52A/69

SUPREME COURT OF VICTORIA

OVERBEEK v CITY OF BROADMEADOWS

Smith J

12-13, 18 December 1967 — [1971] VicRp 42; [1971] VR 353; (1971) 22 LGRA 368

LOCAL GOVERNMENT – CONSTRUCTION OF STREET – APPLICANTS OWNERS OF LAND IN THE STREET – NOTICE OF CONSTRUCTION WORKS NOT SERVED ON THE APPLICANTS AT THEIR LAST-KNOWN PLACE OF ABODE – CARELESSNESS ON THE PART OF A COUNCIL OFFICER – WHETHER THE SCHEME WAS "FINALLY SETTLED" – WHETHER THE APPLICANTS WERE DUE FOR THE DEBT PAYABLE FOR THE STREET CONSTRUCTION: *LOCAL GOVERNMENT ACT* 1958, SS578, 876.

HELD: Order that the plaintiffs be served with the relevant notice and be awarded costs.
1. The knowledge referred to in the *Local Government Act* 1958 s578(1)(b) is that of the council. The purpose of the use of the words "last-known" is to validate service by letter addressed to an owner's former place of abode, if the council knew it as his place of abode and has not learned that he has left. The knowledge received in March 1962 by the officer or officers, charged with the responsibility for entering changes of address in the municipal rate book, of the fact that the plaintiffs had changed their address from the Moonee Ponds address to the Spotswood address, was for the purposes of s876(2) the knowledge of the council. Consequently it could not be maintained that at any time after March 1962 the Moonee Ponds address was the "last-known place of abode" of the plaintiffs within the meaning s876(2).

2. Accordingly, the plaintiffs were right in their contention that notice as required by s578(1)(b) had never been served upon them.

SMITH J: The plaintiffs in this action are the owners of an allotment of land having a frontage to Streldon Avenue, Pascoe Vale, in the municipal district of Broadmeadows, and being the land comprised in certificate of title, vol. 8035, folio 157. The municipality in 1964 constructed that street and claimed from the plaintiffs payment of £153 15s 2d., described as instalments and interest payable on account of a principal debt of £1429 13s. for the cost of that construction. It also claimed to be entitled to a charge on the allotment for the amount of that principal debt.

The plaintiffs thereupon brought this action against the municipality claiming, amongst other relief, declarations they are not liable to the defendant in the sum of £1429 13s. in respect of the construction of Streldon Avenue, nor for interest upon that sum, and that the allotment is not subject to a charge in favour of the defendant to secure that sum or interest thereon.

The defendant has counter-claimed for a declaration that the plaintiffs are liable to it in the sum of £1429 13s. for their proportion of the cost of the construction of Streldon Avenue pursuant to a scheme under Division 10 of Pt XIX of the *Local Government Act* 1958.

There is evidence that the council did, in September 1963, cause to be prepared a scheme for the construction of certain streets including Streldon Avenue and that the estimated amount to be recovered from the plaintiffs as their share of the cost of the proposed works was stated in the scheme to be £1429 13s. There is evidence, also, that notices to the owners intended to be made liable were prepared and posted; that objections were received and considered by the council and the scheme then adopted without modification or alteration; that notices of this adoption were prepared and posted to the owners who had objected to the scheme; that in response to these last-mentioned notices one objection only was received; that the council referred that objection to a Court of Petty Sessions, but the objection was then withdrawn; that the council then resolved that the scheme be finally settled; and that the work was in fact completed in the year 1964.

The plaintiffs contend, however, that the scheme was invalid or that at least the proceedings of the council in relation to the scheme were ineffective to impose liability upon them. One or other

of these results followed, they say, from a failure by the council to comply with the requirement of s578(1)(b) of the Act, that it should cause to be served on them, as two of the owners intended to be made liable, a notice in writing as described in that provision.

Section 876(1)(a) requires that such a notice shall be addressed to the owner and shall, if the owner and his residence are known to the council, be served on the owner or left with some adult inmate of his abode; and the evidence satisfies me that there was no actual service of the required notice upon the plaintiffs and no leaving of it at their abode. But s876(2) provides that such a notice may also be served by post, and that in proving such service it shall be sufficient to prove that the notice was "addressed to the usual or last-known place of abode" of the owner and was put in the post. There is evidence that a notice addressed to the plaintiffs was in fact posted, but it was addressed to them at No.25 Ormond Road, Moonee Ponds. This had, at an earlier time, been their place of abode, but at the time of this posting it was not, and the substantial issue between the parties on this question as to service is whether the Moonee Ponds address was, at the time of the posting, the "last-known place of abode" of the plaintiffs, within the meaning of s876(2).

