

22A/81

## INDUSTRIAL APPEALS COURT MELBOURNE

**TUCKER v WATKINS**

Judge Leckie P, ER Gwyther and NA Gibbs

15 December 1980

**INDUSTRIAL JURISDICTION – ILLEGAL WEEKEND TRADING – CHEMIST SHOP OPEN ON A SUNDAY – MEANING OF "CHEMISTS' SHOPS" – MEANING OF "CLASS OF TRADE" – VARIETY OF GOODS DISPLAYED FOR SALE – CHARGE LAID – DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: LABOUR AND INDUSTRY ACT 1958, SS80(1), 83, 192, Fifth Schedule.**

**The defendant established that his shop came within the exception stated in s80(1) of the *Labour and Industry Act 1958* and accordingly, the magistrate was not in error in dismissing the information.**

**THE PRESIDENT:** This is an appeal by the complainant against the dismissal by a Magistrates' Court of an information alleging that the defendant, being a shopkeeper, did unlawfully fail or neglect to close and keep closed his shop for the whole of Sunday 20th January 1980.

The basic facts on which the prosecution was founded are simple and not disputed. The shop in question was fundamentally a chemists' shop, although somewhat larger in area than that normally found in the suburbs. It was visited by two Inspectors of Factories and Shops at approximately 10:40 a.m. on the Sunday in question. The front door was open. The lights were on and there were members of the public inside inspecting items on display. These items included, according to the evidence, electric haircurlers, electric hairdryers, electric calculators and adding machines, microphones, electric shavers, electric toasters, watches and jewellery, female shoes with the brand name Hobby Dobs toys such as trucks, cars, dolls and model assembly goods, silver and glassware, clothing such as hats, handbags and umbrellas.

The basic provision upon which the prosecution relies is s80(1). It reads:

"(1) Save as otherwise expressly provided in this Act all shops (except shops of the classes or kinds mentioned in the Fifth Schedule and petrol shops) shall be closed and kept closed—  
(a) on Sundays, for the whole of the day;"

"Chemists' shops" are referred to in the Fifth Schedule. They have only recently been included. On the face of it, therefore, the defendant's shop was not required to close on Sunday except from eight o'clock in the evening. This is because of s83, which provides that the dispensing of a prescription during hours when a shop is required to be closed is not an offence and goes on:

"(2) Subject to the last preceding section all chemists' shops shall be closed on Sundays from the hour of eight o'clock in the evening."

The result is that although transferred to the Fifth Schedule, chemists' shops, alone amongst Fifth Schedule shops, are subject to this restriction, which appears to have been overlooked.

The various provisions of the *Labour & Industry Act* and its predecessors have been the subject of judicial interpretation over the years. There has emerged what can conveniently be described as the "two shops" doctrine. It appears as early as 1900, in *ex parte Crawcour* [1901] VicLawRp 71; (1901) 26 VLR 406. That was followed by *Billingham v Gaff* (1907) VicLawRp 117; (1907) VLR 691; 13 ALR 474; 29 ALT 159, *Slattery v Bishop* [1919] VicLawRp 97; [1919] VLR 675; (1919) 25 ALR 412, *Hall v Hooker* [1922] VicLawRp 82; (1921) VLR 471; 27 ALR 289; 43 ALT 68, and the decisions of this Court in *Fryberg v Chynoweth* 12th October 1965 and *Levy v Jenkin* 10th November 1971, a case to which I shall return.

The effect of this doctrine is that in the one premises a number of different descriptions

of shops may be carried on. This can conveniently be illustrated from the case of *Billingham v Goff*. Mr Dennis, appearing for the complainant in the present proceedings has submitted, in my opinion correctly, that the scheme of s80 of the *Labour & Industry Act*, providing as it does that all shops shall be closed on Sundays and excepting Fifth Schedule shops and petrol shops imposes an onus on the defendant to prove that he falls within the exception.

Section 168 of the *Magistrates (Summary Proceedings) Act 1975* provides:

"(1) Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the Act, order, by-law, regulation or other document creating the offence, may be proved by the defendant but need not be specified or negated in the information.

(2) Whether an exception, exemption, proviso, excuse, or qualification is specified or negated or not no proof in relation thereto shall be required on the part of the informant."

It has been held that the onus of proof resting on a defendant in these circumstances is that of proof according to the balance of probabilities and not proof beyond reasonable doubt. (See *Everard v Opperman* [1958] VicRp 62; [1958] VR 389; [1958] ALR 847). What a defendant has to prove, however is not simply that the shop in question was a chemists' shop. Because of the "two shops" doctrine he has to establish that it was a chemists' shop only and not some other type of shop in addition. It would have been my inclination to follow *Levy v Jenkin* and hold that the defendant was conducting not only a chemists' shop but also a gift-shop, a jewellers' shop, a toy shop and so on, and consequently, by the combined operation of Section 80(1) and Section 91(1), was required to keep the establishment closed on Sundays. However, in the course of the hearing of the present appeal, the Court's attention was drawn to Section 192(1) paragraph (p) of the *Labour & Industry Act*. This unfortunately was not adverted to in the case of *Levy v Jenkin*.

