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IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 19 of 1983

Between:

SUREND PAL NANDAN

Appellant

- and -

PRICES & INCOMES BOARD

Respondent

Mr. G.P. Shankar for the Appellant
Mr. Sharma & Dr. Singh for the
Respondent

Date of Hearing: 7th November, 1983

Delivery of Judgment:

JUDGMENT OF THE COURT

Henry, J.A.

This is an appeal under Section 22(1) of the Court of Appeal Act. Appellant was charged in the Magistrate's Court with a breach of paragraph 2 of the Counter-Inflation (Application of Section 15) Order 1973. This provision required a landlord to give six weeks previous written notice to the Prices & Incomes Board of any proposed increase in any rent payable under any tenancy. The date of the offence alleged is April 14, 1981.

Appellant was the landlord of a flat in 9 Mariko Street, Suva, which was, on the date charged, let to one Sushil Chandra at \$400.00 per month. The previous tenancy of the flat had expired in February 1975. The rent was then \$325.00 per month. It is common ground that no notice of this increase in rent was given. The gravamen of the offence charged is that the rent of \$325.00 paid

until February 1975, which was the last relevant letting, was increased to \$400.00 on April 14, 1981 without the notice provided by the said order.

The Magistrate dismissed the charge. On appeal the learned Chief Justice allowed the appeal and sent the charge back for a continuation and completion of the trial before a new Magistrate - the Magistrate who originally heard the charge having left Fiji permanently. Appellant has now appealed against this order and contended that the charge should be dismissed.

The charge was laid on August 18, 1982. The relevant portions of the charge read as follows :

" Statement of Offence

Failing to give six weeks written notice to the Prices and Incomes Board of a proposed increase in respect of a letting of premises under a tenancy which the Counter-Inflation Act applies: Contrary to paragraph 2 of the Counter-Inflation (Application of Section 15) Order, 1973 and Section 33(1) of the Counter-Inflation Act No. 11 of 1973.

Particulars of Offence

Surendra Pal Nandan s/o Shiu Pal Nandan did on the 14th day of April, 1981 at 9 Mariko Street, Suva, increase the rent of a flat occupied by Sushil Chandra s/o Ramsay Haripal Ram Narayan t. tenant thereof under a letting made with the said tenant, such increase of rent being \$325.00 per month to \$400.00 per month without being first given six weeks written notice to the Prices and Incomes Board the proposed increase in rent under that tenancy. "

The Counter-Inflation Act (No. 11 of 1973) has been replaced by the corresponding Act which appears in Volume IV Cap. 73 of the Revised Laws of Fiji. There is some change in the numbering of the Sections but we propose to refer to the numbering in the 1973 Act. By Section 3 a

body corporate to be known as the Prices & Incomes Board, was established. It will be referred to as "the Board". The Board had wide powers of control over prices, charges, remuneration, dividends and rents. It is sufficient for this case to cite Section 8(a). It reads :

- " 8. The functions of the Board shall be -
- (a) to exercise any of the powers and carry out all of the functions and duties conferred or imposed upon it under the provisions of this Act. "

Sections 14 & 15 deal with the control of rents. Section 14(1) gives the Board general power to restrict increases in rent. It provides :

- " 14. (1) Subject to the provisions of section 36 of this Act, but notwithstanding the provisions of any other written law, the Board may, with the approval of the Minister, by order, restrict increases of rent in respect of the letting or continued letting by any person or class of persons (including the Crown) of any premises under any tenancy. "

In order to exercise the functions of the Board, and, in particular, under Section 14, Section 15 empowers the Board to require notification of proposed increases of rent. Section 15 reads :

- " 15. (1) The Board may, with the approval of the Minister in any case or class of case as appears appropriate, by order, make provision to require that at least six weeks' written notice is given to it by any person of any proposed increase in any price, charge, remuneration, dividend, or rent in time to consider whether the Board should exercise the powers conferred by this Act in order to restrict those increases.

