

57/84

## SUPREME COURT OF VICTORIA

**GODDARD v COLLINS**

Nathan J

9 August 1984 — [1984] VR 919; 55 LGRA 57

**HEALTH – PESTICIDES – USE OF BY PERSON NOT LICENSED OR REGISTERED – WHETHER USE AMOUNTS TO USE IN COURSE OF "BUSINESS" – MEANING OF "COURSE OF HIS BUSINESS" – MEANING OF "OBSTRUCTION": *HEALTH ACT 1958*, SS108A-C, 403.**

Section 108B of the *Health Act 1958* provides:-

"A pest control operator using or intending to use pesticides in the course of his business shall not carry on that business unless he has paid the prescribed registration fee and his name is correctly entered on a register of pest control operators kept by the Commission."

Section 403 of the *Health Act 1958* provides:

"Every person who—

(a) obstructs hinders impedes resists or opposes; or

(b) refuses admission to any premises to any member of the Commission ... in the performance of anything which such member officer or person is empowered or required by or under this Act to do shall be guilty of an offence against this Act."

G., an officer of the Health Commission, saw C. at a building site emerging from partly-constructed home units with spraying equipment in his hands and wearing appropriate protective apparel. After C. had placed the equipment in the boot of his motor car, G. approached him, questioned him about his activities and requested to look at the equipment. C. refused, got in his motor car and drove off. Subsequently C. was charged with being an unlicensed pest control operator, using a pesticide whilst unlicensed and obstructing G. in the performance of his duty. He was convicted of each charge. Upon order nisi to review—

**HELD: Order nisi discharged.**

**(1) The expression "course of his business" in s108B of the *Health Act 1958* means that the business must be of a commercial character and imply a necessary expectation of commercial reward.**

**(2) As C. had previously treated some 25-30 other building sites and had been paid for his services, it was open to conclude that he was engaged in a commercial activity within s108B of the Act.**

**(3) The basic element of "obstruction" is the purposeful act of making it more difficult for a law enforcement officer to do that which he is empowered to do, provided he is acting in good faith.**

*Hinchcliffe v Sheldon* [1955] 3 All ER 406; [1955] 1 WLR 1207 applied.

**(4) C.'s adopting an active stance, refusing to engage in further conversation, moving to his motor car and driving away were positive acts amounting to "obstruction" within s403 of the Act.**

**NATHAN J:** *[After setting out the facts, the scope and nature of the Health Act 1958 and the relevant provisions, His Honour continued]: ... [8] The Magistrate was entitled to take into account and accept the evidence of Mr Goddard that he was Mr Collins at the building site, was him emerge from partly constructed home units with spraying equipment in hand and wearing the appropriate gear. [9] As well as the conversation, the Magistrate had ample evidence by way of the conduct of Mr Collins to conclude he was undertaking pest spraying work. Mr Collins' statements, "This is pest treatment work" and "Mr Argyrou asked me to spray" amount to an admission that he was using a pesticide.*

Section 108B prohibits a pest control operator in the course of his business from using a pesticide unless registered to do so. "Pest Control Operator" is defined (section 108A) as "a person who carries on or holds himself out in any way as carrying on the business of controlling, destroying or repelling pests". Admissions were made by Mr Collins that he was involved in pest treatment work but that he had not done the work for a charge but as a matter of goodwill. His

words were: "I told him that I would do the work without charge". The evidence of Mr Argyrou that he had telephoned Mr Collins and asked him to spray and that Collins had done this chore for him on previous occasions (25 to 30 times) for which he had been paid but that he would not be charged for these two houses, is conclusive that Mr Collins was engaged in a course of conduct not necessarily continuous but nevertheless of a repetitive kind aimed at the extermination of pests. The surrounding circumstances which indicate that he had the equipment, knapsack and gear required for this work, all support this conclusion. Further, the work was being done on a building site for a builder and took more than one hour to complete. All of these factors are indicative of continued and regular work in a particular line of trade. They do not support a conclusion of an intermittent or casual act of neighbourliness or goodwill such as Mr Collins attempted to imply.

