Neutral Citation Number: [2006] IEHC 182

THE HIGH COURT

No. 2000/8719 P

BETWEEN

DAVID PIERCE TRADING AS SWORDS MEMORIALS AND ANDREW PIERCE MONUMENTS

PLAINTIFF

AND

THE DUBLIN CEMETERIES COMMITTEE GLASNEVIN CEMETERY MONUMENT WORKS LIMITED AND GLASNEVIN CREMATORIUM LIMITED

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 11th May, 2006.

The factual background

1. Since 1988 the plaintiff has been engaged in the business of designing, constructing and selling headstones and monumental sculpting in the Dublin area. Initially the business was conducted in partnership with his brother. However, in 1999 he acquired his brother's interest. From the start, the business was carried on from Swords, County Dublin and that is the current position, although for a period in the late l990s the plaintiff also carried on the business from a premises in Capel Street in the city of Dublin. The plaintiff's business services cemeteries in the city and county of Dublin.

2. The first defendant (the Committee) is a body corporate established by a private Act of the Oireachtas, the Dublin Cemeteries Committee Act, 1970 (the Act of 1970). The Committee replaced a body corporate, which had been established under the name the Dublin Cemeteries Committee (the 1846 Committee), by the Dublin Cemeteries Act, 1846 (the Act of 1846), which is described in s. LIII thereof as a public Act. The Committee is a registered charity for tax purposes. It currently owns and manages the following cemeteries situated in the City and County of Dublin:

(1) Goldenbridge Cemetery;

(2) Glasnevin (formerly Prospect) Cemetery;

(3) Palmerstown Cemetery, which was established in 1978;

(4) Dardistown Cemetery, which was established in 1990; and

(5) Newlands Cross (also referred to as Ballymount) Cemetery, which was established in 1999.

3. Goldenbridge and Glasnevin Cemeteries were in existence when the Act of 1846 was passed. The enactment of the Act of 1970 enabled the establishment of the cemeteries at Palmerstown, Dardistown and Newlands Cross. Goldenbridge Cemetery is full, which I understand to mean that interments rarely, if ever, occur there now.

4. The second defendant (the Company) is a company limited by shares, which was incorporated in 1971 with the primary object of carrying on the business of manufacturing and selling tombstones and monuments. It is wholly owned and controlled by the Committee. The decision of the Committee to conduct the business of providing monuments through a company was explained by the defendants as having been motivated by caution to ensure that the Committee's exemption from rates was not jeopardised. A secondary motivation, according to the evidence, was to ensure that the Committee would not have an unfair tax advantage over competitors; the Company is liable for Corporation Tax and Value Added Tax. However, nothing turns on that.

5. What provoked these proceedings is the manner in which the Company conducts its business. It operates a sales outlet at the entrance to each of the operating cemeteries under the remit of the Committee, Glasnevin, Palmerstown, Dardistown and Newlands Cross Cemeteries, and the officer of the Committee at each Cemetery, the Registrar, is effectively a salesman for the Company's products and services. The plaintiff contends that this gives the Company a competitive advantage over other monumental sculpting businesses which operate in the Dublin area. I accept on the evidence that that contention is correct. The Company also sells headstones for use in other cemeteries in the Dublin area, for example, cemeteries under the aegis of local authorities.

6. The third defendant, which is also wholly owned and controlled by the Committee, was incorporated in 1982 to operate the crematorium at Glasnevin Cemetery. While the plaintiff has a specific complaint against this defendant arising out of the fact that the Company has a virtual monopoly in relation to inscription in the Garden of Remembrance at Glasnevin where cremated remains are interred and elsewhere within Glasnevin Cemetery, a practice which the Committee justifies on the necessity for consistency of inscriptions recording communal interments, I am satisfied that it is not necessary to consider the position of the third defendant separately.

7. The plaintiff contends that the manner in which the Company conducts its business is unfair to persons like him who are operating monumental sculpting businesses and is damaging to their businesses. Prior to embarking on these proceedings, he sought to have these issues addressed by making representations to politicians and representations to the Revenue Commissioners and to the Competition Authority, without success.

The proceedings

8. The nub of the plaintiff's case in these proceedings is that the Act of 1970 does not empower the plaintiff to sell monuments, headstones, inscription services and such like and that its activities, through the medium of the Company, in those areas of enterprise are ultra vires. He seeks declarations that, *inter alia*, the Committee, either by itself or through the Company, is not entitled to engage in the commercial sale of headstones, and that the Committee is not entitled to prohibit the engaging of monumental sculptors, including the plaintiff, for the purposes of placing inscriptions on, *inter alia*, the Garden of Remembrance at Glasnevin Cemetery. He seeks injunctions to prohibit the Committee engaging in such activity. He also seeks damages for breach of constitutional rights, breach of statutory duty and misfeasance in public office. The constitutional right which he invokes and which he alleges has been unlawfully interfered with is his right to earn a livelihood.