It was in March 1962 that the plaintiffs left No. 25 Ormond Road, Moonee Ponds, and from then until the end of March 1964 they lived at No. 156 Hall Street, Spotswood. At the time when they left No. 25 Ormond Road, Moonee Ponds, they notified the council in writing of their change of address, and the change was at that time entered upon the plaintiffs' card in the system of cards which constituted the rate book of the municipality. Moreover the address, No.156 Hall Street, Spotswood, continued to be the address recorded in the rate book as that of the plaintiffs, at least until May 1964, when they notified the council of a further change of address. During the two years for which they lived at the premises in Spotswood they received from the council, addressed to them at those premises, a receipt for payment of the 1961/1962 rates which bore date 30 March 1962, a rate notice for the year 1962/1963, and then, in December 1963, a rate notice for the year 1963/1964. But the only notice under s578(1)(b), in respect of this scheme of street construction, which the council ever attempted to give to the plaintiffs, was one posted to them on 19 September 1963, addressed to their former address at No.25 Ormond Road, Moonee Ponds; and it was not until after the works had been completed that the plaintiffs first learned of the project, or of any claim to hold them liable in respect of a part of the cost.

The evidence called for the defendant shows that at all material times the practice in the council's offices was that, when a scheme of street construction had been prepared, printed forms of notices under s578(1)(b) directed to the owners intended to be made liable were filled in manually by an officer in the private streets department. Normally it was his duty to obtain the addresses, in the first place, from the rate book; and when the addresses had been inserted in the notices he, or some other officer, was under a duty to check the notices against the rate book. The change of address to No.156 Hall Street, Spotswood, was clearly recorded in the rate book at the material time, and, accordingly, the error made in the plaintiffs' case can only be accounted for by carelessness in carrying out the practice of the office or by a departure from that practice or both. The deputy town clerk suggested in his evidence that the error may have been due to an officer consulting, instead of the rate book, a field book which the valuers kept for their valuations and in which the Moonee Ponds address of the plaintiffs remained unaltered until May 1964.

On behalf of the defendant, it was argued that for the purposes of s876(2) the "last-known place of abode" of the plaintiffs was to be determined by reference to the knowledge of the officer by whom the Moonee Ponds address was inserted in the notice, and the knowledge of the officer, if any, by whom that address was checked before the notice was posted.

I am not able, however, to accept this argument. The knowledge referred to in the section is that of the council. The purpose of the use of the words "last-known" is to validate service by letter addressed to an owner's former place of abode, if the council knew it as his place of abode and has not learned that he has left: compare *Price v West London Investment Building Society* [1964] 2 All ER 318 at p323; [1964] 1 WLR 616. And, in my opinion, the knowledge received in March 1962 by the officer or officers, charged with the responsibility for entering changes of address in the municipal rate book, of the fact that the plaintiffs had changed their address from the Moonee Ponds address to the Spotswood address, was for the purposes of s876(2) the knowledge of the council. Consequently it cannot, in my view, be maintained that at any time after March 1962 the

Moonee Ponds address was the "last-known place of abode" of the plaintiffs within the meaning s876(2).

Accordingly, I consider that the plaintiffs are right in their contention that notice as required by s578(1)(b) has never been served upon them.

The defendant submitted that this omission was cured by s580(2) which is in the following terms:

> "The scheme as finally settled shall be the scheme to be observed for the construction of the private street and, notwithstanding any defect error or apparent invalidity in the scheme or in its preparation adoption or approval or in any procedure or matter relating thereto, shall be valid and shall not be challenged in any court whatever and every owner intended to be made liable under the scheme shall be liable accordingly".

To this submission the plaintiffs put forward two answers, the first of which was that the scheme here in question has never been "finally settled" within the meaning of the validating provision.

