Privy Council Appeal No. 20 of 1973

Associated Minerals Consolidated Ltd. and Another – *Appellants*

v.

Wyong Shire Council – – – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH OCTOBER 1974

Present at the Hearing:

LORD WILBERFORCE
LORD HAILSHAM OF ST. MARYLEBONE
LORD CROSS OF CHELSEA
LORD SALMON
SIR HARRY GIBBS

[*Delivered by* LORD WILBERFORCE]

This is an appeal from a decree of the Supreme Court of New South Wales in its equitable jurisdiction dated 18th May 1972. By that decree the learned judge (Hope J.) declared that the use of certain land in the Shire of Wyong for the purpose of the mining of certain minerals without the consent of the respondent Council was in breach of a Planning Scheme of the Shire of Wyong, and granted an injunction against using the land for that purpose without the respondent's prior consent.

The subject land is known as the North Entrance Peninsula and lies between the Pacific Ocean and Tuggerah Lake. It is about 1,750 acres in extent and substantial parts of it are covered by trees in the form partly of a rain forest and partly of an angophora forest. The soil of the peninsula is basically sand, and is believed to contain minerals characteristically found in sand such as rutile and zircon. An estimate was given to the judge of an established value of $53 million.

The conflict in the present proceedings is between the appellant companies, which desire to extract the minerals, and the respondent Council which has come to desire to preserve the peninsula, or the greater part of it, for its amenity and natural beauty. The process of mining would involve the destruction of vegetation, the removal and piling of the top soil and the excavation of the sandy subsoil by dredging and extraction of the minerals. The rain forest, it is not disputed, would be irremediably destroyed.

The subject land is Crown land: it comprises four adjoining parcels known in these proceedings (running from south to north) as M.L.s 42, 48, 51 and 44. Before 1961 prospecting licences had been granted in respect of each parcel, and some exploratory work by drilling of holes,

later to be detailed, had been carried out. There have been various changes in the parties who from time to time have had rights over the four parcels under the Mining Act 1906. It is not necessary to narrate these, nor to enter upon the changes in the structure of the group of companies now represented by the two appellants; except that in 1967 the second appellant came with its parent company, Wyong Minerals Ltd., under the control of the first appellant these are not material for the present appeal. It is relevant, merely, to state that the four parcels were at the commencement of the proceedings in December 1971 held under Mining Leases granted pursuant to s.40 of the Mining Act 1906 as follows:

(i) The second appellant was the lessee of M.L.42 under a Special Mining Lease granted on 3rd May 1961.

(ii) The second appellant was the lessee of M.L.48 under a Special Mining Lease granted on 14th June 1961.

(iii) The second appellant was the lessee of M.L.51 under a Special Mining Lease granted on 29th August 1962.

(iv) The first appellant was the lessee of M.L.44 under a Special Mining Lease granted on 22nd February 1967.

The terms of the leases (i) to (iii) were deemed to be current at the commencement of proceedings by virtue of section 107A of the Mining Act 1906: the term of lease (iv) was similarly deemed to be current after 22nd February 1972. By each of the Special Mining Leases the land comprised therein was demised for the purpose of mining therein for zircon, rutile, ilmenite and monazite and for purposes connected with such mining being mining purposes within the Mining Act 1906 and for no other purpose. The leases specified the depth down to which mining was permitted as 100 feet below the surface as regards M.L.s 42, 48 and 51. There was no limitation as regards M.L.44. They contained, as is usual, clauses obliging the lessees to work the mine in the best and most effectual manner and to the best advantage without interruption and obliging the lessees to employ a stated number of workers, but the latter obligations have been suspended from time to time on application by the lessees.

