

A **PRICES AND INCOMES BOARD & 2 OTHERS**

v.

RICHARD YANCHUN FONG & ANOR.

B [COURT OF APPEAL, 1979 (Gould V. P., Spring J. A., Marsack, J. A.) 21st, 29th March]

Civil Jurisdiction

C *Price Control—Board empowered to reduce prices currently charged if the latter exceed those which would result from standards laid down in Price Control Orders.*

M. J. Scott for Appellants.

M. S. Sahu Khan for the Respondents.

D Appeal against the judgment of the Supreme Court delivered at Suva 11 January, 1979 interpreting certain provisions of the Counter Inflation legislation. The original action was brought by the respondents personally, and as office-holders of the Fiji Pharmaceutical Society. In their action against the Board, the respondents asked for declarations:

- E
- (a) That the purported exercise of his powers under the Counter-Inflation Act by the Minister of Finance in giving the directions cited above, was *ultra vires* and of no legal validity;
 - (b) That the purported Orders made by the Prices and Incomes Board following the directions from the Minister namely Counter-Inflation (Price Control) (No. 2) and (No. 3) Orders, 1978 were null and void.
 - (c) _____

F The facts were recited by Marsack, J. A. as follows:—

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1. The Minister of Finance acting under powers given to him by the relevant sections in the Counter-Inflation Act 1973 directed the Prices and Incomes Board that in fixing the maximum wholesale and retail prices of items stated, a percentage mark-up formula was to be adopted. This Notice was no. 74/77, of 28 June, 1977. On 28 February, 1978 by Legal Notice No. 38 the Minister added to those set out in No. 74 two further items being "medicines ethical" and "medicines patent".
 - H 2. On 24 February 1978 the Board gave notice under section 11 of the Act that after 14 days it would make an order fixing the maximum wholesale and retail prices at which the goods mentioned therein might be sold. This notice prescribed the percentage mark-up, in respect of "Medicines Ethical" at 20 per cent of landed cost for the wholesale price and 35% over the wholesale price for the retail price; plus 30 cents fees for dispensing,

recording and the container. By another notice (section 11 of the same date) the Board notified its intention of issuing an Order after 14 days setting out the prices at which a large number of medicines might be sold. These prices were in many instances less than those currently being charged at the time of the Order. A

3. Acting in accordance with the directions given by the Minister, and the notices already advertised by the Board, the Board issued Counter-Inflation (Price Control) (No. 2) Order, 1978 which laid down the maximum sale prices for "Medicines-ethical", adopting the mark-up system already quoted. B

The learned trial Judge held that the Board was not empowered by the Counter-Inflation Act to make either Counter-Inflation (Prices Control) (No. 2) Order or (No. 3) Order; both of which he said:— C

"effected a general reduction of all the selling prices of the medicines therein-referred to below the maximum prices then pertaining to such medicines;"

and that such Orders were void and of no effect.

His decision was based on the learned Judge's view that the Board was not empowered by the Counter-Inflation Act to make orders fixing the maximum prices by reducing the then current selling prices of the medicines in question. The learned Judge of Appeal summarised the Reasoning of the Judge below. Marsack, J. A. then said that the result of this finding is that the Board was held to have no authority to fix the maximum selling price at a figure lower than the maximum price at which it was currently being sold. D E

The learned Judge of Appeal referred to the words "fix and declare" in section 11 of that Act. He said—

"If the phrase is to be interpreted in accordance with the purposes of the Act, then it would appear that the Board must, if the definition of inflation given above is accepted, take all necessary steps to ensure that there is no increase of prices beyond the proper limits. If the Board, on its examination of all relevant factors, concludes that some current prices lie beyond the proper limits, then this section of the Act would be rendered nugatory if it were held that the Board has no power to do anything about these prices—except to ensure that they do not go higher still. The learned trial Judge appears to have formed the opinion that "fix" in section 11(1) means to stabilise at the present level." F G

After further analysis of the reasoning of the trial Judge the Court said—

"In the result, I am satisfied that the Board in fixing maximum prices, is legally empowered by the Act to reduce the prices currently charged where these exceed those which would result from the due application of the standards laid down in Prices Control Orders. The first ground of appeal in my opinion succeeds." H

A In the court below the learned Judge, referring to the Counter-Inflation Act said—

“That a specific direction to the Board to adopt a percentage mark-up formula cannot be considered direction as to the policy to be followed.”

B Marsack, J.A. described this as “unduly narrow” but noted that the adoption of a mark-up system . . . was beyond the power of the Board.

