36/03; [2003] VSC 452

SUPREME COURT OF VICTORIA

AB OXFORD COLD STORAGE CO PTY LTD v ARNOTT

Kellam J

4 June, 18 November 2003 — (2003) 8 VR 288; (2003) 130 IR 179

OCCUPATIONAL HEALTH AND SAFETY – PROCEEDINGS TO BE BROUGHT BY AN INSPECTOR AUTHORISED IN WRITING – WRITTEN AUTHORISATION APPOINTED THE INFORMANT TO BRING PROCEEDINGS AGAINST COMPANY AND A PUBLIC OFFICER – CONDUCT ALLEGED TO AMOUNT TO OFFENCES NOT PARTICULARISED IN THE AUTHORISATION – FINDING BY MAGISTRATE THAT INFORMANT WAS AUTHORISED TO BRING PROCEEDINGS – WHETHER MAGISTRATE IN ERROR – EMPLOYER TO PROVIDE "ADEQUATE FACILITIES" FOR THE WELFARE OF EMPLOYEES – MEANING OF "ADEQUATE FACILITIES" – WHETHER ENCOMPASSES THE PROVISION OF FIRST-AID SERVICES – WHETHER THE FAILURE TO PROVIDE FIRST-AID SERVICES AND CALL AN AMBULANCE OR DOCTOR CONSTITUTED A BREACH OF THE ACT – COMPLAINTS MADE BY EMPLOYEES TO COMPANY OFFICER – DISCUSSION HELD WITH GENERAL MANAGER – COMPANY OFFICER INFORMED THAT IF EMPLOYEES HAD FRESH AIR THEY WOULD IMPROVE – FINDING BY MAGISTRATE THAT COMPANY OFFICER CONSENTED TO THE COMMISSION OF THE OFFENCE BY THE COMPANY – MEANING OF "CONSENT" – WHETHER MAGISTRATE IN ERROR: *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985, SS21(1)(2), 47, 48(2), 52(1).

Seven employees working for the defendant ('Oxford') were adversely affected by carbon monoxide fumes coming from a forklift in a freezer room at Oxford's premises. Four of the employees spoke to the general manager (Hilton) and Oxford's public officer (Fleiszig). The employees were told that there was a possibility that their symptoms could have been caused by exhaust emissions from a forklift and that they should "take a break" and if they felt better to return to work and if they did not feel better, to go home. Later that day all of the employees were admitted to hospital showing signs of substantial exposure to carbon monoxide.

Subsequently charges were authorised to be laid against Oxford for breaches of the *Occupational Health and Safety Act* 1985 ('Act') including the failure of Oxford to provide adequate facilities for the welfare of employees. Fleiszig was charged with an offence under s52(1) of the Act in that the offence committed by Oxford was committed with his consent or connivance or was attributable to wilful neglect on his part. At the hearing it was submitted that the informant was not authorised either generally or in the particular case to bring the proceedings. This submission was rejected and after a lengthy hearing the magistrate found the charges proved. Upon appeal—

HELD: The appeal by Oxford dismissed. The appeal by Fleiszig upheld.

1. Section 48(1) of the Act provides that proceedings for an offence may be brought by the Authority itself or by an inspector. However, s48(2) provides that the inspector may not bring proceedings for an offence under the Act unless he has the authority of the Authority generally or in any particular case. It is apparent that the intention of Parliament is to ensure that proceedings which are brought in relation to an offence under the Act are brought only after the Authority has given appropriate consideration to the bringing of such proceedings. The requirement for authorisation is no doubt designed to ensure that inspectors appointed under the Act do not bring proceedings which are unjustified or without sufficient foundation to be brought. The authorisations which were given to the informant were in accordance with the requirements of s48(2) of the Act which does not require that the conduct alleged to amount to an offence be particularised. Nor does the sub-section contain any requirement other than it shall be in writing and shall be either a general authority or an authority to bring proceedings in a particular case. The written authorisation provided by the Authority to the informant was to bring "the proceedings" against Oxford in one case, and Fleiszig in another, in relation to specified sections of the Act. The charge and summons served on each defendant contained charges which accorded completely with the document granting authority to bring proceedings. One needs to do no more than look at the authorities given to the informant and at the charges alleged against the parties to see that the authorities authorise those charges. Accordingly, the informant was authorised to bring proceedings for the alleged offences against the specified sections of the Act.

2. The word "facility" is sufficiently wide to encompass not just structures or buildings, or indeed the existence of a first aid centre, to administer to injured employees, but also to encompass a protocol or a system to enable the facilitation of the provision of medical service to injured workers and/or the provision of medical or first aid assistance to assess their condition. It is apparent that in

the event of an obvious physical injury to an employee, such as amputation of a hand, that a failure on the part of the employer to provide first aid assistance and to facilitate the provision of medical assistance would be a breach of s21(2) of the Act to provide adequate facilities for the welfare of employees at the workplace. The Magistrate did not fall into error in concluding that a failure on the part of the employer to provide "first aid services to the workers in the form of calling of an ambulance or a doctor" could properly be defined as a failure to provide adequate facilities for the welfare of employees at the workplace.

3. The word "consent" in the context of s52 of the Act is akin to aiding and abetting the commission of the substantive offence by the body corporate. Consent involves assent, agreement, acquiescence or permission. No-one may be convicted of aiding and abetting the commission of a criminal offence, unless with full knowledge of all the essential facts which made what was done an offence, he/she intentionally aids and abets the principal offender. It is necessary for the required consent under s52 of the Act to be given with full knowledge of all the essential facts. In order for the prosecution against Fleiszig to succeed, it needed to be established that Fleiszig was aware of the essential facts constituting the offence by Oxford and that he agreed or consented to the offence being committed. Consent is defined by *Stroud* as being "an act of reason, accompanied with deliberation, the mind weighing, as in balance, the good and evil on each side". Furthermore, before the charge could be made out against Fleiszig the prosecution was required to prove first that there was a failure on the part of the company to provide "adequate facilities" in the workplace, and secondly, that Fleiszig with full knowledge of that fact failed to act. There was no evidence that Fleiszig had any basis to believe that a possible cause of the complaints made by the employees was carbon monoxide poisoning. There was no evidence before the Magistrate to enable him to conclude that Fleiszig with full knowledge of the facts, "consented" to the commission of an offence under s21(2)(d) of the Act or that he intentionally assented to or concurred with a decision not to provide medical treatment to persons whom he believed, or on reasonable grounds should have believed, had suffered carbon monoxide poisoning. Accordingly, the Magistrate erred in law in finding that there was evidence that Fleiszig consented to an offence committed by Oxford and it follows that the appeal in his case should be upheld.

KELLAM J:

Introduction

1. A.B. Oxford Cold Storage Co Pty Ltd ("Oxford") operates cold storage facilities in Laverton North. Luiz Fleiszig is a public officer of Oxford.

2. On 29 December 1999, seven students who were working as casual employees of Oxford were affected adversely by carbon monoxide which had been produced by a forklift inside a freezer room at Oxford's premises where they were working at the time. Subsequent to suffering symptoms of headache, dizziness, nausea and lethargy, four of those employees attended at the office of the defendant. They asked to speak to the general manager of Oxford, Mr Gabor Hilton who was known to some of them. Before Hilton came to speak to the workers, Fleiszig entered the reception area and they commenced to describe their symptoms to him. As they were doing so Hilton arrived. Hilton mentioned the possibility that their symptoms could have been caused by exhaust emission from a forklift. Hilton advised the workers to "take a break" and if they felt better to return to work, and if they did not, to go home. The remaining three employees who had not gone to the office continued working for a brief period of time, but as they felt progressively more unwell, they attended at the office and met up with the other four employees who had spoken to Hilton and to Fleiszig. All seven employees decided that they did not feel well enough to continue working and so they decided to go home. Later that day, they were all admitted to hospital suffering markedly elevated levels of carboxyhaemoglobin in their blood, a sign of substantial exposure to carbon monoxide.

