

07/00; [2000] VSC 85

SUPREME COURT OF VICTORIA

GOLDBERG v OFFICE of FAIR TRADING & BUSINESS

Beach J

7 March 2000 — (2000) 31 MVR 11

MOTOR CAR TRADER – PERSON ADVERTISED FOR SALE SOME 25 MOTOR CARS ON 59 SEPARATE OCCASIONS OVER A PERIOD IN EXCESS OF TWO YEARS – PERSON NOT LICENSED TO TRADE IN MOTOR CARS – APPLICATION TO MAGISTRATE FOR AN INJUNCTION FOR PERSON TO STOP UNLICENSED TRADING – APPLICATION GRANTED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR TRADERS ACT 1986, SS3, 7, 7A, 33A.

G., who was not licensed to trade in motor cars advertised for sale some 25 motor cars on some 59 separate occasions over a period in excess of two years. Pursuant to the provisions of s33A of the *Motor Car Traders Act* 1986 ('Act') an application was made by the Director of Consumer Affairs to a magistrate for an order requiring G. to stop trading in motor cars. G. argued that when he purchased the motor cars from a licensed motor car trader these were exempt transactions and that further transactions involving the cars thereafter were also exempt transactions. The application was granted by the magistrate. Upon appeal—

HELD: Appeal dismissed.

1. An exempt transaction under the Act includes selling motor cars or offering to sell motor cars by any person to—

- (i) licensed motor car traders;**
- (ii) special traders; or**
- (iii) employees of the person or, where the person is a body corporate, of a related company of the person.**

2. It is not the motor car which gains an exemption under the Act; it is the transaction itself. Accordingly, if a person purchases a motor car from a licensed motor car trader, that transaction is exempt; but if the person later offers the same car for sale to the public at large, that transaction is not an exempt transaction.

3. It was clearly open to the magistrate—

- (i) to find that in advertising the 25 motor cars for sale G. was deemed to be trading in motor cars; and**
- (ii) make the order requiring G. to stop trading in motor cars.**

BEACH J:

1. This is an appeal from the dismissal by a Master of the appellant's application that the Master state questions of law raised by an appeal the appellant wishes to bring in respect of an order made by the Melbourne Magistrates' Court on 3 February 2000 whereby the appellant was restrained from trading in motor cars without being the holder of a motor car trader's licence issued pursuant to the provisions of the *Motor Car Traders Act* 1986 (the Act).

2. Section 33A of the Act reads:

"33A. Injunction to stop unlicensed trading

(1) The Director may apply to the Magistrates' Court for an order requiring a person to stop trading in motor cars.

(2) The Magistrates' Court may make the order if it is satisfied that the person is trading in motor cars and is not authorised to do so under this Act."

The Director there referred to is the Director of Consumer Affairs.

3. It is an offence for a person to trade in motor cars without being licensed to do so: see s7 of the Act. The appellant is not licensed to trade in motor cars.

4. Trading in motor cars is defined in s3 of the Act. It means

"buying selling or exchanging motor cars, whether as principal or agent, and offering to buy sell or exchange motor cars, whether as principal or agent, and includes an advertisement or invitation to treat but does not include an exempt transaction under sub-section (3)".

5. For present purposes it is only necessary to note that an exempt transaction includes selling motor cars or offering to sell motor cars by any person to—

(i) licensed motor car traders;

(ii) special traders; or

(iii) employees of the person or, where the person is a body corporate, of a related company of the person.

6. Section 7A of the Act provides that persons doing certain things in relation to motor cars are deemed to be trading in them. The relevant sub-sections of the section for present purposes are sub-ss(1), (2), (3), (4) and (5), which read:

"(1) A person who buys, sells or exchanges, or offers to buy, sell or exchange, 4 or more motor cars in any period of 12 months (whether as a principal or as an agent) is deemed to be a motor car trader carrying on a business of trading in motor cars.

(2) Sub-section (1) does not apply if the person can prove that she, he or it did not, in that period, carry on the business of trading in motor cars and did not hold herself, himself or itself out as carrying on the business of trading in motor cars.

(3) In counting the number of motor cars bought, sold or exchanged by a person, any purchase, sale or exchange—

(a) that is an exempt transaction for the purposes of the definition of "trading in motor cars" is not to be counted;

(b) that is from, to or with a licensed motor car trader is not to be counted.

(4) In counting the number of motor cars offered for purchase, sale or exchange by a person, any offer—

(a) that would result in an exempt transaction for the purposes of the definition of "trading in motor cars" if it was to be accepted is not to be counted;

(b) that is made to a licensed motor car trader is not to be counted.

(5) In this section an offer to sell includes an invitation to treat and the publishing (or authorising the publication) of an advertisement."

