44/74

SUPREME COURT OF VICTORIA

BANGER v DRIFT FRUIT JUICES PTY LTD

McInerney J

6 December 1973; 22 February 1974

[1974] VicRp 82; [1974] VR 677; (1974) 30 LGRA 433

WEIGHTS AND MEASURES – DEFENDANT CHARGED WITH SELLING BOTTLES OF FRUIT JUICE THE CONTENTS WEIGHING LESS THAN THE MEASURE STATED ON THE PACKAGE – CHARGES FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *WEIGHTS AND MEASURES ACT* 1958; *WEIGHTS AND MEASURES (PRE-PACKAGED ARTICLES) ACT* 1967, S82H(2).

HELD: Order nisi discharged.

1. The magistrate was correct in concluding that there was no requirement that the temperature of the article to be weighed (and of the measuring instrument also) had to be brought down to (or up to) the temperature at which the measuring instrument had been calibrated. The measurement made on the measuring instrument at the temperature prevailing at the time and place of measurement was, for the purpose of proceedings under s82H of the *Weights and Measures (Pre-Packaged Articles) Act* 1967 ('Act'), to be taken as the "true measure" of the article measured.

2. It followed that the extent of the discrepancy between the measure so arrived at and the measurement which would have been arrived at had the article to be measured and the measuring instrument been brought to the temperature at which the instrument had been calibrated was to be disregarded as irrelevant. The measurement in fact recorded on the measuring instrument at the time and place of measurement was to be taken, for the purpose of determining liability under subs(1) or subs(2) of s82H of the Act, as the true measure of the article in question.

3. The effect of the legislation was that notwithstanding that the "true measure" of six of the pre-packed articles was less than the stated weight, nevertheless the defendant could escape liability only provided it could bring itself within both par. (a) and par. (b). In the present case, the evidence showed that the deficiency was in no case in excess of five parts per cent of the stated weight, but there was an average deficiency in the contents of the 12 pre-packed packages purchased by the inspector. The defendant, therefore, failed to bring himself within both par. (a) and par. (b) of subs(5), and the magistrate could not, therefore, have lawfully held that the pre-packed articles (the juices) referred to in the information were to be deemed to be of a true measure equal to the measure stated on the package.

4. Accordingly, the grounds of the order nisi failed.

McINERNEY J: This is the return of an order nisi to review granted by Master Jacobs on 18 August 1972 to review a conviction of the defendant at the Magistrates' Court at Colac on 16 June 1972 upon the hearing of an information laid on 21 April 1972. The information, laid by the informant as weights and measures inspector for the Corangamite Weights and Measures Union, charged that the defendant on 12 April 1972 at the premises of Colac Park View Dairy Pty Ltd, 5 Dennis Street, Colac, did sell a pre-packed article, to wit, bottles of fruit juice, the true measure of which was less than the measure stated on the package containing the article, contrary to the provisions of s82H(2) of the *Weights and Measures (Pre-Packed Articles) Act* 1967 and the *Weights and Measures Act* 1958. The magistrate found the charge proved and convicted the defendant fining it $20 with $85.84 costs.

Prior to the hearing, namely on 31 May 1972, the defendant had requested further particulars from the informant specifying by what actual person was the article sold, to what actual person was the article sold, identifying the number of articles referred to in the information and as to each such article stating respectively what was the true measure of the contents of each package and in relation to each such package what was the measure stated on the same. In reply,

by further particulars dated 2 June 1972, the solicitors for the informant stated the article was sold by Bruce Stanley Tomkins to the informant, that the number of articles sold was 12, that 10 of these packages had the measure "1 imperial pint" stated thereon and two had the measure "1 pint" stated thereon. The informant in the same document also set out the true measure of the contents of each of the 12 bottles. These measures were verified in the evidence adduced by the informant at the hearing. It is sufficient to say that in the case of six bottles the true measure was greater than the measure stated on the label, but in the case of the other six the true measure was less and that the total deficiency over all the 12 bottles was 193 minims. That deficiency was less then five parts per cent of the measure of the bottles stated thereon and this is one of the circumstances relied on by the defendant in support of an argument founded on s82H(5).

