[HIGH COURT OF AUSTRALIA.]

TOOTH AND COMPANY LIMITED AND ANOTHER . . . . . Applicants, } Appellants;

AND

THE COUNCIL OF THE CITY OF PARRAMATTA . . . . . Respondent, } Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1955.

SYDNEY, *April* 14, 15.

Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Appeal—High Court—Appeal from Supreme Court of State—To erection of premises as licensed hotel—Local council—Refusal of approval—Traffic hazards—Amenity of locality—Injury—Mandamus—Application to State Full Supreme Court—Refusal—Other remedies available—Appeal to High Court as of right—Amount involved—Special leave—Judiciary Act 1903-1950, *s.* 35 (1) (*a*), (1), (2) *—Local Government Act* 1919-1952 (*N.S.W.*), *s.* 342R (*a*), (*e*), (*f*), (*g*)*—County of Cumberland Planning Scheme Ordinance, cll.* 26, 27.

Upon a conditional order for the removal of a publican's license to certain land having been made by the Licensing Court, despite opposition thereto by the council of the area, the applicant applied to the council: (i) under s. 312 of the *Local Government Act* 1919-1952, for its approval of the plans and specifications of the hotel building and consent to its erection; (ii) under cl. 41 of the *County of Cumberland Planning Scheme Ordinance* for its consent; and (iii) under s. 342R of the Act for it to grant the application. The council refused the application. Although other remedies were available to the applicant, he applied to the Supreme Court of New South Wales for a mandamus commanding the council to give its approval and consent and to make the said grant. The application was refused, whereupon the applicant appealed to the High Court as of right.

Held, that the order under appeal did not fulfil the requirements of s. 35 (1) (*a*) (1) or (2) of the *Judiciary Act* 1903-1950 inasmuch as it did not involve an amount of £300 and, accordingly, no appeal as of right lay.

Held, further, that there being appropriate remedies by way of appeal against the council's decision available to the applicant, special leave to appeal ought not to be granted.

Where the legislature has provided for the very description of case a remedy designed as appropriate and adequate, a court should be careful that mandamus is not used to avoid recourse to the remedy or as a substitute for it. The court will exercise its discretion against granting a writ of mandamus where a remedy is provided by way of appeal or the like which is equally convenient, beneficial and effective. If the writ of mandamus does not provide the party with a more convenient and better remedy, the court, in such a case, leaves the party with that which has been provided.

Observations on the scope and effect of s. 342R (f) of the *Local Government Act* 1919-1952 (N.S.W.) and cl. 26 and the proviso to cl. 27 of the *County of Cumberland Planning Scheme Ordinance*.

APPEAL from the Supreme Court of New South Wales.

An application was made by Tooth & Co. Ltd. and Howard Francis Swanbury to the Supreme Court of New South Wales to make absolute an order nisi for a writ of mandamus directed to the Council of the City of Parramatta commanding it to approve of the plans and specifications submitted to it in respect of the proposed erection of a hotel on certain land owned by Tooth & Co. Ltd., situate at the corner of Woodville Road and Guildford Road, Guildford, and also commanding it to consent to the erection of such hotel upon that land, or, in the alternative, commanding it to reconsider according to law and free from irrelevant and extraneous considerations the application for approval of the plans and specifications and for consent to erection of the hotel.

The Supreme Court discharged the order nisi, whereupon the applicants appealed as of right to the High Court.

The facts so far as they are relevant to this report appear sufficiently in the judgment of *Dixon* C.J. hereunder.

G. Wallace Q.C. (with him *H. Jenkins*), for the appellants.

J. K. Manning Q.C. (with him *J. D. Evans*), for the respondent. The appeal is incompetent in that the order of the court below does not involve a question respecting any property or civil right of the value of £300.

[DIXON C.J. referred to *Oertel* v. *Crocker* (1).]

A refusal to compel a council to perform a public duty is not a question involving property. The language of s. 35 of the *Judiciary Act* 1903-1950 is quite inapt to give any appeal in respect of proceedings by way of rule nisi for a writ of mandamus to compel the performance of a duty. The question whether or not a council is entitled to exercise its discretion one way or another cannot involve a civil right. The appellants have a complete remedy by way of

(1) (1947) 75 C.L.R. 261.

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appeal to the Land and Valuation Court and otherwise and they do not need mandamus. The refusal of the court below to grant mandamus cannot be quantified in terms of money or proprietary or civil rights. The appeal can only be entertained if the Court grants special leave.

