CASE NOTES

RIVER MURRAY POLLUTION

Major issues are sometimes resolved in minor forums. Such was recently the case in respect of litigation before the Swan Hill Magistrates' Court. The long debated question of jurisdiction over the Murray River was raised directly in the case of two prosecutions pursuant to section 39(1) of the *Environment Protection Act* 1970 (Victoria).

The facts before the court were these. The defendant company owned and occupied a site in Swan Hill on which it operated a factory. It had entered into a contract in Melbourne with a large petroleum company for the supply of furnace oil to the factory. The petroleum company subcontracted the task of delivering the oil from Melbourne to Swan Hill to a firm operating under a business name, the registration of which had lapsed some years earlier. The proprietor of the business was the second defendant. Pursuant to the contract oil was being delivered by road tanker to the factory. The tanker was standing upon a concrete apron within the factory premises and pumping oil to an inlet point in the wall of a building. Apart from the tanker driver, no one else was present. A short time after the transfer started the hose flexed and subsequently the camlock on the tanker was forced off by a build up of pressure in the hose. A quantity of oil spilled onto the concrete apron from where it flowed by natural gravitation to an open stormwater drain only a few metres away. The tanker driver, in an effort to clean up the spilled oil commenced to hose it to the stormwater drain by means of a hose provided by an employee of the company. At no time was he informed, nor was he aware that the stormwater drain led to the Murray River some 300 metres away. The oil and water passed through the stormwater system and produced a substantial slick on the river.

The defendant company was charged with permitting waters to be polluted so that the physical condition of the waters was so changed as to make part of the waters unclean. The second defendant was charged with an identical offence, though it was alleged that he caused rather than permitted the pollution. In opening the prosecution case, the author, who appeared for the E.P.A. indicated that the waters cited in the informations were both the waters of the Murray River and the open stormwater drain. (Section 4 of the *Environment Protection Act* defines "waters" to include a drain.) The prosecutor was called upon by Solicitors acting for both defendants to elect which waters the charges related to and amend the informations accordingly. That application was successfully resisted on the basis of section 218 of the *Justices Act* 1958, which provides that a description of an offence in the words used by the Act creating the offence shall be sufficient in law.

In closing its case on the second day of the hearing the prosecution indicated that in respect of the defendant company, it relied upon the provisions of section 63(2) of the *Environment Protection Act.* That section deems the owner or occupier of trade premises guilty of an offence where the offence arises from the discharge of waste or pollutants from the trade premises. Both defendants made similar "no case submissions".

It was submitted on behalf of the defendant company that section 63(2) only applied where the primary offence of polluting waters was made out and not to an offence, by it, of permitting the pollution. It was further submitted: that oil was not a waste or pollutant, that in the absence of expert evidence the court should not find that it made the waters unclean, or caused a physical change in the waters, that both the waters of the river and the drain were unclean anyway, and that the definition of "waters" in section 4 of the Act excluded man made drains. It was also contended that there was no evidence that the defendant company carried on a trade at the site and thus, did not attract the provisions of section 63(2).

A second line of submission related to the word "permit" and the court was referred to an extract from the joint judgement of Winneke C.J. and Smith J. in *Chappell* v. *Ross & Sons Pty Ltd.*[1] That extract reads as follows

> "We think that in accordance with the natural use of language it (permits) involves not only a right or capacity on the part of the permittor to prevent the contravention, but also a state of mind amounting to consent to, or acquiescence in, the contravention. And consent or acquiescence must include an element of knowledge or foresight."

On behalf of the second defendant it was further submitted that he did not "cause" the pollution because he had no knowledge of the consequences of his employees act in hosing the oil to the stormwater drain and that, in those circumstances the employer was not vicariously liable for the acts of his servant. Both defendants submitted that the court should take judicial notice of the fact that the Murray River was in New South Wales and that the *Environment Protection Act* did not apply to it.

The prosecution made answering submissions to the effect that:

(a) section 63(2) applied to the defendant company because there was evidence that it carried on a trade at the site in question and the word "offence" in these circumstances meant the primary offence of polluting waters pursuant to section 39, no matter how that offence was alleged to arise.

(b) reference was made to the definition of "pollutant", "pollution" and "waste" and it was contended that oil was a prima facie pollutant when discharged to water in significant quantities.

(c) it was not necessary to establish that waters were perfectly clean before it could be alleged that they were made unclean. It is only necessary to establish that the discharge of waste or pollutants made the waters less clean.

(d) by failing to supervise the transfer operation, by having no safety precautions such as an interceptor pit or bunding to trap and prevent

[1] [1969] V.R. 376, 382.

spillages from entering the stormwater drain, by constructing the concrete platform with a natural slope to the stormwater system and by allowing the driver to hose the oil to the drain, the defendant company permitted the waters to be polluted.