At the outset of the hearing before the magistrate, Mr Fagan announced his appearance under protest as to the jurisdiction. He did not develop that protest by any argument. Before me, he stated the protest was founded on the proposition that the Geelong Magistrates' Court was nearer of access to the place of abode of the defendant company and to the place where the subject- matter of the information arose than was Colac: see s89 of the *Justices Act* 1958.

Mr Fagan did not, however, call any evidence or make any submissions on that point. It appears from the affidavit filed on behalf of the defendant that during the course of the opening it was made clear that the sale on which the informant was relying was the sale of 12 bottles of fruit juice purchased by the informant at the premises of Tomkins Dairy, Colac. The informant's case was presented on a purchase by the informant at the premises of Tomkins Dairy, Colac, on 12 April 1972 of 12 bottles of Drift Fruit Juice which were selected by Tomkins. The informant said that each bottle bore the name of the packers as being that of the defendant.

If does not appear to have been suggested by the defendant, in the course of the informant's case, that the sale of the 12 bottles had not been effected by or on behalf of the defendant, and although various no case submissions were made at the conclusion of the informant's case it is nowhere suggested in the affidavits that any submission was made that the information should be dismissed on the ground that the evidence did not establish any sale by the defendant to the informant but rather a sale by Tomkins Dairy or by Colac Park View Dairy Pty Ltd. At the hearing before me counsel for the defendant said that he was unable to say that any such submission was made, but in a memorandum submitted after I had reserved my decision he stated that in his view the point was met by s82H(7). It was not until the deponent, Raymond Frank Moore, the manager of the defendant company gave evidence that there was any suggestion that the bottles the subject of the charge had been sold by the defendant to one John Tank of Lorne who picked them up at Chilwell, Geelong. There was no evidence as to the date of this sale but presumably it was prior to 12 April 1972 when Bruce Tomkins, who was called by the defendant, sold the bottles in question to the informant. Tomkins, in his evidence said that Tomkins Dairy purchased the bottles from John Tank of Lorne.

At the close of the defendant's case three further submissions were made on behalf of the defendant but none of those submissions, on the face of it, related to the question whether the defendant was the party who had sold the bottles to the informant.

There is no indication, on the material before me, that the information was ever amended so as to charge the defendant with having sold the articles in question at Geelong to one John Tank or to charge an offence against s82H(1).

The magistrate reserved his decision and on 30 June 1972 gave his reasons in writing. They are set out, apparently verbatim, in the affidavit of the defendant's manager, Raymond Frank Moore. The magistrate did not in those reasons for judgment, which dealt very fully with the question of the adequacy and reliability of the measurements made by the informant and the question of precautions taken by the defendant, deal in any detail with the question of sale save in so far as it is to be collected from the sentence "I find the charge proved". In that context I would have taken that sentence to mean that the magistrate found that on 12 April 1972 at the premises of Colac Park View Dairy Pty Ltd, 5 Dennis Street, Colac, the defendant did sell a pre-packed article, to wit, bottles of fruit juice the true measure of which was less than the measure stated on the package containing the article contrary to the provisions of s82H(2) of the *Weights and Measures (Pre-Packed Articles) Act* 1967 and the *Weights and Measures Act* 1958.

The order nisi obtained from Master Jacobs on 18 August 1972 was granted on three grounds of which the first two are obviously directed to questions of the true measure of the bottles the subject of the information. It could not be argued that the question whether the defendant had sold those bottles was raised in grounds 1 or 2 of the order nisi, but counsel for the defendant argued that it was open to him under ground 3 of the order nisi, namely that "The decision of the magistrate was contrary to the evidence and to the weight of the evidence".

