

IN THE HIGH COURT OF AUSTRALIA

THOMPSON & OTHERS

V.

THE COUNCIL OF THE MUNICIPALITY OF
RANDWICK.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on THURSDAY, 7th SEPTEMBER, 1950

THOMPSON & ORS.

V.

THE COUNCIL OF THE MUNICIPALITY OF RANDWICK

O R D E R

Appeal allowed. Decree of the Supreme Court of New South Wales in Equity set aside. Order that the respondent, its servants and agents be restrained from acquiring or attempting to acquire the lands of the respective plaintiffs by resumption pursuant to its resolution of 20th January 1948 and its application of 9th August 1948 under sec. 536 of the Local Government Act 1919, as amended.

Order the respondent to pay the costs of the appellants of this appeal and of the proceedings in the Supreme Court.

THOMPSON & ORS.

V.

THE COUNCIL OF THE MUNICIPALITY OF RANDWICK

JUDGMENT

Williams J.
Webb J.
Kitto J.

THOMPSON & ORS.

V.

THE COUNCIL OF THE MUNICIPALITY OF RANDWICK.

JUDGMENT

WILLIAMS J.

WEBB J.

KITTO J.

This is an appeal by the plaintiffs from a decree of the Supreme Court of New South Wales in Equity (Reper C.J. in Eq.) dismissing with costs a suit brought by them to obtain injunctions restraining the defendant Council from resuming certain lands which they own in the Municipality of Randwick for the purposes of a scheme resolved upon by the Council on 20th January 1948. The Council has applied to the Governor through the Minister under the provisions of secs. 532 and 536 of the Local Government Act 1919 as amended to have these lands resumed for the purposes of this scheme. The lands in question comprise a number of lots shown on an old plan of sub-division situated in an area in Coogee which is bounded on the north by Cairo Street, on the south by Pearce Street, on the east by Alexandria Parade, and on the west by Denning Street. The scheme provides for the construction of a new road running north and south midway between and parallel to Denning Street and Alexandria Parade. It also provides for the closing of the eastern end of Bloomfield Street and the whole of Wisdom Street. These two streets, which run east and west from Alexandria Parade to Denning Street between Cairo Street and Pearce Street, are not made roads but are two of the streets each 66' wide shown on the plan of sub-division of which the plaintiffs' lands form part. Alexandria Parade is also not yet constructed but the Council hopes that this will be done as part of a plan for building a marine drive along the ocean front. The Council proposes to substitute the new road for the portion of Bloomfield Street proposed to be closed and for Wisdom Street. The scheme provides for the re-subdivision of a number of allotments in the old sub-division to conform to this alteration of roads. As

part of the scheme it is proposed to create four new lots in the portion of Bloomfield Street to be closed and four new lots in Wisdom Street, all these lots having frontages of 33' to the new road.

The Council does not propose to resume the whole of lots 23, 24 and 25 of section 5 of the old plan of sub-division, but only to resume a 12' strip on their southern front along which a path will be constructed to give pedestrians access to these lots from the portion of Bloomfield Street which is not to be closed. This strip is to be resumed from these lots instead of being reserved from the portion of Bloomfield Street to be closed, so that there will be room for two new lots on the western end of this portion of Bloomfield Street. There is already a house on lot 24 owned by the plaintiff Tunnie, and the result of the scheme, if put into operation, will be that Tunnie, instead of having a house with a frontage to a 66' road will be left with a house having pedestrian access only along a 12' path and looking into the backyards of the houses to be built on two of the new lots in Bloomfield Street. The same fate awaits the owners of lots 23 and 25, at present vacant lands, if and when they decide to build on their allotments. Lots 4, 5 and 6 of section 6 of the old plan of sub-division are owned by the plaintiff Pepplewell. Only parts of these lots are required for the new road and the residues are capable of being amalgamated into two lots, one on each side of the new road, each having an extensive frontage to the new road. Lots 20, 21 and 22 and part of lot 23 of section 7, owned by the plaintiff Staunton, are in a similar position. The plaintiff Beer owns lots 11 and 12 of section 7, only parts of which are required for the new road, and the residues are capable of being amalgamated into one lot having an extensive frontage to the new road. The plaintiff Porter owns two lots 15 and 16 of section 7, lot 15 fronting Wisdom Street and lot 16 Alexandria Parade. Lot 15 will not have any frontage to a road after Wisdom Street is closed, but these lots can be combined and made into two lots fronting Alexandria Parade. In between lots 11 and 12 owned by Beer and lots 15 and 16 owned by

