

IN THE PRIVY COUNCIL

NO. 18 OF 1977

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O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF  
QUEENSLAND

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B E T W E E N :

BRISBANE CITY COUNCIL

- and -

MYER SHOPPING CENTRES PROPRIETARY LIMITED

- and -

Appellants  
(Defendants)

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HER MAJESTY'S ATTORNEY-GENERAL FOR THE STATE  
OF QUEENSLAND (AT THE RELATION OF ARTHUR  
THOMAS SCURR and WILLIAM PERCIVAL BOON)

Respondent  
(Plaintiff)

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CASE FOR THE APPELLANTS

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Record

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1. The issue of these consolidated appeals is whether the Appellant Brisbane City Council is free to dispose of certain land situate at Logan Road, Mt. Gravatt, Brisbane, Queensland which it has contracted to sell to the Appellant Myer Shopping Centres Proprietary Limited. The Respondent Attorney-General contends that it is not, asserting that the land is subject to a valid and enforceable public charitable trust.

p.8 ll 19 to 22  
p.2 ll 20 to 26

p.6 ll 17 to 21

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2. The appeals are from a judgment dated 18th March 1977 of the Full Court of the Supreme Court of Queensland (Hanger C.J., Stable and D.M. Campbell J.J.), dismissing by a majority (Stable J. dissenting) appeals from a judgment dated 7th December 1976 of the Supreme Court of Queensland (Hoare J.), declaring that the land is held by the Council on trust for showground, park and recreation purposes and that the Council is bound by the terms of a resolution which it passed on 19th October 1937 approving a proposal for the transfer of the land to it.

pp. 140 & 141

pp. 115 & 116

Record

p.6 ll 7 to 9  
p.8 ll 10 to 12

3. The Council is the registered proprietor of an unencumbered estate in fee simple in the land which is slightly more than 20 acres in area and is described as Subdivisions 2 & 3 of Portions 332 and 333 in the County of Stanley, Parish of Bulimba.

p.4 ll 1 to 4

p.3 ll 33 to 36  
p.5 ll 7 to 9  
p.151  
pp.159 to 161  
p.47 ll 11 to 25  
p.176

4. (a) Immediately prior to the transfer of the land to the Council the registered proprietors were two persons who were registered as trustees thereof for the use enjoyment and benefit of the members of the Mount Gravatt Agricultural Horticultural & Industrial Association (otherwise variously known as the "Mt. Gravatt Agricultural Horticultural & Industrial Society", the "Mt. Gravatt A.H. & I. Society" or the "Mt. Gravatt Show Society").

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pp.156 to 158  
p.183

(b) Further at all material times prior to the transfer of the land to the Council the land was subject to a bill of mortgage in favour of the Bank of New South Wales securing the repayment to the bank of £450/0/0 with interest.

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p.3 ll 17 to 21  
p.311

5. The Mt. Gravatt Agricultural Horticultural & Industrial Association (hereafter referred to as the "Mt. Gravatt Show Society") was at all material times an unincorporated body having so far as is know neither constitution objects rules nor other restrictions upon its functions or activities.

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6. The transfer of the land to the Council was preceded by a number of communications between it and representatives of the Mt. Gravatt Show Society and a number of resolutions of each of those bodies. Discussions were initiated by representatives of the Mt. Gravatt Show Society in or about September 1937. Events of that period are evidenced by the following documents which are set out in chronological order.

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No.	Description of Document	Date
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pp.167 & 168

1.	Unsigned Report on Deputation from Mt. Gravatt Show Society to Lord Mayor held on
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2/ 9/1937

