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SUPREME COURT OF VICTORIA — FULL COURT

BLOUNT v GIANEVSKY

Young CJ, Crockett and King JJ

12 September 1979 — [1980] VicRp 19; [1980] VR 156; 42 LGRA 294

HEALTH – DEFENDANTS OPERATED A FISH AND CHIP SHOP – DEFENDANTS WISHED TO INSTALL TWO PINBALL MACHINES IN THEIR SHOP – APPLICATION FOR PERMISSION WAS MADE TO THE LOCAL COUNCIL – APPLICATION REFUSED – APPEAL TO TRIBUNAL ALLOWED – DEFENDANTS INFORMED THAT THEY MUST OBTAIN A PERMIT FROM THE COUNCIL TO OPEN AN AMUSEMENT PARLOUR – SUCH PERMIT NOT OBTAINED – SHOP OPERATED WITH PINBALL MACHINES – CHARGES LAID – UPHELD BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT* 1958, SS3, 191(1)(b).

HELD: Orders nisi absolute. Convictions quashed.

1. Whilst there may be amusement parlours that can be brought within the definition of "Public building" in s3 of the *Health Act*, the instrument of delegation in effect defines an "amusement" as a public building for the purposes of the Act or, put in another way, assumes that any amusement parlour is *ipso facto* a public building. There is no justification for the instrument's being so expressed and accordingly the delegation is invalid and of no effect.

2. It may be conceded that a fish and chip shop in which two coin operated amusement machines have been installed would not ordinarily be called an "amusement parlour" but the question is whether the delegation operated to cover the defendants' premises.

3. Even if the instrument of delegation were otherwise valid, the informant could not rely upon it in these proceedings. In order for the informant to be able to rely on the instrument of delegation he would have to show that what the defendants did was to open an amusement parlour. It is only in respect of such buildings that the Council is authorised to give approval. There are two reasons why the informant could not successfully rely upon the delegation. The first reason is that the defendants were not charged with opening an amusement parlour. They were charged with opening a permanent public building. The second reason, which is the more substantial is that there was no evidence upon which the magistrate might have concluded that the defendants did open an amusement parlour. There is no definition of "amusement parlour" in the instrument of delegation. It is sufficient to say that the 1972 *Supplement to the Oxford English Dictionary* shows that that word is frequently found in combination with such words as arcade, centre, hall, park. The combinations denote places to which people resort for the purposes of amusement. The mere installation of two coin operated amusement machines cannot convert a fish and chip shop into a place to which people resort for the purposes of amusement. It is nothing to the point that one or two people may do so. Necessarily a question of degree is involved. If there be an undoubted amusement parlour it would not have its character altered by the installation of a pie stall in one corner of it. It cannot be accepted that the defendants' premises which they had conducted as a fish and chip shop since 1971 became, so far as the evidence shows, an amusement parlour on 25th November 1977.

THE COURT: This is the return of two orders nisi to review referred into this Court by Lush J. The orders nisi were obtained by B. and A. Gianevsky respectively to review decisions of the Magistrates' Court at Heidelberg, whereby each applicant was convicted of an offence under s191(1)(b) of the *Health Act*. The information upon which the applicants were convicted was the information of the Chief Health Inspector (sc. of the City of Heidelberg). It alleged that the applicants "on or about the 25th day of November 1977 at Waterdale Road, Ivanhoe did open a permanent public building without the approval in writing of the Council of the City of Heidelberg first had or obtained contrary to the provisions of section 191(1)(b) of the *Health Act* (as amended)."

The premises referred to in the information have been conducted as a "fish and chip" shop by the defendants since 1971. In 1977 the applicants wished to install amusement machines such as pinball machines in their shop and they applied to the Heidelberg Council for permission to do so. We were informed by counsel that permission had to be obtained under the Melbourne and Metropolitan Planning Ordinance and that it might be obtained from the Council as the responsible authority within its municipal district, although those facts do not appear in the

material before us. The Council refused permission and the applicants then appealed to the Town Planning Appeals Tribunal. That Tribunal allowed the appeal and both its reasons for doing so and the permit issued by the Heidelberg Council in consequence of the appeal being allowed were made exhibits at the hearing in the Magistrates' Court.