The Planning Scheme of the Shire of Wyong was made under the provisions of Part XIIA of the Local Government Act 1919 as amended. On 6th January 1961 a direction was given to the respondent Council, and the Council thereupon came under obligation to prepare a Scheme as soon as practicable through a planning committee and to forward it to Departments of the Crown and other bodies, which might then make representations (section 342 F Local Government Act 1919–1957). Section 342 G (*ibid.*) lists in considerable detail the matters which may be provided for in the Scheme. These are very wide; they include the zoning of land and the prohibition in any zone of use for specified purposes. The Act contains provisions regarding the approval and prescription of Schemes and regarding their enforcement. Some of these have been the subject of amendments subsequent to 1961 which need not be specified. There is also, in Division 7 of Part XIIA, a provision as regards interim development, which too, was substantially amended in 1962 by the Local Government (Town and Country Planning) Amendment Act 1962. Under this provision there was made in 1957, and in force in 1961, Ordinance No. 105, which was a General Interim Development Ordinance. Some reference will be made later to this matter.

Pursuant to the 1961 direction, the respondent Council prepared a Planning Scheme, and on 3rd May 1968 the Wyong Planning Scheme Ordinance was prescribed by publication in the Government Gazette.

No issue was raised before their Lordships as to the validity of this prescription. Those provisions of the Ordinance which are particularly relevant to the present appeal are the following:

Part III deals with zoning. It contains a zoning table which by clause 13 is made applicable to land in a zone. The subject land falls into three of the categories specified in the table.

(i) Non-urban "A"—covering part of M.L.44. Use of land in this category for "other purposes" which in fact would include mining is permissible only with the consent of the responsible authority (*i.e.* the respondent Council).

(ii) Residential "A"—covering part of M.L.44. Use of land in this category for mines is absolutely prohibited.

(iii) Open space, recreation—covering M.L.s 42, 48 and 51 and part of M.L.44. Use of land in this category for mines for or in connection with the purpose of obtaining rutile, zircon and similar minerals is permissible only with the consent of the responsible authority (*i.e.* the respondent Council).

The respondent Council's claim in these proceedings is based upon these provisions and it is clear, in their Lordships' opinion, that, subject to admissible defences, they are a proper foundation for the Council's claim for relief, since no consent of the Council has been given, or sought, for the use of any part of the subject lands for mining purposes.

The Ordinance contains a number of provisions which are invoked by the appellants by way of defence.

First, clause 14 enables an existing use of land to be continued notwithstanding the zoning restrictions. Existing use is defined in clause 3 as "a use of . . . land for the purpose for which it was used immediately before the appointed day" (*viz.* 3rd May 1968). This clause is however cut down by clause 18 which prevents an "existing use" being relied on if commenced after 6th January 1961 in contravention of the Town and Country Planning (General Interim Development) Ordinance (No. 105). It has been the contention of the respondent Council that any use for mining purposes after 6th January 1961 would in fact come within this provision.

Second, clause 48 contains a general saving provision in favour of development of any description specified in Schedule 6. Schedule 6 contains the following paragraph 6:

> "6. The carrying out by the owner or lessee of a mine of any development required for the purposes of the mine, except . . . (immaterial)."

The Ordinance, further, by clause 44 confers power to make tree preservation orders, in the circumstances and subject to the conditions there set out. The respondent Council passed two resolutions in relation to trees, on 22nd July 1971 and on 9th December 1971, and as an alternative to its claim based on the zoning provisions sought relief based on the provisions of these resolutions. Their validity and effect has been contested by the appellants; the trial judge made no decision with regard thereto, it being unnecessary for him to do so in view of his finding as to the zoning restrictions. The respondent Council sought to invoke them before their Lordships.

Further narrative details will become necessary in relation to particular defences of the appellants but enough has now been stated to enable their Lordships to deal with the appellants' first main contention. This is

that Part XIIA of the Local Government Act 1919 does not authorise the inclusion in a Planning Scheme Ordinance of any provision whereby the holder of a Mining Lease issued pursuant to the Mining Act 1906 can be prevented from exercising the rights conferred and fulfilling the obligations imposed on him by the Lease or by the Mining Act and Regulations made under it.

