

OTAGO AND SOUTHLAND OYSTER OPENERS - ORDER
STRIKING OUT PARTY TO AWARD

Dated 5/5/70.

In the Court of Arbitration of New Zealand, Otago and Southland Industrial District-In the matter of the Industrial Conciliation and Arbitration Act 1954; and in the matter of the Otago and Southland Oyster Openers Award, dated the 22nd day of December 1969.

Award - Interpretation of - Imperfect Drafting -
Powers of Amendment and Striking Out of Parties -
Oyster Openers

The bulk of the applicant firm's business was the receiving of orders for, and dispatch of, oysters to customers outside Otago and Southland. The Fish Shop Assistants Award covers workers who prepare oysters for retail. The Oyster Openers Award covers "establishments engaged in the opening of oysters for sale outside Otago and Southland".

Held, that

- (1) A wholesaler who operates only in Otago and Southland, is not subject to either award.
- (2) Where orders come from outside Otago and Southland, acceptance and sale will probably take place within those districts, if the original order was by letter or telegram. Hence the Oyster Openers Award will not include much of that business for which coverage was sought.
- (3) To avoid the legal implications of such imperfect drafting, would involve amending the Award in proceedings not suitable for such a purpose.
- (4) The Court was not disposed to include a dissenting party under a defective and unsatisfactory clause.

Entores Ltd v Miles Far East Corporation (1955)
2. Q.B. 327 noted.

In pursuance and exercise of the powers conferred upon it by section 162 (1) (a) of the Industrial Conciliation and Arbitration Act 1954 and after hearing the duly appointed representatives of the parties concerned, The Court Doth Hereby Order that the Otago and Southland Oyster Openers Award, dated the 22nd day of December 1969, shall be amended by striking out from the list of parties thereto the name of Talls Fish Supply, 136 Dee Street, Invercargill.

Dated, Tuesday, the 5th day of May 1970.

J.B. THOMSON,
Judge.

MEMORANDUM

This is an application by Talls Fish Supply Limited (to which firm we shall hereafter refer as Talls) to be struck out as a party to the Otago and Southland Oyster Openers

Award. The applicant was originally a fish shop in the ordinary sense. About three years ago it ceased to deal in ordinary fish over the counter though some is still sold in bulk orders to hotels and the like. Otherwise the firm deals in oysters only. It claims to be in substance a retailer. It says that it sells to hotels and restaurants in Invercargill to the extent of 10 per cent of its turnover, to three clubs in the North Island to the extent of another 10 per cent, and the remaining 80 per cent it sells by retail sales over the counter or by mail or telephone orders which are delivered to public transport for transmission to the customer. A considerable part of this 80 per cent will go out of Otago and Southland. It does not supply any retail shops for resale.

The membership rule of the Otago and Southland Oyster Openers and Other Depot Employees Industrial Union of Workers until August 1968 related to persons employed in connection with the opening, counting and preparation of fresh oysters for the wholesale trade. On the 16th August 1968 the Registrar of Industrial Unions approved of an amendment to this rule which enabled the union to cover persons engaged in the retail trade. The union in 1969 filed claims for a new award and cited a large number of retail fish shops. The New Zealand (except Northern Industrial District other than Gisborne Judicial District) Fish Shop Assistants Award, dated 20 August 1969 and current until 31 January 1971, relates to the retail fish trade which is defined to include the selling of oysters, and a shop assistant for the purpose of that award is defined as a worker employed in any capacity in connection with the preparation of goods in or for the shops of employers bound by the award. No specific rate for oyster openers is prescribed but it was not in dispute that oyster openers in the retail trade have been and still are usually paid by the sack and not by the dozen as are workers under the Oyster Openers Award. "Talls Fish Shop, 134 Dee Street, Invercargill" is an original party to the abovementioned Fish Shop Assistants Award.

Having amended its rules so as to include oyster openers in the retail trade the union then made an arrangement with the Shop Assistants Union the effect of which would have been that the latter union continued to cover employees who were engaged in oyster opening in fish shops if they were permanent employees, while the Oyster Openers Union would have covered seasonal employees. This arrangement was abandoned and in conciliation all the retailers were struck out as parties. Talls had been cited in a schedule comprising wholesalers or merchants and remained a party. Agreement was reached in conciliation that the description of the industry should be "establishments engaged in the opening of oysters for sale outside the Otago and Southland Industrial District" and the other terms of the award were also settled by agreement. Talls appear to have expressed some dissent from the proposed terms. The settlement was however submitted to the Court pursuant to section 130. To facilitate the operation of the agreement the Court made an award pursuant to the settlement on 22 December 1969 but reserved for hearing later an application by Talls to be struck out from the list of parties.

