

37/04; [2004] VSC 358

SUPREME COURT OF VICTORIA

SERBANESCU v HERTER & McKEE

Williams J

23-24 June, 22 September 2004

CRIMINAL LAW – DANGEROUS DOGS – DEFENDANT SUPPLIED THE SERVICES OF GUARD DOGS AT NON-RESIDENTIAL PREMISES – DOGS SUPPLIED INVOLVED IN TWO SEPARATE INCIDENTS OF ATTACKS UPON OTHER DOGS – DEFENDANT CHARGED WITH OFFENCES AS OWNER OF THE DOGS – WHETHER DEFENDANT WAS "OWNER" OF THE DOGS – WHETHER MEANING OF "OWNER" LIMITED – CHARGES FOUND PROVED – WHETHER MAGISTRATE IN ERROR: DOMESTIC (FERAL AND NUISANCE) ANIMALS ACT 1994, SS24(2), 29(1), 41(1), 94(1)(a).

S. was the sole director and shareholder of a company which carried on the business of supplying the services of guard dogs. The business had contracted to supply guard dogs at non-residential premises. By definition under the *Domestic (Feral and Nuisance) Animals Act 1994* ('Act') the dogs were "dangerous dogs". As a result of the dogs escaping from the premises and attacking other dogs, charges were laid against S. for several breaches of the Act. The magistrate found the charges proved. Upon appeal—

HELD: Appeal dismissed.

1. Giving a limited reading of the expression "the owner" in s9(1) would not give effect to the statutory purpose of protection of the public to which it would appear to relate. The protection of the public would not be promoted if the person properly characterised as an "owner" under s3 could not be prosecuted in relation to an attack by a dangerous dog unless there had been successive prosecutions of any person having the animal under apparent control and a determination in each case that such a person was not an "owner" under s3. It would seem probable that such a ponderous process would deter the relevant prosecuting authorities from pursuing the appropriate person through the courts. Further in any premature prosecution of a person otherwise liable as an "owner" under s3, evidence that a third party had the dog under apparent control, absent the requisite evidence to prevent the deeming provision's operation would result in an acquittal. Such considerations demonstrate how the interpretation of s29(4) contended for by the defendant would reduce the deterrent effect of the penalty provisions of the Act and diminish the level of public protection sought to be derived from their application.

2. There should be no departure from the general rule as to the consistent interpretation of the word "owner" throughout the Act. The provisions of s29(4) should be interpreted as including within the meaning of the word "owner", in any proceedings under s29(1), s29(1AA), s29(1A) and s 29(3) of the Act, a person who has apparent control of a dangerous dog and who does not adduce evidence controverting the applicability to that person of the definition of "owner" under s3. The meaning of "owner", as defined in s3, should continue to apply, rendering any person properly so characterised susceptible to charges laid under any relevant provisions of the Act, including s24(2), s29(1) and s41(1).

3. S29(1) of the Act exempts from liability the owner of dangerous dogs where they are "guard dogs guarding non-residential premises" at the relevant times. The legislative aims of the Act would not be achieved if the exception in s29(1) were extended, beyond the activities of a guard dog whilst engaged in guarding premises, to its actions whilst at large after escape.

WILLIAMS J:

1. The appellant has appealed from the decisions in two separate proceedings of the Magistrates' Court at Ringwood constituted by Mr Hallenstein M on 4 February 2004 convicting him of offences under s24(2), s29(1) and s41(1) of the *Domestic (Feral and Nuisance) Animals Act 1994* ("the Act").

2. The respondent informant in each proceeding was an authorised municipal local law officer. The appellant had been charged with a number of offences under the Act in relation to dogs of which the learned Magistrate found him to be the "owner". He had pleaded guilty in respect of some of the charges, but had maintained that he was not guilty in relation to others, including

those laid by the City of Whitehorse, under s24(2), s29(1) and s41(1) of the Act, and the City of Knox, under s29(1), respectively.

The Act

3. The following provisions were included in the Act at relevant times:

“ 1. Purpose The purpose of this Act is to promote animal welfare, the responsible ownership of dogs and cats and the protection of the environment by providing for—

- (a) a scheme to protect the community and the environment from feral and nuisance dogs and cats; and
- (b) a registration and identification scheme for dogs and cats which recognises and promotes responsible ownership; and
- (c) the identification and control of dangerous dogs; and ...
- (g) other related matters.

