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SUPREME COURT OF VICTORIA

TOUR FINANCE LTD v WATTS

Stephen J

18-19 August, 2 October 1970 — [1972] VicRp 8; [1972] VR 58

PRACTICE AND PROCEDURE – SUMMONS ISSUED ON AN INFORMATION ALLEGING THAT THE DEFENDANT LENT MONEY AT AN EXCESSIVE RATE – THE DEFENDANT CALLED UPON TO SHOW CAUSE WHY ITS LICENCE SHOULD NOT BE CANCELLED – SUBMISSION MADE THAT THE PROCEEDINGS WERE OUT OF TIME – SUBMISSION REJECTED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MONEY LENDERS ACT* 1958, S12; *JUSTICES ACT* 1958, S215.

HELD: Order nisi discharged.
1. In relation to the second limb of s215 of the *Justices Act*, which referred to an offence or act punishable by summary conviction, it was said that it was apt to describe the present case either because a proceeding under s12 of the *Money Lenders Act*, if successful, was or involved a summary conviction for an offence or act or, alternatively, became of that nature when the terms of s73(1) of the *Justices Act* were applied. In either event, therefore, s215 became applicable to the present proceedings.

2. Section 12 of the *Money Lenders Act* 1958, was not a section concerned with an offence or with conviction; it was, rather, a part of the licensing procedure applicable to money lenders, first introduced in Victoria by the *Money Lenders Act* 1938 and now appearing in the 1958 consolidation. It provided a procedure whereby the Registrar of Money Lenders or any member of the police force may have, on a number of alternative grounds, instituted proceedings for the cancellation of the licence of a licensed money lender and for his disqualification from subsequently holding a licence; it involved neither any offence by the licensed money lender nor any conviction of him but was rather a machinery provision for the revocation of licences.

STEPHEN J: Tour Finance Ltd which is a money lender is the defendant to a summons dated 24 December 1969 issued on an information laid by the respondent, the Registrar appointed under the *Money Lenders Act*, which information alleges that Tour Finance lent money at an excessive rate of interest, having regard to certain circumstances specified in the information. The summons calls upon Tour Finance to show cause why the licence held by it under the *Money Lenders Act* 1958 should not be cancelled under s12 of that Act.

When the matter came on for hearing before the Magistrates' Court, counsel for Tour Finance announced his appearance under protest and submitted that the proceedings were out of time, relying upon the terms of s215 of the *Justices Act* 1958 which reads as follows: -

> "Where a Magistrates' Court or justices are authorized by law to make an order in respect of any offence or where any offence or act is punishable by summary conviction, if no time is specially limited for laying an information in the Act of Parliament relating to such case, such information shall be laid within twelve months from the time when the matter of such information arose and not afterwards."

After hearing submissions on the matter the stipendiary magistrate rejected the submissions of counsel for Tour Finance and, at his request, adjourned the further hearing of the summons so as to enable Tour Finance to proceed by way of order to review so as to bring before this Court the question of the operation of s215 of the *Justices Act* as it was said to apply to those proceedings.

An order nisi to review was obtained on 6 March 1970 on the following grounds: –

> "1. That the magistrate was wrong in holding that s215 of the *Justices Act* 1958 did not apply to the information laid against the defendant.
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> "2. That the magistrate was wrong in holding that it was not a defence to the information laid against the defendant that the matter of the information arose more than 12 months prior to the time when the information was laid.

"3. That the magistrate was wrong in holding that the summons contained in the information was validly issued by a justice of the peace.

"4. That the magistrate should have dismissed the information."

The first two of these grounds raise for decision the point which has been in the forefront of the argument before me. The contention on which these two grounds are based may be simply stated as follows: proceedings under s12 of the *Money Lenders Act* involve an information for an offence or act punishable by summary conviction and s215 of the *Justices Act* requires such an information to be laid within 12 months from the time when the matter of such information arose; here the matter of the information clearly arose more than 12 months before the information was laid and, so it is contended, s215 of the *Justices Act* accordingly applies so as to constitute a defence to the information: *Adams v Chas. S. Watson Pty Ltd* [1938] HCA 37; (1938) 60 CLR 545; [1938] ALR 365; 5 ATD 1.

