

23/76

SUPREME COURT OF VICTORIA

SENCEK v ARCHIBALD

Gillard J — 29 March 1976

PRACTICE AND PROCEDURE – SUMMONS TO SHOW CAUSE – ESTATE AGENT – ALLEGED TO HAVE CONTRAVENED THE PROVISIONS OF STATUTE – DUPLICITY OF INFORMATION – FINDING BY MAGISTRATE THAT INFORMANT REQUIRED TO ELECT – NATURE OF PROCEEDINGS – WHETHER THE RULES OF DUPLICITY APPLIED TO THIS PROCEEDING – WHETHER MAGISTRATE IN ERROR: ESTATE AGENTS ACT 1958, S20(1)(c).

Summons to Show Cause why A. should not have his Estate Agent's licence cancelled and why he should not be permanently or temporarily disqualified from holding such a licence. The information contained two averments: firstly that he had been guilty of such conduct as an agent as to render him so unfit in that he had incorrectly claimed to be in *bona fide* control of the business of X Company to assist that company obtain a corporation licence; and secondly that he had contravened s20(1)(c) *Estate Agents Act*.

HELD: Information remitted to the Magistrate to be dealt with according to law. [cf MC 60/76]

If this had been an information for an offence to be dealt with either summarily or on indictment it would have suffered from the vice of duplicity. However, the doctrine of duplicity was quite inapplicable to a proceeding of the character of this case. These proceedings were of an administrative character and the information was not an information for an offence at all. Accordingly, the doctrine of duplicity did not apply to such proceedings.

***Tour Finance Ltd v Watts* [1972] VicRp 8; (1972) VR 58, followed.**

GILLARD J: ... It was sought in the proceedings before the Magistrate to rely upon the fact that he was not in *bona fide* control of the estate agency business and it was on that basis that the first averment was made in the information, namely, that he had been guilty of such conduct as an agent as rendered him unfit to hold a licence.

Now, it is unnecessary for me to pass any view as to whether the evidence was sufficient to justify that averment, because right at the threshold of the case, objection was taken that on its face the information suffered from the vice of duplicity. If this were an information for an offence to be dealt with either summarily or on indictment I would have agreed with such a statement. In my opinion, it is quite inapplicable to a proceeding of the character of this case. These proceedings were comparable to the proceedings referred to in the case of *Tour Finance Ltd v Watts* [1972] VicRp 8; (1972) VR 58, where Stephen J pointed out that the proceedings were of an administrative character. The information in that case, like in this case, was not an information for an offence at all. Accordingly, the doctrine of duplicity does not apply to such proceedings.

When counsel submitted that the information suffered from this vice, the learned Magistrate put the Informant to his election as to whether he would rely upon the first or second grounds set out in the information. He elected to rely upon the second ground only, and accordingly, the proceedings were never litigated on the basis of the first ground, which was struck out of the information.

Mr Batt, who appeared for the Informant in these proceedings before me to move the order absolute, was unable to inform me whether the Informant in the court below had available to him any other evidence to support the first ground. Having regard to this statement, I cannot deal with this information on the basis of the evidence already given. There might be other evidence which the Informant was prevented from leading because ground (1) was struck out. Having regard to these views, it seems to me that the learned Magistrate mis-directed himself when he required the Informant to elect as to which of the two grounds he was relying on in the proceedings before the Magistrate. Since the learned Magistrate has so mis-directed himself it must follow that the information must be sent back to him with a direction to hear such further evidence as may be led by the Informant and to determine whether Alan Stanley Archibald has been guilty of such conduct as an agent as to render him unfit to hold a licence.