38/89

SUPREME COURT OF VICTORIA

EDGAR v HANNAKER

Fullagar J

27 September 1988

TOWN AND COUNTRY PLANNING – USE OF LAND AS A JUNK YARD – SUCH USE IN A CERTAIN AREA PROSCRIBED BY PLANNING SCHEME – PRIOR LAWFUL USER EXCEPTED – ONUS OF PROOF: *LOCAL GOVERNMENT ACT* 1958, S696C(1); *MELBOURNE AND METROPOLITAN PLANNING SCHEME ORDINANCE*, CL7(1), 14(2); *TOWN AND COUNTRY PLANNING ACT* 1961, S49(1); *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, S168.

The substance of s49(1) of the *Town and Country Planning Act* 1961 and cl7(1)(e) of the *Melbourne and Metropolitan Planning Scheme Ordinance* proscribes the use of residential C land as a junk yard except in the case of the continuation of prior non-conforming use. Having regard to the provisions of s168 of the *Magistrates (Summary Proceedings) Act* 1975 and the fact that an informant would be required to prove a negative of facts more likely to be within a defendant's knowledge, the onus of proving a prior conforming use rests on the defendant.

***Bell v Hyde* [1939] VicLawRp 44; [1939] VLR 300; [1939] ALR 386, followed.**

FULLAGAR J: [1] This is the return of an order nisi to review the decision of a Magistrate made at Lilydale on 14th October 1987 whereby he convicted the applicant Kenneth George Edgar of two offences under s49(1) of the *Town and Country Planning Act* 1961 (hereinafter called the TCP Act) and of one offence under s696C(1)(a) of the *Local Government Act* 1958.

The order nisi was obtained in a form which showed the applicants as Kenneth George Edgar and Gertrude Evelyn Edgar **[2]** (who is his elderly mother) and the respondents as Rodger N Hannaker and Kevin Gordon Williams. Mr Monotti of counsel appeared on a summons for both informants seeking to have the order nisi set aside as against KG Williams and also set aside insofar as showing GE Edgar as an applicant.

The summons was referred to the Judge by a Master. Mr Monotti contended that GE Edgar has no standing to review the decision of the Magistrate who merely adjourned the proceedings against her rather than record a conviction, and that in any event GE Edgar has not applied for an order nisi. Mr Monotti referred me to the practice adopted by Menhennitt J in *Brudenell v Nestle Company (Australia) Ltd* [1971] VicRp 27; [1971] VR 225; (1970) 22 LGRA 277.

I then ascertained that there was no appearance for GE Edgar and that Mr Moyle of counsel for KG Edgar (hereinafter called the defendant or the applicant) had no objection to an order as follows, and I then ordered that the order nisi made 13th November 1987 be set aside insofar as it is or purports to be made on behalf of GE Edgar and insofar as it is directed to KG Williams, and that appropriate alteration be made to the heading of the order nisi, and directed that the solicitors for the informant Hannaker should take out this order.

The case for the prosecution in relation to the two informations relating to the TCP Act, which I shall call informations 1 and 2, was that the applicant KG Edgar had been at all times since 20th September 1954 an owner and occupier of a house and land in the municipality of Nunawading, and that between 30th November 1985 and 27th November 1986 (the latter being the date of the **[3]** informations) the land, being situated in a residential C zone, was used as a "junk yard", this being a defined and prohibited user under the Melbourne and Metropolitan Planning Scheme Ordinance. There was tendered in evidence the Ordinance No. 14 Volume 1.

No submission was made to me that a conviction on one of the two informations opened up a plea of *autrefois convict* on the other of them, and I express no opinion whatever on that question.

Section 49(1) of the TCP Act provides, so far as material, as follows -

> "Any person who contravenes or fails to comply with ... any interim development order or planning scheme, ... and the owner of any land in relation to which any such contravention or failure occurs, shall ... be guilty of an offence against this Act."

