[HIGH COURT OF AUSTRALIA.]

ELECTION IMPORTING COMPANY PROPRIETARY LIMITED . . . . . Applicant;
Plaintiff,

AND

COURTICE AND OTHERS . . . . . Respondents.
Defendants,

H. C. OF A. 1949.

SYDNEY, *June* 16; *July* 1.

Williams J.

Customs—Watches and watch movements—Importation—Licence—Conditions—Currency—Licence acted upon—Revocation—Wholly or partly—Reasons therefor—Power—Exercise by Minister or delegate—Administrative or quasi-judicial—Customs Act 1901-1936, *s.* 52—*Customs* (*Import Licensing*) *Regulations* (*S.R.* 1939 *No.* 163), *regs.* 3, 8, 11, 12, 14.

The *Customs* (*Import Licensing*) *Regulations* authorize the Minister or his delegate to prohibit goods being imported at any time prior to their actual entry into Australia.

The powers thus conferred by the regulations are administrative in nature and in exercising them the Minister or his delegate, although not entitled to act arbitrarily or capriciously, is nevertheless not bound to act judicially.

B. Johnson & Co. (*Builders*) *Ltd.* v. *Minister of Health*, 177 L.T. 455, applied.

Motion for Injunction.

In an action brought in the High Court by Election Importing Co. Pty. Ltd. against Benjamin Courtice, Minister of State for Trade and Customs, the Comptroller of Customs and the Collector of Customs of New South Wales, the plaintiff, by motion, applied for an interlocutory injunction restraining the defendants until the hearing of the action or further order of the Court from proceeding to cancel import licence No. 094585 or from taking any action against the plaintiff on the basis that that licence had been validly cancelled.

The motion was heard before *Williams* J. in whose judgment hereunder the material facts are set forth.

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Dr. F. Louat, for the applicant.

P. C. Spender K.C. and *A. J. Moverley*, for the repondents.

Cur. adv. vult.

July 1.

The following written judgment was delivered :—

WILLIAMS J. This is a motion for an interlocutory injunction in an action between Election Importing Co. Pty. Ltd., a company duly incorporated in accordance with the laws of New South Wales, as plaintiff and Benjamin Courtice, the Minister of State for Trade and Customs, the Comptroller-General of Customs and the Collector of Customs of New South Wales as defendants. The motion asks that until the hearing of the action or further order of this Court the defendants be restrained from proceeding to cancel import licence No. 094585 or from taking any action against the plaintiff on the basis that this licence has been validly cancelled.

The plaintiff is primarily engaged in the importation of watches and watch movements from Switzerland, and its managing director, Walter Sternberg, is the agent in Australia of Nouvelle Fabrique Election SA. of La Chaux-De-Fonds, Switzerland, a manufacturer of watches and watch movements (hereinafter called the Swiss company). The licence in question was granted to the plaintiff on 16th March 1949 under the provisions of the *Customs* (*Import Licensing*) *Regulations* and authorized it to import into Australia 3,000 watch movements manufactured by the Swiss company which were expected to reach Australia in three shipments of about 1,000 movements each on approximately 15th May, 15th June and 15th July 1949. The provisions of reg. 8 of the *Customs* (*Import Licensing*) *Regulations* were complied with as the order for these movements was placed with the Swiss company immediately after the granting of the licence and was accepted by that company on 1st April 1949. On 2nd May 1949 the plaintiff company ordered 3,000 watch cases from a company in Victoria to case the movements on their arrival in Australia.

The licence contains a condition that payment and final settlement for the purchase of the watch movements will be in Italian lira and that now and in the future no demand will be made for Swiss currency in regard to this transaction. The total purchase price was £8,026 15s. 7d. and the licence authorized importation of movements to the total value of £8,027 0s. 0d. c.i.f. & e. The contract of purchase between the Swiss company and the plaintiff provided that payment should be made to the Banca Commerciale

Italiana di Milana for Mr. Ricardo Groth of that city after the plaintiff had received the air-mail waybill.

On receipt of invoices for the first shipment the plaintiff opened a letter of credit for the purchase money for this shipment being 5,958,315 Italian lira (£A3,286) with the Union Bank of Australia, Sydney, and the money was cabled to Groth on 24th May 1949. On 26th May 1949 the plaintiff received a letter signed by M. Ryan, Administrative Officer, written on 25th May 1949, in the following terms :—" With reference to Licence No. 094585 issued in Sydney on 16th March, 1949 in favour of Election Importing Co. Pty. Ltd., Sydney, for the importation of 3,000 watch movements of Swiss origin ex Italy of c.i.f. & e. value of £8,026 15s. 7d. I have to advise that the Collector of Customs, Sydney, has been instructed to take action to cancel the licence mentioned in respect of that portion of the value of the licence not remitted to date. You are directed to return the original licence to the Collector of Customs, Sydney, as early as possible for cancellation." No shipment of the watch movements has yet reached Australia but it is clear from the letter that the defendant Minister is not seeking to cancel the licence with respect to the first but only with respect to the second and third shipments.

