36/01; [2001] VSCA 83

SUPREME COURT OF VICTORIA — COURT OF APPEAL

MELTON SHIRE COUNCIL v TANKARD

Winneke P, Phillips and Buchanan JJ A

24, 25 May 2001 — (2001) 114 LGERA 177

LOCAL GOVERNMENT – OWNER/OCCUPIER REQUIRED TO REMOVE UNSIGHTLY MATERIAL FROM LAND – WRITTEN NOTICE SERVED ON OWNER/OCCUPIER – FORM OF NOTICE NOT SPECIFICALLY APPROVED BY COUNCIL – NATURE OF BREACH NOT SPECIFIED IN NOTICE – WHETHER NOTICE INVALID: *LOCAL LAW* 1, cl706.

Clause 706 of the Local Law made by a Council required that an authorised officer who believes that land may have become unsightly serve on the owner or occupier "a notice in a form approved by Council". A Council approved a form which required specification of the clause of the Local Law said to have been breached and a description of the breach. A form served by the Council on T. failed to specify the breach of the law which the officer opined had been committed.

HELD: It was fundamental that the nature of the breach be specified not only because the approved form required it but also because the clause created a multiplicity of offences for contravention of which a requirement to carry out works can be imposed. A failure to specify the breach rendered a notice issued under cl706(2) invalid.

***Melton Shire Council v Tankard* [1999] VSC 465; (1999) 106 LGERA 371; MC27/99, affirmed (but on a different ground).**

WINNEKE P:

1. I will invite Buchanan JA to give the first judgment in this matter.

BUCHANAN JA:

2. Since 1979 the respondent has owned and occupied the land situated at 1 Creamery Road, Toolern Vale. The land is in a rural area. There are fruit trees and grassed areas on the land. Photographs of the land taken in August and September 1998 disclosed that the land was strewn with boxes, some broken, tins, bottles, pipes, papers, several motor vehicles, some of them of a military appearance, and a somewhat dilapidated caravan.

3. The land is within the Municipal District of the Shire of Melton. On 13 August 1998 an authorised officer of the appellant ("the Council") served on the respondent a notice requiring him within 30 days to remove from the land "stockpiles of glass bottles ... all unregistered motor vehicles ... all stockpiles of paper and cardboard ... all stockpiles of timber and wooden boxes."

The notice also required the respondent to "remove from the fibro cement shed on the property and remove from the property all stored paper and cardboard."

4. The notice was served pursuant to the provisions of cl706 of the Local Law made by the Council under s111 of the *Local Government Act* 1989 ("the Act"). The local law provided:

> "706. (1) The (a) owner; and (b) occupier of any land must not allow (i) the land to become (y) unsightly; or (z) detrimental to the amenity of the area in which the land is located; (ii) a Noxious Weed to grow on the land; (iii) vegetation growth of more than 20 centimetres in height on urban land which is vacant; or (iv) unconstrained refuse, rubbish, rubble, demolished or discarded materials from building work or other matter to accumulate on the land so as to (1) constitute a hazard to the health or safety of any Person; or (2) litter the land. (2) If an Authorised Officer reasonably suspects that an owner or occupier of land is contravening sub-cl706(1), he or she may serve on the owner or occupier a notice in a form approved by Council; and (a) Upon receiving any such notice, the owner or occupier shall cease his or her contravention of sub-cl706(1) in accordance with the notice. (b) A notice served under this sub-cl. may require the owner or occupier to seal off any building on the land, fence off the land (or any portion of it) or otherwise restrict means of access to it (or any portion of it)."

The respondent did not comply with the notice. Section 225 of the Act provided:

> "(1) If a person fails to carry out any work which he or she is required to carry out by a Council under any Act, regulation or local law— (a) any other person may with the approval of the Council cause the work to be carried out; or (b) the Council may carry out the work. (2) Any other person who carries out the work may recover the cost of carrying out the work from the person who failed to do it. (3) If the Council carries out the work the Council may recover the cost of carrying out the work from the person who failed to do it."

Clause 1107 of the Local Law provided:

> "1107. Any expense incurred by the Council in consequence of a breach of this Local Law or in the execution of work directed pursuant to this Local Law to be executed by any person and not executed by him or her shall be paid by the person committing such breach or failing to execute such work."

