04/85

SUPREME COURT OF VICTORIA

DAVEY v BRIGHTLITE NOMINEES PTY LTD and ORS

Nicholson J

16-18, 21-22 May, 9 August 1984 — [1984] VicRp 76; [1984] VR 957; 56 LGRA 274

TOWN AND COUNTRY PLANNING – PREMISES ZONED "LIGHT INDUSTRIAL" – PREMISES USED FOR TRADE SALES AND TO PUBLIC – MEANING OF "INDUSTRIAL SALES" – MEANING OF "SECONDARY INDUSTRY" – MEANING OF "WHOLESALE" – WHETHER SALES BY RETAIL – WHETHER PREMISES USED AS A SHOP: *TOWN AND COUNTRY PLANNING ACT* 1961, S49A; *MELBOURNE METROPOLITAN PLANNING SCHEME ORDINANCE*, CLl4, 7.

The Melbourne Metropolitan Planning Scheme Ordinance ("Ordinance") provides, insofar as relevant:

Cl4(2) : "Land within the metropolitan area shall only be used or subdivided or otherwise developed and buildings or works shall only be erected, constructed or carried out thereon in conformity with the planning scheme."

Cl. 7 provides that within a zone described in a section of the Table to it—

"(a) may be used for any of the purposes specified in column 2 of such section;

(c) may, subject to the permission of the responsible authority be used for any of the purposes specified or included in column 4 of such section;

(e) Shall not be used for any of the purposes specified or included in column 5 of such section."

The expression "shop" is defined in the Ordinance as follows:

"Shop means any premises whereon goods are kept exposed or offered for sale by retail and includes commercial display area, furniture and carpet sales and service premises and take-away food premises but does not include ... industrial sales or premises used for any purpose falling within the definition of industry."

"Industrial sales" is defined in the Ordinance as follows:

"Industrial sales means any premises upon which motor vehicles (other than motor cars, motor bicycles and caravans) machinery equipment or materials are brought kept or exposed for sale lease or hire for use in primary or secondary industry."

The defendants were convicted for using or permitting certain premises to be used for the purpose of a shop or for a commercial display area. The premises comprised a large glass shop front, a substantial showroom area and a workshop and storage area at the rear. In the showroom area, a large number of light fittings were displayed, mainly by way of a ceiling display, but also available for inspection were other more portable light fittings, light globes and electric fans. In 1980, the council granted a permit for the use of the premises for the purpose of "industrial sales", and no permit for the purpose of sales to the public generally. Subsequently, the defendants opened a retail section of their business in premises situated in an adjoining municipality; however, the major display area remained at the original premises. In 1983, a Councillor purchased a light globe from the original premises. The premises were open to the public at large, and 80% of sales were in respect of house lots owned by customers referred by electricians and house-builders. These sales were made at the other premises to customers producing a trade order. Upon order nisi to review—

HELD: Order nisi discharged.
(1) In a prosecution for using premises otherwise than in accordance with the provisions of the Ordinance, the test is whether the particular use does not comply with the Ordinance. Whilst the workshop area at the rear of the premises may have fallen within the definition of "industry" thereby taking the premises outside the definition of "shop", the presence of such workshop area did not operate to legitimise other uses of the premises which may have been unlawful.
***Pacific Seven Pty Ltd v City of Sandringham and Ors* [1982] VicRp 14; [1982] VR 157, considered and distinguished.**

(2) The system of selling goods to a trade order was not "wholesale" in that the goods were not sold to be retailed by others nor in large quantities. It was open to the Court to conclude that the

goods were "exposed or offered for sale by retail."

***City of Brighton v Eura Nominees Pty Ltd* (1983) 56 LGRA 263; (1983) 2 PABR 180 (29 July 1983) observations of Gobbo J applied.**

(3) In the definition of "industrial sales" –
(i) the phrase "secondary industry" contemplates the sale of goods which will be used in a manufacturing industry to produce a finished product. These sales – whilst they may have been connected with the building industry – were not involved in the production of manufactured goods, and were not sold for use in a "secondary industry" and accordingly, were not "industrial sales";
(ii) the phrase "machinery equipment or materials" is to be read in connection with secondary industry or an industry involved in the production of manufactured goods. The sales of light fittings did not fall within the category of "machinery equipment or materials", and were not "industrial sales".

Accordingly, the use of the premises did not fall within the categories excluded from the definition of a "shop", and the defendants were rightly convicted.