			<u>Record</u>
	2. Minutes of the Council	19/10/1937	pp. 169 to 170
	3. Letter Council to W.H. Clarke (one of the Trustees of the land and the Secretary of the Mt. Gravatt Show Society)	25/10/1937	p.171
	4. Minutes of Mt. Gravatt Show Society Annual Meeting held	15/12/1937	p.172
10	5. Minutes of Mt. Gravatt Show Society Show Committee Meeting held	17/ 2/1938	pp. 173 & 174
	6. Minutes of Mt. Gravatt Show Society Show Committee Meeting held	21/ 4/1938	pp. 174 & 175
	7. Letter Mt. Gravatt Show Society to Council	21/ 4/1938	pp. 176 & 177
20	8. Letter Mt. Gravatt Show Society to Council	4/ 5/1938	p.178
	9. Letter Mt. Gravatt Show Society to Council	5/ 7/1938	p.179
	10. Minute of the council	12/ 7/1938	p.180
	11. Letter Council to Commissioner of Taxes (Queensland)	22/ 7/1938	p.182
	12. Letter Council to The Deputy Federal Commissioner of Taxes	22/ 7/1938	pp.182 to 183
30	13. Letter Bank of New South Wales to Mt. Gravatt Show Society	23/ 7/1938	p.183
	14. Letter Mt. Gravatt Show Society to Council	26/ 7/1938	p.184
	15. Letter Council to Mt. Gravatt Show Society	24/ 8/1938	p.187 & 188

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In addition during that period a draft p.181

Record

pp.185 & 186

Agreement and a draft Nomination of Trustees and Schedule of Trusts were prepared but those documents were not at any time executed.

7. The letter signed by the Town Clerk of the Council and addressed to the Secretary of the Mt. Gravatt Show Society dated 24th August 1938 (with which the Council submitted the documents for the transfer of the land) contained the following paragraph:

p.188 ll 1 to 22

"The Council undertakes to hold the land for the purposes of a Public Park, Recreation Reserve, or Show Ground, or other purposes not inconsistent therewith. It will also grant to your Society without any charge whatsoever the exclusive right to use the land and all buildings and erections thereon for a period of three weeks in each and every year for the purposes of the Mt. Gravatt Annual Show, provided such show shall take place during the months of July or August. It will also be necessary for your Society to give one month's written notice of its intention to hold such show. The Council will also as soon as practicable take all necessary steps to level and fence that part of the land known as the Show Ring."

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pp.189 to 191

8. On 15th September 1938 a Declaration was signed by the Secretary of the Mt. Gravatt Show Society which declaration provided inter alia that at a Special Meeting of the Mt. Gravatt Show Society duly held on the 15th day of December 1937 the following resolution was passed by the members then present:

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pp.191 ll 13 to 18

"That the Show Ground be handed over to the Brisbane City Council on condition that the overdraft at the Bank be liquidated and that the Council take immediate steps to improve the ground, particularly in regard to the Ring."

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pp.192 to 195

9. On 20th September 1938 the Memorandum of Transfer of the land to the Council was duly signed, the overdraft was paid out, and on 9th November 1938 the release of the mortgage to the bank and the transfer of the land to the Council were registered.

p.150

		<u>Record</u> p.197
	10. A. Although the amount paid may have been less than the value of the land and the improvements thereon the money expended by the Council in respect of its acquisition of the land was paid from its general funds as appears from the evidence of Mr. R.V.M. Hackwood, the Manager of the Council's Department of Finance & Management Services.	p.87 11 33 to 39  p.91 11 3 to 28
10	B. (i) None of the documents save the draft Nomination of Trustees and Schedule of Trusts contains any suggestion that the land was to be or was transferred to the Council as a trustee.	pp.185 & 186
	(ii) Further the draft Schedule of Trusts would have permitted the sale of the land by the Council subject only to the consent of the Mt. Gravatt Show Society if it then remained in existence.	p.186
20	C. Both the Council and the Mt. Gravatt Show Society treated the Council as the beneficial owner of the land immediately following its transfer to the Council as is evidenced by the following documents which are listed in chronological order:	
	(i) Letter Mt. Gravatt Show Society to Alderman W.R. Howard - 8th August 1940	pp.200 & 201
30	(ii) Letter Council to Mt. Gravatt Show Society Show Committee - 4th September 1940	pp.201 & 202
	(iii) Letter Mt. Gravatt Show Society to Council - 11th September 1940	pp.202 to 204
	(iv) Minute of Council - 1st October 1940	pp.204 to 206
	(v) Letter Council to Mt. Gravatt Show Society - 14th October 1940.	pp.207 & 208
40	D. Additional money expended by the Council in respect of the land after its acquisition also was paid from the Council's general fund as appears from Mr. Hackwood's evidence.	p.91 11 3 to 28

