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SUPREME COURT OF VICTORIA

WINDOW v THE PHOSPHATE CO-OPERATIVE CO of AUST LTD

Murphy J

20 April 1983 — [1983] VicRp 88; [1983] 2 VR 287; 50 LGRA 10

ENVIRONMENT PROTECTION – POLLUTION OF ATMOSPHERE – CAUSING POLLUTION – MUST BE POSITIVE ACT - EFFECT OF DEEMING PROVISIONS – "TRADE", "IN THE COURSE OF": *ENVIRONMENT PROTECTION ACT* 1970, SS41(1), 63(2).

Section 41(1) of the *Environment Protection Act* 1970 (the 'Act') provides (insofar as relevant):

"No person shall pollute the atmosphere or cause or permit the atmosphere to be polluted...."

Section 63(2) of the Act provides (insofar as relevant):

"Where any offence against this Act with respect to the discharge or emission of waste or pollutants... occurs... from any premises in the course of any trade carried on in those premises... the owner or occupier of the premises (as the case requires) shall be deemed to be guilty of the offence."

The defendant company ('the company') carries on the trade of making superphosphate. To do this, the company treats phosphate rock with sulphuric acid and for this purpose, it stores quantities of sulphur at its premises in a ground-pit. The sulphur is then heated to 132°C. to make it molten for transport in pipes to treat the phosphate. This heating makes it more difficult for the sulphur to ignite, because if sulphur is ignited, it then gives off sulphur dioxide which can cause nausea, vomiting and discomfort to persons exposed to it. On one occasion, a fire commenced in the sulphur pit, and a cloud of sulphur dioxide smoke escaped from the company's premises; this caused the atmosphere to be polluted. The cause of the fire could not be ascertained; nevertheless, the company was charged under s41(1) of the Act in that it caused the atmosphere to be polluted. Upon a submission of no case at the end of the informant's case, the company's counsel submitted that a *prime facie* case of "causing pollution" had not been made out. In reply, the informant's counsel contended that as there had been pollution in unexplained circumstances, the company had an obligation to show that it did not cause it. The magistrate ruled that there was a case to answer. Upon order nisi to review—

HELD: Order nisi absolute.
(1) On a charge of "causing the atmosphere to be polluted", it is necessary to prove that some positive act or course of conduct was performed or entered upon by the person charged, which act or course of conduct caused the atmosphere to be polluted. The defendant's act in bringing the sulphur on to its land and placing it where it was did not cause the atmosphere to be polluted.
***Alphacell Ltd v Woodward* [1972] UKHL 4; [1972] AC 824; [1972] 2 All ER 475; [1972] 2 WLR 1320, and.**
***Price v Cromack* [1975] 2 All ER 113; [1975] 1 WLR 988, applied.**

(2) Before the deeming provisions of s63(2) of the Act (in respect of an owner or occupier of premises) can be brought into operation, it is first necessary to prove that some person actually polluted the atmosphere, or caused the atmosphere to be polluted, or permitted the atmosphere to be polluted. Section 65(2) of the Act does not avail the informant, where he is unable to prove how the fire started, or whether a person started it or whether the offence was committed by someone unknown.

(3) *Obiter*: (a) In order to be a "trade" as used in s63(2) of the Act, the activity carried on must be one which is likely to result or of its nature results in the discharge of wastes.

(b) In order for a discharge to occur "in the course of" any trade carried on, as referred to in s63(2) of the Act, it must he shown that the discharge was connected with the trade or part of the trade.

MURPHY J: *[After setting out the facts, and the grounds of the order nisi, His Honour continued]:* ... **[6]** In the present case, it was in the first place a question of fact whether the defendants brought sulphur onto its premises and whether the burning of that sulphur occurred at all and whether the burning caused the atmosphere to be polluted; the questions of law are whether on the evidence it was open to the magistrate to find that the defendant caused the atmosphere to be polluted and whether the magistrate misdirected himself either as to the way in which he should apply

principles laid down in earlier decisions or as to the interpretation that he should place upon s63(2) of the Act, to which I shall refer.

[His Honour then discussed Alphacell Ltd v Woodward *[1972] UKHL 4; [1972] AC 824; [1972] 2 All ER 475; [1972] 2 WLR 1320 which concerned the provisions of the* Rivers (Prevention of Pollution) Act *1951 (UK), and continued]:* ... **[8]** In the instant case the question of causation arising for my consideration appears to be whether as a question of law the defendant could in the **[9]** circumstances at the conclusion of the case for the informant have been *prima facie* said to have caused the atmosphere to be polluted, simply because it brought the sulphur onto its land and placed it where it was.

