17/93

SUPREME COURT OF VICTORIA — FULL COURT

DIX v CRIMES COMPENSATION TRIBUNAL

Fullagar, Brooking and Tadgell JJ

12 August 1992 — [1993] VicRp 21; [1993] 1 VR 297; (1992) 28 ALD 565

CRIMES COMPENSATION – APPLICATION FOR EXTENSION OF TIME TO MAKE APPLICATION – WHETHER DISCRETION FETTERED – WHETHER ANY PRE-CONDITION TO EXERCISE OF DISCRETION: *ADMINISTRATIVE APPEALS TRIBUNAL ACT* 1984, S31(2).

The power given by s31(2) of the *Administrative Appeals Tribunal Act* 1984 for the grant of an extension of time is in unrestricted terms and the discretion given is unfettered. It is not a pre-condition to the grant of an extension of time that the applicant show "an acceptable explanation of the delay".

***Hunter Valley Development Pty Ltd v Minister for Home Affairs and Environment* (1984) 58 ALR 305; [1984] FCR 344, not followed.**

[See also, *Arnold v Crimes Compensation Tribunal* 11 VAR 299, 4 December 1991, Administrative Appeals Tribunal, Judge Smith and *Tarson Pty Ltd v Travel Agents Licensing Authority*, unrep, AAT, 8 October 1991, Judge Smith, MC16/92. Ed.]

BROOKING J: [*After setting out the facts and quoting a passage from* Hunter Valley Development Pty Ltd v Minister for Home Affairs and Environment *(1984) 58 ALR 305 at pages 310-311; [1984] FCR 344, His Honour continued]* ... **[6]** The primary submission of Mr Cavanough for the appellants was that the Tribunal dismissed the **[7]** applications because of the erroneous view, which is derived from the *Hunter Valley case*, that it was a pre-condition to the grant of an extension of time under s31(2) that the applicants show an "acceptable explanation of the delay" and because in its opinion neither applicant had done this.

The first question is whether the Tribunal did proceed in this way. After a close consideration of its reasons for decision as a whole, I am satisfied that it did, in other words, that it considered itself constrained to dismiss the applications by the operation of a principle or rule that regardless of the other circumstances no application for an extension of time could be granted unless the applicant showed by way of the fulfilment of a pre-condition an "acceptable explanation of the delay". The next question is whether the Tribunal erred in law in proceeding in this way. I have read several times the relevant passages in the judgment of Wilcox J in the *Hunter Valley case* in considering whether His Honour may be said to have used, in the short and critical passage, words which, given their ordinary meaning, do not accurately reflect the intention to be derived from the judgment considered as a whole. What I have called the critical passage is this at p310:

> "It is a pre-condition to the exercise of discretion in his favour that the applicant for extension show an 'acceptable explanation for the delay' ..."

What is later said by his Honour at page 312 does not suggest to my mind that what I have called the critical passage is not to be read literally:

> "I now turn to an application of the principles I have summarized to the **[8]** facts of this case. Mr Bennett argues that the applicants have not made out a case for extension so as to displace the *prima facie* rule that an application shall be made within 28 days of the relevant decision. Expressed another way, there is no 'acceptable explanation' of the delay."

Having considered the reasons for decision as a whole, including what is said at p314 about the relationship between the adequacy of an explanation for delay and the nature of the case, I am not persuaded that the passage referring to a pre-condition is not to be given its ordinary meaning. Understood in that sense, ought it to be viewed as correct? I set out the sentence in full:

> "It is a pre-condition to the exercise of discretion in his favour that the applicant for extension show an 'acceptable explanation of the delay' and that it is 'fair and equitable in the circumstances' to extend time (*Duff v Freijah* [1982] FCA 159; (1982) 43 ALR 479 at 485; (1982) 62 FLR 280; (1982) 5 ALD 16: *Chapman v Reilly,* Neaves J, 9 December 1983, not reported, at p7)."

