

**CITY OF ST KILDA
METRO LINK HOLDINGS PTY LTD
JOHN BROWNLOW PTY LTD**

REQUESTOR
RESPONDENT OCCUPIER
RESPONDENT OWNER

Appeal No. : 1991/30279
Date of Determination : October 10, 1991
Tribunal Member : D Gibson

APPLICATION FOR INTERIM ENFORCEMENT ORDER – ANTICIPATED USE OF PREMISE AS “PLACE OF ASSEMBLY” WITHOUT PERMIT CONTRARY TO PLANNING SCHEME – WHETHER NON CONFORMING USE RIGHTS – UNDERTAKING AS TO DAMAGES – EQUITABLE PRINCIPLES APPLICABLE

Certain land was used as a picture theatre from 1919-1961. In March 1960 the MMBW 1959 IDO came into force and applied to the land. In 1961 the owner sought a permit for exclusive catering and reception uses and the MMBW, as Responsible Authority responded stating that the existing use as a Place of Assembly would accommodate the proposed new use provided provision was made for car parking at a specified rate calculated on the floor area by which the existing building was extended. Cl.28 of the IDO contained certain parking requirements for a reception centre use.

No parking provision was made and the catering use continued until 1990 or 1991. The land then passed to the present occupier who proposed to modernise it for dancing and reception functions. The use of “Place of Assembly” required a permit under the current Planning Scheme.

The Responsible Authority sought an interim enforcement order under s.120 of the Planning and Environment Act against use as a place of assembly. It had the application issued on what it believed would be the first of three consecutive days for the site to be used as a teenage reception venue. It argued: that the period of cessation in 1990-91 had extinguished any non-conforming use rights; alternatively that any non-conforming use rights were extinguished on February 16, 1988 (when the Day One Planning Scheme came into operation) due to non-provision of parking.

The occupier denied that there had been any increase in floor area in 1961.

Held, dismissing the application

1. An interim enforcement order was analogous to an interim injunction and similar principles applied. The legislative intent in s.120 was for the Tribunal to adopt equitable rules of procedure and substance relating to interlocutory injunctions. The purpose of an interim injunction was primarily to reserve the status quo pending the hearing of the main action.
Principles concerning interlocutory injunctions, discussed.
Equity Doctrines and Remedies by Meagher Gummow and Lehane, p.493; Hubbard v Vospar [1972] 2 WLR 389 at 396, applied.
2. The application would be refused because:
 - (i) The continuing use rights may not have been extinguished
 - (ii) No undertaking as to damages had been given
 - (iii) The urgency of the initial application had passed. Although there was

some threat of use as a Place of Assembly this was unlikely to cause irreparable damage and the final hearing could be set down in approximately four weeks.

Appeal Site: 145-149 Ormond Road, Elwood

Mr R Bush, Solicitor, instructed by Ms C Mosk, Solicitor of Messrs Blake Dawson Waldron, appeared for the Requestor.

Ms L Gyfteas of Counsel, instructed by Mr B Crump, Solicitor of Messrs Ebsworth & Ebsworth, appeared for Metrolink Holdings Pty Ltd on September 20, 1991.

Mr M Naughton, Solicitor of Messrs Best Hooper, appeared for Metrolink Holdings Pty Ltd on September 27, 1991.

Determination and Reasons for Determination

The proceedings before this Tribunal were conducted over two hearing days. The Requestor applied for an Interim Enforcement Order pursuant to Section 120 of the *Planning and Environment Act* 1987 to restrain the Respondents from undertaking unlawful activities as a Place of Assembly at the appeal site at 145-149 Ormond Road, Elwood. This site was formerly a picture theatre being constructed in 1919. That use continued until 1961 whereupon it became a Place of Assembly for exclusive catering and reception. In that year minor modifications were undertaken to the building to accommodate the reception use. The use was said to continue until an unknown date somewhere between 1990 and 1991. The dispute relates to the date of cessation of the reception centre use, the Respondent alleging that it was within the requisite two year period and the Requestor saying it lay outside that time.

It is the Requestor's submission that the Occupier, Metrolink Holdings Pty Ltd, had no authority to conduct any use as a Place of Assembly for the site. Any rights that once existed, the Requestor said, had been extinguished as prior use as a Place of Assembly were extinguished after the day 1 planning scheme had become the effective (16th February 1988) and as a result there had been no lawful use of the site as a reception centre since that time. This was so because the planning controls in 1961 constituted the 1959 Interim Development Order of the Melbourne and Metropolitan Board of Works. It was Mr Bush's submission that Clause 28 of the Order provided that mandatory accommodation for stationary vehicles had to be provided with the use as a reception centre and were not. It was his view that no parking provision to accommodate stationary vehicles had at any time been made by the owner or occupier of the subject site.

