Privy Council Appeal No. 15 of 1990

(1) Apple Fields Limited and
(2) Styx Mill Orchard Partnership No. 6 *Appellants*

v.

(1) The New Zealand Apple and Pear Marketing Board and
(2) New Zealand Fruitgrowers Federation *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER 1990

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ROSKILL
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

[Delivered by ***Lord Bridge of Harwich****]*

This appeal arises out of an action brought by the appellants, who are growers of apples in New Zealand on a large scale, against the New Zealand Apple and Pear Marketing Board ("the Board") and the New Zealand Fruitgrowers Federation ("the Federation") in which the appellants sought a declaration, *inter alia*, that a levy imposed under section 31 of the Apple and Pear Marketing Act 1971 on apple growers submitting apples for purchase by the Board in the year 1988/89 in quantities exceeding previous years was unlawful as contravening sections 27, 29 and 36 of the Commerce Act 1986.

The Board is constituted under the Act of 1971. It consists of six members of whom four are appointed on the nomination of the Federation. The Act has been extensively amended from time to time but in this judgment, unless otherwise indicated, reference will be made to the provisions of the Act as in force in February 1988, when the relevant levy was imposed. This was before the Apple and Pear Marketing Amendment Act 1988 was enacted on 31st March 1988 which effected further extensive amendments. The provisions of the Act apply equally to apples and

pears, but since the appeal relates solely to apples reference to pears may be omitted.

The principal functions of the Board are to acquire and market apples either grown in or imported into New Zealand and, subject to Part III of the Act, to determine the prices which it is to pay for them: section 9(1). Part III of the Act provides an elaborate mechanism for the determination by the Board in each season of the prices payable to New Zealand growers for different kinds, varieties, grades, qualities, or sizes of apples subject to a ceiling fixed by reference to an overall average price determined by the Apple and Pear Prices Authority. The Board is obliged to purchase at the prices so determined all apples offered to it by growers which are harvested, packed and graded in the manner required by the Board: section 19. Subject to section 43, which permits certain small sales by growers direct to the consumer, growers are prohibited by section 42 from selling apples to any person other than the Board. The effect of these provisions, in the current jargon used by economists, is to make the Board a monopsonist.

The Board has two sources of capital finances. One is a capital charge which the Board is required to fix at a uniform rate per traycarton of apples purchased by the Board from growers in each season. The other is the levy which the Board may impose under section 31 which, so far as material, provides as follows:-

> "31. Levies - (1) The Board, with the approval of the Fruitgrowers' Federation and of the Minister, may impose on growers levies of such nature and incidence as the Board thinks fit.
>
> (2) Any such levy may be imposed on all growers, or on any specified class or classes of growers, or on growers in any specified part or parts of New Zealand.
>
> ...
>
> (4) Subject to subsection (5) of this section, the proceeds of every levy shall be paid by the Board into a fund to be called the Capital Reserve Fund and the money in that fund shall be applied by the Board in the acquisition, development, and improvement of capital assets, and for such other purposes as are for the time being approved by the Fruitgrowers' Federation. The money in that fund may be invested by the Board pending its application for those purposes and the income derived from any such investment shall be credited to that fund.
>
> (5) Any such levy shall be refunded, in whole or in part, to the growers by whom it has been paid or to their personal representatives and interest

shall be paid from time to time on the whole or part of any levy which is to be refunded if -

(a) The conditions under which the levy has been imposed so require; or

(b) The terms of a resolution passed by the Board and approved by the Fruitgrowers' Federation and the Minister so require.

...

(7) Where the whole or part of any levy is to be refunded, the amount to be repaid to any grower shall be repaid on his death or on his retirement as a grower or on the date appointed by the Board for the repayment of the levy, whichever is the sooner."