It has been said that "at bottom the problem is one of balancing interests.... Hence an act is the legal cause of consequence only if the law considers that liability should be imposed for that consequence". See *Paton on Jurisprudence* (3rd ed. 1964) at pp426-7. If the informant's submission is correct, would it mean, as the defendant submits it would, that, if a person merely brings onto land something which catches fire – and causes the atmosphere to be polluted – that person is guilty of the offence of causing the atmosphere to be polluted?

If so, it has been submitted, the building of a wooden home, the storage of a movie film, the parking of a motor car, the use of gas cylinders, the accumulation of rubbish including rubber tyres, leaves or plastic – any one of many day to day activities – which, if a fire occurred, would spread unwholesome fumes into the atmosphere – would then come within the ambit of such a provision. Mr Lloyd, who appeared for the defendant, asked rhetorically, would a fire which burnt a home during a bushfire mean that the owner of the home caused the atmosphere to be polluted? [**10]** Is this what is meant by the use of the word "causes"?

[His Honour then discussed Majury v Sunbeam Corporation Ltd *(1974) 1 NSWLR 659 which concerned the provisions of the* Clean Waters Act *1970 (NSW), and* Price v Cromack *[1975] 2 All ER 113; [1975] 1 WLR 988, and continued]:* ... **[13]** In the instant case the magistrate has not speculated as to the cause of the fire. He would have been wrong to do so. (See *Wakelin v London and South Eastern Railway Co* (1886) 12 AC 41; 3 TLR 233). It would have been pure surmise, for there was no evidence as to how it started. No-one knows what the circumstances were. No inferences were drawn or could reasonably have been drawn from the evidence given. In these circumstances it seems to me, as a matter of law, that it is not open to say that the defendant caused the atmosphere to be polluted.

The positive act of causing relied upon by the magistrate was the bringing of the sulphur by the defendant onto its premises at Seabreeze Parade. But this act of the defendant was, in my opinion, merely a circumstance, another skein in the net (a *causa sine qua non*, if you like), and by doing **[14]** it, the defendant did not cause the atmosphere to be polluted within the meaning of s41(1) of the Act. In the same empirical way, the law would say that the mere purchase by a person of a motor car, and the garaging of it at his home, did not cause an accident, if the accident occurred while the vehicle was being driven by someone who stole the car from the garage or used it without authority. Nor would the law say that a person who merely collected leaves into a pile preparatory to placing them on a compost heap, caused the atmosphere to be polluted if, in some unknown way, a fire started in the pile.

Although it is clear that the Act is concerned with public health and public enjoyment, and that intentional interference with these matters need not be proven in order to prove an offence against the Act, nonetheless, in a charge of "causing the atmosphere to be polluted", it is necessary to prove that some positive act or course of conduct was performed or entered upon by the person charged, which act or course of conduct caused the atmosphere to be polluted.

In the *Alphacell case* [1972] UKHL 4; [1972] AC 824; [1972] 2 All ER 475; [1972] 2 WLR 1320 Lords Wilberforce, Pearson and Salmon, in the course of their judgments, recognised that if the mechanics which caused the stream to be polluted came about by the "intervening act of a trespasser" or by an "Act of God" **[15]** or "by the act of a third party" or "by natural causes" (see (1972) AC at pp834, 845 and 847), the reasoning by which they proceeded in that case might not apply. (see also *Impress (Worcester) Ltd v Rees* (1971) 2 All ER 357 at p58). In any event, in the present case, the act of the defendant in bringing sulphur onto its land was not "calculated according to the ordinary course of things and the laws of nature to produce" a fire or to cause the atmosphere to be polluted. (see *Kirkheaton District Local Board v Ainley, Sons and Co* (1892) 2 QB 274 per Bowen LJ at 283). However, the informant then relied upon s63(2) of the Act. *[His*

Honour then set out the relevant provisions]. Mr McArdle of counsel, who appeared for the informant before me, submitted that here someone committed an offence by causing the fire in the sulphur pit and thus causing the sulphur dioxide to be discharged from the defendant's premises in the course of their trade of making superphosphate, and accordingly, no matter who it was, whether trespasser, saboteur or servant, the defendant, as occupier, should be deemed to be liable because s63(2) of the Act operates.