3. Definitions

(1) In this Act - ... “owner” in respect of a dog or cat, includes a person who keeps or harbours the animal or has the animal in his or her care for the time being whether the animal is at large or in confinement; ...

“dangerous dog” means—

- (a) a dog which has been declared to be dangerous by a Council under Part 3;
- (b) a dog which by virtue of the operation of section 34A is a dangerous dog; ...

24. Dogs found at large

(1) If a dog is found at large outside the premises of the owner or not securely confined to the owner’s premises, between sunrise and sunset, the owner is guilty of an offence and liable upon conviction to a penalty of not more than 3 penalty units.

(2) If a dog is found at large outside the premises of the owner or not securely confined to the owner’s premises between sunset and sunrise, the owner is guilty of an offence and liable upon conviction to a penalty of not more than 5 penalty units. ...

29. Penalty and Liability for attack by a dog

(1) If a dangerous dog, that is not a guard dog guarding non-residential premises, attacks or bites any person or animal, the owner is guilty of an offence and liable, on conviction, to a term of imprisonment not exceeding 6 months or to a fine not exceeding 120 penalty units. ...

(4) In any proceeding under sub-section (1) ... evidence that the dog was apparently under the control of a person immediately before the dog conducted itself in the manner which is the subject of the proceedings is evidence and, in the absence of evidence to the contrary, is proof that that person is the owner of the dog. ...

34A Dangerous dogs

A dog is a dangerous dog if—

- (a) the dog is kept as a guard dog for the purpose of guarding non-residential premises; or
- (b) the dog has been trained to attack or bite any person or anything when attached to or warned by a person. ...

41. Restraint of dangerous dogs off the owner’s premises

(1) If a dangerous dog is outside the premises of its owner and is not—

- (a) muzzled in a manner which is sufficient to prevent it causing injury by biting; and
 - (b) under the effective control of some person by means of a chain, cord or leash—
- the owner of that dangerous dog and any person for the time being in charge of the dog are guilty of an offence and liable upon conviction to a penalty of not more than 5 penalty units for a first offence and 10 penalty units for a second or subsequent offence.

(2) This section does not apply to a dangerous dog which is a guard dog while the dog is guarding non-residential premises. ...

91. Liability of officers of bodies corporate for offences

If a body corporate is guilty of an offence against this Act, any person who is concerned in or takes part in the management of that body corporate who was, in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission of the offence is also guilty of, that offence. ...

94. Evidentiary provisions

(1) In any proceeding for an offence under this Act—

(a) evidence that a person is the occupier of a house or premises where an animal is usually kept or permitted to remain is evidence and in the absence of evidence to the contrary is proof that that person is the owner of the animal;"

Background

4. The appellant was the sole director and shareholder of the company, Dan Michael Nominees Pty Ltd, which carried on the business of supplying the services of guard dogs under the registered business name "OZK9 Security". The business had contracted to supply the services of guard dogs at non-residential premises at Nunawading and Ferntree Gully. It was common ground that the dogs supplied were "dangerous dogs" under s34A and, accordingly, under the definition in s3 of the Act. It was also common ground that dangerous dogs supplied by OZK9 Security had been involved in two separate incidents of attacks upon other dogs.

5. The first attack occurred on 5 February 2003, after two dogs escaped when Mr Tam Tran of Teak Mahogany Furniture opened the gate of the business's guarded premises in Whitehorse Road, Nunawading. Charges were laid by the City of Whitehorse as a result.

6. The second attack took place on 7 April 2003, following the escape of two other dogs from premises occupied by the business trading as Asplundh Tree Expert at Acacia Road, Ferntree Gully. It was not known how the dogs escaped. However, when Mr Ho, an employee of OZK9 Security, attended the premises on the morning after the attack, he discovered the absence of the dogs and later ascertained that they had been impounded. The City of Knox charges followed.

