

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 193 of 1992

Brisbane

[B.C.C. v. Smith]

BETWEEN:

JOHN ANDREW SMITH
(First Applicant) Appellant

- and -

CHRISANTHOS KOSTOPOULOS
(Second Applicant) Appellant

- and -

THE DIRECTOR-GENERAL OF HEALTH AND
MEDICAL SERVICES
(First Respondent)

- and -

THE BRISBANE CITY COUNCIL
(Second Respondent) Respondent

The President
Mr Justice Davies
Mr Justice Byrne

Judgment delivered 29/03/93

Judgment of the Court.

APPEAL ALLOWED. DECLARATION THAT THE VEHICLES REGISTERED NUMBERS OF-9454 AND OG-2452 ARE NOT "ARTICLES" WITHIN THE MEANING OF SUBSECTION 28(I) (a) (vi) OF THE FOOD ACT 1981. RESPONDENT TO PAY THE TAXED COSTS OF THE APPEAL AND OF THE HEARING BELOW.

CATCHWORDS: PUBLIC HEALTH - Food - Offences - Whether vehicle is "article" within meaning of

section 28(1) (a) (vi) Food Act 1981

**WORDS AND PHRASES - "article" - Whether
vehicle is "article" within meaning of
section 28(1) (a) (vi) Food Act 1981**

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Solicitors: Peter Channel and Associates for the
Appellants
City Solicitor for the Respondent

Hearing Date(s): 08/02/93

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REASONS FOR JUDGMENT - THE COURT

Judgment delivered 29/03/93

This is an appeal from a determination made in the Trial Division on 27 August 1992. The appeal seeks a declaration that two vehicles used by the appellant for the preparation and delivery of food are not "articles" within the meaning of

subsection 28(1) (a) (vi) of the Food Act 1981. The vehicles have been seized and detained by the respondent in reliance upon that provision, and it is common ground that it had no power to do so if the appellant's contention is correct.

For the purposes of this appeal, it is necessary to assume in favour of the respondent that there had been contraventions of the regulations in relation to each vehicle. It was not disputed for the appellant that such a breach was a contravention of the Act for the purpose of subsection 28(1) (a) (vi). Further, it was not in dispute that each vehicle is an "article" within paragraph (e) of the definition of article in subsection 5(1) of the Act, namely, a thing "... used for or in connexion with the sale or conveyance for sale of food". The respondent's argument depends entirely upon the importation of that definition into subsection 28(1) (a) (vi). However, as is made clear by the introductory words to subsection 5(1), the definition does not apply "where the contrary intention appears".

Potentially material sections of the Act include sections 21(1), (2), (5) and (7) 28(1) (a) (ii), (iii), (iv) and (vi), (e) and (5), 32, 33(5) and 43(3) of the Act which respectively provide:

"21. Powers with respect to unclean food store, food vehicle or appliance. (1) Where the Director-General or a Local Authority is satisfied from an inspection made or caused to be made by him or it or from the report of an authorized officer that any food store, food vehicle or appliance is in an unclean or insanitary condition, he or it may, by order in writing served on the proprietor of the food store, food vehicle or appliance, direct that the food store, food vehicle or appliance specified in the order be put into a clean and sanitary condition to the satisfaction of an authorized officer within such time as is specified in the order.

(2) Where, after the expiration of the period specified in an order under subsection (1), the food store, food vehicle or appliance to which that order relates has not been put into a clean and sanitary condition to the satisfaction of an authorized officer, the Director-

General or Local Authority concerned may, by a further order in writing served on the proprietor of the food store, food vehicle or, as the case may be, appliance, direct that -

- (a) the food store shall not be kept or used for the sale or preparation, packing, storing, handling, serving or supplying for sale of food;
- (b) the food vehicle shall not be kept or used for the sale or preparation, packing, storing, handling, serving, supplying or conveying for sale of food;
- (c) the appliance shall not be used in or for the sale or preparation, packing, storing, handling, serving, supplying or conveying for sale of food or in the cleaning of any other appliance.

until an authorized officer has given to the proprietor of the food store, food vehicle or, as the case may be, appliance a certificate in writing that the food store, food vehicle or appliance has been put into and is in a clean and sanitary condition.

...