At that hearing a copy of p3989 of the *Government Gazette* dated 18th November 1942 was tendered as an exhibit. It will be necessary to refer to it in more detail later. Evidence was given by a Health Inspector of the City of Heidelberg that he had visited the applicants' shop on 26th September 1977 and delivered to the applicants a letter from the Council which, omitting the formal parts, read as follows:

> "Re: Food Premises 228 Waterdale Road, Ivanhoe
>
> Mr Robin Viney of Council's Town Planning Department has informed us that your appeal to permit 3 coin operated amusement machines to be installed at the above premises was upheld.
>
> I desire to inform you that this is a permit under the *Town and Country Planning Act* only. It is necessary to obtain permission from Council under the *Health Act*
> (a) to alter the use of a Food Premises
>
> (b) to open an amusement parlour (Public building).
>
> In regard to (b), premises with coin operated amusement machines are public buildings which, although required to be registered with the Health Commission, also require Council approval of plans, specifications and approval to open. Therefore, should any such machines be installed in the above premises without the necessary approvals under the *Health Act*, legal action will be instituted."

The witness said that he explained to the male applicant that although he had a Town Planning Permit, the consent of the Council must also be obtained for the installation of amusement machines. The applicants had not obtained such consent and as far as appears had never applied for it. It was also proved that the premises in question were registered with the Council as food premises under s227 of the *Health Act*. On Thursday, 24th November 1977 a Health Inspector employed by the Heidelberg City Council visited the applicants' shop and saw two coin operated amusement machines. One was being operated by two boys. The inspector informed the male applicant that he should not have the machines in his shop without the Council's permission. The male applicant produced the Town Planning Permit but was told that he had to get Health Department approval for putting machines in the shop, because the shop was registered as "food premises". It was further proved that on Friday, 25th November 1977 two health inspectors visited the premises and saw two coin operated amusement machines. A teenage girl was operating one of them. On being asked about them the applicants produced a Town Planning Permit but when told that they also needed a permit from the Council the female applicant said that she did not understand very well. By the following Monday the machines had been removed.

Both applicants were represented before the Magistrate by counsel who submitted that there was no case for the applicants to answer. Upon the submissions being overruled the applicants elected not to call any evidence and each was accordingly convicted and fined $50 with $80 costs.

Each applicant obtained an order nisi to review upon identical grounds which read as follows:

> 1. That the purported delegation of the Commission of Public Health published in the *Government Gazette* No. 331 of November 18, 1942 was not a valid authorization by the Commission of the Council of the City of Heidelberg to give approval in writing to the opening of any permanent public building or any extension thereof in the Municipal District of the City of Heidelberg within the meaning of Section 191(1)(b) *Health Act* 1958 in that—
> (a) the purported delegation did not delegate any power or duty of the Commission with respect to permanent public buildings or any extension thereof;
>
> (b) the purported delegation did not delegate any power or duty of the Commission with respect to public buildings as defined in the *Health Act* 1928 or *Health Act* 1958.
>
> 2. That on the evidence, the Magistrate was wrong in holding that the premises in question were an amusement parlour.

3. That there was no evidence that at the date of the delegation the premises in question were within the Municipal District of the Council of the City of Heidelberg.

4. That there was no evidence that the Defendant opened the premises in question on or about the 25th day of November 1977 or on any other date within the meaning of Section 191(1)(b) *Health Act* 1958.

(5) That there was no evidence that the premises in question were a building or structure in around or upon which numbers of persons were usually or occasionally assembled for the purposes of recreation amusement entertainment or instruction and not being an amusement structure under Division 1A of Part XI of the Health Act 1958."

Ground three was abandoned before us. In argument the grounds were subsumed under two headings, the first involving the delegation to the Heidelberg City Council of the power to give consent to the opening of a permanent public building, and the second concerning the evidence necessary to bring the relevant sections into operation.

In order to explain the first of these headings it is necessary to set out s191 of the *Health Act*, the section under which the information was laid. It reads:

"191. (1) A permanent public building or any extension thereof shall not be opened—
(a) without the approval in writing of the Commission; or

(b) (in any case or class of cases in which the Commission authorizes councils to give such Approval) without the approval in writing of the council—
and in any such approval the Commission or the council (as the case may be) may include terms specifying the use or uses to which the public building or extension may be put and the maximum number of persons who may be accommodated in such building or extension.

(2) If without approval or contrary to the terms included therein any permanent public building or any extension thereof is opened or remains open the proprietor shall be liable to a penalty of not more than $200 and to a further penalty of not more than $20 for every day or night during which the same remains open without such approval or contrary to the terms included therein."