[16] Mr Lloyd QC, who with Mr Roger Gillard of counsel who appeared for the defendant, submitted that since no-one can say how the fire started, or even that a person (as distinct from adventitious, animal or natural causes) caused it to start, it cannot be said that any offence against the Act occurred, and accordingly s63(2) cannot be brought into operation.

This deeming provision in the Act has apparently been included in order to render it unnecessary for an informant to prove, in the circumstances postulated in the sub-section, exactly who it was that committed an offence which occurred. Where, however, the offence charged is that an occupier caused the atmosphere to be polluted, and the informant relies upon the deeming provision of the sub-section, I think that the informant must first prove that someone committed that precise offence of "'causing the atmosphere to be polluted". **[17]** I do not think that the section is open to the construction that whenever any discharge of pollutants occurs from premises in circumstances which would amount to the commission of an offence, if the discharge was caused by an individual, then the occupier is to be deemed guilty of that offence.

In my opinion, if it is desired to rely upon s63(2) of the Act, it is not sufficient to prove only that certain factual elements of an offence occurred, such as the discharge of pollutants into the atmosphere from premises in the occupation of the defendant. It must also be proved, as the first link, and depending upon what charge is laid under s41(1) of the Act, either that some person actually polluted the atmosphere, or caused the atmosphere to be polluted, or permitted the atmosphere to be polluted. Then, although the informant cannot identify who the actual offender was, but can and does prove that the offence involving discharge of pollutants, etc., as the case may be, occurred from premises in the course of the trade carried on in those premises, he may rely on s63(2) on a charge against the occupier or owner, as the case may be. If this construction is correct, then s63(2) does not avail the informant in the present case, where he is unable to prove how the fire started, or whether a person started it, or whether the offence of causing the atmosphere to be polluted was committed by someone **[18]** unknown.

It was also submitted by the defendant (on the assumption that it was proven that an offence of causing the atmosphere to be polluted was committed) that it was not possible to say that the offence occurred from premises "in the course of any trade carried on in those premises". It was clearly not open to find that setting fire to sulphur, or the production, of sulphur dioxide, was part of the defendant's trade. No-one in the employment of the defendant was employed to do anything which would or could have this result. It was altogether outside the scope of the defendant's normal trading activities. The presence of the sulphur on the defendant's premises was, however, associated with the trade of the defendant. It was used in the process of manufacture of goods by the defendant. It was in the sulphur pit, where it was being used by the defendant at the time that it caught fire. But, as I have found, none of these matters was shown to have caused the atmosphere to be polluted.

It may be of some importance, to decide to what words the expression "in the course of any trade carried on in those premises" attaches. One construction is that they attach to and characterise the preceding words "Where any offence ... occurs ... <u>in the course of any trade</u> carried on in ... premises". On this view it would be **[19]** necessary to prove that the offence was one which occurred in the course of a trade.

Another construction is that the words attach to the preceding words with respect to the discharge or emission of waste or pollutants or the emission of noise ... <u>in the course of any trade</u>" carried on in ... premises". On this view the discharge or emission should be shown to be in the course of a trade. On the facts of the present case, it is not necessary to decide this matter, and I do not do so. The alternative constructions may involve a distinction without a difference, and I leave this matter open.

"Trade" is defined in s4 of the Act itself as follows: "'Trade' means any trade business or undertaking whether ordinarily carried on at fixed premises or at varying places which results in the discharge of wastes ..." "Waste" is also defined in s4 to include any matter, liquid, solid, gaseous or radioactive, discharged or emitted in the environment in such volume as to cause alteration. It is only an undertaking "which results in the discharge of wastes which is a "trade" for the purpose of the deeming provisions of s63. Sections 54, 55, 60 and 63 are, I was informed, in a submission by counsel for the defendant, the only sections of the Act in which the word "trade" appears. **[20]** Apart from s63, which we are considering, these sections appear to relate to processes carried on in premises, which processes of their nature discharge wastes or emit noise or are likely to do so, or may be suspected of doing as an incident of carrying them on. Other legislation might call them "noxious trades".