9. The plaintiff's case raises a broader question: whether the Committee is entitled to perform any of its functions or exercise any of its powers through the Company or the third defendant. Counsel for the defendants submitted that it was and, in their written

submission, dealt at length and comprehensively with this issue. However, as it was accepted by the defendants, properly in my view, that, if the Committee was not entitled to engage in the activities which the plaintiff contends are *ultra vires*, then a company owned and controlled by the defendant could not engage in such activities, it is not necessary to determine the broader question. The core issue in this case is whether, as contended for by the plaintiff, the activities in question are *ultra vires* the Committee.

10. One of the bases on which the defendants defend these proceedings is that the plaintiff has no *locus standi* to seek all or any of the relief he claims. Having outlined the provisions of the Act of 1846, insofar as they are relevant, and the provisions of the Act of 1970, I propose addressing that question.

11. It was agreed by the parties that the court should be concerned, in the first instance, only with the issue of liability. Accordingly, this judgment addresses that issue only and not any question in relation to any relief which is claimed, in particular, the plaintiff's entitlement to damages and the quantification of such damages if liability has been established.

The Acts

12. The preamble to the Act of 1846 recited that a Committee for the management of Goldenbridge and Glasnevin Cemeteries had existed prior to its enactment but that members had died or declined to act. In that Act certain named persons and all other persons who should be nominated and elected to fill vacancies were constituted the 1846 Committee with power to hold Goldenbridge and Prospect Cemeteries (s. I). It was provided that it should be lawful for the 1946 Committee, subject to such conditions as they should think proper, to sell –

> · the exclusive right of burial in any vault, catacomb, or place of burial constructed by them within the cemeteries,
>
> · the right of constructing any vault, catacomb, or place of burial within any such cemetery with exclusive right of burial therein,
>
> · the right of single interment in any vault, catacomb or other place of burial constructed within the cemeteries or in the open ground thereof,
>
> · the right of erecting and placing any monument, tombstone, or gravestone in the cemeteries, or any monument or monumental inscription on the walls of the chapels or other place within the cemeteries. (s. XVIII)

13. It was provided that all interments, vaults, catacombs, burial places, monuments, tombstones and gravestones in the cemeteries should be subject to such regulations, restrictions and conditions as the 1846 Committee should from time to time make, and it was expressly provided that monumental inscriptions should be approved by the 1846 Committee before being inscribed (s. XVIII). The 1846 Committee was given power to enforce its regulations, restrictions and conditions by being empowered to erase or remove an unauthorised inscription (s. XIX) and to take down and remove an unauthorised monument, tombstone and such like (s. XXV).

14. In its long title, the Act of 1970 was described as an Act "to establish a body corporate to undertake and carry out the functions at present undertaken and carried out by the 'Dublin Cemeteries Committee' and to enlarge and extend such functions". The preamble recited the 1846 Act, the acquisition by the 1846 Committee of further lands in the Parish of Glasnevin, and that doubts which had arisen as to –

> "… the nature and constitution of the 1846 Committee and as to its power to acquire and provide burial facilities in the County and County Borough of Dublin elsewhere than in the Parish of Glasnevin aforesaid to sell or dispose of land, and to invest or deal with surplus monies."

15. Section 3 provided for the establishment of the Committee as "a body corporate with perpetual succession and an official seal … and power to sue and be sued in its said name and to purchase, take, hold and dispose of land and other property". Members of the 1846 Committee were to be members of the Committee (s. 4(2)). Subject to certain exceptions, a member of the Committee was to hold office for life (s. 5). The Committee was to be self-perpetuating (s. 6), subject to an upper limit on membership of 20 (s. 4(1)).

16. The provisions of the 1970 Act on which the resolution of the core issue in this case turns are ss. 16 and 17.

17. Section 16 provides as follows:

> "The objects for which the Committee is established are as follows:
>
> (a) To maintain, improve and extend the existing Cemeteries and to preserve the bodies interred in them from disturbance and desecration.
>
> (b) To acquire, provide, maintain, improve, lay-out, construct and operate in the County and County Borough of Dublin cemeteries, burial grounds and other places and means for the burial, interment, preservation or disposal of human remains in accordance with the rites, services and beliefs of any of the religious denominations specified in Article 44 of Bunreacht na hÉireann or any other religious denomination existing in the Republic of Ireland on the establishment date."

18. Section 17, insofar as it is relevant for present purposes, provides as follows:

> "Subject to the provisions of this Act, the Committee shall have, in addition to any other powers vested in or conferred on it by any other provision of this Act power:-
>
> (a) to purchase, take on lease or otherwise acquire any lands …
>
> (b) to sell, improve, manage, develop, exchange, lease, hire, mortgage, dispose, turn into account or otherwise deal with all or any part of the undertaking property and rights of the Committee.
>
> (c) to borrow …
>
> (d) to invest …
>
> (e) to employ …

(f) to accept … grants, subscriptions, donations, devises, and bequests for all or any of the purposes of the Committee and generally to manage, invest and expend all moneys or property belonging to the Committee.