The Charges

3. Subsequently, both Oxford and Fleiszig were charged with a number of offences under the *Occupational Health and Safety Act* 1985 ("the OHS Act"). The informant who brought the charges on behalf of the Victorian Workcover Authority ("The Authority") was Mr James Arnott ("the informant").

4. Four charges were brought against Oxford. Each charge alleged against Oxford that on 29 December 1999 it failed to provide and maintain a working environment which was "safe and without risk to health" in contravention of s21(1) of the *Occupational Health and Safety Act* which provides as follows:

> "(1) An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health."

5. In addition, each charge alleged a specific breach of s21(2) of the *Occupational Health and Safety Act* which for relevant purposes states as follows:

> "(2) Without in any way limiting the generality of sub-section (1), an employer contravenes that sub-section if the employer fails—
> (a) to provide and maintain plant and systems of work that are so far as is practicable safe and without risks to health;
> (b) ...
> (c) to maintain so far as is practicable any workplace under the control and management of the employer in a condition that is safe and without risks to health;
> (d) to provide adequate facilities for the welfare of employees at any workplace under the control and management of the employer; or
> (e) to provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe and without risks to health."

6. Charge 1 alleged that Oxford was guilty of an offence against the *Occupational Health and Safety Act* in contravention of sections 21(1) and 21(2)(a) thereof which require the provision and maintenance of "plant and systems of work that are so far as is practicable safe". The particulars provided were that Oxford failed to:

> • Provide and maintain a system of regular maintenance of forklifts to ensure that carbon monoxide emissions were kept within safe levels.
>
> • Provide carbon monoxide detection alarms and medical ventilators in the freezer areas.

7. Charge 2 alleged that Oxford was guilty of an offence against the *Occupational Health and Safety Act* in contravention of sections 21(1) and 21(2)(c) thereof which require the maintenance of a workplace to be in "a condition that is safe". The particulars provided were that Oxford failed to:

> • Provide any health and safety policies or procedures which ensured that the workplace was maintained in a condition that was safe and without risks to health.

8. Charge 3 alleged that Oxford was guilty of an offence against the *Occupational Health and Safety Act* in contravention of sections 21(1) and 21(2)(d) thereof which require the provision of "adequate facilities for the welfare of employees at any workplace under the control and management of the employer". The particulars provided in relation to this charge were that Oxford failed to:

> • Provide any first aid or medical treatment at the workplace to assist its employees who were suffering carbon monoxide poisoning.
>
> • Provide transport home or otherwise ensure that the victims were in a safe condition to drive themselves home or to a doctor.

9. Charge 4 alleged that Oxford was guilty of an offence against the *Occupational Health and Safety Act* in contravention of sections 21(1) and 21(2)(e) thereof which require Oxford to "provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe". The particulars provided in relation to this charge were that Oxford failed to:

> • Inform and instruct the victims that carbon monoxide was emitted from the exhaust systems of LPG powered forklifts;
> • Inform and instruct the victims of the dangers of exposure to carbon monoxide gas;
> • Inform and instruct the victims that carbon monoxide emissions from LPG powered forklifts could build up to unsafe levels in freezer areas or other poorly ventilated areas of the workplace;
> • Inform the victims of the symptoms of carbon monoxide poisoning and how to recognise them;
> • Instruct the victims what to do in the event that they experienced any symptoms of carbon monoxide poisoning;
> • Supervise the victims to ensure that any problems of this nature were detected.

10. The charge brought against Fleiszig was that Oxford having committed an offence in contravention of s21(1) and 21(2)(d) of the OHS Act (i.e. "failing to provide adequate facilities for employees"), he being an officer of Oxford was guilty of an offence under s52(1) of the OHS Act, in that the offence committed by Oxford was committed with his consent or connivance or was attributable to wilful neglect on his part. The particulars of this offence were alleged to be that Fleiszig had failed to:

> • Provide any first aid or medical treatment for the seven victims at the time of the incident or arrange for someone else to provide same when the illnesses were brought to his attention by the victims;
> • Provide any transport home or organise for someone else to provide transport or otherwise ensure that the victims were in a safe condition to drive themselves home or to a doctor.

11. The charges against both Oxford and Flieszig were heard at the same time at Sunshine Magistrates' Court over the course of five days, and on 13 December 2002, the Magistrate made final orders whereby each of Oxford and Fleiszig were found guilty of each offence alleged against them under the OHS Act. Oxford was convicted and fined $50,000. Fleiszig was not convicted and the proceeding was adjourned on condition that he be of good behaviour and make a contribution of $4,000 to the Court fund.

12. Both Oxford and Fleiszig have now appealed against the orders of the Magistrate under s92 of the *Magistrates' Court Act* 1989 which provides that a party to a criminal proceeding in that Court may appeal to the Supreme Court on "a question of law", from a final order of the Magistrates' Court.

The Questions of Law

13. On 5 February 2003, Master Wheeler determined that the questions of law to be raised on the appeal of Oxford in its appeal are as follows:

> (a) whether for the purposes of section 48(2) of the *Occupational Health and Safety Act* 1985 the informant was authorised either generally or in the particular case to bring the proceeding against the Appellant?
>
> (b) whether for the purposes of section 21(2)(d) of the *Occupational Health and Safety Act* 1985 the alleged failure of the Appellant to do the acts alleged against it in the Respondent's further and better particulars of charge in respect of charge 3 amounts to or is capable in law of amounting to a failure to provide adequate facilities for the welfare of employees?
>
> (c) whether the learned Magistrate erred in law in receiving oral evidence of authority to prosecute under section 48(2) of the *Occupational Health and Safety Act* 1985 generally or by reference to a document not being the document specified in the section?
>
> (d) whether the learned Magistrate erred in law in permitting the prosecution to re-open its case to call evidence in respect of the authority to prosecute under section 48(2) of the *Occupational Health and Safety Act* 1985?
>
> (e) whether the learned Magistrate erred in law in receiving oral evidence of authority to prosecute under section 48(2) of the *Occupational Health and Safety Act* 1985 by reference in part to a document not being the authority to prosecute while upholding a claim of legal profession privilege and/or public interest immunity as to the document itself and without permitting the Appellant to inspect the document?
>
> (f) whether the learned Magistrate erred in law in refusing to order the production to the Appellant or its legal representative of a document not being the authority to prosecute on the basis that the document was not a document made or produced by the witness, notwithstanding the fact that the witness had relied upon it to give evidence and that the document was in Court?
>
> (g) whether the learned Magistrate erred in law in finding that the Appellant had not done all that was practicable to provide a safe working environment on the evidence, particularly the evidence of the conduct of a Hazard Assessment on behalf of the Appellant?

It will be observed that questions of law (a), (c), (d), (e) and (f) are all related to an issue of whether or not the informant was authorised to bring the proceeding and/or to the admissibility of evidence in relation to that issue.

