A

TAM CHUNG HOI

v.

B

HOTEL LICENSING BOARD

[COURT OF APPEAL, 1975 (Gould V.P., Marsack J.A., Spring J.A.), 4th, 26th November]

Civil Jurisdiction

C *Appeal—refusal of Supreme Court to allow appellants to apply for order of certiorari—whether Court of Appeal, on allowing the appeal, has power to hear and adjudicate upon whole matter—Court of Appeal Rules r. 7—Court of Appeal Ordinance (Cap. 8) s. 13.*

Interpretation—Ordinance—whether Interpretation Ordinance 1967 s. 24 enables powers under Hotels and Guest Houses Act 1973 ss. 4 & 5 to be exercised by Hotel Licensing Board prior to the Act itself coming into force—Interpretation Ordinance 1967 s. 24—Interpretation Act 1889 (52 & 53 Vict, c. 63) (Imp) s. 37.

D Sections 1, 2, 3 and 13 of the Hotels and Guest Houses Act 1973 came into force on 1st August 1974, and the remainder of the Act on 1st January 1975. Sections 4 & 5 prevented the use of premises as a guest house without a licence, and made such licence dependant on the character of the applicant, and the use of the premises.

In December 1974, the appellant's application for such a licence was heard E by the Hotel Licensing Board and refused.

The appellant appealed to the Supreme Court submitting that the Board had acted without jurisdiction in that the enpowering sections 4 & 5 of the Act were not in force when the application for a licence was refused. The Supreme Court rejected the submission basing its decision on the Interpretation Ordinance 1967 s. 24—

F *Held* : 1. Section 24 Interpretation Ordinance did allow for powers conferred by an Act to be exercised between its publication and its coming into force. These were powers to make any appointment, to make any subsidiary legislation, to prescribe forms, or to do any other thing for the purposes of the Act, and might be exercised at any time after the publication of the Act, unless a contrary intention appeared.

G 2. The power of the Board to adjudicate upon applications for licences could only fall within the power to do any other thing for the purposes of the Act, but in the present case such a power did not fall within section 24. The *ejusdem generis* rule would be contravened in that section 24 related to matters which were subsidiary or auxillary to the main purpose of the new legislation and not to the main purpose itself. To decide otherwise would allow the Act to function almost to its fullest extent by virtue of the Interpretation Ordinance without the bringing of the Act into effect at all.

H 3. Although a quai—original jurisdiction was involved, the Court did have power to hear and adjudicate upon the whole matter. The appeal would, therefore be allowed and the determination of the Hotel Licensing Board would be quashed.

Cases referred to :

R. v. Minister of Town and Country Planning ex parte Montague Burton Co. Ltd. [1950] 2 All E.R. 282 ; [1950] 1 K.B. 163.

Usher v. Barlow [1952] 1 Ch. 255 ; [1952] 1 All E.R. 205.

R. v. Industrial Injuries Commissioner ex parte Amalgamated Engineering Union [1966] 2 Q.B. 21 ; [1966] 1 All E.R. 97.

Appeal from the Order of the Supreme Court refusing an ex parte application for leave to apply for an order of certiorari.

H. A. L. Marquardt-Gray for the appellant.

M. J. Scott & Q. Bale for the respondent Board.

Judgment of the Court (read by Gould V. P.) : [26th November 1975]—

This is an appeal from an Order of the Supreme Court refusing an ex parte application by the appellant for leave to apply for an order of certiorari. The order was sought for the purpose of removing into the Supreme Court and quashing a decision of the respondent Board on the 5th December 1974, whereby it refused an application by the appellant for a licence to keep a lodging house.

Such an establishment had been kept by the appellant for a considerable period but, until the provisions of the Hotels and Guest Houses Act, 1973, became operative, he was not required to have any licence for it. That Act received the assent of the Governor-General on the 25th October 1973, but by Section 1 it was to come into force on a date to be notified by the Minister in the Gazette : there was specific power to notify different dates for different sections, and accordingly, by Legal Notice 134/74, Sections 1, 2, 3 and 13 were brought into force on the 1st August 1974, and the remainder of the Act on the 1st January 1975.

