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SUPREME COURT OF VICTORIA

CHAPMAN v WILSON

Murphy J

28 April 1978

PROCEDURE – AUTHORITY TO PROSECUTE – BUILDING SURVEYOR OF THE CITY OF FRANKSTON – CHARGES LAID FOR ALLEGED BREACHES OF THE *UNIFORM BUILDING REGULATIONS* – CHARGES DISMISSED ON GROUND THAT SURVEYOR HAD NO AUTHORITY TO PROSECUTE CHARGES – WHETHER MAGISTRATE IN ERROR: *LOCAL GOVERNMENT ACT* 1958, S867.

Ten informations brought against the respondent by the applicant in the capacity of informant were dismissed. The Magistrate held that the informant had no authority to prosecute for alleged breaches of the *Uniform Building Regulations*, he not having been appointed under section 867 of the *Local Government Act* 1958, and it not being open to him to bring such proceedings as a private citizen. Upon an Order nisi to review—

HELD: Order nisi discharged.

1. Regulation 207 did not expressly or impliedly authorise the surveyor to take proceedings in the Magistrates' Court in the present case. In appointing Mr Chapman as surveyor the council did not impliedly order that proceedings be taken by the surveyor 'for the punishment of any person offending against the provisions of the Act.' (See ss866 and 929(1A) *Local Government Act* 1958).

2. The resolution of the Council set out in the letter relating to Mr Chapman's appointment as Building Surveyor and proper officer for the purpose of Part XLIX Building Regulations of the *Local Government Act* 1958, was in marked contrast to the resolution appointing him as Scaffolding Inspector under the *Scaffolding Act* 1971 'charged with the responsibility of instituting court proceedings to secure the enforcement of the said Act and regulations thereunder.' The resolution relating to the Building Regulations did not authorise or charge him with such responsibility under the *Building Regulations* 1974 or the *Local Government Act* 1958.

3. Whilst it was common ground that at all material times Mr Chapman was the surveyor for the City of Frankston and the issues were whether, as such or by appointment he was authorised to take proceedings in his own name for breaches of the *Uniform Building Regulations*, and, more specifically, if he was specially authorised, whether there was any evidence of such authorisation in these cases.

4. In the opinion of the Court, neither the identity card nor the said letter did more than support the oral evidence of Mr Chapman that he was the surveyor of the City of Frankston.

MURPHY J: ... The informant stated in evidence in the court below that he was the Building Surveyor of the City of Frankston and had been so for some seventeen years, and he produced in evidence what was referred to as an authority card, signed by the Town Clerk of the City of Frankston. This was Exhibit 'B' to the affidavit of Neil Francis Falconer, solicitor, who conducted the several prosecutions on behalf of the informant in the Magistrates' Court, and who swore the affidavit in support of these orders nisi. The said card read:

CITY OF FRANKSTON

The Bearer

Mr N.S. CHAPMAN
(Whose signature appears in the margin hereof)

is employed as BUILDING SURVEYOR & PROPER OFFICER UNIFORM BUILDING REGULATIONS VICTORIA. PART XLIX — BUILDING REGULATIONS, OF THE LOCAL GOVERNMENT ACT — 1958 & SCAFFOLDING INSPECTOR & PROPER OFFICER SCAFFOLDING ACT 1971. SCAFFOLDING REGS. 1974.

By the Council of the CITY OF FRANKSTON

and in the course of his duties is authorised to make inspections of premises situated in the City of Frankston

(Signed)
Adrian Butler TOWN CLERK'

Alongside this writing, on the right hand side of the card, appears the word "Signature'' and then apparently Mr Chapman's signature is annexed.

In cross-examination, Mr Chapman said that he represented the City of Frankston in the proceedings, and he relied on Exhibit 'B' as his authority under s867 of the *Local Government Act* 1958. He said that he had no other document such as would comply with s867(b) of the *Local Government Act* 1958.