Record

p.32 ll.9 to 17 p.33 ll.5 to 11 p.37  
l.33 to p.38 l.3 p.39 l.10 p.39 ll.10  
to 17 p.40 l.3 to p.41 l.10 p.42 ll.11  
to 18 p.57 l.11 to p.58 l.13 p.58 ll.19  
to 23 p.58 ll.18 to 26 p.63 ll.13 & 14  
p.64 ll.9 to 20 p.66 l.6 to p.67 l.8  
p.75 l.14 to p.76 l.3 p.77 ll.33 to 41  
p.77 l.42 to p.78 l.10

11. (a) Both prior to and after the transfer of the land to the Council the land was used as a "showground", i.e. as the site for an annual event known as the "Mt. Gravatt Show" which included amusements such as sideshows, chocolate wheels and merry-go-rounds, competitions, sporting activities, horse and motor races, demonstrations, advertising and sales of various types of merchandise from various sources, and sales of refreshments including alcoholic drinks, in addition to displays of stock and produce.

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(b) In the first Supreme Court action, No. 1598 of 1971, (to which further reference is hereafter made) which the Respondent Attorney-General commenced against the Appellants (also at the Relation of Mr. Arthur Thomas Scurr) the Respondent in particulars of an allegation in his Statement of Claim described "showground purposes" as:

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"(a) the conduct of the Mt. Gravatt Show (which includes the exhibiting of animals; equestrian events; displays of agricultural and horticultural produce; wood chopping; and the provision of facilities for entertainment and amusement), by the Mt. Gravatt Agricultural Horticultural & Industrial Society;

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(b) displays of poultry, birds and animals from time to time by divers voluntary associations, the exact names of which are not specifically known to the Plaintiff;

(c) pony club meetings and activities;

(d) passive recreation by local people, and active play by children."

12. Also both prior to and after the transfer of the land to the Council the land was used for a variety of other purposes including social functions, sporting activities, competitions, recreation, sales, pre-sale demonstrations, motor and horse races, rodeos,

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p.32 ll.2 to 17 p.41 l.28 to p.42 l.10 p.42  
ll.41-44 p.43 l.28 to p.44 l.10 p.45 ll.1 to  
3 p.45 ll.4 to 11 p.45 ll.12 to 33 p.58 ll.31  
& 32 p.58 ll.34 & 35 p.58 ll.36 to 38 p.59  
ll.1 & 2 p.59 ll.13 to 18 p.60 ll.23 to 35  
p.60 ll.39 to 41 p.61 ll.4 to 8 p.64 ll.21 to  
35 p.65 ll.1 to 16 p.76 ll.4 to 20 p.76 l.25  
to p.77 l.15 p.197 p.200 p.211 ll.31 to 41  
p.220 ll.9 to 18 p.228 ll.14 to 23 p.277  
ll.16 to 23 p.283 ll.19 to 26

Record

and fairs, and carnivals; it was also used as a camping ground, and by private clubs for their various purposes.

13. Both the Council and the Mt. Gravatt Show Society derived revenue for their respective general purposes from these uses of the land; in the case of the Council only after the land was transferred to it.

p.59 ll 35 to 41  
p.60 ll 1 to 38  
p.61 ll 14 to 18  
p.61 ll 19 to 23  
p.62 l 30 to  
p.63 l 8

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14. In September 1970 consequent upon the Council inviting tenders for the purchase of the land on terms and conditions which provided for \$500,000-00 of the purchase money to be spent on sportsfield development in adjoining Council owned land and on establishing a showground on other Council owned land and upon Myer tendering, the Appellants entered into a contract for the sale of the land by the Council to Myer for \$1,010,000-00; a deposit of \$101,000-00 was paid and accepted but the balance purchase price remains unpaid. The contract was subject to consent to the use of the land as a shopping centre being obtained within a specified period which was extended. The consent was unable to be granted until March 1976 for reasons which hereafter appear.

p.299 l 17  
p.301 l 10  
p.301 l 30  
p.72 ll 31 to 35  
p.299 l 17  
p.301 l 40  
p.303 l 26

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15. By the City of Brisbane Town Planning Act 1964 as amended the use of the land as a shopping centre required the consent of the Council and forbade the grant of such consent until after public notice was given of the proposed use and objections were considered. Objectors have a right of appeal to the Local Government Court against a proposed grant of consent by the Council.

