

32/79

SUPREME COURT OF VICTORIA

MacKENZIE v SEXTON

Jenkinson J

26 May 1978

ENVIRONMENT PROTECTION – WASTE OF A CERTAIN PROHIBITED AMOUNT DISCHARGED – LICENCE TO DISCHARGE WASTE GRANTED SUBJECT TO LIMITATIONS, RESTRICTIONS AND CONDITIONS – HOTEL PREMISES GRANTED LICENCE – HOTEL OCCUPIED BY PERSONS OTHER THAN LICENSEE – LICENSEE CHARGED WITH OFFENCES – LICENSEE DEFENDANT NOT THE HOLDER OF A HOTEL-KEEPER'S LICENCE AT TIME OF DISCHARGE – INFORMATIONS DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: ENVIRONMENT PROTECTION ACT 1970, S27(2).

HELD: Order nisi discharged.

1. The licence granted was that the licensee may discharge waste. Therefore the licence conditions numbered 10(a), 10(b) and 12 should be understood as referring only to waste discharged by the licensee.

2. There was no evidence before the Magistrates' Court that any of the waste about which evidence was given in relation to the informations was discharged by the defendant licensee. Even if a mere right of control over premises, or over activities likely to cause the discharge of waste on or from premises, were regarded as involving the legal consequence that any discharge of waste in fact occurring on those premises was discharged by her in whom that right is vested, the evidence before the Magistrates' Court did not support a conclusion that any such right was vested in the defendant in May or June 1977. Any inference tending towards such a conclusion which might have been raised by proof of the defendant's legal ownership of the land was displaced by the uncontradicted evidence that the premises were at the relevant times the subject of a hotel-keepers licence of which the defendant was not the holder. A right of the kind conferred on the owner of licensed premises by s80 of the *Liquor Control Act 1968* could not be regarded as a right of control over the premises or over activities thereon.

3. Accordingly, the only order the Magistrates' Court could lawfully have made in respect of each information was to dismiss it.

JENKINSON J: Nine informations alleging breaches of s27(2) of the *Environment Protection Act* by Respondent were by consent heard together by the Magistrates' Court at Bairnsdale and each dismissed. Evidence established that Respondent was the holder of a licence under s27(2) which provides:

"Any person who being the holder of licence under this Act contravenes or fails to comply with any condition, limitation, or restriction to which the licence is subject shall be guilty of an offence against this Act and liable to a penalty of not more than \$5000 and in the case of a continuing offence to a daily penalty of not more than \$2000 for each day the offence continues after conviction or after service by the Authority or a protection agency on the Defendant of notice of contravention or of failure to comply with any such condition, limitation, or restriction (whichever is the earlier).

(A schedule to such licence contained certain "further conditions" some of which are as follows:

10(a) The arithmetic mean value of the B.O.D. (5 day) of five consecutive samples of the waste discharge taken as specified in Condition 8 shall not exceed 10 g/m³.

(b) At no time shall the B.O.D. (5 day) of the waste discharge exceed 20 g/m³.

12 At no time shall the number of bacteria (E.Coli) colonies in the waste discharge exceed 200 colonies per 100 millilitres.)

Two of the informations allege "did fail to comply with Condition 12 of the licence by discharging waste discharge containing bacteria (E.Coli) colonies exceeding 200 colonies per 100 millilitres contrary to Section 27(2) of the said Act."

One of the informations alleges "did fail to comply with Condition 10(a) of the licence by discharging waste discharge containing biochemical oxygen demand (5 day) which arithmetic mean value of the five consecutive samples of the waste discharge taken exceeded 10 grammes per cubic metre contrary to Section 27(2) of the said Act".

The other informations alleged "did fail to comply with Condition 10(b) of the licence by discharging waste discharge containing biochemical oxygen demand (5 day) exceeding 20 grammes per cubic metre contrary to section 27(2) of the said Act". Each of three of those informations alleged a contravention on 12 May 1977; 23 June 1977 and 24 June 1977 respectively. The other three allege contravention on 22 June 1977 but each of them at a different time on that day.

The proper construction of the conditions of the licence is bedevilled by many ambiguities and obscurities of language, but for the disposal of these orders to review it is sufficient to say that in my opinion the meaning of the expression "waste discharge" in each of the "limitations, restrictions and conditions" numbered 10(a), 10(b) and 12 must in case of doubt be governed, as a matter of construction, by the meaning of the words in which is expressed the grant of the licence which is subject to those "limitations, restrictions and conditions".

There is, in my opinion, some room for doubt as to whether the conditions relate only to waste discharged by the respondent. That doubt may be thought to arise not only from the verbiage by which the conditions are expressed, but also from the circumstance, which the evidence disclosed, that the officers of the licensor, the Latrobe Valley Water & Sewerage Board, were aware at the time the licence was granted that a hotel in the occupation of persons other than the licensee was sited on the premises. There were circumstances which suggested the improbability that a responsible public body would limit conditions of the kind found in Conditions 10(a), 10(b) and 12 of this licence if its power to abstain from such a limitation were not in doubt. But those are speculative considerations, particularly when regard is had to s29(1) of the Act and the general legislative scheme of licensing analysed by Gillard J in *Protean (Holdings) Pty Ltd v The Environment Protection Authority* [1977] VicRp 5; (1977) VR 51; (1977) 40 LGRA 189.

Any doubts which there may be must, in my opinion, be resolved by regard to the words of grant "grants this licence to the abovenamed to transport and discharge waste into the environment at the location named above, subject to the following limitations, restrictions and conditions". The licence is that the licensee may discharge waste. Therefore the conditions numbered 10(a), 10(b) and 12 should in my opinion be understood as referring only to waste discharged by her.

There was no evidence before the Magistrates' Court by reference to which a finding could be supported that any of the waste about which evidence was given in relation to the informations was discharged by the defendant. Even if a mere right of control over premises, or over activities likely to cause the discharge of waste on or from premises, were regarded as involving the legal consequence that any discharge of waste in fact occurring on those premises is discharged by her in whom that right is vested, the evidence before the Magistrates' Court did not support a conclusion that any such right was vested in the defendant in May or June 1977. Any inference tending towards such a conclusion which might have been raised by proof of the defendant's legal ownership of the land was displaced by the uncontradicted evidence that the premises were at the relevant times the subject of a hotel-keepers licence of which the defendant was not the holder. A right of the kind conferred on the owner of licensed premises by s80 of the *Liquor Control Act* 1968 could not in my opinion be regarded as a right of control over the premises or over activities thereon.

It follows that in my opinion the only order the Magistrates' Court could lawfully have made in respect of each information was to dismiss it. It is therefore unnecessary to consider the grounds of any of the orders nisi. The verbiage of some of those grounds, which was derived from words attributed in the affidavits in support of those orders to the learned Magistrate in his reasons for decision, involves difficulties which I need not attempt to resolve. In each matter the order nisi will be discharged.