects. Otherwise the Council refused to recede from the resolution and on 24th August 1951 the plaintiff filed his statement of claim and gave notice of motion for an interlocutory injunction. *Roper* C.J. in Eq. dismissed the motion on the ground that there was no contract to carry out the plan embodying the housing project and that no basis could be found for an injunction in estoppel, if for no other reason, because there was no representation as to an existing fact.

Three views of the case were presented in support of the appeal against this decision. In the first place it was contended that the contract referred to the plan in such a way as to make it part of the contract and that a stipulation was to be implied that the Council would not depart from the plan and destroy an amenity or advantage for which it provided. In the next place an alternative contention was advanced that when through its officer the Council furnished the plaintiff with the pamphlet, and produced to him the plan of the project showing the parks provided, the Council offered a collateral promise that if he would become a purchaser the Council

would not use or deal with the land shown as parks for any other purpose. There was thus a collateral contract to that effect the consideration for which was the plaintiff's entering into the contract of purchase. Thirdly it was contended that the pamphlet and the plan amounted together to a representation that the areas shown as parks had been reserved as parks. Such a representation was a representation of existing fact and, having been acted upon by the plaintiff, it estopped the Council from denying that the areas had been so reserved. Upon the footing that they were reserved as parks, the plaintiff was entitled to an injunction against cutting up the parks into building allotments and building houses upon them.

The questions raised by these contentions cannot be made the subject of final decision upon this appeal. What is under appeal is the refusal of an interlocutory injunction and what we are called upon to decide is whether it ought to have been granted.

In order to obtain such an injunction the plaintiff must make a prima-facie case in support of the existence of the right he seeks to enforce or protect. But he is not required finally to establish the issues upon which the existence of the right depends.

It is perhaps desirable to begin the consideration of the question whether the plaintiff has shown a prima-facie case under any of the three foregoing heads by seeing exactly what statutory powers the Council were pursuing in putting forward the housing project and in including in it a provision for parks. Section 496 (1) of the *Local Government Act* 1919-1951 enables the Council to erect dwellings, shops and buildings and to sell them upon extended terms. Section 348 (1) gives power to a council to provide, control and manage grounds for public health, recreation, convenience, enjoyment or other public purpose of the like nature including (a) parks . . . (c) gardens. It is assumed that a park provided under this power becomes a public park. Section 344 (1) (a) gives to the council the care, control and management of public reserves which are not under the care of or vested in any other body or person. The expression " public reserve " is defined and public park forms part of its meaning : s. 4. Section 518 gives the council a general power of selling land or buildings or other real or personal property vested in or belonging to the council or under its care, control or management, but the power does not authorize the sale of a public reserve. Section 518A makes it clear that the Act contemplates the use of this power for sale for housing purposes.

Apparently it is under a combination of these powers that the Ryde Council proceeded in carrying out its housing scheme. It is

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quite clear that it was competent to the Council as part of its scheme to appropriate areas of land to form parks and so to constitute them public reserves. What formal steps are necessary before it can properly be said that the Council has "provided" a park within s. 348 may not be very clear, but it would seem enough for the Council to adopt a resolution appropriating specific land of the Council. The land may be acquired for the purpose or may be land not required for some other purpose: s. 347. Whether the Council did or did not adopt by resolution Housing Project No. 4 as a definitive appropriation of the lands to the various uses shown on the plan does not appear. The third of the before-mentioned contentions advanced for the plaintiff-appellant we understand to be based on the view that the Council is precluded by the plaintiff's acting on the representation contained in the plan read with the pamphlet from denying that the areas in question were duly appropriated so as to be provided as parks under s. 348 (1) with the consequence that they may not be alienated under s. 518. This contention we shall not examine. For we think that the plaintiff has made a sufficient prima-facie case in respect of the other two grounds by which his appeal is supported.