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16. Myer having applied for consent and public notice of the application having been given the Relator Arthur Thomas Scurr (amongst others) gave notice of objection on 17th July 1970.

p.69 l.30  
p.70 l.7  
pp.261 to 263

17. The Council notified the objectors including the said Relator Scurr that it

p.69 l.6 to  
p.70 l.2

Record

p.70 1.17

proposed to grant its consent and amongst others Mr. Scurr appealed to the Local Government Court by Notice of Appeal dated 30th September 1970.

pp.263 to 266

p.71 1.3

18. Prior to the hearing of these Local Government Court appeals interlocutory disputes were contested in the Local Government Court and then on appeal in the Full Court of the Supreme Court of Queensland and then on an application for special leave to appeal to the High Court of Australia. The Council and Myer were successful in these proceedings.

p.71 1.22

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p.71 1.25

19. The Local Government Court appeals came on for hearing on 25th October 1971 and continued for 14 days. Judgment dismissing the appeals was delivered on 15th December 1971.

pp.295 & 296

20. On that same day 15th December 1971 an action was commenced in the Supreme Court of Queensland, No. 1598 of 1971, by the Attorney-General at the Relation of the said Scurr in which it was sought to impeach the validity of the sale of the land by the Council to Myer.

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p.242

21. In January 1972 Mr. Scurr appealed to the Full Court of Queensland against the decision which had been given on 15th December 1971 by the Local Government Court. The appeal to the Full Court was dismissed on 27th April 1972. On 21st June 1972 Mr. Scurr appealed to the High Court, by leave, from the decision of the Full Court.

p.274

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p.306

22. The trial of the original Supreme Court Action, No. 1598 of 1971, took place before Lucas J. without a jury at Brisbane on 6th, 7th, 8th, 9th, and 10th November 1972 and the learned judge's reserved judgment dismissing the Attorney-General's claims was delivered on 30th November 1972.

p.72 1.7

23. The hearing of the High Court Appeal from the decision of the Full Court of Queensland dismissing the appeal from the Local Government Court took place on 13th and 14th March 1973 and the reserved judgment of the High Court allowing the appeal on the footing

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Record

that the public notice of the application for consent had been inadequate was delivered on 24th September 1973.

- 10 24. A further application for consent to the use of the land as a shopping centre having been made to the Council by Myer and public notice of the further application having been given Mr. Scurr and the other present Relator William Percival Boon (amongst others) gave notice of objection in November 1974. p.72 l.11 pp.276 to 282
25. The Council notified the objectors including the said Relators Scurr and Boon that it proposed to grant its consent and each of the present Relators Scurr and Boon (amongst others) appealed to the Local Government Court in January 1975. p.72 l.16 pp.288 to 295
- 20 26. After further interlocutory disputes in the Local Government Court the appeals were heard in that Court on 24th, 25th, 26th, 27th and 28th November and 1st, 2nd, 3rd, 4th and 5th December 1975. p.72 l.18
27. On the 12th day of December 1975 the appeals were dismissed. p.72 l.20
28. On the 24th day of December 1975 the Relator Scurr gave Notice of Appeal to the Full Court of Queensland against the decision of the Local Government Court but that appeal was not prosecuted and was dismissed by the Full Court on the 2nd day of March 1976. p.72 l.21
- 30 29. Only then was the present action commenced to attempt to establish that the Council holds the land subject to a trust. The Writ of Summons was issued out of the Supreme Court of Queensland on 18th March 1976. As in the first Supreme Court Action the Plaintiff was Her Majesty's Attorney-General for the State of Queensland at the Relation of Arthur Thomas Scurr and in the present action William Percival Boon is also a Relator. The defendants in the present action were again the Council and Myer. pp. 1 & 2
- 40 30. In his Amended Statement of Claim in the present action (No. 673 of 1976), delivered pp.3 to 7

