3/10 (2/3) First NZLR X

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.232/81

1171

BETWEEN CITY SOUTH SUPERMARKET LIMITED & OTHERS

Plaintiffs

A N D J. RATTRAY & SONS LIMITED

Defendant

Hearing: 7, 8, 9, 10, 11 December 1981; 3, 4 September 1984

Counsel: J.R. Milligan for Plaintiffs
R.E. Wylie and E.D. Wylie for Defendant

Judgment: 14 SEP 1984

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JUDGMENT OF HOLLAND, J.

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This action was originally heard before me for five days in December 1981 together with an action brought by the Christchurch City Council seeking similar relief by way of injunction restraining the defendant from continuing the operations of selling groceries to the public in premises at 45 Battersea Street, Sydenham, Christchurch. The premises are zoned, under the Town and Country Planning Scheme in force under the Town and Country Planning Act 1977 for the Christchurch City, as Industrial 3. The issues between the parties were whether the operation of a retail grocery store by the defendant was an "industry" which was a predominant use under the scheme and whether the use was that of a warehouse. Interesting questions arose as to the meaning of "wholesale" and "retail" under the ordinances forming part of the scheme. At the conclusion of the hearing in 1981 the action brought by the City Council was dismissed for procedural reasons. The proceedings had been brought by way of writ of summons and had been commenced before any breach occurred.

Judgment could not be given in favour of the Council without amending the proceedings to add a new cause of action which had come into force after the commencement of the proceedings. It was held that this could not be done. The present action commenced by the above plaintiffs was adjourned sine die to enable a ruling first to be obtained from the Town and Country Planning Tribunal before whom there was then an application by the defendant for a specified departure from the provisions of the scheme. Since that date a ruling adverse to the defendant has been given by the Tribunal and that ruling has been challenged in the Administrative Division of this Court and in the Court of Appeal. In each case the decision was adverse to the defendant and there is now no doubt that the operations carried on by the defendant are contrary to the provisions of the Town Planning Scheme and have been since business commenced in November 1981.

The Christchurch City Council, following the dismissal of the earlier writ brought by it, has issued new proceedings seeking an injunction under the provisions of section 92(2) of the Town and Country Planning Act 1977 (now repealed). The parties in that action have consented to an injunction in the following terms.

> "There will be an order for the issue of an injunction restraining the defendant its servants and agents and subsidiaries from using or permitting the use of the premises at 45 Battersea Street Christchurch or any part thereof for the sale of goods to persons other than those in the business of reselling such goods either in an original or processed form. The injunction is to lie in Court and not issue until 31 May 1985.

I am satisfied that notwithstanding the repeal of section 92(2) of the Act there is jurisdiction to grant such an injunction and will do so if this action by the plaintiffs does not result in an injunction being granted to the plaintiffs.

The plaintiffs in these proceedings are not content with the arrangements made between the Christchurch City Council and the defendant and seek an injunction to take effect immediately. The issues between the parties are now much narrower but nevertheless involve some considerable difficulty in application. It is submitted by the defendant that the plaintiffs have no standing to seek an injunction or in the alternative that if the plaintiffs have standing the Court in its discretion should refuse the application.

There is no dispute that the activities of the defendant are in breach of the City Council's Town Planning Scheme. The issues involve consideration of whether any, and if so what, civil rights are created by the Town and Country Planning Act 1977. It is common ground between the parties that the only private rights or rights given to individuals by the Act are the rights to object in the various steps prescribed in the machinery provisions of the Act. The defendant submits that no public right is created by the Act which is capable of being enforced by an individual. The defendant recognises that the Act provides for enforcement by the City Council and that the defendant is liable to prosecution but submits that it is not subject to civil process from anyone other than the local authority concerned. In this respect it is submitted that the procedure provided by the Town and Country Planning Act 1977 is an exclusive code. In the alternative the defendant submits that if the code is not exclusive and there are public rights created by the Act

then those public rights can be enforced only by a relator action at the suit of the Attorney General. In brief, and in very general terms, the Court is asked to decide whether the plaintiffs have suffered an injury of such a nature that they should be entitled to enforce the public law as an exception to the general rule that criminal breaches of the law are to be enforced only in the criminal Courts or in rare circumstances in a civil suit brought by the Attorney General.

