

09/85

SUPREME COURT OF VICTORIA

DALGETY FARMERS LTD v CHRYSTIE

McGarvie J

28 February 1985 — [1985] VicRp 74; [1985] VR 778

STATUTORY INTERPRETATION – RULES OF CONSTRUCTION – MEANING OF "PERSON" – WHETHER INCLUDES CORPORATION – WHETHER CONTEXT OF AUCTION SALES ACT 1958 ENTITLES A CORPORATION TO APPLY FOR AN AUCTIONEER'S LICENCE: AUCTION SALES ACT 1958, SS3-7, 22, 24, 29, 33, 35, 38; INTERPRETATION OF LEGISLATION ACT 1984, SS35, 38.

Section 7 of the *Auction Sales Act 1958* gives "any person" a right to apply for an auctioneer's licence. The word "person" is to be regarded as including a corporation, unless the contrary intention appears from the context of the Act. There are clear indications that when the *Auction Sales Act 1958* refers to a person acting as an auctioneer, it refers to what is done by the individual who conducts the auction and not to what is regarded as done in law by the individual's employer. Accordingly, a corporation which employs auctioneers to conduct auction sales, is not entitled to apply for and not required to hold an auctioneer's licence.

McGARVIE J: [8] In this appeal, the concise issue is whether a corporation may obtain an auctioneer's licence. Dalgetys applied, under s7 of the *Auction Sales Act 1958*, for an auctioneer's licence. The respondent, Chrystie, an officer of the Attorney-General's Department, authorised to issue licences, objected on the ground that the Act did not authorise the issue of a licence to a body corporate. The application was heard in the Magistrates' Court at Melbourne by a different Magistrate than the one who heard the charge the subject of the other appeal. He held that an auctioneer's licence could not be issued to a corporation and dismissed the application.

Section 7 of the Act gives "any person" a right to apply for an auctioneer's licence. For the applicant, Mr Hansen relied on s38 of the *Interpretation of Legislation Act 1984*, which provides that:

"In all Acts and subordinate instruments, unless the contrary intention appears— ...
"Person" includes a body politic or corporate as well as an individual".

Mr Habersberger argues that the contrary intention appears from the context of the Act. Counsel have addressed me as to the principles to be applied in resolving the rival contentions on the approach to construction and I set out the principles by which I am guided. The Act is to be read as though a provision in the terms of s38 of the *Interpretation of Legislation Act 1984* appeared [9] in its interpretation section; *Christophers v The Mutual Store Ltd* [1890] VicLawRp 39; [1890] 16 VLR 172 at p174. I do not accept Mr Hansen's submission, based on *Duperouzel v Cameron* [1973] WAR 181, that the contrary intention can only be found in s7. That case concerned an unusual legislative scheme. It is well established that every part of an Act is to be construed with reference to the other parts of the Act: *City of Nunawading v Melbourne & Metropolitan Board of Works* [1959] VicRp 59; [1959] VR 410 at p412; [1959] ALR 943. *The Metropolitan Gas Company v The Federated Gas Employees Industrial Union* [1925] HCA 5; [1924] 35 CLR 449 at p455; 31 ALR 117 is authority for that proposition and also for the proposition that "where alternative constructions are equally open, the alternative is to be chosen which will be consistent with the smooth working of the system, which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system". The passage there quoted by the High Court came from *Shannon Realities Ltd v Ville de St Michel* [1923] UKPC 81; [1924] AC 185 at pp192-3.

The approach is to regard the word "person" as including a corporation unless an examination of the Act as a whole shows, with reasonable clarity, that it is intended that the word, when used in relation to an applicant for, or holder of, an auctioneer's licence, does not include a corporation. The fact that there may be some provisions relating to a licensed auctioneer, which

could not be applied if a corporation were licensed as an auctioneer, does not necessarily show that the word does not include a corporation: see *Comptroller of Stamps v Handevel Pty Ltd* [1984] VicRp 72; [1984] VR 894 at p898; (1984) 8 ACLR 827; 15 ATR 672; *Australasian [10] Temperance and General Mutual Life Assurance Society v Howe* [1922] HCA 50; [1922] 31 CLR 290 at p299; 29 ALR 46; *Christophers v The Mutual Store Ltd* [1890] VicLawRp 39; [1890] 16 VLR 172. Section 7 of the Act provides;

"Where any person is desirous of obtaining an auctioneer's licence for any year he, on or before the first Tuesday in the month of November preceding such year, shall deliver to the clerk of the magistrates' court for the place mentioned or referred to in section seventeen nearest to which he resides—

(a) a notice in writing of his intention to apply for the same in the form in the Second Schedule; and

(b) a certificate of character in the form attached to the said Schedule signed by six respectable householders resident in the locality in which he resides."