7. The appellant admitted that, for the purposes of many of the charges, he was properly characterised as the "owner" of the dogs under s3 of the Act. Indeed counsel for the appellant conceded that his client fell within the definition of owner in s3 because he kept or harboured the animals or had them within his care.^[1] The appellant had pleaded guilty in relation to charges premised upon his ownership:

- (a) under s10(1), of failing to apply to register dogs;
- (b) under s(19)(2), of being the owner of a dog which was not identified in accordance with the regulations;
- (c) under s40, of being the owner of dangerous dogs not wearing collars;
- (d) under s39, of being the owner of dangerous dogs not displaying warning signs at the premises at which they were kept;
- (e) under s40, of being the owner of an unregistered dog wearing an identification marker; and
- (f) under s38(1), of being the owner of a dangerous dog kept in a daytime enclosure not capable of being securely locked.

The Magistrate's decision

8. The learned Magistrate found the elements of the charges under s24(2), s29(1) and s 41(1) proved and he gave the following reasons for his characterisation of the appellant as the owner of the respective dogs:

"Let me come to ownership. The Act does not provide an all-inclusive definition of 'ownership'. It actually does not totally define 'ownership' at all. What the Act sets out are a number of things which the Act includes to be or deems to be or treats as ownership, but is silent as to what other type of factual circumstances might also constitute ownership. The s3 definition of 'owner' in respect of a dog or cat includes - it is not saying it is or it is limited to or it covers only, it says it includes, 'a person who keeps or harbours the animal, has the animal in his or her care for the time being, whether the animal is at large or in confinement'. That definition assumes that someone else is the owner - that is a person referred to in the definition of 'owner' - is included as being owner by reason of the factual circumstances surrounding the dog and the person included at the relevant time. To that point one might assume that the owner might well be the person who has paid for the money for and who is the person registered as owner for the dog, and it includes someone else perhaps, at least contemplates somebody else perhaps - who is keeping or harbouring the animal, has the animal in his or her care for the time being; the owner being away and somebody else babysitting the dog, all sorts of circumstances, in other words multiple ownership. But with the Act increasing the coverage of its definition over and above and beyond the actual legal, all-knowing understood owner of that dog, it includes in 'ownership' the carer, the keeper, the harbourer for the time being. Similarly s29(4) does not set out a definition of 'ownership'. It simply extends the net even further as to what the Act regards or includes or deems to be ownership as evidence that, 'A dog is apparently under the control of a person immediately before the dog conducted itself in the manner which is the subject of the