14. On the same date the Master determined the questions of law to be raised on the appeal by Fleiszig. They are as follows:

> (a) whether for the purposes of s48(2) of the *Occupational Health and Safety Act* 1985 the informant was authorised either generally or in the particular case to bring the proceeding against the Appellant?
>
> (b) whether the learned Magistrate erred in law in receiving oral evidence of authority to prosecute under s48(2) of the *Occupational Health and Safety Act* 1985 generally or by reference to a document not being the document specified in the section?
>
> (c) whether the learned Magistrate erred in law in permitting the prosecution to re-open its case to call evidence in respect of the authority to prosecute under s48(2) of the *Occupational Health and Safety Act* 1985?
>
> (d) whether the learned Magistrate erred in law in receiving oral evidence of authority to prosecute under s48(2) of the *Occupational Health and Safety Act* 1985 by reference in part to a document not being the authority to prosecute while upholding a claim of legal profession privilege and/or public interest immunity as to the document itself and without permitting the Appellant to inspect the document?
>
> (e) whether the learned Magistrate erred in law in finding that there was any evidence capable of satisfying any reasonable Magistrate that the offence alleged against the body corporate was committed with the Appellant's consent or connivance or to have been attributable to wilful neglect on his part such as to render him liable under s.52 of the *Occupational Health and Safety Act* 1985?
>
> (f) whether for purposes of s.21(2)(d) of the *Occupational Health and Safety Act* 1985 the alleged failure of A.B. Oxford Cold Storage Company Pty Ltd to do the acts alleged against it in the Respondent's further and better particulars of charge amounts to a failure to provide adequate facilities for the welfare of employees?

As with Oxford, four of the above questions, (a), (b), (c) and (d) are related to the question of whether the informant was authorised to bring the proceedings and to the admissibility of evidence in relation to that issue.

15. Five of the above questions of law are common to both Oxford and Fleiszig. They are questions (a), (b), (c), (d) and (e) of the questions of law determined by the Master to be raised on the appeal of Oxford (i.e. questions (a), (b), (c), (d) and (f) raised on the appeal of Fleiszig).

16. The questions raised by paragraphs (f) and (g) on the appeal of Oxford relate solely to Oxford. The question raised by paragraph (e) on the appeal of Fleiszig relates only to Fleiszig. Upon the matter coming on for hearing before me I was informed by Mr Priest QC who appears with Mr Russell of Counsel for both Oxford and Fleiszig, that his clients do not seek to rely upon the questions raised in questions (d) and (g) raised in the appeal of Oxford or upon question (c) in the appeal of Fleiszig which relates solely to Fleiszig. Both appeals were heard at the same time before me. By reason of the common issues it is convenient for me to hand down a single judgment in both appeals.

The first Question of Law – (Question (a) raised on both Appeals: The Authority of the Informant to bring the proceedings)

17. Section 48(2) of the OHS Act provides that –

> "No proceedings for an offence against this Act shall be brought by an inspector without the authority in writing of the Authority given generally or in any particular case."

18. In the course of the proceeding before the Magistrate the informant tendered a document headed "Authorisation of Proceedings"[1] in relation to Fleiszig. It was dated 5 June 2001 and was signed by one Barry Derham, the Executive Director, Health and Safety of the VWA. It appointed the informant " ... to bring these proceedings against Luiz Fleiszig for offences pursuant to section 47(1) of the OHS Act in relation to the following sections:

> **"*Occupational Health and Safety Act* 1985 (Vic)**
> Section 21(1) & 2(d), Section 47(1) and Section 52(1) – one charge"

19. Later in the proceedings a document headed "Authorisation of Proceedings" and signed by the aforesaid Barry Derham was tendered before the Magistrate. It authorised the informant to "bring these proceedings against (Oxford) for offences pursuant to section 47(1) of the OHS Act in relation to the following sections:

> **"*Occupational Health and Safety Act* 1985 (Vic)**
> Section 21(1) & (2)(a) & 47(1) – one charge
> Section 21(1) & (2)(c) & 47(1) – one charge
> Section 21(1) & (2)(d) & 47(1) – one charge
> Section 21(1) & (2)(e) & 47(1) – one charge"

20. After the closing of the prosecution case, and as part of a "no case to answer" submission, Fleiszig (who appeared for himself before the Magistrate) submitted that the authority provided to the informant to prosecute was ineffective and did not authorise the prosecution against him. This submission was adopted by counsel for Oxford (notwithstanding his earlier statement to the Magistrate that Oxford would not take "any issue with the formalities" and his agreement that "the charges have been properly laid").[2]

21. Upon the submissions being made that the authorities to prosecute were ineffective, the Prosecutor sought leave to re-open the prosecution case. The Magistrate granted such leave and the Prosecutor recalled the informant who gave evidence. In the course of giving further evidence the informant produced a document purporting to be a delegation of authority from the Authority to its Chief Executive Officer which was tendered[3] as was a purported delegation of authority from the Chief Executive Officer to the aforesaid Barry Derham.[4]

22. Further in the course of his evidence, the informant gave evidence about a document entitled "Recommendation to Prosecute" said to relate to the proceedings.[5] However, that document was not tendered before the Magistrate.

23. Having heard further evidence from the informant and submissions from the parties, the Magistrate held that the necessary authorisation for the prosecution had been given under s48(2) of the OHS Act. He said, "I refer to the formal documents tendered, the provisions of section 50 of the Act, the evidence given by (the informant), the adoption of the presumption of regularity and the statements made by Mr Justice Eames in *Yamasa Seafoods v Watkins*.[6] I note that the defendants are named in the authorisation and the section of the Acts (sic) relied upon are specified. I reject the submission that the authorisations fail for vagueness".

24. Mr Priest submits that in so finding the Magistrate fell into an error of law. He submits that the written authorities upon which the Magistrate relied, lacked particularisation. Beyond naming the proposed defendant, and the relevant sections of the OHS Act and purportedly authorising the bringing of "these proceedings" there is, he submits, no further description of the proceedings which are said to be authorised. There is no statement of the dates upon which the offences are said to have occurred, nor is there any description of the circumstances said to found the proceedings which are to be authorised. Mr Priest concedes that the particularity required is not that of a pleading in civil cases, or of a charge in a criminal proceeding, but he submits that the authority to prosecute must nevertheless identify the "particular case" in question and this, he submits, is not done in the case of either document purporting to authorise the prosecution.

25. Furthermore, Mr Priest submits that s48(2) of the OHS Act permits of only two categories of possible authority to prosecute. No proceedings may be brought without the authority in writing of the Authority either "generally" or in a "particular case". He submits that neither authority to prosecute, provided to the informant in this case falls into either category.

26. He submits that as a matter of ordinary language authority to prosecute is given "generally" if it is given without restriction or limitation. Since each authorisation document before the court imposes limits by reference to the name of the proposed defendants and the section of the OHS Act said to have been breached, he submits that the written authorities to prosecute cannot be said to have been given generally.

27. Insofar as to whether the authorities are given in "any particular case" it is submitted by Mr Priest that the authorisations in question were not so given. First, Mr Priest submits that the

sections of the *Occupational Health and Safety Act* nominated in each written authority can be breached in an infinite variety of ways and in an infinite variety of circumstances. Some breaches might be of great magnitude and seriousness, warranting substantial punishment. Others might be technical or trivial, warranting no prosecution at all. He submits that there is nothing in the bare references to sections of the OHS Act to indicate what conduct is alleged to warrant prosecution. By way of example, he points out that there is nothing in the documents to tie the purportedly authorised prosecutions to the alleged carbon monoxide poisoning of the employees of Oxford.

28. Secondly, he submits that there is no temporal description. On their face, the authorisations permit prosecutions of the defendant for breaches of the nominated sections of the OHS Act no matter when committed, whether in the past or in the future.