Critical to this argument is the nature of an order made under s12 of the *Money Lenders Act*. Section 12 reads as follows: –

"(1) Any licensed money lender may on the information of the registrar or any member of the police force be summoned before a Court of Petty Sessions to show cause why any licence held by him or on his behalf should not be cancelled and why he should not be disqualified either permanently or temporarily from holding a licence on the ground—

(a) that such licence was improperly obtained contrary to the provisions of this Act; or

(b) that the licensed money lender or/any person responsible for the conduct or management of the money-lending business is not a fit and proper person to continue any longer to conduct or manage a business; or

(c) that the licensed money lender or any person responsible for the conduct or management of the money-lending business has been guilty of such conduct as renders him unfit to continue any longer to conduct or manage such a business; or

(d) that the licensed money lender has lent money at an excessive rate of interest having regard to the risk the value of any security the time of repayment the amount lent and any other relevant circumstances; or

(e) that the licensed money lender has published an advertisement containing a statement of the terms of interest on which he is prepared to make loans or any particular class of loans and has without proper cause made any such loan or (as the case may be) any loan of any such class on terms of interest less favourable to the borrower than those so advertised.

"(2) Upon being satisfied of the truth of any of the grounds aforesaid the court may if it thinks fit order that such licence be delivered up forthwith and cancelled and that any such person be disqualified either permanently or for such period as the court specifies from obtaining or holding a licence or from conducting or managing a money lender's business.

"(3) In any proceedings under this section the court may determine what costs (if any) shall be paid by the defendant to the informant and may order that such costs be paid; but an order for costs shall not be made against the informant."

It was agreed before me that what was described as the first limb of s215 was inapplicable; that is to say, s12 of the *Money Lenders Act* did not involve an order "in respect of any offence". This is clearly correct since the first limb only applies to indictable offences which may be punishable summarily under s102A of the *Justices Act*: *Re Mercantile Bank* [1893] VicLawRp 85; (1893) 19 VLR 527, and see *Wright v Mooney* [1966] VicRp 30; [1966] VR 225, at p228. There remains the second limb of s215 of the *Justices Act*, which refers to an offence or act punishable by summary conviction. This, it was said, was apt to describe the present case either because a proceeding under s12 of the *Money Lenders Act*, if successful, was or involved a summary conviction for an offence or act or, alternatively, became of that nature when the terms of s73(1) of the *Justices Act* were applied. In either event, therefore, s215 became applicable to the present proceedings.

I reject each of these alternative arguments; s12 is not, in my view, a section concerned with an offence or with conviction; it is, rather, a part of the licensing procedure applicable to

money lenders, first introduced in Victoria by the *Money Lenders Act* 1938 and now appearing in the 1958 consolidation. It provides a procedure whereby the Registrar of Money Lenders or any member of the police force may, on a number of alternative grounds, institute proceedings for the cancellation of the licence of a licensed money lender and for his disqualification from subsequently holding a licence; it involves neither any offence by the licensed money lender nor any conviction of him.

The general form of the licensing provisions of the *Money Lenders Act* are familiar ones in modern Victorian legislation concerned with the licensing of persons whose occupations involve them in having dealings with the public. In those instances not concerned with questions of public health and where no special boards or other bodies have been created to regulate and ensure proper standards of conduct a common legislative formula is a system of licensing coupled with a power, exercisable by information and summons, to require the licence holder to show cause in a Magistrates' Court, on one or more of a number of grounds specified in the legislation, why his licence should not be cancelled with or without a period of future personal disqualification. Thus s19 of the *Estate Agents Act* 1958 is very similar in terms of s12 of the *Money Lenders Act*, as is s18 of the *Private Agents Act* 1966 and s12 of the *Process Servers and Inquiry Agents Act* 1958.