proceedings is evidence and, in the absence of evidence to the contrary, is proof that the person is the owner of the dog.' So one sees a growing level on level on level of people at various stages involved with the dog being dragged into the net of being called owners or deemed to be owners by the Act; the owner to the carer to somebody who comes and takes the dog from the carer for a walk in the sense of that type of multiple tiers of consideration. So that ownership to the point that I have referred to in the provisions so far of the Act is an extension of what might ordinarily be understood as the owner to many people within the terms of harbouring, caring, under the control of, under the control of at particular points in time, including all of them as owners – not mutually exclusively, but all of them. Finally if one then looks at s91, if it is right that in a case or in this case a corporation is the owner of the dogs in question – if that is right, and let me not dispute that at this point; if that is right – then s91 says, 'If a body corporate is guilty of an offence against this act' – now, as far as the core features of the charges are concerned, I have already found proved beyond reasonable doubt all the charges to which there were pleas of guilty and I have found beyond reasonable doubt the core features, putting aside ownership, of the charges to which there were pleas of not guilty So the dog attacked animal, the dog rushed a person, the dog at large not muzzled or leashed, I found all the core features of those charges apart from ownership proved beyond reasonable doubt because those facts are not disputed. Let us say that the company in this case is the owner of the dog, s91 'if the body corporate is guilty of an offence,' if the company is the owner, then under [the Act], the company would be guilty of those offences which I have found proved in their core features on a factual basis apart from (indistinct) proved beyond reasonable doubt. 'If the body corporate is guilty of an offence against this act, any person who is concerned in or takes part in the management of that body corporate who was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission...of the offence is also guilty of that offence.' So we have a person who is concerned in or takes part of the management of a body corporate, who was in any way by act or omission knowingly concerned or a party to the commission of the offence. So we have a further extension of in essence the definition of 'ownership' under [the Act], not because s91 defines that person as an owner, that is the corporate involved person as an owner, but by indicating that that corporate involved person is also guilty of that offence if the company is guilty of the offence. The company could only be guilty of an offence if it is an owner, and if the corporate person involved in it also results in being guilty of an offence, *ipso facto* that corporate involved person would also have to be treated as and deemed to be an owner because it is the owner offences that the Act is referring to in this case. The Act is not making an all-inclusive definition of 'ownership'. It is simply casting a net in a number of circumstances by which it adds to the ordinarily understood meaning of 'ownership' by including a range of people with a variety of associations with a particular dog. In this case it is perhaps a moot point whether the company or whether the individual defendant were owners or both owners or both considered to be owners. If one looks at the defendant's conduct and the materials produced in this case, there is an equal body of evidence from the defendant's own conduct which indicates that he himself has been personally the owners (sic) of the dogs. There is also evidence which indicates the company has been owner of the dog, it would appear through its business OZK9 Security. In any event, I am satisfied beyond reasonable doubt in this case that not only was the defendant in this case concerned in and taking part in the management of the company, but was both directly and indirectly concerned with the dogs, involved with the dogs, had responsibility for the dogs and had responsibility in terms that places him so closely to those dogs that by ownership, the dogs have then both been at large and committed specific action offences and have also, by reason of the non-compliance with the registration, identification, collaring and housing offences been at least indirectly by omission concerned in the commission of those offences. So even if one accepts that the company is an owner of the dogs – all of them in these proceedings – with respect to all the charges in both sets of prosecutions, I have to conclude that the net of [the Act] has been cast so widely as to who it includes either as owners or as guilty of an offence as if owner for a corporation that the defendant is included in that category in any event, whatever in his mind might have been his actual status with respect to himself and the company. One would have to conclude on looking at the provisions of the Act that one could not have been surprised or would not have been surprised in this case if one had seen defendants to these proceedings, so far as relevant to the particular offence, that the company, the defendant in these proceedings, Mr Ho, Mr Tran, Asplundh, probably under the Corporations Act some Asplundh or all Asplundh directors as well. The fact that in these proceedings in any event the defendant out of all of them is the only defendant is not the basis for saying that therefore he has a defence because there are other people who are also responsible under the Act, whether or not they have been charged. For the reasons that I have stated, I am satisfied beyond reasonable doubt that in both prosecutions in this case, the defendant is deemed to be, is included to be, an owner of the animals in each of the charges for the dangerous dogs as charged. Accordingly I find proved beyond reasonable doubt that the defendant as owner of dangerous dogs as charged is guilty as charged in the charges referred to."

The questions of law

9. The questions of law stated by the Master on 15 March 2004 as having been shown by the appellant to be raised by the appeal in each case are:

“(a) did the learned Magistrate err in finding that at the time of the relevant dog attack the appellant was the owner of the dogs as defined by ss3, 29 and 91 of the *Domestic (Feral and Nuisance) Animals Act 1994*?

(b) did the learned Magistrate err in holding that a 'guard dog' ceased to have the protection afforded to it by virtue of s29(1) of the Act upon escaping from the non-residential premises?”

10. After submissions had been made on the appeal, counsel for the appellant agreed that, apart from the reference to s91, his challenge under question (a) in each case was confined to the extent that his Worship's finding was based upon a conclusion that the meaning of “owner” in s3 was not limited by the operation of s29(4) or s94(1)(a).

The effect of s29(4)

11. Although the appellant has appealed against convictions under s24(2) and s41(1) of the Act, s29(4) does not purport to apply to proceedings other than s29(1), s29(1AA), s29(1A) or (3). Accordingly, the operation of s29(4) is not relevant to the meaning of “owner” in s24(2) or s41(1) of the Act and the appeal fails in so far as the convictions under those sections are challenged on the basis of the operation of s29(4).