[His-Honour-then referred to the section and continued] ... When pressed for any other authority, the informant produced a letter dated 25th October 1974 signed by the Town Clerk onto letterhead of the City of Frankston, and addressed to "The Clerk of Courts, Court House, FRANKSTON. 3199." This letter read:

"Dear Sir,
I hereby certify, pursuant to section 872 of the *Local Government Act* 1958 (as amended), that at Meeting No. 2293 on August 19, 1974. Council resolved as follows:-
1. BUILDING ADMINISTRATION
THAT N.S. CHAPMAN BE APPOINTED BUILDING SURVEYOR AND PROPER OFFICER FOR THE PURPOSE OF PART XLIX BUILDING REGULATIONS, OF THE LOCAL GOVERNMENT ACT, 1958.
2. SCAFFOLDING ADMINISTRATION

THAT N.S. CHAPMAN BE APPOINTED PROPER OFFICER AND SCAFFOLDING INSPECTOR PURSUANT TO THE REGULATIONS 1971, AND THAT IT BE THE DUTY OF N.S. CHAPMAN TO TAKE SUCH STEPS AS ARE NECESSARY TO SECURE THE ENFORCEMENT OF ALL PROVISIONS OF THE SCAFFOLDING ACT 1971 AND THE REGULATIONS MADE THEREUNDER AND THE SAID N.S. CHAPMAN IS HEREBY CHARGED WITH THE RESPONSIBILITY OF INSTITUTING COURT PROCEEDINGS TO SECURE THE ENFORCEMENT OF THE SAID ACT AND REGULATIONS THEREUNDER.

Yours faithfully,
(Signed)
G.S. PENTLAND, TOWN CLERK.

This letter was tendered as an exhibit and is Exhibit 'C' to Mr Falconer's affidavit of 11th October 1977.

The letter purported to certify, through G.C. Pentland, Town Clerk, that the Council had resolved in accordance with the resolution set out, and claimed to certify pursuant to s872 of the *Local Government Act* 1958 as amended. I will return to this section and to this letter later in my judgment. The informant stated that he had no other authority to prosecute.

Before me, Mr Morris submitted in support of ground one of the orders nisi, that the magistrate was wrong in law in holding that the informant was not authorised to prosecute the informations. He submitted that the informant was so authorised as building surveyor, and that it was common ground that he was so appointed as building surveyor and proper officer under the *Uniform Building Regulations*. Mr Strong agreed that it was common ground. Mr Morris submitted that accordingly Mr Chapman had a mandatory duty to take steps to secure enforcement of the regulations, and that this included a duty to prosecute for breaches which he detected. He further submitted that s867 of the *Local Government Act* 1958 applied only to prosecutions launched in the name of the municipality, that is to say, in the corporate name.

As to the first submission Mr Morris relied upon clause 207 of the *Uniform Building*

Regulations 1974 which reads:

> 'Duties of a Surveyor — (a) Except as otherwise expressly provided, it shall be the duty of the Surveyor to take such steps as are necessary to secure the enforcement of all the provisions of these Regulations in respect of the construction of new buildings, and alterations, additions, repairs, and changes of use or occupancy in existing buildings.'

The words 'to secure the enforcement of all the provisions of these Regulations' appear to me to relate to Chapter 3 of the Regulations, which is entitled 'Penalties and Enforcement of Regulations.' Clause 301 deals with 'Penalties'. Clause 303 outlines what is to be done where any building is constructed in breach of any provision of these regulations. A show cause notice is to be given and if the breach is not remedied the building may be pulled down, removed or altered.

It appears to me that this is the 'enforcement' to which Regulation 207 relates. It is the surveyor appointed by the council pursuant to Regulation 206 who has the duty under Regulation 207 to enforce the Regulations. He is the 'proper officer' referred to in Regulation 303 (and see also the definitions in Regulation 102) who gives notice to the owner or builder of a building, work or structure which breaches the regulations, to show cause why it should not be made to conform to the requirement of the regulations. This view would seem to me to be consistent also with the reasoning seen in *Dutton v Shire of Walhalla* [1899] VicLawRp 170; (1899) 24 VLR 910.

I am not persuaded that Regulation 207 expressly or impliedly authorised the surveyor to take proceedings in the Magistrates' Court. I am not persuaded that in appointing Mr Chapman as surveyor the council impliedly ordered that proceedings be taken by the surveyor 'for the punishment of any person offending against the provisions of the Act.' (See ss866 and 929(1A) *Local Government Act* 1958).

As to Mr Morris' second submission that s867 of the *Local Government Act* only relates to proceedings taken by the municipality in its corporate name, I was at first inclined to accept that this was so. However, Mr Strong referred me to *Steane v Whitchall* [1906] VicLawRp 118; (1906) VLR 704; 12 ALR 390; 28 ALT 60 and I find that the Full Court comprising Hood, Cussen and Chomley JJ, in a joint judgment delivered only some three years after the *Local Government Act* 1903 (Act No.1893) was passed, held to the contrary.