The evidence is that the 1959 IDO was gazetted on the 16th March 1960 and on the 8th March 1961 the owner of the site, John Brownlow Pty Ltd, applied for a planning permit for exclusive catering and reception uses in a property described as having an existing use of 'Picture Theatre'. On the 23rd May of that same year the MMBW, as Responsible Authority, by letter dated the 23rd May 1961, responded to the application stating that the existing use of the site as a Place of Assembly would accommodate the proposed new use provided that provision is made for the parking of vehicles at the rate of one car space per 200 square feet of floor area *by which the existing building is extended*. The

Requestor sought to demonstrate that an increase in floor area had occurred by the production of building plans for the building from 1919, 1961 and a current plan lodged with the Council for a building permit detailing existing conditions and comparing them. It is the Responsible Authority's assertion that by scaling off from the plans, in 1961 an extension of floor area occurred to the first floor, but there had been no accompanying parking accommodation provided.

The Respondents' assertions were that there had been no increase in floor area but merely a levelling of the former dress circle floor to better accommodate reception use. It was a further submission that the Requestor's assertions in relation to the increase of floor area were erroneous and those allegations were being vigorously denied. Metrolink Holdings Pty Ltd (Metrolink), submitted that it had purchased and recently entered a commercial lease with an annual rent of \$40,000 and had made commercial commitments which involved the use of the property as a Place of Assembly. It was its further submission that a recent building application had been made for modernisation to accommodate the proposed use of the site for dancing and reception functions as a Place of Assembly.

The Requestor had applied to the Tribunal for an Interim Enforcement Order to restrain the Occupier, Metrolink, from staging a three day schedule activity at the site plus any further activities as a Place of Assembly contrary to the Planning Scheme. The aim is to protect an expected detrimental impact to amenity of commercial and residential neighbours. In substance it was the Requestor's case that there are no continuing user rights associated with the building and that any activities associated with a Place of Assembly now require a planning permit.

Consideration of the Merits of the Request

The Planning Scheme requires a permit for a Place of Assembly. No permit exists. The Respondent relied upon continuing user rights to support what it considered was a lawful use of the building and that the proceedings for an Interim Enforcement Order were inappropriate in the circumstances and that the matter should be properly considered at an enforcement order hearing. Therefore they oppose the Application.

The Requestor had instituted those proceedings on the same day that it believed was to be the first of three for the site to be used as a teenage reception venue. The hours of the function were to be from 7.00 pm to 11.45 pm Friday and Saturday and 1.00 pm to 5.45 pm Sunday, being the 20th, 21st and 22nd September 1991. There was to be provided supervised entertainment and sale of food. No alcohol or smoking were to be permitted. In addition and on different dates the Hall was also available for private functions by special bookings.

The Respondent had indicated to the Tribunal that it would not stage any adult function pending the outcome of these proceedings. It was also the evidence at the 27th September hearing, that the scheduled three day teenage receptions were not held because there had been a failure by Metrolink to comply with the requirements of the building permit issued to authorise the Hall modifications to stage the proposed functions. It was also the evidence that Metrolink had by letter dated the 16th August 1991 notified the Requestor of its intention to deploy the old theatre/reception rooms as reception rooms. The letter had never been

responded to by the Requestor. A Building Permit Application had also been lodged and approved by the Building Department for modification works.

It was the Requestor's evidence that it had acted upon information and belief it had formed when its officer, Ms Debra Robinson, had become aware of pamphlets advertising the three day teenage entertainment proposal. It was her further evidence that it was the Occupier's intention to charge the children an entry fee and also, as earlier mentioned, sell food during the night's activities. Finally, it was the Requestor's submission that it was unable to give an undertaking as to damages to protect the Respondent in the event of financial loss that unjustifiably incurred if an Interim Order was inappropriately made.

It was submitted by Mr Naughton for the Respondent that Interim Enforcement Orders are analogous to an interim injunction and that similar rules of principle apply. The Tribunal agrees with this submission and has formed the opinion that the intent of the Statute in Section 120 is for the Tribunal to adopt the equitable rules of procedure and substance relating to interlocutory injunctions.