Clause 7(1) of the Ordinance provides that, "subject to the provisions of this Ordinance", land in a residential C zone shall not be used for any of the purposes specified or included in Column 5 of the Table attached to clause 7. Column 5 of the Table includes use as a "junk yard". By clause 2 of the Ordinance the words "Junk Yard" are defined as meaning –

> "any lard or building used for the collection, storage, or sale of scrap metals, second hand timber, second hand building materials, second hand containers, waste paper, rags, bottles or other materials, or for the collection, dismantling, storage or salvaging of motor vehicles or machinery or any parts thereof."

Clause 14(2) of the Ordinance, subject to certain other provisions, provides as follows -

> "where immediately before the approval date any land was lawfully used for any purpose specified or included in column 5 ... of the Table to Clause 7, ... such land may continue to be used or be used (as the case may be) for that purpose."

[4] The Planning Scheme Ordinance came into effect on 1st March 1955, that is to say this was the "approval date" for the purposes of clause 14(2), and an issue at the hearing of the informations was whether, immediately before 1st March 1955, the land was lawfully used as a junk yard. At the hearing the informant maintained that the burden of proof was upon the defendant to establish, on the balance of probabilities, that there was such non-conforming user at the approval date. For the defendant it was maintained that, in a prosecution under s49(1) of the TCP Act, the burden was upon the informant to establish beyond reasonable doubt that the land was not used as a junk yard at the approval date.

One gathers that it was not contested that the premises were used as a junk yard at the date of the hearing, and it is clear in any event that the Magistrate found that they were used as a junk yard between the dates laid in informations 1 and 2. Counsel for the defendant at the hearing stated in his submissions that the only issue to be resolved in respect of informations 1 and 2 was whether or not non-conforming use rights existed at 1st March 1955. He contended the burden on this issue lay upon the prosecution.

It must, I think, have been clear that the only issue to be resolved in respect of information 6 i.e. the information under s696C of the *Local Government Act*, was whether there was established user within sub-s1(a) of that section as at its commencement date which was before me agreed to be 13th December 1966. As I understand the position at the trial, it was common ground that, in respect **[5]** of information 6, the burden was upon the defendant to prove, on the balance of probabilities, that the land was on 13th December 1966 lawfully used "for the storage of old or secondhand motor vehicles or machinery or old or used secondhand materials", these quoted words being taken from the information numbered 6. I understand that counsel for the defendant, after the view of the land by the Magistrate, conceded that the premises were so used at the date of the information numbered 6, but this understanding is not essential to my resolution of the order nisi.

It is in the light of the foregoing matters that the effect should be later considered of a further concession at the trial by the defendant's counsel in the following terms -

> "that if the court should hold that the defendant does not have the benefit of a non-conforming use right in respect of informations 1 and 2, the defendant cannot claim the benefit of the proviso to section 696C of the *Local Government Act*, because that proviso depends on the applicant being able to prove that the lard was lawfully used for the purposes referred to in that section prior to its commencement on 13th December 1966."

The above language of the concession is in the words used before me by Mr Moyle of counsel, who appeared for the defendant below in the last two of the three hearing days and who also appeared for him as applicant before me. Mr Monotti, who before me appeared for the

respondent/informant, but who did not appear below, accepted what I have quoted as being the substance of the concession made below.

The Magistrate at the end of the third day of the hearing stated that he made the following findings, after first stating that he found "all the charges proven" -

> **[6]** "(a) the applicant and his mother went into occupation of the premises on 20th September 1954, and occupied the premises for normal residential purposes; at 1st March 1955 the defendant was not using the land for the storage or renovation of vehicles so as to attract a non-conforming use right, and
>
> (b) it was for the defendant/applicant to prove the non-conforming use defence on the balance of probabilities, and he had not done so, "and therefore" the defendant was using the land as a junk yard as alleged, which was a prohibited use."

The Magistrate then went on apparently to consider penalties, for he stated that it seemed reasonable to him, subject to such consent as the council might give pursuant to s696C of the *Local Government Act,* that the defendant should be able to store six vehicles upon the land within the structure at the rear, and could store one further vehicle in the garage. Having had a view of the land, he stated his opinion that the current use of the land constituted "one heck of a mess" and "a strong harbourage for rats and other vermin", and he added a comment indicating that this was a danger to the defendant's elderly mother.