On proceedings by way of order nisi the matter came before the Full Court of Victoria, which was asked to determine the question whether or not the information ought to have been dismissed on the ground that it was laid in the name of a person who had no right to be informant.

In *Steane v Whitchall* (*supra*) at p709, after reviewing relevant provisions of the Act, the court stated:

> 'It seems, therefore, to us that under these sections a prosecution may be ordered by the council in the name of the council or corporation or it may be authorised to be taken by an officer in his own name as representing the council or corporation.'

It is implicit in the judgment of the Full Court that if the authority of the surveyor to prosecute in his own name had not existed, then the information in question would have been laid by a person with no *locus standi*. Today we have *Uniform Building Regulations*, but otherwise the provisions concerning offences against the regulations, and the payment of penalties to the relevant municipal, funds, remain the same (see s893 *Local Government Act* 1958).

It appears from a reading of *Steane v Whitchell* (*supra*) that the relevant regulations themself provided that it was the duty of the surveyor to see that the regulations were observed and by those regulations:

> '... he is authorised and instructed to prosecute in the name of the council, all persons committing a breach of the regulations, and to recover the penalties incurred thereby.'

The court appears to have doubted the validity of this authority contained in the regulations, and considered it to be merely enabling (see p710 of the above report). Such an authority is not contained in the present regulations and such words as are contained relating to the surveyor's

duty (Regulations 206 and 207) are not as I have said earlier, and as the Full Court impliedly found in *Steane v Whitchell* (*supra*) anything more than 'enabling'.

In *Steane v Whitchell* (*supra*) an express general authority under the municipality's seal was issued to the surveyor to take proceedings against any person offending against the building regulations of the Town of Northcote, and the court construed that authority as one authorising him to prosecute in his own name and possibly in the name of the municipality or council (see at p710 (1906) VLR).

It was submitted by Mr Morris, for the informant that in the present case there was express authority given to the surveyor to bring proceedings as evidenced by Exhibits "B" and "C" to Mr Falconer's affidavit. In my opinion this is not so.

Exhibit "B" amounted simply to an identification card signed by one Adrian Butler as Town Clerk. It was undated; it is ambiguously worded. It appears to be an authentication of the employment of Mr N.S. Chapman as Building Surveyor of the City of Frankston at some time or other. It has, in my opinion, no probative value on the issue arising as to Mr Chapman's authority to bring proceedings. It is clearly not an appointment 'by the chairman of the municipality in writing under his hand' (see s867(b) *Local Government Act* 1958).

Mr Morris then relied on Exhibit 'C'. Exhibit 'C' is the letter which I have set out earlier. It again did not have, in my opinion, probative value to prove an appointment under the said s867. The provisions of s872 of the *Local Government Act* 1958 were then relied upon by Mr Morris. They said:

> 'All documents whatever purporting to be issued or written by or under the direction of the municipality and purporting to be signed by the municipal clerk shall be received as evidence by any justice or justices and in all courts of law and shall be deemed to be issued or written by or under the direction of the said municipality without proof unless the contrary is shown. The word "documents" in this section shall include all regulations orders directions and notices.'

In my opinion, it is extremely doubtful whether the said letter (Exhibit 'C') is 'purporting to be issued or written by or under the direction of the municipality.'

It is true that it is written on paper carrying the letterhead of the council. It does also refer in its opening words to s872 of the said Act, and as such can be said to purport to be written pursuant to that section. However, it purports really to be a certificate as to certain resolutions passed at meetings of the council, and I believe it misapprehends the meaning of s872.

It is dated 25th October 1974, nearly three years before the informations laid by the surveyor in these cases. The letter does not state that the appointment and authorities referred to in the resolutions are to continue for any specified period; and three years is a long time for any presumption of continuance to operate (but see *Dore v Gormley; Ex parte Dore* (1963) 38 QWN 85; see also *Seaton v Chen Fong Yan* (1908) St R Qd 195).

In any event, the resolution set out in the letter relating to Mr Chapman's appointment as Building Surveyor and proper officer for the purpose of Part XLIX Building Regulations of the *Local Government Act* 1958, is in marked contrast to the resolution appointing him as Scaffolding Inspector under the *Scaffolding Act* 1971 'charged with the responsibility of instituting court proceedings to secure the enforcement of the said Act and regulations thereunder.'