Under Division 10 there are three ways in which a scheme may become "finally settled" for the purposes of the legislation. First, if no objection is received within 14 days after service of the last of the notices served under s578(1)(b), and if the council thereupon adopts the scheme without modification or alteration, the scheme as so adopted becomes by force of s580(1) "the scheme as finally settled". Secondly, if an objection is received from an owner within 14 days after service on him of the notice required by s578(1)(b), and the council adopts the scheme with or without modification or alteration, and in consequence, the council is required to and does give notice of its adoption under s579(1)(b), but no objection to the scheme as adopted is received within 14 days after service of the last of the notices of adoption, then the scheme as so adopted becomes by force of s580(1)(b)(i) "the scheme as finally settled". Thirdly, if an objection is received within 14 days after service of the last of the notices of adoption, and the council, as required by s579(3), refers the objection to a Court of Petty Sessions, and that court approves the scheme, then the scheme as so approved becomes by force of s580(1)(b)(ii) "the scheme as finally settled".

The plaintiffs contend that here the scheme has not been "finally settled" in any of these three ways. In particular they say that, as an objection to the adoption was received by the council and referred to a Court of Petty Sessions, the only way in which it was possible for the scheme to be "finally settled" was by an approval by that court, and this, as the defendant admits, has not occurred.

The defendant, in reply to this argument, relies on the provision in s579(7) that an owner who has objected to the council may withdraw his objection, and that thereupon such objection shall be deemed never to have been made. The defendant says that the only objection which was made was later duly withdrawn, and that thereupon, notwithstanding the reference, in the meantime, of that objection, to a Court of Petty Sessions, the scheme became one which had been "finally settled" in the second of the three ways which I have listed: see s580(1)(b)(i). As against this the plaintiffs contend that where a reference has once been made, s579(7) cannot operate to invalidate the reference, or to take the matter out of the hands of the Court of Petty Sessions. But, in my view, that provision does have that effect, in a case such as the present in which the only objection to adoption is duly withdrawn. For s579(7) requires that the facts be taken to be that, when the reference purported to be made, there was in truth no objection to be referred; and it further requires that the facts be taken to be that, after the making of the purported reference, there was in truth no objection for the Court of Petty Sessions to consider or uphold or overrule under the provisions of s579(4). The matter, therefore, must be taken never to have been in the hands of that court, though it does possess, in relation to costs, a power given to it by s579(8).

For these reasons, I consider that the plaintiffs' contention that the scheme has never been "finally settled" is erroneous.

The second answer made by them to the defendant's submission regarding the validating provisions of s580(2) is that an omission to serve notice on an owner as required by s578(1)(b) does not come within the natural meaning of the words "any defect error or apparent invalidity

in the scheme or in its preparation adoption or approval or in any procedure or matter relating thereto" appearing in the validating provision. They point out, in addition, that the requirement of service of notice of the scheme is of fundamental importance under Division 10, because unless observance of it is insisted upon, owners will be liable to be deprived of the opportunity to be heard before obligations are imposed upon them. And it is urged that, therefore, if the scope of the validating provision is doubtful, it should not be read widely so as to cover non-service of notice, but narrowly so as to allow non-service to be an invalidating omission.

In my view, however, non-service on one of the owners falls clearly within the natural meaning of the extremely wide words "any defect...in any procedure or matter relating thereto" in s580(2); for service of notice of the scheme is a procedural step leading up to the adoption of the scheme, in that it either leads to a demonstration of the absence of objection before adoption, or else it elicits the objections which the council is directed to consider, along with the scheme itself, when deciding whether to adopt the scheme or not. Moreover, though the basic importance of the requirement of notice of the scheme is obvious, what is here in question is not a total or wholesale disregard of that requirement, nor an absence of *bona fides*; it is an ineffective attempt at service of notice upon the owners of one of a large number of properties comprised in the scheme. And I see no justification for reading down the wide words of the validating provision so as to exclude a case such as this. The legislature has shown by the provisions of s590 and s876, which dispense in certain cases with actual notice to owners, that, in its view considerations of policy require that the powers of the council to impose liability under Division 10 shall be exercisable notwithstanding that some of the persons made liable are left unaware of what is being done until it is too late for them to object. No doubt the legislature has been affected by considerations such as are discussed in the judgment of Isaacs J in *City of Sandringham v Rayment* [1928] HCA 13; (1928) 40 CLR 510, at pp526, 527; [1928] VicLawRp 48; [1928] VLR 312; [1928] ALR 173.