Both of the two cases cited concern applications for an extension of time under s11 of the Commonwealth Act. In each of them, as it seems to me, the learned judge merely treated as a matter relevant to the exercise of the discretion the question whether there was a satisfactory explanation of the failure to lodge the application in time or the somewhat different question whether there was a satisfactory explanation of the actual delay. The same may be said of the remarks of Sheppard J in *Wedesweiller v Cole* [1983] FCA 94; (1983) 71 FLR 256; (1983) 47 ALR 528 at p531; (1983) 5 ALN N137 cited by Wilcox J at p311. Indeed, Sheppard J went on to refer to the discretion as vested in the court in completely unrestricted terms. It is also worth noting that what was said by O'Connor J in *Re Mulheron v Australian Telecommunications Corporation* (1991) 14 AAR 42 at p50; (1991) 23 ALD 309 is **[9]** inconsistent with the view that an applicant for an extension of time under s29(7) of the Commonwealth *Administrative Appeals Tribunal Act* 1975 must in all cases explain his delay in applying for review.

I entertain no doubt that it is not a pre-condition to the grant of an extension of time under s31(2) of the *Administrative Appeals Tribunal Act* 1984 that the applicant show an "acceptable explanation of the delay". The power given by s31(2) is given in unrestricted terms and it is not for the Court to impose an arbitrary limitation of the power not expressed in the words of the statute (*FAI General Insurance Company Limited v Southern Cross Exploration* NL [1988] HCA 13; (1988) 165 CLR 268 at pp283-4; (1988) 77 ALR 411; (1988) 62 ALJR 216 per Wilson J). Instructive decisions for present purposes are *Evans v Bartlam* [1937] AC 473 especially at pp479-80 per Lord Atkin, p481 per Lord Russell of Killowen and pp448-9 per Lord Wright; [1937] 2 All ER 646; (1937) 53 TLR 689, and *Kostokanellis v Allen* [1974] VicRp 71; (1974) VR 596, both dealing with the suggestion that the discretion to set aside a default judgment or a judgment entered where the defendant has not appeared to show cause cannot be successfully invoked unless the applicant gives a satisfactory explanation for his default or non-appearance.

The distinction is there drawn between the recognition of matters relevant to the exercise of the discretion and the elevation of some matter into a condition precedent to the existence or exercise of the discretion; see in particular the observations of Lord Russell cited at pp603-4 in *Kostokanellis v Allen* and the reference at pp605-6 in the latter case to the adoption of a formula created by erecting what are merely relevant factors into arbitrary principles so as to allow the **[10]** automatic production of a solution. For a very recent illustration of the refusal to impose restrictions on an unfettered discretion conferred by Parliament see the decision of the Full Court in *Leighton Contractors Pty Ltd v Kilpatrick Green Pty Ltd* ([1992] VicRp 83; [1992] 2 VR 505, 22 October 1991).

For these reasons, I respectfully disagree with the view that it is a condition precedent to the grant of an extension of time under s31(2) of the *Administrative Appeals Tribunal Act* 1984 that the applicant show an "acceptable explanation of the delay". I would only add in this regard that if there were any such condition precedent as is suggested, great uncertainty would exist as to what was an "acceptable explanation" notwithstanding the development of that notion in the *Hunter Valley case*.

The error of law in the present cases is such that the decision of the Tribunal should be set aside. That error prevented the Tribunal from giving consideration to all matters relevant to the exercise of its discretion. Had the Tribunal done this, the Tribunal, in the proper exercise of its discretion, might or might not have granted the applications. This court should set aside the actual decision of the Tribunal – that is, the decision refusing to extend time on each application – and remit both cases to the Tribunal to be determined again without the hearing of further evidence in accordance with the directions of this court. To correct the record, I would also set aside the formal order dated 4 December 1990 which, as earlier mentioned, wrongly affirms the decision of the Crimes **[11]** Compensation Tribunal, that decision not being before the Administrative Appeals Tribunal, which had before it only applications for an extension of time.

FULLAGAR J: I agree in the judgment of Brooking J.

TADGELL J: I consider that each appeal should be allowed for the reasons given by Brooking J and I also agree in the orders he proposes.

FULLAGAR J: The orders of the Court are as follows. Order in each case as follows: Appeal allowed. Set aside the order of the Tribunal dated 4 December 1990 and its refusal to extend time and remit the case to the Tribunal to be determined again, without the hearing of further evidence, in accordance with the directions of this Court. Order that the respondent pay the appellant's costs of the appeal. Order that a certificate issue to the respondent, pursuant to s13 of the *Appeal Costs Act*, in respect of the appeal.

Solicitors for the appellants: Maurice Blackburn and Co.
Solicitors for the respondent: Victorian Government Solicitor.
