**04/70**

**SUPREME COURT OF VICTORIA**

# *A-G for the STATE of VICTORIA v LIDO SAVOY PTY LTD and ORS*

**Little J**

**23 February 1970**

**PRACTICE AND PROCEDURE – APPLICATION FOR AN INTERLOCUTORY INJUNCTION – INJUNCTION SOUGHT TO PREVENT THE PRESENTATION OF THE STAGE PRODUCTION OF A SHOW CALLED *OH! CALCUTTA!* – A BOOK WAS HELD FOR EXAMINATION AND SEIZED BY THE DEPARTMENT OF CUSTOMS – UPON INSPECTION THE BOOK AND PHOTOGRAPHS INDICATED A THEME OF SEXUALITY AND THE GRATIFICATION IN VARIOUS AND ABNORMAL WAYS OF SEXUAL IMPULSES – PLAYERS WERE DEPICTED AS INDULGING IN ACTS OF SEXUAL INTERCOURSE – WHETHER THE INJUNCTION SHOULD BE GRANTED.**

**HELD: Order that pending the trial of the action the defendants were restrained from presenting at the Lido Restaurant the play *Oh! Calcutta!***

**Having regard to the material provided, it served to show that *Oh! Calcutta!* was nothing other than an excursion in depravity. One word described it – "filth". Accordingly, a *prima facie* – indeed a strong *prima facie* case was made out that the presentation of *Oh! Calcutta!* at the Lido Restaurant would involve the commission of offences alleged.**

**2. The evil which it was sought to prevent and the prevention thereof in the public interest outweighed the injurious consequence which it was said the defendants would suffer if an injunction were granted, and it was not unjust that the defendants should have been enjoined pending trial of the action.**

**3. Accordingly, an order was made that pending the trial of this action or further order the defendants be restrained from presenting at the Lido Restaurant, the play *Oh! Calcutta!***

**LITTLE J:** This is a summons for an interlocutory injunction in an action brought by the Attorney-General against the defendants. There is no occasion for me, I think, to read the terms of the endorsement on the writ. It is sufficient to say that in substance the allegation is that the defendants intend to present a stage production entitled *Oh! Calcutta!* at the Lido Restaurant at 184 Russell Street, Melbourne, and that in doing so they will commit or aid and abet the commission of various offences which are either indictable or summary.

In support of the present summons two affidavits have been filed on behalf of the plaintiff, one which exhibits in book form the script of the production *Oh! Calcutta!* – it is Exhibit A to the affidavit of Mr Darroch. It consists of a series of plays or sketches, and the subject matter and acting is liberally illustrated in photographs; further photographs appear in a magazine (which was also an exhibit to an affidavit) known as "Playboy". Attention was particularly directed to the plays appearing in the list of contents commencing with "Prologue" and ending with "Coming together. Going together."

The question which arises at the threshold is whether the plaintiff has made out a case sufficient for the purposes of an interlocutory injunction that the defendants intend to produce *Oh! Calcutta!* in the form or substantially in the form it appears in the book to which I have referred.

The principles applicable to a grant or refusal of such an injunction are well established and I refer, without quoting the passages in question, to the statement thereof by the High Court in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1; (1968) 118 CLR 618; [1968] ALR 469 at p470; (1968) 42 ALJR 80; and the more recent discussion by Mr Justice Pape in *Dajon Investments Pty Ltd v Talbot* [1969] VicRp 75; [1969] VR 603 at pp605-607; (1969) 21 LGRA 228.

I turn accordingly to consider the question which is in substance: What is it that the defendants intend to preclude? The material before me shows that a book, of which Exhibit

"A" to Mr Darroch's affidavit is a copy, was approximately on the 2 December 1969, received in Australia from the United States in an envelope addressed to Mr David McIlwraith, Lido Savoy Pty Ltd, 180 Russell Street, Melbourne. Notice was given to him by the Department of Customs that the book was being held for examination. On the 17 December 1969, a notice of seizure was issued to Mr McIlwraith who on the same date applied for a conditional release of the book for a limited period of two months. That application was approved and on the 22 December, the book was delivered to Mr McIlwraith for a period of two months, a period which has now expired. It may be added that between the 5th and the 17th December, according to the affidavit of Mr Darroch, the defendant De Bona sought release of the book as a matter of urgency. Thereafter publicity was given to *Oh! Calcutta!* in newspapers and samples thereof were before me as exhibits to the affidavit of Detective Sergeant Mudge.