The submission of counsel for the defendant that the Town and Country Planning Act 1977 provides an exclusive code of remedies for enforcement so that the local authority is the only body or person that can seek an injunction faces substantial obstacles by way of precedent. In Attorney General & Anor v Birkenhead Borough & Anor (1968) N.Z.L.R. 383 Richmond J. held that a neighbour whose property was affected by the erection of a building depriving her of a view but not giving her any legal right of action independent of the Act was entitled to ask the Court to exercise its equitable jurisdiction by way of injunction to secure compliance with the public general duty imposed by the Act (p392). In Hamilton & Ors v Christchurch City & Arlington Motor Inn Ltd (1972) 4 N.Z.T.P.A. Wilson J. likewise held that an owner of an adjoining building had locus standi to seek an injunction because he could show that as a result of the unlawful work he was suffering or would suffer special and particular detriment over and above that suffered by the public generally (p284). In Attorney General & Ors v Codner & Ors (1973) 1 N.Z.L.R. 545 McMullin J. granted an injunction at the suit of a neighbour in a relator action brought by the Attorney General that a consent given by a local authority under the Act was invalid. It was,

however, conceded that if the Court held the grant of conditional use to be void an injunction could not be avoided (p551). The concession was no doubt properly made and the Judge was not troubled about jurisdiction. In Junction Motors v New Lynn Borough Council & Anor (1975) 5 N.Z.T.P.A. Perry J. granted an injunction at the suit of a neighbour (p312). Likewise did Speight J. in Bates v Waitemata City Council & Anor (1975) 5 N.Z.T.P.A. 381 (p383). So did Haslam J. in Mundy v Cunningham (1973) 1 N.Z.L.R. 555 (p560), as did Cooke J. at the substantive hearing reported (1974) 1 N.Z.L.R. 737, although at that stage the Attorney General had been joined as a party. In Environmental Defence Society v Attorney General (1981) 2 N.Z.L.R. Quilliam J. made a declaration in lieu of an injunction at the suit of a plaintiff other than the local authority.

It was submitted by counsel that all of these cases could be distinguished on the grounds that the injunctions there granted were no more than an enforcement of the plaintiff's right to object at properly constituted hearings before the local authority. In some instances that was undoubtedly a material part of the decision. But the distinction does not arise in a number of others including in particular the Attorney General v Birkenhead Borough.

It was submitted by counsel that if the earlier cases could not be distinguished then they should not be followed as being per incuriam or as being in conflict with the dicta in the later opinions of the House of Lords in Gouriet v Union of Post Office Workers (1978) A.C. 435 and Lonrho v Shell Petroleum (1982) A.C. 173.

The submission that the decisions were per incuriam was on the basis that they conflict with the old and well established principle that where an act creates an obligation and provides

facilities for enforcing the obligation in a specified manner it is a general rule that performance cannot be enforced in any other manner: Doe d. Bishop of Rochester v Bridgegs (1831) 1 B. & Ad. 847, 109 E.R. 1001. That such a principle exists cannot be gainsaid and was indeed referred to by Richmond J. in Attorney General v Birkenhead Borough & Anor (p389). Richmond J. held that the Town and Country Planning Act was an exception to the general rule under the principles explained by Buckley J. in Boyce v Paddington Borough Council (1903) 1 Ch. 109. That decision is now 16 years old and has been followed on a number of occasions. The Town and Country Planning Act has been amended on a number of occasions and no attempt has been made by the legislature to clarify or amend the effect of the decisions by legislation. Not only am I satisfied that it is too late in this Court to submit that the decision is per incuriam but with respect I am satisfied that the original decision is right and for the reasons expressed by the learned Judge.

Issues of locus standi have in recent years been the subject of expressions of opinion by the House of Lords in the two cases referred to earlier. In Gouriet's case in particular the opportunity was taken to place some substantial restrictions on the temporary opening of the doors to the Courts which had been made by Courts of Appeal presided over by Lord Denning. Although this Court is in a different judicial hierarchy from that in which the House of Lords is supreme and accordingly not strictly bound by its opinions, it would be a bold Judge indeed who would not pay great weight to those opinions. If those opinions demonstrate errors in the law as previously expressed in New Zealand it may well be appropriate for this Court in the absence of binding precedent from the Court of

Appeal to follow the opinions of the House of Lords rather than earlier judgments of this Court. The questions therefore are whether anything said by the House of Lords in the two cases relied on by counsel for the defendants indicate error in the New Zealand decisions.