Record

p.5 l.10  
p. 169  
p.5 l.19  
p.171  
p.6 l.1  
p.177  
p.171

on 22nd April 1976, the Attorney-General referred to the resolution of 19th October 1937 of the Council and two letters, that from the Council dated 25th October 1937 and that to the Council dated 4th May 1938, and alleged that the transfer of the land to the Council was made on the conditions referred to in the letter from the Council dated 25th October 1937 namely:

- "(a) The area to be set aside permanently for Showground, park and recreation purposes; 10
- (b) The Show Ring to be levelled off;
- (c) The Show Society to be granted the exclusive use of the Ground without charge for a period of two weeks in each and every year, for the purposes of and in connection with the District Annual Show".

p.6 ll.19 to 21

It was further alleged that the Council "thereby came under an obligation to set aside the said land permanently for Showground, park and recreation purposes." 20  
The claim was for:

p.6 l.33 to  
p.7 l.4

- (a) A declaration that the land is presently held by the Council on trust for showground, park and recreation purposes or other public charitable trusts.
- (b) An injunction to restrain any sale by the Council of the land. 30
- (c) In the alternative to (a) a declaration as to the trusts on which the land is held.
- (d) Further or other relief.
- (e) Costs.

pp.7 to 11  
pp.11 to 15

31. The Council delivered its Defence on 11th May 1976 and Myer delivered its Amended Defence on 12th August 1976. Each denied that the Council held the land subject to any valid trust and further pleaded laches and acquiescence and relied upon the previous

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Record

action in the Supreme Court of Queensland as having given rise to an estoppel per rem judicatum.

32. On 26th August 1976 the Attorney-General delivered his Reply to the Amended Defence of Myer and on the 18th October, 1976 delivered his Amended Reply to the Defence of the Council.

pp.18 & 19  
pp.16 to 18

10 33. The trial of the action took place before the Honourable Mr. Justice Hoare without a jury at Brisbane on 18th, 19th, 22nd, 23rd, 24th, 25th and 26th November 1976 and his reserved judgment was delivered on 7th December 1976.

pp.21 to 105

pp.106 to 115

20 34. A. Hoare J. held that it was the intention of both parties to the transaction whereby the Council acquired the land that it would hold it permanently for the purposes expressed in its resolution of 19th October 1937 and in the circumstances that the Council had declared itself a trustee of the land in the terms of that resolution.

p.109 ll. 1 to 12

30 B. The learned judge described the next matter for consideration as being whether or not the trust was valid and enforceable, noting that the onus of establishing that there was a charitable trust was on the Attorney-General and observing that the question was one of very great difficulty. After mentioning that the word "show" is used in many different contexts and noting some of the different meanings he stated that in Queensland the term "showground" had acquired a more or less definite meaning and referred to the common practice in towns and districts in Queensland of holding an annual "show" or exhibition, the activities of each being broadly similar, and the Mt. Gravatt Show appearing to be typical. The critical passage in Hoare J.'s reasons is concerned however not with "showground" purposes but with the Mt. Gravatt Show Society. The learned judge said:

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p.109 l.41

Record

p.112 1.37 to  
p.113 1.29

"One would have preferred to have had more positive evidence of the precise objects of the association. However it is well known that the various associations throughout the State which hold an annual "show" are each conducted by a voluntary association. These voluntary associations are managed by committees. The members of the various committees give much time and effort to the association. In the bigger towns there is often a paid secretary but the over-all management is in the hands of a voluntary committee. It is difficult to imagine that the enormous amount of voluntary work done by the various "show" societies would be given so freely if the main object of these societies was for some commercial purpose. In the absence of proof to the contrary I would readily infer that the main object of these societies is for the promotion of agriculture horticulture and industry in the various areas of the State. It perfectly true that all the activities carried on at the various shows do not directly relate to any of these purposes but if one assumes for the moment that the original purpose of the various societies was for promoting agriculture horticulture or industry in the area, then one can readily understand how all the various activities which today serve to make up a 'show' came to be added to the activities directly relating to the broad over-all purpose. They were I think intended to assist in ensuring a successful 'show'.