(e) insofar as the defendant company was concerned the application of sections 63(2) and 39(2)(b) rendered the offence one of strict liability and if such was the case, knowledge or mens rea was not relevant. Reliance was placed upon extracts from *Goodes* v. *G.M.H. Pty Ltd*[2] and *Alphacell Ltd* v. *Woodward*.[3]

The bulk of the prosecution submission related to jurisdiction over the waters of the Murray River. Apart from evidence of the oil in the drain and the fact that it passed through the drain on its way to the river, the substantial evidence of pollution was in the form of a slick in the middle of the main stream of the river. The prosecution submission on this aspect of the cases raised the following points:

(a) Acts 13 and 14 Vict. which separated the colonies of New South Wales and Victoria in 1850 left doubt as to the actual dividing line. As a result the New South Wales *Constitution Act* of 1855 (18 and 19 Vict.) sought to clarify that position and section 5 provided in part as follows

> "The whole watercourse of the said river Murray, from its source therein described to the eastern boundary of the colony of South Australia, is and shall be within the territory of New South Wales. . ."

However, the section went on to provide three circumstances in which it would be lawful for the legislatures of the colonies of New South Wales and Victoria to pass legislation relevant to the Murray River. Those circumstances related to the levying of customs duties, the regulation of navigation and the re-definition of the boundary by concurrent legislation.

(b) It was submitted that section 5 was intended primarily to clarify the actual boundary and achieved that by placing the river in New South Wales. It never intended to vest exclusive sovereignty over the river in the colony of New South Wales and in fact recognized three circumstances in which the Victorian legislature had jurisdiction over the river. The 1855 Act was not able nor intended to deal exclusively with the jurisdiction of the Victorian legislature. Obviously the jurisdiction of the Victorian legislature is given by section 1 of the Victorian *Constitution Act* of 1855 which provides that, it has jurisdiction to make laws "in and for Victoria in all cases whatsoever".

(c) The Victorian legislature has a number of rights and obligations with respect to the Murray River arising in part from contractual arrangements. The most significant of those agreements is the *River Murray Waters Agreement* of 1914, entered into between the States of Victoria, New South Wales and South Australia and the Commonwealth

[2] [1972] V.R. 386.
[3] [1972] 2 All E.R. 475.

Government. The Victorian Government ratified that agreement by the *River Murray Waters Act* 1915, as amended. That agreement established the River Murray Commission which, inter alia, supervises the drawing of water from the River by the States of New South Wales and Victoria. The 1970 amendment to the agreement, which is reflected in the 1970 amendment to the Victorian Act, imposed an obligation upon the contracting governments to exercise their respective jurisdictions to implement the amendments to the agreement. (See clause 3 of the agreement in the Schedule to the 1970 amending Act.) Clause 22 of the agreement related to the control of water quality in the river at Swan Hill and Merbein. It followed that the State of Victoria had not merely a right, but an obligation to take measures designed to maintain the quality of the water in the river, not merely for the benefit of Victorian users, but to honour its obligations to users on the New South Wales side and the downstream users in South Australia. Given those rights and obligations, a law of the Victorian Parliament which seeks in general terms to prevent the pollution of waters is a law "in and for Victoria" even in its application to the Murray River.

(d) On the facts of these cases all the acts or omissions giving rise to the offence occurred within Victoria and it was there that the offence had a substantial nexus, not with the State of New South Wales. The discharge of pollutants from the Victorian side by a company registered in Victoria and with its plant in Victoria, which happen to pass to the Murray River and there cause a condition of pollution, is an act punishable in Victoria under the provisions of section 39(1) incorporating section 39(2)(b) and applying section 63(2) of the *Environment Protection Act* 1970 (Victoria). Any extra-territorial application of the Victorian Act was a valid one. The court was referred to passages from the judgement of Kitto J. in *Welker* v. *Hewett*.[4]

The Magistrate, Mr J. F. Presnell delivered a carefully reasoned determination rejecting each of the defence submissions. He held that the provisions of section 63(2) of the Act were applicable to the defendant company. He was satisfied that a trade was carried on at the premises and that a pollutant namely oil was discharged from those premises. He held that the object of the section was to render the owner or occupier liable for the primary offence pursuant to section 39(1), that of polluting waters. On a reading of the Act as a whole and the authorities cited, the offence was one of strict liability in its application to both defendants.

Applying the definitions of the words "pollutant" and "pollution" in section 4 he was satisfied that the discharge of oil to the river produced an alteration to the quality of an element of the receiving environment so as to adversely affect the beneficial uses of irrigation and domestic supply. No technical evidence was required to establish that furnace oil was in the circumstances of the case a pollutant and thus, the discharge of oil prima

[4] 43 A.L.J.R. 410.

facie rendered the waters of both the open stormwater drain and the Murray River unclean.

