08/89

SUPREME COURT OF VICTORIA

THE SHIRE OF SWAN HILL v SALVO and COTRUZZOLA

Brooking J

21 October 1988

HEALTH – RUBBISH BIN COLLECTION – DIFFICULTY IN MAKING RUBBISH AVAILABLE FOR COLLECTION – ANNUAL GARBAGE CHARGE – REFUSAL TO PAY – PROCEEDINGS INSTITUTED FOR RECOVERY OF CHARGE – TEST TO BE APPLIED BY COURT – "PROPER" – "PREMISES" – "TENEMENTS": *HEALTH ACT* 1958, SS60, 61.

Section 61(1) of the *Health Act* 1958 provides (insofar as relevant):

> "Instead of making and levying a rate as aforesaid—
> (a) the council may make an annual charge for the proper collection removal and disposal of—
> (i) refuse and rubbish..."

As a result of a change by the Council to the system of household rubbish collection, S. and C. were inconvenienced. Upon their refusal to pay the annual garbage charge, summonses were issued returnable in the Magistrates' Court. When the summonses came on for hearing, the Magistrate upheld the defence and dismissed the matters on the ground that the Council had not made a charge for the "proper" collection of refuse and rubbish. Upon order nisi to review—

HELD: Order absolute.
The test which the court should apply in such matters is whether it was open to a reasonable council to take the view that the service it provided constituted the proper collection, removal and disposal of refuse and rubbish. Accordingly, the magistrate was in error in considering whether the service was, in fact, for the proper collection, removal and disposal of refuse and rubbish.

BROOKING J: **[1]** Francesco Salvo and Salvatore Cotruzzola each have a farm of 30 odd acres at Beverford. They have got into litigation with the Shire of Swan Hill. There has been a 'how-do-you-do' over the advent in the Shire of the Big Bin system of household rubbish collection.

We are all by now familiar with the Big Bin; made of black plastic, with its two wheels and hinged lid, **[2]** it quite dwarfs ordinary dustbins and calls to mind the siege tower of ancient warfare as it trundles slowly forward. Mr Salvo and Mr Cotruzzola have very long drives. They do not want the Big Bin; they say their houses are too far from the road for the bin to make a weekly journey on its strong, but tiny, wheels, from house to highway and back again. Their Big Bins stand despondently in the long grass by their gates, unwanted and unused. They say the Shire's garbage contractor must call at their door if the collection service is to be of any use to them. They point to a plebiscite, which they claim showed the General Will to be against the new system.

The Shire nevertheless resolved to impose an annual garbage charge for the years ending 30 September 1986 and 1987, $50 for the first year and $52 for the second. The two farmers refused to pay it. Each was sued in the Magistrates' Court at Swan Hill for the charges plus interest. They won the case. The Court decided that the Council had not made a charge for "the proper collection, removal and disposal of refuse and rubbish" as authorised by s61 of the *Health Act* 1958. A system for the collection of rubbish was not "proper", the learned Magistrate thought, if it required some householders to wheel the bin distances of the order of those in question, 460 metres each way in one case and 290 metres each way in the other. Whether the defendants might reasonably have been expected to leave the bins near their gates and take the rubbish to them in small containers seems not to have been raised **[3]** at the hearing. Nor was it suggested to His Worship by the Shire that the section was concerned with collection from premises and that the householder's perambulations within his own boundaries had nothing to do with collection from the premises, at all events where the Council chose to collect from just outside the gate which was all that collection from the premises required.

In the Magistrates' Court both sides seemed to have treated the main question as whether there was, in fact, a "proper" system of collection in view of the length of the defendants' drives. It is not clear whether they, or for that matter the learned Magistrate himself, proceeded on the basis that, if there was no "proper" collection service provided for the defendants that would afford a defence not only to them but also to those who lived a short step from their front gates. So far as practical considerations are concerned, that a charge should be unenforceable in respect of any premises because one or two householders lived too far from the highway seems a strange result; on the other hand, if the question is to be approached on a case by case basis, then, since distance is a matter of degree, great uncertainty will result, recoverability depending on the Magistrates' determination of on which side of the line a given case falls.

A brief excursion through some of the dustier volumes of the Statute Book is desirable, for the history of ss60 and 61 of the present *Health Act* goes back a century. It begins with s19 of *The Public Health Act* 1888, authorising local boards of health to **[4]** make and levy a rate to provide for the proper removal of night-soil. *The Public Health Act* of the following year, by s45, empowered municipal councils to provide for the proper disposal of night-soil by making an annual charge for its removal. It also, by s40, gave the councils power to make by-laws providing that they should have power, in lieu of making a rate for the removal of night-soil and rubbish, to make a charge on each occupier for the service.

Then came the *Health Act* 1890, which brought together the provisions of the two earlier Acts. Section 258 authorised councils to make and levy a rate for the proper removal of night-soil. Section 259 gave them the alternative power to provide for the proper disposal of night-soil by making an annual charge for its removal and s253 authorised the making of by-laws providing that the council should have power in lieu of making a rate, for the removal of night-soil and rubbish, to make a charge on each occupier for the services.