Attention was directed by Mr Harris for the plaintiff to an article in "The Australian" dated 16 January 1970, to the contents whereof I think I need not specifically refer, and more particularly to an advertisement in "The Age" newspaper of 5 February 1970, to the following effect:

> "David McIlwraith presents Hillard Elkins production of *Oh! Calcutta!* You've got to see it to believe it! Restricted to mature adults only".

The statement therein "David H. McIlwraith presents Hillard Elkins production of *Oh! Calcutta!"* was linked by Mr Harris to the statement in the book in evidence that *Oh! Calcutta!* was first performed in New York in June 1969, and was produced by Hillard Elkins in association with other named persons. In this connection reference was also made to paragraph 4 of the affidavit of the defendant, David McIlwraith stating in substance that as a result of negotiations between him and Elkins Productions International Corporation, which controls the overseas rights to *Oh! Calcutta!*, the first defendant secured the exclusive right to present *Oh! Calcutta!* in Australia and New Zealand.

Plaintiff's counsel also relied on paragraph 4 of the affidavit of Detective Sergeant Mudge which records that in a conversation between him and Mr McIlwraith on 6 February 1970, the defendant McIlwraith said he had seen *Oh! Calcutta!* in New York. The paragraph proceeds in these terms.

> "He (that is McIlwraith) went on to say that it was hilariously funny and was more of a burlesque type of show. He said they could put it on at the Lido because of the type of audience they get there. He further said that the Lido really was the only suitable venue for a show like this and they only get a mature audience".

This conversation occurred on an occasion when Detective Sergeant Mudge, as appears from his affidavit, was inquiring from Mr McIlwraith and Mr De Bona what it was that the defendants intended to produce and was asking for a cony of the script. He was unsuccessful in that quest. But the point made by Mr Harris was that no suggestion was then offered to Mudge that any alteration had been effected to the script – the script received from the Department of Customs – other than the deletion of "offensive words". Similarly, reliance was placed on the letter of the Chief Commissioner dated 9 February 1970, to the solicitors for the defendants and the reply of those solicitors dated 12 February 1970, which it was contended by counsel contained nothing to suggest that only one of the sketches in the book was not to be produced or that any substantial alteration had been made or was intended to be made in any sketch or that the players were not to appear in nudity. The proper inference from this material, counsel contended, was that the defendants intended to present *Oh! Calcutta!* in substantially the same form as in the book put in evidence.

Together with that material there is to be considered the affidavit of Mr McIlwraith on which Mr McGarvie relied, in particular he referred to paragraphs 3, 7, 12, 13 and 17 thereof. He did not in terms refer to paragraphs 9 and 10, but I do not overlook them.

Mr Harris strongly criticised all these paragraphs as vague and evasive and of no weight and submitted that if any substantial alteration or excision was to be made in the plays as appearing in the New York production, or if any one of them was to be omitted, it would have been simple to have indicated what alterations or excisions were to be made or what plays were to be omitted.

To this criticism Mr McGarvie made answer that serious common law misdemeanours were alleged and the defendants were not to be put in a position which might incriminate them. This of course is not an objection taken by Mr McIlwraith, but even accepting Mr McGarvie's submission the position is that Mr McIlwraith's affidavit and its relevant portions are so vague, and indeed I think evasive, that I get no worthwhile assistance from it and I am left in substance with the material on which the plaintiff relies. It is imposing undue strain on credulity, judicial or otherwise, to think or suggest that the defendants on the eve of the production of *Oh! Calcutta!* at the Lido, after having the book in their possession for two months, rehearsals having necessarily having taken place in the meantime were not fully aware of the plays to be presented, the general text thereof and the scenes to be depicted to the audience. It may well be, as Mr Harris was prepared to concede, that various words such as the commonly called four letter words and the like and some segments illustrated by photographs were to be omitted in the production. Be that as it may, I am satisfied that there is at least a *prima facie* case that the defendants were intending to produce the plays in question substantially in the form appearing in the books produced and illustrated in the photographs therein.

I turn to the book. I have read the script of *Oh! Calcutta!* It is unnecessary, for the purposes of this application that I should deal with it in any detail, but it is desirable, I think, that I should say publicly something of it which will be sufficient to indicate its character. The theme throughout is sexuality and the gratification in various and abnormal ways of sexual impulses. It is portrayed in speech and action which is salacious and depraved. Players are depicted as indulging in acts of sexual intercourse, in some instances in the immediate presence on the stage of interested and much amused onlookers.