Accordingly I conclude that it is more probable than not that the main object of the Mount Gravatt Agricultural Horticultural and Industrial Association in holding its annual shows during the years leading up to 1937 was for the promotion of agriculture horticulture and industry in the Mount Gravatt area. Accordingly I hold that any activity for the purpose of assisting it to hold such a show was 'charitable'."

p.114 11.1 to 42

C. As to the defence of laches Hoare J.

held that the Relator Scurr did not in fact know of what had transpired between the Council and the Mt. Gravatt Show Society at the time the land was taken over by the Council until the Council's Minutes were searched although Scurr had some suspicion that there was a trust and that neither Appellant could have believed that the reason why no proceedings were taken either by the Relator Scurr or by the Attorney-General at his relation was that while Scurr knew of the circumstances which might have created a trust he had deliberately decided not to set up such a case. He considered that laches had not been established against Scurr and he did not find it necessary to consider whether the Attorney-General might be in a somewhat different position.

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D. As to estoppel per rem judicatam Hoare J. said that the issues in the present action are very clearly different from the issues in the first action (No. 1598 of 1971).

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p.114 l.43 to  
p.115 l.10

35. Appeals to the Full Court by the Appellants were heard together on the 7th, 8th and 9th February 1977 and its reserved judgment was delivered on 18th March 1977.

pp.124 to 140

36. A. D.M. Campbell J. (with whom Hanger C.J. concurred) agreed with Hoare J. that the terms on which the Council took the land are set out in the resolution of October 19th, 1937. He said that the intention of the Mt. Gravatt Show Society in its dealings with the Council was to have the land set apart permanently for showground, park and recreation purposes and that the other matters, "the matter of levelling the ring, the matter of the use of the showgrounds for the annual district show, and the matter of having the bank release its security over the property were all incidental matters." In his opinion a trust for "showground park and recreation purposes" fell under the fourth head of Lord Macnaghten's classification - trusts for other purposes beneficial to the community not falling under any of the preceding heads.

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p.135 ll.35 to 37

p.136 ll.15 to 24

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p.137 ll.13 to 17

B. As to the defence of laches D.M.

p.139 ll.15 to 30

Record

Campbell J. said that he looked at the matter in rather a different way from Hoare J. In his opinion there had been no delay but if there had it was not practically unjust to permit the enforcement of the trust.

p.140 11.24 to 32 C. Finally in relation to the question of estoppel per rem judicatam D.M. Campbell J. said that the issues in the first action (No. 1598 of 1971) were not clearly related to the issues in the present action (No. 673 of 1976). 10

pp.124 to 129 37. Stable J. in his dissenting judgment expressed the opinion that a trust for showground park and recreation purposes was not a valid charitable trust. He said:

p.129 11.17 to 37 "As I see the record there was no definitive evidence of the scope of the activities associated with a 'showground' - a word for which, by way, I can find no definition in any dictionary to which I have access, including the 1976 edition of the Concise Oxford Dictionary and the 1976 Australian Pocket Oxford Dictionary. The latter, however, has a definition of 'show' which is 'annual exhibition of livestock, produce etc. with ring events, sideshows, etc. usually lasting several days.' This seems to me to be a fairly apt description of an event with which most of us are more or less familiar. The showground logically would be the venue for such activities. Coming right to the point I find it more than hard to bring this major use of the land at Mt. Gravatt within the spirit and intendment of the Statute of Elizabeth. The expression relied on as constituting an obligation of trust is in my view too vague and uncertain to satisfy the onus of showing that it falls within the Statute." 20 30 40

pp.169 to 170 38. The Appellants respectfully submit that Hoare J. and all members of the Full Court erred in holding that the transaction between the Council and the Mt. Gravatt Show Society resulted in the creation of a trust in the terms of the resolution of the council of 19th

October 1937. They further respectfully submit that Hoare J. and the majority in the Full Court erred in holding that such a trust was a valid charitable trust and further erred in holding that defences of laches and estoppel per rem judicatam were not made out.

