32/75

SUPREME COURT OF VICTORIA

DOWNWARD v BABINGTON

Gowans J

23, 26 May 1975 — [1975] VicRp 85; [1975] VR 872

LOCAL GOVERNMENT – DEFENDANT A LOCAL COUNCILLOR – DEFENDANT CHARGED WITH SEVERAL OFFENCES IN RELATION TO HIS FAILURE TO DISCLOSE AN INTEREST OR BY REMAINING IN THE ROOM WHEN CONSIDERATION OF A RELEVANT ISSUE AROSE – MEANING OF "PECUNIARY INTEREST" – DEFENDANT COULD HAVE BENEFITED IF THE PROPOSALS WENT AHEAD – FINDING BY MAGISTRATE THAT CHARGES PROVED – WHETHER MAGISTRATE IN ERROR: *LOCAL GOVERNMENT ACT* 1958, S181(8).

HELD: Order nisi discharged.

1. In the light of the authorities it was right to apply the proposition that a councillor should be held to have a pecuniary interest in a matter before the council if the matter would if dealt with in a particular way, give rise to an expectation which was not too remote of a gain or loss of money by him.

2. It was common ground that the Council or its committee had before it, at the different times referred to, a project to allow the establishment of a supermarket in the immediate vicinity of the defendant's shops; a proposal to compulsorily acquire land, adjoining them and the supermarket site, for off-street parking; a proposal to permit development of vacant land adjoining them as a retail shop; and a proposal to buy land in the immediate vicinity for off-street parking.

3. It was open to the magistrate to regard the evidence as being in substance that each of the various proposals could, if granted, have had an effect on the level of rents receivable by the defendant for the letting of his shops and that if approved the projects would have given rise to an expectation not too remote of a gain or loss by him in respect of rents. This was capable of being regarded as involving a "pecuniary interest".

4. In addition, it was open to the magistrate to regard the evidence as being to the effect that each of the proposals, if granted, could have had some effect on the capital value of the defendant's property and to regard that as an expectation of benefit or disadvantage that was not too remote and was capable of being regarded as involving a "pecuniary interest".

5. The only question before the Magistrates' Court was whether there was evidence upon which the defendant could have been convicted. It was very much a matter of fact and for the evaluation of the particular circumstances, particularly the nature of the property and the proximity and the effect of the projects. It could not be said that on no reasonable view did the defendant have a pecuniary interest in the matters under consideration.

6. What effect the Magistrate gave to the evidence in the end, and whether he was satisfied by it beyond reasonable doubt, was a matter for him. It was also for him to consider any matter put before him in exculpation under subs(8). In the result the magistrate was right in deciding that there was a case to answer.

7. The order nisi was therefore discharged and the summons to set aside dismissed.

GOWANS J: The proceedings before me consist of a summons to set aside an order nisi to review and the return of the order nisi itself. The matters sought to be reviewed consist of a ruling given in a Magistrates' Court at Hastings that there was a case for the defendant to answer in relation to thirteen informations charging offences against s181(8) of the *Local Government Act* 1958. Such a ruling has been held to be an order capable of review: (*Byrne v Baker* [1964] VicRp 57; [1964] VR 443.)

Subs(8) refers back to the provisions of subs(1) and makes a failure to comply with them an offence unless there is proved to be wanting knowledge of certain specified matters. Subs(1)

reads as follows:

> "181(1) If a councillor of any municipality has any direct or indirect pecuniary interest in any contract or proposed contract with the municipality or in any other matter in which the municipality is concerned, and is present at a meeting of the council or any committee of the council at which the contract, proposed contract or other matter is being considered, he shall at the meeting, as soon as practicable after the commencement thereof, disclose his interest, and shall not remain in the room in which the meeting is being held during any consideration or discussion of, or the taking of any vote on any question with respect to, the contract, proposed contract or other matter."

There were 17 informations in all presented against the defendant on 17 October 1974. They concerned five meetings of the Council of the Shire of Hastings or of one or other of its committees. At each of these meetings a matter relating to some project in the town area of Hastings was under consideration. In respect of each of these matters it was alleged that the defendant had committed a number of contraventions of subs(1) whether by omitting to disclose an interest or by remaining in the room either during discussion or during the consideration of the matter or during the taking of a vote.