12. Counsel for the appellant submitted that because s29(1) was a punitive provision to which was attached criminal liability and the serious penalty of imprisonment for six months, it should be construed narrowly and strictly. He argued that the Court should follow the approach of O'Bryan J in *Stevens v O'Connor*^[2] to the construction of the penal provision in s22 of the *Dog Act 1970*. S22 also imposed criminal liability in respect of a dog attack upon the owner of the dog and his Honour held that the meaning of the word “attack” in the section should be construed strictly, noting in passing that the statutory provision did not require proof of the owner's knowledge of the animal's mischievous propensity or actionable negligence which would found an action at common law.

13. The appellant urged the Court to strictly construe s29(1) in light of 29(4) so as to render the occupier of the Nunawading premises, Mr Tam Tran, the only person who could be liable for an offence, unless there was evidence that he was not the owner of the dogs. Counsel argued that, as Mr Tran had led no evidence to disprove his ownership, s29(4) precluded liability under s29(1) in any other person as “the owner” of the dogs within the definition in s3.

14. Counsel for the respondents contended that the definition of “owner” in s3 applied throughout the Act. He relied upon the statement of the rule by Hodges J in *Craig, Williamson Pty Ltd v Barrowcliff*^[3];

“I think it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applies especially to an Act of Parliament, and with a special force to words contained in the same section of an Act. There ought to be very strong reasons present before the court holds that words in one part of a section have a different meaning from the same words appearing in another part of the section.”

15. Counsel also referred to the statement of Mason J, with whom Barwick CJ and Jacobs J agreed, in *Registrar of Titles (WA) v Franzon*^[4] :

“It is a sound rule of construction to give the same meaning to the same words in different parts of the statute unless there is reason to do otherwise.”

Counsel for the respondents cited a number of other authorities to the same effect.^[5]

16. He submitted that the word “owner” should be given its plain meaning which was clear. Otherwise, he urged the Court to take into account the legislative purpose of the Act. Counsel argued that s29(4) had been deliberately drafted to “expand the net” to cover persons Parliament intended to reach to achieve its statutory purpose of ensuring that dogs which attack, bite, rush and chase people should be kept under control even when out of the immediate control of an owner, but apparently under the control of another.

17. Counsel for the appellant argued that if the definition in s3 were to apply throughout the Act, the extension of the ambit of the definition of “owner” would mean that it would be “so

expanded and exploded [as] to be meaningless". He submitted that the legislature sought to restrict the "prosecutorial discretion" as to which person falling within the definition of "owner" in s3 should be charged under s29.

Statutory purpose

18. The Act came into operation on 9 April 1996. S29 of the Act was amended to increase the penalty for an offence from a fine of \$500 to a fine not exceeding 120 penalty units or imprisonment not exceeding 6 months by the *Animals Legislation (Responsible Ownership) Act 2001* ("the Amending Act").

19. The use of the definite article "the" in relation to the word "owner" in s29(1) in the statutory context which included s3 and s29(4) renders the expression "the owner" in s29(1) capable of different interpretations. S35 of the *Interpretation of Legislation Act 1984* permits recourse to consideration of the purpose or object of the legislation to aid its construction.

20. In the second reading speech in the Legislative Assembly on 8 September 1994 in relation to the *Domestic and (Feral and Nuisance) Animals Bill* the Minister for Agriculture, Mr W D McGrath, noted "growing problems with dangerous dogs" which could not be dealt with under the then existing *Dog Act 1970*. The Minister said:

"This legislation clearly defines dangerous dogs in terms of specific dangerous behaviour by an individual dog and does not depend on the real or perceived characteristics of a breed or type of dog. To protect the community this legislation sets out precise requirements for the identification and control of such dogs and gives the local council the authority to deal with the problems these dogs cause."^[6]

21. In his 2001 second reading speech in relation to the proposed amendments to the Act the Minister for Agriculture, Mr Hamilton, said of the provisions for increased penalties for dog attacks:

"The current penalty for a dog attack on a person or for setting a dog to attack is \$500. An owner is also liable for any damage caused by an attack if convicted. A Magistrate can also order the destruction of the dog. The Bill increases the maximum court penalties for dog attacks in response to public concern over publicised dog attack cases and the perception that current penalties are not an adequate deterrent. The increases are significantly higher for dog attacks that result from deliberate human action such as urging a dog to attack and for an attack by a dangerous dog that has a history of attack or attack training."^[7]

22. The purpose of the Amending Act set out in s1(1)(b) were, *inter alia*, "to increase penalties, to make further provision in relation to enforcement powers and money collected by councils and to make provision for further controls on certain breeds of dogs".

