52/88

SUPREME COURT OF VICTORIA

CONSTRUCTION INDUSTRY LONG SERVICE LEAVE BOARD v OTTO

Murphy J

9 June 1988

PROCEDURE – NOTICE REQUIRING INFORMATION – COUCHED IN WIDE TERMS – REQUEST WITHIN POWER – WHETHER OPPRESSIVE OR BURDENSOME – WHETHER NOTICE INVALID: *CONSTRUCTION INDUSTRY LONG SERVICE LEAVE ACT* 1983, SS70, 71, 81, 86.

1. Provided that a notice requesting the supply of information has the necessary relationship to the matter being investigated, a notice which is wide in its terms, or is burdensome or fails to specify precisely or to identify the exact material to be produced is not invalid.
***Melbourne Home of Ford Pty Ltd v Trade Practices Commission* [1980] FCA 94; (1980) 31 ALR 519; (1980) 47 FLR 163; [1980] ATPR 40-174, applied.**

2. Where a Board had a duty to elicit information, and in the exercise of its power gave a notice couched in wide terms requesting information and the production of records, a Magistrate was in error in holding that the notice was invalid on the grounds that it was too wide and did not particularise with sufficient clarity what records were required to be produced.

MURPHY J: [1] Return of an order nisi to review (granted by Master Barker 13 December 1987) a decision dated 15 October 1987 of the Magistrates' Court sitting as the Metropolitan Industrial Court whereby an information by the applicant, that the respondent did on or about 12 February 1987 fail to comply with a notice issued pursuant to s86 of the *Construction Industry Long Service Leave Act* 1983, was dismissed. The *Construction Industry Long Service Leave Act* 1983 (hereinafter termed "the Act") is an Act of Parliament designed to make special provision in relation to long service leave for persons employed in the construction **[2]** industry, where employees are accustomed to move from employer to employer, whilst at the same time remaining employed in more or less the same capacity. Its forerunners were the *Building Industry Long Service Leave Act* No. 8693 of 1975, which was amended in 1979 by Act No. 9355, and the *Construction Industry (Electrical and Metal Trades) Long Service Leave Act* No. 9825 of 1982. All of these Acts were brought together in the Act, which established and renamed the Board charged with the responsibility of administering the Act and the Fund established under the Act, and of making payments from such Fund.

The Board is required to keep a Register of employers in the construction industry (section 21) and also a Register of workers (section 23). Employers are required by the Act to pay to the Board a long service leave charge of a prescribed percentage of wages paid in respect of every employee employed by him "to perform building trades work", (s24(1)), or "to perform electrical trades work or metal trades work" (s24(2)). Then the Act contains sections dealing with workers' entitlements to payments by the Board from the Fund after specified terms of employment in the industry. In effect, the Board is to assume the responsibility normally falling upon an employer to pay long service leave. The success of the scheme depends to a large degree upon the accuracy of the Register of employers and employees and upon the payment by employers to the Board of the prescribed percentage of wages. Accordingly **[3]** the Act gives to the Board charged with the administration of the scheme, powers to investigate the activities of employers, power to ascertain the names of employees and the wages paid to them from time to time.

It is with one of these powers that the present order to review is concerned. Section 86 is headed "Board may require information" and it reads:-

> "86(1) The Board may by notice in writing require any person to give all that information including any books documents or papers under that person's control to the Board which will enable the Board to ascertain that person's or any other person's liability or entitlement under this Act.

(2) a notice under sub-section (1) must specify the time (being not less than 28 days) and place at which the required information must be produced.

(3) a person required to give that information—
(a) must do so in the specified time or in any further period allowed by the Board; and
(b) must give that information that is within that person's power to give; and
(c) must not give any information which is to that person's knowledge false in any material particular."