(g) …

(h) …

(i) to build, construct, erect, improve and maintain buildings, chapels, monuments, headstones and structures for use or decoration in or in connection with cemeteries or burial grounds.

(j) To bury …

(k) To do all such other things as the Committee may consider incidental or conducive to the attainment or advancement of any of the objects of the Committee."

19. It is necessary to refer only to some other provisions of the Act of 1970 which complete the picture of the Committee's status and functions. Section 15 provides that the Committee may exercise and perform any of its "functions" through or by any of its members or employees authorised by the Committee on that behalf. It is clear from s. 18 that the power to dispose of land relates only to land surplus to the Committee's requirements for use as a burial ground. Section 20 reflects the charitable nature of the purposes of the Committee and provides that on winding up its surplus assets are to go to an institution or institutions with similar objects, and if and so far as effect cannot be given to that provision, to some charitable object approved of by the Commissioners of Charitable Donations and Bequests for Ireland. Section 24 provides that the Committee shall out of monies received by it keep the cemeteries and the chapels and buildings thereon and the external walls and fences thereof in a suitable state of repair and condition so far as practicable. Section 29 empowers the Committee to make rules for various specified purposes and generally for carrying the Act of 1970 into effect.

Locus standi

20. Over the last quarter of a century the jurisprudence governing the circumstances in which a litigant will be found to have sufficient interest to maintain an action or an application for a civil remedy has evolved and in relation to various causes of action and various remedies is well established now.

21. At issue in the seminal case of *Cahill v. Sutton* [1980] I.R. 269 was what was required to give a person standing to seek a declaration that a statutory provision is unconstitutional. While in his judgment in the Supreme Court Henchy J. stated (at p. 283) that, as a general principle, it would be generally undesirable and not in the public interest to allow any citizen, regardless of personal interest or injury, to bring proceedings to have a particular provision declared unconstitutional, he recognised, (at p. 285) possible exceptions to that general principle, stating that the rule of personal standing might be waived or relaxed if, in the particular circumstances of a case, the court finds that there are weighty contravening considerations justifying a departure from the rule. As was pointed out by McCracken J. in *Construction Industry Federation v. Dublin City Council* (the Supreme Court, 18th March, 2005, unreported), an authority relied on by the defendants, similar principles were applied in the context of judicial review applications in *Lancefort Limited v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270 and more recently in *Mulcreevy v. Minister for Environment, Heritage and Local Government* [2004] 1 I.L.R.M. 419. While I do not consider this to be a case in which the plaintiff lacks personal standing, I mention those authorities because counsel for the defendants specifically relied on the decision of the Supreme Court in the *Construction Industry Federation* case to which I will return.

22. Of more relevance to the issue of the plaintiff's standing to maintain these proceedings, in my view, are cases in which a plaintiff or applicant who could show that he or she was adversely affected by an unlawful activity on the part of the defendant was found to have sufficient standing to seek a declaration that the defendants' actions were unlawful and an injunction to restrain the activity. In *Parsons v. Kavanagh* [1990] I.L.R.M. 560, the plaintiff, who operated a passenger bus service pursuant to a licence under the Road Transport Acts, 1932 and 1933, sought to injunct the defendant who was operating a similar service on the same route but without a licence. The defendant contended that the plaintiff was not entitled to take proceedings to enforce the Road Transport Acts. O'Hanlon J. outlined the general principles derived from English authorities on the question whether, and under what conditions, a duty imposed by statute may be enforced at the suit of a private individual. He identified one of the key questions as whether, on its proper construction, the statute was intended to protect a limited class of persons or the public as a whole. He rejected the contention of the plaintiff that the Road Transport Acts should, on their true construction, be regarded as statutes passed for the benefit of a limited class of the public, of whom the plaintiff was one, who were for the time being holders of licences granted under the Acts for the carriage of passengers by road. However, that was not the end of the matter, because, as O'Hanlon J. pointed out (at p. 565), in this jurisdiction it was necessary to consider whether the legal situation was different by reason of the provisions of the Constitution. He considered that it was. He summarised his views in the following passage (at p. 566):

> "I take the view, accordingly, that the constitutional right to earn one's livelihood by any lawful means carries with it the entitlement to be protected against any unlawful activity on the part of another person or persons which materially impairs or infringes that right."