G. Wallace Q.C. This is a proper case for a full mandamus: *Reg.* v. *Preston Corporation* (1). The right here sought is indirectly, if not directly, one in respect of property of the requisite value. [He referred to *Meghji Lakhamshi & Bros.* v. *Furniture Workshop* (2); *Tipper* v. *Moore* (3); *Watson* v. *J. & A. G. Johnson Ltd.* (4); *Oertel* v. *Crocker* (5).] If the Court considers that no appeal lies as of right, then special leave to appeal is sought. The mere fact that there may be other remedies will not prevent mandamus going if that be the most effective method of dealing with the matter, as is here the case.

[DIXON C.J. referred to *R.* v. *H. Beecham & Co.*; *Ex parte R. W. Cameron & Co.* (6).]

The type of question there under consideration was dealt with in *Reg.* v. *Foster*; *Ex parte The Commonwealth Steamship Owners' Association* (7) and *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (8). Important questions concerning the *Local Government Act* 1919-1952, particularly s. 342R, and the *County of Cumberland Planning Scheme Ordinance*, particularly cll. 26 and 27, here arise. The council did not comply with s. 342R. Under par. (f) a duty lies on the council not to refuse an application unless satisfied *inter alia* that other land suitable for the erection of such building as is specified in the application is available on reasonable terms, and on the material before it the council could not have been so satisfied. No notice was given. Clause 26 provides in effect that a person cannot erect a building in a living area unless a notice issues under s. 342R or permission for such erection is granted by the council as the responsible authority. No notice having been given, therefore under s. 342R (e) the person desiring to erect such building could apply to the council for its permission therefor. Clause 27 of the ordinance is a general provision applicable both to erection and use. When it comes to an erection application under cl. 27 on Pt. II land, then it is governed by the provisions of s. 342R. This is so because it deals specifically with the erection on Pt. II

(1) (1887) 3 T.L.R. 665.
(2) (1954) A.C. 80, at pp. 87, 88.
(3) (1911) 13 C.L.R. 248.
(4) (1936) 55 C.L.R. 63, at p. 70.
(5) (1947) 75 C.L.R. 261, at pp. 266, 267, 270-274.
(6) (1910) V.L.R. 204.
(7) (1953) 88 C.L.R. 549, at p. 557.
(8) (1953) 87 C.L.R. 1, at p. 29.

land by virtue of the concluding words of cl. 26. It is not competent for a council relying on the expression " injury to the amenity of the neighbourhood " to refuse to allow a hotel to be erected on a site approved by the Licensing Court on the ground that it will cause traffic congestion: *Watt* v. *Geddes* (1) and *Ex parte Tooheys Ltd.* (2). The council cannot frustrate the order of the Licensing Court. There is power in the council to regulate but not prohibit. Section 10 of the *Local Government Act* is governed by cl. 27. There is no other planning scheme affecting the land. " Injury to the amenity of the neighbourhood " in cl. 27 does not include traffic congestion. In context the word " including " really means " means and includes ". " Otherwise " must be read *ejusdem generis*. Traffic congestion was never intended to be included in that setting but is confined to the development of roads. The expression " amenity of the neighbourhood " must be read down.

J. K. Manning Q.C. was not called upon in reply.

April 15.

The following oral judgments were delivered:—

DIXON C.J. This is an appeal instituted as of right from an order of the Supreme Court of New South Wales discharging an order nisi for mandamus. The mandamus sought was directed to the respondent council. It was to command the respondent council to approve of plans and specifications for an hotel to be erected and to consent to its erection or, in the alternative, to reconsider, according to law and free from irrelevant and extraneous considerations, the application for approval of the plans and specifications for the hotel, and for consent to the erection of the hotel.

The hotel which it was proposed to erect was to stand upon certain land situated at the corner of Woodville Road and Guildford Road in the municipality of the respondent council. An application had been made to remove a licence to this piece of land, and the Licensing Court had made a conditional order for removal. That conditional order of removal was opposed by the council. The appellant who is the prosecutor then submitted to the council an application for consent and approval of the plans for the building. In fact it was in substance an application for two or three different things. There was an application under s. 312 of the *Local Government Act* 1919-1952 for the approval of the plans and specifications of the building and consent to the erection of the building. There was also an application in effect under cl. 41 of the *County of Cumberland*

(1) (1936) 36 S.R. (N.S.W.) 447; 53 W.N. 161.

(2) (1952) 18 L.G.R. 188.

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Planning Scheme Ordinance, and it is said there was also an application under s. 342R of the *Local Government Act*. The council refused the application, and gave some reasons.