Section 70(3) of the Act makes any person who fails to comply with any of the provisions of the Act (insofar as relevant) guilty of an offence and liable to a penalty of not more than 18 penalty units (section 71). I should perhaps also remark that s81 of the Act requires an employer to keep prescribed books and records relating to workers employed on construction work and to preserve them for seven years. **[4]** The notice which was given to the respondent (defendant) in the present case was in very wide terms. It appears to be a standard form of Notice used by the Board, which attempts to follow the words of s86 of the Act. It requires the respondent to give to the Board within a specified time of 30 days "all that information as the Board requires which will enable the Board to ascertain the liability or entitlement of you or any other persons under any of the provisions of the *Construction Industry Long Service Leave Act* 1983 and I also require you to give to the Board all books documents and other papers under your control relating thereto." The Notice also contains a final relevant paragraph:-

"The information sought and the records required to be examined by the Board are set forth in the attached letter which forms part of this Notice."

The letter insofar as here relevant reads:-

"The records required to be examined and information sought refer to any business or company in the building and construction industry with which you are or may have been associated in an executive or managerial role, and includes those records and information relating to all workers and persons who performed building or construction work, for or on behalf of any such business or company, on or after 1 February 1977, including information relating to any of these people, being their
(a) names and addresses;
(b) date of commencing and terminating of any periods of employment or services;
(c) number of working days engaged in building or construction work;
(d) periods of any absences together with reasons why;
(e) actual wages or remuneration paid; and
[5] (f) description of their duties;
together with any other records such as wage books, cash books or journals, ledgers, cheque butts, annual depreciation schedules of capital equipment, annual taxation returns, annual profit and loss accounts or annual revenue and expenditure accounts which include breakups of information in categories, prescribed payment slips, invoices for services rendered, quotations for work subsequently obtained, as well as records showing payments made to other persons performing building or construction works."

One of the responsibilities of the Board is to make estimates and assessments of the amount of long service leave charges that in its opinion are due from an employer who fails to furnish prescribed returns to it, and to do so from information, including prevailing rates of pay and records kept by an employer or other information relating to amounts paid by the employer in respect of the work performed for him. Section 30(1)(2)(3). The Board's work is not only administrative but also of an investigatory and policing nature. Inspectors are to be appointed (Section 54) with powers of a very wide nature (Section 55), and it is made an offence to delay or fail to comply with or conceal information from an inspector in the exercise of any power under the Act. Section 57. The Board is also to institute proceedings for the recovery of unpaid charges Section 60. In the present case, the respondent admitted **[6]** receiving the notice and that he had not answered or replied to it in any way. He simply ignored it. Before the Magistrates' Court, counsel for the respondent submitted that the notice was too wide and did not particularise with sufficient clarity just what it was that the respondent was required to produce. Accordingly, he submitted the notice was invalid and the charge should be dismissed. No evidence was led on the respondent's behalf. The Stipendiary Magistrate acceded to this submission and dismissed the information.

Mr Phillips QC who, with Mr Bornstein appeared to move the order absolute, submitted

that the notice was a *bona fide* exercise of the investigatory powers of the Board, given by s86, and that neither the cases dealing with interrogatories and discovery nor those dealing with a subpoena *duces tecum* were relevant to a determination of the validity of this notice. c.f. *Lucas Industries Ltd v Hewitt* (1978) 18 ALR 555, 571, 573, 45 FLR 174, 190; *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564; *Alliance Petroleum Australia (NL) & Ors v Australian Gas Light Co* (1982) 31 SASR 35; (1982) 65 FLR 243; (1982) 44 ALR 124. He submitted that the words "any person" in s86 (above) should not be read down and meant what they said. They were comparable to the words "any other person" appearing in s80(1) of the *Trade Practices Act* 1974 which the Full Court of the Federal Court had concluded should not be read down: *Phelps v Western Mining Corporation Ltd* (1978) 33 FLR 327, 332, 333, 335; (1978) 20 ALR 183.