NICHOLSON J: *[After setting out the facts and details of the evidence, relevant definitions in the Ordinance, the findings of the Magistrate, whether he misdirected himself as to the onus of proof, and the grounds of the Order nisi, His Honour continued]:* ... **[16]** What the prosecution was required to establish beyond reasonable doubt was the proposition that the premises were being used as a shop contrary to the requirements of the Ordinance. In order to do so it was necessary for the Prosecutor to establish the positive proposition that goods were exposed or offered for sale by retail, or that the activity fell into one or other of the inclusive uses specified in the definition, which included that of a commercial display area. However, the informant was also required to establish beyond reasonable doubt that the same user of the premises did not fall within the categories excluded from the definition of a shop.

I stress the words "the same user" because premises may be used for more than one purpose, and provided that each use is a distinct and separate use, then, in my opinion, such individual use may be unlawful even if the rest of the premises are used for lawful purposes. Taking an extreme example: the use of a portion of an hotel as a brothel could not be legitimised by the lawful use of the remainder of an hotel. This approach seems to me to be in accordance with that adopted by the New South Wales Court of Appeal in *Foodbarn Pty Ltd and Ors v The Solicitor-General* [1973-6] 32 LGRA 157; (1975) 32 LGERA 157.

I am conscious that, on one view, it might be thought to be at variance with the decision of Marks J in *Pacific Seven Pty Ltd v City of Sandringham and Ors* [1982] VicRp 14; [1982] VR 157, **[17]** where His Honour applied a test of the substantial purpose for which the premises were being used in order to determine the questions of uses. In that case His Honour had before him the return of an order nisi to review a decision of the then Town Planning Appeals Tribunal, confirming a Council's refusal to grant a permit for the use of certain premises as service premises. The Tribunal had taken the view that the numerous permitted uses contained in the Ordinance definition of "service premises" were mutually exclusive and that it was not open to the applicant to conduct a multi-purpose store embodying a number of such uses. The applicant in that case also proposed to supply a limited amount of take-away food at the premises and the definition of "service premises" in fact specifically excluded the use of the same as take-away food premises.

In this regard the Tribunal held that once it was established that some food was to be prepared and sold hot for consumption off the premises, then this exclusion operated to disqualify the premises from being characterised as service premises. His Honour held that the permitted uses were not mutually exclusive and I do not differ from His Honour on this point. His Honour also held that for the purpose of considering an application for a permit it was sufficient to look at the real and substantial purpose for which the premises were to be used and found that the fact that it was intended to supply some hot take-away food as part of the overall operation should not be regarded as a disqualifying factor. He continued at page 163 to consider the question of dual or multiple uses and said:

> "It may be thought that a difficulty arises from what I have said where an applicant proposes multiple uses falling within the **[18]** definition. How, it might be said, can the test propounded by Kitto J (in *Shire of Perth v O'Keefe and Another* [1964] HCA 37; [1964] 110 CLR 529 at 529-34; [1965] ALR 70; (1964) 10 LGRA 147; (1964) 38 ALJR 83; 10 LGERA 147; [1965] A Crim R 70 be applied in such circumstances particularly if it is to be applied in relation to each use? But the answer I think is that

> the test propounded by Kitto J is not to be applied to each use separately specified in the definition. The qualifying category of "use" under column 4 is "service premises". The test is to be applied, in my view, to use as or for the purpose of "service premises", and in the application of the test in those circumstances recourse needs to be had to the definition. If all the uses proposed are covered by the definition, then I see little or no difficulty. If a non-qualifying or disqualifying use is proposed then the test falls to be applied by considering whether in the light of its proposed extent, the real and substantial purpose of the premises is nevertheless for use as "service premises". But even if the answer is unfavourable to the applicant, I regard it as the duty of the Tribunal or the responsible authority, whichever body happens to he considering the problem, to consider informing the applicant of the effect of the proposed disqualifying use, so that the applicant is afforded the opportunity to abandon its pursuit or indicate willingness to comply with a condition restraining that use."

It is this passage in His Honour's judgment which may be thought to be at variance with the views which I have expressed. However, it is apparent that His Honour conceded that there might be more than one "real and substantial purpose" for which the premises were intended to be used, and in the context of a permit application he suggested that if a proposed purpose did have a disqualifying effect, then the applicant should have the opportunity to either abandon it or to indicate willingness to comply with the restrictive condition. I do not materially differ from the views expressed by His Honour in relation to permit applications where a broad view may be taken in determining the question as to whether a permit should or should not be granted.