The resolution relating to the Building Regulations does not authorise or charge him with such responsibility under the *Building Regulations* 1974 or the *Local Government Act* 1958. It is common ground that at all material times Mr Chapman was the surveyor for the City of Frankston and the issues are whether, as such or by appointment he was authorised to take proceedings in his own name for breaches of the *Uniform Building Regulations*, and, more specifically, if he was specially authorised, whether there was any evidence of such authorisation in these cases.

In my opinion, neither the identity card nor the said letter do more than support the oral evidence of Mr Chapman that he was the surveyor of the City of Frankston. It was submitted next that in s869(c) of the *Local Government Act* the authority referred to includes the authority to

prosecute flowing from or implied in Regulations 206 & 207 of the *Uniform Building Regulations*, and that once it was established that Mr Chapman was the appointed surveyor pursuant to Regulation 206, his authority to prosecute for breaches of the *Uniform Building Regulations* followed.

I have already said, that in my opinion, Regulations 206 & 207 do not, by implication or express wording, authorise the surveyor to prosecute for breaches of the Building Regulations. 'Authority' in s869(c) means rather a specific or general authority given by the municipality or the council to a particular official, whether 'municipal clerk surveyor inspector or other officer of the council' to prosecute in respect of breaches of an 'Act relating to local government'. Without s869(c) evidence of such authority might be thought to be necessary in every case.

> 'The right to lay an information for offences created by Statute depends upon the intention of the legislature as expressed in the terms of the Statute. An information for an offence against an enactment for the benefit of the public at large may in general be laid by anyone, independently of any authority from the party or parties to whom the penalties to be recovered are awarded by law; and in such a case, where no form of information is expressly authorised, the information should purport to be laid in accordance with the law which determines the parties for whose benefit the penalties are to enure wholly or in part; *Cole v Coulton* [1860] EngR 625; (1860) 2 E & E 695; 121 ER 261; 29 LJMC 125; 2 LT 216; (1860) 24 JP 596. A different rule applies in cases where the act prohibited by Statute is a grievance to an individual only in respect of which a penalty is given by Statute to the party aggrieved by way of redress; Per Cockburn LJ in *Cole v Coulton* 2 E & E at p702-3; or where the offence is against an enactment relating to a matter of purely local concern, and not of general interest or affecting the general public; *R v Hare; ex parte Bush* [1887] VicLawRp117; (1887) 13 VLR 71; or where the offence charged is the breach of a law the enforcement of which is committed by Statute to local authorities; *R v Panton; ex parte Schuh* [1888] VicLawRp 91; (1888) 14 VLR 529; and see as to this case: *Keane v Schuh* [1890] VicLawRp 45; (1890) 16 VLR 199. In any of these cases an information cannot be laid by a person who is not interested in the penalty, and who is not duly authorised to lay the information by a party interested or by Statute.'

Part XLIX of the *Local Government Act* is the part dealing with the Building Regulations. *[His Honour then proceeded to consider the relevant sections within that part, and continued]* ... The *Uniform Building Regulations* 1974 are of some assistance. Regulation 202 reads:

> 'Administration by Council —
> (a) Except as provided in clauses 203(a), 204 & 205 and subject to any specific reference elsewhere in these regulations, the administration of these Regulations within any municipality shall be carried out by the council of that municipality.
>
> (b) Where a council has specific powers under these Regulations in certain matters and has established a policy relating to matters affecting those powers then the council may delegate its authority to the surveyor to allow issue of permits and notices in accordance with the policy.'

It will be noted that the power of the council to delegate its authority to the surveyor is limited to the issue of permits and the giving of notices in certain circumstances and it does not extend to delegating him to taking proceedings in the Magistrates' Court. It follows in my opinion that a breach of the regulations or of Part XLIX of the *Local Government Act* is a breach of the law, the enforcement of which is committed by Statute to local authorities, namely the relevant council in whose municipal district the offence is committed.

It was submitted next that a breach of the regulations is an offence of a public character which anyone can prosecute. Reliance was placed by Mr Morris on *Dunstan v Neems* [1914] VicLawRp 48; (1914) VLR 364; 20 ALR 219; 36 ALT 10 and Mr Strong properly referred me during the course of his submissions to *O'Brien v Finlayson* [1922] VicLawRp 14; (1922) VLR 146; 28 ALR 119; 43 ALT 126. Both of these cases concerned an offence against the current *Local Government Act*, allegedly committed by the returning officer of the council and Shire Secretary respectively in connection with elections and voters' rolls. Cussen J decided both cases.