In each case the Magistrates' Court is required on the evidence "to be satisfied of the truth of the grounds" alleged before making an order. In some cases the specified grounds of cancellation include matters involving no moral blameworthiness whatever; for example, a private agent may lose his licence merely on the ground of his not being "capable of carrying out the duties of a licence-holder". Thus it is clear that the contentions urged on behalf of Tour Finance Ltd are, if correct, capable of application, when the circumstances are appropriate, to a far wider field of persons than those whose activities are regulated by the *Money Lenders Act*.

Reverting now to the question of the terms of s12 of the *Money Lenders Act*, it is to be noted that the summons which subs(1) provides for calls upon the money lender to show cause why his licence should not be cancelled upon one or more of five specified grounds. Not all of these grounds involve any concept of wrong doing; thus included in the grounds is the situation in which either the money lender or any person responsible for the management of the money lending business is not "a fit and proper person" to continue any longer to be a money lender: see s12(1)(b). In *Hughes and Vale Pty Ltd v State of New South Wales (No. 2)* [1955] HCA 28; (1955) 93 CLR 127; [1955] ALR 525; (1955) 29 ALJR 129, Dixon CJ, McTiernan and Webb JJ, in their joint judgment pointed out, at (CLR) p156, that the words "fit and proper person" were traditional words used when the purpose was to give the widest scope for judgment and for rejection of persons as qualifying for an office or vocation. Some of the decisions noted in *Meston on Money Lenders*, 5th ed. (1968), at pp83-7, illustrate the range of matters which have been thought to be involved in the concept of "fit and proper" in this context. Interpreting the term in the light of the subject-matter of the Act, as did Hale J in *Maxwell v Dixon* [1965] WAR 167, in relation to the licensing of estate agents, it would seem that age, incapacity or threatened insolvency might, in appropriate circumstances, suffice to disqualify a money lender from the class of those who are fit and proper to hold a licence. It follows, I think, that a section which may operate in such circumstances is not readily to be treated as involving any concept of conviction for an offence, such as referred to in s215 of the *Justices Act*.

Section 12(2) states the task of the Magistrates' Court before which the proceedings are heard; the task is not expressed in terms of conviction in respect of any offence or act. It is, rather, the task of determining whether the court is "satisfied of the truth of any of the grounds" alleged, being those described in s12(1). If satisfied of the truth of the grounds the court may cancel the licence and may disqualify, but no other consequences follow; there is no provision in s12 for the imprisonment. Indeed the court, even if satisfied of the truth of the grounds alleged, is not bound to take any action at all; it is free, if it sees fit, to leave the licence holder in possession of his licence.

Section 12(3) does not bear the appearance of a sub-section concerned with an offence; it empowers the court to determine "what costs (if any) shall be paid by the defendant to the informant" and expressly protects the informant against an order for costs; these provisions are to be contrasted with the general cost provisions of s105(1) of the *Justices Act* which is expressed to apply where any conviction or order is made in favour of an informant or complainant.

The terms of s13 provide a striking contrast to those of s12. Section 13 deals with the case of any person convicted by any court of any offence against the provisions of the Act. In such a case the court is empowered, much as it is in s12, to order cancellation of a licence and may also order future disqualification. If s12 is no more than part of the licensing machinery of the Act what would otherwise appear to be unnecessary duplication is explained; if, however, the contrary view be taken of the effect of s12, treating it as concerned with offences against the Act, then unnecessary duplication does appear to arise. This, in itself, should make one slow to conclude that s12 involves any concept of conviction for an offence.

In the general context of the Act it is difficult to contemplate that an order adverse to a licence holder and which is made under s12 can bring s13 into operation; yet s13 is expressed to apply "where any person is... convicted of any offence against the provisions of this Act" and if, as Tour Finance contends, s12 involves an offence or act punishable by summary conviction it would seem to follow that s13 should apply. If this were so, there would, in effect, be found in s13, provisions which largely, if not entirely, duplicate the existing provisions of s12.