23. In *Gubbins v Wyndham Shire Council*^[8], Hansen J considered the purposes in s1 of the Act which included the promotion of animal welfare and went on to state:

"The purposes make it clear that the Act's concerns include the safety of the public from dogs. The Act is not ... a mere charter of canine rights to which the safety of persons and other animals is secondary. The Act should be interpreted in a manner that promoted the purposes of protecting the public from dangerous dogs."

Conclusion – s29(4)

24. In my view, the limited reading of the expression "the owner" in s9(1) contended for by the appellant would not give effect to the statutory purpose of protection of the public to which it would appear to relate. The protection of the public would not be promoted if the person properly characterised as an "owner" under s3 could not be prosecuted in relation to an attack by a dangerous dog unless there had been successive prosecutions of any person having the animal under apparent control and a determination in each case that such a person was not an "owner" under s3. It would seem probable that such a ponderous process would deter the relevant prosecuting authorities from pursuing the appropriate person through the courts. Further in any premature prosecution of a person otherwise liable as an "owner" under s3, evidence that a third party had the dog under apparent control, absent the requisite evidence to prevent the deeming provision's operation would result in an acquittal. Such considerations demonstrate how the

interpretation of s29(4) contended for by the appellant would reduce the deterrent effect of the penalty provisions of the Act and diminish the level of public protection sought to be derived from their application.

25. I am not persuaded by any of the appellant's arguments in relation to s29(4) that there should be any departure from the general rule as to the consistent interpretation of the word "owner" throughout the Act. The provisions of s29(4) should be interpreted as including within the meaning of the word "owner", in any proceedings under s29(1), s29(1AA), s29(1A) and s29(3) of the Act, a person who has apparent control of a dangerous dog and who does not adduce evidence controverting the applicability to that person of the definition of "owner" under s3. The meaning of "owner", as defined in s3, should continue to apply, rendering any person properly so characterised susceptible to charges laid under any relevant provisions of the Act, including s24(2), s29(1) and s41(1).

The effect of s94(1)(a)

26. The appellant also argued that s94(1)(a) limited the definition of "owner" for the purposes of s24(2), s29(1) and s 41(1). S94(1)(a) provided that evidence of occupation of premises where an animal was usually kept or at which it was permitted to remain would constitute proof of ownership, if there was no evidence to the contrary. Submissions to the same effect as those relating to the operation of s29(4) were made in support of this proposition. I note that these submissions were made despite the appellant having pleaded guilty in relation to a number of offences to which the subsection might have been arguably applied to prevent him from being characterised as the owner of the relevant dogs and to result in his acquittal.

Conclusion – s94(1)(a)

27. In my view, the appellant's arguments in relation to s94(1)(a) fail for the same reasons as those relating to the purposes of the Act and the Amending Act which were decisive in respect of his arguments under s29(4). The interpretation contended for would have an even greater limiting effect upon prosecutions for offences because s94(1)(a) relates to any proceeding for an offence under the Act, whereas s29(4) only applies to certain prosecutions under s29. It would not promote the stated legislative purposes. It is, in my view, an evidentiary provision applicable the case of relevant prosecutions.

S91

28. Question (a) seems to imply that the learned Magistrate had found that the appellant was characterised as the "owner" of the dogs by the operation of s91. The reasons are somewhat equivocal, but his Worship does at one point say:

"So we have a further extension of in essence the definition of 'ownership' under [the Act], not because s91 defines that person as an owner, that is the corporate involved person as an owner, but by indicating that that corporate involved person is also guilty of that offence if the company is guilty of the offence."

29. His Worship also stated that it was perhaps "a moot point whether the company or whether the individual defendant were owners or both owners or both considered to be owners."

30. I interpret the reasons as stating the conclusion that, even though the company might be regarded as an owner of the dogs under the Act, the appellant should also be so characterised because he fell within the ambit of the definition in s3.

31. Whilst it might be the case that the learned Magistrate applied s91 of the Act to conclude that the appellant was guilty of an offence under s29(1) because of his involvement with a company which was itself guilty of an offence, any such finding would have been additional to his finding that the appellant was guilty as the owner under s3, in any event.