This contention is presented in two ways. First,—this is the more extreme argument—it is said that the Local Government Act 1919 Part XIIA does not apply to mining land at all, the latter being governed exclusively and comprehensively by its own code as stated in the Mining Legislation. Secondly, if the first argument is not acceptable in its full width, it is said that the Planning Ordinance of the Shire of Wyong should not be construed as taking away rights validly conferred upon the holders of Mining Leases to exploit their holdings in accordance with the terms of the Leases and of the Mining Legislation.

Their Lordships are unable to accept the contention in either form.

In its wider presentation the argument raises the issue, which frequently arises, of the interrelation in law of two statutes whose field of application is different, where the later statute does not expressly repeal or override the earlier. The problem is one of ascertaining the legislative intention: is it to leave the earlier statute intact, with autonomous application to its own subject matter; is it to override the earlier statute in case of any inconsistency between the two; is it to add an additional layer of legislation on top of the pre-existing legislation, so that each may operate within its respective field?

Discussion of such questions commonly starts from the use of the maxim "*generalia specialibus non derogant*" and with citation from the judgment of this Board in *Barker v. Edger*:

> ". . . The general maxim is, '*Generalia specialibus non derogant*'. When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms." [1898] A.C.748, 754.

The principle stated in this passage and others to a similar effect is of course unexceptionable but cases are rarely so simple as this, for even where the earlier statute deals with a particular and limited subject matter which is included within the general subject matter with which the later statute is concerned, it is still a matter of legislative intention, which the courts endeavour to extract from all available indications, whether the former is left intact, or is superseded, and the cases in which the latter has been held are almost as numerous as the former.

The present case is not one of a private legislative bargain for the benefit of individuals, which, it could be said, should not be disturbed by later general legislation (*cf. per* Lord Blackburn in *Garnett v. Bradley* [1878] 3 App. Cas. 944, 968). Nor is it one of a special class or area or subject, as to which the question might be whether it falls within a general, or wider, class or area or subject. It is rather one of two public general Acts as to which the question is, first, whether there is any inconsistency between their provisions, and secondly, if there is, whether the earlier (the Mining Act) is *pro tanto* repealed by the later (the Local Government Act Part XIIA).

Both Acts apply or are capable of being applied with complete generality to land in the State of New South Wales. Can they, in relation to a given piece of land, co-exist? In their Lordships' opinion they clearly can and do. The Acts have different purposes, each of which is capable of being fulfilled. The purpose of the Mining Legislation is to enable persons to acquire a legal right or title to enter upon, to prospect, and ultimately to mine, land in the State. It also—and this is important—regulates the conditions under which, as between private citizens, rights may be acquired and used. In relation to the subject lands, it provides the title of mining enterprises to enter upon and to work land of the Crown. The planning legislation, *i.e.* Part XIIA of the Local Government Act 1919, is in its turn capable of being applied to all land in the State, including Crown Land, without exception. It enables restrictions as to use to be imposed upon all such land. Not only can such legislation restricting user coexist with the rights of persons, whether derived from the Crown or from private owners, to mine land, but the whole purpose which underlies the planning legislation would be defeated if it did not. Planning by its nature presupposes the possibility of competing uses for land and endeavours to regulate these in the public interest. The Local Government Act itself clearly points toward the generality of its application, and away from any suggestion that there exists a large area of exclusion from it. The definition of land contained in Part XIIA, s.342 B, is stated to include any estate or interest in land and any right in or affecting land and also all lands of the Crown. There is no indication anywhere in this Part of an intention to exclude land used, or usable, for mining, or to reserve the application of Mining Legislation. Section 10 of the Act sets out a list of enactments which are stated not to be affected by the Act: the Mining Act 1906 is not mentioned, and, while it is true that this section does not form part of Part XIIA, its application is general and it has several times been amended since Part XIIA was introduced in 1945, without adding the Mining Act 1906 to the list of preserved statutes. It mentions some statutes, *e.g.* the Liquor Act 1912—which, in spite of preservation, must clearly operate subject to planning restrictions.