It is convenient to state first why we think that he has made out a prima-facie case of a collateral promise or warranty that the areas in question shall be used as a park or parks and not otherwise. The question is very much one of fact. But it appears to us that in formulating Housing Project No. 4 as part of the Ryde Housing Scheme the Council was putting forward something conceived as an entirety. The purpose of such a project, as the pamphlet makes clear, was to provide a design, coherent, integrated and complete in itself, for the forming of a new habitable locality possessing specific features. The basal purpose of the design was to afford an environment and amenities calculated to enhance the living conditions of the inhabitants of the area. The project, on its face, appeared to confer upon the purchaser to whom a subdivisional lot was allocated a share in the enjoyment of the environment so formed. For the purposes of this interlocutory proceeding the inference must be made that this was done with the full authority of the Council and that the housing officer and his clerical assistants at the Council's housing branch were put there to produce the plan and expound the project to intending purchasers. The plan records in diagrammatic form the features of the project of which the subdivision into lots is only a part. When a prospective purchaser was invited to buy a lot with a home erected upon it, it was upon the footing of the project, the existence and effectiveness of which was, as it appears

to us, an assumption from which the transaction was intended to proceed. The allocation of an individual lot to the purchaser, his acceptance of the allocation and the execution of a contract for the purchase of that lot necessarily supposed the prior formulation of Housing Project No. 4 as the foundation of the transaction. Unless the main features of the project were fixed, it would be meaningless. It is, we think, a reasonable construction of the Council's action in putting forward the project as the basis upon which the intending purchaser could proceed, if it is treated as amounting to or involving an undertaking or promise by the Council to him that they would adhere to and maintain the project, if he would become a purchaser of a lot which he might select and they might allocate to him. The reluctance of courts to hold that collateral warranties or promises are given or made in consideration of the making of a contract is traditional. But a chief reason for this is that too often the collateral warranty put forward is one that you would expect to find its place naturally in the principal contract. In a case like the present it is, we think, otherwise. Doubtless the main contract might have included a clause by which the Council undertook not to depart from the housing scheme. But it seems to be not unnatural that the parties should treat the contract as devoted to the purchase of the lot which the individual purchaser acquired, the existence and stability of the project of which the transaction was an outcome being presupposed as something antecedent upon which the purchaser might implicitly rely. It is the common intention that he would so rely upon it and on that basis proceed to contract to buy the particular lot allocated to him. It is because of this that the assurance which is embodied in the plan, when it is read in the light of the pamphlet, obtains its effect as a collateral promise. In a case with many analogies a similar conclusion of fact or finding was upheld both by a Divisional Court and the Court of Appeal. It is *Jameson* v. *Kinmell Bay Land Co. Ltd.* (1). The defendant owned land on Kinmell Bay in North Wales and proceeded to develop it as a seaside residential estate. The plaintiff inspected the estate and was minded to buy an allotment. He was told that a road was to be constructed close to the allotment. He entered into a contract to buy it and ultimately took a conveyance which referred to " the frontage to the proposed new road together with a right of way along it ". *Talbot* J. said " It was said that the oral promise relied on was collateral to the written contract for the purchase of the plot. If set out in detail it would have taken the form of an agreement by the defendants

(1) (1931) 47 T.L.R. 410, 593.

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that in consideration of the plaintiff's entering into the contract of purchase at the price and on the terms stated the vendors would undertake to make a road on the line shown as Towyn-way on the plan and would complete that road by the time the bungalow was finished. Such a promise could be binding, as appeared from the case of *Erskine* v. *Adeane* (1). The County Court Judge held that the promise was a warranty, as it went to the root of the contract and was collateral to it. He thought that this meant that the promise was the consideration for entering into the contract and that it was in no way contradictory to the conveyance" (2). His Lordship decided that there was no error in law in this conclusion. *Finlay* J. was of a like opinion. In the Court of Appeal (3), Lord *Hanworth* M.R. said that *Erskine* v. *Adeane* (1) and other cases had abundantly proved there might be, as in the case before him, a contract which accompanied a sale of land and yet was separate from it. The Master of the Rolls thought the findings fully justified. *Lawrence* and *Romer* L.JJ. agreed.

