[HIGH COURT OF AUSTRALIA.]

VITOSH . . . . . APPELLANT;
PLAINTIFF,

AND

BRISBANE CITY COUNCIL . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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MELBOURNE, *Oct.* 11, 12.

Dixon C.J., McTiernan, Williams, Webb and Taylor JJ.

Local Government (Q.)—Brisbane City Council—Resolution—Validity—Power to declare "any defined part of the city to be a residential district"—Resolution declaring all parcels of land vacant at date of resolution or then having residential buildings on them to be residential district or districts—Unsuccessful application for mandamus upon assumption that resolution valid—Contention in later action between same parties that resolution invalid—Issue estoppel—The City of Brisbane Acts 1924 *to* 1952 (15 *Geo. V. No.* 32—1 *Eliz. II., No.* 52), *s.* 36 (1) (2) (3)—*Brisbane City Council Ordinances, Chap.* 35.

A council had power given by ordinance to declare by resolution "any defined part of the city to be a residential district". In the purported exercise of this power it adopted a resolution declaring that "all parcels of land which are now vacant or upon which there are now residential buildings shall be a residential district or districts in terms of" the ordinance and prohibiting the erection etc. in such district or districts of any building for the purpose of certain trades subject to such exemptions as might in future be made by resolution of the council.

Held, that the resolution was invalid because it was not an exercise of the powers given by the ordinance which contemplated the definition by some sufficient topographical description of an area forming part of the city.

Russell v. *Brisbane City Council* (1955) Q.S.R. 419, disapproved.

An owner of land which was affected by the resolution applied to the council for an exemption or for the council's consent to his proceeding with the erection thereon of a building for the purpose of a prohibited trade. When this application was refused he unsuccessfully applied for a writ of mandamus to compel the council to exercise its discretion under the resolution. In the course of

giving its reasons for the refusal of the mandamus the Full Court of the Supreme Court of Queensland stated that the resolution was valid. Subsequently the owner commenced an action claiming that the resolution was invalid.

Held, that the validity of the resolution not being in issue on the application for mandamus, which application assumed its validity, the owner was not estopped from subsequently claiming that it was invalid.

Decision of the Supreme Court of Queensland (*Matthews* J.), reversed.

APPEAL from the Supreme Court of Queensland.

Robert Vitosh of Yeerongpilly, Brisbane, commenced an action on 3rd February 1953 in the Supreme Court of Queensland against the Brisbane City Council, a body corporate incorporated by *The City of Brisbane Acts* 1924 *to* 1952 (Q).

The nature of the plaintiff's claim so far as material to this appeal appears by the following portions of his statement of claim :— 1. On or about 18th December 1950 and at all relevant times certain lands, situate at Balham Road, Rocklea, Brisbane aforesaid being resub-division 2 of sub-divisions 33 and 34 of portion 66, Parish of Yeerongpilly, were within the City of Brisbane as constituted and declared by s. 4 of *The City of Brisbane Acts* 1924 *to* 1930. 2. On 6th December 1932 portion 66 aforesaid consisted of four parcels of land namely, sub-division 33 being 1 a. 19.2 per. ; sub-division 34 being 2 a. 28.6 per.; sub-division 35 being 2 a. 1 r. 37.9 per.; and sub-division 36 being 2 a. 2 r. 34.2 per. 3. On 14th April 1948 the defendant approved of a further sub-division of the lands described and in consequence thereof sub-divisions 33, 34 and 35 were resub-divided into resub-divisions 1, 2, 3, 4 and 5 of sub-divisions 33, 34 and 35. 4. On or about 16th April 1951 a resub-division of the lands in Balham Road, Rocklea, Brisbane, described in par. 1 hereof was approved by the defendant on the application of one Elizabeth May Beesley, the registered proprietor for an estate in fee simple in the whole of the land so described for the purpose of sale by her to the plaintiff of a parcel of land being resub-division 2 of the said lands, and new description for the newly sub-divided parcel of land was given by the defendant as Sub-division 2, Resub-division 2, Sub-divisions 33 and 34, Portion 66, Parish of Yeerongpilly. 5. On or about 5th May 1951 the plaintiff acquired by purchase from the said Elizabeth May Beesley an estate in fee simple in the lands mentioned and described in par. 4 hereof and became registered proprietor thereof. 6. On or about 21st May 1951 the plaintiff made application in writing to the defendant for permission to establish a factory for the manufacture of houses on