Held: The Board in fixing maximum prices was legally empowered to reduce the prices currently charged.

The Minister in directing the adoption of mark-up was not acting beyond power.

C The Counter-Inflation Orders (No. 2) and (3) were good and valid orders of full legal effect.

Cases referred to:

Damodar Bros. v. Prices & Incomes Board (S. C. 298 of 1973).

D MARSACK, J.A.:

Judgment

E This is an appeal against a judgment of the Supreme Court delivered at Suva on the 11th January, 1979 interpreting certain provisions of the Counter-Inflation legislation in Fiji. The original action was brought by the respondents personally, and as office-holders of the Fiji Pharmaceutical Society. The judgment of the learned trial judge and the argument before this Court covered so wide a range of matters connected with the legislation that I find it necessary to set out briefly the basis of litigation brought before the Supreme Court.

F The facts giving rise to the action were that the Minister of Finance, acting under the powers given to him by the relevant sections in the Counter-Inflation Act No. 11/73, gave a direction to the Prices and Incomes Board that in fixing the maximum wholesale and retail prices of various stated items, a percentage mark-up formula was to be adopted. The Legal Notice to this effect was No. 74/77, and it was dated 28th June, 1977, gazetted 1st July, 1977. On the 28th February, 1978, by Legal Notice No. 38, the Minister added two items to those set out in No. 74; these items being “medicines ethical” and “medicines patent”.

G On 24th February, 1978 the Prices and Incomes Board gave notice under section 11 of the Act that after the expiration of 14 days, it would make an order fixing the maximum wholesale and retail prices at which the goods mentioned therein might be sold. This notice prescribed the percentage mark-up, in respect of “Medicines Ethical” at 20 per cent of landed cost for the wholesale price and 35 per cent over the wholesale price for the retail price; plus 30 cent fees for dispensing, recording and the container. By another Notice under section 11 of the same date, the Board notified its intention of issuing an Order at the expiration of 14 days, setting out the prices at which a large number of medicines might be sold. These prices varied as between different localities; such as Suva-Lautoka, rural areas lying outside the towns, and places in Vanua Levu, Taveuni and elsewhere. These prices were in many instances, less than those currently being charged at the time of the Order.

Acting in accordance with the directions given by the Minister, and the notices already advertised by the Board, the Board issued Counter-Inflation (Price Control) (No. 2) Order, 1978 which laid down the maximum wholesale and retail sale prices of a large number of medicines; and Counter-Inflation (Price Control) (No. 3) Order, 1978 specifying the method of calculating the maximum wholesale and retail prices for "medicines-ethical", adopting the mark-up system already quoted.

In their original action against the Board, the respondents asked for declarations:

- (a) That the purported exercise of his powers under the Counter-Inflation Act by the Minister of Finance in giving the directions cited above, was *ultra vires* and of no legal validity;
- (b) That the purported Orders made by the Prices and Incomes Board following the directions from the Minister namely Counter-Inflation (Price Control) (No. 2) and (No. 3) Order, 1978 were null and void;
- (c) That Counter-Inflation Act No. 11/73 is inoperative.

No argument was addressed to this Court as to (c) above and it is therefore not necessary to consider that further.

As reference will have to be made from time to time to certain sections of the Counter-Inflation Act, it will perhaps be convenient to set them out here:

"Section 4(4). The Board shall in the exercise of its functions under this Act, act in accordance with any general or special directions as to the policy to be followed given to it from time to time by the Minister and published by him in the Gazette.

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; and
- (b) such other functions in relation to prices and incomes as the Minister may from time to time by regulation determine.

11.—(1) The Board may, with the approval of the Minister, by order, fix and declare the maximum price or charges by any person (including the Crown) in the course of business for the sale of goods or the performance of services, either generally or in any specified part of or place in Fiji.

- (2) Before making or giving an order or notice under this section (other than one which only removes or lessens a restriction), the Board shall, subject to the provisions of the next succeeding section, give fourteen days notice in the manner prescribed in the next following subsection to the person selling the goods or performing the services which would be subject to the restriction, and shall afford to such person an opportunity of making representations to the Board which, unless the Board otherwise directs, shall be in writing.