The purpose of interlocutory proceedings is to preserve the status quo until the hearing of the main action. A Section 114 application bearing No 1991/30287 has been issued by the Requestor and notices under Section 115 forwarded by the Registrar to the notifiable people on the 23rd September 1991 took place. At the hearing, the Respondent indicated its intent to lodge an objection to the notice and contest the application at a hearing.

At the hearing's conclusion a decision was made by myself and published at the hearing whereby I declined to make an Interim Order. I now wish to record the reasons for that determination.

The Section under which the proceedings are brought implies the nature of the order to be interim or for a period only. I therefore form the opinion that the nature of any proceedings is intended as interim with an aim to primarily preserve the status quo pending the hearing of the main action. Not always however have the courts in responding to interlocutory injunction applications restricted themselves to preservation of the status quo. In certain circumstances the courts are prepared to take positive action if it is adjudicated to do so would best serve justice. Quoting from the text book *Meagher Gummow & Lehane 'Equity Doctrines and Remedies'* page 493 I find myself in agreement with one of the comments made by the authors in paragraph 2166. The comment is:

"The truth of the matter is that no real principles can be laid down."

The power of courts to invoke injunctions today tends more toward statutory authority than strict rules of equity. These proceedings before this Tribunal are clearly created by statute. Section 120(3) of the Act provides mandatory enquiries that must first be satisfied before exercising any discretion under Sub-Section 4 of that Section as to whether an Interim Enforcement Order should issue. Once having made those enquiries, nothing in the language of the statute in my opinion conflicts with the general principle attributable to interlocutory injunctions and it seems most appropriate to quote and follow the words of Lord Denning in the case of *Hubbard v Vospar* [1972] 2 WLR 389 at 396 (extracted from page 493 and 494 of the text book earlier referred to):

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead ... The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."

The purpose of this request was stated by the Requestor as to protect the public's rights from abuse by the Respondent using his land in an unlawful way and thereby denigrating the amenity of the neighbours in particular and the community generally. On the other hand, Metrolink is of the view that it has a right to use the land for the purpose published and that to otherwise restrain its activity could lead to serious and perhaps irreparable commercial damage.

The Tribunal formed the opinion on the evidence that the nature of the request was not to restrict a use that will result in irreparable damage. It did however acknowledge that there may be some community disturbances that may prove to be significant. On the other hand, considerable weight has to be made of the following facts: firstly, the Requestor's failure to make an undertaking to recompense the Respondents in the event of unjustifiable loss occurring, particularly as the restraint requested relates to commercial activity, and secondly where there is no permanent irreparable damage proved.

There was also the further weakness in the Requestor's case, that as it had been adjourned for one week, the urgency for the original restraint sought based upon imminent activities on the 20th, 21st and 22nd September had lapsed. To be weighed against that position, however, no undertaking was given by the Respondent that when the building permit conditions have been satisfied receptions for teenagers would not commence. In fact there was evidence of bookings being accepted.

The Respondent, Metrolink, in contesting the evidence of the Requestor had in my opinion raised a sufficient doubt as to the rescission of the continuing user rights as alleged by the Requestor. It was also Metrolink's further submission that because the Section 114 hearing for an Enforcement Order can be set down in the near future to properly explore in detail the respective user rights, the Interim Order application should be set aside.

On balance, the evidence of the rights of the Occupier did persuade me that the Requestor's claim ought not to be allowed particularly as no undertaking had been given. I so found because of the following reasons:

1. The continuing user rights may not be extinguished (particularly as the Council had issued a Building Permit for renovation of the Hall for use as a Place of Assembly) and therefore provide a reasonable defence to the primary claim of the Requestor.
2. No undertaking had been provided by the Requestor in circumstances of commercial loss.
3. The urgency of the initial application has now passed although there is some

threat of the site being used by the Occupier as a Place of Assembly, but there is unlikely to be irreparable damage as a result of such use and the hearing for an Enforcement Order can be set down in approximately four weeks hence.

Finally, there was a request for costs by the Respondent but after considering the matter I made an order to reserve costs and leave be granted to make submissions at the completion of the enforcement proceedings.

Determination

Section 120 of the *Planning and Environment Act 1987*

1. The determination of the Tribunal is that the application for an Interim Enforcement Order is dismissed.
2. Costs are reserved with liberty for either party to apply for an Order at the conclusion for whatever reason of the Enforcement Order proceedings in Appeal No 1991.30287.

AED