39. The Appellants respectfully submit that:

10 (a) the intention of the Council and the Mt. Gravatt Show Society, the parties to the transaction whereby the Council acquired the land, was not to impose any legally enforceable obligations upon the Council or alternatively was to impose only contractual obligations in favour of the Mt. Gravatt Show Society; it was not intended that the Council have no beneficial interest in the land.

20 (b) alternatively if the effect of the transaction was to constitute the Council a trustee of the land the trust created was not for public charitable purposes only and being permanent is invalid -

(i) because a trust for "showground park and recreation purposes" is not within the spirit and intendment of the Charitable Uses Act, 1601 (imp), 43 Eliz.c.4.

30 (ii) because "other purposes not inconsistent therewith" (see the letter from the Council to the Mt. Gravatt Show Society dated 24th August 1938) are not limited to purposes which are public charitable purposes.

pp.187 & 188

40 (iii) because even if the terms upon which the Council took the land are those contained in the letter dated 25th October 1937 from the Council (as pleaded by the Respondent) or the council's resolution of 19th October 1937 (as held by Hoare J. and the Full Court) the purposes of the trust extended beyond "showground park & recreation purposes" to separate purposes which were not public charitable purposes nor

p.171

pp.169 & 170

Record

ancillary thereto including the private purposes of the Mt. Gravatt Show Society which was not alleged or proved to be a body having charitable objects.

40. The Appellants further respectfully submit that both laches and estoppel per rem judicatam at least in the wider sense of that doctrine were clearly established:

pp.70 to 92

A. The Local Government Court proceedings which were wholly futile and unnecessary if the land is subject to a valid and enforceable trust extended from September 1970 to March 1976 and involved, in addition to interlocutory disputes in the Local Government Court, two full hearings in the Local Government Court occupying in all 24 days, three appeals to the Full Court of Queensland and an application for special leave, a separate application for leave, and an appeal to the High Court of Australia. 10 20

These proceedings involved each of the Appellants in the expenditure of thousands of dollars in respect of costs including -

(i) the costs of all parties in respect of the initial hearing in the Local Government Court and on the appeal therefrom to the Full Court of Queensland and on the application for leave to appeal and the appeal therefrom to the High Court of Australia; and

(ii) its own costs of the second proceedings in the Local Government Court which had its power to award costs in such proceedings taken away by an amendment to the City of Brisbane Town Planning Acts prior to January 1975 when those proceedings were commenced. 30

p.72 1.31

In addition the Appellant Myer Shopping Centre Pty. Ltd. has been without the sum of \$101,000-00 (paid as a deposit) and income therefrom since about September 1970. 40

B. (i) The patent object of both the first Supreme Court action and the present Supreme Court action is to prevent the sale of

the land by the Council to Myer.

10 (ii) In the first Supreme Court action (No. 1598 of 1971) the Attorney-General alleged that the Council had acted in excess of power in contracting with Myer and in extending the time for obtaining consent to the use of the land and that the Council had acted in bad faith with a view to preferring Myer as a purchaser of the land. The relief claimed in that action by the Attorney-General was as follows:

"1. As against the first Defendant -  
(the Council).

p.303 1.34

20 A. Declarations that the first Defendant in purporting to agree to sell the subject land to the second Defendant acted ultra vires and in bad faith, and that its resolution of the first day of September 1970 purporting to accept the tender of the second Defendant and all subsequent proceedings in relation to or arising out of such resolution, are null and of no effect.

30 B. A declaration that the resolution of the first Defendant of the thirty-first day of August 1971 purporting to extend the period during which the second Defendant was required to obtain the consent of the first Defendant to the proposed use of the subject land for the purposes of a Target Discount Shopping Centre was passed ultra vires and in bad faith, and is null and of no effect.

C. An injunction to restrain the first Defendant by itself its servants or agents from selling to the second Defendant or to any nominee of the second Defendant the subject land.