Porter are lots 13 and 14 of section 7 owned by the plaintiff Brackenbury. They will lose their frontages when Wisdom Street is closed, and so it is proposed to add lot 13 to the rear of the residues of Beer's lots 11 and 12 and to add lot 14 to the rear of Porter's lots 15 and 16. Lot 8 owned by Beer will also lose its frontage to Wisdom Street and it is proposed to add this lot to the rear of the residues of lots 9 and 10. Another block of land affected by the scheme is that owned by one Blair fronting Alexandria Parade and Wisdom Street. None of this land is required for the new road or for amalgamation with other lots and it will still retain its frontage to Alexandria Parade, but the Council proposes to resume the whole block and divide it into two lots fronting Alexandria Parade.

The origin of the scheme was a report to the Town Clerk by the Council Engineer dated 14th June 1945 recommending the closing of Wisdom Street and part of Bloomfield Street, and the construction of the new road. Certain advantages of access were claimed for the new road over the access which would be provided if Bloomfield Street and Wisdom Street were constructed. It was pointed out that the main disadvantage of the new road was its narrow width and its proximity to parallel streets. The estimated cost of constructing the new road including construction and resumptions less the sale of the surplus lots was £10,516 as against £6,850 the estimated cost of construction of the balance of Cairo Street, Bloomfield Street and Wisdom Street. At a meeting of the Works Committee of the Council held on 18th October 1945, it was recommended that the engineer's plan be adopted and that all necessary steps be taken to acquire all the land in the area as part of a town planning scheme. At a meeting of the Council held on 6th November 1945 it was resolved that the matter be referred back to the Works Committee, and the Engineer be instructed to prepare final plans for the proper town planning of the area.

The Engineer made a further report to the Works Committee of the Council on 12th March 1946. He estimated the cost of the new road at £8,220 as against £7,950 the estimated cost of

constructing Bloomfield and Wisdom Streets. But he pointed out that, if the lands of the plaintiffs and of the other owners in the area were resumed, the excess on the re-sale of the resumed lands over the cost of their resumption would be £2,046 and this would reduce the estimated cost of the new road to £6,174, so that, with the assistance of these profits made from the resumptions, the new proposal would be the cheaper method by about £1,776. He claimed in the report that the new road would provide better access than Bloomfield Street and Wisdom Street and would be cheaper to maintain. The Works Committee of the Council recommended that the proposed plan appeared to be the only solution of a difficult re-planning of the area and that the scheme submitted should be adopted and it was adopted at a meeting of the Council held on 19th March 1946.

On 20th March 1947 the Council applied to the Minister under the provisions of the Public Roads Act 1902 to have the land included in the scheme resumed for public roads and to have Bloomfield Street and Wisdom Street closed as no longer required as a means of access in the area affected by the resumption. The proposed action under the Public Roads Act, however, met with difficulties. It was found that Bloomfield Street and Wisdom Street had not been dedicated as roads under the Local Government Act and this had to be done before they could be closed. It was also found that, as the Council had decided to resume more land than was required for the new road, the resumptions could not be made under the Public Roads Act. It was therefore decided to proceed under the Local Government Act.

At a meeting of the Council held on 20th January 1948, the Town Clerk reported that he had been advised by officers of the Lands Department that the only land which might be resumed by the Department was that actually utilised for road purposes and that "in view of Council's plan for the re-designing of the area which includes sub-dividing the land uniformly to the new road, it will now be necessary for Council to pass a further resolution approving of the resumption of the part and whole allotments shown on the

attached scheme for the purpose of the improvement and embellishment of the area". The report went on to recommend that the lands of the plaintiff Thompson with a frontage to Alexandria Parade, and Mrs. G. H. De la Lorenzo's cottage with a frontage to Cairo Street, should be excluded from the resumption as the absence of both these areas would considerably lessen the cost. The Council resolved to adopt the Town Clerk's report and to exclude these properties from the resumption application.

The resumption application, which is dated 9th August 1948, states that the Council makes application under secs. 532 and 536 of the Local Government Act 1919 as amended for the approval of His Excellency the Governor to the Council acquiring by the resumption for the purposes of the improvement and embellishment of the area - sec. 321(d) - the land within the area briefly described in the schedule thereunder and more particularly in the accompanying certified plan.