There is a number of cases which support the proposition that the mere production by the vendor of a plan of the land and its immediate surroundings at or before the making of a contract of sale of land will not be sufficient ground for importing a term or condition that a particular feature or structure shown on the plan will not be altered by the vendor. These cases are sometimes concerned rather with the implications of the principal contract than with the formation of a separate and collateral contract in consideration of the making of the principal contract. But since an implied term in the principal contract is relied upon by the appellant as his first argument and that is to be next considered and since they are not altogether irrelevant to the topic of collateral promise or warranty, it is convenient now to deal with them. They do not in our opinion govern either branch of this case because in none of them was the plan a formulation of a housing scheme for the development of the neighbourhood providing amenities for the common advantage of the owners of subdivisional allotments and in none did the circumstances and the contents of the plan evince a promissory purpose or intent. In all of them it is important to understand the state of facts to which the reasons relate. The line of cases begins with the *Feoffees of Heriot's Hospital* v. *Gibson* (4). The sale was of an allotment in an Edinburgh street formed by extending under statutory authority an old street. The plan exhibited at the auction sale delineated some existing buildings as

(1) (1873) L.R. 8 Ch. 756.
(2) (1931) 47 T.L.R., at pp. 410, 411.
(3) (1931) 47 T.L.R., at p. 594.
(4) (1814) 2 Dow 301 [3 E.R. 873].

intended for removal. The articles of sale referred to the allotments purchased as marked and numbered on the plan. The purchaser refused to pay feu duty because the houses were not subsequently removed, and the issue was whether he was entitled so to refuse pending the removal of the houses. Lord *Eldon* and Lord *Redesdale* in the House of Lords expressed themselves strongly against the view that there could be any contract to complete the improvements indicated by the delineations on the plan, both because of the danger of admitting extraneous terms as additions to the written contract and because of the danger involved in saying " that the mere exhibition of the plan should be considered as an engagement that all that was exhibited should be done " (1). In *Squire* v. *Campbell* (2), the question concerned the eastward extension of Pall Mall across the foot of the Haymarket towards St. Martins-in-the-Fields. When this was done the corner piece of land, on the north-east corner of the intersection had in front of it an open triangle of street where Cockspur Street comes into Pall Mall. The proposal, afterwards carried out, was made that Wyatt's statue of George III. should be placed there. The case relates to an objection by the owners of a lease of the buildings upon the north-east corner. They applied for an injunction against the proposal. They relied upon the fact that upon the treaty for the lease a plan had been produced showing this space as open and as part of the carriage way. Lord *Cottenham* gave an elaborate judgment in which he excluded the possibility of a separate contract arising from these facts and excluded the inference of a contract or term from the exhibition of the plan.

Important as these two cases no doubt have been in preventing the growth of a doctrine by which the use of a locality plan at the time of the making of the contract would suffice to tie down the vendor to create or maintain the physical conditions it indicated, they do not in our opinion touch such a transaction as the present, where the plan is the record of a housing scheme or project formulated for the very purpose of providing amenities and advantages to be enjoyed by the inhabitants of the area and thus forming the foundation of the transaction. The same observation may be made on the decision of *Kekewich* J. in *Whitehouse* v. *Hugh* (3), affirmed in the Court of Appeal on somewhat different grounds (4). Indeed in the Court of Appeal *Vaughan Williams* L.J. with whom *Romer* and *Fletcher Moulton* L.JJ. concurred, seems disposed to

(1) (1814) 2 Dow., at p. 312 [3 E.R., at p. 877].
(2) (1836) 1 My. & Cr. 459 [40 E.R. 451].
(3) (1906) 1 Ch. 253, at p. 260.
(4) (1906) 2 Ch. 283.