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the land situate at Balham Road, Rocklea, aforesaid and submitted a set of plans for the proposed factory, showing the site and describing the said lands. 7. On 13th August 1951 the Council Registration Board, in pursuance of the powers delegated to the said board by the defendant in respect of the approval of the use of land, under and subject to Ordinance Chap. 35 of the Ordinance of the City of Brisbane resolved that the site of the proposed factory at Balham Road, Rocklea, aforesaid be not approved for the manufacture of houses. 8. An ordinance adopted by the Brisbane City Council under *The City of Brisbane Act of* 1924 and approved by the Governor in Council on 29th February 1928 under the style of "Chap. 35—Residential Districts" provided (*inter alia*): "1. The council may, not less than thirty days after notice published in a newspaper published in the City of Brisbane giving the purport of its intention, by resolution—(a) Declare any defined part of the city to be a residential district; and (b) Prohibit the erection in such district of any building for use for the purpose of such trades, industries, manufactures, shops, and places of public amusement as may be described in the resolution; and (c) Prohibit the use of any land or building in such district for any such purposes as last aforesaid; and (d) Prohibit the erection or use of advertising hoardings in such districts; and (e) Regulate the class, quality, or description of buildings that may be erected or permitted to continue (whether erected before or after the passing of such resolution) in such district. 2. Nothing herein contained shall preclude the continuance of the use of any land or building for any purpose for which such building was used at the date of such resolution, or for such other purposes as the council may in the circumstances deem reasonable. 3. The council may, when passing such resolution, provide for the exemption of such building or buildings, subdivision or subdivisions, as may thereafter be determined by the council by resolution at an ordinary meeting." 9. By a resolution of 6th December 1932 the defendant in the purported exercise of its powers under Ordinance Chap. 35 aforesaid declared: "That Resolution No. 2,211/1928, adopted by the council on 22nd October, 1928, be now and is hereby rescinded, and that all parcels of land which are now vacant or upon which there are now residential buildings (which term includes a combined shop and dwelling) shall be a residential district or districts in terms of Chap. 35 of the Ordinances (Residential Districts), dated 29th February, 1928, and the erection in such district or districts of any building for the purpose of the trades, industries, manufactures, shops, and places of

public amusement described in the schedule hereto, and the use of any building in such district or districts for any such purposes are prohibited subject to such exemptions as may hereafter be determined by resolution of the council at an ordinary meeting: Provided that this resolution shall not apply to industries or undertakings engaged in or to be engaged in under license from the council." 10. The said resolution is invalid in that it does not declare any defined part of the City of Brisbane to be a residential district.

By its defence dated 4th August 1954 the defendant, *inter alia*, denied the allegation contained in par. 10 of the statement of claim and pleaded as follows: 1. The defendant says that the plaintiff ought not to be admitted to set up and/or make the allegations in par. 10 of the statement of claim because on 21st February 1952 before the commencement of this action the plaintiff obtained an order nisi from the Supreme Court of Queensland calling upon the defendant and one Frank G. Costello to show cause before the Full Court of the said Supreme Court why a writ of mandamus should not issue directing the defendant and the said Frank G. Costello to exercise their discretion in a proper manner in relation to the application for site approval for the establishment of a factory at Balham Road, Rocklea, Brisbane by the said Robert Vitosh and why the defendant should not pay the costs of the application and such order. The said land at Rocklea aforesaid is the land referred to in par. 4 of the statement of claim. On 24th March 1952 the said order nisi was discharged and the plaintiff was ordered to pay the costs of the defendant and the said Frank G. Costello. The Full Court found and/or held that the plaintiff's claim for the writ of mandamus necessarily failed because the defendant through its appropriate organ had exercised its discretion on the application made to it by the plaintiff for site approval for the establishment of a factory at Balham Road, Rocklea, Brisbane. The defendant craves leave to refer to the whole of the reasons for judgment of the said Full Court. The matter referred to in par. 10 of the statement of claim was either an issue determined by the said judgment of the Full Court against the plaintiff or was a matter which was a necessary ingredient to the cause of action in respect of which judgment was so given. The said judgment of the Full Court still remains in force.

The action was heard before *Matthews* J. who, on 22nd April 1955, dismissed it with costs.

From this decision the plaintiff appealed to the High Court.

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C. G. Wanstall, for the appellant. The resolution of the Brisbane City Council dated 6th December 1932 is not a valid exercise of the power conferred by the ordinance dated 29th February 1928 because it does not declare any defined parts. It makes no attempt to create a district within any known connotation of that word. Literally it may mean that a vacant block of land between two factories constitutes a residential district. No issue arose in the mandamus proceedings as to the validity of the resolution. The validity of it was assumed.