5. The Council paid a contractor to clean the respondent's land at a cost of $2,995 and sought to recover the cost and a $200 administrative fee from the respondent by suit in the Magistrates' Court, relying upon s225 and cl1107. As a contractor, not the staff of the Council, performed the work, it might be argued, as the President pointed out in the course of argument, that the wrong party sued to recover the cost of the work; for it may be that under s225 the Council can only recover the cost of carrying out work performed by its own servants, and if another person carries out the work, that person alone can recover the cost of doing so.

6. The magistrate who heard the complaint dismissed it. He said that the Council relied upon that part of cl706 which proscribed allowing "land to become unsightly", and held that the relevant part of cl706 related to the land surface or a structural fixture on the land, but not to objects which had accumulated upon the land.

7. The Council appealed from the dismissal of the complaint to a single judge of this Court pursuant to s109 of the *Magistrates' Court Act* 1989. The questions of law settled by a master pursuant to Rule 58.09 were:

> "(1) Whether the learned magistrate erred in law in holding that land is incapable of being rendered unsightly by an accumulation of matter having been placed upon it, not being by way of buildings and other fixtures erected thereon. (2) Whether the learned magistrate erred in law in holding that cl.706(1)(a) and (b)(i)(y) of Melton Shire Council Local Law 1 cannot apply to matter accumulated on land by the provisions of cl.706(a) and (b)(iv)."

The judge said:

> "[I]t is strongly arguable having seen the photographs, that this land was unsightly or certainly it is strongly arguable that it was open to the magistrate to so find within the meaning of the Local Law, and I would be very surprised if the magistrate was correct in his interpretation of the Local Law, but I do not need to decide that question ..."

8. Rather than decide the question, the judge dismissed the appeal on the ground that the notice served on the respondent did not comply with the requirements of cl706 of the Local Law. The Council had approved a general form for use under cl706, but it was conceded on behalf of the Council that the notice served on the respondent had not been approved by the Council. His Honour held:

> "[I]t is not a matter for the authorised officer to determine the form of the notice in any particular case, but it must be approved by the Council, and that, in my view means, that in any case where a notice is to be served upon an owner or occupier, the actual notice must be approved by the Council."

Later he said:

> "There are difficulties about this Local Law, because it does not talk about the Council or the authorised officer requiring any particular work to be done; it simply says the owner shall cease his contravention in accordance with the notice. So it is left up in the air what the contravention is and what the notice should say, and I consider that that gap is filled on the present drafting of the Local Law, by Council actually approving the form of notice which is to be given."

9. I consider that his Honour's reservations as to whether the magistrate's decision was correct were well founded.

10. The magistrate relied on the definition of "land" in s38 of the *Interpretation of Legislation Act* 1984. The definition is as follows:

> "'Land' includes buildings and other structures permanently affixed to land, land covered with water, and any estate, interest, easement, servitude, privilege or right in or over land; ..."

The definition is of little assistance in answering the question whether land has been allowed to become unsightly by an accumulation of articles upon the surface of the land. The magistrate appears to have distinguished between unsightliness due to a change in the land itself and unsightliness due to activities or objects placed upon the land. I do not think the distinction is relevant. In either event the land can properly be described as unsightly. Nor do I think that the draftsman of cl706 intended sub-cl(1)(iv) alone to cover objects upon the surface of land while sub-cl(1)(i) was to be limited to changes in the land itself.

11. I am of the opinion, however, that his Honour erred in supporting the magistrate's decision on the ground that the Council did not approve the particular notice given to the respondent. In my view cl706(2) does not require the Council to approve each particular notice. A notice will comply with the sub-clause if it contains the material specified by a general form approved by the Council. While it is understandable that notices under cl706 should contain the same type of information, such as the facts constituting the breach, the time within which the contravention is to cease, the consequences of failing to comply with the notice and where information may be obtained as to the notice, it is difficult to see what objective is achieved by requiring the Council itself to approve the particulars to be inserted in each notice. The members of the Council will generally have no personal knowledge of the land the subject matter of the notice. Further, it may be necessary for notices to be given expeditiously. Clause 706 covers objects on land constituting a hazard to health or safety. It would be clearly unsatisfactory if no step could be taken against a danger to health or safety until the full Council had met to consider the matter.