The alleged interest of the defendant centred around his ownership and letting out of a number of shops called "the Corner Shops" on three lots at the corner of King Street and High Street, Hastings, in relation to which he was said to have a "pecuniary interest" affected by the projects dealt with at the meeting. There was evidence that he had been granted approval by the Shire under the Interim Development Order which controlled planning in the locality to develop part of the site and the shops and extend its area.

The first of the meetings was that of the Town Planning Committee on 17 July 1973. It had before it a report from the Shire Engineer relating to a project by and a permit for a firm called Permewan Wright to establish a supermarket on a site separated by one vacant lot from the site of the defendant's Corner Shops. Three of the informations relate to the defendant's conduct at this meeting.

The second meeting was one of the Council itself on 18 September 1973, which had before it a report from the Shire Secretary relating to a proposal for the Council to acquire eight lots of land adjoining the defendant's shops and the supermarket site for the purpose of providing land for off street parking spaces. Four informations were concerned with the defendant's conduct at this meeting.

The third meeting was another meeting of the Council on 2 October 1973. A matter of roadwork was before this meeting but the four informations relating to it were dismissed and no question survives in relation to it.

The fourth meeting was one of the Town Planning Committee on 11 December 1973. It had before it a recommendation for a permit to be granted for the development of the vacant lot which separated the defendant's shops from the supermarket lots as a retail shop site subject to a contribution for the cost of providing car parking space. Four informations related to the defendant's conduct at this meeting.

The fifth meeting was one of the General Purposes Committee on 4 June 1974. There was before it a report of the Acting Shire Secretary as to the receipt of an offer to sell to the Council a lot which had been one of the eight lots under consideration at the second meeting as well as another lot further away, and a recommendation that authority should be given to negotiate for the purchase of both lots. Two of the informations related to the defendant's actions at this meeting.

No question arose or arises as to any of the matters before the meetings being a matter referred to in s181(1) of the Act, or as to the facts of the defendant's conduct at the meetings, or as to that conduct satisfying the description prohibited by s181(1), provided that the defendant had a "direct or indirect pecuniary interest in" the particular matter.

What was contended for was that in relation to the first meeting the defendant as proprietor and landlord of the Corner Shops could expect to benefit from the fact of shoppers being attracted into the area of the shops by the creation of a large shopping complex; that in relation to the

second meeting he would expect to benefit from the provision of parking spaces for persons using his shops and by shoppers being attracted to their immediate area; that in relation to the fourth meeting he would benefit from the additional business generated in the shops by the retail store; and that in relation to the fifth meeting he would expect to benefit from the provision of parking spaces in the same way as in respect of the matter under consideration at the second meeting.

At the hearing evidence was given by a Town Planner as to the importance of car-parking facilities near shopping centres, and their potential effect on the custom and consequently on the rental value of trading premises, and in turn on their capital values; and also of the potential effect, for good or bad, on the value of shops, produced by the advent into the locality of a shopping complex, dependent upon the existing capacity for trade expansion. A tenant of one of the defendant's shops gave evidence of the absence of car-parking facilities in the locality, and, in cross-examination, of the absence also of street-parking restrictions.

At the conclusion of the evidence for the prosecution, there was a submission made that there was "no case to answer" on the basis that there was no evidence of the defendant having any direct or indirect pecuniary interest in any of the matters considered at the meetings.

In a ruling given by the Stipendiary Magistrate in 27 November 1974, this submission was upheld in relation to the four informations concerned with the matter of the third meeting, but rejected in relation to the 13 informations concerned with the matters at the other meetings. In dealing with this submission the Stipendiary Magistrate considered that although with respect to a proceeding for the recovery of penalties under s56 of the Act, the relevant onus to be discharged was that of proof on the balance of probabilities, the appropriate onus for the purpose of a prosecution under s181 was that of proof beyond reasonable doubt. In this he was right. But he purported to apply that onus to the submission of "no case to answer". In doing so he failed to apply what was said by the High Court in *May v O'Sullivan* [1955] HCA 38; [1954] ALR 671; (1955) 92 CLR 654 at p658:

> "When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact."

The question to be determined at the stage when the submission was made was whether there was evidence on which the defendant could be convicted, not whether on the evidence he should be convicted.

Following the ruling the further hearing of the balance of the informations was adjourned with a view to its being resumed in February.