In the alternative, he argued that I should in the exercise of the powers granted by s158 of the *Justices Act* 1958 allow the ground to be amended, so as to raise the point explicitly. In answer to the first point, counsel for the informant contended that the conviction could be sustained by the application of s82H(7) to the facts established by the evidence.

So far as relevant s82H(7) provides:—

> "Where the true measure of an article contained in such a package as is referred to in sub-paragraph (i) of paragraph (b) subs(6) is found by an inspector to be less than the measure stated on the package containing the article, any person who appears from the marking on the package to have packed the article...
>
> (a) shall be deemed to have sold the article to the inspector on the day when, and at the place where, the inspector...measured the article; and
>
> (b) shall be liable to the same penalty as if he had actually sold the article to the inspector on that day and at the place."

To be a package such as is referred to in sub-paragraph (i) of paragraph (b) of s82H(6) the package must be marked as required by s82D and by s82F. Section 82D(1)(a) requires that where an article is packed by a packer on his own account it shall be marked with his name and address, or with an approved brand approved for use by the packer at the place of packing. Section 82F provides (so far as relevant) that after the appointed day no person shall pack for sale or cause or permit or suffer to be packed for sale any article of any description to which the section applies unless the package containing the article is marked in accordance with the regulations with a statement of the true measure of the article.

In the present case, the affidavit of the defendant's manager shows (subs(6)(a)) that the empty bottles were tendered in evidence and in addition (subs(6)(d)) that the informant testified that each bottle bore the name of the packers as being that of the defendant. This evidence was admissible: see *Hindson v Monahan* [1970] VicRp 12; [1970] VR 84 at p91. From this evidence it would appear that the requirements of s82D(1)(a) had been complied with, although the written submission of counsel for the defendant suggests the contrary. It would appear also that the "package" (i.e. each bottle) was marked with a statement of the true measure of the article (i.e. the fruit juice contained in the article) and, therefore, that there had been a marking on the package (i.e. the bottle) as required by s82F. On the face of it, therefore, each package (i.e. each bottle) would appear to have been one marked as required by s82D and by s82F.

In a prosecution under s82F(1) the prosecution would have to show that the offence had been committed on or after the appointed day as defined by s82F(2) and furthermore that the article was of a description which had been prescribed under s82F(8). No evidence in relation to either of these matters was tendered by the informant. Nor did the informant tender in evidence any regulations such as are referred to in s82F(1), prescribing the manner of marking packages (sc. the bottles of fruit juice) with a statement of the true weight of the article packed therein (sc. the fruit juice contained in the bottles).

A question arises, therefore, whether in the absence of such evidence the informant is entitled to invoke the evidentiary provisions of s82H(7). I have come to the conclusion that he can. The operation of s82H(7) is, in my opinion, dependent (so far as is relevant to the facts of the present case) on there being evidence that at the time when the inspector measured the article, the package containing that article was marked with the name and address of some person purporting to be the packer thereof (s82D) and with a statement of the (purported) true measure of the contents (s82F), and furthermore that the inspector found that the true measure of the article was less than that stated on the package. Evidence of these matters brings into play the

provisions of pars.(a) and (b) of s82H(7). It is not necessary for the informant to show (either in relation to s82D or s82F) that the packing of the article complies with the regulations relating to the marking of packages: cf. *Australian Safeways Stores Pty Ltd v Gorman* [1973] VicRp 55; [1973] VR 570 at pp574-8; (1972) 28 LGRA 303.