Sections 1 and 2 contained provisions as to coming into force and as to interpretation. Section 3 constituted a Hotels Licensing Board and provided for its membership and meetings. By subsection (8) the Board was empowered, subject to the provisions of the Act, to regulate its own procedure. Section 13 empowered the Minister to make regulations for the better carrying out of the provisions of the Act and also for " the rules of procedure of the Board ". We would observe that such regulations as have since been made do not touch upon procedure in any way which could affect the Board's power to regulate its own procedure.

The main relevant provisions of the remainder of the Act, which, as we have said, came into force on the 1st January 1975, were as follows. By Section 4 the use of such premises as those of the appellant as a guest house was prohibited, unless the manager held a licence under the Section. The Board was empowered to grant such licences in its absolute discretion. Section 5 provides that no licence should be granted or renewed unless the Board was satisfied (inter alia) that the manager was of good character and a fit and proper person to run and conduct a hotel (which includes a guest house) and that the hotel or any part of it would not be run as a disorderly house or for illegal or immoral purposes. By Section 7 applicants to the Board and others were " entitled to be heard by the Board, to call evidence, and to be represented by counsel ". Section 8 provided for an appeal to the Minister against a refusal by the Board to grant or renew a licence (the Minister's decision not being subject to any appeal or review in any Court) and also for an appeal on a point of law to a first class magistrate. Section 10 provided penalties for breaches of the provisions of the Act and in particular for keeping or managing premises as a hotel without the licence required by Section 4.

During the interval between the 1st August 1974, and the 1st January 1975, it would seem that applications were invited from intending guest house keepers and were dealt with by the respondent Board. The appellant's application for a licence under the Act was heard by the Board on the 5th December 1974, and was refused. It would appear from the notes of the proceedings that objections had been received based on alleged use of the premises in question for immoral purposes.

After this refusal the appellant first lodged an appeal in the Magistrate's Court, but discontinued it and made the application to the Supreme Court with which we are now concerned. In the Supreme Court, as here, counsel for the appellant submitted that the Board had acted without jurisdiction in that the empowering Sections 4 and 5 of the Act were not in force when the application for a licence was refused. A second submission was that the Board had in any event departed from the *audi alteram partem* rule with the result that there had been a breach of natural justice. Both submissions were rejected.

In rejecting the first submission the learned judge in the Supreme Court based his decision on Section 24 of the Interpretation Ordinance, 1967, which, he said—

> " allows for power conferred by an Act to be exercised between its publication and its coming into operation. This is necessary and expedient ' so that the necessary machinery will function as soon as the Act comes into operation and things shall not come to a standstill '. "

He was quoting from the judgment of Tucker L.J. in *R. v. Minister of Town and Country Planning Ex Parte Montague Burton Ltd.* [1950] 2 All E.R. 282, 285.

In the submission of counsel for the appellant Section 24 of the Interpretation Ordinance 1967, does not apply. It reads—

> " 24. Where an Act is not to come into operation immediately on the publication thereof and confers powers to make any appointment, to make any subsidiary legislation, to prescribe forms or to do any other things for the purposes of the Act, such powers may, unless a contrary intention appears, be exercised at any time after the publication of the Act, but so, however, that any subsidiary legislation or any instrument made in exercise of such power shall not, unless a contrary intention appears in the Act or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation. "

We proceed to analyse this section. Its first condition is fulfilled in that the Hotels and Guest Houses Act did not come into operation immediately on the publication thereof. In such circumstances an Act may be looked at to see if it confers powers—

1. to make any appointment, or
2. to make any subsidiary legislation, or
3. to prescribe forms, or
4. to do any other things for the purposes of the Act.

For convenience we will refer to these subdivisions as classes.

Class 1, for example, would apply to Section 3(1) and (2) of the Act in question, which empowers the Minister to appoint a chairman, members, secretary and other officers of the Hotels Licensing Board. Classes 2 and 3 have not been exercised pursuant to this section. Class 4 is the only one which might possibly extend to cover the activity of the constituted Board in purporting to exercise functions under Sections 4 and 5. We will return to this.