29. Thirdly, he submits that no place is named and the documents under examination would seem to permit prosecutions no matter where the impugned conduct occurred. Insofar as the documents refer to the words "the proceedings", the determination of what proceedings are authorised can be answered only by looking beyond the documents in each case.

30. In summary, Mr Priest's submission can be seen to be that the authorities provided to the informant in writing contained too much by way of particulars to be authority "given generally" to bring proceedings for an offence against the *Occupational Health and Safety Act*, but had insufficient particularity to authorise the bringing of proceedings in a "particular case".

31. Furthermore, and insofar as the Magistrate relied upon the presumption of regularity to operate, Mr Priest submits that there was no scope for consideration of such presumption. He submits that the task for the Court was to construe the documents for themselves and that this is not a case where there was a gap in proof caused by the absence of a document or other evidence which would permit the presumption to operate. In such circumstances, he submits that the proceedings were not authorised and should have been dismissed by the Magistrate.

32. Mr Holdenson QC who appears for the informant was unable to point to any previously decided case referring to s48(2) of the OHS Act. However, he submits that the authority documents comply sufficiently with s48(2) so as to be valid authority to bring the proceedings which have been brought in each case against Oxford and Fleiszig.

33. Mr Holdenson submits that the written documents in each case authorise the informant to bring "these proceedings" against Oxford and Fleiszig who are each named correctly in the document. He submits that the words "these proceedings" do not refer to something "outside the four corners" of the document but rather refer to what comes next, upon a reading of the document, that is, the name of the person against whom the proceedings are to be brought, and the sections of the OHS Act which are to be the subject of the charges. Thus, he submits, the defendant is identified precisely and correctly, and that the statutory provisions said to have been breached and said to constitute an offence, have been identified precisely and correctly. He points out that there is no disparity between the charges as they appear on the charge sheets and the authorisation documents. Mr Holdenson submits that s48(2) of the OHS Act does not require the conduct alleged nor the particulars of the charges to be laid to be authorised, nor does the section require that the time or place of the alleged offence is to be specified.

34. In support of these contentions Mr Holdenson relies upon *Berwin v Donohoe*[7] which case involved a prosecution brought against the managing director of a company for trading with the enemy contrary to the *Trading with the Enemy Act* 1914 (C'th) which Act provides that:

> "... a prosecution for an offence against this section shall not be instituted without the written consent of the Attorney-General".

35. The consent which was given by the Attorney-General was in these terms:

> "The Attorney-General of the Commonwealth hereby consents to a prosecution being instituted against Arthur George Berwin for an offence against the *Trading with the Enemy Act*."

36. The High Court unanimously upheld the appeal of Berwin against his conviction on the basis that there was no evidence before the Magistrate upon which he could be properly convicted.

The joint judgment of Griffith CJ, Gavan Duffy and Rich JJ in such circumstances stated that it was unnecessary to express any opinion as to the sufficiency of the authority to prosecute given by the Attorney-General.

37. However, each of Isaacs, Higgins and Power JJ who wrote separate dissenting judgments in relation to the issue of whether or not there was sufficient evidence to convict the Appellant, gave consideration to the question of the sufficiency of the consent of the Attorney-General.

38. Isaacs J said in reference to the sufficiency of the consent:

> "The next objection to be noted is that the prosecution must fail for want of compliance with sub-sec. 6 of sec. 3. The object of that sub-section is obviously to prevent persons being harassed by private prosecutions, which patriotic fervour might induce, without a careful examination of the circumstances of the particular case. The written consent of the Attorney-General is required for the prosecution of an offence under sec. 3. As such sections are interpreted in England, the objection should fail in the present case."[8]

39. Further, Isaacs J said:

> "Now, here the Attorney-General signed a consent in these terms: 'The Attorney-General of the Commonwealth hereby consents to a prosecution being instituted against Arthur George Berwin for an offence against the *Trading with the Enemy Act*.' No other section than sec. 3 requires such consent, and the presumption is that the consent was given with reference to sec. 3. No other prosecution or offence or challengeable conduct on the part of Berwin within the purview of the Act is suggested. In short, there is nothing but the present set of circumstances to which, so far as appears, the consent could possibly have reference, and the consent was entrusted to the Crown officer Donohoe actually prosecuting in this particular case. If it is to be presumed that the Attorney-General has done his duty in examining the circumstances of this case, his consent in the terms in which he has given it is sufficient. And that is the conclusion to which I come. But if that is not to be the presumption, if the written consent is to be treated as a memorandum under the *Statute of Frauds*, it would be disastrous. A complicated set of circumstances may be reviewed by the Attorney-General, and his consent to a prosecution under the Act may be given in general terms leaving it to the Crown Solicitor to formulate the charge. If the precise form of the charge were necessary to be stated, then the provisions in the Justices Acts and the Crimes Act permitting amendments and guarding against the old fatalities for variances would be inoperative. If the defence definitely challenges the fact that the Attorney-General has examined the facts of that particular case, the prosecution may be put to prove that he has; but, as I say, no such challenge was made here. The objection was merely as to the form of the documents. Then I see no distinction between this and a consent specifying sec. 3. Section 3 embraces a multiplicity of offences any one of which may have been or may not have been the subject of a consent merely specifying the whole section. In my opinion the protection intended by the sub-section has been fully afforded, and the objection should be overruled."[9]

40. Higgins J in relation to this issue said as follows:

> "Before the prosecution was instituted, the Attorney-General signed a consent as follows:- 'The Attorney-General for the Commonwealth of Australia hereby consents to a prosecution being instituted against Alfred George Berwin of Sydney in the State of New South Wales for an offence against the *Trading with the Enemy Act* 1914'. It is said that this consent is not sufficiently specific, does not specifically refer to this particular prosecution. It is not pretended that there is any other prosecution to which it could possibly refer. There is only one offence specified in the information, an offence under sec. 3 (see *Acts Interpretation Act* 1904, sec. 8); and there is no offence mentioned in the Acts that requires the consent of the Attorney-General except an offence against sec. 3. It is quite true that the words in the written consent might also be applicable to some other offence than that specified in the information; but the words are distinctly applicable to that so specified. An indictment of John Smith would not be bad because there are other John Smiths to whom it might refer. A devise in a will of `my farm in the parish of Wycombe' is not void for uncertainty even if the testator had two farms in that parish; and evidence would be admissible to show which farm was referred to. Here there are not two prosecutions of Berwin, and the difficulty of showing which prosecution is referred to does not arise. The words of the Act providing for the consent of the Attorney-General are similar to those found in leases providing for the consent of the landlord to an assignment. If we had before us the words 'an assignment of the lease shall not be made without the written consent of the lessor', and if the lessor signed a written consent to 'assignment', without restricting it to assignment to any definite person, how could anyone say that there was a breach of the covenant? Inasmuch as the prosecution in this case answers the description of the prosecution to which consent has been given, it is not necessary for the prosecutor to give evidence identifying the former with the latter.

> It is for the accused to rebut the presumption that the consent refers to this prosecution (*Sewell v Evans;*[10] *Leake on Contracts*, 5th ed., p.137). It is for the accused to show that the written consent which on its face, and without any straining of words, can fit this prosecution, does not relate to it (and see *R v Metz*[11]). Even if there were two prosecutions to which the consent would be equally applicable, evidence would be admissible to show to which the consent is applicable; the consent would not be a bad consent. There would be a sufficient description even if evidence had to be given to show to which prosecution the consent referred (*Shardlow v Cotterell;*[12] *Plant v Bourne*[13]). I am clearly of opinion that the objection to the conviction is groundless, and that the rule *nisi*, so far as it relates to this ground, should be discharged."[14]

41. Mr Holdenson submits that the decision of the High Court in *Berwin v Donohoe* is "a complete answer" to the argument raised on behalf of the Appellants as to the question of whether or not the informant was authorised to bring the proceedings. However, Mr Priest submits that little assistance is derived from that case which depends upon its own facts. The issue here, he submits, is the construction of s48(2) of the OHS Act and of the document allegedly authorising the bringing of the proceedings.