M. Ryan is one of the licensing officers within the meaning of the *Customs* (*Import Licensing*) *Regulations* to whom the Minister for Customs pursuant to reg. 14 has delegated all his powers under regs. 10, 11 and 12 of granting, refusing to grant and revoking licences and of approving, determining, varying and modifying the terms and conditions of licences, so that the delegated powers may be exercised by the delegate.

Pending the hearing of the motion Sternberg has received a further invoice from the Swiss company in respect of the second shipment and is obliged under his contract forthwith to open a further letter of credit in favour of Ricardo Groth at Milan. But the Bank has been requested by Ryan not to open any further letters of credit in respect of the licence and has refused to do so.

Before the grant of the licence there had been interviews and correspondence between Sternberg and Ryan as a result of which Ryan stated that he would approve of the issue of a licence to import the movements on condition that Sternberg produced some evidence that the Swiss exchange authorities would not claim Swiss francs in respect of the transaction and that the watch movements would be assembled in Italy. Sternberg then produced a letter from the Swiss Watch Chamber of Commerce to the Swiss company stating that the former would have no

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objection to granting the latter an export quota to ship watch movements to Australia without any payment within the framework of the Anglo-Swiss monetary agreement and outside the sterling quota. The letter stated that this transaction would not require any payment in Swiss francs or in sterling from Australia to Switzerland, nor would such a payment be requested afterwards. The Swiss company then wrote to the plaintiff certifying that they agreed to export their watch movements per medium of an agent in Italy and that no claim for the value of the goods in question would be made by them or the Swiss authorities against sterling, that the transaction would not require any payment in Swiss francs or in sterling from Australia to Switzerland, and that such a payment would not be requested afterwards.

In his affidavit Ryan states that on 24th May 1949 he received information which led him to believe that the watch movements were not to be assembled in Italy, and would be paid for in Swiss francs, and that this led him to write the letter the following day. The reference in the interviews and correspondence between Sternberg and Ryan prior to the granting of the licence to the watch movements being assembled in Italy is somewhat ambiguous, but in view of the certificate of the Swiss company it would not appear to mean more than that the watch movements would be exported from Italy. In any event the condition in the licence only relates to the payment of the purchase money and not to the assembly of the movements. This condition relates to the payment of the purchase money by the plaintiff to the Swiss company, and does not relate to any subsequent dealings between the Swiss company and Ricardo Groth after the plaintiff has complied with this condition by paying Groth in Italian lira. The payment for the first shipment was in Italian lira and there is no evidence that the plaintiff intends to pay for the subsequent shipments in any other manner. There is therefore no evidence that the condition has been broken.

The plaintiff contends that it is entitled to the injunction sought on four grounds. They all depend upon the construction of the *Customs* (*Import Licensing*) *Regulations*. These grounds are (1) that under the regulations the Minister or his delegate can only revoke a licence before it has been acted upon; (2) that the Minister or his delegate can only revoke a licence as a whole and cannot revoke part of a licence; (3) that the Minister or his delegate is under a duty to act judicially and cannot therefore revoke a licence without giving the licensee an opportunity of being heard; (4) that even if the authority to cancel a licence is administrative