**[10]** The definition section of pest control operator is extraordinarily broad and encompasses any person who "holds himself out in any way". The definition is not restricted to a person whose sole or major commercial enterprise or occupation is the controlling or destroying of pests. It is broadly phrased, so as to capture a person who puts himself forward in any way, as being involved in the business of pest destruction.

I turn to consider the meaning of the word "business" in this context. Very little assistance can be had from those authorities dealing with the concept business in the context of the *Income Tax Assessment Act* or like revenue raising enactments. See *Hyde v Sullivan* 73 WN (NSW) 25; [1956] SR (NSW) 113 dealing with section 6(1) of the Tax Act as it then was, "business" being defined as "trade, profession, employment, vocation or calling". The New South Wales Full Court considered that, "Speaking generally the phrase 'to carry on business' means to conduct some form of commercial enterprise": also *Commissioners of Inland Revenue v Marine Steam Turbine Co Ltd* [1920] 1 KB 193, dealing with trade or business under the terms of the British legislation.

In the context of the *Health Act*, I consider that the expression "course of his business" does carry with it the necessary intent that the business must be of a commercial character, that is, "business" implies a necessary expectation of commercial reward. However, that reward need not necessarily be for the specific acts or work then and there done. **[11]** The expression "course of business" implies a continuum or a type of conduct for which an ultimate reward of a commercial character is expected. That can include the generation of goodwill, or doing a particular piece of work at less than market rates in order to generate the expectation of further work or further reward. There are many types of conduct and procedures which businessmen undertake in their day to day activities for which an immediate financial benefit is not expected. However, there must be an element, that in the longer term and during the entire course of business a financial benefit might ultimately ensue.

A course of business is established if it can be proved that a person is engaged in a commercial activity, albeit of an intermittent kind, where there is an ultimate expectation of financial or material gain. In this case, I am satisfied the Magistrate was correct in concluding that the evidence established Mr Collins was engaged in a course of business when he applied the pesticide to the houses upon the building site. It was not necessary that a specific payment in respect of that particular and individual piece of work be expected, if in the long run Collins expected to maintain the flow of work from the builder concerned or, as he himself put it, was engaged in generating goodwill.

My reasoning in relation to the definition and scope of the terms "Pest Control Operator", "Course of Business", and "Pesticides", applies equally to sections 108B and C. **[12]** Accordingly, for the reasons given the first and second grounds upon which the Orders Nisi were obtained viz. that the Magistrate was in error in determining that Mr Collins was using a pesticide in the course of business as a pest controller and that the Magistrate was in error in determining that Mr Collins was a pest control operator, have not been made out ... **[17]** The concept of prohibiting the obstruction of law enforcement officers in the execution of their duties is not novel. It is found, for example, in Income Tax and Local Government legislation. It is obviously a power which is necessary, to make the prohibitive and enforcement provisions of the *Health Act* efficacious. In considering a similar power in relation to Taxation legislation – *D'Emden v Pedder* [1904] HCA 1; [1904] 1 CLR 91; 10 ALR (CN) 30, the Full Court said at p110 CLR:-

"Where any power or control is expressly granted, there is included in the grant, to the full extent of

the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective. This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten constitution, formal written instrument, or other delegation of authority, and applies from the necessity of the case, to all to whom is committed the exercise of powers of Government."

[18] This principle was referred to by Connor J in *Jumbunna Coal Mine (No Liability) & Another v The Victorian Coalminers' Association* [1908] HCA 95; [1908] 6 CLR 309 at p356; 14 ALR 701. These cases were considered in *Federal Commissioner of Taxation & Ors v ANZ Banking Group* [1979] HCA 67; [1979] 143 CLR 499; 52 ALJR 73 and I refer particularly to the analysis of Murphy J at pp543 *et seq.* That case also considered Taxation legislation and when referring to the "power to inspect", the obstruction of which was made an offence, Murphy J considered (at p544) [1979] 23 ALR 480 at p505:-

"... like all powers it must be exercised in good faith, for the purposes for which it was conferred ... These implied limitations on the power of inspection serve to safeguard the extremely important social value of privacy which must be balanced against the necessities of administration of the revenue laws. They moderate what would otherwise be a power capable of oppressive use. The Commissioner of Taxation is not only expected, but bound, to observe those limitations on the power."