23. The decision of O'Hanlon J. in the *Parsons* case was considered by the Supreme Court in *Lovett v. Gogan* [1995] 3 I.R. against the background of a factual situation similar to the factual situation in the *Parsons* case. The plaintiff in the *Lovett* case was the holder of an occasional passenger licence pursuant to the provisions of the Road Transport Act, 1932, on foot of which he operated a motor coach passenger service. The defendants operated a similar service on the same route, but it was unlicensed. In upholding the decision at first instance to grant an injunction restraining the defendants from operating an unlicensed motor coach passenger service on the grounds that they were in breach of the Road Transport Act, 1932 and guilty of an offence in so doing, Finlay C.J. found (at p.141) the decision of O'Hanlon J. in the *Parsons* case to be correct in law on the findings of fact made by him in that case. Further, he found that what was involved in the case before him was an interference actual and threatened in its continuance with the constitutional right of the plaintiff to earn his living by lawful means. He rejected a submission made on behalf of the defendants that, even that being the case, it would not entitle the plaintiff to any remedy other than one which he could frame within one of the causes of action which exist, such as breach of contract, inducing breach of contract or conspiracy, referring to the judgment of the Supreme Court in *Meskell v. C.I.E.* [1973] I.R. 121 and he stated (at p. 142):

> "I am satisfied therefore that the true position in this case is that the plaintiff is entitled to such an injunction if he can establish that it is the only way of protecting him from the threatened invasion of his constitutional rights. Having regard to the limitation contained in the Act of 1932 on the fine which may be imposed on a person running a road passenger service without a licence and in particular on the minimal figure of £5 in respect of a continued offence, there is in my view no doubt that if the plaintiff is entitled to an injunction it is the only remedy which can protect him."

24. In a slightly different context, a similar approach was adopted by Barrington J. in *Irish Permanent Building Society v. Cauldwell* [1981] 242. The issue in that case was whether a registered building society (Irish Permanent) had *locus standi* to seek declarations to the effect that another building society (Irish Life), which had been recently registered by Cauldwell, the Registrar of Building Societies, did not have the status of a building society within the meaning of the Building Societies Act, 1976 and an injunction restraining Irish Life from carrying on the business of building society within the State. The basis on which Barrington J. decided that Irish Permanent did have *locus standi* is set out in the following passage (at p. 252), in which he analysed their complaint:

> "Their real complaint is not that they have to face competition from the defendant building society but that the defendant building society is not a body entitled to be incorporated under the Building Societies Act and is therefore not entitled to compete with the plaintiffs at all. The position, they suggest, is made worse because the defendant building society, by reason of its close association with the Irish Assurance Company Limited, enjoys unfair advantages which, the plaintiffs suggest, can lead to and have led to abuses of building society law. In these circumstances it appears to me that it would be wrong to treat the plaintiffs as if they were mere members of the public. They come before the court as persons with a real grievance arising out of an alleged breach of the law and with a substantial interest in the outcome of the proceedings. It appears to me therefore that if these were certiorari proceedings, the plaintiffs would properly be regarded as persons aggrieved by the decision of the registrar to register the second named defendants as a building society."

25. Later in his judgment (at p. 253), Barrington J. concluded that the fact that Irish Permanent was pursuing a declaratory action did not alter the position stating:

> "In my view the plaintiffs come into court with the status of aggrieved persons and with a vital concern in the subject matter of the proceedings. They would therefore have had the status of aggrieved persons in *certiorari* proceedings and have sufficient *locus standi* to maintain these present proceedings."

26. Counsel for the defendants referred the court to the decision of Farwell J. in *Attorney-General v. Metropolitan Electric Supply Company Limited* [1905] 1 Ch. The defendant in that case was a limited company incorporated under the Companies Acts, but was subject to special Acts which prohibited it from supplying energy beyond its specified statutory areas. In 1903, purporting to act under the general powers in its Memorandum of Association, the defendant commenced to supply energy to a railway company in the area of the Willesden Urban District Council, which was outside its statutory areas. In an action brought by the Attorney-General, at the relation of Willesden Urban District Council, the court granted an injunction restraining the company from that activity which was held to be in contravention of the prohibition. The passage in the judgment of Farwell J. relied on by counsel for the defendants comes in the first paragraph (at p. 30) and is to the following effect:

> "Of course, the Attorney-General can maintain such an action irrespective of the fact that the Willesden Urban District Council, who join as relators for the purpose of costs, would have no right of action by themselves."

27. In the light of the decisions in the *Parsons, Lovett* and *Irish Permanent* cases, it is now settled that the approach adopted in the English authorities does not determine the issue of locus standi in actions for breach of a constitutional right or breach of statutory duty in circumstances where the only course open to the plaintiff to protect his rights is an action to restrain the alleged breach.