- A (3) If it appears to the Board to be impracticable to give notice under the last preceding subsection to all the persons selling the goods or performing the services, it shall instead give fourteen days' notice by publication in the Gazette and in such other ways as it may consider appropriate of its intention to make the order and shall afford to all those persons an opportunity of making representations to the Board which, unless the Board otherwise directs, shall be in writing.
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The learned trial judge held that the Board was not empowered by the Act to make either Counter-Inflation (Price Control) (No. 2) Order or (No. 3) Order, both of which Orders, in his word—

- C “effected a general reduction of all the selling prices of the medicines therein referred to below the maximum prices then pertaining to such medicines;”

D and that such Orders were void and of no effect. This decision was based upon the learned Judge's view that the Board was not empowered by the Act to make orders fixing the maximum prices by reducing the then current selling prices of the medicines in question. He referred to the wording of section 11(1) which empowered the Board by order “to fix and declare the maximum price or charges by any person (including the Crown) in the course of business for the sale of goods”. He pointed out that the Board's powers under section 11(1) are definitely different from those under section 5 of the Price Control Ordinance, (Cap. 208 1955 Edn.) since repealed. Section 5 gave the Controller a discretion in fixing the maximum price, which should be what was in his opinion a fair price. Section 11(1) on the other hand, allows no discretion by the Board. In the view of the learned trial judge the duty of the Board under Section 11(1) is to fix and declare the maximum prices at the figure in operation at the time of making the order. The result of this finding is that the Board is held to have no authority to fix the maximum selling price of any article at a figure lower than the maximum price at which it was currently being sold.

E Shortly stated, the contention of the appellants is that the Board's powers were not restricted to upholding the maximum prices then being charged by the traders concerned.

F In support of his case counsel for the appellants submitted a very detailed written argument, and also addressed the Court at considerable length. Although the Court is grateful to counsel who has devoted so much time and attention to the presentation of his argument, his submissions, in my opinion, have gone far beyond what was necessary to answer the points raised in the appeal against the judgment of the learned trial judge.

G It was conceded, and in fact affirmed, by both sides that in interpreting a statute, full regard must be had to the purpose for which the statute was enacted. The objective of the Counter-Inflation Act must be to counter inflation. Some argument took place before this Court as to the precise meaning of this phrase, and several dictionary definitions of “inflation” were quoted. That most relevant to the present proceedings could well be that of the New Oxford Dictionary: “Increase beyond proper limits, especially of prices”. Keeping this in mind will, in my view, help to interpret the relevant sections in the local Act.

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Two grounds of appeal were submitted by the appellants. These read:—

- (a) That the Learned Judge erred in Law in holding that the Prices and Incomes Board was not empowered by the Counter-Inflation Act to make the Counter-Inflation (Price Control) (No. 2) Order 1978 and the Counter-Inflation (Price Control) (No. 3) Order 1978, both of which Orders effected a general reduction of selling prices of medicines therein referred to, and that consequently and because the Prices and Incomes Board did not have power to make such reduction the said Orders were void and of no effect, notwithstanding that the Counter-Inflation Act did in law empower the said Prices and Incomes Board to reduce the said prices. A
- (b) That the Learned Judge erred in law in considering that the second appellant was not empowered by the provisions of the Counter-Inflation Act to direct the first appellant to adopt a percentage mark up formula in controlling, or seeking to control, prices of goods and services, and further erred in considering that the second appellant usurped the statutory powers of the first appellant, and that the first appellant did not act independently in the exercise of its powers. B

In his opening address counsel for the appellants defined very succinctly what he submitted was the real issue requiring determination: was the trial judge right in holding that, under the provisions of the Counter-Inflation Act, the Board had no power to reduce current prices? The answer depends, as is admitted, on the interpretation of section 11(1). What is meant by the phrase “fix and declare?” In the course of his judgment the learned trial judge answers this question in the following words: C

“It is necessary first to decide what the word ‘fix’ means in its context. In my view the word ‘fix’ in section 11(1) means to ‘set or place and secure against displacement, to make firm or stable’ (The Shorter Oxford English Dictionary). The Board if it makes an order must first ascertain the maximum price and then by order stabilise that price and declare it to be the maximum price.” D

“The Board was not set up to control prices, but to ascertain maximum prices of goods and then by order to fix and declare that maximum and thereafter to control increases of those prices as a measure of countering inflation. The correct description of an order made by the Board under the Act should be ‘Counter-Inflation (Maximum Price) Order’ ”. E

In my opinion, the words in question cannot be so defined. If the phrase is to be interpreted in accordance with the purposes of the Act, then it would appear that the Board must, if the definition of inflation given above is accepted, take all necessary steps to ensure that there is no increase of prices beyond the proper limits. If the Board, on its examination of all relevant factors, concludes that some current prices lie beyond the proper limits, then this section of the Act would be rendered nugatory if it were held that the Board has no power to do anything about these prices—except to ensure that they do not go higher still. The learned trial judge appears to have formed the opinion that “fix” in section 11(1) means to stabilise at the present level. Webster’s Dictionary defines “fix” as “to establish, set or arrange definitely”. If this definition is adopted, then the phrase in question could well be interpreted to mean that the Board must determine what should be the maximum price and then establish that as the maximum price to be operative thenceforth. F