These three sections had their counterparts in ss319, 320 and 314 of the *Health Act* 1915 (Act No. 2665). The *Health Act* 1919 went further than the earlier legislation as regards the imposition on councils of duties to collect rubbish and night-soil. Section 42 obliged city and town councils, and enabled the Commission of Public Health to require borough and shire councils to undertake or contract for the removal of rubbish from premises and its collection. Section 43 obliged city and town councils, and enabled the Commission to require borough and shire councils, to provide for the collection, **[5]** removal and disposal of night-soil. Sections 53 and 54 replaced ss319 and 320 of the Act of 1915, which dealt with the night-soil rate and night-soil charge respectively. Section 53 empowered councils to make and levy a "sanitary rate" for the purpose of providing for the proper collection, removal and disposal of refuse and rubbish, or of night-soil, or of refuse, rubbish and night-soil. Section 54 gave the alternative power to make an annual charge for the proper collection, removal and disposal of the same matter.

In the 1928 consolidation, the provisions of the 1919 Act were reproduced (*Health Act* 1928), ss39, 40, 51 and 52). Then came the *Health Act* 1950. By ss48, 49, 60 and 61, it made the same provision as the 1928 Act. The Act of 1956 was amended by the *Health Act* 1959, s3 of which introduced into s61 of the 1956 Act a substituted sub-section (1), which dealt in para. (b) with the case of trade or business premises and which is in the same terms as s61(1) of the present Act. The present Act, as amended, contains in ss48, 49, 60 and 61 provisions corresponding to the sections bearing the same numbers in the Act of 1956, ss48 and 49 being in substantially the same terms as their immediate predecessors and ss60 and 61 differing from them in some respects. There is a good deal to be said for the view that "proper" in para (a) of s61(1) adds nothing to the section. This view gains support both from other provisions of the present Act and from the history of the legislation. As to the present Act, s49 requires or empowers councils to provide for the collection, **[6]** removal and disposal of night-soil. Presumably this duty will not be discharged, and this power will not be lawfully exercised, unless the system is in some sense a proper one. Section 63 does not provide the answer here, for the work might be done promptly, efficiently and regularly under a system which ignored elementary requirements of hygiene.

Section 50(1) requires sewerage authorities to provide for the collection, removal and disposal of nightsoil; again the duty is presumably one to provide for the proper collection, removal and disposal. When the Act of 1888, by s19, empowered local boards of health to make a rate for the purpose of providing for the proper removal of night-soil, Parliament no doubt intended to

encourage the establishment of a sound system (compare *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama* (1957) AC 149 at p166; [1956] 2 Lloyds Rep 379), but I doubt whether it intended to submit to judicial scrutiny the question whether a given system was the most convenient or hygienic that might be devised. The by-law making power given by s40 of the 1889 Act referred only to removal, not to proper removal, of night-soil and rubbish and s45 of the same Act empowered councils to provide for "proper disposal" by making a charge for "removal".

The impression given by these provisions, and by the 1890 Consolidation, which brings them together, is that Parliament is concerned to encourage the establishment and maintenance of satisfactory systems of disposing of night-soil, but again I doubt whether judicial oversight except to a very limited extent was in contemplation.

[7] Whether one is considering the present provisions or those in force at any stage of the history of the charge, it seems to me unlikely in the extreme that Parliament intended to commit to the determination of the court in which the charge was sought to be recovered the question whether the service provided answered the description "the proper collection, removal and disposal of refuse and rubbish" in the sense of being the right one. It seems to me that (leaving aside the effect of s345(2) of the *Local Government Act* 1958) the Court in which the charge is sought to be recovered or, for that matter, any court in which a question is raised about the charge, cannot have been intended to involve itself in questions of public health and local government to the extent of deciding, as a question of fact, whether a given service was for the "proper" collection, removal and disposal of rubbish.

The power conferred by s61 is not unlike a by-law making power. Indeed, it has been historically associated with this power and still is. See the present s93 and the earlier sections which referred to by-laws empowering the council to make a charge for the removal of night-soil and rubbish. If the by-law analogy is sound, the Court's power of review must be very limited. Even if that analogy is not a sound one, the need for judicial restraint in review is indicated by cases like *Re Decision of Walker* (1944) KB 644 and *Luby v Newcastle-under-Lyme Corporation* (1965) 1 QB 214; compare *Secretary of State for Education v Thameside Metropolitan Borough Council* [1976] UKHL 6; [1976] 3 All ER 665; [1976] 3 WLR 641; (1977) AC 1014 at p1064 per Lord Diplock.