Section 3(1) includes these interpretation clauses;

"Auctioneer' means any person who sells or attempts to sell or offer for sale or resale any goods or any lands by way of auction as herein defined."

"Sales by auction' or 'to sell by auction' implies the sale of any goods or of any lands by outcry knocking down of hammer candle lot parcel instrument machine or any other mode whereby the highest or the lowest bidder is the purchaser; or whereby the first person who claims any goods (other than food for human consumption offered for sale by retail in particular specified markets) or lands submitted for sale at certain price named by the person acting as auctioneer is the purchaser; or whereby there is a competition for the purchase of any goods or any lands in any way commonly known and understood to be by way of auction."

The following sections are relevant;

"4. Any person who not being a clerk or deputy authorized as hereinafter provided to act as an auctioneer and not being a person deemed as hereinafter provided to be a licensed auctioneer acts as an auctioneer without having obtained a licence in the manner hereinafter provided shall for each offence be liable to a penalty of not more than \$400 and if the court imposing the penalty so orders shall not for such period (but not exceeding three years) as the court thinks fit be qualified to hold an auctioneer's licence.

5. An auctioneer's licence shall authorize the person obtaining the same to act as an auctioneer within Victoria and for such licence a fee of \$100 shall be paid."

Mr Hansen placed particular reliance on s4. He referred to s35(a) of the *Interpretation of Legislation Act* 1984 which provides:

[11] "In the interpretation of a provision of an Act or subordinate instrument—

(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object."

His submission was that, as s4 precludes any person other than the clerk or deputy mentioned in it, from acting as an auctioneer unless licensed, it would frustrate the purpose of the section if a corporation could not be licensed. He argued that, as a corporation such as Dalgetys acts by its employees or agents, it is the corporation which the Act requires to have a licence and not its employees who conduct the auctions on its behalf.

The resolution of this appeal turns upon the meaning of the word "person" and also on what the Act means by the expression "act as an auctioneer". Mr Hansen submits that where the auction is conducted by an employee it is the employer who is treated as selling by auction. Mr Habersberger submits that it is the individual employee who sells by auction within the meaning of the Act. Mr Habersberger emphasises that what is sold is not the property of the employer but the property of the seller which is sold to the buyer.

The effect of the definitions is that someone acts as an auctioneer within the meaning of s4 who sells, attempts to sell or offers for sale or resale any goods or lands by way of auction.

Someone who sells by the process commonly regarded as an auction, sells by auction. In my view there are clear indications that when the Act refers to a person acting as an auctioneer it refers to what is done by the individual who conducts the auction, not to what is regarded as done in law by the individual's employer. [12] The indications are that the word "person" as used in the sections relevant to this appeal means an individual capable of actually conducting an auction sale and therefore does not include a corporation.

I do not accept Mr Hansen's submission that, as a corporation acts by its employees and agents, it is the employer corporation which the Act requires to be licensed and not its employees who actually conduct the auctions on its behalf. If that were the meaning of the Act there would be no need for the temporary licence under s22(1) which enables the deputy or clerk of a licensed auctioneer to be granted a temporary licence to act as an auctioneer on behalf of the licensed auctioneer when the latter is unable from illness or other good cause to act as auctioneer. If the deputy or clerk could without licence conduct auctions on the employer's behalf as its employee or agent, there would be no point in providing for a temporary licence for them. Also, on the view advanced for the appellant, it is difficult to see how a corporate employer, if capable of being a licensed auctioneer, could be said to be unable from illness or any other good cause to act as auctioneer if it had a deputy or clerk available who was able to conduct the auction.

One may test the ordinary meaning of acting as an auctioneer by looking at analogous situations. If the inquiry were whether a person acted as a solicitor one would look to see whether what an individual did fell within the normal description of acting as a solicitor. If so, it would make no difference whether the individual practised on his own account or was employed by a corporation. It would seem clear that [13] a surgeon, employed by a hospital which was a corporation, would be acting as a medical practitioner in performing an operation, but his doing so would not mean that the hospital was acting as a medical practitioner unless the particular context indicated that meaning.

A number of sections indicate that in referring to a person who acts as an auctioneer and is accordingly required to be licensed, the Act means the individual who conducts the auction and not the employer of the individual. In one of the defined forms of selling by auction the purchaser is the first person who claims goods or land submitted for sale at a certain price "named by the person acting as auctioneer". S3(1).

Section 6 provides for the granting in Victoria of licences to licensed auctioneers resident in States which extend similar rights to licensed auctioneers resident in Victoria. The licences are referred to in sub-sections (1) and (2) as licences "to follow the occupation of an auctioneer". A reference to an occupation fits an individual more naturally than a corporation. *In re Chaffey Bros Ltd* [1895] VicLawRp 146; [1895] 21 VLR 727 at 735.