Sec. 532 of the Local Government Act, which is included in Part XXV headed "Acquisition of Land", provides that the Council may acquire land within or outside the area for any purpose of this Act by lease, purchase, appropriation or resumption in accordance with this Part. Sec. 4 of the Act provides that in this Part, unless inconsistent with the context or subsequent matter, "Area" or "local government area" means city, municipality or shire.

The provisions of the Act relied upon as specifying purposes for which the proposed resumptions may be made are secs. 235, 321(d), 322 and 535. Sec. 235 provides that the Council may provide any public road, and that any land required for the purpose of this section may be acquired in any mode authorised by this Act. This section cannot support the whole of the proposed resumptions, because the only land which could be resumed for the purpose of the new road under sec. 235 would be the land required for the construction of the road. Sec. 322 provides that the Council may purchase or resume, as elsewhere in the Act provided, any land, and may thereupon do all or any of certain specified things, including (d) close any existing

public road through such land, and (h) sell or lease the whole or any portion of such land, in one or more lots, as elsewhere in the Act provided. In our opinion this section does not confer a power to purchase or resume independently of purpose, nor does it enumerate purposes for which purchases or resumptions may be made. Its operation, in our opinion, is to confer powers which may be exercised with respect to land when purchased or resumed for a purpose authorised elsewhere in the Act. Sec. 535 authorises a Council, where it proposes to acquire land for any purpose, also to acquire other land adjoining or in the vicinity. The language of sec. 535 is in terms very wide. But the section can only operate where the Council proposes to acquire land for any purpose. It is therefore not an independent but an incidental power and this indicates that some limits must be placed on its meaning. It does no more, we think, than confer a power to acquire land adjoining or in the vicinity of land authorised to be acquired by sec. 532 whenever the acquisition of such adjoining or proximate land is reasonably incidental to the carrying out of the purpose for which the land is authorised to be acquired under that section. In the present case it is clear that the lands proposed to be resumed exceed what is required to construct the new road, and there is no evidence that it is reasonably incidental to any purpose under sec. 235 of the Act that this excess should be acquired under sec. 535. The scheme must therefore be supported, if at all, by the provisions of sec. 321(d), and indeed it was on this sub-section that the Council relied in passing the resolution of 20th January 1948 and making the application to the Governor under sec. 536.

Sec. 321(d) provides that, subject to the provisions of this Act, the Council may control and regulate and may undertake the improvement and embellishment of the area. It was contended for the appellants that the word "and" in sec. 321(d) must be read conjunctively and not disjunctively and that nothing could be an improvement which was not an embellishment of the area. But the word "and" is used disjunctively in the preceding paragraphs of sec. 321, and we are not prepared to hold that it is not used in the same sense in paragraph (d). We consider that in the collocation of words

this sub-section contains, improvement is used rather to denote utilitarian betterments and embellishment to denote beautification of the area. But we also consider that the improvement or embellishment must at least be some physical improvement or embellishment of the area. Sec. 321(d) contains two powers: (1) power to control and regulate the improvement and embellishment of the area; this power does not authorise the doing of any act or any work by the Council itself, but only the control and regulation of work done by others; (2) power to undertake the improvement and embellishment of the area; this power authorises the Council itself to undertake work which can be said to be an improvement or embellishment of the area and provides a purpose for which the Council may acquire the land on which the work is to be done. In the present case the only work the Council proposes to do is to construct the new road and path. It proposes to resume far more land than is required for this purpose. It does not propose to do any work upon the balance of the land. It only proposes to sell this balance. It was contended that it was necessary to resume this balance because this was the only way in which the Council could re-subdivide the land into new allotments of suitable size and having suitable frontages to the new road or to the existing roads other than the roads to be closed. The answer to this contention is that this is not an undertaking by the Council of the improvement or embellishment of the area. It is not the doing of any work by the Council on the lands not required for the new road and pathway. The Council does not itself propose to erect any buildings or other amenities on these lands. It merely proposes to re-subdivide and sell them. If the Council wishes to compel the owners to amalgamate the residues of their lands into lots appropriate to the new frontages it seems to us, as at present advised, that the Council may be able to do so under its power to control and regulate the improvement of the area by only allowing buildings to be erected on these residues after they have been amalgamated. If this be not so, we have not been referred to any other power which would authorise the resumption of land for this purpose and, in the words of Bowen L.J. in Gard v. Commissioners of Sewers of the City of

