

81/78

## SUPREME COURT OF VICTORIA

**OLEX CABLES LTD v HOWDEN**

Murphy J

8 May 1978

**ENVIRONMENT PROTECTION – COMPANY CHARGED WITH POLLUTING A CREEK – POLLUTION OCCURRED AS A RESULT OF A SUMP ON COMPANY PREMISES BEING OPENED – COMPANY CHARGED WITH OFFENCE – STATEMENT OF A MANUFACTURING DIRECTOR OF THE COMPANY TENDERED TO THE COURT – STATEMENT RELIED ON BY MAGISTRATE TO FIND CHARGE PROVED – FINDING BY MAGISTRATE THAT ANY DIRECTOR OF THE COMPANY COULD BE ASSUMED CAPABLE OF MAKING ADMISSIONS – WHETHER MAGISTRATE IN ERROR: ENVIRONMENT PROTECTION ACT 1970, S39.**

**HELD:** Order nisi absolute. Conviction quashed.

1. The Magistrate was wrong, as a matter of law, in saying, 'I do accept that any director ought to be assumed capable of making those admissions ... so I, accept the admissions of Mr Carter'. On the one hand, many directors are completely unconnected with the day-to-day affairs of a company and have no authority to make admissions on its behalf. On the other hand, a director may be cloaked with authority by the Board of Directors to speak on its behalf. He may have such authority given him from the Board of Directors in writing. He may be the sole director, managing the company. He may be expressly held out by the company, or delegated by it, to speak with authority on its behalf on the matter in question.

*Fraser Henleins Proprietary Limited v Cody* [1945] HCA 49; (1945) 70 CLR 100; [1945] ALR 186; and

*Scott v Fernhill Stud Poultry Farm Pty Ltd* [1963] VicRp 2; (1963) VR 12, applied.

2. There was insufficient evidence to justify a finding that Carter had authority to make admissions in this matter against the company itself or on behalf of the company itself. The statement should have been rejected.

3. Without the statement, the manner of entry of the colouring into the waters of Stony Creek was not clear. Was it the result of someone's deliberate act, aware that the pollution would occur — or was it the result of an intentional act or an accidental act or a negligent act or how otherwise? The answer to these questions was material to a determination whether a charge of polluting waters against the company could be sustained or whether the proper charge was causing waters to be polluted or permitting to be polluted.

[There were five (5) grounds upon which the order nisi was granted, and that part of the judgment dealing with the 4th ground only, i.e., that pertaining to the admissibility of the alleged admission, is reproduced below. Ed.]

**MURPHY J:** It is important then to consider what evidence there was as to the cause of the assumed, for this purpose, uncleanness. The only direct evidence as to how the uncleanness got into the waters of Stony Creek is contained in the evidence of one Bowden, through whom was tendered a statement of one Carter, a manufacturing director of the defendant company.

Carter admitted that the defendant owned the premises and that the colouring of the water resulted from the 'accidental' (*quaere* 'negligent') opening of a sump on its premises. If Carter's evidence was admissible against the defendant, it would seem to establish that some one of the defendant's servants caused an orange/red coloured liquid to be placed in such position as to drain ... into Stony Creek — so that the physical condition of the said waters — was so changed as to make part of those waters unclean.'

The Magistrate admitted Mr Carter's statement when it was tendered from Mr Howden and he stated at the conclusion of the case, that is to say at the end of the Crown case when counsel for the defendant made certain submissions in connection with the statement:

'Yes, as to the admission, I think Miss Robinson is right when she says that the basic relevant admissions must be concerned or must have been related to the manufacturing process at this establishment. I think had it not been for the manufacturing work the pollution would not have occurred, and I think that disposal of substances being used should be considered as part of the overall manufacturing process, end, as such, the responsibility of the manufacturing director.'

At any rate, I wonder if — even if I had found against you, Mr Fagan, on that — that there is not sufficient evidence without admissions to link the offence back to the defendant company. Perhaps for that purpose there would need to be some admissions, some ownership and occupation. I do accept that any director ought to be presumed capable of making these admissions - - - so I accept the admissions of Mr Carter.'

The learned Stipendiary Magistrate was wrong, as a matter of law, in saying, 'I do accept that any director ought to be assumed capable of making those admissions ... so I, accept the admissions of Mr Carter' (see *Fraser Henleins Proprietary Limited v Cody* [1945] HCA 49; (1945) 70 CLR 100; [1945] ALR 186 and *Scott v Fernhill Stud Poultry Farm Pty Ltd* [1963] VicRp 2; (1963) VR 12). On the one hand, many directors are completely unconnected with the day-to-day affairs of a company and have no authority to make admissions on its behalf. On the other hand, a director may be cloaked with authority by the Board of Directors to speak on its behalf. He may have such authority given him from the Board of Directors in writing. He may be the sole director, managing the company. He may be expressly held out by the company, or delegated by it, to speak with authority on its behalf on the matter in question.

There is, however, a third category, which is difficult to define. It is with regard to this category that difficulties in drawing the line are encountered. A managing director as such (i.e. *ex officio*) is sometimes said to have authority to speak on behalf of the company — for, it is said, it is his job to manage (see, for example, *Tesco Supermarket Ltd v Nattrass* [1971] UKHL 1; [1972] AC 153 at pp171, 187 and 193; [1971] 2 All ER 127; [1971] 2 WLR 1166).

But a 'manufacturing director', which Mr Carter was shown to be in the return of directors which was tendered in evidence, is not *ex officio* in a category known to me. As Lord Pearson said in *Tesco Supermarkets Ltd v Nattrass* (*supra*) at p193:

'The supervision of the details of operations is not normally a function of higher management.'