[8] In my view, if it was open to a reasonable council to take the view that the service it provided constituted the proper collection, removal and disposal of refuse and rubbish, that was an end of the matter. Of course, the learned Magistrate did not apply this test; he was never invited to. Both sides asked him simply to consider for himself whether the service was, in fact, for the proper collection, removal and disposal. Had His Worship been asked to apply the test, which I consider the appropriate one, he might well have reached the same conclusion as I.

My conclusion is that it could not be said that it was not open to a reasonable council to take the view that the service it provided constituted the proper collection, removal and disposal of refuse and rubbish. The Shire now says that the Magistrates' Court could not even consider the suitability of the scheme to the limited extent I have mentioned because of s61(2), whereby the charge may be paid to, or recovered by, the council in the same way as general rates are payable or recoverable under the *Local Government Act* 1958. The Shire relies on s345(2) of the latter Act:-

> "Upon any complaint or action for the recovery of any rate from any person, the invalidity or badness of the rate as a whole or in respect to any part thereof shall not avail to prevent such recovery."

Mr Kendall, on the other hand, argues that the Court should be reluctant to hold that s345(2) is applicable because of the absence of a right of appeal in relation to these charges, corresponding to that **[9]** conferred as regards rates by ss304-7 of the *Local Government Act*. This submission presupposes that s61(2) does not make these sections applicable, a question which I find it unnecessary to consider.

The affidavits conflict on whether the Shire invoked s345(2) in the Magistrates' Court. The learned Magistrate does not, in the course of his careful reasons for decision, refer to the section and, in these circumstances, I should proceed on the basis that it was not raised. But Mr Kendall accepts that it is open to the Shire to rely on the section in these proceedings, assuming it to be

applicable. There is little authority dealing with the effect of s61(2) of the *Health Act*. One of its predecessors, in different terms, was briefly mentioned in *Shire of Yarrawonga v Christie* [1931] VicLawRp 2; (1931) VLR 4, at p6; 36 ALR 372. In *Shire of Tungamah v King* [1916] VicLawRp 13; (1916) VLR 116, at pp118-9, Hood J expressed the opinion that another predecessor to s61(2) brought in the requirement of a written demand. Finally, in *Mayor (etc.) of South Melbourne v Quigley* [1902] VicLawRp 104; (1902) 27 VLR 637; (1897) 3 ALR 124, a County Court decided that the effect of the provision was to make expenses due for removing night-soil a charge on the land; for the proceedings in the Full Court, see the case of the same name, reported in (1902) 27 VLR 637.

Having regard to my view that, even in the absence of s345(2), it was not possible to say that the service provided was not the proper collection, removal and disposal of refuse and rubbish, I need not and shall **[10]** not express any opinion on the applicability of s345(2). Mr Kendall sought to uphold the orders below on two other grounds, both points having been unsuccessfully taken below, although not in precisely the same terms. The first was that no service was rendered, or available, within the meaning of s61(2). I will content myself with saying that, even having regard to the additional arguments now advanced, I think that this defence was rightly rejected by the learned Magistrate.

In the second place, Mr Kendall submitted that the expression "tenements" in s61 bore some such meaning as "a dwelling and its curtilege". But such a construction is not possible if only because para (b) of sub-section (1) shows that trade or business premises can constitute a "tenement". The section exhibits an unfortunate diversity of expression. Paragraphs (a) and (b) of sub-section (1) speak of "premises". Sub-sections (2) and (3) use the word "tenements". Section 60, dealing with the sanitary rate, talks of "rateable properties" and "any one separate tenement".

Section 61(a) speaks in terms of land, presumably because s251 of the *Local Government Act* itself does so. Although I need not decide the question, I am strongly disposed to think that the expressions "premises" and "tenements" in s61(1) and (2) bear the same meaning as "one separate tenement" in s60(2) and that s61, like s60, is concerned with rateable properties, the intention being that councils shall employ the same machinery **[11]** in relation to the collection and recovery of charges as they employ in relation to rates.

In this regard, it is worth recalling the origins of the present scheme in the Acts of 1888, 1889 and 1890 and the use in those Acts of the expression "tenement" in relation both to the rate and to the charge. In the result, in each case, the order nisi will be made absolute on ground 4:-

> "That the Magistrate was wrong in law when he held that the appellant's system of collection, removal and disposal of refuse and rubbish was not proper."

It will be made absolute with costs, including any reserved costs in each case. The order of the Magistrates' Court at Swan Hill made on 18 February 1988 dismissing the complaint and ordering the complainant to pay the defendant's costs is, in each case, set aside and, in lieu thereof, it is ordered that the defendant pay the complainant the sum of $124.41, together with $508.52 costs. I have allowed in this substituted order the same amount for costs as the Court awarded the defendants. The costs incurred by the complainant were presumably somewhat greater but, unless counsel wish to suggest that the matter be remitted in relation to costs, the order will be as I have said.

APPEARANCES: For the Shire of Swan Hill: Mr B Monotti, counsel. Maddock Lonie & Chisholm, solicitors. For the respondent Salvo: Mr R Kendall, counsel. Basile Pino & Co, solicitors.