(2) Any order made under the provisions of the last preceding subsection may provide that, until the end of the period given for consideration of the proposed increase by the Board, any implementation of the increase constitutes a contravention of the order. "

The requirement for the approval of the Minister appears to refer to the Minister of Finance. This requirement was inserted by the Act No. 19 of 1975 so it did not apply to the first order of 1973 which will be considered later but it did apply to all later orders.

The day on which the Act came into force, namely, on June 30, 1973, Legal Notice No. 71 was gazetted invoking the powers conferred on the Board by Section 15. We will now describe the salient features of this order and of subsequent relevant orders -

" A. The order of 1973 (Legal Notice 71), which we will call the 1973 order, contained the following paragraphs :

- 2. Six weeks written notice shall be given to the Prices and Incomes Board of any proposed increase in rent, any price, charge, remuneration, dividend or rent, except any increase authorised by any Price Control Order in force at the date hereof.
- 3. Until the end of the period of the notice referred to in the last preceding paragraph, any implementation of the proposed increase shall constitute a contravention of this Order.

B. An Order (Legal Notice No. 122) made on September 8, 1976 which will be called "the 1976 Order" provided as follows :

- 2. Twelve weeks' written notice shall be given to the Prices and Incomes Board of any proposed increase in any rent in respect of the letting or continued letting by any person

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or class of persons (including the Crown) of any premises under any tenancy to which the Act applies.

4. The Counter-Inflation (Application of section 15) Order, 1973 is hereby revoked.

C. An Order (Legal Notice No. 34) was made on April 22, 1981. It will be called the 1981 Order. The following provisions are important :

2. Six weeks' written notice shall be given to the Prices and Incomes Board of any proposed increase in any rent in respect of the letting or continued letting by any person or class of persons (including the Crown) of any premises under any tenancy to which the Act applies.
4. The Counter-Inflation (Application of section 15) Order, 1976 is revoked. "

It will be noticed that the period of time in paragraph 2 has not remained constant. In the 1973 Order it was six weeks; in the 1976 Order it was increased to twelve weeks but in the 1981 Order the period reverted to six weeks. To complete the history of the legislation, by an amendment to the Act in 1981, the period of six weeks in Section 15 was increased to twelve weeks and a new legal notice was immediately issued fixing a period of twelve weeks.

Of importance is the rule of statutory construction which applies when it is sought to give retrospective effect to provisions such as are relevant here. The rule is succinctly stated in *re a Solicitor's Clerk* [1957] 3 All E.R. 613. The following passage appears at p. 619 :

" In all edition of MAXWELL ON THE INTERPRETATION OF STATUTES it is stated that it is a fundamental rule of English law that no statute should be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by a necessary or distinct implication and this passage has received judicial approval by the Court of Appeal; see *West v. Gwynne* (1) [1911] 2 Ch. 1 at p. 15 per Kennedy, L.J. "

In Halsbury's Laws of England 4th Edition Volume 44 para. 923 it is stated that the presumption against retrospective effect applies in general to legislation of a penal nature. The legislation, now being considered including the said orders, is of a penal nature. None of the orders is couched in terms which will permit a retrospective construction. Each refers in particular, to rent being paid at the time when the order was promulgated and prospectively to any rent payable during its currency whether an increase in an existing rent or a new rent which comes into existence in respect of premises not let on the date of the order.

The intention of the act and the orders made under it, is clear. Existing rents, payable at the date of the order, are "frozen". If there is no such rent then payable but a tenancy is thereafter created, that rent is "frozen". Such rents will be referred to as "base rents". The orders do not, by reason of what we have earlier said, have retrospective effect. They control as on and from the date when promulgated, only base rents, and, of course, any permitted increase thereof. Any subsequent increase of a base rent is an offence unless the requisite notice has been given.