In the case before me, the conduct of Mr Collins which would ordinarily be acceptable, that is, the departure from his place of work, a refusal to enter into conversation with another person and driving away, are not coloured by any obvious oppression or expression of bad faith on Mr Goddard's part. It has not been sworn nor would it seem possible to suggest that Mr Goddard adopted an overbearing or assertive posture in relation to the departure of Mr Collins from the site or to suggest an oppressive use by him of the powers granted to him under section 401 of the *Health Act*.

[19] It was not argued before me, but it is possible to contend, that Mr Collins was exercising his common law right to free and unhindered access to his motor vehicle and then the further right to drive away and to such destinations as he may choose. In some cases concerning the Breath Analysis legislation it has been asserted that the common law right to legal advice would justify an apprehended person refusing to supply a sample of his breath for analysis. See *Fischer v Douglas (ex parte Fischer)* [1978] Qd R 27, or the 'cockatoo' case, that is, warning sly grog merchants of an impending raid by police. See *Hinchcliffe v Sheldon* [1955] 1 WLR 1207; [1955] 3 All ER 406. In that latter case the appellant had been convicted of obstructing a policeman in the exercise of his duty contrary to the relevant English legislation. It was said that he had acted as the 'cockatoo' to warn the sellers of sly grog of an impending raid and that by so acting he delayed the police in apprehending the offenders and permitted them a chance to cover their tracks. Lord Goddard CJ, with whom the other members of the Court agreed, said the following about the word "obstructing" (at p1210):-

"Obstructing for the present purpose, means making it more difficult for the police to carry out their duties. It is obvious that the defendant here was detaining the police by giving a warning; he was making it more difficult for the police to get certain entry into the premises, and the Justices were entitled to find as they did, and therefore the appeal is dismissed."

[20] The basic element in relation to obstruction is the purposeful act of making it more difficult for a law enforcement officer (Goddard) to do that which he is empowered to do provided he is acting in good faith. See also *British Equitable Assurance Company Ltd v Baily* [1906] AC 35 and *Isles v Daily Mail Newspaper Ltd* [1912] HCA 18; [1912] 14 CLR 193; 19 ALR 281 per Isaacs J at p202 CLR. It is not possible to more closely restrict the definition of obstruction. As Lord Upjohn in *Jenkins v Allied Iron Founders Ltd* [1970] 1 WLR 304 at p315 said [1969] 3 All ER 1609 at 1619:

"My Lords, when considering whether something is an 'obstruction' or not it is no use trying to define by further language what is meant by that word for it is a word in common and everyday use in the English language and is, in my opinion, thus incapable of further definition. Everyone is agreed that some limitation must be put on the word but that limitation is itself incapable of definition. All one can do is to suggest tests by which to measure whether something is an obstruction or not."

I return to the actual words of the Act. Section 403(a) recites:- "Every person who obstructs

hinders impedes resists or opposes." Adopting the principle of interpretation of *noscitur a sociis* it can be seen that the requirement of each word in the section is a positive act by the person charged. Mere inertia may not be enough.

However, in this case Mr Collins did adopt an active stance and by refusing to engage in further conversation and actually moving to his car, getting in it and driving it away, he made the further investigation or examination of the [21] offence impossible. The movement and driving away were positive acts by him designed and making it impossible for Mr Goddard to exercise the powers invested in him in section 401(2)(a), namely "inspect and examine any substance" and more particularly (b) "inspect and examine any substance being in or upon or conveyed on any street or public place". Mr Goddard undoubtedly had the power to inspect and examine any substance whether in Mr Collins' knapsack or in the boot of his car. However, the Information is particularised as being "restricted to the power to inspect and examine such substances in the boot of the motor vehicle". Mr Collins was asked to show Mr Goddard the chemical by opening the boot of the car, the response was "No" and he then proceeded to drive away. In these circumstances, as the car was parked on a public road, the refusal and more particularly the driving, fulfils each and every one of the ingredients contained in section 403(a).

It is hardly possible to conceive of a more explicit and obvious act of obstruction than the wilful removal from the purview of the law enforcement officer of the substance being sought to be inspected or examined. The Magistrate was justified in finding the Information proved. I find that this ground has not been established. It follows that none of the grounds or the Orders Nisi have been made out. The Orders will be discharged.

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