As regards the narrower argument, it is true no doubt that the appellants were the holders ot mining leases at the time when the planning restrictions became effective, though it is perhaps relevant to notice that (as will be shown later) they were still, at most, at the stage of exploration and that the continuation of leases was discretionary. The Planning Scheme does nothing to invalidate, or nullify, the leases: what it does is to require the lessees to operate in conformity with planning restrictions: these, except as regards the land zoned Residential "A", permit mining subject to consent of the responsible authority. If the land were private land, there could be no doubt, in their Lordships' opinion, that, whatever the terms of the lease, mining operations would have to take place subject to planning regulation, and the position of land held on lease from the Crown must be the same.

The appellants relied upon the provisions of section 342 G (4) of the Local Government Act. This reads:

> "A scheme may suspend either generally or in any particular case or class of cases the operation of any provision of this or any other Act, or of any rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made, to the extent to which that provision is inconsistent with any of the provisions of the scheme."

This it was said specifies a procedure whereby a Planning Scheme might be made to override a pre-existing Act or regulation such as

Mining Legislation—one which might have been, but was not, used in the present case.

But this paragraph, in terms, only applies where the previous provision is inconsistent with the Scheme. In their Lordships' view there was no such inconsistency; the paragraph was not applicable, and no valid argument can be based upon it.

Their Lordships therefore conclude that Part XIIA and the Planning Scheme made under it effectively operated over all the subject lands.

The next question is whether the appellants can claim the benefit of the existing use provisions in the Scheme. These have already been quoted. In order to deal with this it is necessary to state some facts regarding the actual use of the lands up to 3rd May 1968. These were the subject of findings by the trial judge which were not challenged on appeal. Their Lordships will state them in summary form from the time when operations commenced on the lands though for the purpose of the existing use provisions it is the use immediately before the appointed day that is relevant.

1. Before 6th January 1961, starting in mid-1956, a number of holes had been drilled on M.L.44, in order to determine the presence of minerals, and in relation to negotiation with the Mines Department for the excision of 80 acres in the north-eastern corner. There had been some 61 holes drilled on M.L.s 42, 48 and 51 and some further check drillings on behalf of an unrelated company with a view to possible purchase. There was a map showing diagrammatically the location of these holes. It appears that, in this early period, they were widely spaced: about 1 per 5 acres on M.L.44 and more widely on the other lots. The holes were about 3″ in diameter, and were taken down to varying depths.

2. After 6th January 1961 and before 3rd May 1968:

(*a*) M.L.42. Drilling took place between September 1964 and December 1966 in order to determine a dredge path. This was suspended or abandoned on the merger of Wyong Mining Ltd.—and so indirectly of the second appellant—with Associated Minerals Pty. Ltd.

(*b*) M.L.44. Drilling took place between December 1963 and March 1964 along a line (the purple line) running N.W.–S.E. from Tuggerah Lake across part of M.L.44 and part of M.L.51.

(*c*) M.L.48. Similar drilling to that mentioned in (*a*).

(*d*) M.L.51.

(i) See (*b*) above;

(ii) drilling took place of an exploratory character along a line (the yellow line) but this was, as the judge found, not established to be before 3rd May 1968. Drilling along the lines mentioned was spaced at intervals of about 30 yards.

Thus, as at 3rd May 1968, the most recent operations had been those conducted on M.L.s 42 and 48 in September–December 1966.

Nothing had been done on M.L.44 since 1964 and then only along a particular line—the purple line.