In the case of a refusal of an application under s. 312, s. 341 of the Act gives a right of appeal to the Land and Valuation Court. In the case of a refusal of an application for consent under a scheme such as the County of Cumberland Planning Scheme, s. 342N (2) of the *Local Government Act* gives an appeal to the Land and Valuation Court under s. 341 from the refusal of the council. In the case of an application under s. 342R, par. (g) of that section enables a person who is dissatisfied with a refusal of such an application to appeal to the Minister.

When the appeal came on for hearing an objection was taken by the respondent to the competency of the appeal, on the ground that an appeal did not lie as of right from the order discharging the order nisi. The objection to the competency is that the order appealed from does not fall within the provisions of s. 35 (1) (*a*) (1) or (2) of the *Judiciary Act* 1903-1950, inasmuch as it does not involve the necessary amount of money. The material words of the provision are: "Every judgment . . . which (1) is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of three hundred pounds; or (2) involves directly or indirectly any claim, demand, or question, to or respecting any property or civil right amounting to or of the value of three hundred pounds." The appellant says that the order refusing the mandamus involves a civil right, namely a right to the consent of the council to the building of the hotel, which right is of the necessary value. I am of opinion that the order the subject of the appeal does not fulfil the requirements of s. 35 (1) (*a*) (1) or (2). The provisions have been explained by this Court comparatively recently in the case of *Oertel* v. *Crocker* (1). The effect of that decision is that the provisions properly construed do not authorise an appeal as of right against an order, which, while it stands, does not prejudice to the extent of £300 the proprietary or other rights to which any person or persons would be entitled if the order had not been made or if the order sought by the party appealing had been made.

In the present case the appellant who sought the mandamus was in a position to pursue other remedies which might or might not have resulted in the refusal of the respondent council being overruled. The refusal of the mandamus meant no more than that the particular remedy was denied. It meant that an immediate order was not made commanding the council to reconsider the

(1) (1947) 75 C.L.R. 261.

application. I say " commanding it to reconsider the application " because, having regard to the nature of the case, the alternative relief sought, a writ commanding it forthwith to grant its approval to the applications and its consent to the erection of the building, seems to me to be out of question. But, even if it were possible, it would still mean no more than that there had been a denial of an immediate remedy requiring consent to the building and approval of plans. It is the order which must be considered and the order does not prejudice whatever right the appellants may have or the remedies appointed by statute which remain available. Such an order does not seem to be capable of reduction to a money value. It falls outside the provision simply because it is not possible to measure the denial of the particular remedy in terms of money and to say it amounts in value to £300, there being other remedies still existing and the right not being concluded by the order. It may be added that one of the reasons given by the Supreme Court for denying the remedy was that there was a more appropriate or suitable remedy and it was therefore not a case for mandamus, even assuming that a foundation for the writ was otherwise made out. For the reason I have given I am of opinion that the appeal is incompetent. On the assumption that that was our view the appellants applied for special leave to appeal. It becomes necessary therefore to consider whether it is a proper case for the grant of special leave.

The application to the council was made, as I have already said, first under s. 312 of the *Local Government Act*, second under cl. 41, and third, it is said, under s. 342R, although it does not appear to be at all clear that it was so. In the case of all three provisions the statute has appointed a remedy for persons who are aggrieved by the refusal of a council to grant an application. An examination of the many and complicated provisions which govern and regulate the appellants' right to erect a building and to seek the approval and consent of the council shows that they form parts of an elaborate system or systems of control devised so that the development of localities and the use of land may be subject to direction and restraint. The County of Cumberland Planning Scheme is, of course, of that description but, though in a less degree, the material provisions of the Act have the same general ends. The rights of persons who will or may be affected by the restrictions involved have obviously been considered by the legislature, which has appointed remedies where the consent of the council under the Act or under the scheme as responsible authority has been withheld. The appeal to the Land and Valuation Court and in the case of

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s. 342R to the Minister are the appointed remedies. No doubt it would not be right to treat the provisions creating them as excluding as a matter of legislative intention an application for mandamus where there has been a clear failure on the part of a council to perform a public duty imposed upon it. But, where the legislature has provided for the very description of case a remedy designed as appropriate and adequate, a court should be careful that mandamus is not used to avoid recourse to the remedy or as a substitute for it. The general rule is that the court exercises its discretion against granting a writ of mandamus where a remedy is provided by way of appeal or the like which is equally convenient, beneficial and effective. If the writ of mandamus does not provide the party with a more convenient and better remedy, the court, in such a case, leaves the party with that which has been provided.

