04/84

INDUSTRIAL RELATIONS COMMISSION OF VICTORIA IN COURT SESSION

CLISBY PTY LTD v TUCKER

KD Marshall, President

18 October, 23 December 1983

INDUSTRIAL LAW – LABOUR AND INDUSTRY – FAILURE TO CLOSE SHOP ON A SUNDAY – BILLIARD TABLE MANUFACTURER SELLING BILLIARD TABLES ON A SUNDAY – WHETHER BILLIARD TABLES "WORKS OF ART AND HANDICRAFT": *LABOUR AND INDUSTRY ACT* 1958, S80(1), FIFTH SCHEDULE.

Section 80(1) of the *Labour and Industry Act* 1958 (insofar as relevant) provides:

"Save as otherwise expressly provided in this Act all shops (except shops of the classes or kinds mentioned in the Fifth Schedule...) shall be closed and kept closed—
(a) on Sundays, for the whole of the day;
(b) on Saturdays, from the hour of one o'clock; ...."
The Fifth Schedule contains 20 items including: "Shops for the sale of works of art and handicraft".

C Co. makes a range of billiard tables and sells them in its 2 shops. The top-of-the-range model is most elegant, its features including carved timber, turned legs and other ornamentation. Manufacture of the tables requires the services of persons who are possessed of a high degree of work skills and experience. C Co. was convicted in the Magistrates' Court for failing to close and keep closed on a Sunday its 2 shops, and fines were imposed. On appeal to the Commission in Court session, C Co. argued that its shops were shops for the sale of handicraft, and therefore, within the exception.

HELD: Appeal dismissed. Convictions confirmed.
(1) "Shops for the sale of works of art and handicraft" are places where works of art (including paintings and like works) and other objects crafted by people possessed of creative ability are displayed for viewing and/or sale.

(2) The category "works of art and handicraft" constitutes a genus, and the word "art" colours the word "handicraft".

(3) Billiard tables are neither a handicraft nor works of art because they are not within the generic description "works of art and handicraft".

(4) Accordingly, C Co's shops did not come within the exception, and were not entitled to be open on Sundays.

[NOTE: By virtue of s22(7) of the *Industrial Relations Act* 1979, a decision by the Commission in Court session on a question of law is binding on the Metropolitan Industrial Court and Magistrates' Court in proceedings arising under the *Industrial Relations Act* 1979 the *Labour and Industry Act* 1958, the *Industrial Training Act* 1975 or the *Industrial Safety, Health and Welfare Act* 1981. Ed.]

MARSHALL P: *[After setting out the details of the convictions, the relevant provisions of s80(1) of the* Labour and Industry Act *1958 and the process involved in the manufacture of the billiard tables, the President continued]:* ... **[4]** Mr Galbally, who appeared for the company, contended that his client is not guilty in relation to the informations charged because the shops are within the category "Shops for the sale of works of art and handicraft" (the category) which appears in the Fifth Schedule and that they are therefore entitled to be open on Saturdays after 1 p.m. and on Sundays.

His primary submission was that the word "and" in the category means "and/or"; that it was meant to be disjunctive and not conjunctive, so that a shop can sell works of art or handicraft without necessarily selling both. Support for that proposition was said to be found in *Hall v Hooker* [1921] VicLawRp 82; (1921) VLR 471; 27 ALR 289; 43 ALT 68, a judgment given by the Supreme Court of Victoria (Cussen J) in 1921, which authority, it was submitted, was binding upon the Commission and should be applied to the whole of the Fifth Schedule. **[5]** Mr Galbally added that there must be certainty when construing a statute. Further, after referring to other categories in

the Fifth Schedule which contain the word "and", he contended that unless "and" in "Shops for the sale of works of art and handicraft" is read as "and/or", the category does not make sense. He said that as the Act is a penal statute, if there is any ambiguity arising on this point it should be resolved in favour of the Company.

Mr Dennis appeared for the respondent in the appeal. He contended that where a conjunction such as "and" is used in the Fifth Schedule, it joins two categories which fit within a genus – other examples being booksellers' and newsagents' shops where the genus is reading material, and flower shops and retail plant nurseries where the genus is plants. He contended that even if "and" appearing in the category "Shops for the sale of works of art and handicraft" does mean "and/or", that does not alter the fact that there is a genus there and that "handicraft" is coloured by the word "art". He cited the decision dated 30 October 1981 of the Industrial Appeals Court in *Tucker v Second Mountain Gate Nominees Pty Ltd* (not reported) in support of his argument. It is noted that Mr Galbally submitted that the particular paint in that case was wrongly decided.