28. The decision of the Supreme Court in the *Construction Industry Federation*, case in my view, undermines, rather than supports, the defendants' argument on *locus standi.* In that case, the Construction Industry Federation brought an application by way of judicial review to quash a decision of Dublin City Council to make a Development Contribution Scheme pursuant to s. 48 of the Planning and Development Act, 2000. The issue of standing arose on the application for leave, the court having to be satisfied before granting leave that the applicant had a "sufficient interest" in the matter to which the application related (O. 84, r. 20(4) of the Rules of the Superior Courts, 1986). The decision of this Court (Gilligan J.) to refuse leave was upheld by the Supreme Court, McCracken J. stating as follows:

> "In the present case, the Appellant claims to have a sufficient interest on the basis that the proposed scheme affects all or almost all of its members in the functional area of the Respondent, and therefore the Appellant has a common interest with its members. However, it appears to me that to allow the Appellant to argue this point without relating it to any particular application and without showing any damage to the Appellant itself, means that the court is being asked to deal with a hypothetical situation, which is always undesirable. This is a challenge which could be brought by any of the members of the Appellant who are affected, and would then be related to the particular circumstances of that member. …
>
> … I can see no justification for departing from the normal rule which requires that an applicant for judicial review must have a 'sufficient interest' in the outcome of the application, and I cannot see any justifiable basis upon which it can be said that the Appellant has any interest other than its individual members. In the circumstances of this case where there is no reason why one or more of such individual members should not have made this application I would refuse to allow this application and dismiss the appeal on the basis that the Appellant does not have *locus standi.*"

29. The basic flaw in the defendants' argument on *locus standi* is their analysis of the plaintiff's purpose in bringing these proceedings. They suggested that the object of the plaintiff's challenge is not to ensure that the powers of the Committee are exercised so as to advance the objects of the Committee, but rather to deprive the Committee of a source of revenue, which it was submitted was not a legitimate interest in the operation and management of the Committee which would give the plaintiff the necessary standing to maintain his action. In short, they say that his objective is not to ensure that the Committee operates within the confines of its powers. The correct analysis, in my view, of the plaintiff's objective is that he asserts that his constitutional right to earn his living is being interfered with by reason of the Committee engaging in an activity which he alleges is *ultra vires* its powers. There being no other way in which the plaintiff can protect the right he asserts and contends is being, and will continue to be, infringed, in my view, he has *locus standi* to bring an action for declaratory and injunctive relief. To succeed, he must establish that the Committee is acting *ultra vires*. I turn now to that issue.

Ultra vires

30. The ascertainment of the powers of a statutory corporation and whether a particular activity is *intra vires* or *ultra vires* the powers of the corporation are tasks with which the courts are frequently confronted and the proper approach to be adopted by a court to such issues is well settled. In *Keane v. An Bord Pleanála* [1997] 1 I.R. 184, Hamilton C.J. adopted the following passage from Halsbury's Laws of England (4th Edition) Vol. 9, para. 133 as a correct statement of the law (at p. 212):

> "The powers of a corporation created by a statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein or is necessarily and properly required for carrying into effect the

> purposes of incorporation or may be fairly regarded as incidental to or consequential upon those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited."

31. Hamilton C.J. also quoted with approval the following passage from the judgment of Costello J., as he then was, in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 at p. 112:

> "It has long been established as a general principle of the construction of the powers of statutory corporations that whatever may be regarded as incidental to, or consequential upon those things which the legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires* (*Attorney General v. Great Eastern Railway Company* (1880) 5 App. Cas. 473 at 478)."

32. The corporations whose powers were in issue in the *Keane* case (the Commissioners of Irish Lights) and the *Howard* case (the Commissioners of Public Works) were public bodies whose powers were delimited by public Acts. In the case of statutory corporations established by private Act, the normal canons of construction applicable to the ascertainment of the powers of a statutory corporation, must be applied having regard to the special rules of construction which have evolved in relation to private Acts.

33. The court has been referred to helpful commentaries on private legislation in Collins and O'Reilly on *Civil Proceedings and the State*, (2nd Edition, Thomson Round Hall, 2004 at chapter 12) and Gwynn Morgan on *Constitutional Law in Ireland* (The Round Hall Press) at pp. 103 and 104. In both texts, the authors explain the nature of private legislation by reference to Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* Collins and O'Reilly quote the following passage from the 22nd Edition (London, 1997) in which private legislation is defined as follows:

> "Private legislation is legislation of a special kind for conferring particular powers or benefits on any person or body of persons – including individuals, local authorities, companies or corporations – in excess of or in conflict with the general law. As such it is to be distinguished from public general legislation, which is applicable to the general community …"

34. Because of the special nature of private Acts, special rules have evolved for construing them. I am satisfied that the following passage from Bennion on *Statutory Interpretation* (4th Edition, 2002, Butterworth's) can be regarded as applicable to the construction of private Acts in this jurisdiction:

> "There are special criteria for the construction of private Acts. These arise because a private Act is essentially a derogation, for the benefit of a few, from the law generally applying. Some private Acts notably estate Acts, are little more than conveyances of land. The 'little more' amounts to something which the law precluded the parties from doing for themselves, hence they resort to private Bill procedure. … It follows that estate Acts, which are still passed today, are to be construed more as private conveyances than statutes. …
>
> It has been said of private Acts generally that their wording 'is to be treated as the language of the promoters of them'. The Act is framed by the very persons who desire that the general law shall be eased in their private favour. So where there is any doubt its language is to be construed against them. The rule is *verba cartarum fortius accipiuntur contra proferentem* (the words of written instruments are to be taken most strongly against those who put them forward)."

