ORIGINAL

IN THE HIGH COURT OF AUSTRALIA.

16

HORTEN-JAMESON AND ANOTHER

V.

THE COMMONWEALTH OF AUSTRALIA AND OTHERS

REASONS FOR JUDGMENT.

MR. JUSTICE WILLIAMS

Delivered at SYDNEY

on Wednesday, 8th August, 1945

40358 A. H. PETTIFER, ACTING GOVT. PRINT.

HORTEN JAMESON AND ANOTHER

V

THE COMMONWEALTH AND OTHERS

ORIGINAL

JUDGMENT WILLIAMS J.

1 This is an action brought by the plaintiffs, who carry on in partnership the business of motor spirit retailers under the name of the Transport Service Station at Darlinghurst Road, Kings Cross in the State of New South Wales, against the members of the Liquid Fuel Control Board, State of New South Wales, appointed pursuant to reg.13 of the National Security (Liquid Fuel) Regulations and the Commonwealth of Australia in respect of a purported cancellation by the Board by notice in writing on 5th June 1945 of a motor spirit retailers licence granted by the Board under the powers conferred upon them by regs.25 and 26 to the plaintiff Horten-Jameson on 23rd March 1945.

2 Reg.26(2) provides, so far as material, that a motor spirit retailers licence shall authorise the holder thereof to purchase quantities of motor spirit equivalent to the motor spirit ration tickets handed over to the bulk supplier from whom the motor spirit is purchased.

3 The notice of 5th June 1945, which was signed by the Secretary, omitting formal parts, was as follows:-

> "At the meeting of the State Liquid Fuel Control Board on the 4th June 1945, it was resolved to cancel your motor spirit retailers licence.
>
> The grounds upon which the Board decided upon the aforementioned action are as follows:-
>
> (a) That you were in possession of ration tickets acquired otherwise than in accordance with the National Security (Liquid Fuel) Regulations.
>
> (b) That you did dispose of motor spirit in a

manner contrary to that prescribed by the National Security (Liquid Fuel) Regulations.

An authorised officer of the Board will deliver this letter to you and you are required in terms of the National Security (Liquid Fuel) Regulations to deliver up to him all ration tickets and records relating to your trading in motor spirit under the authority of your resellers licence. You are also required to deliver to him your motor spirit retailers licence and to not impede him in the sealing of your bowsers.

I am also instructed to inform you that consideration will be given to the restoration of your retailer's licence in the event of the lodgment of a fresh application at the expiration of ninety (90) days from the date hereof.

The Board has also directed me to inform you that the papers relating to this matter are being forwarded to the Deputy Commonwealth Crown Solicitor for the institution of such legal proceedings as may be necessary in the circumstances."

4 On the same day, immediately after the service of the notice, officers of the Board, acting under its instructions, compelled the plaintiff to deliver to them all motor spirit ration tickets then in their possession and the licence, and sealed up the plaintiffs' petrol bowsers.

5 It was contended on behalf of the plaintiff that the cancellation of the licence was not authorised by the regulations and was void, on the ground that in deciding to cancel the licence the Board was under a duty to act judicially and should have given the plaintiff Horten-Jameson notice that it intended to consider whether the licence should be revoked and afforded him an opportunity of showing cause against the revocation. Alternatively it was contended that if the Liquid Fuel Regulations on their true construction conferred authority upon the Board to decide that a licensee had committed a breach of the regulations and to cancel a licence on that ground, they confer on the Board authority to exercise judicial power and are beyond the legislative

powers conferred upon the Commonwealth Parliament by the Constitution and therefore beyond the power of that Parliament to delegate to an executive body by the National Security Act 1939-1943.

If the plaintiffs are entitled to succeed on either of these grounds, they ask for consequential relief in the nature of mandatory injunctions compelling the Board to redeliver the licence and ration tickets to them and to remove the seals from their bowsers, and for damages.

The Board, in giving the notice of 5th June 1945, purported to act under the powers conferred upon it by regs. 33 and 34. These regulations are, so far as material, as follows:-

> 33.(1) A licence shall be in force until revoked or cancelled or for such period as is specified in or endorsed on the licence.
>
> (2) The Board (that is, the Commonwealth Liquid Fuel Control Board), in the case of a motor spirit or deisel oil fuel bulk suppliers licence, or, subject to any direction of the Board, a Liquid Fuel Control Board, (that is, the defendant Board), in the case of any other licence, may, upon application, renew the licence.
>
> 34.(1) The Board, in the case of a motor spirit or deisel oil fuel bulk suppliers licence, and the Board or, subject to any direction of the Board, a Liquid Fuel Control Board, in the case of any other licence, may revoke the licence at any time by notice in writing to the licensee, who shall thereupon return the licence and any ration tickets held by the Board or to the Liquid Fuel Control Board by which the licence was granted.