If any such power is conferred it may be exercised at any time after the publication of the Act, subject to one limitation which applies generally to all the classes and one which applies only to " subsidiary legislation or any instrument. " The general limitation is contained in the words " unless a contrary intention appears ". The additional provisions in the case of " subsidiary legislation or any instrument " is to the effect that though (if the general restriction abovementioned does not apply) regulations, for example, may be made, they do not come into operation until the Act itself does, unless a contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation. The word " instrument " incidentally, used in this final part of Section 24 does not appear specifically in any of the classes, but is associated with " subsidiary legislation " by the definition of that phrase in Section 2.

It is now possible to compare Section 24 of the Interpretation Ordinance with Section 37 of the English Interpretation Act, 1889, which was the section interpreted in the case of *R. v. Minister of Town and Country Planning* (supra), which the learned judge in the Supreme Court relied on, and in the later case of *Usher v. Barlow* [1952] 1 Ch. 255. What we have called the " classes " are expressed rather differently but are in fact very similar.

They are—

1. to make any appointment
2. to make grant or issue any instrument, that is to say, any Orders in Council, order, warrant, scheme, letters patent, rules, regulations or by-laws
3. to give notices
4. to prescribe forms, or
5. to do any other thing for the purposes of the Act.

Classes 2 and 3 are both included (by definition) in the Fiji class 2. When we come to the limiting provisions, however, a difference is at once apparent. The provisions we have outlined in the Fiji section are there, but with a second general limitation, so that the two general limitations read—

> " ....that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, *so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof* ... "

The portion of that passage we have underline was in the forefront of the argument in both the cases we have cited, and much emphasis was placed upon the words " necessary or expedient ". In *R. v. Minister of Town and Country Planning* (supra, at p. 285) Asquith L.J. said that the only point of substance raised was the argument that Section 37 of the Interpretation Act, 1889, did not apply because the giving of the directions in question was not necessary or expedient for the purpose of bringing the Act of 1947 into operation. In *Usher v. Barlow* (supra) in which the principle of the earlier case was applied, there is the following helpful passage in the judgment of Jenkins L.J., at p. 262.

> " As pointed out by Tucker L.J. in the passage cited above, the section extends to a comprehensive enumeration of matters : ' order in council, order, warrant, scheme, letters patent, rules, regulations, or by-laws '. Clearly many of these matters are matters requiring to be dealt with under the Act when in operation, in order that it may operate effectively, rather than matters without which the Act cannot come into operation at all. Further the vital words of the section are ' so far as may be necessary

A or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof '. If the section had been confined to matters without which the Act could not come into operation at all, the words ' or expedient ' would, so far as I can see, have been not only otiose but wholly inappropriate. A matter without which an Act cannot come into operation at all is necessary for the purpose of bringing it into operation, and cannot be anything less than that. A matter which is merely expedient for the purpose of bringing an Act into operation is a matter B without which the Act can come into operation, but with which the Act will come into operation more conveniently or effectively. ''

As we have pointed out the '' vital words '' quoted do not come into the Fiji Section 24 at all.

Though for the reasons given it may be that the learned judge put more than justifiable weight on *R. v. Minister of Town and Country Planning,* it and C *Usher's* case do serve as a guide to the general purpose of such sections in the Interpretation Acts. Their design is clearly to enable legislation to operate as effectively as possible from the time it comes into force. We have pointed out that the second general limitation in the English section is absent from the Fijian Section 24 and it could be argued that the latter is to that extent the more unrestricted section. As regards the present case, however, we are not concerned with subsidiary legislation but with the power of the Board to D adjudicate upon applications for licences, which, if it comes within Section 24 at all, must be within Class 4—power to do any other things for the purposes of the Act. We do not think that such a power falls within the section, for two reasons.

The first is that so to regard it would clearly contravene the *ejusdem generis* rule. Classes 1 to 3 of the section all relate to matters which are subsidiary to the main purpose of new legislation in that they are to facilitate its operation E and avoid administrative vacuums. Appointments, forms, subsidiary legislation, which is defined to include by-laws, notices, orders, proclamations, regulations, rules and other instruments, form a category of this subsidiary or perhaps auxiliary nature. To such a category the power to fulfil the main or the only purpose of the Act is foreign ; and the general words of what we have called Class 4 above must be construed accordingly. Another approach to the same question is expressed thus in *Craies on Statute Law* (7th Edition) at p. 182—

F '' In accordance with this principle of construction, it has always been held that general words following particular words will not include anything of a class superior to that to which the particular words belong. ''

If our view that the *ejusdem generis* rule applies is incorrect it would seem to follow that this particular Act could have been made to function almost to its fullest extent by virtue of the Interpretation Ordinance, without bringing G the Act into effect at all.