35. The decision of the English Court of Appeal in *The Bournemouth-Swanage Motor Road and Ferry Company v. Harvey and Sons* [1929] 1 Ch. 686 was cited by counsel for the plaintiff as an example of the strict construction of a private Act. The Act in question was the Bournemouth-Swanage Motor Road and Ferry Act, 1923, under which the plaintiffs were empowered to make and maintain a motor road in the county of Dorset. Section 56 of the Act empowered the plaintiffs to "establish maintain work and use a ferry service for passengers animals vehicles and goods between the Sandbanks and Soundhaven Point" within Poole Harbour. It was held by the Court of Appeal that the Act did not confer on the plaintiffs an exclusive right of ferry and that they were not entitled to an injunction restraining the defendants, who for many years before the Act had in fact carried passengers between the Sandbanks and Soundhaven Point, without claiming any franchise entitling them to do so, from carrying passengers, bicycles and goods across the mouth of Poole Harbour within or near the limits of the plaintiffs' ferry. In the passages from his judgment relied on by counsel for the plaintiff, Sankey L.J. looked at the Act as a whole and he noted provisions which seemed to negative the idea that the plaintiffs were to have an exclusive right of ferry. He noted that the ferry service appeared to give very meagre rights to the public and he asked rhetorically what the ferryman did for his monopoly. He also noted that the ferryman could, if so minded, by neglect, extinguish his obligation to ferry because, if he ceased to perform his duties the Poole Harbour, Commissioners could oust him from his position subject to compensation. Looking at the whole Act, Sankey L.J. concluded that its real and main object was to empower the plaintiffs to make a motor road from Bournemouth to Swanage, and for that purpose to give the right of transporting motor cars and incidentally persons who desired to cross from one point to the other. But that did not empower the plaintiffs to exclude the defendants from ferrying passengers across Poole Harbour.

36. A more recent application of the strict approach to construction of a private statute cited by counsel for the plaintiff is the decision of the Court of Appeal (Civil Division) of England and Wales in *The Corporation of London v. The Secretary of State for Environment, Food and Rural Affairs and Covent Garden Market* [2004] EWCA Civ. 1765. The Covent Garden Market Authority (CGMA) had been established by the Covent Garden Market Act, 1961, by virtue of which a common law market franchise, which had been granted by letters patent of Charles II in 1670, was converted into a statutory market dealing in bulk in horticultural produce. Section 18(1)(f) of the Act empowered the CGMA to "carry on all such other activities as it may appear to the Authority to be requisite, advantageous or convenient for them to carry on for or in connection with the discharge of their duties or with a view to making the best use of any of their assets", but there was an added proviso that "the Authority shall not … carry on activities with a view to making the best use of their assets except with the consent of the Minister". In May, 2003 the Minister had purported to grant consent to CGMA granting, or extending the scope of, leases for the purpose of selling fish or meat, or fish or meat products, in such a part of the market area as the CGMA considered to be surplus to its requirements for the purposes of providing market facilities for the dealing in bulk of horticultural produce. The consent was quashed at the suit of the Corporation of London, the owner of Billingsgate Market, where fish is traded, and Smithfield, where meat is traded, in the City of London. Having held that the grant of a franchise to hold a market for the buying and selling of specified commodities does not entitle the grantee to hold a market for the buying and selling of other commodities (para. 50), Sir Martin Nourse continued as follows (at para. 51):

> "That having been, in law, the state of affairs subsisting at the time that the power in the second limb of section 18(1)(f) was enacted, what ought we to make of that power? In my judgment Parliament, especially in a private Act, cannot be taken to have intended, by the general words is has used, that CGMA should be able, even with the consent of the Secretary of State, to extend the ambit of their own franchise. As is stated in Maxwell on the Interpretation of Statutes, 12th ed.; p. 262:

> 'Perhaps most strictly construed of all enactments are local and personal statutes which, by their very nature, create exceptions to the general law of the realm. The court is entitled to notice that such Acts are framed by those who benefit under them, and to treat them as contracts between their promoters (or that portion of the public which might be directly interested in them) and the legislature. It follows that the maxim *verba cartarum fortius accipiuntur proferentem* (which is ordinarily inapplicable to a statutory construction) is relevant in the context of this class of statute.'

> Although a body established for public purposes, it is CGMA who are the beneficiaries of the 1961 Act. Without clear words, I decline to attribute to Parliament the intention of allowing them, even with the consent of the Secretary of State, to achieve the enhanced monopoly for which no express provision was made."