I do not see anything in the opinions in either case which indicates that a private individual cannot ever seek the assistance of the civil Courts for the purpose of preventing public wrongs. The existence of such a right was made clear in Boyce v Paddington Borough Council (supra) and that case has never been overruled. Difficulties arise over defining the very limited class of persons who may bring such a claim in the Courts. Gouriet's case was complicated because it was commenced by the plaintiff in his own name and not as a relator action by the Attorney General. The Attorney General was joined in the Court of Appeal and the issue essentially before the House of Lords was much more a question of whether the civil Courts should be used in aid of the criminal law at the suit of the Attorney General rather than the rights of individuals to enforce the criminal law or public law. The House of Lords was dealing with an action originally brought by a person who claimed no special damage or injury and no private right other than what he claimed was his right to see that the law was enforced. I do not read anything in any of the opinions from which it can be inferred that it was the intention of the House of Lords to depart from the well known statement of Buckley J. in Boyce's case which is referred to in respected text books but more importantly has been cited with approval in a number of judgments.

In Lonrho (supra) more help can be obtained. In that case all of their Lordships sitting, concurred with the opinion of Lord Diplock. The issue there was primarily whether the particular statute in question gave a private right to the plaintiff entitling it to claim damages, but their Lordships were required to consider the enforcement of public rights by individuals and Boyce v Paddington Borough Council.

At p185 Lord Diplock said:-

> "The second exception is where the statute creates a public right (i.e. a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J. in Benjamin v Storr (1874) L.R. 9 C.P. 400, 407, described as 'particular, direct, and substantial' damage 'other and different from that which was common to all the rest of the public'. Most of the authorities about this second exception deal not with public rights created by statute but with public rights existing at common law, particularly in respect of use of highways. Boyce v Paddington Borough Council (1903) 1 Ch. 109 is one of the comparatively few cases about a right conferred upon the general public by statute. It is in relation to that class of statute only that Buckley J.'s oft-cited statement at p114 as to the two cases in which a plaintiff, without joining the Attorney-General, could himself sue in private law for interference with that public right, must be understood. The two cases he said were: '... first, where the interference with the public right is such as that some private right of his is at the same time interfered with ... and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right'. The first case would not appear to depend upon the existence of a public right in addition to the private one; while to come within the second case at all it has first to be shown that the statute, having regard to its scope and language, does fall within that class of statutes which creates a legal right to be enjoyed by all of Her Majesty's subjects who wish to avail themselves of it. A mere prohibition upon members of the public generally from doing what it would otherwise be lawful for them to do, is not enough."

It is clear from what has been said by Lord Diplock that the question resolves itself into one of interpretation of the statute in question. In Attorney General v Birkenhead Borough (supra) Richmond J. held that the Town and Country Planning Act then in force was a statute which created a legal right to be enjoyed by all of Her Majesty's subjects who wished to avail themselves of it and that a neighbour occupying the property adjoining an offending building was one of those subjects able to avail themselves of the right to enforce the law. There is nothing in Lonrho's case to persuade me that such a decision was wrong in principle or result. Notwithstanding the very careful and extensive argument of counsel for the defendant I am satisfied that the plaintiff should not be declined relief upon the grounds of lack of locus standi or that the Act provides an exclusive code. Counsel for the defendant recognised the difficulties in his submission and properly has referred me to all the authorities which I have mentioned in this judgment. He has been unable to persuade me that they should not be followed.

In this case there is no physical damage to any of the plaintiffs or to their real property. The plaintiffs are trade competitors in the vicinity. The degree to which they have been affected by the defendant's illegal operation varies from one to the other but I am satisfied that the illegal operations of the defendant has resulted in material financial loss to each of the plaintiffs in loss of custom which they would have received had the defendant not been operating. The loss is considerable but difficult to quantify. It is unnecessary for me to quantify it because it is properly conceded by counsel for the plaintiffs that the law gives them no cause of action for damages. Indeed, were it not for the provisions

of the Town and Country Planning Act the plaintiffs would have no ground for complaint whatsoever. All that has happened apart from the breach of the Town and Country Planning Act is that the plaintiffs have been faced with competition which has adversely affected them.