Prior to the purported cancellation the plaintiff Horten-Jameson had been interviewed by two Inspectors employed by the Board, C. J. Hennessy and R. J. Cabot, on two occasions, and questioned about a number of petrol consumers ration tickets delivered to the service station between 16th January and 9th April 1945 by customers in exchange for petrol and handed by the plaintiffs to the bulk supplier in exchange for further petrol.

The first interview took place at the service

station on 4th May and the second at the office of the Board on 24th May 1945. Evidence of what occurred at these two interviews was given by this plaintiff and the two Inspectors. Detectives Fraser and Campbell gave evidence on behalf of the defendants with respect to the first interview but their evidence is only on the fringe of the case, and J. A. T. Rochfort, the accountant and manager of the De Luxe Taxi Cab Company, who also acted as the plaintiffs' accountant and accompanied Horten-Jameson to the second interview, gave evidence on their behalf with respect to that interview. There are some discrepancies between the accounts of the various witnesses, most of which are immaterial, but in so far as they are material, I prefer the evidence of the Inspectors to that of Horten-Jameson because I consider that their recollection is more complete and accurate than his and because Rochfort, whom I accept as a reliable witness, corroborates their account of the second interview in some important respects.

Reg.21(2) requires that the holder of a consumer's licence shall endorse in ink on the back of each ration ticket the number of the licence and the registration number of the vehicle, and shall sign his name in ink to the endorsement, provided that it shall be a sufficient compliance if the endorsement is duly made and signed by an authorised agent of the licensee, and includes the name of the licensee. Reg.27 provides that a person shall not dispose of any motor spirit to the holder of a consumer's licence unless (a) the licence is produced to him by the holder immediately before every such disposal; (b) ration tickets have been delivered to him corresponding to the quantity to be disposed of; and (c) before delivering the motor spirit he verifies the particulars required by reg.21(2) to be endorsed on the back of each ration ticket by comparing each ticket with the licence and with the registration number shown on the number plate affixed to the vehicle.

The questions put to Horten-Jameson at the two interviews related to an alleged failure by the plaintiffs to comply with the requirements of reg.27. The Inspectors at both interviews showed the plaintiff ration tickets taken from seven envelopes,

which he admitted had been delivered by customers to his service station, and a list compiled from these tickets and departmental records, with respect to which they alleged that either the vehicle numbers endorsed on the back of the tickets were numbers for which there were no registration plates in issue, (that is in current issue); or if there were such plates, the registrations were not in the names of the persons endorsed on the back of the tickets. The interrogation on 4th May was of a preliminary nature but the plaintiff was told by Hennessy that he would see him again. At the second interrogation on 24th May the same ground was covered, but more fully, as that covered on 4th May. The envelopes, the ration tickets, and the written list were again produced, and the plaintiff was questioned in all cases where there was a difference in the particulars shown on the list. I am satisfied that he was told by Hennessy at one of the interviews that the matter would be reported to the Board. On 30th May 1945 the Inspectors made a joint report in writing to the Board in which they stated that a check of ration tickets in several envelopes surrendered by the plaintiffs between 16th January and 9th April 1945 revealed that a number were incorrectly endorsed in the following respects:-
(a) with vehicle numbers the number plates not being in issue;
(b) with vehicle numbers the registrations being in names different to those shown on the tickets; (c) with endorsements apparently made by others than the consumers whose particulars appeared on the tickets, and that the number of tickets and gallonages represented were with respect to (a) 36 and 47; (b) 148 and 265; and (c) 46 and 88, the total number of gallons being 400. At a meeting on 4th June, the Board, after considering the report, decided that the licence should be suspended for three months and the licensee informed that he might apply for consideration of the re-issue of the licence, and it was in pursuance of this decision that the Secretary wrote the letter of 5th June 1945 and that the action against the plaintiffs to which I have referred was taken by the officers of the Board on that date.

Reg.34 authorises the Board to cancel a licence whether it is a licence, as in the present case, which is to remain in

force until revoked or a licence for a fixed period. The effect of the cancellation is to deprive the licensee of an existing right to carry on his business of selling petrol by retail. In Mulqueen v. Minister for Labour and Industry and Zinc Corpn Ltd 38 S.R.(NSW) 583 at pp.591-2: Ex Parte Wilson, re Cuff and ors 40 S.R.(NSW) 559 at pp.563-4 and in re Gosling 43 S.R(NSW) 312 at pp.316-318 Jordan CJ. has collected an imposing number of cases which relate to the question whether a person clothed with a statutory power is under an obligation to, act judicially in its exercise. In the last mentioned case His Honour said at p.316:- "It has been held that persons who have been

> invested by Statute with authority to determine questions affecting the legal rights of subjects have the legal duty to act judicially, unless the Statute conferring the authority indicates that its depository is to be at liberty to act at his own uncontrolled discretion or that his act is to be of a purely executive character. Hence, 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, in respect of some particular matter or matters."