The next section which throws some light on the matter is s16. It affords an appeal to the County Court in three cases, the initial refusal to issue a licence, the suspension or cancellation of the licence and the case of disqualification for the future. The first of these three instances clearly involves no question of any offence or conviction, the appeal is simply against the decision of the licensing tribunal. This in itself casts doubts upon an argument urged on behalf of Tour Finance and which sought to use s16 in support of its general contentions as to s12. It was said that the terms in which the appeal is granted under s16 involves a conclusion that s12 creates an offence; this was because s16 provides that the appeal should proceed under Division 7 of Pt V of the *Justices Act* as if the order "were an order imposing a penalty exceeding the sum of $10" and since the only applicable provision of the *Justices Act*, s141(a), confines appeals to cases where there has been a "summary conviction" it follows, it was contended, that unless s12 operated as a summary conviction the right of appeal conferred by s16 was abortive.

Since there can be no question of any summary conviction where there is a mere refusal to issue a licence under s16(a) it follows that on this interpretation of s16 there is indeed a miscarriage of the clear legislative intent of giving a right of appeal. The true answer is, I think, that s16 confers an effective appeal in each of the three cases with which it deals, refusal to issue a licence, its suspension or cancellation and future disqualification, and does so simply by assimilating the position of a person aggrieved by an order affecting him as a licence holder to the position of a person aggrieved by his summary conviction.

However, s16 not only fails to advance the general approach to s12 urged by Tour Finance but points rather in the opposite direction; the inclusion of the case of initial refusal to issue a licence as one of the cases for an appeal under s16 suggests that that section is concerned with appeals in cases involving licences rather than with appeals in cases of offences against the Act.

Section 48(2) is a deeming provision and provides in effect that where a licence holder commits an offence and is a corporation the officers of that corporation and any person holding a licence on behalf of that corporation are themselves deemed to have committed the like offence and it makes them liable "to the pecuniary penalty or imprisonment or both" provided by the Act. This sub-section cannot well apply to the so-called sanctions under s12; loss of licence and disqualification for the future, yet these are what Tour Finance contends give to s12 its character of punishing an offence or convicting by summary conviction so as to fall within s215 of the *Justices Act*. Accordingly, s48(2) appears to me, by its terms, to contemplate that the offences to which it refers do not include acts or omissions such as s12 concerns itself with. The reason for this is, I think, simply that s12 is not dealing with offences at all.

The foregoing provisions of the *Money Lenders Act* all point, in my view, to the conclusion that s12 is not concerned with the punishment of offences but is, rather, a machinery provision for the revocation of licences.

The only indication to the contrary in the legislation and one which Tour Finance of course relied was the use of the word "information" in s12. It is true that that term is customarily employed in connexion with the initiation of criminal proceedings although, as a matter of history, there

were certain somewhat exceptional types of proceedings which did not involve crimes or other offences and yet were instituted by means of an information.

On this aspect I have been assisted by the decision in *Wright v Mooney*, *supra*. In that case the Chief Justice said, speaking specifically of s215, that an information was a document by which proceedings for an offence were initiated, the basal character of the information being that it informed that an offence was alleged to have been committed. It immediately strikes one that in some cases at least it would be difficult to so describe an information under s12; for instance where the only ground relied upon is that the money lender is not a fit and proper person any longer to conduct the money lending business because of matters such as supervening insolvency. In *Cobiac v Liddy* [1969] HCA 26; (1969) 119 CLR 257; (1969) 43 ALJR 257; [1969] ALR 637, cited by the applicant in another context, Windeyer J remarked of the word "convict" that its meaning in a statute must depend on context and on the policy and purpose of the Act as made manifest by language. In the present case I consider that the language of the *Money Lenders Act* makes it manifest that "information" is used in a special sense, a sense which is, as I have already pointed out, not unusual in Victorian legislation concerned with the licensing of persons for certain semi-public occupations.