7. On 28 November 1999 the appellant was served with an application by the Director for an order pursuant to s33A. The application came before the Magistrates' Court on 2 February last. The evidence called on behalf of the Director was that over the period from 22 March 1997 to 26 June 1999 the appellant had purchased some 20 damaged cars from Fowles Motor Auctions. Fowles Motor Auctions is a licensed motor car trader and those transactions, therefore, were exempt transactions. However, over the same period of time the appellant advertised for sale some 25 motor cars on some 59 separate occasions.

8. It is clear that the magistrate took the view that by advertising those cars for sale to the public the appellant was deemed to be trading in motor cars and made the order against him accordingly.

9. On 25 February the appellant made his application to the Master. In dismissing the application the Master noted, alongside the heading "Other Matters":

"The Master was satisfied that there was evidence before the Magistrate, of offers for sale of motor cars made by the Appellant to the public, which attracted the deeming provision in section 7A(1) of the *Motor Car Traders Act* 1986 and that it was open for the Magistrate on the evidence as he must have done to conclude that the Appellant had not, before the Court proved on balance of probabilities that he did not carry on the business of trading in Motor Cars (section 7A(2) of that Act)."

10. The argument advanced by the appellant — who, I might add, appeared before me in

person — was that once he purchased a motor car from a licensed motor car trader, a transaction which is clearly an exempt transaction, then any transaction involving the car thereafter is also an exempt transaction.

11. In my opinion that is a misconception of the section. It is not the car which gains an exemption, it is the transaction itself. And so, if a person purchases a car from a licensed motor car trader, that transaction is exempt; but if he later offers the same car for sale to the public at large, that transaction is not an exempt transaction.

12. In my opinion the Master made no error in the matter. It was clearly open to the magistrate to find that in advertising the 25 cars for sale the appellant was deemed to be trading in motor cars and that the appellant had not proved that he had not.

13. This appeal to a judge of the court must therefore be dismissed with costs to be taxed and paid by the appellant.

APPEARANCES: The appellant Goldberg appeared in person. For the respondent: Mr S Devlin, counsel. Solicitor to the Office of Fair Trading.

NOTE: On appeal to the Court of Appeal (Winneke P, Brooking and Charles JJ A) in the matter of *Goldberg v Maclellan*, [2000] VSCA 129, 25 July 2000. **Held: Appeal dismissed.**

WINNEKE P (with whom Brooking and Charles JJ A agreed): [*After setting out the relevant legislation, the history of the case and other matters, His Honour continued*] ... 22. The substantial point argued by the appellant was the one which he has argued before the magistrate, before Master Evans and before Beach J namely, that the proper construction of s7A of the Act compels the conclusion that because there was no, or no sufficient, evidence before the magistrate upon which to conclude that the vehicles which he offered to the public for sale were not the vehicles which he had purchased from a licensed motor car trader, then there was no evidence upon which the Magistrates' Court could have concluded that the vehicles offered for sale were not "exempt" within the meaning of subs(3) of s7A. Because he was the person buying from the licensed trader, and because it was the same vehicle which he was offering for sale, the transaction of offer for sale by him was itself exempt. I agree with his Honour that this argument misapprehends the provisions of s7A of the Act. Those provisions exempt transactions, not the vehicles which are the subject of them, and the fact that transactions pursuant to which the appellant has habitually purchased vehicles from a licensed motor car trader are themselves "exempt" transactions for the purposes of s7A does not similarly "exempt" further transactions pursuant to which the appellant habitually on-sells those vehicles or offers them for sale to the public generally. If it were otherwise, the essential purpose of the Act, which is to protect the rights of those who purchase motor cars from traders, would be substantially defeated. I therefore do not accept the appellant's primary ground of appeal that his Honour "erred in law by neglecting, omitting or refusing to accept s7A(3)(a) and (b) and s3(3)(a)(i) of the Act as compelling the conclusion that the transactions in which the appellant had engaged were, themselves, exempt transactions". It necessarily follows that I do not accept either the other expressed ground of appeal relied upon namely, that his Honour erred in law in concluding that the appellant had not satisfied the onus which s7A(2) casts upon him of proving that he did not, in the period relied upon, carry on the business of trading in motor cars. Once it is concluded that the transactions of offering the vehicles for sale to the public were not "exempt", there was abundant evidence upon which it was open to the magistrate to conclude that the appellant had not satisfied the onus of proof that he was not "trading".

23. In conclusion I should say that this Court has brought to the appellant's attention the provisions of sub-s(6) of s7A. He cannot assume that selling even less than four cars per year will render him immune from prosecution under the Act or from proceedings for breach of the injunction which is on foot.

24. For all these reasons I would dismiss the appeal with costs, including the costs of the "stay application" made to this Court on 31 March of this year. It necessarily follows that the costs orders which were made by the Magistrates' Court and by Beach J, which orders were stayed by the order of this Court on 31 March, will take effect according to their tenor.