In one such case, the male actor is fitted with electrodes whilst a nurse recites to others present what is described as "an excitation reading". There is a scene in which measurements with a ruler are taken by the two players concerned, a male and female, of their respective genital organs. The comparison of the measurements made determines which of them has the right to decide whether they will have intercourse.

Intercourse in fact takes place, and in such a way that the girl collapses on stage and dies. There is a scene in which a female player simulates masturbation, and if I may use the language of the script, "begins what will become the personal sexual fantasies of the moment for each of the players on the stage".

There is a scene in which four male players with their backs to the audience but facing a film screening of glamorous women are engaged in an act of masturbation; another in which a youth gives vent to sexual fantasies and experiences in which Mr Harris describes as "the coarsest and most vulgar fashion"; another in which adopting the language of the script, "the mood of this exploration of sensuality is slow and tender". Male and female players in the nude participate in dances in a highly sensuous manner and adopt postures, interlocking and otherwise, which reek of sensuality. In one scene, aptly described as a sexual orgy, a group of nude players of both sexes "mass their bodies together, skin against skin, and finally all join in a line, belly to belly, back to belly, back to back, yelling 'I want it, want it, want it, want it'".

I refrain from further detail. What has been outlined, however, serves to show that *Oh! Calcutta!* is nothing other than an excursion in depravity. One word describes it – "filth". In my opinion, accordingly, a *prima facie* – indeed a strong *prima facie* case is made out that the presentation of *Oh! Calcutta!* at the Lido Restaurant will involve the commission of offences alleged, it is not necessary to do more than refer to the provisions of the *Summary Offences Act* 1966, and the *Vagrancy Act* 1966 as specified in the endorsement on the writ, *Russell on Crime*, 12th Edition, Vol 2, 1949 and 1430, *R v Saunders* (1875) 1 QBD 15 at pp18 and 19, *DPP v Shaw* [1961] UKHL 1; [1962] AC 220; [1961] 2 All ER 446; 45 Cr App R 113 and *Crowe v Graham* [1968] HCA 6; (1968) 121 CLR 375; [1968] ALR 524; (1968) 41 ALJR 402 – authorities cited to me by Mr Harris.

I should also add in fairness to counsel for the defendants that it was frankly conceded by Mr McGarvie that the presentation of *Oh! Calcutta!*, in its present form in a public place would involve offences related to obscenity. His contention was, as I have already indicated, that I should not be satisfied that the play would be presented in that form.

I have already rejected that contention, but I might add at this point in relation to it that I should find it very difficult to see how sketches or plays as found in the book in evidence could be so altered as to fall within the bounds of decency and yet remain recognisable as the offspring of the parent, Hillard Elkins' production of *Oh! Calcutta!*. But I have arrived at my conclusion independently of that consideration and the arguments in relation to it, and I say nothing more about it.

It was not in dispute that there was jurisdiction in the court to entertain an application by the Attorney-General for an injunction restraining the commission of criminal offences. The Attorney-General, as the first law officer of the Crown, is entrusted with the enforcement of the law and represents the public interest in saying that the law shall be observed. There are many cases in which the courts have at the suit of the Attorney-General intervened to prohibit by way of injunction offences against the law. It is correct that in the main – and naturally so – intervention has occurred where penalties inflicted for earlier infringements have not served to deter a citizen from further infringements or threats thereof.

But the power to intervene is not so confined, see *Attorney-General v Harris* [1961] 1 QB 74; [1960] 3 All ER 207; [1960] 3 WLR 532 1961, and cases cited therein and compare *Attorney-General v Smith* [1958] 2 QB 173; [1958] 2 All ER 557; [1958] 2 WLR 81, a case where an injunction was sought and granted before any offence had been committed; *Halsbury* 3rd Edition Vol 21, at 347 and pp303 and 304; *Cooney v Ku-Ring-Gai Municipal Council* [1963] HCA 47; (1963) 114 CLR 582; [1964] ALR 98; (1963) 9 LGRA 290; (1963) 37 ALJR 212; *Attorney General v Twelfth Night Theatre* [1969] Qd R 319. The question whether the court should or will intervene to prevent a threatened breach of criminal law must depend on the circumstances of each case and a weighing in the balance of considerations operating in one direction or the other.