In considering whether such activities as these can amount to an "existing use", a broad and businesslike approach must be adopted,

regard being had to the nature of the work undertaken. As was said in the High Court:

> " It is not difficult to agree that the use of premises for a given purpose is not necessarily interrupted whenever activities for that purpose are temporarily stopped. When such an ordinance as is here in question refers to the purpose for which land or a building ' was used ' on a given day, it calls for an inquiry, not limited to the physical activities which might have been observed on the land or in the building on that day, but taking account of any course of user which may fairly be regarded as having been current on that day. Most forms of user of land or buildings involve not continuous activity but recurring activities . . . Whether an interruption of activity puts an end to the user must always be a question of fact, and in resolving the question in each case that arises the circumstances of that case must necessarily be considered as a whole." (*Rosenblum v. Brisbane City Council* (1957) 98 C.L.R. 35, 45–6)

A quality which the use must have, in order to qualify, is that of continuity: this is indicated by the words, in clause 14 of the Planning Ordinance, " may be continued " and the necessity for it has been affirmed in many decided cases. Naturally the requirement must be sensibly interpreted, in relation particularly to the nature of the use—see for example *Woollahra Municipal Council v. Banool Developments Pty. Ltd.* (1973) 47 A.L.J.R. 714—a

> " use which is still continuing, notwithstanding that it may be marked by some interruptions or breaks which are not of such a kind to bring about a termination or abandonment of the use " (*ibid. per* Mason J. p.716).

From the facts above stated it is, in their Lordships' opinion, reasonable to conclude that immediately before May 1968 there was no existing use for any mining purpose, whether exploration or extraction. The element of continuity of use, essential if reliance is to be placed on existence of it on the appointed day, was completely absent. At the highest, and putting it more favourably to the appellants than their Lordships would wish to do, there could be said to have been use for exploration purposes, but nothing more. No actual dredging took place in fact until July 1969 when a dredging plant (known as Plant 10/10) commenced to mine M.L.42.

But use for exploration purposes such as was found to have existed, could not justify use for actual mining purposes, on the basis of existing use. The two types of operations widely differ in intensity. These are differences not merely of degree but in kind. The nature of exploratory drilling has already been described. That of dredging involves the use of bulldozers to remove the trees, to remove all the top soil, to make large excavations to permit the floating of the dredge, and the erection of facilities for the passing of the excavated sand through suction pipes. Further the two activities are significantly, indeed vitally, different for planning purposes. Exploration can be effected without radical disturbance of the top soil and vegetation and with minimal destruction of trees. Extraction involves the (irrevocable) destruction of forest areas, removal of top soil, and levelling of contours. The principle on which the continuation of existing use is permitted, must necessarily exclude from the permission operations so radically different in intensity and effect on planning as extraction by dredge differs from exploration by drill.

The defence of existing use therefore, in their Lordships' judgment, totally fails, and it is therefore unnecessary to consider whether any part of the existing use is disqualified on account of breach of the provisions as to interim development.

The third defence which the appellants put forward is based upon clause 48 of the Planning Ordinance and paragraph 6 of Schedule 6. This paragraph has already been quoted. The paragraph uses the words " owner or lessee of a mine " and " for the purposes of the mine ". In clause 3 of the Ordinance there is a series of definitions expressed to apply unless inconsistent with the context or subject matter. Under the word " mine " there is the following:

> " ' Mine ' means any place, open cut, shaft, tunnel, pit, drive, level or other excavation, drift, gutter, lead, vein, lode or reef wherein, whereon or whereby any operation is carried on for or in connection with the purpose of obtaining any metal or mineral by any mode or method and any place adjoining on which any product of the mine is stacked, stored, crushed or otherwise treated but does not include a quarry."

There appear to be indications in Schedule 6 as to what kind of development is in mind. The Schedule contains a series of exceptions from planning restrictions thenceforth to be imposed: their common feature is that some person has on foot and is operating an established undertaking. Each paragraph allows the owner or operator of the undertaking to carry out works of development required for the undertaking without the necessity of applying for consent from the responsible authority.