J. D. McGill, for the respondent. A district may consist of a small vacant piece of land. The accumulation of blocks, either vacant or with residential buildings on them on 6th December 1932 constituted either a residential district or residential districts. The blocks were defined parts of the city.

[DIXON C.J. referred to *Stewart* v. *City of Essendon* (1); *Corless* v. *Richmond* (2).]

By taking proceedings for mandamus against the council the plaintiff proceeded on the basis that the resolution was valid. He is bound by the reasons for judgment of the court which state that the resolution was valid.

The judgment of the Court was delivered by DIXON C.J.

This is an appeal against a judgment of *Matthews* J. by which the plaintiff's claim in an action against the defendant, the Brisbane City Council, was dismissed with costs. His Honour gave judgment against the plaintiff upon a counter-claim by the defendant, but that counter-claim is no longer in question.

By his claim in the action the plaintiff sought relief against a resolution of the Brisbane City Council by which lands of a given description were declared to be a residential district or districts and against the refusal of the council to relax the provisions which that resolution contained. The plaintiff claimed certain consequential relief, including damages.

By s. 36, sub-s. (1), of *The City of Brisbane Act of* 1924 (Q.) the Council of the City of Brisbane is charged with the government of the city and has the control of the working and business of such government. Sub-section (2) of s. 36, empowers the council to make ordinances for promoting and maintaining certain purposes which include the general good government of the city and of its inhabitants. Sub-section (3) of s. 36 extends the power of the council. Among the matters included in the extension are the

(1) (1924) V.L.R. 219. (2) (1924) V.L.R. 408.

sub-division of land, the use and occupation of land, and the use and occupation of buildings and generally all works matters and things in the opinion of the council necessary or conducive to good government of the city and the well-being of its inhabitants.

In 1928 the council adopted an ordinance which forms Chap. 35 and is entitled "Residential Districts". The ordinance was approved by the Governor in Council. By this ordinance the council took power to create residential districts by resolution of the council. The power it took enabled the council by resolution to declare any defined part of the city to be a residential district. Upon making such a declaration the ordinance enabled the council by the resolution to prohibit the erection in each such district of any building for use for the purposes of such trades, industries, manufactures, shops and places of amusements as might be described in the resolution.

The council adopted a resolution on 6th December 1932 in purported pursuance of this ordinance and it is that now in question. By the resolution the council resolved that all parcels of land which are "now", that is to say on 6th December 1932, vacant or upon which there are "now" residential buildings which term included a combined shop and dwelling, to be a residential district or districts in terms of Chap. 35 of the ordinance. The ordinance is referred to as the residential district ordinance and is dated 29th February 1928.

The resolution went on to forbid the erection in such districts of any building for the purposes of the trades etc. described therein and to forbid the use of any building for such purposes. The resolution, however, was expressly made subject to such exemptions as might thereafter be determined by resolution of the council at an ordinary meeting.

At that time certain land in Balham Road, Rocklea, Brisbane, fell within the description contained in this resolution. On 16th April 1951 the defendant council approved an application by one Elizabeth May Beezley as registered proprietor for a resub-division of this land. On 5th May 1951 the plaintiff acquired from her by purchase a parcel of land so resub-divided. He applied to the defendant council for permission to erect certain buildings on the land. If the resolution of 6th December 1932 is valid it would operate, by virtue of the ordinance, to make unlawful the erection of such buildings as the plaintiff desired upon the site. That is to say, unless an exemption were granted by resolution of the council at an ordinary meeting pursuant to the ordinance.

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The plaintiff's application to the defendant council for permission was refused. He resorted unsuccessfully to remedies by way of mandamus and then he brought this action.

The first question in the action is obviously whether the resolution is a valid exercise of the power conferred upon the council by the ordinance. That question had already been decided in the affirmative by the Full Court of Queensland in the case of *Russell* v. *Brisbane City Council* (1). *Matthews* J. was, of course, bound by that decision. We, however, are of opinion that the resolution is invalid and are unable to agree with the decision of the Full Court in *Russell* v. *Brisbane City Council* (1).