It was here contended on behalf of the defendants that if the play were presented and criminal offences resulted, the ordinary processes of the criminal law could be invoked against the players and all others concerned. On the other hand it was said for the plaintiff that this was not a case in which a single breach would occur; there would be many breaches by several persons at any one presentation, and each presentation would involve a repetition thereof. It was also urged in that connection that resort merely to criminal prosecutions and the finalisation thereof would inevitably be attended with considerable delay and that the all-important thing in this case was that the public should be protected at the outset against this serious assault on decency, and it should be done by dealing at once with the persons primarily concerned, namely the promoters as distinct from the players they were using to further their ends.

Reference was made in this connection to the fact that it was the Attorney-General who was seeking the injunction and it was put that it was to be assumed that as a responsible officer of the Crown he had considered the various ways open to him for the enforcement of the law and had come to the conclusion that the most effective and appropriate way was to approach the court for an injunction, see *Attorney-General v Bastow* [1957] 1 QB 514 at 522; [1957] 1 All ER 497; [1957] 2 WLR 340 and *Attorney-General v Harris, supra*. It is made clear in the cases just cited, this of course does not mean that the Attorney-General's view is to prevail. The whole matter is essentially one for the decision and discretion of the court.

Again it was contended that the Crown was adopting an inconsistent attitude, for it was suggested that the Chief Secretary had in effect indicated that the defendants could present the play but that they did so at their own risk as to prosecution. I refer in this connection to paragraph 5 of Mr McIlwraith's affidavit where the deponent refers to an interview he had with the Chief Secretary on 18 November 1969, and

> "The advice tendered to us by the Chief Secretary on that occasion was that if there were removed from the dialogue words that might be regarded as offensive and that if the remainder of the production was presented with delicacy and with discretion so as not to be offensive, he did not anticipate there would be any complaint from his department".

The contention, in my view, has no adequate foundation and it is proper to mention at once that it was conceded by Mr McGarvie that s6 of the *Theatres Act* 1958 giving the Chief Secretary power to prohibit performance of objectionable plays at licensed theatres had no application – the Lido was not a place which fell within the ambit of that section. But the date of the interview with

the Chief Secretary is also significant for present purposes; it was 18 November 1969, some weeks prior to the script of *Oh! Calcutta!* arriving in this country. There is no evidence that the Chief Secretary or any officer of his department at any time saw the script, and indeed the evidence points in the contrary direction. I should have found difficulty, moreover, in thinking that Mr McIlwraith or anyone else could have considered that the production could be presented "with delicacy and discretion, so as to not be offensive". The Attorney-General now has that script, and having seen it this action was instituted. Mr McGarvie further argued that the interlocutory injunction would, in his own words, "close the show" and this would involve great injury to the defendants, particularly as they have spent a large sum of money in anticipation of the production. He went on to say that police intervention and the arrest of players might also close the show.

It is to be remembered in this connection that the injunction now sought is interlocutory only and that if this action is brought to trial at an early date and a permanent injunction is refused, the opening of the play may merely be postponed. Assuming however an interlocutory injunction were to have the result which Mr McGarvie indicated, that is in my submission something for which the defendants must accept a proper measure of responsibility. In seeking to peddle dirt for their own financial gain they must have realised that their activity would inevitably attract in some form the processes of the law and that they were incurring expenditure at serious risk that it would be entirely fruitless and wasted.

I think in what I have said I have dealt with the principal contentions of counsel for the parties. At the conclusion of argument I had formed the view that this was a case in which an interlocutory injunction should be granted. Having considered the matter in the weekend and given further thought to Mr McGarvie's submissions in particular, I remain of that view. I have already expressed my own estimate of *Oh! Calcutta!* and I am clearly of opinion on this application that the case is one in which the ordinary processes of the criminal law are unsuitable and inadequate and that despite the considerations cogently argued by Mr McGarvie the court should, pending final determination of the action, intervene to protect the public interest and in doing so prevent the perpetration of the serious crime involved and the carrying into effect of the conspiracy alleged.

The evil which it is now sought to prevent and the prevention thereof in the public interest outweigh in my view the injurious consequence which it is said the defendants would suffer if an injunction were granted, and it is not unjust that the defendants should be enjoined pending trial of the action. There will accordingly be an order that pending the trial of this action or further order the defendants be restrained from presenting at the Lido Restaurant, the play *Oh! Calcutta!*

I have expressed that in perfectly general terms; the matter was discussed in some more detail on Friday last as to the form of the injunction and I think perhaps counsel might either want to make some submissions to me or be content with what has already been said in argument on Friday last and submit to me a form of order appropriate to the case. Some amendments to the summons I think may be involved for that purpose of a comparatively minor character.

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