Applying these principles to the facts of the present case the position may be shortly stated. The base rent, whilst the 1973 Order was in force, was

\$325.00. When that order was revoked on September 8, 1976 the premises were no longer subject to a tenancy since the existing tenancy expired in February, 1975. When the 1976 Order came into force there was no base rent. The 1976 Order did not, on its proper construction, include the rent which was no longer payable after February, 1975. The premises were not again let until April 14, 1981 when the agreed rent was \$400.00. The new rent of \$400.00 became the base rent under the 1967 Order which was the order then in operation. Accordingly there had never been an increase in a base rent so no offence had been committed.

To meet the obvious answer which appellant had to the charge under the 1973 Order it was argued on behalf of the Board that the 1976 Order was ultra vires. This, so it was contended, left the 1973 Order still in force and accordingly an offence had been committed during the currency of that order. Just when, if ever, the 1973 Order was revoked was not stated, but, if the 1976 Order did not have that effect, then there has never been an express revocation of the 1973 Order.

The first time in the present proceedings when the question of ultra vires arose was in this Court. Counsel for appellant applied for an amendment of his grounds of appeal which raised the question of the 1973 Order having been revoked in 1976 - Counsel claimed that it was no longer a ground for an offence as charged. If Counsel had not raised the point the Court would have asked that it be argued as it was aware of the revocation clause in the 1976 Order and that it had not been dealt with.

The argument that the 1976 Order is ultra vires was based on two grounds, namely,

- "(1) That it fixed a period of time of not less than twelve weeks for the requisite notice whereas the statute gave the landlord a right to give not less than six weeks' notice, and,
- (2) That rent was not stated simpliciter but was in qualified terms. "

Ground (2) has no merit and is not worthy of any comment.

As to ground (1) it clearly deprives a landlord of a statutory right. That being so it is undoubtedly ultra vires.

The contention of Counsel for the Board was that, since para. 2 of the 1976 Order was ultra vires, then para. 4 revoking the 1973 Order was also ultra vires. The power of the Board to revoke any order was not in question. The power of revocation was one which the Board could exercise either with or without substituting a new provision for notice. In short there could be a simple revocation. It would be monstrous, if in a matter of such public importance (or in any instrument creating a criminal offence) the validity of the exercise of a power of revocation depended upon the validity of the substituted provision. The validity of such a substituted provision may well involve difficult legal issues. The Board undoubtedly considered for some years that the 1976 Order was valid. How, if the contention now put forward is correct, would a landlord know whether the 1973 Order or the 1976 Order governed increases in rent after 1976? The argument on behalf of the Board that its clear revocation of the 1973 Order is ultra vires, sounds ill in the mouth of the Board. It was an argument

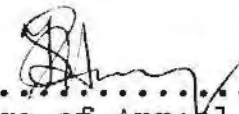
for which no legal authority has been cited. It is clearly contrary to principles governing criminal responsibility and must be rejected. The action of the Board and its advisers in pursuing a prosecution on a provision long extinct when the act complained of was committed, and, then seeking an amendment which, on the undisputed facts, did not disclose an offence, is not a proper and responsible exercise of its functions.

In the opinion of the Court the 1973 Order was validly revoked. When appellant created a new tenancy in April 1981 the rental of \$400.00 was a base rent under the 1976 Order and so was not an increase, but, in any event the 1976 Order did not contain a valid provision for notice to be given of a proposed increase. The appellant ought to be acquitted on both grounds. This finding disposes of all other points argued.

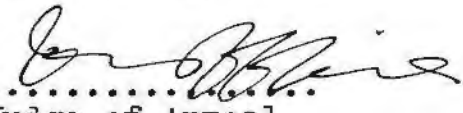
The appeal will be allowed. The order of the Supreme Court will be quashed and the case will be remitted to a Magistrate to enter a judgment of dismissal of the charge.



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Vice-President



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Judge of Appeal



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Judge of Appeal