Section 82D is not, but s82F is, expressed to operate only in respect of prescribed articles and on or after the appointed day. In respect of any prescribed article and on and after the appointed day, over and above the obligation imposed by s82D(1) to mark the package with the name and address of the packer or his principal (or with an approved brand) there is a further obligation imposed by s82F(1) to mark the package containing the article with a statement of the true weight or measure of that article. It is appropriate enough, therefore, to assume in respect of a package so marked that the marking was made in fulfilment of the statutory obligations imposed by s82D(1) and by s82F(1) and that the name and address (or approved brand) shown on the package as being that of the packer (or, in appropriate cases, his principal) will be authentic. In the circumstances, the "deeming" provisions of s82H(7) operate, ordinarily speaking, justly enough, in that the person whose name appears on the package as the packer (or the agent or packer) will, in fact, be the person responsible for having packed the article or the agent of that person.

When the article is not one to which s82F applies or the packing was done before the appointed day, or indeed if no day has ever been declared to be the appointed day, it cannot be assumed that the marking of the package was done in fulfilment of any statutory obligation, and there is not the previously mentioned basis for assuming that the name and address (or approved brand name) appearing on the package as that of the packer will be authentic. The question arises whether the "deeming" provisions of s82H(7) operate in such a case?

It is to be borne in mind that the offences created by subs(1) and subs(2) of s82H depend on it being shown that the true weight of measure of the pre-packed article is less than that stated on the package containing the article irrespective of whether the package containing the article is required by or under the Act to be marked with a statement of the weight or measure of the article: see s82H(3). In those circumstances, and bearing in mind that the provisions of s82H(7) appear to have been designed to cover the case where the actual seller establishes the defence created by s82H(6), there seems to be no justification for reading down the provisions of s82H(7) so as to preclude the "deeming" provisions from operating in cases where the package containing the article is not required by or under the Act to be marked with a statement of the weight or measurement of the article.

It was, therefore, permissible for the prosecution in this case to invoke the provisions of s82H(7) so as to show that the defendant company was a person who appeared from the marking on the package to have packed the article.

Provisions similar to s82H(7), namely subs(1) and subs(2) of s241 of the *Health Act* 1928 (as amended by the *Health Act* 1931, Act No. 4010) were invoked by the prosecution in *Iles v Orr* [1935] VicLawRp 40; [1935] VLR 203; [1935] ALR 307, to show that the defendant Orr was the seller of the goods the subject of the charge. The only reference to the defendant Orr contained in the label was to be found in the words "Distributor: Leslie Orr, 7 Rankin Lane, Melbourne". Mann J (VLR at p221; ALR at p314) said:

> "In my opinion, it did not appear from the words quoted that the defendant was the wholesale supplier of the goods in question. It does not so 'appear', within the meaning of the Act...unless what is seen on the label is not reasonably consistent with any other construction."

Irvine CJ said (VLR at p215; ALR at p311):

> "in a criminal charge it is not enough to show that the statutory description of a condition of liability may be read widely enough to include what has taken place, but that it must be so read."

Applying the test suggested in *Iles v Orr*, *supra*, the evidence given by the informant, and a view of the bottles produced in evidence, justified the magistrate in applying s82H(7) so as to deem the defendant company to have been effected the sale to the inspector.

One circumstance should, however, be mentioned: s82C(1) specifically provides that nothing in Division 4 (sc. of PtV of the Act) applies to or in relation to "an exempted article"—a term which by s82C(4) is defined to mean, *inter alia*, an article or any description that is wholly exempted by the regulations from the operation of this Division. In my opinion, it was necessary for the informant to establish that the article here in question had not been wholly exempted by regulations from the operation of Division 4: cf. *Barritt v Baker* [1948] VicLawRp 85; [1948] VLR 491; [1949] ALR 144; *Donoghue v Terry* [1939] VicLawRp 27; [1939] VLR 165; [1939] ALR 215; *Bell v Hyde* [1939] VicLawRp 44; [1939] VLR 300; [1939] ALR 386. No evidence was given to show that no such regulation had ever been made; nor were any regulations tendered to show that though some articles had been exempted by those regulations, fruit juice was not one of the articles so exempted. In those circumstances, it would have been open to the defendant to object that the informant had not established beyond reasonable doubt that the article here in question (fruit juice) was not, at the relevant date, an exempted article, and to have contended that, on the evidence, the defendant was, in law, entitled to an acquittal.