Was the informant authorised to bring the proceedings?

42. In my view the answer to this question is in the affirmative. Section 48(1) of the OHS Act provides that proceedings for an offence may be brought by the Authority itself or by an inspector. However, s48(2) provides that the inspector may not bring proceedings for an offence under the OHS Act unless he has the authority of the Authority generally or in any particular case. It is apparent that the intention of Parliament is to ensure that proceedings which are brought in relation to an offence under the Act are brought only after the Authority has given appropriate consideration to the bringing of such proceedings. The requirement for authorisation is no doubt designed to ensure that inspectors appointed under the Act do not bring proceedings which are unjustified or without sufficient foundation to be brought. In my view, the authorisations which were given to the respondent were in accordance with the requirements of s48(2) of the OHS Act which does not require that the conduct alleged to amount to an offence be particularised. Nor does the sub-section contain any requirement other than it shall be in writing and shall be either a general authority or an authority to bring proceedings in a particular case.

43. The written authorisation provided by the Authority to the informant was to bring "the proceedings" against Oxford in one case, and Fleiszig in another, in relation to specified sections of the OHS Act. The charge and summons served on each defendant contained charges which accorded completely with the document granting authority to bring proceedings. One needs to do no more than look at the authorities given to the informant and at the charges alleged against the parties to see that the authorities authorise those charges. As Higgins J said in *Berwin v Donohoe*, the prosecution brought "answers the description of the prosecution to which consent has been given … It is for the accused to show that the written consent which on its face, and without any straining of words, can fit this prosecution, does not relate to it". In my view, the informant was authorised to bring proceedings for the alleged offences against the specified sections of the OHS Act.

44. Having answered questions (a) in the appeal of Oxford and in the appeal of Fleiszig in the affirmative, it becomes unnecessary to decide questions (c), (e) and (f) in the Oxford appeal or questions (b) and (d) in the appeal of Fleiszig which relate to whether or not the Magistrate erred in law in receiving oral evidence of authority to prosecute and to the evidence as admitted. Whether or not the Magistrate erred in relation to these matters is an irrelevant issue, in circumstances whereby the informant was, in my view, in any event properly authorised to bring the proceedings and in circumstances where, when the issue arose, the written authorisations were produced before the Magistrate.

45. The remaining questions of law raised on the appeal by Oxford and Fleiszig go to the substantive issues before the Magistrate in relation to charge 3 against Oxford and to the charge brought against Fleiszig.

The meaning of "adequate facilities" under s21(2)(d) of the *Occupational Health and Safety Act* – (Question of law (b) on the appeal of Oxford and (f) on the appeal of Fleiszig)

46. The first such substantive question of law is "whether for the purposes of s21(2)(d) of the OHS Act the alleged failure" of Oxford to

> • provide any first aid or medical treatment at the workplace to assist its employees who were suffering carbon monoxide poisoning;
> • to transport home or otherwise ensure that the victims were in a safe condition to drive themselves home or to a doctor

amounts to or is capable in law of amounting to a failure "to provide adequate facilities for the welfare of employees" at the "workplace under the control and management of" Oxford.

47. The same question of law is raised on the appeal of Fleiszig.

48. Section 21 of the OHS Act under the heading "General Provisions Relating To Occupational Health and Safety" sets out the duties of employers. Section 21(2)(d) provides that an employer contravenes the requirement set out in s21(1) to provide a working environment that is safe and without risk to health if the employer fails "to provide adequate facilities for the welfare of employees at any work place under the control and management of the employer".

49. Upon his ruling in relation to the submission of "no case to answer" in relation to this matter the Magistrate said[15]:

> "... I note that the word `facilities' is not defined in the Act. I am told there is no authority as to its meaning. I note the definitions in the Major Hazards Facilities Regulations. As an aid to interpretation, I refer to the objects of the Act, as set out in section 6. Taking those objects into account, I find that the word `facilities' encompasses first aid services. Such services, in my opinion goes (sic) to the securing of the health and welfare of the workers, to protect workers against risk to health and to assist in servicing safe and healthy work environments. I find there is evidence indicating the lack of such services."

50. Furthermore, and in the course of giving reasons for his final decision the Magistrate said[16]:

> "In relation to charge 3, I refer to and repeat my findings in relation to the interpretation of the word 'facilities' given in my rejection of the no case submission ... I note the evidence given by Edith Wood as to her first aid qualifications. I accept the evidence of the workers as to the description of their symptoms given to Hilton and Fleiszig and the evidence of Mr Hilton as to his identification of their symptoms being caused by carbon monoxide poisoning. I find that the failure of the company to offer first aid services to the workers in the form of calling of an ambulance or a doctor constitutes a breach of s21(1) and s21(2)(d) of the Act and the charge is proved."

51. Thus the Magistrate found the charge against Oxford proved on the basis that the requirement under s21(2)(d) of the OHS Act to provide "adequate facilities" encompassed the provision of first aid services and that the failure of Oxford to call an ambulance or a doctor was a breach of the section.

52. Mr Priest submits that the Magistrate fell into error when he found that the term "facilities" encompassed first aid services. Mr Priest submits that the term "facilities" relates to structures or buildings or similar in common parlance. He submits that a facility is different from the provision of a service, although a service might be provided in a facility. By way of example, he observes that in Regulation 104 of the *Occupational Health and Safety (Major Hazard Facilities) Regulation* 2000 the term facility is defined as meaning "any building or other structure on land" which is a workplace, and at which certain defined materials are present or are likely to be present for any purpose. He submits that it is clear that the term "facility" does not embrace the provision of transportation and in such circumstances he submits that the charges against both Oxford and Fleiszig should have been dismissed.

53. Mr Holdenson submits that the ordinary meaning of the word "facility" or "facilities" is not such as to confine the word to structures or buildings. He referred to the *Macquarie Dictionary* which defines "facility" as being "something that makes possible the easier performance of any action; advantage. *transport facilities, to afford someone every facility for doing something*". He submits that the word "facility" is commonly used outside of structures or buildings, and by way of example he refers to the provision of loan facilities by banks, credit facilities by department stores and facilities provided by barristers' clerks to enable money to be placed in a trust account. By way of further example, he refers to the fact that the word "facility" is used in s31(2)(e) of the

OHS Act which deals with occupational health and safety representatives and committees in such a way that it is clear the word is not used in relation to buildings or structures. Section 31(2)(e) of the OHS Act provides that an employer shall provide "such other facilities and assistance to health and safety representatives as are necessary or prescribed to enable them to perform their functions and duties". Mr Holdenson submits that the charge laid against Oxford identified the gravamen of the offence as being the failure of Oxford to offer the facility of first aid and/or the facility of medical treatment or transport to the employees of Oxford who were suffering from carbon monoxide poisoning.

54. In my view, the submission made by Mr Priest that the word "facilities" is confined to structures or buildings is to place a far too narrow construction upon the section in question. It appears to me that the term "facilities" encompasses a much wider circumstance than mere buildings and structures.