All of these references occur in Part X of the Act, which contains the General Provisions of the Act. Section 41(1) under which the charge here is laid, appears in Part VI, the Clean Air provisions of the Act. It appears to me that in order to be a "trade" within the meaning of that word as used in s63(2) of the Act, the better view is that the activity carried on must be one which is likely to, or of its nature results in the discharge of wastes. "Trade" does not include an activity which on an isolated or abnormal occasion does have that singular result.

If this is so, s63(2) would be available for use by informants against occupiers of premises on which an offence occurs in the course of any activity carried on which might be expected to result in the discharge of "wastes", or, in other words, which have the characteristics of discharging "wastes". It will be noticed that in the definition of "trade", it is the plural "wastes" which is used and not the singular "waste", which again suggests to me that the **[21]** discharge is to be a characteristic of the activity, rather than an event which occurs on an isolated uncharacteristic occasion.

If the offence alleged to have occurred does not occur, or possibly if the discharge or emission does not occur "in the course of a trade" as defined, then the deeming provisions cannot be invoked, and the ordinary proofs must be satisfied. In my opinion, for this reason also, s63(2) does not apply to the facts of the present case. The evidence does not suggest that the defendant's manufacturing or industrial process was a "trade" within the meaning of the Act. In fact the evidence suggests the opposite. Such a conclusion accords with the principal objects of the Act. (See *Protean (Holdings) Limited v Environment Protection Authority* [1977] VicRp 5; (1977) VR p51, per Gillard J at pp54-56; (1977) 40 LGRA 189.

Finally, the words "in the course of" appearing in s63(2) should be considered. Their meaning has been said to vary according to the context of the Act in which they appear. Thus, in the *Workers Compensation Act*, the words "in the course of employment" are often found in the juxtaposition with the words "arising out of employment".

In *St Helens Colliery Co v Hewitson* [1924] AC 59; 16 BWCC 230, Lord Dunedin said at p75:-

> "In my view 'in the course of the employment' is a different thing from 'during the period of employment'. It connotes, to my mind, the idea **[22]** that the workman or servant is doing something which is part of his service to his employer or master."

(See also *Pearson v Fremantle Harbour Trust* [1929] HCA 19; (1929) 42 CLR 320 at pp328-330; 35 ALR 258; *Humphrey Earl Ltd v Speechley* [1951] HCA 75; (1951) 84 CLR 126; [1952] ALR 46; (1951) 25 ALJR 616; *Commonwealth v Ockenden* [1958] HCA 37; (1958) 99 CLR 215; [1958] ALR 772; 32 ALJR 235, where similar expressions as to the meaning of the words appear.

The *Transport Regulation Act* 1933 contained the phrase "carry goods for hire or reward or in the course of trade". In *Bolton v Moore* [1949] VicLawRp 40; (1949) VLR 215; [1949] ALR 804 Lowe J said at p217 :-

> "... before I can say that on this occasion he was carrying goods in the course of his trade, it must be shown that it was part of his trade, and in the course of his trade to transport or cause to be transported his own supplies to his place of business...".

It is not, I think, possible to paraphrase the section and to say just what would be encompassed by the words "in the course of any trade carried on", nor to say just what would fall outside them. (See also the *Shell Co of Australia Ltd v Esso Standard Oil (Aust) Ltd* [1963] HCA 66; (1963) 109 CLR 407 at p417; [1962] ALR 304; 35 ALJR 355; 1B IPR 523; and *Fendick v Downard* [1950] VicLawRp 47; (1950) VLR 271 at p279; [1950] ALR 621).

Nonetheless, it is possible to say that for a discharge to occur "in the course of any trade carried on", it must be shown that the discharge was connected with the trade or part of the trade. In the present case, it was not shown on the evidence that the discharge consequent on the fire occurred as an incident to or connected with or as **[23]** part of the defendant's undertaking. If the fire causing the atmosphere to be polluted was caused by overheating of the sulphur during the treating process, it might have been argued that the discharge of pollutants occurred in the course of the defendant's trade (assuming that he carried on a "trade").

Otherwise, it would seem that it did not. But the circumstances in which the fire occurred were not the subject of evidence and could not be inferred. For this reason also, I am of the opinion that the magistrate erred in applying s63(2) in the circumstances of this case. In my opinion the magistrate ought to have ruled that a *prima facie* case had not been made out against the defendant. In my opinion the Order Nisi should be made absolute.

APPEARANCES: Mr E Lloyd QC, with Mr R Gillard, counsel for the Applicant/Defendant. Mr J McArdle counsel for the Respondent/Informant.