It is submitted by counsel for the defendant that because the loss is not direct but is merely a consequential loss these plaintiffs are unable to come within the category described in Boyce v Paddington Borough Council or any of the earlier New Zealand cases referred to in which injunctions or declarations have been granted at the suit of individuals. Buckley J. described that category as "where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right". It is obvious that when the Judge used the term "special damage" he was not using it within the legal connotation of damages recoverable at law because if that had been the case the plaintiff would have been suing in the first category as a person whose private rights were interfered with.

Counsel referred me to two Australian cases where he submitted that mere loss as a trade competitor had been held to be insufficient to establish the "special damage" referred to in Boyce's case. The first is a decision of Else-Mitchell J. in California Theatres Pty Ltd v Hoyts Country Theatres Ltd (1959) 59 SR NSW 188 and the second a decision of Jacobs J. in Helicopter Utilities Pty Ltd v Australian National Airlines Commission (1962) NSWR 747. In the first case no mention is made in the judgment of Boyce's case and I accordingly find it of little assistance in determining what was

meant in Boyce's case. If it should be an authority restricting the words used in Boyce's case I decline to follow it. In the second Jacobs J. referred to Boyce's case but also emphasised that his decision was one of an interlocutory nature only. He referred to doubts about the legal position and because the application was an interlocutory one preferred to follow the older English cases of Stockport District Waterworks Company v Manchester Corporation (1862) 9 Jur. N.S. 266 and Pudsy Coal Gas Company v Bradford Corporation (1873) L.R. 15 Eq. 167. Those cases were well before the decision in Boyce and contrary to the view of Jacobs J. on an interlocutory matter I do not find them of assistance in determining what was meant in Boyce's case. I have already indicated that I do not regard "special damage" as having a connotation related to special damages recoverable at common law. The attitude of the Courts to claims for purely economic loss have changed substantially since the decision in Hedley Burn & Co v Heller & Partners (1964) A.C. 465 and that decision alone is sufficient in my view to cast doubt on the validity of the earlier authorities.

There is nothing in the judgment in Boyce's case or in the many judgments which have adopted and applied the definitions of the categories so to exclude claims based solely on economic loss and I am not prepared to deprive these plaintiffs of their right to enforce the public law because the special damage which they have suffered is an economic loss and not a damage or loss to real property or person. The claim for an injunction is one seeking the inherent equitable jurisdiction of the Court. It is discretionary. Once a claimant has established "special damage" of a nature greater than or different from damage suffered by ordinary members of the

public he should not be limited by matters of locus standi from bringing a claim. The nature of the special damage may well be relevant to the exercise of the discretion.

It is common ground that despite the establishment of these facts the Court is not obliged to grant an injunction and that it must be established that it is just in the interest of the parties and of the public for an injunction to be granted. I emphasise the interests of the public because the right which the plaintiff is seeking to have enforced is a public right and not a private right.

There are many factors which weigh against the Court granting an injunction in this instance. Section 92 of the Town and Country Planning Act 1977 as it was at the commencement of the proceedings provides that the Council in whose district the offence had been committed may apply for an injunction. That section has been repealed but replaced by a provision empowering the Council to apply for an injunction to the District Court only. The Council has in fact applied for an injunction in properly commenced proceedings and proceedings in which I have held that notwithstanding the repeal of section 92(2) there is still jurisdiction to make an order. The Council and the defendant have agreed to an injunction but on condition that it lie in Court until 31 May 1985.

Section 62(3) of the Act provides as follows:-

> "(3) Except as otherwise provided in this Act, while a district scheme is operative it shall be the duty of the Council, and of every other public body and local authority having jurisdiction within the district, in respect of any of the subject-matters of the scheme, to observe, and (to the extent of its authority) to enforce the observance of, the requirements

> and provisions of the scheme; and neither the Council nor any other public body or local authority nor any person shall thereafter depart or permit or suffer any departure from the requirements and provisions of the scheme."