(5) (a) Where an authorized officer upon the completion of an inspection by him of any food store, food vehicle or appliance following a request under subsection (4) refuses to give to the proprietor a certificate under subsection (2) in respect of the food store, food vehicle or appliance so inspected, the proprietor may, within 14 days after the date of the refusal, appeal to a Magistrates Court constituted under the Justices Act 1886-1980 against that refusal.

- (b) An appeal under this subsection -
 - (i) shall be instituted and conducted as prescribed;
 - (ii) shall not operate as a stay of a further order made under subsection (2);
 - (iii) shall not affect the liability of a person and its decision in subsection (7).

(c) The court shall hear and determine the appeal and its decision thereon shall be final and without appeal.

Costs of and incidental to the appeal shall be in the discretion of the court.

...

(7) Where a further order under subsection (2) has been served on the proprietor of any food store, food vehicle

or appliance and -

- (a) a certificate in respect of that food store, food vehicle or appliance has not been given subsequently under that subsection or deemed to have been given under subsection (vi); or
- (b) an appeal under subsection (5) against the refusal of an authorized officer to give a certificate has not been allowed,

a person who-

- (c) contrary to the further order -
 - (i) keeps or uses the food store for the sale or preparation, packing, storing, handling, serving or supplying for sale of food;
 - (ii) keeps or uses the food vehicle for the sale or preparation, packing, storing, handling, serving, supplying or conveying for sale of food;
 - (iii) uses the appliance in or for the sale or preparation, packing, storing, handling, serving, supplying or conveying for sale of food or in or for the cleaning of any other appliance; or
- (d) fails to comply with a condition of the further order,

commits an offence against this Act.

Penalty: \$5,000

...

28. Powers of authorized officers. (1) For the purposes of this Act and subject to subsection (vi), an authorized officer -

- (a) may, subject to subsection (2), enter any premises or other place in or at which he believes on reasonable grounds any article is sold or prepared, packed, stored, handled, served or supplied for sale and therein -

...

- (ii) may make an inspection and examination thereof and of articles, fittings or fixtures found including anything that he believes on reasonable grounds is used or capable of being used for or in connexion with the sale or preparation, packing, storing,

handling, serving or supplying for sale of any article.

(iii) may, subject to section 29(6), take and remove therefrom any article or samples of any article;

(iv) may open or order to be opened any container used for the conveyance of goods, or any package or other receptacle of any kind that he believes on reasonable grounds contains any article;

...

(vi) may seize and detain for such time as is necessary any article found by means of or in relation to which he believes on reasonable grounds this Act has been contravened;

(e) may stop, detain and search any vehicle used or that he believes on reasonable grounds is being or is likely to be used for the conveyance of any article or in or on which he believes on reasonable grounds any article is sold or prepared, packed, stored, handled served or supplied for sale and may exercise in relation to that vehicle any of the powers or authorities and discharge any of the functions or duties conferred or imposed upon him by or under this subsection.

...

(5) A person is not obliged under this Act to answer any question or give any information or evidence tending to criminate him.

...

32. Keeping and storage of certain articles. An article that has been seized and detained or taken or otherwise obtained under this Act by an authorized officer may, at the direction of an authorized officer -

(a) be kept and stored in, at or on the premises or other place or vehicle where it was seized and detained or taken or otherwise obtained;

(b) be removed to any other proper place and there kept and stored.

...

33. Remedy in respect of articles seized. (1) Where an article is seized and detained by an authorized officer under section 28, the person from whom the article was seized may within 3 days after the seizure make

application in the prescribed form to a Magistrates Court under the Justices Act 1886-1980 for an order directing the authorized officer to release the article seized by him.

(2) The applicant shall forthwith give to the authorized officer responsible for the seizure and detention of the article in question a copy of the application made under subsection (1).

(3) The court shall thereupon appoint a place, date and time for the hearing of the application and notify the applicant and the authorized officer thereon.

(4) Upon the hearing of an application under subsection (1) the court -

- (a) if it is satisfied that -
 - (i) the authorized officer responsible for the seizure of the article did not have reasonable grounds for believing that the article was one by means of or in relation to which this Act had been contravened; or
 - (ii) the article was not one by means of or in relation to which this Act had been contravened,

may set aside the seizure and detention of the article and order that the article be released from detention otherwise the court shall refuse the application and confirm the seizure and detention;

- (b) may make such order as it thinks fit in respect of the costs and expenses of and incidental to -
 - (i) the application; and
 - (ii) the removal and storage of the article seized.