12. Other clauses of the Local Law contain the formula "a notice in a form approved by Council", and in those cases it is clear that the formula only requires filling in the blanks in a general form approved by the Council. Thus cl1002, which deals with on the spot infringement notices, requires the notices to be in "a form approved by Council". It would be absurd to require the Council to approve each particular notice. Perhaps more strikingly, cl1108 provides that a person applying for a permit must lodge an application "in a form approved by Council". It could not be supposed that the Council was to approve each word on an application when lodged. In my view the use of the same formula in those clauses supports the conclusion that cl706(2) does not require that there be a resolution of the Council relating to each notice given under the clause.

13. His Honour pointed out that there were other difficulties with the form of the notice. He observed that the notice did not identify the contravention of the Local Law otherwise than by referring to cl706. The form approved by the Council was before this Court. It requires specification of the clause of the Local Law said to have been breached and a description of the breach. The relevant part of the approved form is as follows:

> "You have, in the opinion of ..... ("the Council") or an authorised officer of the Council, committed a breach of cl. ... of the Council's Local Law No 1 by To remedy the breach, you must do the following, within .... days from the date of this Notice:"

The notice given to the respondent contained no statement of the alleged breach of cl706. The word "by" after "Local Law No 1" was omitted and the notice proceeded to specify the work required to remedy the breach. That part of the form requiring a statement of the breach was ignored. In my opinion it is clear therefore that the notice was not in a form approved by the Council, and thus did not comply with cl706(2) of the Local Law.

14. Counsel for the appellant contended that the requirements of cl706(2) were met because an authorised officer of the Council signed the notice. Clause 1112(2) of the Local Law provides:

> "(2) Where in this Local Law, something may be done by Council, it may be done by an Authorised Officer of Council."

It was submitted that the authorised officer approved the form by signing it. In my view cl706(2) distinguishes between an authorised officer and the Council and gives them discrete powers, with the result that only the Council can approve the form of a notice under cl706(2).

15. As the notice did not comply with cl706(2), the work giving rise to the cost sought to be recovered by the Council was not work the respondent was required to carry out under a Local Law, and accordingly the Council could not recover the cost under s225 of the Act. As I have said, the Council relied upon cl1107 of the Local Law as well as s225 of the Act. In my opinion the cost of clearing the respondent's land was not an expense incurred in consequence of a breach but could only be an expense in the execution of work directed pursuant to the Local Law to be executed by any person. In order to be effective to create liability under cl1107 the direction must be one which complies with the Local Law. It is a matter of considerable importance that the notice comply with the requirements of cl706(2), for, according to the appellant's counsel, the liability of an owner or occupier of land does not depend upon the existence of a contravention of cl706(1), but only upon the forming of a reasonable suspicion by an authorised officer that a contravention has occurred.

16. The respondent to an appeal under s109 of the *Magistrates' Court Act* is entitled to support the order of the Court below upon any ground that was open to him at the stage when the order was made, whether the ground was raised then or not[1]. Accordingly, I would dismiss the appeal.

WINNEKE P:
17. I will invite Phillips JA to deliver the next judgment.

JD PHILLIPS JA:
18. I agree with Buchanan JA. I would add only this: that there are perhaps reasons for questioning the validity or efficacy of cl706 of Local Law No.1. The power to make local laws is found in s111 of the *Local Government Act* 1989. Under s123, a local law may be revoked, in whole or in part, by the Governor-in-Council on the recommendation of the Minister and, in deciding whether to recommend revocation, the Minister must consider whether there is a substantial breach of any of the matters specified in Schedule 8. Schedule 8 includes some criteria which, I should have thought, should be satisfied as a matter of common fairness, whatever the sanction for non-compliance, and I instance in particular the standards in paragraph 2(g) and (h), that a local law not "unduly make rights and liberties of the person dependent upon administrative and not upon judicial decisions" and not "be inconsistent with principles of justness and fairness".