On the submissions with respect to jurisdiction, he upheld that of the prosecution, finding that the watercourse of the Murray River at Swan Hill, including its southern bank was within the State of New South Wales. He was however, satisfied that the Victorian Parliament had a right to pass legislation with respect to the river. The cases from *A.G. (New South Wales)* v. *Macleod*[5] to *Welker* v. *Hewett*[6] recognized the extra-territorial application of legislation and on the facts before him there was a clear nexus with the State of Victoria. Victoria had an inherent right to part of the waters of the river and this fact was fortified by the contractual agreements it had entered into. The *Environment Protection Act* was an Act for the public benefit of the people of Victoria and he was led inevitably to the conclusion that the Victorian Parliament had the power to enact such legislation which applied to pollution of the Murray River.

At the conclusion of the defence cases each defendant was convicted. The defendant company was fined $900 with costs and the second defendant was fined $700 with costs. It appears to have been the first occasion on which a prosecution has been brought in Victoria for pollution of the main stream of the Murray River and whilst the precedent is no doubt a modest one, the submissions of counsel and considered judgement of the court will no doubt be of interest to many people. Professor Sandford Clark and Mr Ian Renard in volume four of their research project for the Australian Water Resources Council, at page 21 stated

> "The same doubts (i.e. jurisdictional doubts) hamper effective pollution control on the River Murray. As recent publicity in the press has testified, the problem is serious and inter-State co-operation is only on an ad hoc basis. It is not entirely clear whether the discharge of animal or industrial waste into the Murray from the Victorian side of the river should be prosecuted under Victorian or New South Wales legislation. The act of pollution might be said to occur either at the point of discharge (Victoria) or the point of entry into the river (New South Wales)."

At the time this article was being written there were moves afoot in both Victoria and South Australia to achieve greater water quality control over the waters of the Murray, through the River Murray Commission. The problem of jurisdiction was still of major concern. The Swan Hill Magistrates' Court may have answered that problem but it remains to be seen whether it will be taken up again in a higher forum.

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5 [1891] A.C. 455.
6 43 A.L.J.R. 410.
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DIRECTOR OF POSTS AND TELEGRAPHS v. *ABBOTT*[1] AND THE DEFENCE OF EXECUTIVE NECESSITY

In the recent action for damages for breach of contract, *Director of Posts and Telegraphs* v. *Abbott*, the facts were these: Abbott, the plaintiff, made written application on November 24th, 1971, to the PMG's department for telephone service at an office into which he planned to move on January 4th, 1972. His application contained the phrase, "Must be installed by 4 January for sure". Between Christmas and New Year the department installed some equipment at Abbott's new office, but his service did not become operative by January 4th, 1972. The reason for this was that PMG linesmen were on strike at the time and the department chose not to use other people to perform the striking linesmen's job of connecting Abbott's equipment to the telephone system. Abbott's service was finally made operative on February, 3rd, 1972, as soon as the strike had ended.

On these facts the Full Court of the Supreme Court of South Australia, reversing the Local Court of Adelaide, held, by a two to one majority, that the defendant was not liable.

Bright J., whose judgment was concurred with by Walters J., held: (1) that the department had accepted Abbott's offer of a contract by its conduct of having its employees install equipment at Abbott's new office; (2) that the acceptance prior to January 4th, 1972, of an offer containing the phrase, "Must be installed by 4 January for sure", did not mean that the department had promised to have Abbott's service operative by that date; (3) that there was instead only an implied promise by the department that the service was to begin within a reasonable time; (4) that the department had fulfilled this implied promise, taking into account the delay caused by the strike.[2]

It is submitted that holdings (2), (3) and (4) were wrong and that they took the shape they did only because of the majority's desire to find the defendant not liable in the circumstances which had arisen.

To deal first with the holding that the department had not promised to have Abbott's service operative by January 4th, 1972, Bright J. attempted to support his conclusion by reference to the presumed intention of the parties. First, he suggested that it had not been Abbott's intention that the contract contain a term whereby the department promised to have the service operative by January 4th, 1972. He characterized the insertion of the crucial phrase in the offer as "an intimation of what the respondent wanted, and wanted very much, but nothing more".[3] The only evidence he offered to justify this conclusion was that between the specified date and the date on which the service finally became operative, "the respondent,

[1] (1974) 2 A.L.R. 625.

[2] The dissenting Judge, Sangster J., was prepared to accept holding (1) (although he believed that the contract had been formed on the date Abbott had made his application for service), because he believed that the outcome of the case was the same regardless of which date of formation were used. He disagreed with holding (2).

[3] (1974) 2 A.L.R. 625, 631.