The grounds of the order nisi are as follows

> "A. The learned Magistrate erred in law in holding that the Plaintiff carried the burden of proving that the land, the subject of the offence was used in a non-conforming manner at the time that the Interim Development Order came into operation in order to exculpate himself in respect of the two charges of breaches of Section 49 of Act No. 8716.
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> **[7]** B. The learned Magistrate erred in law in failing to pronounce his findings in respect of the charge of breach of Section 696C of Act No. 7495 and in failing to give any reasons for the conclusion he must have reached that the charge was proven."

It is now contended for the defendant/applicant that the Magistrate erred in law in ruling in connexion with informations 1 and 2 and that the burden of proof was on the defendant to prove that the land was used in a non-conforming manner at the date of the Development Order coming into operation, and that this error vitiated his finding in (a) above that the defendant was not using by a non-conforming use at 1st March 1955.

It is said that, as the Magistrate said nothing by way of reasons for his finding proven information number 6, this Court should conclude that he at no time directed his mind to the question of the state of use as at 13th December 1966. Accordingly his conclusion that information number 6 was proven should also be set aside, on the ground that he failed to state any reasons and thereby put it outside the power of the appellate court to determine whether or not he made an error of law. I understand that this submission is made only upon the footing that the applicant now succeeds on the onus of proof put in respect of informations 1 and 2, but again the understanding is not essential to my resolution of the order nisi.

It is necessary to deal first with the question upon whom lay the burden of proof, in connexion with informations 1 and 2, of the existence or non-existence as at 1st March 1955 of a non-conforming use. **[8]** Looking at the matter in the absence of authority, and observing the form of the legislation, there seems to be a great deal of force in the following argument by Mr Moyle for the applicant/defendant -

> "(1) The offence charged is an offence against s49(1) of the TCP Act.
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> (2) The elements of the offence are simply that the applicant contravened a provision of the planning scheme ordinance, and the provision is clause 7(1)(e).
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> (3) The prosecution therefore bears the burden of proving beyond reasonable doubt a contravention of clause 7(1)(e) of the planning ordinance and, as the opening words thereof – "subject to the provisions of this Ordinance" – have the effect of incorporating into the sub-class the provisions of clause 14(2), the prosecution has the burden of establishing the non-existence of the non-conforming prior use.

Another way of putting the same argument is to say, as Mr Moyle did, that one cannot ascertain whether there has ever occurred a contravention of the planning scheme until it is ascertained whether there was any non-conforming prior use. Merely to establish that there was use as a junk yard after the approval date does not establish contravention of the planning scheme. Nor does it establish contravention of a "provision" of the planning scheme because the provision put forward – clause 7(1)(e) – itself has an element, by virtue of the seven opening words of sub-clause (1), that **[9]** there has not been prior non-conforming use. As Mr Moyle put it, the prosecution must prove that, upon a full examination of the planning scheme ordinance as a whole, the proper conclusion is that there has been a contravention of a provision of it.

Upon this view Mr Moyle contended that the finding of fact of the Magistrate, that he was satisfied that "at 1st March 1955 the defendant was not using the land for the storage or renovation of vehicles so as to attract a non-conforming use right", is vitiated by his finding of law that the burden was upon the defendant to prove non-conforming user coupled with his finding of fact that the defendant had failed to establish this and the Magistrate's further statement that therefore he found the defendant was guilty of prohibited user.

In my opinion the proper conclusion from the rival accounts of what took place before the Magistrate is that he found and held as follows in respect of information 1 and 2.

> "(1) that the onus was upon the defendant to establish prior non-conforming use, and
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> (2) that the defendant failed to establish it,
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> (3) that the informant had satisfied the court of all the other elements of the offence charged, and
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> (4) that therefore the defendant was guilty of the offence charged.

A critical question therefore is whether proposition (1) is or is not correct, and I have come to the conclusion that it is correct. **[10]** Section 168 of the *Magistrates (Summary Proceedings) Act* 1975 is in the following terms -

> "168(1) Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence in the Act, order, by-law, regulation, or other document creating the offence, may be proved by the defendant but need not be specified or negatived in the information.
>
> (2) Whether an exception, exemption, proviso, excuse, or qualification is specified or negatived or not no proof in relation thereto shall be required on the part of the informant."