An application to a master for an order nisi to review, on the basis that the ruling that there was a case to answer in respect of the 13 informations was wrong, was dismissed. An appeal was then taken to a Judge, and on 24 March an order nisi to review the ruling was granted by Harris J on the ground

> "that the stipendiary magistrate ought to have held
> (a) that upon its proper construction s181(1) of the *Local Government Act* 1958 required the informant to prove that the defendant had such an interest direct or indirect in the matters alleged in each of the said informations that it would bring him a material or appreciable benefit or advantage, or had such an interest, direct or indirect, in the said matters that it was such as to be capable of being measured in money or money's worth;
>
> (b) that with the respect to each of the said informations there was no evidence that the defendant had any such interest and the defendant had no case to answer on any of the said informations and the stipendiary magistrate ought to have dismissed the said informations".

A summons for an order that the order nisi be set aside was taken out on 22 April 1975. It is the first matter now before me.

The grounds of the application to set aside the order nisi were orally stated as follows:

> "(a) (i) that it should have been held that it was not an appropriate time in the hearing for the grant of an order to review;
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> (ii) there was nothing in the material to show special circumstances warranting the grant of an order nisi at that stage;
>
> (b) there was nothing in the material put before the Court to show a *prima facie* case of error or mistake within s155(1) of the *Justices Act* 1958."

These grounds represented a resort to what was said in *Mudge v O'Grady* [1965] VicRp 8; [1965] VR 65 and *Andrew v W Pridham (Aust) Pty Ltd* [1974] VicRp 74; [1974] VR 620; (1974) 31 LGRA 6. In one aspect, these cases were concerned with the existence of a discretion to decline to grant an order nisi and with the proper exercise of that discretion. In the latter case, the exercise of the discretion by a master in favour of granting an order nisi was treated as reviewable by a judge on appeal from the master and it was reversed. But where a judge exercises his discretion in a similar way that determination is not reviewable in the same way. It would involve a second judge sitting on appeal on the exercise of discretion by the first judge. Even if it could be done on the basis that the second judge acts in the place of the first judge for the review of the latter's own *ex parte* decision, it would be a rare case, if at all, where it would be considered appropriate, in a procedure of the kind that an order nisi to review is, to reverse the exercise of the discretion. Whether it could be done or not, I would have to be satisfied that the exercise of the discretion entrusted to the judge in the first instance was vitiated in some way and miscarried, and I am not prepared to hold that the exercise of discretion in this case was erroneous. That disposes of grounds (a)(i) and (ii). As to ground (b), it would be sufficient to say that, for the purposes of the summons, it is not made out that there was not a sufficient *prima facie* case. But, as was conceded, the ultimate disposal of the summons should, in this respect, await the disposal of the order nisi.

I now turn to the ground of the order nisi. I treat the essence of the ground as being set out in para. (b), and as not dependent upon the correctness or otherwise of the argumentative matter set out in para. (a). The primary question is as to what is meant by the expression in s181(1) "any direct or indirect pecuniary interest"—when used in relation to the subject matter which follows, and, in particular, in relation to the words "in any other matter in which the municipality is concerned". But the ultimate and critical question is whether, in the factual situation emerging from the evidence in this case, there is shown to be a case of the defendant having what can properly be described as a "pecuniary interest" in the matter of the proposal for the Council to permit a supermarket in the immediate locality of his shops, in the matter of the acquisition by the Council, compulsorily or by purchase, of land in that locality for off-street parking, or in the matter of the proposal for the Council to permit the development of the vacant land in the immediate locality for a retail shop site, on the basis that there would or could emerge a betterment of the value of the defendant's shop property or an enhancement of the rental returns from the property.

The first matter to be considered is the proper construction of the statutory provision. I approach this matter bearing in mind the mischief the provision is aimed at—to prevent the conflict between interest and duty that might inevitably arise if the conduct referred to on the part of the councillor were not prohibited. (See *Nutton v Wilson* (1889) 22 QBD 744, per Lord Esher MR at p747, and per Lindley LJ at p748; and also *Rands v Oldroyd* [1958] 3 All ER 344; [1959] 1 QB 204 at pp211 and 215.)

The statutory provision ought to be treated as extending to the achievement of that object so far as the language permits. But in attributing a meaning to the language two other considerations ought to be borne in mind. The first is that it ought not to be given so extreme a meaning as to make the conduct of municipal business at meetings impossible; and the second is that, since a contravention is made an offence punishable by a penalty, the language should only be given a meaning which it clearly bears.

The next aspect to be adverted to is that what has to be examined for the purpose of determining what gives rise to the existence of a pecuniary interest is not the motives or actions of the councillor in dealing with the matter at the meeting, but the contract or proposed contract or other matter in which the municipality is concerned which is being considered at the meeting.