As I have already said, one of the reasons which led the Supreme Court to discharge the order nisi was that the case is met by suitable statutory remedies; the statutory appeal was appropriate and satisfactory. We think that their Honours correctly applied the principle in holding that the appeal to the Land and Valuation Court was an equally convenient, beneficial, effective and appropriate remedy; indeed it appears better calculated to lead to a proper result. The appeal to the Minister with respect to s. 342R is, of course, not a judicial remedy, but it is that appointed by statute for dealing with an administrative problem even if, contrary to my opinion, the case falls within the provision. Having regard to the considerations I have stated, we would not be warranted in granting special leave to appeal.

To refuse special leave as we do on this ground means that the remedies I have mentioned are open to the appellants. It is the fact that the appellants have lodged an appeal to the Land and Valuation Court and that that appeal is pending. In these circumstances the claim which the appellants make to have their application consented to and their plans approved may be considered in the Land and Valuation Court. In that case it will be for that court to decide upon the matters which have been raised. It is therefore not desirable that we should go into the merits of the case made and express our opinion fully upon the contentions of fact and law that have been advanced. But there are two or three matters to which it is perhaps desirable to refer.

In the first place one of the grounds relied upon in support of the application for special leave to appeal is that the council in giving their reasons for refusing the application under s. 312 and under cl. 41 of the *County of Cumberland Planning Scheme Ordinance*

limited their grounds and that the Supreme Court has found that the council's discretion was properly exercised on grounds which go outside those limits. I do not propose to examine the resolution which the council passed or the notification thereof sent to the appellant or to discuss how far the grounds the Supreme Court attributed to the council are covered by those respective documents. What I desire to say about them is that if the council had, by a proper exercise of its discretion, in truth discharged its duty under the provisions of Div. 4 of Pt. XI of the *Local Government Act*, in which s. 312 stands, and under the clauses of the *County of Cumberland Planning Scheme Ordinance* (namely cll. 26, 27 and 41), then it would appear to me to be a sufficient answer to an application for a writ of mandamus, even if thereupon the council had not performed its further duty in giving a notice as full or complete as the provisions of s. 314 (3) may be considered to require.

In the second place, as a mandamus could in any case command only the reconsideration of the matter, it would be open to the council to reconsider it on all grounds, and the remedy would prove futile.

In the next place, it is perhaps desirable to refer to s. 342R. There are some difficulties about that provision which it is not necessary to discuss. It is enough to deal with the ground taken for the appellant which was that under the proviso to par. (f) a duty lay upon the council in this particular case not to refuse an application unless it was satisfied among other things that other land suitable for the erection of such building as is specified in the application is available on reasonable terms, and that the council was not so satisfied and could not have been so satisfied. That fact is not conceded. But however that may be, it is important to notice that the duty which is laid upon the council by the proviso in negative terms not to refuse an application does not arise unless the council has power to grant the application and that it has no power to grant an application unless under par. (f) of s. 342R it is satisfied that the proposed erection of the building will not contravene any permanent provisions of the prescribed scheme. It is not conceded that the council was satisfied that the proposed erection of the building would not contravene any permanent provisions of the prescribed scheme. Speaking for myself, I should think that the council would be well justified in not being satisfied that the building would not contravene the permanent provisions of the prescribed scheme.

It has been assumed that s. 342R applies to the appellants' land because the last portion of cl. 26 of the *County of Cumberland*

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Planning Scheme Ordinance suffices to bring under its operation land within the zone to which cl. 26 refers and that zone includes the appellants' land. The earlier portion of cl. 26 states that the purposes for which buildings may be erected or used without the consent of the responsible authority (in this case the council) or only with such consent or may not be erected or used at all are shown in the table which is annexed to the clause. The provision then proceeds to say that no building operation shall be undertaken upon land within the zone specified in Pt. II of the table unless a notice applying to the land has been given under par. (a) of s. 342R and such notice is still operative or permission to erect a building has been granted under par. (e) of the said section.

No doubt it may be suggested that this last portion may not aptly fulfil the condition laid down in the commencing words of s. 342R which make the whole of the ensuing paragraphs of the section contingent upon there being a prescribed scheme in which the erection of buildings on land is prohibited or restricted until such time as the responsible authority has given notice, as provided in the section. For the clause does not pursue the terms of the section but first of all uses the word " unless ", and then adds the additional limitation that the notice must still be operative and then further the alternative condition excluding the prohibition or restriction if permission to erect a building has been granted under par. (e). I do no more than mention the doubt lest it should be thought to have been overlooked. But for present purposes I assume that the doubt is not well founded.