19. In this instance, the respondent submitted to us that sub-cl(1) of cl706 used language which in itself was far from certain, and plainly there is force in that. In particular, what is "unsightly" is obviously something on which views might fairly differ. Yet contravention of clause 706(1)(a)(i)(y) is an offence on the part of an owner (and for convenience I do not mention the occupier who is in like case) and the owner may be prosecuted for breach: see cl1103 of the Local Law. More importantly for present purposes, contravention of sub-cl(1) should surely, one would have thought, underlie the remedial steps authorised by sub-cl(2): yet that is not the case. Instead, sub-cl(2) operates simply upon the opinion of an authorised officer that the owner of land might be contravening sub-cl(1). In terms sub-cl(2) is called into operation if "an authorised officer reasonably suspects that an owner ... of land is contravening sub-clause 706(1)". Again, one might not cavil if that led only to notice requiring the owner to engage in dialogue to sort the matter out: but that is far from so.

20. If sub-cl(2) is called into operation, the authorised officer may then serve a notice requiring the owner to "cease his or her contravention of sub-clause 706(1) in accordance with the notice". This, appellant's counsel said, meant that the notice could require the owner not simply to desist from previous conduct, but to rectify the situation so that what otherwise would be a continuing offence ceased to be so. In a case like this that meant, he said, clearing the land up in the manner directed by the notice. In default, the owner would again be in breach of cl706 – this time in breach of sub-cl(2) – and accordingly guilty of an offence for which he could be prosecuted. And by virtue of s225, the Council claimed the right to recover the cost of clearing the land up, if the owner failed to do so. That is how the appellant justified its present civil claim against the respondent in the Magistrates' Court.

21. Let it be supposed, for the sake of argument, that by notice under sub-cl(2), the Council, through its authorised officer, can properly require the owner to undertake certain specific works to clean up the land. At what stage, I ask, is the owner to have the opportunity to dispute that the land had become unsightly in the first place? Contravention of sub-cl(1) is not in terms a pre-condition of notice under sub-cl(2); sub-cl(2) depends simply upon the reasonable suspicion of the authorised officer and authorises, it is said, a direction to undertake specific works. In answer to the question I have posed, appellant's counsel said that the challenge could be mounted when the owner was brought before the court on a claim for the expense incurred by the Council in cleaning up the property if the owner failed to comply with the notice; but that answer is scarcely satisfactory, and for a number of reasons. An argument that the authorised officer had abused his power might be open at that point, but such a case would be rare: more importantly, the underlying question of contravention or no would arguably not fall for decision. Indeed so much seems to follow from the Council's own pleading in this instance; for the pleading does not mention contravention of sub-cl(1).

22. Further, where is found the power in the Council to require by notice the performance of what is considered (presumably by the authorised officer) to be remedial work to clean up the land? It was suggested by appellant's counsel that s225 conferred power on the Council to make a Local Law authorising or requiring the performance of remedial work. But is that so? Or does s225 (like clause 1107 it would seem) simply assume the power, providing only the machinery to enable the Council (or in some cases the person who does the work) to recover the cost of remedial work should the owner default in complying with the notice? If the latter, the power in the Council to make the Local Law authorising notice to be given, requiring specific works to be undertaken, must be found elsewhere than in s225: and if so, where is it? Clause 706(2)(b) is specific, but limited.

23. These questions were raised during argument on this appeal. Of course it is not our function at this stage to pass generally upon the validity of cl706 of Local Law No.1, but I find it disturbing that the appellant is pursuing the respondent on the basis of a notice, requiring him to commit himself to the cost of the works specified in the notice and in default to answer to the Council for that cost, when the ground for such a notice is no more than that "an authorised officer reasonably suspects" a contravention of sub-cl(1), a sub-clause which itself is cast in somewhat subjective terms.

24. As at present advised, I think that the power of the Council to require remedial work should somewhere be spelled out plainly, if the Council is to give to an owner of land (or indeed the occupier) the sort of notice upon which the Council relies here; and if such a notice is to be given, provision should presumably be made (I suppose in the Local Law itself) to afford the owner at least the opportunity to contest the alleged contravention of sub-cl(1) upon which the matter appears, in essence, to be proceeding. It may be accepted that the Council should not be exposed to liability for a bona fide but mistaken opinion about the contravention of sub-cl.(1), but by the same token the owner should have the opportunity, at least, of putting a view to the contrary (if reasonably arguable) and having any dispute resolved before he is put to the expense of work to remedy a "contravention" which at the end of the day might turn out to be no contravention at all.