55. However, Mr Priest contends that even if the term "facilities" is given greater width having regard to s6 of the OHS Act, it could not embrace the provision of transportation because s21(2)(d) of the Act required only that the employer provide adequate facilities for the welfare of employees "at any workplace under the control and management of the employer". Thus he submits that any failure on the part of the employer to provide first aid services or to call an ambulance or doctor could not properly be regarded as the failure to provide "adequate facilities for the welfare of employees at any work place" and the charge should thus have been dismissed.

56. In my view, the Magistrate did not fall into error in concluding that a failure on the part of the employer to provide "first aid services to the workers in the form of calling of an ambulance or a doctor" could properly be defined as a failure to provide adequate facilities for the welfare of employees at the workplace. In my view, the word "facility" is sufficiently wide to encompass not just structures or buildings, or indeed the existence of a first aid centre, to administer to injured employees, but also to encompass a protocol or a system to enable the facilitation of the provision of medical service to injured workers and/or the provision of medical or first aid ssistance to assess their condition. In my view, it is apparent that in the event of an obvious physical injury to an employee, such as amputation of a hand, that a failure on the part of the employer to provide first aid assistance and to facilitate the provision of medical assistance would be a breach of s21(2) of the OHS Act to provide adequate facilities for the welfare of employees at the workplace.

57. Accordingly, it follows, in answer to question (b) on the appeal of Oxford and question (f) on the appeal of Fleiszig, as to whether or not the alleged failure to "provide any first aid or medical treatment at the workplace to assist its employees who were suffering carbon monoxide poisoning" is capable of amounting to a failure to provide adequate facilities for the welfare of employees is in the affirmative. I accept the argument advanced by Mr Priest that the provision of transport home would not be embraced by the words "facilities for the welfare of employees at the workplace", but that is not to say that the existence of a system designed to facilitate medical treatment and/or assessment whether or not such treatment is provided on the premises or otherwise, is not so covered.

58. It should be observed that the only ground of appeal by Oxford in relation to s21(2)(d) of the OHS Act is whether the "alleged failure" of Oxford "to do the acts alleged against it in the Respondent's further and better particulars" of charge 3 is capable of amounting to a failure to provide adequate facilities for the welfare of employers. No ground is raised on behalf of Oxford, as distinct from that on behalf of Fleiszig as to whether or not the evidence before the Magistrate was sufficient to render Oxford liable under the section in question, in the event that I conclude that the term "adequate facilities" encompasses the provision of first aid or medical services. Furthermore, no submission was put before me in relation to that matter.

59. Accordingly, and as Oxford does not rely upon questions of law in (d) and (g) before me, it follows that the appeal of Oxford fails.

Was it open to the Magistrate to find that Fleiszig "consented to" or "connived at" the commission of an offence by Oxford?

60. I turn now to question (e) of the questions of law relating to the appeal of Fleiszig which is "whether the learned Magistrate erred in law in finding that there was any evidence capable

of satisfying any reasonable Magistrate that the offence alleged against the body corporate was committed with the Appellant's consent or connivance or to have been attributable to wilful neglect on his part such as to render him liable under s52 of the *Occupational Health and Safety Act* 1985?"

61. Section 52 provides as follows:

> "**Section 52.** ***Offences by bodies corporate***
> (1) Where an offence against this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any wilful neglect on the part of, an officer of the body corporate or person purporting to act as such an officer, that officer or person is also guilty of that offence and liable to the penalty for that offence.
>
> (2) When in any proceedings under this Act it is necessary to establish the intention of a body corporate it is sufficient to show that a servant or agent of the body corporate had that intention."

62. It appears that there is no authority as to the effect of this section notwithstanding that it has counterparts in other Victorian legislation and in at least one other jurisdiction.

63. In consideration of whether or not there was a case to answer on the part of Fleiszig to the charge brought against him pursuant to s52 of the OHS Act the Magistrate said:

> "I also find, pursuant to s.2, that there is evidence of Mr Fleiszig's consent to or wilful neglect of Mr Hilton's statement to the workers as to the option to return to work in the freezer".[17]

He, however, did not provide any reasons for that finding at that time.

64. When giving reasons for finding the charge proven against Fleiszig the Magistrate said as follows:

> " ... Having found proven charge 3 against the company it is necessary to determine whether Mr Fleiszig consented, connived or by wilful neglect failed to meet the requirements of s21(1) and (2)(d) of the Act. The evidence of Mr Hilton reveals that Mr Fleiszig was present when the workers identified their symptoms to Mr Hilton, when Mr Hilton identified the probable cause of their symptoms and when Mr Hilton expressed the options to continue working or to leave work. Under these circumstances, in my opinion, the only inference open is that Mr Fleiszig, and taking into account his status and authority as a director, shared the views expressed by Mr Hilton and thereby consented to the company's breach of s21(1) and (2)(d) of the Act, and the charge is therefore proved."

65. It is apparent from the findings of the Magistrate that he considered that Fleiszig was guilty of a breach of s52 because the offence that he found to have been committed by Oxford was committed with his consent. Clearly he made no finding that Fleiszig connived at the offence. Likewise, although he mentioned "wilful neglect" in finding that there was a case to answer, he made no finding of wilful neglect on the part of Fleiszig in his final decision.

66. It is submitted by Mr Priest on behalf of Fleiszig that consent in the context of the OHS legislation is "akin to aiding and abetting the commission of the substantive offence by the company", that is, to consent is to assent, acquiesce, permit or similar. He submits that if this is so, then in order to succeed, the prosecution needed to establish that Fleiszig was aware of the essential facts constituting the offence by the company and that he agreed or consented to the commission of the offence. He submits that a central theme in s52, be it consent, connivance or wilful neglect is that an officer of a company is required to turn his or her mind to the facts or circumstances said to found the offence and then required to be found to have failed to act. It is submitted by Mr Priest that there was no evidence upon which a reasonable magistrate could have found these matters proved. It is submitted that nothing in the circumstances suggested that the employees required first aid or medical treatment, or needed transport home or to a doctor. It is submitted that although Mr Gabor Hilton gave evidence that he may have raised the possibility of carbon monoxide poisoning in the presence of Fleiszig nothing in the presentation or symptoms of the employees would have suggested to Fleiszig any need for their treatment.

67. The response of Mr Holdenson to the submissions of Mr Priest is that there was an "abundance of evidence" before the Magistrate to enable him to reach the conclusion that he did.

68. In such circumstances it is necessary to examine what evidence was before the Magistrate in relation to the allegations made against Fleiszig that he is guilty of an offence pursuant to s52 of the Act.