The plaintiffs' next submission is that even if the scheme is validated by s580(2), nevertheless the necessary steps have not yet been taken to make them indebted to the municipality for any sum under the scheme or, if a debt has been created, to make it presently payable. It is said in the first place that the words "shall be liable accordingly", appearing at the end of s580(2), do not mean that the owners become indebted to the municipality at the point of time when a scheme is "finally settled", but merely mean that the owners then come under a liability to be made debtors by the operation of later provisions of the Act. The later provisions so referred to consist of -

> (a) s581(1), in so far as it requires that the council shall serve on every owner of premises fronting on the street to be constructed a notice in writing requiring payment of "the sum for which he is liable under the scheme as finally settled";
>
> (b) s581(2), in so far as it provides that subject to s582, every such owner shall, within one month after the commencement of the works in situ, pay to the council "the sum...for which he is liable under the scheme";
>
> (c) s582, in so far as it provides that if request is made before the expiration of one month after service of the notice referred to in s581(1), the council shall accept payment of the sum for which a person is liable by quarterly instalments with interest, the first such instalment being payable one month after the commencement of the works in situ.

In my view, the context negatives the construction which the plaintiffs seek to place on the word "liable" in s580(2). That subsection, I consider, operates to impose on the owners at the time when the scheme becomes "finally settled" a debt of the amount for which they are intended to be made liable under the scheme. The plaintiffs, therefore, have become indebted under the scheme. But I agree with their alternative submission that the debt which has been imposed upon them has not as yet become presently payable. This result flows from the provisions of s581 and s582, to which I have already referred. The legislative scheme which those sections embody requires, as I construe the provisions, that before the debt of an owner can become presently payable he must be served with a notice under s581, so that he will have the opportunity to determine, during the month following such service, whether to require the council to accept payment by quarterly instalments or, on the other hand, to allow the whole debt to become payable upon the expiration of that month. That the debt cannot become payable before service of the notice under s581 was, indeed, conceded by counsel for the defendant during his final address; and it appears to me to be a necessary conclusion from the fact that the entry of judgment against an owner before service

of the notice would deprive him of the opportunity already mentioned which the provisions are intended to secure to him.

In the present case no notice under s581 has ever been served on the plaintiffs, the only attempt to do so having been the posting to them, on 30 January 1964, of a notice addressed to their former address in Moonee Ponds.

Accordingly, I am of opinion that the plaintiffs' debt has not yet become presently payable and that no part of it will become so payable until after notice under s581 has been served upon them. I do not consider that s580(2) is in any way inconsistent with that conclusion. That sub-section assumes as does also s582(3), that the commencement of the works *in situ* will not occur until after service of the notice under s581; and, despite the positive language used, the actual legal effect of s580(2) is, I consider, to impose a condition, additional to service of the notice, which must be satisfied before the debt of an owner served can become presently payable. But that additional condition, which is that one month must have elapsed after commencement of the works *in situ*, has, of course, been satisfied in the present case.

It is necessary to add that the evidence called for the defendant shows that in September 1966, after the commencement of this action, the city engineer certified, pursuant to s581(3), that the actual amount of the portion of the cost of the scheme which was to be recovered from the owners was a figure substantially less than the estimated amount as set out in the scheme as finally settled. In consequence of this, the amount of the plaintiff's debt under the scheme has been reduced from £1429 13s. to $2536.14.

For the foregoing reasons, there will be judgment for the plaintiffs for a declaration that, though the plaintiffs, as owners of the land comprised in certificate of title vol. 8035, folio 157, are indebted to the defendant in the sum of $2536.14 in respect to the cost of street construction pursuant to Division 10 of Pt XIX of the *Local Government Act* 1958, no sum is presently payable by the plaintiffs to the defendant municipality, or to the council of the defendant, in respect of that debt, nor in respect of interest on that debt. The declaration sought in the counter-claim will, because of the form of declaration made in the action, be refused.

Although the plaintiffs have not obtained all the relief they sought in this action, they have succeeded upon the issue as to whether the purported service upon them of the two notices was defective, and they have obtained worthwhile relief in respect of the non-service of the second notice.

Moreover, the carelessness of the defendants' officers in a matter of great importance to the plaintiffs has been the whole cause of the present litigation, and has deprived the plaintiffs of rights of objection which ought to have been allowed to them, and which, as their allotment was charged a large sum in respect of a second frontage, might quite well have proved of practical value.

I consider that in all the circumstances the proper order to be made as to costs will be – and I now order – that the plaintiffs' costs of the action, except in so far as increased by opposition to the counter-claim but including costs of pleadings, discovery, interrogatories and recorded notes, be taxed and paid by the defendants. There will be no order for costs in favour of the defendants.

Solicitors for the plaintiffs: O'Phelan and Co.
Solicitors for the defendant: Gair and Brahe.
