54/87

SUPREME COURT OF VICTORIA

KILLEEN v CLARRIS; VICKERS v WOOLEY

O'Bryan J

11 November 1987

TOWN AND COUNTRY PLANNING – PERMITS FOR MASSAGE PARLOURS GRANTED – PERMIT HOLDERS GRANTED BROTHEL PERMIT – WHETHER PERMIT HOLDERS HAVE INTEREST IN MORE THAN ONE BROTHEL PERMIT – WHETHER INTEREST IN MORE THAN ONE BROTHEL: *TOWN AND COUNTRY PLANNING ACT* 1961 (AS AMENDED), SS24, 49C; *MELBOURNE AND METROPOLITAN PLANNING SCHEME ORDINANCE*, CH2, 25.

Section 49C of the *Town and Country Planning Act* 1961 ('Act') (as amended) provides:

> "(1) A person who at any time has an interest in more than one permit granted by a responsible authority for the use of land for the purposes of the operation of a brothel shall be guilty of an offence."

C. and W. held permits to use separate premises for the purposes of massage parlours. Whilst holding these permits, they were granted a permit to use other premises for the purposes of a brothel. Each was charged with a breach of s49C of the Act in that they had an interest at the same time in more than one permit for the use of land for the purposes of a brothel. On the hearing of the charges, the Magistrate upheld a submission of no case to answer and dismissed the charges. Upon orders nisi to review—

HELD: Orders nisi discharged.
(1) Section 47C of the Act strikes not at a person who has an interest in more than one brothel but at a person who has an interest in more than one permit for the use of land for the purposes of a brothel.

(2) In the present case, as the massage parlour permits held by the defendants were not granted to them as brothel permits, it did not follow that the defendants had an interest in more than one brothel permit at the same time and accordingly, the defendants were not in breach of s49C of the Act.

O'BRYAN J: **[1]** These orders nisi were heard together because they raised the same questions of fact and law. Each respondent was charged on information with an offence that, at Dandenong, she did at the same time have an interest in more than one Permit, granted by a responsible authority for use of land for the purposes of a Brothel contrary to s49C *Town and Country Planning Act* 1961. At the conclusion of the case for the informants (applicants) in the Magistrates' Court at Dandenong on 18th June 1986, the learned Magistrate upheld a submission of no case to answer and dismissed each information.

[2] On 18th July 1986, Master Brett granted an order nisi in respect of each information on four grounds:

> "1. The learned Magistrate erred in law in finding that s49C of the *Town and Country Planning Act* 1961 did not apply to restrict the ownership of Massage Parlours which were operated pursuant to Planning Permits issued prior to the operation of that section.
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> 2. That the learned Magistrate erred in law in finding that Sub-clause 5A of the Melbourne and Metropolitan Planning Scheme did not operate to alter all Permits for "Massage Parlours" to Permits for "Brothels".
> 3. The learned Magistrate misdirected himself in finding that a Massage Parlour was not a Brothel within the meaning of the *Town and Country Planning Act* 1961 and the Melbourne and Metropolitan Planning Scheme.
>
> 4. The learned Magistrate was wrong in law in finding that there was no case to answer."

The facts which were not disputed in the Court below showed:

> "1. That on 20th August 1979, the Shire of Cranbourne granted to the respondents Permit No. MM105

in respect of land situate at Lot 1, Frankston-Dandenong Road, Dandenong, to use the land for the purpose of establishing a Massage Parlour.

2. That on 31st March 1983, the City of Dandenong granted to the respondents - Permit No. 1577 in respect of land situate at Lot 1, Bridge Road, Dandenong, to use the land for the purpose of a Massage Parlour.

3. That on 14th June 1985, the Melbourne and Metropolitan Board of Works (responsible authority) granted to the respondents Permit No. TD 109310 in respect of land situate at 92 Greens Road, Dandenong, to use the land for the purpose of a Brothel.

4. That on 6th November 1985, the applicant Killeen visited the premises referred to in paragraphs 1, 2 and 3 and then had a discussion with the respondent Clarris. In the course of the discussion, Clarris **[3]** admitted she was the holder of a Permit in respect of the premises referred to in paragraphs 1, 2 and 3 with the respondent Wooley. Outside each of the premises was a sign offering sexual acts for various prices and the informant observed that the premises were being used for the purposes of prostitution.