69. A statement dated 3 May 2000 and provided by Fleiszig to the Authority was tendered in evidence before the Magistrate. That statement confirmed that Fleiszig spoke to a number of the employees on the date of the incident. Paragraphs 4 to 8 of the statement were as follows:

> "3. I say that this was a particularly hot day and although I had, over many years become used to the bad smells which come from the adjoining rendering works, Pridhams, on this particular day the smell was extremely vile and nauseating."
>
> 4. Early in the afternoon at a time which I believe was approximately 2.30 pm I was called to the reception by Edith Wood. She told me that a number of the students were at the reception complaining of the bad smell. I spoke to three or four of the boys who were present and one of them told me that he had a headache and one or more of the others told me they were feeling unwell as a result of the bad smells at Pipe Road.
>
> 5. I was certainly under the impression that any ill effects they may have felt arose out of those smells and I told them that they could take a break and if they felt better they could go back to work or if they did not then they could go home.
>
> 6. Gabor Hilton who was walking along the corridor at this time heard the conversation and joined in. He conjectured that apart from the bad smells there might also be some effects of carbon monoxide from forklifts operating at the depot. We briefly discussed this and decided that the carbon monoxide problem was most unlikely because firstly the boys had complained about the bad smells of which both I and Gabor Hilton were aware and which we believed were making them feel unwell, secondly the forklifts operating at the Pipe Road depot were relatively new being only about a year and a half old. Thirdly, such forklifts were fitted with catalytic converters which we believed had the function of absorbing exhaust fumes. Fourthly, the relevant forklifts had at all times been under a service agreement which we believed kept them operating in accordance with legal requirements. Fifthly, the method of work at Pipe Road was the same as that used on previous occasions with no problems relating to carbon monoxide.
>
> 7. In all the circumstances we both concluded that the Pridham's discharge was the problem and Gabor Hilton also spoke to the boys and repeated what I had said, namely that they could take a break and return to work if they felt better or go home if they did not feel better.
>
> 8. I say that none of the boys appeared to require first aid or other medical attention. I also say that Gabor Hilton informed me at that time that he had some years previously suffered ill effects from forklift fumes but that after he took a couple of Panadol and a short break he was quite alright."

70. It is apparent from this statement that Fleiszig had a detailed discussion with Hilton about the possibility that the workers could be affected by carbon monoxide poisoning.

71. The evidence of the General Manager, Mr Gabor Hilton, in relation to Fleiszig's involvement with the workers was as follows.[18]

> "At some stage that day, in the afternoon, did a number of the students attend or come to the Hume Road office?—Yes.
> Do you know how many there were of them?—I think four.
> Did you actually see them talking to someone at the office?—Yes, I walked past the office and they were talking to Luis Fleiszig.
> That's the defendant, is that right?—That's right.
> At the end of the table here?—Yes.
> Where were they talking to him?—At the reception.
> Was there anyone else present other than the four plus Mr Fleiszig at that time?—Yes, there was Edith Wood.
> Edith Wood. Did you stop and listen to what was taking place?—Yes.
> What did you hear?—I heard that they were complaining of having headache and feeling a little bit dizzy, and they were complaining about the bad smell coming from a company behind the cold store.
> What is that company, by the way?—Peerless Holdings.
> Is that Peerless?—Peerless, yes.
> Peerless Holdings?—Yes.
> What's the nature - to your knowledge, what was the nature of the smell coming from Peerless

Holdings?—Well Peerless Holdings they - it's a rendering plant and they boil down animal waste and (indistinct) and carcasses and from time to time it's a very bad smell coming from there.
When they complained of headaches and dizziness, did you have any idea as to what may be the cause or possible causes of those symptoms?—Well it could have been - could have been caused by the - the pungent odour coming from Peerless Holdings, which some people find sickening. It could have also been caused by emission from a forklift.
Now that latter possible cause that you've just mentioned, is that something that you actually said on that particular day?—I think I would have mentioned it, yes.
Was that in the presence of Mr Fleiszig?—I think it was.
When you say 'emissions', at that time did you have any understanding of what part of or aspect of the emissions may cause those sorts of symptoms?—Well on gas fork (sic) it's fitted with a catalytic converter, and if that catalytic converter malfunctions then you could have a leakage of carbon monoxide coming out from the exhaust.
Are you able to say whether or not you - other than speaking of emissions from the forklifts, whether you identified in the conversation when Mr Fleiszig was present what gas may be involved in it?—I think I may have said it could have been caused - the symptoms are similar to – to what happens when there is a carbon monoxide leak from exhaust system.
What, if anything, beyond what was said by either yourself or Mr Fleiszig about whether these workers - what they should do?
—Over the years I've had - been affected by carbon monoxide myself, so I knew what the symptoms were and I knew that if I took a couple of Panadols afterwards and if I - if I had a rest for an hour or two then the symptoms would go away, so I just told them to go outside and try to get some fresh air and they can go - they go back to work or if they can't go back to work then should go home.
Are you able to say whether Mr Fleiszig had anything to say during the course of this particular conversation?—I don't think that Mr Fleiszig would have been aware of the effects of carbon monoxide (indistinct) something new to him.
Getting back to my question, are you able to say whether he actually said anything during the course of this conversation?—I think - I think we both said the same thing, that the kids should just try to take a break and that - and if they feel a bit better in half an hour they should go back to work and if they can't, they should go home.
Were they offered any form of medical assistance or first aid or anything like that?—I can't recall but I think what I said (indistinct), you know, just to, 'Go out to the fresh air and - and if it's the smell from the rendering works you will get better, and also if it's - if it's the - if it is the effect of the emission of the gas, then you should also get better.'
Did you have, at that time, a belief that if someone was affected by carbon monoxide, that the person may get better simply by having half an hour or some period like that away from the source of the carbon monoxide?—Well like I said to you before, I've - with all the equipment and over the years with the less sophisticated equipment, I've had the effect myself and that's all I had to do and I always got better.
At that time, prior to suggesting that the workers take the course that you've indicated, did you consider the need or prospect perhaps of trying to ascertain whether the forklift was in proper working order?
—Not at that stage, no.

72. The evidence of Mr Hilton that he had discussed the question of the emission of exhaust gases from a forklift with both Fleiszig and the employees was confirmed by a statement of one of them, Jonathon Krywicki, which statement was, by consent, read to the Magistrate. Mr Krywicki stated:[19]

> "At about 2.30 p.m., myself, Boris Tsietkin and David Bloom left the freezer. When we came out of the freezer, the headaches were really bad and we were very dizzy and we could hardly walk to the car without holding onto each other. We knew there was something wrong. We drove to Hume Road in Phillip's car. I don't know how he drove. I couldn't have at that point. We went into the office and spoke to somebody. I don't know who he was. We told him that we had had headaches, were nauseous and light headed. We said we thought it was the smell. He said that they would move us to another bigger freezer and that we should sit down for a while. Gabor Hilton came out from his office with another guy who I don't know. I know Gabor Hilton because he is my friend's stepfather. Gabor suggested that it might be the fumes from the forklift."

73. As to this matter, Fleiszig, who appeared for himself, called the receptionist of Oxford, to give evidence before the Magistrate. She said that she was working in reception on the date of the incident when "a group of students" came in. She said one of them complained about "bad smells" and stated that he had a "bit of a headache". She said that she went to Fleiszig's office and asked him to come out whereupon he did so and commenced to converse with the group. She said that Gabor Hilton then came in and joined in the conversation. Her memory of the conversation was

limited she said because she was "answering phone calls" and "attending to reception at the time as well".

74. One of the workers who attended at the office and spoke to Fleiszig, Aaron Weinberg, gave evidence before the Magistrate. He said that he had attended at the office in the company of John Krywicki, David Bloom and Boris Tsietkin. Mr Weinberg in the course of cross-examination agreed[20] that at the office he told Hilton that he could not continue to work because of the smell emanating from other premises. Mr Weinberg agreed that he told Hilton that he was suffering headaches and feeling nauseous. Boris Tsietkin gave evidence before the Magistrate that he attended at the office but that neither he nor the other employees asked specifically for medical assistance. David Bloom likewise gave evidence that he had attended at the office and that "the topic of conversation was just simply that we were feeling light-headed and the reason why all of us were feeling light-headed, not just one particular person".[21]

75. In my view, the submission made by Mr Priest that the word "consent" in the context of s52 of the OHS Act is akin to aiding and abetting the commission of the substantive offence by the body corporate is correct. Consent involves assent, agreement, acquiescence or permission. No-one may be convicted of aiding and abetting the commission of a criminal offence, unless with full knowledge of all the essential facts which made what was done an offence, he intentionally aids and abets the principal offender. Likewise, in my view, it is necessary for the required consent under s52 of the OHS Act to be given with full knowledge of all the essential facts.[22]

76. I accept the submission made by Mr Priest, that in order for the prosecution against Fleiszig to succeed, it needs to be established that Fleiszig was aware of the essential facts constituting the offence by Oxford and that he agreed or consented to the offence being committed. Consent is defined by *Stroud* as being "an act of reason, accompanied with deliberation, the mind weighing, as in balance, the good and evil on each side".[23] Furthermore, I accept that before the charge could be made out against Fleiszig the prosecution was required to prove first that there was a failure on the part of the company to provide "adequate facilities" in the workplace, and secondly, that Fleiszig with full knowledge of that fact failed to act.