and not quasi-judicial the authority does not confer an uncontrolled discretion and to be effective must be exercised, in the words of Lord *Macmillan* delivering the judgment of the Privy Council in *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (1), " bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally." The *Customs (Import Licensing) Regulations* came into force on 1st December 1939. Section 52 of the *Customs Act* provides that the following are prohibited imports :—(*g*) all goods the import of which may be prohibited by regulation. Section 56 provides that the power of prohibiting importation of goods shall authorize prohibition subject to any special condition or restriction and goods imported contrary to any such condition or restriction shall be prohibited imports. The regulations are delegated legislation made under the authority of these provisions particularly s. 52 (*g*). Their validity was upheld in *Poole* v. *Wah Min Chan* (2). Regulation 3, so far as material, provides that the importation of goods into the Commonwealth is prohibited unless a licence to import the goods is in force and the conditions (if any) to which the licence is subject are complied with. It was contended that the word " importation " in this regulation is not confined to the act of bringing the goods into Australia but includes the whole transaction of ordering and shipping the goods after a licence has been granted to import them as well as landing them into Australia. It was therefore contended that the Minister could not revoke a licence after firm directions as required by reg. 8 had been despatched to the overseas supplier and the licence had accordingly been acted upon. But I can find nothing in the subject matter or context of the regulations to support this contention. The regulations contain two powers to deal with licences already granted (1) the power contained in reg. 11 for the Minister or his delegate to vary or modify the existing terms and conditions of a licence or if a licence has been granted free from conditions to subject the licence to such conditions as they determine ; (2) the power contained in reg. 12 to revoke any licence. If the latter power is limited to the period in question, the former power must also be so limited. The exercise of these powers is not expressly limited to any period so that the limitation if any must be implied. A licence authorizes the doing of an act which would otherwise be unlawful. It is only lawful under reg. 3. to import goods (other than excepted goods) if a licence to import the goods is in force and the terms and conditions (if any) to which the licence is subject are complied with. I can find no justification for giving the word " import " in this regulation

(1) (1949) A.C. 24, at p. 36. (2) (1947) 75 C.L.R. 218.

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any other meaning than its ordinary natural grammatical meaning of bringing goods into Australia from another country. The licence must therefore be in force when the goods are brought into Australia and the terms and conditions (if any) to which the licence is then subject must be complied with, otherwise the goods would be prohibited imports. Instead of the language of the regulations requiring such an implication, reg. 3 appears to me to show the contrary because it indicates that the power conferred on the Minister and his delegate to vary or modify the terms and conditions of licences and to revoke licences is intended to be exercisable at any time between the granting of the licence and the actual importation of the goods into Australia. Further I can find nothing in the regulations to limit the power of the Minister or his delegate in the case of a licence to import a quantity of goods, to vary or modify conditions with respect to the importation of part of such goods or to revoke the licence with respect to part of such goods provided the part in question has not yet been imported into Australia.

I shall therefore proceed to grounds (3) and (4). Ground (3). I adhere to everything I said in *Horton Jameson & Anor.* v. *The Commonwealth* (1). There I adopted with respect the statement of *Jordan* C.J. in *In re Gosling* (2), that a person is prima facie subject to a duty to act judicially in performing a statutory duty or exercising a statutory power if the performance or exercise will impose a new legal liability on another person or will interfere with the legal rights of another person with respect to some particular matter or matters. The exercise of a power to revoke a licence and thereby abrogate a legal right to which the licence was previously entitled falls within this principle. The passage cited from *Bonaker* v. *Evans* (3) in *Horten Jameson's Case* (4) has recently been discussed by the Privy Council in *Patterson* v. *District Commissioner of Accra* (5). But the particular legislation must be examined in each case to determine whether the principle is applicable. In *Patterson's Case* (6) the Privy Council held that the principle was excluded. Another case in which the principle was discussed and excluded was *R.* v. *Archbishop of Canterbury* (7).

The *Customs* (*Import Licensing*) *Regulations* came into force shortly after the outbreak of the recent hostilities. They deal with a very special subject matter, that is to say with prohibited

(1) (8th August 1945 unreported. Affirmed on appeal to the Full Court unreported.)
(2) (1943) 43 S.R. (N.S.W.) 312, at p. 316; 60 W.N. 204, at p. 206.
(3) (1850) 16 Q.B. 162, at p. 171.
(4) (Unreported.)
(5) (1948) A.C. 341, at pp. 349-351.
(6) (1948) A.C. 341.
(7) (1944) 1 K.B. 282.

