THE BOOKSELLERS CASE: SECTION 20 RE-EXAMINED

In the last issue of this Review[1] a note appeared commenting on the decision of the Trade Practices Appeal Authority (Dalglish J.) in the Fencing Materials Case.[2] It was suggested in the note that s.20 of the Trade Practices Act 1958 should receive a different interpretation from the one advanced by the learned judge. It was submitted that when a trade practice is challenged under s.20(d) of the Act, which relates to practices whose effect is or would be to "prevent or unreasonably reduce or limit competition in certain respects", the effect of the practice in question on the price which the public will have to pay as a result cannot be the test of the reasonableness or unreasonableness of a reduction or limitation in competition, but that it can properly be regarded as one of the factors to be taken into account.

The same argument was advanced by counsel for the appellant in Re The Associated Booksellers of New Zealand[3] and it is naturally gratifying to be able to record that it was accepted by the Authority, which allowed the appeal. Several passages in the judgment indicate that when it is alleged that a trade practice should be deemed[4] contrary to the public interest by virtue of s.20(d) the Trade Practices and Prices Commission "must look at the matter broadly and take all relevant factors into account."[5] The Commission's task, it was held, was exactly the same whether para (d) of s.20 was considered in isolation, or whether s.20 were viewed as a whole. The benefits and the detriments to the public must be balanced against each other. The learned judge, having reviewed all the evidence, framed his conclusion in this way:

1. Vol.3 No.3, p.176.
2. Re The Wellington Fencing Materials Association [1960] N.Z.L.R. 1121.
3. [1962] N.Z.L.R. 1057. R.C.Savage Esq., of the Crown Law Office, kindly lent me a copy of the decision before it was reported.
4. "Deemed" in the opening part of s.20 was construed to mean "held", Hawke's Bay Raw Milk Producers Co-op Co. v. New Zealand Milk Board [1961] N.Z.L.R. 218, 224, being referred to.
5. At 1064.

> "Balancing the possible benefits to be derived by the public from a reduction in prices[6] following the termination of the trade practice as to the price schedule against the likely detriments from the point of view of the general public interest,[7] it is my view that so long as the present conditions in the bookselling trade continue to exist the public interest is better served by the continuance of the trade practice than it would be by the termination of the trade practice."[8]

Space precludes a detailed commentary on the decision, but the following points are perhaps worth making in summary fashion:

1. The Commission had refused to speculate upon the consequences of free competition upon book prices. On appeal the Trade Practices Appeal Authority had no hesitation in assessing the probable consequences. This was not mere 'speculation' as there was a wealth of expert prophecy before the Court.

2. Restriction of competition as to price (as, in the Booksellers Case itself, by means of an agreement to observe the price schedule operated by the Association in respect of imported books) was, it was held, not the only facet of competition to be taken into account, as the Commission had apparently considered. Other facets, such as the services offered by booksellers, and the breadth of selection of books displayed were relevant considerations.

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6. Which, the evidence showed, would probably occur in respect of "quick-selling popular books of an ephemeral character." (at 1066).
7. The evidence suggested (inter alia):-
   (a) More important books would probably sell at a higher price.
   (b) Librarians would be forced to "shop around" for the cheapest prices at which to purchase for their libraries.
8. At 1067.

3. The actual manner in which the trade practice has operated in the past, and its probable operation in the future, are equally relevant: the Booksellers Case thus authoritatively sanctions the reception of evidence of the working out of the restrictive arrangement which it would be against common sense to exclude. As for the probable future consequences of the termination of the instant agreement, Dalglish J. accepted that:

   (a) Booksellers would probably cease to carry stocks of highly-priced educational and scholastic works.

   (b) Good bookshops would disappear from provincial towns.

   (c) Bookshops might be compelled to retire from the main streets of townsowing to reduction in turnover: this would reduce the effectiveness of their displays, and publishing firms in New Zealand would be imperilled in consequence.[9]

   (d) Fewer good books would be read.

4. As a result of the Authority's decision it may now be confidently asserted that the word "unreasonably", which appears in s.20, (a) to (d) of the Trade Practices Act 1958, does not import a purely quantitative test. "How great is the restriction on competition?" is not the only question to be asked.[10]

9. Plainly, no doctrine of remoteness of damage applies to Trade practices!

10. Despite Dalglish J's discussion of his earlier decisions, and his reconciliation of them with his viewpoint in the Booksellers Case, the reader may fairly be excused if he had gathered from the former that "unreasonably" had been given an exclusively quantitative interpretation.

A price schedule affecting 90% of the total number of books sold is not necessarily unreasonable.

5. The Authority decided that the word "only" in s.20 gave the Commission a discretion to decide whether a trade practice which came within one of the paragraphs in the section should be held contrary to the public interest. Thus, even after the balancing operation has been performed with an adverse result, the Commission and, on appeal, the Authority have a further discretion to uphold the practice as nevertheless in conformity with the public interest. In view of the general scheme of the Act, and the presence of "shall" in the section, this construction is very difficult to accept, and, with respect, requires reconsideration.

6. Reference was made in the previous note (at 190) to the possibility of pleading res judicata when the economic position had changed, and the Examiner[11] had initiated a fresh inquiry. Without fully discussing this question, Dalglish J. has indicated (at 1067-8) that the wording of the Act precludes such a plea, and this is definitely the preferable view. The Booksellers Case also underlines the tactical desirability, if one is defending a trade practice, of offering conciliatory undertakings to the Commission.

D.L.M.

11. Previously the "Commissioner of Trade Practices and Prices", whose functions are now discharged by an Examiner of Trade Practices and Prices.