[7] I am of the opinion that the words "any person" in s86 should not be read down. Mr Phillips then submitted that the notice sought information solely for purposes associated with the Board's wide responsibilities in the administration of the Act. The fact, if it was the fact, that the notice was burdensome, or even oppressive, did not affect its validity, for it was the Board's duty to elicit information in circumstances which must at times be seen to be burdensome and even oppressive. Provided the power was *bona fide* exercised, and there was nothing to suggest otherwise here, this was sufficient. I accept that this is so, although, of course, in the exercise of its powers, the Board must act fairly and would no doubt be required to grant appropriate time to enable compliance with a wide notice such as the one which I am considering: see *Riley McKay Pty Ltd v Bannerman* [1977] FCA 7; [1977] ATPR 40-036; (1977) 31 FLR 129; 15 ALR 561 per Bowen CJ at 134-6; and *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* [1980] FCA 94; (1980) 31 ALR 519; (1980) 47 FLR 163 168-9, 172-6; [1980] ATPR 40-174; 31 ALR 519. In this last mentioned case, the Full Federal Court, comprising Brennan, Keely, Fisher JJ considered a notice, the width of which can be seen as set out in the report (pp168-9), and held in a joint judgment that provided that the information or documents required had the **[8]** necessary relationship to the matter being investigated, the notice was "not open to objection on the ground that it is burdensome to furnish the information or produce the documents". (p173). Their Honours said:-

> "The power conferred by a s155(1) is in aid of that function" (viz. of investigation) ,"and is a power which authorises inquiries both wide in scope and indefinite in subject matter. It is an investigative power which is under consideration here and it is not possible to define *a priori* the limits of an investigation which might properly be made. The power should not be narrowly confined."

I am of the opinion that these words may respectfully be adopted by me as applying with equal force to the Board's investigative power pursuant to s86, and it is only if it could be seen that the power was being used unfairly so, for example, as to be "unduly oppressive or burdensome" that a Court would intervene to rule that a notice was in excess of power and so invalid. In my opinion, the present notice is quite capable of being regarded as relevant to the very purpose for which the power was conferred, and there has been no evidence of any sort led to support the view that compliance with it involves the respondent in any difficulty.

The information sought would on its face appear to be the very type of information that any employer would be expected to keep in the way of books, records, cheque butts and the like for ordinary purposes associated with Workcare or Income Tax. As was said in the *Melbourne Home of Ford case* (above) "Notices are to be reasonably, not preciously, construed and the terms used in notices will ordinarily take **[9]** their meaning from the commercial circumstances in which the notices are given". (pp175-6) The power of the Board under s86 is only constrained by a consideration whether "the information, including any books documents or papers under that person's control ... will enable the Board to ascertain that person's or any other person's liability or entitlement under this Act". Within that constraint, the Board is given what Gibbs ACJ when speaking of the Commissioner of Taxation's powers under s264 of the *Income Tax Assessment Act*, accepted to be "a roving commission": *FCT v ANZ Banking Group Ltd* [1979] HCA 67; (1978-9) 143 CLR 499 at 524; 52 ALJR 73. The objection, which succeeded before the Magistrate, that the notice was too wide and did not identify with sufficient clarity just what documents the respondent was required to produce ought not in my opinion to have been upheld. The width of the request standing alone, is no objection (*Currency Brokers (Aust.) Pty Ltd v Corporate Affairs Commissioner* (1986) 5 NSWLR 483; 10 ACLR 623; 4 ACLC 381). The failure to specify precisely or to identify the exact books to be produced, does not render the notice invalid. Provided that the subject matter of the books is seen to relate to the power being considered, as in my view it did here, the notices

are within power, and not invalid. Further time may be required by the addressee of the notice to enable compliance, but the section itself contemplates this, and no doubt it does so because the legislative mind **[10]** was turned to a consideration of this very point of width and complexity: see section 86(3)(a).

It was argued by Mr Caine of counsel for the respondent that the notice required the respondent to make a judgment whether any business that he had conducted or with which he had been relevantly associated was in the building and construction industry, for that was the primary request contained in the notice. He further submitted that it was not at all clear that an inground swimming pool or spa was a building so as to cause its construction to fall within the building and construction industry. However, I do not accept that these matters are relevant to the issue whether the notice was a valid notice. In any event, the word "building" is used in its context as an adjective – not as a noun. One builds a swimming pool just as much as one constructs a building. One can build a tennis court. Each are works for the use of any building within paragraph (XVI) of the definition of construction industry in s3 of the Act, although this may be irrelevant to a construction of s86 of the Act. As was said in the *Melbourne Home of Ford case*, the notice falls to be understood in a commercial sense, and the mere fact that some judgment has to be exercised by the recipient does not in my view affect its validity. I would make the order absolute and set aside the Magistrate's dismissal of the information and remit the same for hearing according to law.