This objection, however, was not taken below. It was an objection which if taken could have been met by the informant adducing further evidence, directed to this point. Furthermore, it is not an objection explicitly taken in the grounds of the order nisi. Section 158 of the *Justices Act* 1958 requires that the order nisi "shall state the grounds upon which it is sought to review the conviction", and this particular objection is clearly not within grounds 1 and 2. It becomes necessary to consider whether it is within ground 3.

Having regard to the course of the proceedings below as disclosed in the affidavit of the defendant's manager, to the terms of grounds 1 and 2 and to the course of the argument before, ground 3 is, in my view, to be understood as asserting that the magistrate's decision was contrary to the evidence and the weight of the evidence challenging the reliability of the informant's measurements of the contents of each bottle of fruit juice. Ground 3 asserts, in effect, that the evidence for the defendant on this issue so greatly—so "overwhelmingly"—preponderated over the evidence of the informant that it can be said that the finding of guilt was a finding which a reasonable magistrate, understanding his responsibility, could not reach: cf. *Hocking v Bell* [1945] HCA 16; (1945) 71 CLR 430 per Latham CJ (diss.), at p440, and per Dixon J (diss.) at pp497-500. It asserts that the defendant was, as a matter of fact, not of law entitled to an acquittal and that the defendant was entitled to have conviction set aside and the case remitted for rehearing: cf. per Jordan CJ in *De Gioia v Darling Island Stevedoring and Lighterage Co Ltd* (1941) 42 SR (NSW) 1, at p5; 59 WN (NSW) 22, cited with approval in *Hocking v Bell*, *supra*, by Latham CJ (diss.) at p442, by Rich J at pp467-9; see also per McTiernan J in *Hocking v Bell*, *supra*, at pp502-3, and the judgment of the Privy Council in the same case, reported in [1947] HCA 54; (1947) 75 CLR 125, at pp131-2; [1948] 1 ALR 85. See also *Driver v War Service Homes Commissioner (No. 1)* [1924] VicLawRp 87; [1924] VLR 515 at p532 per Cussen ACJ; 30 ALR 375. Accordingly, I am of the view that the objection that there was no proof that the article was not an exempted article is not within the ambit of ground 3.

I am further of the view that this Court has no power to bring the objection within ground 3 by amendment under s158 of the *Justices Act* 1958: cf. *Mortimore v Stecher* [1971] VicRp 106; [1971] VR 866, followed in *Pruscino v Nibaldi* [1973] VicRp 9; [1973] VR 113; (1972) 27 LGRA 114. But if it were within power, there is a long course of authority that this Court will not, on order to review proceedings, give effect to a curable objection not taken below and not made a ground of the order nisi: see *R v Shaw; Ex parte Selim* [1883] VicLawRp 96; (1883) 9 VLR (L) 201; 5 ALT 70 (FC); *Noonan v Potter* (1892) 14 ALT 164; *Cameron v Moore* [1894] VicLawRp 18; (1894) 20 VLR 66; 15 ALT 232 (FC); *Wimmera United Waterworks Trust v Dunston* (1896) 18 ALT 42; 2 ALR 234 (FC), and *Jones v Lorne Sawmills Pty Ltd* [1923] VicLawRp 10; [1923] VLR 58; 29 ALR 8.

It follows from what I have said that neither the objection that there was no evidence that the articles were not exempted articles nor the objection that there was no evidence of a sale by the defendant at Colac can be brought within ground 3 of the order nisi either in the form in which that ground now stands, or by amendment. In any event, even if the objection now taken by the defendant were open on ground 3, as it presently stands, I am of the view that on the evidence; and applying the provisions of s82H(7), the magistrate was entitled, in law, to find that there was a sale by the defendant to the informant at Colac on 12 April 1972, as charged in the information. I turn now to examine the grounds proper of the order nisi.