77. The evidence in relation to Fleiszig is that the four employees attended at the office and there complained to him of light headedness, headaches and nausea. They ascribed their symptoms to an unpleasant smell emanating from a neighbouring factory. They did not seek medical treatment. The suggestion that possibly their symptoms were related to the emission of carbon monoxide was a suggestion raised by the General Manager, Gabor Hilton who is a qualified electrical engineer. The evidence before the Magistrate was that apart from their complaints of light headedness, headaches and nausea the employees appeared to have no other symptoms of injury or illness.

78. It should be observed that the charge against Fleiszig was supported by particulars which asserted that he, personally, had failed to provide any first aid, or medical treatment for the "seven victims" at the time of the incident and that he, personally, had failed to "arrange for someone else to provide the same when the illnesses were brought to his attention by the victims". The offence which was found by the Magistrate to have been committed by him however, was that he consented to the company's breach of s21(2)(d) of the Act in that he " ... shared the views expressed by Hilton". However, in my view, "sharing a view" in all the circumstances of this case would not be sufficient to say that he consented, with full knowledge of all the facts and circumstances, to the failure of the company through Hilton, to provide the facility of first aid treatment to the workers. There is no evidence that Fleiszig had any basis, outside of the statement made by Hilton, to believe that a possible cause of the complaints made by the four employees to him was carbon monoxide poisoning.

79. In this regard it should be noted that the Magistrate relied upon "the evidence of Mr Hilton as to the identification of their symptoms being caused by carbon monoxide poisoning" and upon the presence of Fleiszig at the time "when Mr Hilton identified the probable cause of their symptoms"[24]. I am unable to find anywhere in the transcript a statement by Hilton that he did so identify the forklift exhaust emissions as the probable cause of the symptoms, or positively identify their symptoms as being caused by carbon monoxide poisoning. There is no doubt that he raised the issue as a possibility. He had experienced similar "symptoms" as the workers were describing as a result of being exposed to carbon monoxide.[25] However, he gave evidence that his

belief was that forklifts equipped with a catalytic converter, if kept in tune and serviced properly, would not create any problem in relation to "carbon monoxide" emissions. My reading of the whole of the transcript does not establish the basis upon which the Magistrate concluded that Hilton "identified the probable cause" of the symptoms of the employees. Accordingly, the conclusion reached by the Magistrate that Fleiszig "shared the views expressed by Hilton" cannot amount to a finding that Fleiszig had a state of mind that the symptoms complained of by the workers were probably caused by carbon monoxide poisoning. The offence alleged by charge 3 against Oxford was that it failed to provide "adequate facilities" in that it failed to "provide any first aid or medical treatment at the workplace to assist its employees who were suffering carbon monoxide poisoning". At the minimum, and irrespective of what view the Magistrate may have had of what knowledge should reasonably have been held by Hilton in all the circumstances, it appears to me that before Fleiszig could be guilty of consenting to the offence there would need to be evidence that he knew or should reasonably have known that the employees were suffering from carbon monoxide poisoning or were probably so suffering.

80. In my view, the highest point the evidence reached in this regard was that the employees made complaints to him that were reasonably capable of being explained by the noxious odours emanating from a neighbour's presence, as stated by them, or by reason of emissions from a forklift in the freezer as suggested as an alternative possibility by Hilton.

81. There is evidence that he and Hilton discussed the matter, and there is evidence that it was concluded by Hilton that the likely explanation for the symptoms of the workers was the emanation of smells from nearby premises.

82. There is evidence that Fleiszig and Hilton, who it will be recalled gave evidence of being a qualified electrical engineer, informed Fleiszig that he, Hilton, had previously suffered exposure to "forklift fumes" but that after a "short break" he was alright. It is clear that Hilton informed Fleiszig that whether it was the noxious odours or whether it was the forklift emissions causing the symptoms complained of by the four workers, he was of the opinion that if the employees had "fresh air" they would improve.

83. In such circumstances, I do not consider that there was any evidence before the Magistrate to enable him to conclude that Fleiszig with full knowledge of the facts, "consented" to the commission of an offence under s21(2)(d) of the Act. The evidence at the most is that he accepted statements made by Hilton as to his knowledge and experience of the effect of "forklift fumes" and in the circumstances no consideration was given by either of them to the question of whether or not medical treatment was required. In my view, it cannot be said that reliance upon a state of fact which is not the true circumstance, can be said to be "consent" within the meaning of s52 of the *Occupational Health and Safety Act*. It must be remembered that the Act has penal consequences. Consent cannot be signified by mere presence at a conversation. It must involve an intentional conveyance by words, and/or by behaviour, of assent to and concurrence in the commission of the offence by the body corporate. In my view, there was no evidence before the Magistrate to enable him to conclude that Fleiszig intentionally assented to or concurred with a decision not to provide medical treatment to persons whom he believed, or on reasonable grounds should have believed, had suffered carbon monoxide poisoning.

84. It follows that the answer to the question of law raised by paragraph (e) on the appeal of Fleiszig is that the Magistrate did err in law in finding that there was evidence that Fleiszig consented to an offence committed by Oxford and it follows that the appeal in his case should be upheld.

85. Thus, the orders I propose to make are that the appeal in the matter of A.B. Oxford Cold Storage Pty Ltd be dismissed and that the appeal in the matter of Mr Fleiszig be upheld. It appears to me that the costs of each appeal should follow the event but I will reserve liberty to apply to the parties in relation to any consequential orders including the question of costs.

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[1] Transcript p242-3.
[2] Transcript p2.
[3] Transcript p343.
[4] Transcript p344.
[5] Transcript p322-4.

[6] (2000) VSC 156.
[7] (1915) 21 CLR 1.
[8] At 24.
[9] At 25-26.
[10] [1843] EngR 669; (1843) 4 QB 626; 114 ER 1034.
[11] 31 TLR 401; (1915) 11 Cr App R 164.
[12] 20 Ch D 90; LR 20 Eq 492.
[13] (1897) 2 Ch 281.
[14] At 28-29.
[15] At p400 of the transcript.
[16] At p493 of the transcript.
[17] Transcript p400.
[18] Transcript at pp110-111.
[19] Transcript at p265.
[20] At p30 of the transcript.
[21] At p87 of the transcript.
[22] See *Giorgianni v R* [1985] HCA 29; (1985) 156 CLR 473 at 487-8; 58 ALR 641; (1985) 16 A Crim R 163; (1985) 59 ALJR 461; (1985) 2 MVR 97; 4 IPR 97.
[23] *Strouds Judicial Dictionary*, Sweet & Maxwell - 4th ed.
[24] Transcript at pp493-4.
[25] Transcript at pp112 and 125.

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