In deciding this issue, all supporting argument has been considered. Had it not been for the judgment in *Hall v Hooker* (the circumstances of which case may be distinguishable from those now before the Commission) I would have thought that a literal interpretation of the category "Shops for the sale of works of art and handicraft" was appropriate and that the word "and" would **[6]** be read conjunctively. If the Legislature had intended otherwise it could have used "and/or" rather than "and" or it could have listed works of art separately from handicraft (or works of handicraft). But it is possible that by using the word "and" in that category Parliament intended that it should have the same meaning which was given by the Supreme Court in *Hall v Hooker* to that word where it appeared in another category.

Although my preference is that "and" in the category in question ought to be read conjunctively, my consideration of this matter will proceed on the basis that it may just possibly be read as "and/or". The question to be decided then becomes whether or not the Company's shops were shops for the sale of handicraft in the sense in which that word is used in the Fifth Schedule.

Mr Galbally referred to the *Oxford Dictionary* and found that it defined "handicraft" as being a "manual skill; skilled work with the hands" and as "a manual art, trade, or occupation". He submitted that a handicraft is not to be defined by where it is made (i.e. in a factory or elsewhere) but rather one must look at the skill and work which is actually involved in the making of an article (my word). He said that it is a question of degree as to whether or not a particular article is a handicraft. By way of illustration, he suggested that the making of pottery and the weaving and making of Persian rugs, even when they are made in a place where a large number of people are engaged, are handicrafts because of the skill involved in the processes; that the making of crockery may or may not be a handicraft, depending on the degree of skill required for a particular article.

[7] He contended that a work of art can be appreciated in two ways – i.e. it may be something which is an example of fine art which people enjoy without using (e.g. a painting) or it may be something which people enjoy by using it (e.g. fine porcelain) – and that the same can be said of handicraft. He said that in the present case, the role of a billiard ball on a billiard table (something which people enjoy by use) depends upon skilled craftsmanship of such fine precision throughout the whole manufacturing process that, as a matter of degree, the table must be a handicraft, even though power tools are used to make it. His submission went further; that the billiard tables made by his client fall within the general definition of a work of art and that handicraft does not add anything more to that phrase. He said that art and handicraft are one and the same and that the word handicraft is an adjunct of art; that although handicraft does not encompass all works of art, a work of art encompasses all works of handicraft. He referred to the definition of "art" in the *Oxford Dictionary*, saying that it encompasses both a fine art and a handicraft and that it cannot be said that the Legislature intended to distinguish between them.

Amongst other submissions, Mr Dennis said that it is erroneous to look at "handicraft" and ask "Does the manufacture of this object involve handicraft?" because that is not the enquiry. It is not the enquiry, he said, because the Fifth Schedule refers not to objects nor to the skills used

to make them but to shops for the sale of items which fit within the generic category of "Shops for the sale of works of art and handicraft". **[8]** All of the material tendered and submitted to me has been duly considered. Much of Mr Galbally's argument consisted of a review of the decision of the Industrial Appeals Court in the *Second Mountain Gate case*. Those arguments have not been reviewed here for the reason that I have adopted the procedure of simply applying the Act to the facts of this particular case. The "art and handicraft" category was introduced into the Act in 1974 when "Art and handicraft Galleries" was added to the classes of shops listed in the Fifth Schedule. In 1977 the words "Shops for the sale of works of art and handicraft" were substituted for "Art and handicraft Galleries".

I agree with the observation made by the Industrial Appeals Court in *Tucker v Second Mountain Gate Nominees Pty Ltd* (*supra*) that the word "galleries" in the 1974 legislation gives a clear indication of the sense in which "handicraft" is used. Because of the wide definition of "shop" in s3 of the Act it appears to me that the 1977 amendment clearly extended the kind of premises which could come within the category. However, I can perceive no intention to otherwise change its meaning. A place which properly comes within the category "Art and handicraft galleries" brings to mind a place where works of art (which would include paintings and like works) and other objects crafted by people possessed of creative ability are displayed for viewing and/or sale. In my opinion the category of "Shops for the sale of works of art and handicraft" which was substituted for it should be regarded in the same way.

I accept Mr Dennis' submission that that category constitutes a genus and that the word "art" colours "handicraft". **[9]** Whilst I acknowledge that the making of the billiard tables by the Company requires the services of persons who are possessed of a high degree of work skills and experience, I am unable to accept the proposition that those tables are a handicraft for the purposes of the category "Shops for the sale of works of art and handicraft" which appears in the Fifth Schedule to the Act. To use more positive terms, it is my firm opinion that the tables are neither a handicraft nor are they works of art in the sense in which those expressions are used in the said category. It matters not whether the word "and" is read disjunctively or conjunctively. In neither sense can the Company's billiard tables be brought within the generic description "works of art and handicraft". Having so decided, there is no need for me to deal with submissions directed toward billiard accessories. It follows that the appeals are dismissed and the decisions of the Magistrates' Court confirmed.

APPEARANCES: Mr BM Dennis, counsel, for the Minister of Labour and Industry. Mr FW Galbally, solicitor, for Clisby Pty Ltd.