25. The foregoing does no more than reflect some tentative views which occurred to me during argument. None of these matters was fully explored on this appeal. The Council was concerned only to establish the basis for its claim under s225 by supporting the notice given to the respondent under cl706(2) in this instance; the respondent appeared in person to support the judge's decision under appeal or alternatively the decision of the magistrate. Accordingly I express no concluded view on any of the matters I have mentioned. None the less the appellant might consider it worthwhile to look again at the terms in which cl706 is cast.

WINNEKE P:

26. I agree, for the reasons given by Buchanan JA, that the appeal should be dismissed. Mandie J dismissed the Council's appeal to him on the basis that the Council had not established its entitlement to recover the costs of the works carried out on the respondent's land because it had not proved that its authorised officer had served on the respondent "a notice in a form approved by the Council".

27. In my opinion his Honour's conclusion was correct but for an erroneous reason. The entitlement to recover the cost of works is, I think, dependent upon the imposition of a lawful requirement or direction by notice given pursuant to cl706(2) to the person called upon to pay, whether the claim is made pursuant to s225 of the *Local Government Act* 1989 or, if it is valid, cl1107 of the Council's Local Law No.1, 1995. Mandie J found that the requirement or direction was not lawfully imposed because the form of notice imposing the requirement or direction had not been specifically approved by the Council and, for that reason, was not "a notice in a form approved by Council". I agree with the appellant's submission, and for the reasons assigned by Buchanan JA, that his Honour's reason for condemning the notice is not the correct one. However, I agree that the notice was not a lawful notice because it did not comply, in a material respect, with the form which had been approved by Council. The approved form requires not only that the authorised officer form and express the opinion that the person required to carry out works has committed a breach of the relevant clause of the Local Law No.1 but also requires the authorised officer to specify the breach of the law which the officer opines has been committed. Where it is asserted that a breach has been committed of cl706(1) it seems to me that it is fundamental that the nature of the breach be specified, not only because the approved form requires it, but also because the clause creates a multiplicity of offences for contravention of which a requirement to carry out works can be imposed. A failure to specify the breach must, in my view, render the notice issued under sub-cl(2) invalid, first because the owner or occupier of land is not informed what is the contravention of cl706(1) which the occupier must cease to contravene, and secondly because the occupier is not informed to what end it is that he must incur expense in carrying out the works required by the notice. His Honour adverted to this deficiency in the notice, although, as I have said, he did not assign that reason for its invalidity.

28. Notwithstanding that his Honour has, in my view, assigned the wrong reason for finding the notice invalid, I think the appropriate course for this Court to take is to dismiss the appeal because the ultimate decision which his Honour made – namely, that the notice was invalid – was the correct one; the parties have had the opportunity of debating the matter before this Court and, although the respondent has not filed a Notice of Contention in accordance with the Rules, he should be relieved from the consequences of that failure because he is an unrepresented litigant.

29. Although the appellant has as one of its grounds of appeal that Mandie J erred in determining that the decision of the magistrate should be upheld on a ground not decided by the magistrate, I am of the view that, in the circumstances of this case, his Honour was entitled to do so because, if the notice is invalid, the appellant's claim in the Magistrates' Court must be doomed to failure[2].

30. Although this appeal is not the appropriate vehicle to determine the question of the validity of cl706, I agree, for the reasons given by Phillips JA, that the terms of the clause might repay revision by those responsible for its terms.

31. The appropriate order to be made is that the appeal should be dismissed with costs.

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[1] See *O'Donnell v Gardener* [1902] VicLawRp 116; (1902) 27 VLR 718; 8 ALR 81; *Preston Ice and Cool Stores Pty Ltd v Hawkins* [1955] VicLawRp 17; [1955] VLR 89; [1955] ALR 371; *DPP v Makris*, unreported, Batt J 16 March 1994; *Popovski v Ericsson Australia Pty Ltd* [1998] VSC 61; *Mond v Lipshut* [1999] VSC 103; [1999] 2 VR 342 at 351 per Ashley, J.

[2] See *Mond v Lipshut* [1999] VSC 103; [1992] 2 VR 342 at 350-2 per Ashley J.

APPEARANCES: For the Appellant Melton Shire Council: Mr G Garde, QC with Mr R Wilson, counsel. Robert D Taylor and Associates, solicitors. The Respondent appeared in person.