Paragraph (p) reads:

"It shall be deemed that a particular class of trade is carried on in a shop if it is proved that any article was sold therein which is usually sold in shops where such a class of trade is carried on."

The provision is not easy to interpret. The word "usually" must be given a contemporary application. ie according to customary, established or frequent usage; as a rule. In the Act, only two types of shops are defined, "petrol shops" and "butchers shops". "Chemists' shops" are not. Shops are not described by specific reference to the "class of trade" being carried on. Three methods are used. An adjective or adjectival phrase, e.g. "bread shops" and "fruit and vegetable shops"; a description of the goods for sale, e.g. "shops for the sale of works of art and handicraft"; or a possessive e.g. "photographers' shops" and, directly in point, "chemists' shops". The only reasonable approach is to take the expression "chemists' shops" as a composite phrase and ascribe to it the meaning which it prevalently bears in the community.

Section 83A of the Act is concerned with what are generally known as "night pharmacies" and is consequently not directly in point. However, some assistance may be obtained from it in the interpretation of other parts of the Act. Sub-section (3) reads, in part:

"This section applies to a chemist's shop—

(a) in which no goods or materials are kept for sale except goods and materials which are necessary for the dispensing of prescriptions of legally qualified medical practitioners or contraceptives that are registered under the *Health Act 1958*;

(b) in which no other trade is carried on at any time;"

It is a necessary implication from this sub-section, that, apart from s83A, goods and materials may be kept for sale in a chemist's shop other than those necessary for the dispensing of prescriptions or contraceptives. It is necessary, however, to ascribe some meaning to the expression "class of trade", and in the present context, to accept that a class of trade is carried on in a "chemists' shop" within the meaning of that term in the Act. What that class of trade is can only be determined by reference to that term. I have no doubt as to what the expression "chemists' shop" means in every day usage in the community. It is the type of shop which one sees in every city, town and suburb throughout the State and beyond. It bears a sign "Chemist" or "Pharmaceutical Chemist". It has a dispensary where doctors' prescriptions are dispensed by

a qualified pharmacist. It has on display and sell non-prescription medicines, cosmetics and a variety of other articles.

In my opinion, it is the present day meaning which must be applied. I am satisfied that the defendant has on the present appeal carried the burden of establishing on the balance of probabilities that all the articles which he sold or had for sale and upon which the prosecution relies were articles which are usually sold in chemists' shops. What, then, is the effect of paragraph (p) of s192(1), following this finding? It is not an easy provision to construe. It cannot mean that there can be only one description of shop in which a particular article is usually sold. To take an example from the present case, as far as I am aware, there is no such entity as a "calculator shop". If there is, it would be very rare. Leaving aside consideration of department stores, which would rather beg the question, calculators are sold through such diverse outlets as newsagents, office equipment shops, electronics shops and jewellers. One could not say that any one was more usual than another.

Or to take photographic equipment, a "traditional" chemists' line about which there is no dispute, such goods are now also sold in specialised camera shops and there is no generic description which would cover both types of shop. Historically, photographic goods were at one time almost exclusively sold through chemists' shops. It was a "class of trade" carried on in chemists' shops. It cannot be that because of the very much later proliferation of specialised camera shops, it ceased to be a class of trade carried on in chemists' shops.

Paragraph (p) is restated:

"It shall be deemed that a particular class of trade is carried on in a shop if it is proved that any article was sold therein which is usually sold in shops where such a class of trade is carried on."

The meaning may be more easily ascertained if the order of the sentence is inverted so that it reads:

"If it is proved that any article was sold in a shop which is usually sold in shops where a particular class of trade is carried on it shall be deemed that such class of trade is carried on in such shop."

Converted from the general to the particular, in the light of the finding of fact, it would read:

"If it is proved that any article was sold in a shop which is usually sold in chemists' shops it shall be deemed that the class of trade carried on in chemists' shops is carried on in such shop".

The task of the Court in the present case is simply to determine whether the defendant has established that his shop fell within the exception stated in s80(1). For the above reasons, I am satisfied that he has and the appeal will consequently be dismissed. That this decision may have other results simply points to the urgent necessity for the redrafting and re-enactment of the provisions of the Act relating to shops so as to attain some degree of consistency and to enable shopkeepers readily to ascertain what their rights and obligations are.