5. That on 27th November 1985, the applicant Vickers visited the premises referred to in paragraph 2 and had a discussion with the respondent Wooley. Wooley admitted that she shared an interest in a Brothel business conducted at the premises referred to in paragraphs 1, 2 and 3 and that she had three Permits for three different premises to operate as Brothels."

On 2nd July 1984, the *Planning (Brothels) Act* 1984 (No. 10094) came into operation. Section 7 of the Act inserted s49C into the *Town and Country Planning Act* 1961. Section 49C provides:-

"(1) A person who at anytime has an interest in more than one permit granted by a responsible authority for the use of land for the purposes of the operation of a brothel shall be guilty of an offence. Penalty: 100 penalty units.

(2) For the purposes of ss(1), a person has an interest in a permit if the permit was granted to that person or to an associate of that person, whether alone or jointly with another person."

The applicants' case is that each respondent was in breach of s49C(1) when Permit No. TP 109310 was granted because each already had an interest in Permit No. MM105 and Permit No. 1577 which were in effect permits for the use of land for the purposes of the operation of a Brothel. The respondents' case is that neither Permit No. MM105 nor Permit No. 1577 was for the use of land for the purposes of the operation of a Brothel at any relevant time and, accordingly, that the respondents only had an interest in one Permit for the use of land for the purposes of the operation of a brothel. **[4]** It is necessary to examine the Melbourne and Metropolitan Planning Scheme Ordinance (PSO) pursuant to which the Permits referred to were granted. In 1984, before Act No.10094 became law, the PSO defined "Massage Parlour" in Clause 2, thus:-

"Any building or part of any building used for the purpose of body massage by a person other than a person registered under the *Physiotherapists Act* 1978 whether or not it is used solely for that purpose."

In popular parlance "Massage Parlour" was and is a euphemism for "Brothel." Indeed, "Massage Parlour" bears the dictionary meanings:-

"(1) An establishment providing massage for its clients.

(2) Such an establishment which in addition illegally provides for the sexual gratification of its clients." (*Macquarie Dictionary*)

"Brothel" was not defined in Clause 2 until it was inserted by amendment No. 303 on 4th July 1984. At the same time the definition of "Massage Parlour" was removed from Clause 2. "Brothel" is defined as:-

"any land to which people of both sexes or, of either sex, resort for the purpose of prostitution."

This definition is in identical terms to the definition of "Brothel" inserted into the *Town and Country Planning Act*, by Act No. 10094. In November 1984, by amendment No. 326, sub-clause (5A) was inserted into Clause 25 of the PSO. The amendment, so far as relevant, provides:-

> "Notwithstanding anything to the contrary in this ordinance land ... which was on the 2nd day of July 1984, lawfully used for the purpose Massage Parlour pursuant to a Permit under the Planning Scheme may, ... be used for the purpose Brothel."

[5] In my opinion, this amendment did no more than make lawful for the purpose Brothel the use of land permitted for the purpose Massage Parlour. The sub-clause did not change the nature of the Permit granted for the use of land from one for the purpose of Massage Parlour to one for the purpose of Brothel. The Permits numbered MM105 and 1577, granted by the responsible authority in each instance, will continue according to their conditions, unless revoked pursuant to the *Town and Country Planning Act* 1961. (S24) The holder of a Massage Parlour Permit may lawfully use the land for the purpose of Brothel, since 2nd July 1984, but is not obliged to do so.

Mr Kendall of Counsel, for the applicant, submitted that the effect of sub-clause (5A) was to change the nature of each Massage Parlour Permit to the extent that each Permit became a Permit to use land for the purposes of the operation of a Brothel. Mr Kendall invited attention to the marginal note alongside s49C which reads, "Persons not to have interest in more than one Brothel." to support the construction for which he contended. Perhaps it was the intention of the draftsman of the section that persons may not have an interest in more than one brothel, but the plain meaning of the words used in the section does not produce this result. The section strikes at a person who has an interest in more than one Permit for the use of land for the purposes of the operation of a Brothel and not at a person who has an interest in more than one Brothel. The marginal note does not form part of the Act, but may be used to assist in the interpretation of a **[6]** provision of an Act (s36, *Interpretation of Legislation Act*, 1984).

In the present matter the marginal note is not helpful because it is inconsistent with the plain meaning of the section. It would have been a simple matter to draft s49C in terms which deemed an existing Permit for the use of land as Massage Parlour to be a Permit for the use of land as Brothel, but this was not done.

In my opinion, the learned Magistrate was correct in holding as he did, that the respondents were not in breach of s49C. The orders nisi should be discharged with costs.