[19] However, it seems to me that quite different considerations apply to a prosecution for using premises otherwise than in accordance with the provisions of the Ordinance. It may be one thing on a permit application to look at it and say, as His Honour did, that the substantial purpose for which the premises are to be used complies with the definition of service premises so that a permit ought to be granted. It is, I think, quite another to say that the fact that premises are largely used in a lawful fashion, or that their substantial purpose is lawful, operates to make lawful uses which would otherwise be unlawful. The test in such a case, in my opinion, is not whether the real and substantial purpose of the user complies with the Ordinance but rather whether a particular use does not comply with the Ordinance. No doubt when a permit is granted uses which are truly ancillary to the main purpose and which might otherwise be unlawful would be legitimised, such as, for example, the use of portion of shop premises for office purposes connected with and essential to the user as a shop. However, I do not think that this principle can or should be extended to related but separate uses which are in fact unlawful.

Approaching the matter in this way it is clear from the evidence that the premises in question were used for different purposes. Obviously a portion was used as a workshop and this no doubt fell within the category of light industry and was a permitted use. It is also clear that the premises were premises at which goods were kept exposed or offered for sale by retail. The applications appear to have proceeded upon the mistaken notion that if they confined their **[20]** sales to persons in the trade or to persons authorised to make the purchase by persons in the trade that these sales were not retail sales. The word "retail" is defined in the Ordinance, although the word "wholesale" is defined as meaning the selling of goods to be retailed by others. However it is apparent from the judgment of Gobbo J in *City of Brighton v Eura Nominees Pty Ltd* (1983) 56 LGRA 263; (1983) 2 PABR 180, 29/7/83) that "retail" is not merely an antonym of "wholesale", as defined in the Ordinance. In that case His Honour pointed out that sales by wholesale were not necessarily confined to sales within the meaning of this definition but could well encompass the sale of goods in large quantities even if such goods were not sold to be retailed to others.

I respectfully agree with His Honour's view, but even approaching the matter on that basis it seems to me that it was apparent from the evidence in the present case that the goods were not only not sold to be retailed by others but were also not sold in such quantities as to satisfy any test of sale by wholesale of the type adumbrated by His Honour. The system of selling to a trade order was no more than a device to mask the real situation. It seems to be inevitable for any Court to have concluded that the goods at the premises were offered or exposed for sale by retail. Of the uses which might have operated to take the premises out of the definition of a shop, I think that on no view was it open to the learned Magistrate to find that any portion of the premises were used for a purpose falling within the definition of industry other than the workshop area at the rear. For the reasons already expressed I do not consider that the presence of such a workshop area could operate to legitimise other uses of the **[21]** premises if any of them were in fact unlawful. Accordingly, apart from the question of whether the premises could be said to have

been used for industrial sales, I think that there is no doubt on the evidence that they otherwise satisfied the definition of a shop However, it remains the fact that if the learned Magistrate was not satisfied beyond reasonable doubt that the premises were not used for industrial sales, then he was bound to acquit the defendants.

The mere fact that some sales may fall within the definition of industrial sales, would not matter, for to take an obvious example, premises could be used for the sales of parts used in a particular manufacturing industry and thus fall within the category of equipment used in secondary industry and, at the same time, be used for the sale of quite unrelated goods to the public at large. If one such use is lawful pursuant to the scheme, then, for the reasons already expressed, I do not think that it is legitimised by the other. On the other hand, it might be a nice question, if for example, the only category of sales held to fall outside the definition of industrial sales was the sale of a light bulb, because in such a case it might be said that it was a true ancillary use for the major operation of the premises. However, I do not think that the convictions in this case need rest upon this foundation. The key to the present case, as the Magistrate correctly said, lies in the definition of industrial sales. To fall within this category the goods sold or offered or exposed for sale must be capable of being characterised as machinery, equipment or materials for use in secondary industry.