40 D. An injunction to restrain the first Defendant by attempting to implement the resolutions of Brisbane City Council dated the eighteenth day of May 1970, the

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first day of September 1970 and the thirty-first day of August 1971 which are more particularly described in the Statement of Claim.

E. Further or other relief.

F. Costs.

p.304 l.27

2. As against the second defendant - (Myer).

A. Such declarations, orders, injunctions and other relief as are necessary to give full relief to the Plaintiff and to conclude all questions arising herein between the parties to this action.

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B. Costs."

p.269

(iii) In that first action (No. 1598 of 1971) the Attorney-General, although he sought to interrogate as to whether there was any existing trust in respect of the land, made no allegation that there was any such trust and did not seek to rely upon the existence of a trust to support the claims which he there made including a claim for an injunction restraining the sale of the land by the Council to Myer.

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C. The Attorney-General gave no evidence but it is clear from the first Supreme Court action (No. 1598 of 1971) that he then knew of the sale of the land by the council to Myer and that he suspected that the Council might be a trustee of the land. Nor did the Relator Boon give evidence but in answer to an interrogatory (answered by the Relators but admitted as evidence against the Attorney-General) he admitted that he knew of the sale in about 1970. The Relator Scurr did give evidence in the Supreme Court in the present action (No. 673 of 1976) that he knew of the sale as early as 1970 and that he suspected the existence of a trust prior to the first Supreme Court action (No. 1598 of 1971).

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p.310

p.45 ll.34  
p.311  
p.67 l.9 to  
p.68 l.26  
p.68 l.27 to  
p.69 l.14  
p.263 ll.8 to10

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10 D. Although the minutes and documents of the Mt. Gravatt Show Society and the minutes of the Council with respect to the transfer of the land to the Council were readily available no attempt was made to peruse these until the second half of 1975. (There is a statutory right of access to the Council's minutes: Local Government Act 1936 as amended, S.16(1)). Even when the Minutes were perused this action was not commenced but instead the Relators continued to prosecute Local Government Court proceedings and an appeal therefrom.

p.56 ll.17 to 30  
pp.65 to 67  
p.72 ll.21 to 30

20 E. In the premises it is unjust and inequitable and an abuse of process for the Attorney-General to raise by this action the allegation that the land is held by the Council subject to a charitable trust more than five (5) years after the sale to Myer, when that allegation might have been brought forward in the first action No. 1598 of 1971.

41. On 5th April 1977 the Full Court of Queensland made Orders granting the Appellants leave to appeal to Her Majesty in Council and consolidating the appeals.

30 42. The Appellants respectfully submit that the judgments of Hoare J. and the full Court of Queensland were wrong and ought to be reversed and this appeal ought to be allowed with costs, for the following (amongst other)

R E A S O N S

- 40 (i) The Council is not a trustee of the land.
- (ii) Alternatively any trust in respect of the land is not valid, being for purposes which are not solely public charitable purposes.
- (iii) In any event relief ought to be refused to the Attorney-General in the circumstances by reason of
- (a) his delay;

Record

- (b) his failure to raise the present allegations in the earlier litigation between him and the Appellants (Action No. 1598 of 1971 in the Supreme Court of Queensland);
- (c) the decision in that action (1973 Qd.R. 53);
- (d) the prejudice to the Appellants resulting from (a) and (b) supra.

G.E. FITZGERALD

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J. GALLAGHER

No. 18 of 1977

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE FULL COURT OF THE SUPREME  
COURT OF QUEENSLAND

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B E T W E E N :

BRISBANE CITY COUNCIL

- and -

MYER SHOPPING CENTRES PROPRIETARY  
LIMITED Appellants  
(Defendants)

- and -

HER MAJESTY'S ATTORNEY-GENERAL FOR  
THE STATE OF QUEENSLAND (AT THE  
RELATION OF ARTHUR THOMAS SCURR and  
WILLIAM PERCIVAL BOON)

Respondent  
(Plaintiff)

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CASE FOR THE APPELLANTS

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COWARD CHANCE,  
Royex House,  
Aldermanbury Square,  
LONDON, EC2V 7LD.

Solicitors for the Appellants