32. Given my conclusion that the Magistrate was correct in characterising the appellant as the owner under s29(1) and in light of my doubt as to how his Worship applied s91 to reason that the appellant was guilty "as charged", I will not further consider the question as to whether he would have erred had he done so in the circumstances in which the company had not been charged under s29(1).

Question (b): The effect of the exception relating to “guard dogs” in s29(1)

33. The appellant argued that s29(1) exempted from liability the owner of the dangerous dogs involved in each of the two attacks because they were “guard dogs guarding non-residential premises” at relevant times. He said that they fell within the ambit of that description because each had been declared to be “dangerous dogs” under s34A(a) on the basis that it was “kept a guard dog for the purpose of guarding non-residential premises.” Once an animal had been accorded the status of a “dangerous dog” and there was a contract on foot pursuant to which it was guarding premises, then, he argued, even if it had escaped from those premises, its owner could not be prosecuted under s29(1), but would remain susceptible to other charges such as those relating to the dog being unconfined and unregistered. In his submission, such an interpretation protected the commercial interests of the providers of guard dogs such as the appellant.

34. Counsel for the respondents described the appellant’s argument as nonsensical, absurd and contrary to the purposes of the legislation. He submitted that the statutory scheme was designed to use provisions such as s29 to promote the responsible ownership and control of guard dogs characterised under the Act as a “dangerous dogs”. The proposed exception would render s 29 ineffective, by exempting the owners of dangerous animals it was intended to cover.

35. I am not persuaded by the appellant’s contention. In so far as it might be argued that the meaning of the expression “a guard dog guarding non-residential premises” was unclear, its interpretation may be assisted by reference to the statutory context and purpose^[9].

36. I note, in relation to the statutory context of s29(1), that the ambit of the exception from liability in relation to an offence under s41 provided by s41(2) is confined to the owner of a dangerous dog “which is a guard dog while the dog is guarding non-residential premises”.

37. I have already discussed the statutory purposes of the Act and the Amending Act. In my opinion, those legislative aims would not be achieved if the exception in s29(1) were extended, beyond the activities of a guard dog whilst engaged in guarding premises, to its actions whilst at large after escape.

38. The appellant’s contentions were put to his Worship in the course of submissions and, in so far as no express finding appears in the reasons, it is implicit in his decision that he did not accept the argument that s29(1) did not apply in relation to dogs which were “dangerous dogs” by virtue of their guard dog status. Similarly, his Worship must have rejected the argument that the appellant was relieved from liability because the dangerous dogs in question had escaped from the premises being guarded under a subsisting contractual arrangement for the provision of their services. In my opinion, he was correct in refusing to exempt the appellant from liability under s 29(1) on either such basis.

39. The questions posed by the Master should be answered:

Question (a): No. Question (b): No.

[1] T 88.

[2] Unreported, Supreme Court of Victoria, 15 April 1994.

[3] [1915] VicLawRp 66; [1915] VLR 450 at 452; 21 ALR 349; 37 ALT 62.

[4] [1975] HCA 41; (1975) 132 CLR 611 at 619; 7 ALR 383; (1976) 50 ALJR 4.

[5] including: *Hyams v Victorian Electoral Commission and Buchanan* [2003] VSC 156 at [128]-[129] per Gillard J; *Watkins Watkins and Watkins v Lee, Hervey Bay City Council & Ors* [1996] QSC 119, Unrep, Supreme Court of Queensland, 11 July 1996 at p12 per Derrington J; *Dunlop v Anstee* [2004] VSC 139 at [10] per Balmford J.

[6] *Hansard* 8 September 1994. Assembly p189.

[7] *Hansard* 1 November 2001. Assembly p1503.

[8] [2004] VSC 238 at [36]; [2004] VSC 238

[9] See: s35 of the *Interpretation of Legislation Act* 1984.

APPEARANCES: For the appellant Serbanescu: Mr A Hands, counsel. Frank Horvat & Co, solicitors. For the respondents Herter and KcKee: Mr B Stafford, counsel. Goddard Elliott, solicitors.