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concede that an obligation might have arisen from the plan, but for a reservation (1). In *Hodges* v. *Jones* (2), *Luxmoore* J. refused upon the evidence to find a collateral contract for the restriction of the use of some neighbouring allotments to tennis courts. His Lordship (3) said that the purchaser's counsel had placed some reliance on a plan showing the allotments marked as tennis courts and had argued that it was sufficient to establish the collateral contract and on this point had relied on *Tindall* v. *Castle* (4). His Lordship proceeded " It may well be that the evidence in that case was sufficient to justify the decision, but if that case is relied on as establishing the proposition that the exhibition of a plan can by itself amount to a representation that the particular method of laying out or dealing with the land delineated on it must be followed without variation, it seems to me to be contrary to many other decisions which are binding on me." Now the important words in this passage are " the exhibition of a plan can by itself amount to a representation " &c. The view *North* J. took in truth in *Tindall* v. *Castle* (4) began with the fact that there was a building scheme " a common scheme, not for the benefit of the vendor only, but for the benefit of the owners respectively of the property to which the scheme related " (5). He found on three successive plans, which over eight years had been used in sales, a piece of land shown as a lodge. His Lordship said " I am quite satisfied that these plans were put forward with the intention of representing . . . to purchasers and holding out to purchasers that that piece of land was appropriated as a lodge, and that it was intended to be used for that purpose ". The foundation of this decision is in fact the character of the scheme of which the plan is the evidence and the nature of the use made of the plan. It must be borne in mind that when in a building scheme the restrictions are contained only in the covenants of the purchasers with the vendor and there is no covenant or condition or stipulation binding the vendor in respect of the land he retains, an implied contract or covenant is fastened upon him if the intention is considered to be that the restrictions imposed on the purchasers should be for their mutual or common benefit. " . . . it is a question of fact, to be deduced from all the circumstances of the case, whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of

(1) (1906) 2 Ch., at p. 286.
(2) (1935) Ch. 657.
(3) (1935) Ch., at p. 669.
(4) (1893) 62 L.J. (Ch.) 555; 3 R. 418.
(5) (1893) 62 L.J. (Ch.) 555; 3 R., at p. 423.

the several purchasers", per *Stirling* J. *In re Birmingham and District Land Co. and Allday* (1). See further *Mackenzie* v. *Childers* (2).

The present case is not of course a building scheme based upon restrictive covenants imposed on the land sold. But the line of thought which implies a restriction against the vendor where none is expressed suggests the real distinction to be found in such a case as the present. It lies in the fact that the housing scheme is formulated and presented as one for the common advantage of the several purchasers. It is put forward by a public authority and in other respects also is not of a nature which needs to invoke the mechanism of restrictive covenants imposed on the land sold. But the character of the project and the method by which it is formulated make the common advantage of the several purchasers of the subdivisional lots dependent on the existence of an obligation upon the vendor. As we have said we think that the facts and circumstances make a prima-facie case for understanding the Council as making a collateral promise to adhere to the project and so not to use or permit the use of the areas in dispute for any purpose but a park.

But such an interpretation of what occurred before the execution of the contract is needless if from the document itself, interpreted in the light of the admissible circumstances, an implication arises binding the Council to adhere to the project. The foregoing discussion of the considerations which affect the question of a collateral contract covers much of the ground upon which the propriety of such an implication rests. But the cardinal question is the meaning and effect of the description, in the contract, of the allotment of land sold as part of the vendor's Housing Project No. 4 and being allotment No. 85. If this is only an identification of the block of land, it can raise no implication. By an identification of the land we mean a description for ascertaining precisely where it lies on the earth's surface and what are its dimensions and where are its boundaries. If on the other hand it means to describe the land as possessing attributes or incidents which flow from the project, there may be room for implication. It is to be observed that the expression is "part of the vendor's Housing Project" and not "being allotment 85 on the plan of the vendor's Housing Project". The housing project consists of the scheme or design considered as a planned work or, perhaps, conception. The reference to the project makes it both legitimate and necessary to resort to evidence to ascertain what is the project and what are its constituent parts or features. Moreover it is not until this has been ascertained that

(1) (1893) 1 Ch. 342, at p. 349.