There may be in a company personnel directors, administration directors, staff directors, executive directors, pay directors, finance directors, sales directors, and a multitude of other, directors. Today, the new titles proliferate and appear to be unlimited. Relying upon their office alone, I would be loath to attribute to many, if any, of them authority to make admissions against the company in a quasi-criminal matter. If authority is to be implied, that is to say, authority to make admissions, what has to be shown is the function that the person in fact performs, the nature of the company, its activities, his prior activities if known, and any matters of a like nature from which authority to make admissions could properly be inferred (see *Scott v Fernhill Stud Poultry Farm Pty Ltd* (*supra*) at p12).

It was conceded by counsel during the argument before me that the statement by the Magistrate to which I have referred relating to 'any director' was wrong in law. In my opinion, that concession was correctly made. It is important to remember that the question is not what was the knowledge of the person making the admission, or what was his means of knowledge, as would be the question if the person was called as a witness in the case to give evidence. The real question is: What was his authority? Did he have authority to make admissions on behalf of someone else outside court? admissions which will be evidence against that other person inside the court.

I am unable to see in the whole of the Magistrate's statement on this subject, any indication that His Worship correctly considered the matter, although, on one view, he commenced to do so. The matter could be sent back to the Magistrate on this point alone, but both the parties have indicated that they wish to avoid this if it is possible.

There was no evidence of any express appointment by the board of directors appointing Mr Carter as the company's agent or delegate in this matter. As I have already said, an implied

agency to make admissions may be inferred from the conduct or situation of the parties; but the evidence in this case does not in my opinion, suffice to enable any such inference to be drawn.

If a person is appointed by the board of directors as managing director of a company, as I have said, he may be considered, in a given set of circumstances, to be its agent, authorised to make admissions on its behalf. However, no such implication arises from the appointment as manufacturing director. A manufacturing director may simply be akin to a foreman — I do not know. Nor is there any evidence on this subject, apart from the document itself, which was tendered.

Mr Dowling relied upon the evidence that the interview with Mr Carter took place on the defendant's premises, and that Mr Howden had sought the interview which occurred on 4th October, 1977. These are both, in my opinion, relevant matters. The evidence is that Mr Howden 'made an appointment to see Mr Maxwell Carter for an interview on Monday — I arranged to meet Mr Carter on 4th October in relevance to an interview regarding this matter'. Later, he said, 'I asked Mr Szymansky to arrange to interview a person who could legally speak on behalf of the company.' The witness had stated earlier in his evidence that Mr Szymansky was 'services foreman'. I do not know what exactly a 'services foreman' is; but I cannot imagine that he is such a person in the classification of authority in the company that he is able to cloak anyone with authority to make admissions that would bind or be admissible against the company in a quasi-criminal matter. The position is quite different when a letter is addressed to the company seeking an interview with someone appointed or authorised by the "company to speak on behalf of the company", and then following the letter a person is appointed and then an interview with him occurs.

Considering the facts and all the evidence and the surrounding circumstances in this case, I do not see that anyone could reasonably conclude that Mr Carter was authorised by the company to make admissions on its behalf in this matter. I note from the return of directors, which was tendered in evidence, that there is in fact a managing director of this company. There is also a chairman of directors and a sales director as well. There are some eight directors in all, many of them — not including Mr Carter — being directors of other very large companies. It is not shown that any members of the board knew of Mr Carter's talk with Mr Howden, or authorised it, or at any time cloaked him with any authority to speak on behalf of the board in this matter. There is no evidence of any prior occasions upon which the company had held out Mr Carter in a manner which indicated that he had authority to act on its behalf.

He could, of course, make admissions against himself — but that is an altogether irrelevant consideration. He could also have been called to give evidence in the court below, evidence of facts of which he knew. Again, that is an altogether irrelevant consideration. If his statement is excluded, the evidence that the premises were occupied by Olex Cables Limited, and that it owned the plant and the site, along with the explanation as to the manner in which the waters of Stony Creek became discoloured, in so far as these matters appear from this statement, cannot be relied upon to support the conviction.

The fact that the statement itself asserts, in answer to Mr Howden's questions, that Mr Carter did have authority to speak on the company's behalf is insufficient in the circumstances, I find, to establish any such authority (c.f. *Harris v Macquarie Distributors Pty Ltd* [1967] VicRp 29; (1967) VR 257 at pp257 and 262; (1966) 13 LGRA 264; *Chappell v A Ross & Sons Pty Ltd* [1969] VicRp 48; (1969) VR 376, at p389 — a decision of the Full Court.

I think that there may well have been sufficient evidence to enable the Magistrate to conclude that the statement was made on premises occupied by Olex Cables Limited. Mr Howden asserted it in his evidence, and no challenge of any sort was directed to his bald statement even if it was simply an assumption on his part. Furthermore, it is clear that the statement was taken at 207 Tottenham Road. The registered office of the company appearing on the Certificate of Incorporation, is Tottenham Road, without naming any particular number, and in my opinion although not conclusive, there was sufficient evidence to justify an inferential finding that the premises where the statement was made by Carter were occupied by the defendant.

Nonetheless, I am of the opinion that there was insufficient evidence to justify a finding that Carter had authority to make admissions in this matter against the company itself or on behalf of

the company itself. The statement should have been rejected. Without the statement, the manner of entry of the colouring into the waters of Stony Creek is not clear. Was it the result of someone's deliberate act, aware that the pollution would occur — or was it the result of an intentional act or an accidental act or a negligent act or how otherwise? The answer to these questions is material to a determination whether a charge of polluting waters against the company can be sustained or whether the proper charge was causing waters to be polluted or permitting to be polluted.

*[After considering other aspects of the charge, His Honour concluded that the conviction could not stand due to insufficient evidence.]*

---