The contention was that the instrument by which the Commission had purported to authorise councils to give approval (sc. to the opening of a permanent public building or any extension thereof) was not an adequate authorisation for the purposes of paragraph (b) of sub-s(1). The contention assumed that it was incumbent upon the informant to prove that in the case of the premises at 228 Waterdale Road, Ivanhoe, the Commission had authorised the Heidelberg City Council to give approval to the opening of a permanent public building and, in view of the form of the information, the assumption was doubtless rightly made.

The information sought to establish authorisation by the Commission through the tender of an extract from the *Government Gazette* No. 331 dated 18th November 1942 which contained an instrument of delegation dated 30th October 1942 and which reads as follows.

"Whereas by Section 336 of the *Health Act* 1928 (No. 3697) it is provided that, subject to the approval of the Governor in Council the Commission may by instrument in writing delegate any of its powers or duties so that the delegated powers or duties may be exercised by any council within its municipal district; Now therefore, subject to the approval of the Governor in Council, the Commission of Public Health doth hereby delegate to each municipal council in the State of Victoria, for exercise by each such council within its municipal district, all its powers and duties relating to the approval of plans and specifications of the types of public buildings set out hereunder and to the approval of opening of such public buildings—
(a) shooting galleries, and

(b) amusement parlours."

(The delegation was approved by the Governor in Council on 16th November 1942.) It may for the moment be assumed without its being decided, since the parties showed little interest in the point, that s2(2) in some way preserves the operation of this delegation so that it operates as an effective delegation under the present Act. It may be noted that s378(1) is the present equivalent of s336 of the *Health Act* 1928 which is referred to in the delegation.

The first contention advanced on behalf of the applicants was that the purported delegation of 30th November 1942 was invalid because the relevant subject of the Commission's delegation could only be its power to give approval to the opening of a permanent public building but the instrument does not purport to delegate such a power. What it attempts is the delegation of such a power in relation to certain types of public buildings which are nominated in the instrument. But the buildings so nominated are not necessarily public buildings within the ordinary meaning of that expression and they do not fall within the definition of "public building" in s3 of the Act. That definition reads:

> "'Public building means—
> (a) any hospital or any benevolent or other asylum or institution not wholly supported by the State; and not being a private hospital as defined in this Act.
>
> (b) any theatre, opera house, concert music assembly dance or cinematograph hall, cabaret, skating rink, arena, amphitheatre or circus, or any building, enclosure, gallery, platform tent or structure whatsoever in around or upon which numbers of persons are usually or occasionally assembled for the purposes of recreation, amusement, entertainment, or instruction, and not being an amusement structure under Division 1A of Part XI.
>
> (c) any school (not being a State school referred to in Parts I or II of the *Education Act* 1958).
> (d) any church chapel or meeting house, and
>
> (e) any kind or class of building or any particular building declared by proclamation to be a public building within the meaning of this Act; and
>
> (whether any public building is permanent or temporary) includes any building room or stage forming part of or appurtenant to or used in connexion with such public building."

It is nothing to the point that there may be amusement parlours that can be brought within the definition. The point is that the instrument of delegation in effect defines an amusement as a public building for the purposes of the Act or, put in another way, assumes that any amusement parlour is *ipso facto* a public building. There is no justification for the instrument's being so expressed and accordingly the delegation is in our opinion invalid and of no effect.

There is also a further ground upon which the applicants are entitled to succeed. It was contended on behalf of the informant that the instrument of delegation operated to authorise municipal councils to exercise within their respective municipal districts, the Commission's powers (*inter alia*) to approve the opening of such public buildings as are properly described as "amusement parlours". In other words, it was said, that of all the permanent public buildings which can be opened only with the approval in writing of the Commission, the Commission had delegated its power to give approval to municipal councils in respect of those permanent public buildings, which are amusement parlours. It may be conceded that a fish and chip shop in which two coin operated amusement machines have been installed would not ordinarily be called an "amusement parlour" but the question is whether the delegation operates to cover the applicants' premises.