The freedom from the necessity of applying for consent provides an indication of the limited and circumscribed character of the exemptions: for if these were extended widely beyond established undertakings and what is required for their development, the whole system of projected control would be undermined. So in the case of a mine, the intention appears to be clear that what is intended to be allowed cannot be the vast range of possible operations covered by the definition, but a concrete, established, and working undertaking. In their Lordships' opinion this conception is underlined by the use of the words " owner or lessee of a mine "—words which presuppose that a stage has been reached beyond that of mere prospecting. Admittedly the appellants in this case are " lessees " in the sense that they have leases, but, as has been shown, their operations had not, by May 1968, become such as lessees of a mining undertaking would carry out. On this interpretation, since the appellants on no view could be said to have had an established undertaking of mining on any of the parcels, they are unable to take the benefit of clause 48.

The fourth defence put forward by the appellants is one of laches and acquiescence by the Council. Related thereto is a contention that the learned judge ought not, in the circumstances, to have granted the discretionary remedy of an injunction. These were defences of substance which required a careful examination, over a number of years, of the history of the appellants' operations and of the respondent Council's action or inaction with regard to them. The appellants, or their predecessors, had been on the subject lands, intermittently at any rate, for a considerable period. They had spent large sums of money in exploration. They had applied to the Department of Mines for mining leases, and, with reference to each proposed lease, the Department wrote to the Council asking whether the latter had any objection to the grant of a lease, and whether they desired the incorporation in the lease of any special conditions. The Council, in each case, replied that they had no objection, but in some cases sought the inclusion of some special condition: these had no reference to general planning matters, but related to such particular requirements as the making of roads. It seems apparent that the respondent Council never thought, until late in the 1960s, that they should, or

could, apply planning restrictions to these lands; rather they regarded the Minister for Mines as responsible for such matters as might arise. Further, the respondent Council rated each of the subject parcels as mines, so, as the appellants complain, themselves benefiting from the activity which they later set out to stop. However it appears that the Council had no option as to this rating basis under the terms of the Local Government Act.

The evidence as to knowledge and acquiescence is more difficult to assess. It was not proved that the Council knew of the drilling operations carried on over the years. There was some evidence that some Councillors knew, in 1965, of proposed mining operations on the appellants' Tuggerah leases (*i.e.* the subject lands) but not that mining there was immediately, or shortly, imminent. Nothing specific seems to have been said as to the necessity for the appellants to obtain planning consent for mining operations. From 1967 conservationist interest in the rain forest area was becoming awakened, and the Council asked the appellants as to their intentions, expressing concern as to the effect which mining operations might have on the preservation of valuable flora, but no concrete definition of attitude was made.

In July 1968 there was a meeting between representatives of the mining interests and conservation groups at which the problem of the preservation of the rain forest and of the angophora was discussed. In October 1968 the acting General Manager of Associated Minerals Consolidated Limited wrote a letter to the " Wyong Advocate " stating the Company's plans in some detail and saying that they envisaged at least 15 years of operations in Wyong Shire at an increased tempo to the then current operation. It was also said that a large mining plant with a value in excess of $1 million would be installed in the Tuggerah area immediately after March 1969, almost doubling the Company's mining capacity. A copy of this was sent to the respondent. After further correspondence the respondent, in January 1969, said that it was not satisfied with the position and intended to make further representations to the Department of Mines.

In March 1969 the Department of Mines notified Associated Minerals that consent had been given for that Company to occupy two small areas to the south of M.L.42, which did not include the rain forest or the angophora, and to mine them during the pendency of their applications for a lease. The Company was informed that the area was zoned " open space " and " recreational area " in the Wyong Shire Planning Scheme and that consent should be obtained from the respondent prior to the commencement of operations. This consent was applied for and given in May 1969. About the same time a dredge, known as Plant 10/10, was set up in M.L.42 and started operations about July 1969. Its installation cost some $100,000. It continued operations in various parts of M.L.42 and to the south of it and, their Lordships understand, was permitted to continue mining after the hearing before the trial judge. In July 1971 Associated Minerals started to assemble on M.L.44 a very large plant, known as Plant 20. Assembly was completed in December 1971 but it has never operated, being prevented from doing so by the order of the trial judge.