A This interpretation would be consistent with sub-section 11(2) of the Act providing for the giving of persons the opportunity to make representations to the Board before the maximum price is fixed. If the Board has no power to vary current maximum prices, what good purpose would be served by inviting representations from the traders? Current maximum prices are easily ascertainable without hearing the tradesmen concerned; so the representations they are invited to make could lead nowhere. On this point I agree, with respect, with the view expressed by Williams J. in *Damodar Bros. v. Prices and Incomes Board* (298/1973) that "the object of any representations to the Prices Board is to enable the applicants to persuade the Board to alter its proposed prices." Sub-section 11(2) in my opinion, makes it clear that the Board has powers to vary current maximum prices and, to be fair to the persons affected, has enabled them to make representations to the Board before a final decision is given as to the maximum prices.

C In the result, I am satisfied that the Board, in fixing maximum prices, is legally empowered by the Act to reduce the prices currently charged where these exceed those which would result from the due application of the standards laid down in Price Control Orders. The first ground of appeal in my opinion succeeds.

The second ground of appeal involves the question of the interpretation of section 4(4) of the Act. In his judgment the learned trial judge said:—

D "I do not consider that a specific direction to the Board to adopt a percentage mark up formula can be considered as a direction 'as to the policy to be followed'. It appears to me to usurp the statutory powers given to an independent Board to itself determine the best manner in which the maximum prices shall be ascertained."

E In other words, the trial judge held that the Minister's powers under section 4(4) were limited to laying down the broad principles on which the Board should act, or indicating objectives to be aimed at by the Board, but did not extend to directing the Board exactly how those broad principles should be carried into effect. With respect, I feel that this view is unduly narrow. It must be remembered that the Minister did not specify how the mark-up was to be calculated; that was left entirely to the discretion of the Board. He merely gave an indication which, to my mind, could properly be described as a "general or specific direction as to the policy to be adopted". In any event, the learned trial judge did not hold, as has been shown, that the adoption of a mark-up system in the circumstances was beyond the powers of the Board; whether or not the Minister had legal power to give the Board such a direction.

G Respondents filed a Notice setting forth a number of grounds upon which they contended the appeal must fail. The first of these was that the Board did not give them a fair and proper hearing as provided in section 11(2) of the Act. The facts were that the Secretary to the Board sent to respondent Mudaliar on the 28th February, 1978 advance copies of the Intention Orders. On the 13th March, the Pharmaceutical Society's solicitor wrote asking for permission to make oral representations to the Board; and the Secretary wrote in reply confirming the 30th of March as the date for the meeting. Dr Sahu Khan replied by telegram asking for an adjournment till the 5th of April as he would be engaged in Court on the 30th March. On the 5th of April, the sole member comprising the Board was not available. However, the meeting took place, those present being the respondents and their solicitor, the Board's Secretary, Baldeo, a Board inspector and another official seconded to the Board. A

long written statement was submitted by Dr Sahu Khan and this was followed by a full verbal discussion in which Dr Sahu Khan, both respondents, and the Secretary to the Board took part. The written statement and a full report by Baldeo, were transmitted to the Board for consideration. The final order was made on 9th May. In my view, the respondents were given a fair and reasonable hearing, and it appears from the evidence that all submissions were duly considered by the Board. It is to be noted that no complaint was made at the meeting on the 5th April as to the constitution of that meeting.

The other grounds in respondents' notice may be shortly summarised as follows: that the action taken by the Board was unreasonable, as the Board had not made full enquiries, had not given sufficient opportunity to the respondents to present their case, and that their Notice of Intention was given before the Minister's directions were published in the Gazette. I can find no substance in these objections. I have already expressed the opinion that the respondents were given ample opportunity to make their representations. And I can find nothing in the legislation ruling that a Notice of Intention to take certain steps cannot be issued until the direction of the Minister is published in the Gazette. It is enough that the Notice of Intention was given pursuant to the Minister's direction; and respondents were given ample warning—including a personal letter to Mudaliar—of the action the Board proposed to take.

Accordingly, I would hold that for the reasons already given, the appeal must succeed and the Counter-Inflation Orders (No. 2) and (No. 3), both dated 9th May, 1978, and gazetted on 19th May, are good and valid Orders of full legal effect.