Ground 1 of the order nisi is that "Having regard to the magistrate's finding that the temperature of the fruit juices, as measured, was about 40 degrees Fahrenheit and his finding that the measuring instrument used was calibrated at 68 degrees Fahrenheit, he ought to have found that there was no sufficient evidence within the meaning of s82H of the true measure of the fruit juices the subject of the charge".

The argument here was the inspector had not properly measured the fruit juices the contents of the 12 bottles purchased by him because he had used a measuring instrument calibrated at a temperature of 68 degrees F., whereas the temperature of the contents of the bottles, at the time of their measurement by the inspector, was 40 degrees F. There was evidence, which the magistrate accepted, that bottles containing about one pint at 40 degrees F. contained, on the average, 31 minims more when tested at 68 degrees F. The magistrate found, as a fact, that, on the assumption that the juices in the present case, when measured, were of a temperature of 40 degrees F., and that the measure has been calibrated when at a temperature of 68 degrees Fahrenheit, the difference in the two temperatures would produce an error in obtaining a measurement, in that a smaller volume would be shown. What the extent of the error would be did not emerge in the evidence. It was argued for the defendant that it was incumbent on the prosecution to show the precise extent of the error, and that in the absence of such evidence, the prosecution had failed to establish beyond reasonable doubt that the true measurement of the contents of the bottles was less than the measurement stated on the bottles.

Counsel for the informant pointed out that s82I(1) of the Act makes specific provision for certain pre-packed articles to be marked with the words "Net weight when packed" and that the bottles the subject of the information were not so marked. The provisions of subs(1), subs(5) and subs(6) of s82I show that the draftsman adverted to the possibility that the net weight of an article might, by reason of climatic conditions or evaporation, be subject to variation after packing. The extent of the permissible deficiency in weight in such cases is to be collected from the provisions of subs(5) and subs(6) of s82L. Allowance for some further margin of error may, perhaps, be made by a court, in appropriate cases, under s82N(5). There is, however, no suggestion in s82L that the weighing of the articles by the inspector is not to be done at the temperature prevailing at the time and place of weighing.

In relation to s82H, a permissible deficiency in weight is to be collected from the provisions of s82H(5). Again there is no suggestion that the weighing or measurement must be done at other than the temperature prevailing at the time and place of measurement. Considerations of convenience and the effective enforcement of the Act support the view that Parliament envisaged that the weighing or measurement would be done at the room temperature then prevailing.

Ground 1 of the order nisi involves, however, a further question, which the magistrate stated as being whether the temperature of the measure and the temperature of the article measured had to be equated. A further question is whether the temperature of the article to be weighed and of the measuring instrument must be brought up to, or down to (as the case may be), the temperature at which the measuring instrument was calibrated.

As the magistrate pointed out, in his careful reasons for judgment, "there is no special provision in the Act relating to allowances for fluctuation in measurement of the contents of a pre-packed article according to variations between the temperature of the measuring instrument and that of the article measured". As the magistrate further pointed out, if the temperature of the article to be measured (and, it might be added, of the measuring instrument) had to be brought to the temperature at which the measuring instrument had been calibrated, routine tests by an inspector would be much more difficult to make. Almost certainly they would take an inordinate length of time, and the day-to-day activities of the inspector in weighing and measuring articles packed for sale would be severely hampered.

I consider that the magistrate was correct in concluding that there was no requirement that the temperature of the article to be weighed (and of the measuring instrument also) had to be brought down to (or up to) the temperature at which the measuring instrument had been calibrated. In my view, the measurement made on the measuring instrument at the temperature prevailing at the time and place of measurement is, for the purpose of proceedings under s82H, to be taken as the "true measure" of the article measured. It follows that the extent of the discrepancy

between the measure so arrived at and the measurement which would have been arrived at had the article to be measured and the measuring instrument been brought to the temperature at which the instrument had been calibrated is to be disregarded as irrelevant. The measurement in fact recorded on the measuring instrument at the time and place of measurement is to be taken, for the purpose of determining liability under subs(1) or subs(2) of s82H, as the true measure of the article in question.