(2) (1889) 43 Ch. D. 265, at pp. 276-278.

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the contract should be finally interpreted. The evidence before us as to the nature and identity of Ryde Council Housing Scheme No. 4 is restricted to the plan and the pamphlet on group housing. The latter probably is inadmissible for the purpose of construing the contract. But it may be that for a proper understanding of the scheme further information than the plan is necessary. Be that as it may, once the plan is scrutinized, enough appears to show that the project is a planned development of a housing area according to an entire design with parks reserved as an amenity for the common advantage of the purchasers. For the protection of the purchasers against the destruction of the amenities or diversion of the advantages nothing will suffice short of an obligation to use the land only as parks or else to exercise the statutory powers conferred by s. 348 (1) to provide such parks. Without some such implication the purchaser, unless a collateral contract existed, would have nothing to depend on but the will of the Council for the amenities forming an integral part of the scheme. If " business efficacy " is a test an implication is needed to give it. On the whole we think that there is a prima-facie case for making some such implication.

Obviously if the Council alienates the park areas before the hearing of the suit, the right which the plaintiff asserts would be gravely prejudiced.

We think therefore that an interlocutory injunction should be granted in the form of the notice of motion. We would allow the appeal with costs and make an order for an interlocutory injunction giving the costs of the motion to the plaintiff.

WEBB J. Under the *Local Government Act* 1919-1951 (N.S.W.) a municipality can acquire, sub-divide and sell land for residential purposes. In so doing it is in the same position as any other vendor, and its contracts for the sale of the land can be enforced against it in the same way and to the same extent. If the plan of subdivision on the faith of which the land is purchased discloses provision for streets, lanes and other open spaces, including such as are designated " parks ", purchasers can insist on these streets, lanes and open spaces being retained as such, as the representation is of an existing fact, that is that the reservations for those purposes have been made, and is not merely a representation of intention to make them. I understand this to be conceded by counsel for the respondent municipality as regards streets and lanes. But there is no distinction in principle between a reservation for a street or lane and a reservation for a " park ". All are reservations from house-building operations, and if, as is conceded, the vendor can be

restrained from building houses on streets or lanes he can also be restrained from building residences on " parks " or from otherwise using the " park " for purposes inconsistent with its use as a park, although he could not be enjoined to provide a park with its trees, gardens, seats and paths.

In making a reservation for a park in a plan of subdivision for sale the municipality is not necessarily contracting for the exercise of its general statutory powers to provide parks. It is exercising only such powers as any other vendor possesses. It would be different if the reservation were for, say, a bridge over a street, which an individual would not be in a position to provide, and which could be provided only by a municipality exercising its general statutory powers.

Here the contract was for sale of " part of Housing Project No. 4 being allotment 85 ". What that project was, could be and was proved by the plan of subdivision as it stood at the time of the purchase of allotment 85 by the appellant Shepperd. The plan then showed the " Park " in question.

A suggestion was made that the contract was void for indefiniteness in the provision for ascertaining the amount of the purchase price ; but I did not understand that any submission to this effect was made or pressed by counsel for the respondent municipality.

I would allow the appeal.

Appeal allowed with costs. Order of the Supreme Court of 24th September 1951 *discharged. In lieu thereof order that the defendant by its servants and agents be restrained until the hearing of the suit or the further order of the Supreme Court from using or permitting to be used for any purpose other than that of a park the area of land bounded by Perkins Street and Driver Street and being the land shown on a certain plan prepared by the defendant for the purposes of Housing Project No.* 4 *as bounded by the said streets and thereon described as " Park ". And that the defendant do pay the costs of the motion notice whereof was dated 24th August* 1951.

Solicitor for the appellant, *F. R. Anderson.*
Solicitors for the respondent, *Hill, Thompson & Sullivan.*

J. B.