In *Barritt v Baker* [1948] VicLawRp 85; [1948] VLR 491; [1949] ALR 144 Fullagar J in this Court considered s214 of the *Justices Act* 1928 which was in a similar, if slightly narrower, form to that of s168 of the 1975 Act above quoted. He held at p494 that "the section will not operate to relieve the prosecution from proving any fact which is an essential element in the specification of the prohibited act." In that case the prohibited act, prohibited by a section of the *Police Offences Act*, was betting in a street. The place was thus "an essential element in the specification of the offence, and the prosecution must prove not merely the making of a bet but the making of a bet in a street." The actual place was enclosed land. By a different section of the *Police Offences Act* "street" was defined as extending to enclosed land "not including racecourses". Accordingly the burden was on the informant of establishing that the enclosed land on which the offence took place was not a racecourse. In dealing with the argument that his view of the application of s214 "reduced the whole question ... to a matter of form rather than substance", his Honour said, "But it seems to me that the question must often turn on the **[11]** form of the legislation." I would myself emphasize that his Honour used the word "often" and not the word "always".

In *Dowling v Bowie* [1952] HCA 63; (1952) 86 CLR 136; [1952] ALR 1001, the High Court had to consider s141(1) of a Northern Territory ordinance which provided that "a person shall not sell ... liquor to a person who is an aboriginal or a half-caste within the meaning and for the purposes of the *Aboriginals Ordinance* 1918-1947." By s3A of the ordinance last-mentioned it was provided that the Chief Protector may, by notice in the Gazette, declare that any person shall not be deemed to be a half-caste for the purposes of the Ordinance, whereupon the person shall cease to be a person to whom the definitions of "aboriginal" and "half-caste" apply.

The High Court held that, on a prosecution for an offence under s141, the onus lay upon the prosecution of establishing that the person to whom the liquor was sold was not a person who was "not deemed to be a half-caste" by reason of a declaration under s3A. At pp140-141 Dixon CJ, with whose reasons for judgment Fullagar and Kitto JJ expressly agreed, indicated that it was wrong to regard *Barritt v Baker* as "depending on nothing but the form in which the legislation may be cast and not upon its substantial meaning or effect." In *Barritt v Baker* the substance of the critical section, so far as relevant to the facts of the case, was that the place where the betting took place must fall within, and not outside, the artificial definition of "street".

In *Dowling v Bowie* it was "an essential element in the liability imposed by s141 that the person to whom liquor was sold must be governed by the Aboriginals Ordinance; he must be a half-caste or aboriginal not only **[12]** within the meaning but for the purposes of the Aboriginals Ordinance." The substance of the matter was that s141 was not a law for safeguarding against intoxicating liquor anybody but those who were under the protection of the Aboriginals Ordinance.

The High Court also relied upon the consideration that "the non-existence of such a declaration ... is a fact which an informant, having access to the file of Gazettes or an official list of exempt aboriginals and half-castes, would have no difficulty in proving, but it is not a fact that would be within the knowledge of the party proceeded against, nor would it be particularly easy for him to disprove it." The High Court thus held that "all substantial reasons" pointed to the conclusion that it was part of the case of the informant that the person to whom the liquor has been supplied has not been excluded from the definition of aboriginals or half-castes under s3A. In *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* [1945] HCA 22; (1945) 70 CLR 635, Dixon J had said at p644 -

> "But although in such a question the form in which an enactment is shown is a consideration of much importance, it is by no means decisive. The substance of the provision must be considered."

In *McLachlan v Rendall* [1952] VicLawRp 66; [1952] VLR 501 at p506; [1952] ALR 777 Martin J observed that these High Court judgments, as to onus of proof, "point out that in construing a statute attention must be paid both to its form and substance." His Honour added that, in considering such a case as was then before him "one must, in addition to paying attention to the form and substance of the Act, have regard to the principles **[13]** of common law that ordinarily one is not called upon to prove a negative, that generally facts peculiarly within the knowledge of one party are not required to be proved by the other, and to the presumption of innocence – that fault is not presumed but must be proved."