Ground 1 of the order nisi, therefore, fails.

In relation to ground 2, viz. that "on the evidence the juices referred to in the information were deemed to be of a true measure equal to the measure stated on the bottle or bottles containing it by virtue of s82H(5) of the *Weights and Measures Act* 1958", the argument presented depended on the fact that the overall deficiency in measure of the contents of the 12 bottles purchased by the informant did "not exceed five parts per cent of that stated" on the package (i.e. the bottle), and on the submission that provisions of pars.(a) and (b) of s82H(5) were to be construed as alternative rather than cumulative, the word "and" (occurring between those paragraphs) being read as "or". The condition prescribed by par. (a) having been satisfied, it followed (so the defendant's argument proceeded) that the contents of the 12 bottles were by force of s82H(5) to be "deemed to be of a true...measure equal to the...measure stated on the package".

As a supporting argument, it was contended that on the facts in this case no article "was taken by an inspector", or, alternatively, that if 12 articles were "taken by" the inspector they were not taken by him "at random". The conditions of par.(b) not having been complied with, there was no scope for the operation of par.(b) and the true measure of the articles sold to the informant was to be determined by the application of par.(a) alone.

In the present case, the evidence indicates that altogether 13 bottles were purchased, the contents of 12 bottles being measured, the contents of the thirteenth not being measured.

The evidence further shows that all the 12 bottles whose contents were later measured, were selected by Bruce Tomkins, who took them from the dairy's refrigerator. There is no evidence as to who selected the thirteenth bottle or whether it was procured from the refrigerator, nor is there any finding by the magistrate on this point.

In my view, however, the evidence shows that the informant made two separate purchases—one of 12 bottles for the purpose of measuring the contents of each of those bottles, and the other of one (the thirteenth bottle) for the purpose of weighing the inside surface of the measuring instrument before proceeding to measure the contents of each of the (other) 12 bottles. I doubt whether it can, on the evidence, in this case, be said that the packages (bottles) were "taken" by the inspector within the meaning of s82H(5)(b). I am disposed to the view, although I am not to be taken as deciding, that the word "taken" refers to the case where the inspector exercises the right of search, of examination, weighing or seizure conferred by s63 of the Act. I do not find it necessary to determine whether the evidence in this case justifies a finding that the inspector was exercising the power of "demanding" and "procuring" the goods within the meaning of s63(e), or whether, if so, those goods could be regarded as "taken" within the meaning of s82H(5)(b). Certainly I think the phrase "taken at random by an inspector" imports a selection by the inspector out of an "available" number of packages in excess of 12, that selection being made haphazardly, i.e. determined by or dependent on mere chance, without definite aim, purpose or method. The obvious purpose of par.(b) is to ensure fairness of sampling where the selection of the packages to be sampled or measured is made by the inspector. If there are more than 12 packages available for selection, the inspector must take at least 12, and those 12 must be "taken at random". If there are fewer than 12 but not fewer than six packages, the inspector must "take" all those packages.

There is, in the present case, no evidence as to how many packages (bottles) in excess of 13 were in the refrigerator, available to be taken. Assuming, however, that there were in fact more than 13 packages (bottles) available for selection, it was Tomkins and not the inspector (informant) who made the selection of the 12 bottles and of the one bottle out of the total number of available bottles. To that extent the 13 bottles were "taken at random" by the inspector, in that he accepted the selection made by Tomkins. Furthermore, it there were, in fact, two separate purchases—one of 12 bottles and the other of one (thirteenth) bottle, the selection (or appropriation by the vendor

to the sale) of the 12 bottles and the thirteenth bottle having in each case been made by Tomkins, each of those bottles may be regarded as having been "taken at random" by the inspector.