The Act contemplates that the primary responsibility for the enforcement of the scheme is on the Council. This is not a case where it has been demonstrated that the Council is not carrying out its statutory obligation of enforcing the scheme. It has commenced proceedings. It has settled them. It is submitted by counsel for the plaintiff that the Council had no right or power to settle them as its duty under the Act was to enforce the scheme and not to permit or suffer any departure from the requirements and the provisions of the scheme. That is undoubtedly the statutory obligation of the Council but the scheme can only be enforced by Court proceedings. The Court is not bound to grant an immediate injunction or indeed to grant any injunction at all although as was indicated in O'Sullivan v Mt Albert Borough (1968) N.Z.L.R. 1099 at p1108 there would need generally to be strong grounds advanced before the Court would be justified in refusing an injunction at the suit of the Council. Nevertheless, I am satisfied that in this particular case had the City Council taken the matter to a hearing it is unlikely that an immediate injunction would have been granted although undoubtedly an injunction on some terms would have been granted. It is perfectly proper and within the Council's statutory duty to settle legal proceedings and in doing so it cannot be said, as was submitted by Counsel for the plaintiffs it is acting contrary to the duty imposed on it by section 62(3). The public interest is to some considerable extent represented by the local authority and the circumstances would be rare indeed when a Court which was

satisfied that the local authority was carrying out its statutory obligations should interfere at the suit of an individual or individuals so as to depart from or interfere with the course of action bona fide entered into by the Council.

The evidence is that the business carried on by the defendant was one whereby as a matter of policy groceries were made available in bulk to members of the public who chose to call at their premises at a price five per cent less than the prices prevailing in other retail establishments. There are approximately 4,600 orders fulfilled per week at an average of $40 per order. It was suggested that the number of orders would be equated by the number of customers, but there is probably some reduction for customers who call twice in a week. Nevertheless, a large number of persons would be affected by the immediate closing down of the store. The defendant employs a staff of 35 persons in the store and I am satisfied that a number of them would lose their employment if the store were closed down.

This is not a case of a defendant acting in contumacious disregard of the law or of the City Council's scheme. Prior to entering into a lease of the premises the defendant was supplied with a written and apparently considered opinion from a solicitor instructed by the owners of the building that the type of operations contemplated by the defendant would be in accordance with the scheme. The defendant did not rely solely on this opinion but referred the matter to its own solicitors who agreed with the opinion. As it turns out the conclusions of both legal advisers were wrong. With the exception of the possibility of an appeal to the Privy Council, the defendant has exhausted all its legal remedies in

an endeavour to establish that the legal advice given to it was correct. Each decision has been adverse to the defendant. But the defendant has not ignored the provisions of the Act. Prior to the Court of Appeal's decision being known they had made arrangements to purchase property and erect at least two buildings to accommodate the occupants of one of the buildings purchased by it and for its own occupation so that it will not continue offending against the scheme. After the decision of the Court of Appeal was known those negotiations were promptly transformed into binding contracts and the offending can be brought to an end by 31 May 1985. It follows that there is no permanent harm to the town planning scheme itself or to any property of the plaintiffs. As has already been stated there is no private right of the plaintiffs which has been infringed.

Although on the other hand the defendant has been operating illegally for some years (and is likely to continue to do so for some months, if an injunction is refused in these proceedings) and those activities have caused considerable financial harm to the plaintiffs I am not satisfied that those factors are sufficient to outweigh the factors recorded earlier against the granting of an injunction. The application for an injunction is accordingly refused.

At the commencement of the hearing counsel for the defendant indicated that it did not wish to proceed with the counterclaim seeking a declaration that its activities were legal. Such a counterclaim was inevitably doomed to failure because of the decision of the Court of Appeal. Although the plaintiffs have failed in their claim for an injunction they have failed only because the Court has refused to exercise its discretion in their favour. There were five days of hearing in 1982 when the defendant was still

pursuing its counterclaim. The evidence and legal submissions at that five day hearing were directed to the legality of the defendant's operations. The plaintiffs have been successful in resisting the defendant's counterclaim which was not abandoned until long after that five day hearing had taken place. I do not propose to award any costs on the dismissal of the plaintiffs' claim for an injunction because as I have said the injunction was refused solely as a matter of discretion and it has been established beyond doubt that the defendant's actions are unlawful. I consider it appropriate to make an award for costs in favour of the plaintiffs on the dismissal of the defendant's counterclaim. An appropriate sum in this regard is the sum of $2,500 in respect of all costs, disbursements, witness expenses and other necessary payments. There will accordingly be judgment for the defendant without costs on the plaintiffs' claim. On the counterclaim by the defendant there will be judgment for the plaintiffs with costs of $2,500.

A D Holland J.

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