These matters were considered with great care in the judgment of the learned judge, which fully and fairly sets out the evidence summarised above together with other relevant material on points of detail. He first, rightly in their Lordships' judgment, distinguished three periods to which separate considerations apply. Before 1961, the respondent Council had no power to prevent mining on planning grounds. Between 1961 and 1968 he held that the conduct of the respondent Council did not affect the

activities of the mining companies and that nothing that was done was inconsistent with compliance by the companies with Part XIIA of the Local Government Act 1919 and with the General Interim Development Ordinance No. 105 of 1957. On the other hand action taken after 1968 required careful consideration.

The law on this subject, which was correctly applied by the learned judge, contains two propositions. First, even in cases where relief is being sought by the Attorney General in the public interest (and the respondent Council, acting under s.587 of the Local Government Act 1919, is placed in a similar position), the granting of an injunction is discretionary (*Attorney General v. Johnson* (1819) 2 Wils. Ch. 87, *Attorney General v. Sheffield Gas Consumers Company* (1853) 3 De G. M. & G. 304, and *Attorney General v. Newry No. 1 R.D.C.* [1933] N.I. 50).

Secondly, however, it is necessary to take into account that the plaintiff is acting on behalf of the public and in the public interest. It is necessary therefore to base the granting or denial of equitable relief on broader grounds than would normally apply as between private citizens. As was said in *Attorney General v. Newry No. 1 R.D.C.* the Courts are somewhat slower to deny the Attorney General, as the custodian of the public rights, relief on this ground (*sc.* delay) than in the case of an individual (*l.c.* p.71). The injury to a public interest by denial of relief, its extent and degree of irremediability, must be weighed against any loss which the defendant may have sustained by the plaintiff standing by while the defendant incurs expense or, if such is the case, misleading the defendant into supposing that its activities were or would be permitted (see *Lindsay Petroleum Co. v. Hurd* (1874) L.R. 5 P.C. 221, 240: *Brickworks Ltd. v. Warringah Corporation* (1963) 108 C.L.R. 568). It is quite clear, and was so found by the judge, that the respondent Council did not at any time represent or hold out to the mining companies that it had consented to their operations—(contrast the *Brickworks* case above cited)—so no question of estoppel could arise. Indeed the companies must at all relevant times have known that a planning scheme was under preparation under which consent for mining in certain areas at least would be needed. With regard to the two plants, it is clear, in their Lordships' opinion, that there was no undue delay by the Council in starting proceedings after the installation of Plant 20 (they were started in December 1971) and moreover the mining companies were fully aware from July 1971, when installation started, both of the existence of the Planning Ordinance and of the fact that the respondent Council was seeking to control mining operations, for it was then that the first of the resolutions as to tree preservation was passed. It was therefore only the installation and working of Plant 10/10 that gave cause for concern. The learned judge accepted that an injunction as regards this plant would cause hardship. He pointed out that the companies had recovered some of their expense, but not all of it, by operating the plant. In deciding finally whether to grant an injunction, he took into account both that the Council has power under the Planning Scheme to grant consent to mine in particular areas, and also that against any decision to refuse consent an appeal lay to the Land and Valuation Court (now to the Local Government Appeals Tribunal). After weighing all these factors, he granted an injunction, but suspended its operation as regards Plant 10/10 for a short period: as has been stated, it has been permitted to continue operations, under consent, effectively along the eastern side of the peninsula, and not in the forest area.

On this whole matter their Lordships are entirely satisfied with the view of the facts and with the principles of law applied by the judge: they see no ground upon which to interfere with his discretionary decision.

For these reasons, in their Lordships' opinion, the appellants are unable to make good any effective defence against the respondent's claim to an injunction under the Planning Scheme. On this view, it becomes unnecessary to decide whether the Council could also make good its claim for relief under the Tree Preservation Orders. Since the learned trial judge refrained from deciding this matter and since, it appears, such orders have not been passed upon by the Supreme Court of New South Wales their Lordships consider that they should refrain in this appeal from expressing any view as to their validity or effect.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

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