In the last part of cl. 26 it is first provided that no building operations shall be undertaken, that is to say that they shall not be commenced, within the zone specified unless one or other of the conditions is fulfilled. The earlier part, however, which is introductory to it, specifies the purposes which, among other things, require consent. The later part, as it appears to me, ought to be read as cumulative upon the earlier part and not as taking out of the earlier part any case falling under the later part in which one or other of the conditions is fulfilled.

To see how the earlier words of cl. 26 operate to require consent in this case it is necessary to look at Pt. II, item 14, of the table and combine it with item 1 in Pt. I to which item 14 refers. Column 4 in the table shows the purposes for which buildings may be erected or used only with the consent of the responsible authority, which is the council. One of the purposes is " shops ". The definition of the word " shops " includes any premises licensed under the *Liquor Act* 1912 as amended. Clause 27, which follows, then provides

that where an application is made to the responsible authority for its consent to the erection or use of buildings in a zone in which a building of the type proposed may be erected and used only with its consent the responsible authority shall decide whether to give or withhold consent and in the former event what conditions, if any, shall be imposed. There follows a reference to some of the matters to be considered in exercising the discretion.

It appears to me that under par. (f) the permanent provisions of the prescribed scheme, which must not be contravened if the power is to arise, are in this case the provisions which I have read made up of cl. 26 and the table annexed to it and cl. 27. Until, or perhaps I should say unless, there is a consent of the council as the responsible authority, the building would contravene the permanent provisions of the scheme. Accordingly, as at present advised, I would be disposed to think that the power given by par. (f) of s. 342R does not arise and the proviso is not applicable to this case. For that reason the section may be put aside. It is not the only matter arising in connexion with s. 342R, but I do not think it is necessary to say more of this somewhat difficult provision.

Another matter which it is perhaps desirable to mention is the ambit of the proviso to cl. 27 of the *County of Cumberland Planning Scheme Ordinance*. The proviso says that before determining any such application the responsible authority shall consider the provisions of any planning scheme, including this scheme, affecting the land. I pause to say that there does not appear to be any planning scheme affecting the land other than the County of Cumberland Planning Scheme. The proviso goes on " and in any case where it appears to the responsible authority that the erection or use of such building would be in contravention of any such scheme or is likely to cause injury to the amenity of the neighbourhood including injury due to the emission of noise, vibration " and certain other enumerated agencies, " or otherwise the responsible authority may withhold consent ".

I mention cl. 27 specifically for the purpose of saying two things. The first is that the council has a wide discretion and that the grounds on which it is exercisable do not appear to me to be limited to the matters stated in the proviso. The proviso is an express command requiring it to pay attention to the matters specified. The discretion of the responsible authority, however, is not necessarily restricted to those matters. In the second place it was suggested that the words " likely to cause injury to the amenity of the neighbourhood including injury due " and so forth limited the causes of injury to amenity to the causes enumerated after the

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word " including " which was given the same force as a *videlicet*. It is to be noted that the sentence ends with the words " or otherwise ". I think that a restrictive construction of that sort is not warranted by any of the considerations which have been advanced. It is right to say that those considerations depend not only upon the clause itself, but upon the nature of certain powers which are given to other authorities in various parts of the scheme. But I think no cause of injury to the amenity of the neighbourhood is necessarily excluded.

I do not refer to the matters of fact in this case, for they may be matters that are further litigated or made the subject of discussion before the Land and Valuation Court. But it is desirable to say that in a great degree the grounds relied upon in support of the application for special leave as well as in the application to the Supreme Court to make the order absolute really turn on questions of fact or on the proper interpretation of the facts and on what is to be deduced from the facts as to the purposes animating the respondent council.

Having regard to what I have said, and to the degree to which the appeal depends in substance on matters of fact, we do not think this is a proper case in which to grant special leave to appeal.

McTIERNAN J. I agree; and I only wish to add that I am disposed to agree with the observations which the Chief Justice has made upon s. 342B and also upon the construction or interpretation of cl. 27. I entirely agree with what his Honour has said with respect to the question of the competency of this appeal.

WEBB J. Substantially for the reasons given by the Chief Justice I am of opinion that the appeal is incompetent and that special leave to appeal should be refused.

FULLAGAR J. I agree with the judgment of the Chief Justice.

KITTO J. I agree also.

Appeal dismissed as incompetent. Special leave to appeal refused. The appellants to pay to the respondent the costs incurred by the respondent limited to the costs which would have been properly incurred in opposing the application for special leave to appeal.

Solicitors for the appellants, *Smithers, Warren & Lyons.*

Solicitors for the respondent, *J. D. Cawood & Hall*, Parramatta, by *Bowman & McKenzie.*

J. B.