If when that matter is placed alongside the councillor's interests, it appears that he has a direct or indirect pecuniary interest in the matter, the obligation lies upon him to do what the statute requires him to do. Since the councillor is the one who knows where his own interests lie, it is for him to make the comparison and ask himself the right questions and get the right answers. If he does not, and does not refrain as required, he will come within the statute and incur its penalty, unless he can exculpate himself under subs(8).

The next question is as to what idea is intended to be conveyed by the words "any direct or indirect pecuniary interest in" a contract or proposed contract or matter. To find an answer to this, it is necessary to have regard to the ordinary meaning of the words used, to the context in which they are found, and to any guidance which is afforded by precedents to be found in the legal authorities.

The word "interest" in itself is wide enough, and has been treated in this connection as wide enough, to cover any material benefit or advantage of an appreciable character, whether pecuniary or otherwise, although exclusive of an interest based upon merely sentimental associations. (See *Attorney-General for Victoria v Keating* [1971] VicRp 88; [1971] VR 719 at p723; (1970) 26 LGRA 87 and the cases there cited.) There is in subs(2) of s181 an express exclusion of an interest as a ratepayer contributing to the municipal fund or municipal moneys, or an interest only as a ratepayer in common with other ratepayers, or an interest only as a consumer of gas, electricity or water supplied by the Council to him in the same way as to persons who are not councillors, or an interest in the terms and conditions of the right to participate in a service offered to the public. These exclusions indicate the degree of width which the word "interest" might have signified but for the exclusions.

The attachment of the word "pecuniary" to the word "interest" should therefore be treated as introducing a limiting factor excluding that kind of interest which cannot be described as of a "pecuniary" character.

Resort to the dictionaries discloses that the word "pecuniary" has to do with money—"of, belonging to or having relation to money", (and see per Viscount Simonds in *Elmdene Estates Ltd v White* [1960] 1 All ER 306; [1960] AC 528 at p538; [1960] 1 QB 1). Wide as these expressions may appear to be, they cannot be extended to describe as "pecuniary" anything for which money can be obtained. The dictionary meanings do not refer even to "money's worth". But the word refers to anything that "sounds in money". (See *ibid*, per Lord Keith of Avonholme at p543.)

The extension contained in subs(3) and the exclusion contained in subs(4) relate only to the operation of the word "indirect" and throw no light on the meaning of the word "pecuniary".

In the light of this examination I would, with due regard to the dangers of attempting definition, attribute to the words "any direct or indirect pecuniary interest" a meaning which would have the effect of saying that a councillor has a pecuniary interest in a contract or proposed contract or matter in which the municipality is concerned, if the contract or matter would, if dealt with in a particular way, result in the payment of money to him or by him or would give rise to an expectation (so long as it was not too remote) of the payment or receipt, or gain or saving or loss, of money by or to him.

I now turn to consider how this view stands with legal authority on the meaning of "pecuniary interest". The expression "pecuniary interest" has been used in English and Victorian legislation of this kind, and presumably in legislation of a similar kind in other countries, for a long time. But there is very little reported authority. In New Zealand, in *Boyd v Colby* [1918] NZLR 487 there is reported a case in which a councillor conducted a private zoo charging for admission. A by-law had the effect of prohibiting its being kept open on pain of a penalty of £5 per day for contravention. The councillor voted for a resolution for the revocation of the by-law. He was held by the Full Court of three Judges to have had a "pecuniary interest" in the matter of

the resolution. It was not necessary to call in aid the effect on the value of his property as giving him a pecuniary interest. For if the resolution were passed he avoided a penalty of £5 per day and preserved his right to the receipt of his admission fees. His interest involved the liability to pay the fine money. On any view, he had a pecuniary interest in the matter of the resolution and the revocation of the by-law. But it was also said at p489:

> "It is obvious that if he could not lawfully continue to keep these animals in his gardens within the borough he would have to dispose of them or transfer them elsewhere, and the attraction and consequently the value of his gardens would be diminished. If the prohibiting by-law were repealed these results would be avoided; in other words, the pecuniary loss with which the continuance of the by-law threatened him would be averted. The material interest of the appellant in the subject is emphasized by the fact that it was he who initiated the proceedings carried to the Court of Appeal which resulted in the quashing of the previous by-law, as stated in the facts admitted, so that the matter has been deemed by him worth litigation and some expenditure, which on his part cannot have been inconsiderable. We think the mere statement of the facts demonstrates that the appellant was pecuniarily interested in a manner peculiar to himself in securing the repeal of the prohibition, and that his case falls within the statutory provisions referred to."