And order made under this subsection shall be final and without appeal.

(5) Where the application is refused then, upon such refusal, or where an application is not made under subsection (1) then, upon the expiration of the period of 3 days after the seizure, the article seized shall become -

- (a) in the case of an article seized by an authorized officer who is an officer of a Local Authority, the property of the Local Authority; and
- (b) in the case of an article seized by an authorized officer who is an officer of the Department of Health, the property of Her

Majesty,

and shall be destroyed or otherwise disposed of in the manner determined by the Director-General.

...

43. Power of court to order forfeiture. (1) A court -

(a) that convicts a person of an offence against this Act; or

(b) before which a person is charged with an offence against this Act of which he is found guilty or to which he pleads guilty and in respect of which a conviction is not recorded,

may order that -

(c) the article by means of or in relation to which the offence was committed; or

(d) any similar article belonging to and found in the possession of the defendant at the time of the commission of the offence,

be forfeited to Her Majesty.

(2) Subject to subsection (3), a court, in addition to exercising the powers conferred upon it by subsection (1), may, upon the application of an authorized officer and such notice as the court determines being given to such persons as the court determines, order that any article seized or any article of a nature similar to that of an article seized by that officer under this Act found with the article so seized be forfeited to Her Majesty.

(3) A court is not empowered to order forfeiture of an article under subsection (2) unless it is satisfied that the article is one by means of or in relation to which this Act is or has been contravened.

(4) Every article forfeited to Her Majesty under this Act shall be disposed of in the manner determined by the Minister."

There are sufficient indications that the definition of "article" in subsection 5(1) is not meant to apply when the word "article" is used in subsection 28(1) (a) (vi).

A number of these indications appear in subsection 28(1) (a) itself. Thus, for example, there are difficulties in substituting vehicle or thing "used for or in connexion with the sale or conveyance for sale of food" in the introductory words

to paragraphs (a) and sub-paragraphs (ii), (iii) & (iv). Since the introductory words to paragraph (a) seem intended to control the following sub-paragraphs, the tension between the apparent meaning of "article" there and the respondent's argument is of particular importance.

Added to this is the circumstance that, if the respondent is correct, there is substantial overlap between section 21 and subsection 28(1)(a)(vi) and considerable difficulty in reconciling the operation of those two provisions in that area of overlap. Many, perhaps most, breaches of the regulations in relation to a vehicle, including most, if not all, breaches alleged in this case, will involve the "unclean or insanitary condition" of the vehicle. According to the respondent's construction of subsection 28(1)(a)(vi), this is an offence for which the vehicle may be forthwith seized and detained. However, under section 21, provision is made for notices to put the vehicle into a clean and sanitary condition and it is after a second notice is not complied with that an offence is committed for which a penalty is provided (subsection 21(7)). It is difficult to integrate these specific provisions with respect to a vehicle in an unclean or unsanitary condition with a power to seize the vehicle immediately because it is in breach of the regulations and thus an "article ... in relation to which ... this Act has been contravened."

If the respondent is correct, further overlap which is unlikely to have been intended would occur within subsection 28(1) between paragraph (a)(vi), treating a vehicle as an "article", and paragraph (e), which is concerned with a "vehicle used ... for the conveyance of any article or in or on which ... any article is sold or prepared, packed, stored, handled, received or supplied for sale"

While it is unnecessary to elaborate, section 32 provides another example of a provision in which the word "article" may not bear the defined meaning.

Finally, there is the consequence of the respondent's

contention to be taken into account against its favoured construction. Under section 43, the Court may order forfeiture upon conviction for an offence, including a contravention of the Act as provided for in subsection 21(7). However, an "article" which is seized under section 28 is automatically forfeited under section 33 unless an application for the release of the "article" is made within 3 days and, on the application, the Court is satisfied that there was no proper basis for the seizure. It can scarcely have been contemplated by the legislature that an expensive vehicle may be lost in this way for any breach of the regulations, however minor.

The appeal should be allowed and the declaration sought by the appellant made. The respondent must pay the taxed costs of the appeal and of the hearing below.