Several sections refer to applicants or holders of licences residing or being resident in States or localities or having residences, ss6(1) and (2), 7 and 15. Section 7 requires an applicant for a licence to deliver with the application a certificate of character signed by six respectable householders resident in the locality in which the applicant resides. Section 8 requires the posting up of a list setting out the "places of abode" of applicant for licences.

[14] Mr Habersberger referred me to *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* [1922] HCA 50; [1922] 31 CLR 290 especially at pp295-6 and 329-330; 29 ALR 46, Mr Hansen relied on *Koitaki Para Rubber Estates Ltd v FCT* [1941] HCA 13; [1941] 64 CLR 241 especially at p246; [1941] ALR 125; (1941) 6 ATD 82; (1941) 2 AITR 167. Those and similar cases demonstrate that, if for other reasons the word "person" in an Act includes a corporation and the act refers to the residence of a person the courts will, of necessity, engage in the artificial process of determining the residence or residences of a corporation. However, if there is a question such as whether the word "person" in an Act includes a corporation, references to the residence or place of abode of the person point to a natural person rather than a corporation.

Another factor tends to support the view that in the relevant sections of this Act the word "person" refers to an individual and not a corporation. It would not be impossible to determine the place or places of residence or abode of a corporate applicant for, or holder of, a licence, but if that were necessary it would often introduce questions of difficulty and uncertainty and not

contribute to the smooth working of the statutory system of licensing. While the authorities on the law of defamation relied on by Mr Hansen, show that a company may have a character, a certificate of the applicant's character such as is required by s7 is something which pertains more naturally to an individual than to a corporation.

The form of application in the second schedule required by s7, is expressed to be given under the applicant's hand, an expression indicating a natural person as applicant. Similarly [15] s35 requires a licensed auctioneer to keep a registry or book and imposes a penalty "if he does not by signing or initialling the entry verify any particulars therein not actually entered by his own hand".

I accept Mr Hansen's submission that the use of the word "he" in some of the sections does not indicate that a corporation is not included. See *The Union Steam Shipping Company of New Zealand Ltd v The Melbourne Harbour Trust Commissioners* [1882] VicLawRp 87; (1882) 8 VLR (M) 28; (1882) 8 VLR (L) 167 at 181; 4 ALT 28. Section 24, making provision for the business to be carried on after the death of a licensed auctioneer, could not apply to a corporation. Section 24, providing for the event of a licensed auctioneer desiring to absent himself from Victoria for a period of more than a month would not readily apply to a corporation. However, as these sections would apply to individuals they carry little weight on the issue. I also regard s33 as neutral on the question of construction. It precludes a person who holds a hotel keeper's licence from holding an auctioneer's licence. It is a general provision which operates to prevent an individual hotel keeper from holding an auctioneer's licence even though it would not be necessary in order to prevent a corporate hotel keeper from holding an auctioneer's licence, if corporations are unable to obtain licences under the *Auction Sales Act*.

Section 29(1) requires an auctioneer, before beginning any sale by auction of cattle or farm produce to read or recite aloud the material parts of sections of the Act. By a proviso, where successive sales are held on any day at the same selling place and the material parts of the sections are read [16] or recited by the auctioneer conducting the first sale, auctioneers conducting later sales are not required to do so. That Section suggests that the individuals who actually conduct the auction sales are those who sell by auction within the meaning of the Act.

The provision in s38 which depends on the licensed auctioneer having for twelve months been personally acquainted with the owner or possessor from whom the goods were received, may readily be applied if the licensed auctioneer is the individual who conducts the auction but would present difficulties if the licensed auctioneer could be a corporation which employed that individual.

Neither the nature and scheme of the Act nor its particular provisions show that it has an underlying purpose which would require that corporations be capable of being licensed auctioneers in order to achieve the purpose.

I mention that the submission for Dalgetys would have somewhat drastic consequences. If the company which employs auctioneers to sell by auction, as Dalgetys does, is itself acting as an auctioneer, Dalgetys and other reputable companies have for years been engaged in a course of criminal conduct by acting as auctioneers without a licence. There would be a high probability that their contracts for the auction of stock would be treated as illegally performed and be unenforceable. The effect of the appellant's argument before me is that almost everyone has been wrong on this point for over a century. While not conclusive, because common error of long-standing does occasionally show up, that factor indicates the necessity for a careful scrutiny of the argument.

[17] I conclude that a corporation such as Dalgetys, which employs auctioneers to conduct auction sales, is not entitled to apply for and not required to hold an auctioneer's licence. The learned Magistrate was correct in deciding that an auctioneer's licence cannot be issued to the appellant because it is a corporation. The order nisi will be discharged.

Solicitors for the applicant: Mallesons. Solicitor for the respondent: RJ Lambert, Crown Solicitor.