He went on to say that cases can be multiplied, a number of which are cited, which establish that unless the Statute otherwise provides, the person or persons who will be affected by the determination of the matter must be notified when it is to be taken under consideration and must be allowed an opportunity of stating their case. In Bonaker v. Evans 16 Q.B. 163; 117 E.R. 840 Baron Parke said at p.171 that "No proposition can be more clearly established

> than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding unless he has had a fair opportunity or answering the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary."

In Rex v. Woodhouse 1906 2 K B 501 at p.535 Fletcher Moulton L.J. in distinguishing between judicial acts and purely ministerial acts said that in order that the act should be judicial "there must be the exercise of some right or duty to decide". In Urban Housing Co v. Oxford City Council 1940 1 Ch. 70 at p.85 Sir Wilfred Greene M R referred to "the principle that a local

> authority exercising such a power of demolition as this, in coming to its decision to demolish, and thereby conferring upon itwelf the statutory power to demolish, is acting in a quasi judicial capacity and must give the person concerned either a notice that they intend to take this matter into their consideration with a view to coming to a decision, or, if they have come to a decision, that they propose to act upon it, and give him an opportunity of showing cause why such steps should not be taken."

And c.f. Vestry of St James v. Feary 24 Q B D 702 at p.709. It may appear, therefore, from the legislation expressly or by implication that the act which the authority is empowered to do is of a purely executive character or that, although it is of a quasi judicial character, the authority can exercise an uncontrolled discretion; but where, as here, an authority is empowered to decide to do an act which will abrogate a legal right to which a licensee was previously entitled; then, in the absence of such an express or implied provision, there is a prima facie presumption that it was intended that the valid exercise of the power should be subject to the requirements of the maxim qui aliquid statuerit parte inauditâ alterâ, Aequum licet statuerit, non aequus fuerit, because it is in the nature of things impossible for a person to exercise a judicial discretion unless the person to be affected by its exercise has been given an opportunity of being heard. In Local Government Board v. Arlidge 1915 A C 120, described by Lord Wright in a recent article in the Cambridge Law Journal 1945 Vol.9 p.9 as the most famous case on the duties of an administrative body exercising judicial or quasi judicial functions,

the House of Lords discussed the different ways in which a statutory body can fulfil its obligation to give the person whose right is in jeopardy an opportunity of being heard. If it acts according to its established procedure, and that procedure affects substantial justice in this respect, the obligation is fulfilled. In some cases the provisions of the Statute and in other cases the established procedure of the body may authorise the inquiry to be heard by a responsible officer and the body in coming to a decision to act upon the report of that officer. But in the present case there is no statutory provision and the Board has not, and indeed having regard to its ephemeral character would not be likely to have, an established practice of delegating authority to hold such an inquiry to a responsible officer, so that it would have to hold the inquiry itself. In any event the Board did not in fact delegate such an authority to the Inspectors or either of them, and the evidence shows that all that ~~the Inspectors or either of them~~ they were purporting to do was to hold a preliminary investigation with a view to making a report to the Board. The plaintiff Horten-Jameson knew or should have known after the interviews of 4th and 24th May that the Board would probably take action against him, but he was entitled to know what action the Board proposed to take and to show cause against it, or it the Board decided that his licence ought to be cancelled to be given an opportunity to show cause before the decision was carried into effect. And the Board should not have acted on the Inspectors' report without giving the plaintiffs an opportunity of seeing it and meeting any relevant facts: R. v. City of Westminster Assessment Committee 1941 1 K B 53 at p.68: Boswell v. Partridge Jones and John Paton Ltd 166 L T 62 at p.63. As showing the manner in which the plaintiffs were prejudiced by not seeing the report, it is to be noted that the report refers specifically to a sale of 81 gallons of petrol to W. F. Donoghue but does not state that Horten-Hameson said that Campbell had told him that a licence from Donoghue was produced to purchase this petrol in drums; and Campbell, who was on holidays, was not interviewed by the Inspectors although he and not Horten-Jameson was in charge when most of the alleged breaches of the regulations

were committed. And since the letter of 5th June threatened legal proceedings against Horten-Jameson I think that I should point out that, if the Board in deciding to cancel a licence is under an obligation to act judicially, while they can accept facts found in such proceedings as prima facie evidence of breach, they must still consider any evidence brought before them by the licensee: General Medical Council v Spackman 1943 A C 627.