In the present case the form of s49(1) of the TCP Act is simply due to the fact that the creation and punishment of offences is not undertaken in the scheme and ordinance which create the obligations but in a separate Act of Parliament. If the creation and punishment of the offence were dealt with by the same legislative act as created the obligations, it would be clear that clause 7 of the Ordinance was concerned to create a general rule, or a set of general rules, whereas clause 14(2) was concerned to create an exception out of the general rule. That is, in my opinion, still the substance of the matter despite the form of s49(1) of the TCP Act.

Next, the facts dealt with by the excepting clause, clause 14(2), are facts which are generally more likely to be within the knowledge of the person charged rather than within the knowledge of the informant. Next, the burden of proof, if it is upon the informant, is a burden of proving a negative, for he must prove that there was not any relevant non-conforming prior use.

In *Bell v Hyde* [1939] VicLawRp 44; [1939] VLR 300; [1939] ALR 386 the municipal by-law there in question had almost the same effect as the relevant part of the planning scheme of the present case. The by-law prohibited the use for business purposes of any land in a residential area, but further provided that, "nothing hereinbefore contained shall preclude the **[14]** continuance of the use of any land ... for any purpose for which the same was used immediately before the coming into operation of this by-law." Lowe J held that the provision permitting continuance of user introduced an exception to the offence created by the by-law, and accordingly that, by virtue of s214 of the *Justices Act* 1928, the burden of proving that the business was a continuation of prior use of the land lay upon the defendant.

In *Clare v Jeff's Bulk Appliances Pty Ltd* [1981] VicRp 72; [1981] VR 758; 36 LGRA 435 at p763 Murphy, J said -

> "I am not required to rule on the submission concerning a prior lawful use. Out of deference to counsel's submissions, I wish only to say that it does appear clear from the decision (decisions?) that the onus of proving that the defendant simply continued to use the land for a purpose for which the land was being lawfully used immediately before the coming into operation of the Interim Development Order would rest on the defendant."

See also the rationalization by Sholl J in *Everard v Opperman* (1958) VR 389 at pp391-2.

Mr Moyle is in my opinion correct in saying that, if one regards only form, the proper conclusion from s49(1) of the TCP Act is that "exclusion of some particular circumstance or set of facts is an essential element in the primary specification of the prohibited act", the prohibited act being contravention of clause 7(1)(e) of the *Planning Scheme and Ordinance*. But if one regards the substance of the matter, the law proscribes use of residential C land as a junk yard, with an exception in the case of continuation of prior non-conforming use.

In my opinion, despite the form which s49(1) of the TCP Act takes, the substance of the matter is that **[15]** the Planning Scheme provides a general rule prohibiting use for a wide range of "non-residential" purposes subject to an exception in the case of non-conforming use at the coming into operation of the Order. This substance should not be regarded as having been altered by the device of defining the offence by another source of law than the Interim Development Order itself.

Accordingly, s168 of the *Magistrates (Summary Proceedings) Act* applies to place the onus of proof of prior non-conforming use upon the defendant. In addition, common law principles would also ignore the form and go to the substance, with the same result, especially as the burden on the informant would require him to "prove a negative", and especially as the facts constituting the exception are generally more likely to be within the knowledge of the person charged rather than the knowledge of the informant.

The substance of the provisions which go to make up the constitution of the alleged offence, as well as s168, and the common law principles and the decided cases – including a decision of Lowe J in this Court – all seem to me to point in the same direction. Only the form of s49(1) may be said to point the other way. In my opinion the relevant burden of proof was upon the defendant.

In these circumstances it follows, in my opinion, that the Magistrate was entitled to give full effect to the concession below of the defendant's counsel which is earlier referred to. Having concluded correctly that the relevant burden of proof lay upon the defendant in respect of informations 1 and 2, and in the light of his findings and the concession, he was not obliged to give any further **[16]** reasons for his conclusion that the offence alleged by information 6, being a contravention of s696C(1)(a) of the *Local Government Act* was also proved.

For these reasons, the order nisi should be discharged, and the applicant Kenneth George Edgar should pay the costs of the respondent Rodger N Hannaker.

APPEARANCES: For the applicants Edgar: Mr CW Moyle, counsel. For the respondents Hannaker & Williams: Mr BF Monotti, counsel.