[22] If an expression such as "secondary industry" is used in a special sense in the Ordinance then its construction is a matter of law for this court to determine. See *R v Salvo* [1980] VicRp 39; [1980] VR 401; (1979) 5 A Crim R 1. On the other hand, if it is used in its ordinary English sense, then the determination of the same is either a question of fact or a question of mixed fact and law. See *Cozens v Brutus* [1972] UKHL 6; [1973] AC 854; [1972] 2 All ER 1297; [1972] 3 WLR 521; (1972) 136 JP 390; *Franceschini v MMBW & Ors* (1980) 57 LGRA 294; [1983] 1 PABR 279; *Hope v Bathurst City Council* [1980] HCA 16; [1980] 144 CLR 1; (1980) 29 ALR 577; (1980) 12 ATR 231; (1980) 54 ALJR 345; (1980) 41 LGRA 262. If it falls into the latter category it was argued before me that it was a matter for the Magistrate to determine. It is not at all clear from the Magistrate's decision as to the meaning which he in fact ascribed to the expression, save to say it appears he ascribed a more limited meaning to it than to say that it encompasses all industry other than primary industry. Whether he did so or not, upon the hearing of an order nisi to review, it would be absurd for this court to refer such a question back to the Magistrate for him to determine it when it is just as well equipped as he was to determine it and I accordingly propose to do so.

The expression "secondary industry" is undefined in the Ordinance, and because of the special way in which the word "industry" is defined and used, I do not think that reference to this definition is of particular assistance in defining the expression. Even if I was to adopt the Ordinance's definition of "industry", this would not, in my view, assist in ascertaining the meaning of "secondary industry". The expression is not defined in the *Oxford English Dictionary* and I have been unable to find it defined in any **[23]** other dictionary, other than *The Macquarie Dictionary*. In common usage, the expression "secondary industry" appears to be used in contradistinction to primary industry, the latter, as I understand it, being associated with the winning of raw materials from the soil or the sea. Upon this view it could be said that secondary industry means any industry other than primary industry. This would give the expression "industrial sales" a wide ambit. However, I think that in the context of this Ordinance, I would not be justified in giving the expression such a broad meaning. The *Macquarie Dictionary* defines secondary industry as an industry involved in the production of manufactured goods. I think it more likely that it is used in this sense in the definition appearing in the Ordinance. It is to he noted that the user of premises for industrial sales does not contemplate the sale of goods *per se*, as does the user of premises of "shop", but rather the sale of motor vehicles (other than motor cars, motor cycles and caravans), machinery, equipment or materials for use in primary and secondary industry. These items no doubt fall into the general category of goods, but they are obviously goods of a particular kind. The reference to motor vehicles is no doubt explicable upon the basis that the definition also encompasses the sale of goods for use in primary industry and contemplates that in a light industrial zone tractors and agricultural machinery may be sold, and no doubt the reference to the machinery is explicable upon this basis also, although no doubt machinery for use in secondary industry is also contemplated by it. The remaining categories are equipment or materials and, in my view, these words strongly suggest a construction that the type of goods contemplated by the **[24]** definition are those which will be used in a manufacturing industry to produce a finished

product. It is with this construction of the expression in mind that I turn to consider the question as to whether the learned Magistrate, applying the proper test as to the onus of proof, could he said to have been bound to have been satisfied beyond reasonable doubt that the defendants were guilty of the offence charged. In fact, I think that this was the only conclusion that was open to him.

Mr Graham QC urged that the fact that the light fittings were used in houses meant that they were used in secondary industry, which he contemplated as including the building industry. Alternatively, he argued that the fact that the bulk of the fittings were required to be installed by a qualified electrician meant that they were used in another secondary industry, that is, the servicing by electricians of the public, or the building industry. However, it seems to me that these submissions were dependent upon a wider meaning being ascribed to the meaning of "secondary industry" than I have given to it.

Further, it seems to me that these submissions involve the proposition that the evidence establishes that the goods exposed or offered for sale fell within the category of machinery, equipment or materials being used in secondary industry however defined. If the meaning which I have ascribed to the expression "secondary industry" is correct, it is apparent that the industries referred to by Mr Graham fell outside the category of industries involved in the production of manufactured goods. However if this construction be incorrect, I do not think that these goods could, in any case, **[25]** have fallen into the category of machinery, equipment or materials, as used in the definition. They were certainly not machinery used in industry and it is hard to fit them within the category of equipment so used. They are no doubt items of equipment used by persons who occupy houses, but not by the persons who construct them. The word "materials" is a word of wide ambit but it must be read here in the context in which it appears and if so read is not wide enough to cover goods of this type.

I accordingly, find that any doubt which the learned Magistrate may have entertained, that these premises were not used in part as a shop, upon the basis that such use fell within the definition of industrial sales, would not have been a reasonable one. It follows from this that the fact that the Magistrate may in fact have misdirected himself as to the onus of proof is immaterial, and I consider that the first three grounds of the order nisi are not made out ...

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