And at p491 it was said:

> "Let us test the position by an instance to which we consider it must be admitted the section would apply if it is to have any application at all. Suppose, for example, the question before the Council be that a licence for a theatre should be granted, and a Councillor who was the proprietor of the theatre voted for the grant of the licence, undeniably he would have voted in his own favour on a matter in which he had a direct pecuniary interest special and peculiar to himself."

In *Allen v Tobias* [1958] HCA 13; (1958) 98 CLR 367; (1958) 5 LGRA 28; (1958) 65 ALR (CN) 1058; 32 ALJR 32 a councillor of the Shire of Mulgrave in this State allowed part of his land adjoining a neighbour's land along an eroded watercourse to be used for filling the erosion with tipped rubbish and roadwork was to be done for the purpose. The councillor moved the resolution approving the proposal. The question was whether for the purpose of s53 of the *Local Government Act* 1946 he had been "concerned" in a contract of work to be done under the authority of the Council. It was held by Sholl J in this Court, and also by the High Court, that he was. But in the latter Court it was said by Dixon CJ and McTiernan and Williams JJ at p371: "But whatever interest might have been imputed to the defendant it is clear it could not be said that the interest was pecuniary. Accordingly s181 was not infringed."

This was strongly relied on by the present defendant, in the argument before me, as supporting the view that enhancement of the value of land did not supply a "pecuniary interest". But there is a misconception. Because there does not seem to have been present any element of improvement in the value of the land, or at least the High Court might well have thought so. Because in the judgment of Sholl J [1959] VicRp 58; [1959] VR 384 at p407 there appears this passage:

> "It is true that the council during that period maintained the roadway, spending labour and material upon it, and it may be that at times between August 1955 and the issue of the writ in February 1956 the defendant made some use of it, by himself, his partners or the partnership's employees, although that is less likely to have happened in the dry weather after, say, November. But such use, if any, was by the leave and licence of Cornell. The defendant had no other right of any kind, so far as the evidence shows, to use the roadway, and there is no evidence that over that period (or any other period, for that matter) the use of it was of any appreciable monetary value to the defendant or the partnership. Nor am I prepared to find that the presence of the roadway has enhanced the value of the Allens' land; there is no satisfactory evidence that it has done so, and for myself I am unable to see why it should. "Nor has the actual drainage of the Allens' land, effected by or in consequence of the council's works, been of any appreciable benefit to the defendant. No doubt somewhat less surface drainage now flows over the land between the south-east drain and the watercourse, but that land has not been cultivated, nor is it suitable for cultivation. "I further find that the filling of some 48 to 50 feet of the length of the eroded watercourse on the Allens' property, south of its northern boundary, has not been of any appreciable benefit to them. It is insufficient in itself to reclaim the land for agricultural purposes, since topsoil and drainage would be needed for that purpose. From the point of view of grazing, or of sub-division of the land for industrial or residential purposes, it is not enough to be significant, and there must also be taken into consideration the presence on their land of the eroded bed of the diversion channel further to the east."

In the circumstances, I do not find the *dictum* in the High Court judgment of assistance for present purposes.

In *Brown v DPP* [1956] 2 All ER 189; [1956] 2 QB 369, six councillors were tenants of Council houses on terms that required the tenants to pay an increased rent if they took in lodgers. It being proposed in a recommendation to the Council that this impost should be lifted in the case of all tenants of Council houses except councillors, the six councillors voted against an amendment to the proposal which would give councillors the same relief from increased rent as other tenants. In the Divisional Court they were all held to have had a "pecuniary interest" in the matter notwithstanding that three of them had no lodgers and notwithstanding that none of them was voting to seek an advantage.

The case shows (a) that it is the matter before the Council that has to be examined to see whether it gives rise to an interest, not the character of the councillors' conduct as benefiting them or otherwise; and (b) that potential advantages or disadvantages as long as they are not too remote may be used as a test of pecuniary interest; and (c) that a variation in the amount of rent to be paid out is enough to found a pecuniary interest.