The description of the industry which the parties have used is difficult to interpret in a satisfactory way. In the first place it seems that anyone can start in business as a wholesaler operating in Otago and Southland only without being subject either to the Oyster Openers Award or the Fish Shop Assistants Award. No doubt the union agreed to the clause in question because the wholesalers cited do in fact operate outside Otago and Southland, but it is nonetheless an anomalous situation.

In the second place it is a clause of uncertain impact. If sales are made to persons at a distance who order by letter or telegram the acceptance of the purchaser's offer will probably be made by putting the goods on transport in Invercargill and the sale made in Invercargill. If the purchaser rings up it may be that the contract is made at the place where the customer is at the time (*Entores Ltd v Miles Far East Corporation*, 1955 2 Q.B. 327) but this proposition is not likely to affect the bulk of the orders. The award does not therefore really cover the sort of business which the parties must have had in mind.

The Court can readily accept the fact that they did not understand that this was the legal effect of what they had said and if it could see clearly and certainly what they

intended it could give the clause that meaning. But this is difficult. It does not seem satisfactory to imply after the word "sale" the words "to persons normally resident outside Otago and Southland", or "for consumption outside Otago and Southland". These interpretations are likely to catch many ordinary retailers who have been expressly excluded from the award. The substitution of "delivery" for sale would be inadequate because delivery would very often be to the purchaser's carrier in Invercargill. It seems to the Court that the parties were probably aiming at sales on terms that the vendor is to send the goods to a destination outside Otago and Southland. In the opinion of the Court this meaning cannot be attained by any ordinary process of interpretation. It would involve rewriting the clause and amending the award in proceedings not intended or suitable for the purpose.

It seems also that any rewriting would have to take into account the submissions made to the Court by the President of the Oyster Openers Union. He explained that the extension of its rules to include oyster openers engaged in the retail trade was an attempt to avoid evasion of the Oyster Openers Award under the pretext that the employer in question was engaged in the retail trade. His submission refers to "a new enemy to confront this Union - Mini Merchants". It is in effect submitted that Talls are merchants or wholesalers, not retailers.

The award avoids the use of the words "wholesaler" and "retailer", possibly because all the parties to the award will sell retail. In any event a clause, the meaning of which depends on the distinction between wholesale and retail selling, can involve difficulties of interpretation (see *Inspector of Awards v Smith and Smith Ltd*, 37 Book of Awards 1514; *Smith and Smith Ltd v Werry*, 38 Book of Awards 1114; and *Inspector of Awards v R. and E. Tingey and Co. Ltd*, 39 Book of Awards 616). It seems that the class of employer the union is aiming at is the person who sells in quantity to individual purchasers. The parties however have agreed to a description which has nothing to do with the class of business which is being conducted but relates to one characteristic only of the transaction, that is the place of sale or the destination of the oysters. The Court thinks that in adopting such a standard without regard to the nature of the sale the parties have produced an unsatisfactory result. Instead of enquiring into the real nature of Talls' business as compared with that of the other parties the Court is limited to a consideration of a single element namely the quantity of oysters it supplies outside Otago and Southland. No doubt all merchants or wholesalers do sell outside Otago and Southland but so could retailers and the identical enquiry which the industry clause in this award requires could be made in relation to a retailer whose character as such is not in question. A satisfactory industry clause should not be capable of this.

The Court made the award on the assumption that there was a settlement. The parties to the award will be bound by it, but the Court does not feel disposed to include a dissenting party under a clause which it can only regard as defective and unsatisfactory. The Court is not deciding whether or not Talls should or should not be subject to the same working conditions as the parties to the award. This matter is open, but settlement of the problem may have to await the making of a new award or, perhaps, be considered in an application under section 162 to amend the present award, though this course would introduce problems which it might be difficult to solve.

Meantime Talls' application is granted.

J. B. THOMSON,
Judge.