If, as the Chief Justice said in *Wright v Mooney* [1966] VicRp 30; [1966] VR 225, at p228, it was a somewhat strange use of language to speak of a member of the police force found guilty of a breach of s88(1) of the *Police Regulation Act* as having committed a crime or as having been convicted of a criminal offence. It is an even stranger use of language to describe a person concerning whom the court is satisfied of the truth of one or more of the grounds in s12 as having committed a crime or as having been convicted of a criminal offence.

Counsel for Tour Finance relied to some extent upon the view that it was unlikely that the legislature should have intended that matters long past should form the ground upon which proceedings might be taken under s12 to deprive a licensed money lender of his licence. This was said, in substance, in answer to a contention that because the concern of s12 was primarily with the present fitness of the money lender rather than with past events which were not the prime concern of the section but were relevant only because of the light they might cast upon present fitness to hold a licence, that was in itself a reason why it was inappropriate to have regard to a limited period such as the 12 months provided for in s215 of the *Justices Act*. I consider that this contention is correct; it is supported by the terms of grounds (b) and (c) in s12(1). It was sought on behalf of Tour Finance to combat this contention in part by pointing out that s12(1)(a) was necessarily confined to a period of 12 months in the past since money lenders' licences were issued for a period of a maximum of 12 months. However, when s12(1)(a) refers to the "obtaining" of a licence improperly it employs the wording used in s5(1) where the original issue of a licence is in question; once a licence is issued a money lender may thereafter annually apply for a renewed licence under s6. I would have thought that s12(1)(a) is wide enough to cover the case of impropriety in the obtaining of an original licence and may, therefore, relate back to a past event more remote in time than 12 months.

It is correct to say, I think, that whereas s215 of the *Justices Act* is concerned with offences in the sense of some disobedience of some provision of the law (*Lee v Dangar Grant and Co* [1892] 2 QB 337, at pp347, 348, and *R v Tyler* [1891] 2 QB 588, at p594; [1891-4] All ER Rep 1088) s12 is concerned with a quite different subject-matter, the court does no more than itself as to the truth of the ground alleged and if so satisfied may take away the privilege conferred upon the licence holder by virtue of the licence granted to him by the court in the first place. The prime purpose of s12 appears to be to ensure that there is a certain standard maintained by licence holders; it continues, in a sense, after the grant of the licence the process of control and scrutiny exercised by the court over money lenders which commences at the date of the initial grant by the court of the licence. Viewed in this light s12 neither imposes any duty on a money lender nor punishes for any breach of duty but simply provides for the deprivation of a privilege; in so far as it provides for disqualification in the future it does no more than ensure that that privilege shall not be granted in the future.

This view of the effect of s12 is assisted by the terms of s29(2) of the *Money Lenders Act* which correctly, as I think, refers to "the powers of any Court of Petty Sessions under section twelve of this Act"; s12 does in fact confer supervisory powers rather create offences.

It is for the foregoing reasons that I reject the first contention made on behalf of Tour Finance.

It was next argued as an alternative to the first submission, that if s12 did not of itself attract s215 of the *Justices Act* the operation of s73(1) of the latter Act produced that result.

The purpose of s73(1) appears to be to constitute a Magistrates' Court as the sole tribunal for dealing with cases where offences are directed to be prosecuted or penalties are directed to be imposed summarily or before justices or where no procedure is provided for such offence or the recovery of such penalties: see Paul's *Justices of the Peace*, 2nd ed. p151, and notes.

For the reasons which I have already stated I consider s73(1) to be inapplicable to s12 of the *Money Lenders Act*. The latter does not create or concern itself with anything in the nature of an offence nor does it impose fines or penalties. Future disqualification under s12 is not, in my view, a penalty but, rather, of the same nature as the act of cancellation of a licence. It simply ensures that, where it is thought to be appropriate so to do, a person whose licence has been cancelled shall not again be in a position to obtain a licence. Just as the legislation contemplates that in certain circumstances it would be appropriate to deprive a money lender of his licence so also it contemplates that, where appropriate, the money lender should continue to remain deprived of a licence either forever or for a time in the future. This appears to me not to savour of punishment but rather to be a measure concerned with the regulation of those who may from time to time be engaged in the occupation of money lending.