In *Dunstan v Neems*, Cussen J at p368, construed s694 of the *Local Government Act* 1903 (identical with s866 of the *Local Government Act* 1958), but no reference is made either in the judgment or in argument to *Steane v Whitchell* (*supra*), although Cussen J was a member of the Court which delivered that judgment. His Honour decided that the ratepayer in question was interested in the performance of the duty, the breach of which was the subject of the information in the case, and that therefore he could sue.

In *O'Brien v Finlayson*, His Honour simply applied the principle expressed in *Dunstan v Neems*. Mr Strong has pointed out that in both of these cases the informations issued against the officials of the municipality for breach of duty as such officials, and that if no right existed in any person other than the municipality to bring the information, this would be most surprising, for it is unlikely that the municipality itself would lay the information. It may be that cases of this sort fall into a category of their own. The matters in question are not entrusted for enforcement to the municipality. They are offences of a public nature. Prosecutions in respect of them against the municipality must clearly be brought by another person and the Act contemplates that this would be so. See ss862-868 and s894.

However, I do not think that these cases detract from the principles relating to prosecutions for breach of the *Uniform Building Regulations*, which principles, I believe are to be extracted from the decisions in *Sargood v Veale* [1891] VicLawRp 127; (1891) 17 VLR 660; 13 ALT 212 and *Steane v Whitchell* (*supra*). See also *Armstrong v Hammond* [1958] VicRp 77; (1958) VR 479. Counsel were unable to refer me to any other relevant decisions touching on the *Local Government Act* 1958 of Victoria or the *Uniform Building Regulations* 1974 passed thereunder. They could refer me to no section of the Act or Regulations which specifically authorised anyone or any body to prosecute for breaches of Part XLIX of the Act or the *Uniform Building Regulations*.

Section 866 of the *Local Government Act* 1968 clearly authorises the council to order proceedings to be taken, either generally or specifically for the punishment of any person offending against the *Local Government Act*. Breaches of the *Uniform Building Regulations* 1974 are, 'Deemed to be offences against the Act'. See s223 of the *Local Government Act*. Whether the offences in question here are properly to be described as offences of a public nature may be debatable. I do not decide this point as I find it unnecessary to do so.

In *Armstrong v Hammond* [1958] VicRp 77; (1958) VR 479; [1958] ALR 940 a specially convened Full Court considered s20(3) of the *Police Offences Act* 1957, the substantive offence created by that section being wilful damage to public property. The general rule, the Court said, is that any member of the Public may lay an information for an offence if the breach of the law charged is of a public nature. As the offence in question was of a public nature, the public being interested in its property, anyone could prosecute, unless the statute contained some limitation or prohibition.

It is worth noting that this decision contemplates that an Act may create many offences, some of a public nature and others not so, so that for some offences a member of the public could lay an information, and for others he could not. If s866 of the *Local Government Act* stood alone, it would not, I think, suffice to establish generally that an individual could not prosecute for any offence against the *Local Government Act*. It would be properly considered an enabling section as was s190 in *Armstrong v Hammond*.

However, as I have outlined above, there are numerous provisions in both Part XLIX of the Act and in the *Uniform Building Regulations* themselves which do sufficiently indicate that the general or *prima facie* rule that anyone may lay an information for an offence if the breach of law charged is of a public nature, is abrogated, in respect of breaches of the type in question here. *[His Honour then considered the effect of sections 869(b) and 869(c), it having been submitted on behalf of the applicant that no evidence to the contrary had been given. His Honour continued]* ... Thus, the expression namely, 'unless the contrary is proved' requires the defendant to prove the contrary and not beyond reasonable doubt (see *Rex v Carr-Briant* [1943] KB 607; [1943] 2 All ER 156; 169 LT 75; 59 TLR 300; (1943) 29 Cr App R 76; *Glanville Williams on Criminal Law* at p706 and the following pages).

But in the present case, the words 'until evidence is given to the contrary' are not in my opinion, to be equated in any way with such cases of reversal of onus. No onus is placed on the defendant to prove anything on any standard. If once evidence is given which, if accepted, would mean that the surveyor did not have authority to prosecute, the enabling presumption or dispensation contained in s869 does not operate, and if authority to prosecute is required in the particular case, then it must be proven by the informant beyond reasonable doubt. 'Evidence to the contrary' was given in the cases in question and the magistrate was not satisfied that the surveyor had authority to prosecute. It would appear to me, that he was correct in this decision. The order nisi will be discharged.