On the evidence there was an "average deficiency" (of approximately 16 minims) in respect of each of the 12 bottles measured by the inspector, and, therefore, the conditions of par.(b) have not been complied with.

If the word "and" occurring between pars.(a) and (b) of s87H(5) is to be given its ordinary meaning, the defendant has failed to satisfy the conditions required by that sub-section. Counsel for the defendant argued, however, that the word "and" should be construed as meaning "or". It is, however, significant that in this same legislation there are cases where the conditions of exculpation have been expressed to be alternative, the word "or" being expressly used—as e.g. in s82I(6)(c), whereas in other cases the conditions have been linked with the words "and"—as e.g. in s82I(5), and in s82H(5). It is to be assumed that the draftsman was alive to the distinction between the word "and" and the word "or", and that the legislature deliberately approved of his draft, which used the word "and" in s82H(5). The word "and" must, therefore, be given its ordinary meaning in that sub-section.

In my view, subs(5) of s82H is intended to be exculpatory of a defendant who has sold or packed or caused or permitted to be packed, a pre-packed article whose true weight or measure is less than the weight or measure stated on the package. The "true weight or measure" means the exact or precise weight in fact of the pre-packed article in question: cf. *McKenzie v Blackwell* [1921] NZLR 302. It was no doubt realized, that with mass production of pre-package articles, individual variations in weight or measure might occur, and that it would be unjust to penalize the defendant for a deficiency in true weight or measure which might fairly be regarded as untypical. Accordingly, an exculpatory provision was inserted—subs(5)—similar in character to, though not, of course, identical with, the provisions of s6(1), s6(2) and s6(4) of the *Bakers and Millers Act* 1893 (Act No. 1332) considered in *Graham v Reith* [1905] VicLawRp 80; [1905] VLR 541; 11 ALR 301; 27 ALT 37. I may add that I do not consider that either *Graham v Reith* or *Clounsey v Sullivan* [1925] VicLawRp 11; [1925] VLR 111; 31 ALR 43; 46 ALT 141, to which Mr Fagan referred to are of any relevance on the facts of this case.

In the present case, in no case was the deficiency in any one bottle in excess of five per cent, and indeed in all cases but one the deficiency was less than one per cent. Of 12 bottles, six showed a surplus and six a deficiency, but, on the average, there was a deficiency.

In my view, the effect of the legislation is that notwithstanding that the "true measure" of six of the pre-packed articles was less than the stated weight, nevertheless the defendant could escape liability only provided it could bring itself within both par. (a) and par. (b). In the present case, the evidence showed that the deficiency was in no case in excess of five parts per cent of the stated weight, but there was an average deficiency in the contents of the 12 pre-packed packages purchased by the inspector. The defendant, therefore, failed to bring himself within both par. (a) and par. (b) of subs(5), and the magistrate could not, therefore, have lawfully held that the pre-packed articles (the juices) referred to in the information were to be deemed to be of a true measure equal to the measure stated on the package. Ground 2 of the order nisi therefore fails.

As to ground 3, I am of the opinion that the finding of the magistrate was open to him on the evidence. It is impossible to say that the magistrate was bound to accept all the criticisms advanced against the informant's measurements or that the reasons he gave for accepting the informant's measurements are invalid.

All three grounds of the order nisi having failed, the consequence is that the order nisi must be discharged. The formal order, therefore, will be that the order nisi granted by Master Jacobs on 18 August 1972 will be discharged. The informant's costs of and incidental to the order nisi, including any reserved costs, must be taxed and when so taxed paid (up to the statutory limit of $200) by the defendant. Order nisi discharged.

Solicitors for the defendant: Nicholas O'Donohue and Co, as agents for Fallaw and Henderson.
Solicitors for the informant: Sewell and Sewell.