Even if the instrument of delegation were otherwise valid the informant cannot rely upon it in these proceedings. In order to be able to do so he would have to show that what the applicants did on or about 25th November 1977 was to open an amusement parlour. It is only in respect of such buildings that the Council is authorised to give approval. There are two reasons why the informant cannot successfully rely upon the delegation, although one of those reasons might have been removed or avoided. The first reason, which might have been avoided, is that the applicants were not charged with opening an amusement parlour. They were charged with opening a permanent public building. The second reason, which is the more substantial is that there was no evidence upon which a magistrate might have concluded that the applicants did open an amusement parlour. There is no definition of amusement parlour in the instrument of delegation and we are accordingly left to decide as best we can according to the ordinary understanding of English what is meant by "amusement parlour". It is not necessary to attempt a definition. It is sufficient to say that the 1972 *Supplement to the Oxford English Dictionary* shows that that word is frequently found in combination with such words as arcade, centre, hall, park. The combinations denote places to which people resort for the purposes of amusement. The mere installation of two coin operated amusement machines cannot convert a fish and chip shop into

a place to which people resort for the purposes of amusement. It is nothing to the point that one or two people may do so. Necessarily a question of degree is involved. If there be an undoubted amusement parlour it would not have its character altered by the installation of a pie stall in one corner of it. But we cannot accept that the applicants' premises which they had conducted as a fish and chip shop since 1971 became, so far as the evidence shows, an amusement parlour on 25th November 1977.

The foregoing should not be understood as going any further than is absolutely necessary for the purposes of the decision. In particular we refrain from deciding whether, if the applicants had been charged under s191(1)(a) they might have been convicted. Nor should what we have said be taken as indicating any opinion as to the desirability or otherwise of installing amusement machines in premises principally devoted to the sale of food. We were told that the applicants' premises were registered as Food Premises under s227 of the Act. No doubt that registration gives the Commission and the Council a large measure of control over the manner in which the premises are conducted. But where an informant undertakes the proof, as part of his case, that a food shop has become an amusement parlour within the meaning of the delegation of 30th October 1942, very much more cogent evidence would have to be adduced than was adduced in this case before a conclusion could be reached that the premises are an amusement parlour. We do not intend to eliminate the possibility that given premises might at one and the same time constitute both food premises and an amusement parlour. But that is not this case. The question here is did the applicants open an amusement parlour? In our opinion, they did not and they are not to be held responsible for a breach of the Act upon any strained reading of the words "amusement parlour".

What we have so far said is sufficient to dispose of the case. But we were told that the orders nisi were referred to this Court because it was thought that either or both of two earlier unreported decisions might stand in the way of the applicants' success. The decisions are those of Anderson J in *Lee v Zontanos* delivered 2nd February 1972, and of Lush J in *Lee v Disher* delivered on 13th September 1976. In neither of those cases were the points dealt with above relied upon.

In *Lee v Zontanos* the defendants were charged with being the proprietors of a permanent public building, to wit an amusement parlour, which was opened without the approval in writing of the Council of the relevant municipality. The premises there in question were "food premises" and the evidence showed that on a number of occasions several persons had attended at the premises and used various types of amusement machine. Anderson J held that such a use of the premises constituted the premises a public building within the definition of that expression in paragraph (b) of s3 of the Act. In that case, however, the words "amusement parlour" which appear to have been used in the information were or were treated as irrelevant.

In *Lee v Disher* the information charged that the defendant being the proprietor of a permanent public building "(to wit an amusement parlour)" allowed the building to remain open without the approval of the council of the municipality. The premises were again food premises and the evidence showed that on four separate occasions there were seen to be amusement machines on the premises and that a number of young persons had been seen operating the machines whilst others were seen standing around them and watching their operation. Two points were taken on review. The first was as to whether there was evidence upon which the Magistrate could have found that the building was permanent in the structural sense or in any sense relevant to s191 of the Act. With that argument we are not concerned. The second point was that there was no evidence on which the magistrate could have found that the building was a public building within the meaning of the definition in s3 because it was not proved that numbers of persons usually assembled at it or in it for the purposes of recreation or amusement.

Thus in each case reference was made to an "amusement parlour" as though it were accepted that that expression inevitably covered the premises in each case. But in neither case was the expression discussed: the description in the information in each case seems to have been or to have been treated as surplusage. We, therefore, derive no assistance from those cases on the two points to which we have referred. We say no more about those cases because it is unnecessary to do so for the purposes of our decision. But we wish to make it clear that we are not to be taken as having reached any conclusion as to whether those cases were correctly decided.

Accordingly the orders nisi will be made absolute and the convictions quashed.