The resolution attempts to establish as a residential district or districts parcels of land described according to attributes existing on 6th December 1932. The attributes are that the parcels should be parcels which are vacant or upon which there are residential buildings. We think that this cannot amount to an exercise of the power conferred by the ordinance. That power was to declare a defined part of the city to be a residential district. The ordinance contemplates the definition by metes and bounds or by streets or by some other sufficient topographical description of an area forming part of the city. What the resolution does is to take as a criterion the existence or non-existence upon the land on the given date of buildings of certain descriptions or the entire absence of buildings upon the parcel. That involves no selection of a part of the city suitable to form a district. It means merely a decision by the council that vacant land wherever it should be found and land upon which there were then residential buildings should be subject to restrictions contained in the ordinance. That appears to us to be an entirely different kind of discretionary power from that bestowed by the ordinance. It follows from this view that the resolution formed no obstacle to the plaintiff and it was unnecessary for him to apply for an exemption under the ordinance and the resolution.

However, the plaintiff did apply to the council for an exemption or for the council's consent to his proceeding with the building. When this application was refused he sought a prerogative writ of mandamus. As we have said the application was unsuccessful and a mandamus was refused. In the course of giving his reasons for the refusal of the mandamus *Macrossan* C.J. stated that the resolution was valid under the ordinance. It is now said that the proceedings by prerogative writ of mandamus operate by way of issue estoppel to preclude the plaintiff from succeeding in this action on the ground

(1) (1955) Q.S.R. 419.

that the resolution was invalid. It is said that the issue of the validity of the resolution was decided against him. We think that this argument is misconceived. The plaintiff's application for a writ of mandamus assumed the validity of the resolution and upon that assumption the plaintiff sought an order commanding the exercise of the council's discretion under the resolution ; but no issue arose as to the validity of the ordinance or of the resolution. The plaintiff is not estopped by his having proceeded on the assumption that he was bound by the resolution under the ordinance.

The relief sought by the action includes declarations of right, injunctions and damages. No case whatever for damages has been made out by the plaintiff and we do not think that any injunction is necessary even if the facts disclosed by the record give any ground for granting an injunction. We think that it is enough to make a declaration of right, a declaration that the resolution dated 6th December 1932 of the defendant council is invalid.

The appeal should be allowed with costs. The judgment of *Matthews* J. upon the plaintiff's claim should be discharged and in lieu of that judgment a declaration in the terms stated should be made. The plaintiff should have the costs of the action but, of course, not the costs of the counter-claim. The order for costs upon the counter-claim stands. The costs of the action and of the counter-claim should be set off.

McTIERNAN J. I have a few observations to make on the question of the power granted by the ordinance and its exercise by the resolution. I agree with what has been said by his Honour the Chief Justice. The additional observations I wish to make are these : the power granted by the ordinance is to declare any " defined part " of the city to be a residential district. In order to exercise this power in accordance with the terms in which it is granted it is necessary to define a part of the city and then to declare such part to be a residential district. The fact that the part defined is to be a district—a residential district—shows what is meant by the word " part ".

The question is whether the portions of the city indicated by the words of the resolution " all parcels of land which are now vacant or upon which there are now residential buildings " are a defined part of the city according to the intention of the ordinance.

No doubt such parcels of land are capable of being ascertained. The word " now " fixes the time—that is, the date of the resolution when their condition is to be ascertained. But would a collection of parcels of land, not necessarily contiguous, constitute a district

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or districts according to the ordinary meaning of the word district ? There may have been areas of vacant land consisting of one parcel, or contiguous parcels, that would constitute a district. But there may have been many separate parcels of land distant from one another hemmed in by built-up land. The collection of these parcels of land could not be described as a district. It would not be in accordance with the ordinary meaning of the word " district " to say that each of the separate parcels, however small, would be a district. I do not think that it is the intention of the ordinance to empower the council to define a residential district solely by the criterion that a parcel of land is vacant or that a residential building is erected upon it. That seems to me to be the criterion adopted by the resolution. I do not agree that this criterion is correct. The words " any defined part " in this context—the ordinance—seems to me to mean a portion of the territory of the city described with reasonable certainty and reasonably capable of answering to the description of a district considered as an area of land.

It is, of course, within the power in question to define as many residential districts as the council thinks fit. I am unable to agree that this particular resolution is a good exercise of the power to declare residential districts within the city.

Appeal allowed with costs. Judgment of Matthews J. discharged. In lieu thereof declare that the resolution dated 6th December 1932 *of the defendant council is invalid. Order that the plaintiff have the costs of the action and the defendant the costs of the counter-claim and that such costs be set off.*

Solicitors for the appellant, *Sholto Douglas & Morris*, Brisbane, by *Home Wilkinson & Lowry*.

Solicitor for the respondent, *G. L. Byth*, Brisbane.

R. D. B.