

53/81

SUPREME COURT OF VICTORIA

REID v FORDHAM

Gray J

15 May 1981

HEALTH – OFFENCE TO SELL ADULTERATED FOOD – DEFENCE TO HAVE PURCHASED WITH A WARRANTY OF COMPLIANCE – VALIDITY OF WARRANTY: HEALTH ACT SS238, 300.

Defendant charged with selling adulterated food, contrary to s238 of the *Health Act*. Defendant purchased tripe from Drever Purchases Pty Ltd on 9/10/79, and sold it later, on the same day, to SE Dickens Pty Ltd. In his defence, the Defendant relied upon a warranty of compliance with the Act, dated 15/8/79, expressed to apply to sales of tripe during the ensuing three months, and signed by William Drever, on behalf of Drever Purchases Pty Ltd. Over previous ten years, the same warranty procedure had been repeated, every three months. On occasions, when the Defendant had not been satisfied with the condition of the tripe, Drever Purchases Pty Ltd had either refunded money or replaced the tripe. William Drever was not called to give evidence.

Issues of whether the defendant had sufficiently proved:

- (a) the incorporation of the warrantor;
- (b) the authority of William Drever to give the warranty on behalf of the warrantor;
- (c) that the warranty was incorporated into the sale of tripe to the Defendant on 9/10/79.

HELD:

(i) A finding of incorporation is reasonably open in the absence of evidence pointing to a different conclusion where there have been dealings with a Co. almost daily for many years, and documents in use bear the Co. name affixed with a rubber stamp.

Lipke v Goombungee Co-op Dairy Co Ltd [1908] St RQd 103, referred to.

(ii) There is an implied authority for a person to give a warranty on behalf of a Co. when that person has for many years carried out sales with the authority of the Co.

Benmag Ltd v Barda (1955) 2 Lloyd's Rep 354 at 351, referred to.

(iii) A warranty under s300 may apply to future sales.

Palmer v RJ Mercer (Hampton) Pty Ltd [1970] VicRp 4; (1970) VR 32 at 37; 19 LGRA 254, referred to.

A warranty forms part of each succeeding sale during the period stipulated in the warranty, where there is a long history of daily sales, with similar warranties being given at regular intervals, and the parties having acted upon such warranties, from time to time.

GRAY J: ... Mr Hooper, leading counsel for the respondent, ... relied upon the following passage from the judgment of Pape J in *Palmer v RJ Mercer (Hampton) Pty Ltd* [1970] VicRp 4; (1970) VR 32 at p41; 19 LGRA 254.

"It ought clearly to be understood that the defence provided by s300(2) is one which defendants ought to be made to prove strictly (even though the standard of proof is proof on the balance of probabilities) and that mere surmise and inexact proofs, indefinite testimony and indirect inference will not do. ..."

Mr Hooper drew attention to the failure to call William Drever and the failure to prove the incorporation of the company by use of the "best evidence" namely the tender of the Certificate of Incorporation. He submitted that Drever's appointment as agent should have been more clearly proved, particularly having regard to s35 of the *Companies Act*. He referred to a passage in Pape J's judgment in *Palmer's case* (at p38) in which it is said that the defendant must prove a state of affairs as would inevitably lead to the conviction of the warrantor. ... It is very doubtful if any inference can properly be drawn from the failure to call Drever. It must be remembered that the company had been given notice of the proceedings and was, in a sense, a party. It would appear that the company did not wish to contest the warranty and it was hardly an obligation of the

defendant to secure the attendance of Drever in these circumstances. More importantly, it is clear that the only inference which can be drawn from the unexplained failure to call a witness is that the witness would not have helped the cause of the party who might have called him (see *O'Donnell v Reichart* [1975] VicRp 89; (1975) VR 916). ...

I am not sure what Pape J meant to convey by saying that this sort of defence has to be "strictly proved". Clearly the defendant is not under an obligation to call every piece of evidence which may be available to him. His obligation is to place before the Court evidence which, if accepted, satisfactorily establishes, as a matter of probability, the facts which constitute the defence. Order nisi ... made absolute ... conviction set aside....