In *Rands v Oldroyd* [1958] 3 All ER 344; [1959] 1 QB 204, a councillor who was the managing director and a shareholder of a company, which had formerly had building contracts with the Council, but, since he became a councillor in fact had refrained from tendering for Council building contracts, spoke against a proposal which would have authorized the council to increase its own labour force to enable it to tender to carry out its own building work. He was held by a Divisional court to have had a "pecuniary interest" (albeit indirect) in the matter, notwithstanding the company having refrained from tendering, since it was in a position to tender for Council work if it wished to do so. The case decides that a potential situation productive of advantage, so long as it is not too remote, may create a "pecuniary interest".

In the light of these authorities I am satisfied that it is right to apply the proposition that I earlier formulated to the present circumstances in this way—that a councillor should be held to have a pecuniary interest in a matter before the council if the matter would if dealt with in a particular way, give rise to an expectation which is not too remote of a gain or loss of money by him.

What then did the evidence in the present case tend to show? It is common ground that the Council or its committee had before it, at the different times referred to, a project to allow the establishment of a supermarket in the immediate vicinity of the defendant's shops; a proposal to compulsorily acquire land, adjoining them and the supermarket site, for off-street parking; a proposal to permit development of vacant land adjoining them as a retail shop; and a proposal to buy land in the immediate vicinity for off-street parking.

There was evidence from Mr Bissett-Johns, the town planner, which the court could have acted on if it chose, that the addition of a shopping complex to a shopping centre was likely to increase the value of the existing shops, if there are not already adequate facilities for the shopping population, and, if there are, it is likely to be detrimental to the centre, but it is not likely to have no effect; and further, that unrestricted parking facilities close to shops have a potential effect on the trading of the shops and consequently on their rental value, and, following that, on their capital value.

As to this evidence and its bearing on the defendant having a "pecuniary interest", the learned stipendiary magistrate said this:

> "Expert evidence and other evidence was called for the informant. Some of that evidence tended to prove directly that the defendant had such an interest. In respect of other evidence it was reasonable for the court to draw an inference that this was so."

What precisely the magistrate had in mind does not appear. It is likely that he was referring, at least, to the evidence as to the effect on rental values, and to that involving a "pecuniary interest". He may also have had in mind the effect on the capital value and to that as involving a "pecuniary interest".

I have come to the conclusion that it was open to the magistrate to regard the evidence as having this effect in both respects. It was open to him to regard the evidence as being in substance that each of the various proposals could, if granted, have an effect on the level of rents receivable by the defendant for the letting of his shops and that if approved the projects would give rise to an expectation not too remote of a gain or loss by him in respect of rents. This is capable of being regarded as involving a "pecuniary interest". The arguments presented tended to pay too little attention to this aspect. But this would be sufficient for the purpose of making a case.

But, in addition, it was open to the magistrate to regard the evidence as being to the effect that each of the proposals, if granted, could have some effect on the capital value of the defendant's property. I think it was open to the magistrate to regard that as an expectation of benefit or disadvantage that was not too remote. And if he went further and drew the inference that these properties were investment properties which might be realized upon and converted into money at any time, at an enhanced value or even a reduced value, I would think that that was open to him. And, I think, although no doubt it called for careful consideration, that he was not obliged to regard the prospect as too remote. This view, too, is capable of being regarded as involving a "pecuniary interest".

I should add, in case it might be thought that I have not adverted to it, that it was put in the course of argument, that any interest that the defendant had, would come within subs(2)(a) and therefore was excluded from consideration. But I am unable to accept the submission that any interest he had in the matter put forward had to be regarded as "an interest only as a ratepayer" and one "in common with and to the same extent as other ratepayers".

As I have said, the only question before the Magistrates' Court was whether there was evidence upon which the defendant could be convicted. It was very much a matter of fact and for the evaluation of the particular circumstances, particularly the nature of the property and the proximity and the effect of the projects. In my opinion, it could not be said that on no reasonable view did the defendant have a pecuniary interest in the matters under consideration.

What effect the stipendiary magistrate gives to the evidence in the end, and whether he is satisfied by it beyond reasonable doubt, is a matter for him. It is also for him to consider any matter put before him in exculpation under subs(8). In the result I am of the opinion that the magistrate was right in deciding that there was a case to answer.

The order nisi should therefore be discharged; and the summons to set aside should be dismissed; although the case has not succeeded there was a sufficient *prima facie* case presented to justify the granting of the order nisi. The formal orders will be: Summons dismissed with costs; order nisi discharged with costs, within the limit allowed by the *Justices Act*.

Solicitors for the appellant: Loel J Caldwell and Berkovitch.
Solicitors for the respondent: Robert C. Taylor and Son.