37. The plaintiff in his submission emphasised the distinction between the objects of a statutory corporation, such as the objects of the Committee as set out in

38. s. 16 of the Act of 1970, and its powers, such as the powers of the Committee set out in s. 17. It was emphasised that for an activity to come within the ambit of para. (k) of s. 17 it must be incidental or conducive to the attainment or advancement of an object of the Committee. In relation to the word "functions", which appears in s. 15, to which I have already referred, and also in s. 8, in which the Committee is mandated to hold quarterly meetings and such other meetings as may be necessary for the due performance of its functions, it was submitted by the plaintiff that it applies to both the objects and the powers of the Committee, citing the decisions of the Court of Appeal and the House of Lords in *Hazell v. Hammersmith and Fulham LBC* [1990] 3 All E.R. 33 (Court of Appeal) and [1991] 1 All E.R. 545 (House of Lords). While the plaintiff cited the Hazell case with a view to underlining the distinction between the objects and the powers of a statutory corporation, in my view, it contains persuasive guidance as to how the interpretation of the powers of a statutory corporation should be approached.

39. In *Hazell* case, which is the leading case in the United Kingdom on the construction of the powers of a local authority, at issue were the powers of Hammersmith and Fulham LBC, which were governed by the Local Government Act, 1972, s. 111 of which provided that, subject to the provisions of that Act, a local authority should have power "to do anything (whether or not involving expenditure, borrowing or lending of money …) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions". In the late 1980s Hammersmith and Fulham LBC was involved in a variety of capital market transactions, such as interest rate swaps, swap options and such like. In 1988 the District Auditor challenged the legality of the interest rate swap transactions on the ground that they amounted to speculative trading for profit, following which it ended all further participation in swap transactions and pursued an interim strategy of containment designed to limit the extent of its exposure to losses which had resulted from a rise in interest rates, while gradually extricating itself from the market. It was held by the House of Lords that a local authority had no power to enter into interest rate swap transactions, which by their nature involved speculation in future interest trends, with the object of making a profit in order to increase the available resources of the local authority, because they were inconsistent with the borrowing powers of a local authority as defined and controlled by the provisions of a schedule to the Act of 1972. Specifically it was held that the transactions were not saved by s. 111 since they did not "facilitate" and were not "conducive or incidental to" the discharge by a local authority of the borrowing functions as limited by the Act of 1972. It was also held that, since such transactions were unlawful, the fact that those entered into after the District Auditor's challenge in 1988 were intended to eliminate or reduce the risks inherent in the earlier stock transactions, did not render them lawful. The House of Lords applied the canons of construction which Hamilton C.J. restated in the *Howard* case. As to the meaning of the word "functions" in s. 111, Lord Templeman stated (at p. 554):

> "I agree with the Court of Appeal that in s. 111 the word 'functions' embraces 'all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it' … Those activities are its functions. Accordingly, a local authority can do anything which is calculated to facilitate or is conducive or incidental to the local authority's function of borrowing."

40. More recently, in *Akumah v. London Borough of Hackney* [2005] UKHL 17 the House of Lords adopted a similar approach in applying s. 111 in the context of determining the question whether the functions of a local housing authority could properly be said to include the activities of regulating and controlling the parking of vehicles on housing estates, which it answered in the affirmative.

41. The plaintiff, in addressing the *ultra vires* issue, submitted that the question for the court is whether the Act of 1970 gives the Committee the power to sell headstones on a commercial basis. The defendants' response could be described as non-technical. The Committee has power to manufacture headstones and, it was contended, it cannot have been contemplated that it would not receive payment for the headstones it erected. In any event, it was submitted that the idea of a commercial sale is tautologous.

42. The plaintiff accepted that, by virtue of para. (i) of s. 17, the Act of 1970 now contains an express power to manufacture headstones, suggesting that this is an innovation and that the 1846 Committee did not have express power to manufacture headstones under the 1846 Act. It is certainly arguable that a strict construction of the wording of s. XVIII of the Act of 1846 supports that last conclusion. Developing his argument, the plaintiff asserted that, because of the innovation in the Act of 1970, one does not have to look to para. (k) of s. 17 to find an incidental power to manufacture headstones, but para. (i) does not confer an express power to manufacture headstones for sale. Therefore, so the argument goes, it is necessary to consider three questions: whether the power to sell headstones –

> (i) is expressly conferred by some other provision, or

> (ii) is an incidental power, or

> (iii) can be implied applying the normal canons of construction.