Our second reason for this opinion rests upon the general limitation in Section 24 imposed by the words '' unless a contrary intention appears ''. Such an intention would normally be looked for in the Act which is the subject of the inquiry, but it is to be observed that while the latter part of Section 24 uses the words '' unless a contrary intention appears in the Act '' ; the H last three words of that phrase do not appear earlier. Perhaps too much should not be put on that, but it might indicate that in construing the earlier phrase the surrounding circumstances and the enactments of the Minister as part of the legislative machinery, could be looked at.

So far as the Act is concerned Section 4(5) presents an impediment to a construction which would permit the Board to exercise powers under Section 4 prior to its being brought into force. It states that every licence shall be for a period of one year from the date of its issue. Premature exercise of power to issue a licence would bring into being a licence for which there was no authority in law. Further the right of appeal under Section 8 against a Board's adjudication would not be available, as it could not possibly be described as a power to do " any other thing for the purposes of the Act ". We think this aspect of the matter is in itself a sufficient indication of a contrary intention, though it might serve also to reinforce our view of the *ejusdem generis* argument.

It should be added that the Minister did not rely upon the Interpretation Ordinance in his endeavours to get the machinery of the Act operating. We have already mentioned Legal Notice 134 whereby Sections 1, 2, 3 and 13 were brought into force on the 1st August 1974, and the remainder of the Act on the 1st January 1975. A week later he made the Hotels and Guest Houses Regulations, 1974, in exercise of his powers under Section 13 (Legal Notice 135), providing for applications to be sent to the Board, 90 days (this was later modified) before the licence was required to commence. Copies of applications and plans were to be sent to the Commissioner of Police and others; fees and forms were prescribed. This made it clear that all preliminary steps could be taken in time to enable the Board to be in a position to issue licences on the 1st January 1975, when the Act as a whole came into force. Administrative vacuum was thus kept to a minimum. What the Board could not do, however, was proceed to the final step of adjudicating and issuing a licence before the 1st January 1975, and we think it follows that a refusal of a licence before that date must equally be a nullity.

We do not need to express any concluded view upon the argument that the Board had departed from the requirements of natural justice in dealing with the application, though from our perusal of the report of the proceedings, it appeared to be a case in which the Board might well have offered an adjournment to enable the appellant to produce evidence which his representative suggested could be obtained.

The next question is what order should be made. According to our finding the refusal to grant a licence was made without jurisdiction and should be quashed. This of course does not in any way indicate that the appellant was or is entitled to a licence, but that his application for one has not been effectively dealt with. A new application could be made or the old one could be dealt with *de novo*.

Procedurally, this Court is sitting on appeal from the refusal of the Supreme Court to give leave to apply to the Supreme Court for an order of certiorari. If we merely allow the appeal the result could be complete futility, in that issues upon which we have heard full argument would be referred back to the Supreme Court, and possibly back again to this Court on another appeal. Fortunately it seems that this is not necessary. We are obliged to Mr Scott of Counsel for the respondent Board for making available (by consent of all counsel) after the hearing, a reference to *Regina v. Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union* [1966] 2 Q.B. 21, in which the Court of Appeal in England, in almost similar circumstances, held that it had power to hear and adjudicate upon the whole matter, notwithstanding that the exercise of what we might call a quasi-original jurisdiction was involved. We think that while this decision was based largely on established

practice, we are in this Court quite entitled to follow it. Rule 7 of the Rules
A of this Court entitles us to follow the practice and procedure of the Court of Appeal in England in cases not otherwise provided for, and in Civil Appeals by Section 13 of the Court of Appeal Ordinance (Cap. 8) we have for the purposes of the determination of any appeal, the jurisdiction of the Supreme Court of Fiji.

For these reasons we allow the appeal and quash the determination of the Hotel Licensing Board of the 5th December 1974. The appellant will have the
B costs of the appeal. No costs appear to have been ordered in the Supreme Court and no application has been made to us in relation to them—that therefore remains unchanged.

Appeal allowed. Determination of respondent Board quashed.