For these reasons I am of opinion that, if the Board was bound to act judicially, its decision on 4th June to cancel the licence was void and that the plaintiffs are entitled to relief on that basis: Lapointe v. L'Association 1906 A C 535 at p.539: Graham v. Sinclair 25 C.L.R. 102 at pp.106-107.

But the defendants contend that the Board in deciding to cancel a licence are acting in a purely administrative character and they rely on the subject matter of the regulations and precarious nature of the licence as an indication of intention to this effect.

I am unable to find in the liquid fuel regulations any sufficient manifestation of an intention to exclude the prima facie presumption. The purpose of the regulations is to ration the supply of petrol that is available for civilian consumption. This purpose is effected by only providing consumers with as many ration tickets as there is available petrol. If there is an increase or decrease in the amount available, this can be regulated by increasing or decreasing the issue of ration tickets. The retailers can only sell the corresponding amount of petrol. Obviously certain precautions, such as those provided by the regulations are required to ensure that ration tickets are used only for the purpose for which they are intended, but it does not appear to be necessary that the Board, in order to police the regulations, should be empowered to cancel a retailers licence without giving him an opportunity of being heard. The words of Erle C J in Cooper v. The Wandsworth Board of Works 14 C B (NS) 180: 143 E R 414 at p.188 are mutatis mutandis very appropriate: "I cannot conceive any harm

> that could happen to the District Board from hearing the party before they subjected him to a loss so serious

> as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon tham that they should hear the party before they inflict upon him such a heavy loss. I fully agree that the legislature intended to give the District Board very large powers indeed; but the qualification ~~x~~ I speak of is one which has been recognised to the full extent."

The power to cancel exists whether the licence is granted until revocation or for a period and it is the same power in each case so that nothing turns on the precarious nature of the licence. There is no express exclusion of the presumption and none arises by implication. The fact that the discretion is in terms absolute is not a sufficient manifestation of such an intention. It is dangerous to apply decisions on the meaning of other statutes in order to construe the particular legislation except in so far as they contain some statement of principle which is applicable: per Lord Greene M R in R. v. Archbishop of Canterbury 1944 1 K B 282 at p.291: but the general current of authority has been to hold that a body entrusted with the power to decide whether a licence which it is necessary to obtain and hold in order to carry on a particular business shall be granted or renewed or withheld is under an obligation to exercise a judicial discretion: Sharp v. Wakefield 1891 A C 173: R. v. Woodhouse (supra): R. v. London County Council 1931 2 K B 215: Halsbury 2nd Ed Vol.26 p.284, and it must, I think, be the case, a fortiori, where a power is given to a public authority to revoke a licence which has already been granted. In this respect there is an analogy to the cases relating to expulsion from clubs and similar institutions. A candidate for election to such an institution would not ordinarily have the right to be heard before his candidature was refused, but once he has been elected the committee or other body exercising a right of expulsion must act judicially and give the member an opportunity of being heard. Mr Sugermann pressed me with the decision of this Court in

Metropolitan Meat Industry Board v Finlayson and ors 22 C L R 340. There the Meat Industry Act 1915 N S W provided that after the Act came into force no person should, except with the consent of and under the conditions prescribed by the Metropolitan Meat Industry Board, within the metropolitan abattoir area, slaughter any cattle or dress any carcase for human comsumption, except at a public abattoir and that the consent of the Board might be given in such form and subject to such terms and conditions as the Board might in its absolute discretion determine. It was held that the Board had an absolute and unfettered discretion to grant or withhold their consent, so that on an application for consent they need not give reasons for withholding, or before determining whether to grant or withhold it, inform the applicant of any objection which they thought might stand in his way, so that he might have an opportunity of meeting it. This case must, I think, be regarded as a decision upon the particular statute there in question, and in any event it is not directly in point because the present case relates not to the grant but to the revocation of a licence. The closest case on its facts to which I was referred is the decision of the Full Supreme Court of South Australia in James v. Pope and ors 1931 S A L R 441 unanimously affirming the judgment of Angus Parsons J. With the reasoning in that case I respectfully agree. It is to be noted that in Steuart & Bro. Inc v. Bowles 88 U.S.R. Law. Ed. the equivalent legislation in the United States of America gives the licensee a right to be heard before his licence could be cancelled.

For these reasons I am of opinion that the plaintiffs are entitled to succeed on the first ground.