imports. The power of the Commonwealth Parliament under the trade and commerce power to prohibit goods from being imported into Australia at any moment of time prior to their actual entry is undoubted, and very grave loss may be caused to importers by the import of goods being prohibited after they have been ordered and even shipped to Australia. The regulations have been framed, I think, so as to authorize the Minister to prohibit goods being imported at any time prior to their actual entry into Australia. The legal right to import goods conferred by reg. 3 is to import goods as to which there is a licence in force at the moment of importation. The reasons for the refusal to allow goods to be imported is in many instances a question of high governmental policy as to which it may be inadvisable in the national interest, especially during hostilities, for the Minister in charge to make any public announcement. If the Minister or his delegate is under a duty to act in a quasi-judicial manner in revoking a licence with all that that implies he must be under a similar duty before he varies or modifies the existing conditions of a licence or orders that a licence granted free from conditions shall be subject to terms and conditions. To perform the duty the Minister or his delegate would have to disclose to the licensee his reasons for wishing to do so and give the licensee an opportunity of showing cause to the contrary. The Minister or his delegate would have to disclose to the licensee any statements that were prejudicial to him and upon which it was proposed to act so as to give the licensee an opportunity of answering them: *General Medical Council* v. *Spackman* (1). It might only be possible to comply with these requirements by the Minister or his delegate disclosing to the licensee information which it would not be in the public interest to disclose (*Robinson* v. *Minister of Town and Country Planning* (2)). The subject matter and scope and purpose of the *Customs* (*Import Licensing*) *Regulations* appear to me to be such that the principle under discussion is not applicable. The purpose of the regulations to be gathered from their subject matter and language is to prohibit the import of all goods other than excepted goods into Australia unless the Minister or his delegate authorizes their importation by a licence which is in force at the moment of importation. Regulation 3 is the governing provision and the other regulations are machinery for carrying this purpose into effect. The powers of the Minister and his delegates to revoke a licence are therefore administrative powers. If the licence is revoked by a delegate

(1) (1943) A.C. 627, at pp. 640-643.

(2) (1947) 177 L.T. 375, at pp. 380, 381.

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there is under reg. 14 what is called "an appeal" to the Minister but in my opinion the duty conferred on the Minister upon an appeal is of the same character as the power to revoke a licence conferred on him by reg. 12. He is still acting in an administrative capacity and is not under a duty to act judicially. His duty is defined by Lord *Greene* M.R. in *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health* (1), "every Minister of the Crown is under a duty, constitutionally, to the King, to perform his functions honestly and fairly, and to the best of his ability; but his failure to do so, speaking quite generally, is not a matter with which the courts are concerned at all. As a Minister, if he acts unfairly, his action may be challenged and criticised in Parliament."

This leads me to the consideration of the fourth ground. The *Customs (Import Licensing) Regulations* do not in my opinion confer on the Minister or his delegate an arbitrary and uncontrolled power to revoke a licence. But there is no express statement in the regulations of the considerations upon which it is intended that the power shall depend. As *Dixon* J. said in *Water Conservation and Irrigation Commission (N.S.W.)* v. *Browning* (2): "The discretion is, therefore, unconfined, except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view." On the same page his Honour said of such a discretion, "I have before remarked on the impossibility, when an administrative discretion is undefined, of a court's doing more than saying that this or that consideration is extraneous to the power." Two recent cases where the limits of such a discretion have been discussed, in addition to *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (3) and *Water Conservation and Irrigation Commission (N.S.W.)* v. *Browning* (4), are *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* (5) and *Swindon Corporation* v. *Pearce and Pugh* (6). I have already cited the latest statement of the principle by Lord *Macmillan* in *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (7). There is a statement very much in point by *Starke* J. in *Stenhouse* v. *Coleman* (8). Sternberg in his first affidavit suggested that the licence was being revoked because he had caused to be issued out of this Court a writ against the defendants in respect of certain goods namely watches and watch movements seized by the Customs to the value of more than £3,700.

(1) (1947) 177 L.T. 455, at p. 459.
(2) (1947) 74 C.L.R. 492, at p. 505.
(3) (1949) A.C. 24.
(4) (1947) 74 C.L.R. 492.
(5) (1948) 1 K.B. 223.
(6) (1948) 2 K.B. 301.
(7) (1949) A.C., at p. 38.
(8) (1944) 69 C.L.R. 457, at p. 467.

This would not be a bona fide or relevant consideration for revoking the licence. But the suggestion was not pressed at the hearing, Ryan was not cross-examined, and there is no evidence whatever to support it. I must accept Ryan's evidence that he decided to revoke the licence for the reasons already stated. The onus is on the plaintiff to establish that these were irrelevant considerations. I have pointed out that there is no evidence of any breach of the condition of the licence. But it is impossible I think to hold that these considerations, although on their face remote, are so irrelevant as to be outside the subject matter and the scope and purpose of the regulations and therefore not in law an exercise of the discretion. The plaintiff can appeal to the Minister who must decide honestly and fairly whether they are really sufficient to justify the revocation.

But the plaintiff has not in my opinion made a case for the intervention of the Court and I must dismiss the motion, the defendants' costs to be their costs in the action.

Motion dismissed. Defendants' costs to be their costs in the action.

Solicitors for the plaintiff, *E. Edgar Davies & Co.*, Melbourne, by *T. G. D. Marshall, Landers & Giblin.*

Solicitor for the defendants, *K. C. Waugh*, Acting Crown Solicitor for the Commonwealth.

J. B.