Accordingly, I consider that s73(1) has no application to this case. I note in passing that the sub-section does, in dealing with penalties, refer to "recovery", unlike s73(2), a sub-section which came into the legislation at a later date than did subs(1) and which cannot itself affect the interpretation of subs(1). Even if I were of the view that disqualification was a "penalty" it is certainly not one which is "recovered" in the ordinary sense of that term and the use of the word "recovery" in this context emphasizes that the fines and penalties dealt with in s73(1) do not include disqualification from obtaining a money lender's licence.

It was, lastly, contended on behalf of Tour Finance that if, contrary to its submissions, s12 did not, either of its own force or in conjunction with s73(1) of the *Justices Act*, involve an offence or a summary conviction the consequence must necessarily be that the summons in the present case was not validly issued when purported to be issued by a justice of the peace. This, it was said, flowed from the terms of s31(1)(b) of the *Justices Act* which limits the power of justices to issue summonses to cases where informations of the type referred to in s31(1)(a) have been received by them, such informations being restricted to informations "in respect of any offence of whatsoever kind". If it be correct that there is, in cases under s12 of the *Money Lenders Act*, no "offence" then it is said that it follows that there is no power in justices to issue summonses under s12 of the *Money Lenders Act*.

In relation to this submission it is interesting to note that the powers of clerks of courts appear, in this connexion, to be wider than those of justices (see s87(1)(b)) and there would seem to be no reason why, even accepting this submission, a clerk of courts could not under those provisions issue a summons on an information arising under s12 of the *Money Lenders Act*. However, in my view, the submission is ill founded since it ignores the opening words of s31(1) of the *Justices Act* which states that the enumerated powers conferred by the sub-section on justices are in addition to "any power at common law or conferred by any Act of Parliament".

It would seem that the common law powers of justices would not extend to the issuing of summonses on informations laid before them; the power conferred on them by their commission probably only refers to the keeping of the peace: *Shilton v Miller* [1930] VicLawRp 60; [1930] VLR 400; [1930] ALR 334. In *Cromb v Warne* [1958] VicRp 75; [1958] VR 468; [1958] ALR 959, it was said that a Court of Petty Sessions had not the power of courts of common law but only such power as was conferred by statutes expressly upon them and although this is not quite the case where justices act out of session, as they do in issuing summonses, it would appear that the common law powers of justices in the United Kingdom and in Victoria are very limited, due largely to the fact that their jurisdiction has, ever since the 14th century, been largely a statutory jurisdiction.

However, the opening words of s31(1) of the *Justices Act* are not restricted to common law powers but refer also to powers which may conferred upon justices by any Act of Parliament. In my view, s12 of the *Money Lenders Act* itself confers the power to issue summonses and confers that power upon justices and perhaps also upon clerks of petty sessions. Section 12 contemplates that informations may be laid which are to result in proceedings before a Court of Petty Sessions and that the nexus between the information and the hearing before the Court of Petty Sessions is to be a process whereby the money lender is to be "summoned". If then it be the case that the *Justices Act* does not itself, by s31(1), confer jurisdiction on justices to issue a summons in such circumstances, I consider that the reference to "summoned" in s12 of the *Money Lenders Act* imports a power in those persons, predominantly justices, who are concerned with the summoning of persons before courts of petty sessions to issue a summons on an information laid under s12.

For that reason, I cannot uphold this last submission made on behalf of the applicant. I accordingly discharge the order nisi.

APPEARANCES: For the applicant Tour Finance Ltd: Mr GSH Buckner, counsel, Frederick Owen and Associates, solicitors. For the respondent Watts: Mr GL Fricke, counsel. John Downey, State Crown Solicitor.