It is therefore unnecessary finally to consider the other grounds raised on behalf of the plaintiffs, and I shall confine myself to stating that I have assumed without deciding in favour of the defendants that although the minute of the meeting of the Board on 4th June refers to the suspension of the licence, and the regulations only empower the Board to cancel a licence, it was, as the notice stated, having regard to its effect, a decision to cancel the lieence coupled with an intimation that an application

for a renewal might be made in three months time.

It was contended on behalf of the plaintiffs that the Board had purported to determine that the plaintiff Horten-Jameson was guilty of breaches of the regulations, and that if the regulations on their true construction authorised the Board to make such a determination, the Board was invested with judicial power in its strict sense contrary to sec.71 of the Constitution. But all that the regulations do is to give the Board a discretionary power to cancel the licence. If the Board concluded that a licensee was trading in breach of the regulations they would be entitled to consider whether the licence ought to be revoked, but an opinion to that effect formed for that purpose would not be an exercise of judicial power. The difference between judicial power and power in the exercise of which there is a duty to act judicially is explained by my brother Rich in Rola Co (Aust) Pty Ltd v. The Commonwealth 69 C L R 185 at p.203-4.

It is necessary, however, to consider an objection raised on behalf of the defendants that the proper course for the plaintiffs was to apply for a writ of certiorari to quash the decision of the Board or for a prohibition to prevent the Board acting upon it and for a mandamus to compel the Board to reconsider according to law whether the licence ought to be revoked, and that the matters raised in the statement of claim are not justiciable in an action. But simply to quash the decision or prohibit the Board from acting upon it would not give the plaintiffs adequate relief, and if the decision is void the licence has not been revoked and it would be unnecessary to apply for a mandamus. If the decision is void the Board in sealing up the plaintiffs' bowsers is committing a continuous trespass on the plaintiffs' land, and is unlawfully retaining the licence to which the plaintiff Horten-Jameson is entitled and without which the plaintiffs are unable to carry on their business. Under these circumstances they must be entitled to ask for appropriate injunctions, and if precedents for an action in the present form under such circumstances are necessary, they are to be found in De Verteuil v. Knaggs and anor 1918 A C 557: Urban Housing Co v. Oxford City Council (supra): James v Pope (supra). c.f. Cooper v. Wilson 1937 2 K B 309.

Mr Sugermann referred me to Partridge v. General Council of Medical Education 25 Q B D 90 and contended that the plaintiffs could not recover damages for the erroneous exercise of the discretion of the Board in the absence of mala Fides. There are other cases to the same effect: c.f. Everett v. Griffiths 1921 1 A C 631 at pp.659, 660, 695 & 696: Scammell and Nephew Ltd v. Hurley 1929 1 K B 419 at p.429: Halsbury 2nd Ed.Vol.26 pp.284-5. There is no evidence of mala fides so that if all the defendants had done was to resolve to cancel the licence, the plaintiffs would have been entitled to treat the resolution as void and continue to trade and they would have suffered no damage: Wood v Wood L R 9 Ex 190: but, as I have said, the defendants went further, and in respect of their subsequent acts it appears to me, as at present advised, that the plaintiffs would be entitled to recover damages from the Board: Cooper v. Wandsworth Board of Words (supra). But I need not express a final opinion on this point as both parties have requested me to reserve all questions of damages.

As there may be an appeal, both parties have also requested me to continue the appointment of Mr Alexander Ewan Campbell as receiver and manager which I made on 15th June 1945 for three weeks, and if there is an appeal until the determination of the appeal. I do not propose to grant any injunctions against the Board at present as I have no doubt that the Board, subject to their right of appeal, will act in accordance with the declaration which I propose to make and return the licence to the plaintiff Horten-Jameson and take all such other steps as are necessary to allow the plaintiffs to resume their business of selling petrol by retail.

I declare that the purported cancellation by the Liquid Fuel Control Board, State of New South Wales, by notice in writing dated 5th June 1945 of the motor spirit retailers licence granted to the plaintiff Horten-Jameson on 23rd March 1943 was void: order that the appointment of Alexander Ewan Campbell as receiver and manager of that part of the business of selling petrol by retail carried on by the plaintiffs at 108 Darlinghurst Road, Kings Cross, Sydney, made on 15th June 1945 be continued for three weeks and if there is an appeal until the determination of the appeal: reserve liberty for the plaintiffs to apply for such relief by way of injunction

or otherwise pursuant to the above declaration as they may be advised: reserve all questions of damages: order that the defendants pay the costs of the plaintiffs of the action including reserved costs up to and inclusive of this order: reserve the further consideration of this action and all further questions of costs: liberty to apply.