43. In relation to the first question, the defendants analysed para. (b) of s. 17. I surmise that para. (b) perpetuates unintended drafting errors, probably typographical errors, in that I would have expected to see the phrase "turn to account" rather than "turn into account", and I would have expected to see a comma between the word "undertaking" and the word "property". However, that is conjecture, and I attach no weight to it in construing para. (b). The plaintiff submitted that para. (b) does not empower the Committee to sell a headstone manufactured by the Committee under para. (i). It was submitted that the entire context of para. (b) suggests that it is essentially a power to deal with lands owned by the Committee. I do not accept that argument. In my view, under para. (b) the Committee has power to sell any property which the Committee owns, whether it is office equipment or a lawn mower or, subject to compliance with s. 18, land. The actions enumerated in para. (b) do not relate exclusively to land. Leases and mortgages of chattels are a common phenomenon. On the other hand, "hire" is not a concept which applies in relation to land. The plaintiff submitted that the words "undertaking property" means property properly held for the purposes of the undertaking, thus leading to the conclusion that under para (i) the Committee has power to manufacture headstones only for the purpose of maintaining

the cemetery and not for the purpose of sale. It was suggested that this interpretation is borne out by the legislative history and the preamble to the Act of 1970 which indicates that the legislative intent was to clarify existing powers, not to extend them. It was accepted by the plaintiff, however, that in the event of any inconsistency between the operative part of the Act of 1970 and its long title or preamble, the operative part prevails.

44. The plaintiff's approach, in my view, is to read something into s. 17 which is not there. The intention of the legislature in enacting para. (i) is quite clear: the Committee has power to construct or manufacture the specified items, including headstones. It has also power to manufacture other structures, but there is an express restriction, in that such structures must be for use or decoration in, or in connection with cemeteries or burial grounds. Because of that restriction, the Committee does not have power to manufacture, say, garden gnomes. There is no other restriction in para. (i) and I can see no basis for reading into it a proviso limiting the power to manufacture headstones for the purpose of maintaining the cemetery. Similarly, I see no basis for reading into para. (b) any limitation on the Committee's power of sale, other than the limitation stipulated in s. 18 in relation to land. Nothing elsewhere in the Act of 1970 necessitates the implication of any limitation in para. (b) or para. (i) to avoid inconsistency.

45. In my view, on the plain words of s. 17, the Committee has power to manufacture headstones. Any headstones it manufactures become part of its "undertaking property". It is entitled to sell any headstones so manufactured by virtue of para. (b). That interpretation is not so wide as to authorise the Committee to do anything, as the plaintiff suggested. The plaintiff does not have power to manufacture garden gnomes and it does not have power to sell garden gnomes. It is not necessary to consider whether, if the Committee manufactured garden gnomes acting *ultra vires*, it could sell them, but it is clear that, on the authority of the *Hazell* case, it could not continue to manufacture them with a view to exiting the garden gnome business profitably.

46. As regards the second and third questions which the plaintiff suggested the *ultra vires* issue raises, having regard to the view I have taken that, by the combined operation of paras. (i) and (b) of s. 17, the Committee has an express power to sell headstones, these questions are redundant. Nonetheless, for completeness, I will comment on the points made by the plaintiff.

47. The plaintiff submitted that, if the Committee were constrained to rely on para. (k) as the source of its power to sell headstones, it would have to establish that such power is incidental or conducive to the attainment or advancement of its objects as set out in s. 16. It would not be sufficient for it to establish that the power was incidental to an express power given in s. 17. That submission is undoubtedly correct. If there were no express power to manufacture headstones on the lines of para. (i) of s. 17 in the Act of 1970, in my view, para. (k) would be open to the construction that it empowered the Committee to manufacture and sell headstones for use in cemeteries owned and operated by it. I think it would be questionable whether para. (k) was open to the construction that the Committee could manufacture and sell headstones for use in, say, Lucan or Esker cemeteries. However, in conferring an express power on the Committee in para. (i) the legislature did not limit that power to cemeteries owned and operated by the Committee and I see no reason for reading any such limitation into para. (i).

48. If either or both para. (i) or para. (b) were not contained in s. 17, and if the issue was whether the manufacture of headstones for sale could be regarded as incidental to, or consequential upon, the objects of the Committee as set out in s. 16, a strict construction of the Act of 1970 would probably lead to the conclusion that such a power could not be implied. But that proposition is entirely hypothetical. The Committee has an express power to manufacture headstones and it has an express power to sell its "undertaking property". On a literal interpretation of s. 17, the Committee has the power it contends for. Unlike the situations which arose in the *Swanage* and *Covent Garden* cases, the defendants are not contending for a construction that would give them a monopoly or an expanded monopoly where the words of the statute do not admit of such privileges. A consequence of the manner in which the Committee exercises its power and regulates inscription on tablets recording communal burials is that it has a competitive advantage over monumental sculptors carrying on business in the Dublin area. However, unless that is otherwise illegal, for example, under competition law, it is permissible.

49. By way of general observation, to construe the Act of 1970 as not empowering the Committee to manufacture and sell headstones is to insert limitations which are not to be found in the text and to ignore the plain meaning of the text. In form and style ss. 16 and 17 resemble the provisions of a memorandum of association of a company incorporated under the Companies Acts. If the Committee was incorporated under the Companies Acts with similar objects and powers, I doubt if any question would arise as to its power to manufacture headstones for sale.

Conclusion

50. For the reasons I have outlined, I consider that in manufacturing and selling headstones the Committee is not acting *ultra vires* its powers.