London, 28 Ch.Div. 486 at p. 510, the Council "must shew that on the fair construction of the Act of Parliament they had the right to take the whole of the land when really they only wanted a small part". We have not overlooked the fact that some of the lots owned by the plaintiffs, for instance the lots owned by Brackenbury and one of the lots owned by Beer and Porter, will have no frontages to any road if Wisdom Street is closed. But we know of no power which makes it a purpose of this Act within the meaning of sec. 532 for a Council to resume a number of lots fronting a street shown on a plan of sub-division so as to be able to apply under the Public Roads Act to close that street as unnecessary and to be in a position to take advantage of sec. 20(2)(a) of that Act.

In Westminster Corporation v. London & North Western Railway, 1905 A.C. 426 at p. 430, Lord Macnaghten said "It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first". In our opinion, for the reasons already stated, the Local Government Act does not authorise the defendant Council to implement the scheme approved of at the meeting of 20th January 1948. If it does, we are of opinion that the Council, in attempting to resume more land than is required to construct the road, is not acting in good faith. By that we do not mean that the Council is acting dishonestly. All that we mean is that the Council is not exercising its powers for the purposes for which they were granted but for what is in law an ulterior purpose. It is not necessary that this ulterior purpose should be the sole purpose. The Council, no doubt, believes that the new road will have advantages over Bleomfield Street and Wisdom Street from the point of view of access and upkeep. But the evidence establishes that one purpose at least of the Council in attempting to acquire the land not required to construct the new road is to appropriate the betterments arising

from its construction. In Municipality of Sydney v. Campbell, 1925 A.C. 338, this was the sole purpose. But in our opinion it is still an abuse of the Council's powers if such a purpose is a substantial purpose in the sense that no attempt would have been made to resume this land if it had not been desired to reduce the cost of the new road by the profit arising from its re-sale. The most conclusive evidence of this purpose appears to be an attempt to resume the strip of land at the southern frontages of lots 23, 24 and 25 of section 5. There is, as far as we can see, no other explanation of this part of the scheme than that the Council wishes to make as big a profit as possible out of the closing of Bloomfield Street and the purchase and re-sale of portion of the land comprised therein, however ruinous the result may be to the owners of these lots, and particularly to the plaintiff Tunnie, who has built on his lot. There is no doubt that the scheme will depreciate the value of these lots and that there would be no profit but only a loss on their re-sale and so they are not included in the resumptions. Then lots 19 and 20 belonging to Dr. Thompson are amongst the lands finally excluded from the scheme although they are to lose their frontages to Bloomfield Street. The Town Clerk reported that this would help to lessen the expense of the scheme and these lots must only have been excluded because it was considered that without these frontages the lots would not be likely to show a profit on a re-sale. Further, assuming that it is within the power conferred on the Council by sec. 321(d) to resume the residues of the lots through which the new road will pass so as to amalgamate them into new lots with frontages conforming to the new road, in determining whether the power was really exercised for this purpose or for the collateral purpose of making a profit, it is highly significant that the owners of these residues were not given an opportunity of agreeing to reform these lots so as to comply with the scheme before an attempt was made to expropriate them: J. L. Denman Ltd. v. Westminster Corporation, 1906 1 Ch. 464 at p. 478. Equally significant is the inclusion of Blair's land in the scheme. It would seem that the only purpose in resuming this land is to make a profit out of its re-sale unless the purpose is to

acquire the rights under the Public Roads Act of an adjoining owner, in relation to Wisdom Street, which is an equally unauthorised purpose.

Upon consideration of the scheme as a whole, the conclusion seems irresistible that, with respect to so much of the land included in the scheme as is not required for the new road, profit-making by sale is a substantial purpose actuating the Council in deciding upon the proposed resumptions.

The case is not one in which the Council can be allowed to proceed with some of the resumptions while being restrained from proceeding with others. If it cannot proceed with them all, it has no scheme in relation to any of them. It is therefore unnecessary to differentiate, for the purpose of granting relief, between the lands of some of the plaintiffs and the lands of others.

For these reasons we are of opinion that the appeal should be allowed and that the plaintiffs are entitled to an injunction restraining the defendant from acquiring or attempting to acquire the lands of the respective plaintiffs by resumption pursuant to its resolution of 20th January 1948 and its application of 9th August 1948 under sec. 536 of the Local Government Act 1919 as amended.