Respondents are not, in my judgment, entitled to any of the reliefs claimed in the action in the Supreme Court, which I would dismiss with costs. I would also allow the successful appellants their costs of the appeal and of respondents' notice.

SPRING J. A.:

Judgment

I have had the advantage of reading the judgments of the learned Vice President and my brother Marsack J. A. and agree with their reasoning and conclusions.

GOULD V. P.:

Judgment

I have had the advantage of reading the judgment of Marsack J. A. in this appeal and am in agreement with him that the appeal succeeds and the respondents' action must be dismissed.

As the learned Judge in the Supreme Court saw the matter, the most important issue in the case was whether the Board acted beyond the powers conferred on it by purporting to fix the maximum prices below the maximum selling prices pertaining on that date. With respect, I am quite unable to find any words in the Act which place the Board under any such restriction. The power of the Board to make such an order arises under section 11 of the Counter-Inflation Act, 1973, which is set out in the judgment of my learned brother Marsack J. A. The power is to "fix and declare" the maximum price for the sale of goods. There is a procedural requirement in section

A 11(2) and (3) concerning the giving of notice and the making of representations, which in no way limits the power of the Board. The order may only be made "with the approval of the Minister", but that must be obtained whether the order purports to fix the maximum price at, below or above existing selling prices; what the Minister is prepared to approve is a matter for him.

B The words "fix and declare" in the context are so simple that it is fruitless to try to find others of any greater clarity. Perhaps "decide and state" would be nearly equivalent. The learned Judge does not base his argument so much on the exact meaning of the phrase but poses the question "What is the 'maximum price' which the Act directs the Board to fix and declare". He compares the legislation to that contained in section 5 of the Price Control Ordinance (Cap. 208-1955) (now repealed) which empowered the Controller to fix and declare maximum prices for goods, in his discretion, in order to secure their availability at fair prices. A power, as the learned Judge construed it, to fix a maximum fair price.

C By comparison, the present Board, the argument continues, is not concerned with what is a fair price, but must, in accordance with the objects of the Act, so control the price of goods as to counter inflation. The Board's control which the Act envisages, come into operation after the making of an order—section 23, for example, prohibits selling or buying at a greater price than the maximum price. The learned Judge complains that on the Board's interpretation of the present legislation it could fix the maximum price at any level it deemed fit—as there was no "fair price" direction: He relied upon section 20 of the Act, but with great respect section 20 is not relevant to his argument. It provides merely that an order under section 11(1) may direct that the maximum price shall not exceed a specified sum or may prescribe the manner in which the maximum price shall be ascertained—as was done in the present case. Neither has the power to vary an order contained in section 21 any particular relevance.

E Basing himself mainly, I think, on the absence of any "fair price" direction in section 11, and having regard to the objects of counter inflation, the learned Judge arrived at the conclusion that, under section 11, if the Board decides to act, it has the duty of ascertaining what the maximum prices are, which are being charged by persons in their businesses and then by order fixing those prices and declaring them as maximum prices. The phrase "lessens a restriction", used in section 11(2) indicated power to allow upward movements; not power to enforce downward movements. The coming into force of the Act had been preceded by price control and a temporary freeze of prices. An interpretation should be accepted which achieves the obvious object of the Act, and that is countering inflation, by ascertaining the maximum prices, so that the Board is able thereafter to increase those prices.

G This argument is persuasive up to a point and it may be that in many instances when orders are made by the Board it may be acting on considerations similar to those present to the mind of the learned Judge. But those considerations to my mind present no reason why, in "fixing" prices the Board should be deprived of an important power, that of lowering prices where circumstances justify that course. Even professional economists, after all, are not noted for their unanimity of approach to these problems. I cannot accept that the objects of the legislation, however one regards them, would be better served by a Board with power only to stop upward

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price movements, than by one which may also enforce downward movements. The powers of the Board under section 11 are subject to the approval of the Minister, who may also direct the Board as to policy under section 4(4); there is thus no lack of control by those with ultimate responsibility. **A**

For these reasons and those given by Marsack J. A. in his judgment I consider that the approach of the learned Judge to the construction of section 11 was not justified and that the orders made in the present case fell within its plain wording. **B**

I also agree with Marsack J. A. that none of the grounds advanced in the Respondents' Notice enable them to have the judgment upheld on grounds other than those relied upon by the learned Judge, and as a consequence their action must be dismissed with costs.

In accordance with the unanimous opinion of the Court it is so ordered and the appeal is allowed with costs of the appeal and the Respondents' Notice. **C**

Appeal allowed.