

30/74

SUPREME COURT OF VICTORIA — FULL COURT

JORDAN v K and L THOMAS (CHICKS) PTY LTD

Gowans, Nelson and Anderson JJ

28, 29 May 1974 — [1974] VicRp 94; [1974] VR 792

MARKETING OF PRIMARY PRODUCTS – SALE OF EGGS – PRODUCER SOLD EGGS TO ANOTHER PRODUCER FOR SEED FOR SUCH OTHER PRODUCER'S USE – DEFENDANT COMPANY CHARGED WITH BUYING EGGS FROM A PRODUCER OF EGGS CONTRARY TO THE ACT – MEANING OF "FOR SUCH OTHER PRODUCER'S USE" – WHETHER MEANS "FOR USE BY THE OTHER PRODUCER AS SEED" – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MARKETING OF PRIMARY PRODUCTS ACT 1958*, S21.

HELD: Order nisi discharged.

1. The words "for such other producer's use" cannot in the relevant context, mean "for any use the other producer may put it to". To fit in with the language of par.(a) of s21 of the *Marketing of Primary Products Act 1958*, i.e. "required for his own use for seed", it must mean "for use by the other producer as seed".
2. The words "for seed for such other producer's use", meaning "for use by the other producer as seed", must carry the meaning of use as seed by such other producer as a producer of the particular commodity, and that pointed to reproduction by the producer of more of the commodity of which he was a producer, and that in turn involved in the circumstances of this case use for the hatching out of chickens potentially capable of producing eggs.
3. The proviso was not concerned with any use which physiologically might be described as use "for seed". The conception was use for seed for production of the commodity in question.
4. The use for which the eggs were sold or delivered by the producer to the defendant being one which would not admit of the reproduction of other eggs, it was a use in respect of which the necessary objective was missing and, therefore, a use falling outside the proviso.
5. Accordingly, in reaching the conclusion that he did, the magistrate did not misdirect himself and he was correct in deciding that the purchase did not fall within the proviso. The order nisi to review was, therefore, discharged with costs, subject to the limit provided by the statute.

GOWANS J: [delivered the judgment of the Court (Gowans, Nelson, and Anderson JJ)]: This case is concerned with the operation in certain ascertained circumstances of a particular provision of the *Marketing of Primary Products Act 1958*. The purpose of the Act is to regulate the marketing of any "product" which is declared to be a "commodity" under and for the purposes of the Act. "Product" is defined under s4 to mean, *inter alia*, any product of poultry farming, which is declared to be a product. Eggs, as a product of poultry farming have been declared to be a product for the purposes of the Act under s5 and they have also been declared to be a commodity for the purposes of the Act under s7. A "producer" is defined to include a person by whom or on whose behalf a product is actually grown produced obtained or prepared (otherwise than by any process of manufacture) for sale. There is a power under s8 of the Act to appoint a marketing board in relation to a commodity and under s17 a commodity may be vested in the Board. The Egg and Egg Pulp Marketing Board has been constituted in relation to eggs and have been vested in it.

The critical provision of the Act for present purposes is s21. So far as relevant it reads:—

"21. Where a product has been declared a commodity under and for the purposes of this Act and a Board has been constituted in relation thereto—

(a) if a proclamation vesting the commodity in the board has been made then, save as otherwise prescribed, all the commodity so vested (except such portion of the commodity as the producer concerned requires for his own use for seed or desires to sell to another producer for seed for such

other producer's use) ... shall be delivered by the producers thereof to the board or its authorized agent within such times at such places and in such manner as the board ... directs or as are prescribed; ...

(c) every producer ... and every person (other than the board) who, save as prescribed, buys or receives any of the commodity from a producer shall be liable to a penalty of not more than \$200:

Provided ... Provided further that this paragraph shall not apply to the sale delivery purchase or receipt of such of the commodity as is delivered or sold by the producer thereof to another producer for seed for such other producer's use."

The defendant company K. and L. Thomas (Chicks) Pty Ltd was charged in the Magistrates' Court at Cranbourne on 19 December 1973 on an information which alleged that between 6 July 1973 and 22 July 1973 inclusive, it bought eggs from a producer of eggs contrary to s21 of the Act. It was a party to a partnership agreement made with Keith Ian Poultry Farm Pty Ltd and others pursuant to which the latter company conducted poultry farming operations and in consequence of this relationship the defendant company itself came within the definition of a "producer" in relation to eggs as a person on whose behalf eggs are produced. Eremosa Research Farm Pty Ltd was a producer of eggs at Somerville. The purchases by the defendant from Eremosa Research Farm Pty Ltd of the eggs referred to in the information were admitted. But the defendant contended that the eggs so purchased were delivered or sold by Eremosa Research Farm Pty Ltd, as a producer, to the defendant, as a producer, for seed for the latter's use, within the meaning of the proviso which has been quoted. The issue in the case is whether in the circumstances this description applies to the transaction. The onus of establishing on the balance of probabilities that it came within the proviso lay on the defendant: *McNee v Kay* [1953] VicLawRp 71; [1953] VLR 520; [1953] ALR 1061; *Clarkson v Madden* [1954] VicLawRp 101; [1954] VLR 738; [1955] ALR 747; *Taylor v Armour and Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232.

The evidence showed that the course of business between the defendant and its partners and the producer Eremosa Research Farm Pty Ltd was that fertile eggs were purchased by the defendant and its partners from Eremosa Research Farm Pty Ltd according to a specification prescribed by the Commonwealth Serum Laboratories and for the purpose of treatment in the defendant company's incubators so as to produce embryos suitable for use by the Laboratories in their research activities. The conditions of production of the eggs were specified, as were also the conditions of their treatment, the period of incubation being fixed at 10 days only instead of the period of 21 days required for hatching out. Only live embryos (after an estimated tolerance) were to be paid for by the Laboratories. The trade embraced about 4500 to 5000 dozen eggs per week.

The eggs purchased by the Laboratories were intended to be used by them, and were in fact used by them, for the cultivation of influenza and other viruses which require living cells to grow on, and from these viruses vaccines were produced. This involved the incubating of the virus infected eggs for a further two or three days by the Laboratories and the inside of the egg then being drawn off by them.

Findings as to these matters were made by the magistrate. In making those findings he made these statements:

"I find that the second proviso relied on— second proviso to s21 relied on by the defendant—does apply to eggs and that the purchase by one producer by another" (it should read, I suppose, "from another") "for the purposes of incubating such eggs to produce chickens for the purpose of producing more eggs would be a purchase for seed for such other producer's use within the meaning of the proviso."

A little later, he said:

"It is clear from the evidence that the defendant did purchase eggs from another producer for the purpose of producing a live embryo which at the ten day stage of incubation was sold to Commonwealth Serum Laboratories for the purposes of cultivation of vaccines."

And a little earlier, he had said:

"I accept the evidence of Mr Thomas that all the eggs—the subject of these informations—were purchased from Morley's and other producers, and were sold to the Commonwealth Serum

Laboratories by the defendant company as ten day old living embryos. I find that the defendant company is a producer because on the evidence it is a partner with Keith Ian Poultry Farm Pty Ltd which produces eggs for sale."

It was submitted for the respondent that the second of these statements, namely that relating to the fact of the purchase of the eggs by the defendant from another producer for the purposes set out, did not constitute a sufficient finding for the purpose of the proviso. But this may be put aside without determination.

But as to the defendant's contention that the facts so found by the magistrate amounted to the delivery or sale of eggs by the producer thereof to another producer for seed for the latter's use, the magistrate said this:

"I accept the definition of the words 'for seed' advanced by Mr Brooking and agreed to by Mr Buckner as meaning 'for production of a new individual or embryo as the result of the union of a male and female cell'."

And he proceeded later:

"The question is whether the use of the eggs by the defendant for this purpose comply with the requirement that such eggs were purchased for seed for such other producers' use as laid down in the proviso. Looking at the purpose of the Act which is to control and regulate the marketing of certain commodities, in this case eggs, and the language used, I am of the opinion that the use to which the defendant put these eggs did not comply with the proviso relied upon. I believe the words, 'for such other producers' use' means for the purpose of producing more eggs."

He accordingly convicted the defendant.

The defendant then obtained an order nisi for review of the conviction, on grounds which are as follows:—

1. That the stipendiary magistrate misdirected himself as to the meaning of the expression "for seed for such other producer's use" in the said s21(c)
2. That the stipendiary magistrate misdirected himself by holding that the expression "for such other producer's use" in the said s21(c) meant for the purpose of producing more eggs.
3. That the stipendiary magistrate should have held that the purchase the subject of the information fell within the second proviso to the said s21(c).

The word "seed" has a primary meaning which relates to plant life. It refers to the unit of reproduction of a flowering plant capable by germination of developing into another plant of the same kind. It may be incapable of application at all to some commodities under the Act; examples may be egg pulp and tobacco leaf. But if the term can be applied to the commodity of eggs (and we do not find it necessary to determine this finally) it may be understood as referring to eggs which are capable of regeneration, that is to say, to fertilized eggs. But the concept has to be fitted into the context.

That context is "such of the commodity as is delivered or sold by the producer thereof to another producer for seed for such other producer's use". The last words "for such other producer's use" cannot, in this context, mean "for any use the other producer may put it to". To fit in with the language of par.(a) of the section, i.e. "required for his own use for seed", it must mean "for use by the other producer as seed". But is this meaning satisfied by the eggs being put to any use which fertilized eggs may be put to? If so, they could be put to the production of egg pulp. They could be put to the production of table birds. And of course they could be put to the production of live cells for vaccine production. None of these uses would be aimed at the reproduction of the commodity itself.

In our opinion, the words "for seed for such other producer's use", meaning, as we think, "for use by the other producer as seed", must carry the meaning of use as seed by such other producer as a producer of the particular commodity, and that points to reproduction by the producer of more of the commodity of which he is a producer, and that in turn involves in the

circumstances of this case use for the hatching out of chickens potentially capable of producing eggs. It is true that this use would not necessarily ensure the production of other eggs because the birds so hatched might all be males or they might all be used as table birds. But it is also true that use for any other purpose than the hatching out of chickens would not permit of the reproduction of the commodity under consideration. In our opinion, it is this with which the proviso is concerned. It is not concerned with any use which physiologically might be described as use "for seed". The conception is use for seed for production of the commodity in question.

The use for which the eggs were sold or delivered by Eremosa Research Farm Pty Ltd to the defendant being one which would not admit of the reproduction of other eggs, it is, in our view, a use in respect of which the necessary objective was missing and, therefore, a use falling outside the proviso.

In our opinion then, in reaching the conclusion that he did, the magistrate did not misdirect himself and he was correct in deciding that the purchase did not fall within the proviso. The order nisi to review will, therefore, be discharged with costs, subject to the limit provided by the statute. Order nisi discharged.

Solicitors for the applicant: Lloyd P. Goode and Co.
Solicitors for the respondent: Mallesons.