The Federation, as a legal entity, is a company limited by guarantee, but it is also an association representing the interests of fruitgrowers to which fruitgrowers with not less than 40 hectares are entitled to belong and to which they must pay a compulsory levy under the Orchard Levy Act 1953 of $10 per hectare. The Federation operates through eight different district associations and five sectors concerned with different fruit products, the relevant sector concerned with apples being the pipfruit sector. The Director of the Federation clearly described in evidence how the grower members of the Federation through the district associations, sector conferences and annual conferences "reach decisions affecting the industry in a democratic way".

A levy which has been referred to in the proceedings as the second tier levy has been imposed annually since 1983 under section 31 on apple growers who are either new growers or established growers who increase the level of their production. The levy is charged by reference to the quantity of apples which growers require to be purchased by the Board representing either production by new growers or increased production by existing growers over the levels of previous seasons. In February 1988 the rate of the second tier levy for the 1988/89 season was raised to $1.35 per traycarton.

The Commerce Act 1986 came into force on 1st May 1986. It supersedes the Commerce Act 1975 and contains new provisions directed at the elimination of restrictive trade practices. It is expressly provided by section 5 that the Act "shall bind the Crown in so far as the Crown engages in trade" and by section 6 that the Act applies "to every body corporate that is an instrument of the Crown in respect of the Government of New Zealand engaged in trade". The Board is clearly such a body corporate. Section 27(1) provides:-

> "No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market."

By section 3(1) "competition" is defined as meaning "workable or effective competition" and "market" is defined as meaning "a market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense". As already stated the appellants challenged the lawfulness of the 1988 second tier levy as contravening section 27 and also sections 29 and 36 of the Act of 1986, but in view of the conclusion at which their Lordships have arrived it is unnecessary to set out the provisions of the latter two sections. Section 43 of the Act of 1986 provides:-

> "Statutory exceptions - (1) Nothing in this Part of this Act applies in respect of any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act.
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> (2) For the purpose of subsection (1) of this section, an enactment or Order in Council does not provide specific authority for an act, matter, or thing if it provides in general terms for that act, matter, or thing, notwithstanding that the act, matter, or thing requires or may be subject to approval or authorisation by a Minister of the Crown, statutory body or a person holding any particular office, or, in the case of a rule made or an act, matter, or thing done pursuant to any enactment, approval or authorisation by Order in Council.
>
> (3) ..."

At the hearing before Holland J., surprisingly in view of the subsequent history of the litigation, the Board and the Federation expressly disclaimed reliance on section 43. The issues canvassed at the trial in relation to section 27 were:-

(1) whether the second tier levy amounted to or resulted from an "arrangement" within the meaning of section 27;

(2) whether in the circumstances established by the Act of 1971 there was any relevant "competition in a market" between growers of apples in New Zealand; and

(3) if so, whether the second tier levy had either the purpose or the likely effect of substantially lessening competition in the relevant market.

In relation to the second and third of these issues Holland J. had the advantage of elaborate evidence by expert economists on both sides. He concluded that the second tier levy was imposed pursuant to an arrangement between the Board and the Federation, that growers of apples in New Zealand were in competition in a market, as those terms are defined in the Act of 1986, and that the second tier levy had the likely effect, although not the purpose, of substantially lessening that competition. He accordingly held that the appellants were entitled to succeed under section 27. He rejected the appellants' case in so far it relied on sections 29 and 36.

In the Court of Appeal the Board and the Federation sought and obtained leave to rely on section 43 of the Act of 1986 claiming that the second tier levy was an "act, matter or thing which was, or was of a kind, specifically authorised" by section 31 of the Act of 1971. All the members of the Court of Appeal, Cooke P., Richardson, Casey and Bisson JJ., upheld this claim and the judgment of Holland J. was reversed on this ground alone. The issues which had been canvassed at the trial were expressly addressed only in the judgment of Cooke P. He affirmed the conclusion of Holland J. that, subject to section 43, the appellants had established a contravention of section 27. But he went further and held that substantial lessening of competition in the market was not only the likely effect but also the purpose of the second tier levy and, but for the section 43 defence, he would also have allowed the appellants' cross-appeals under sections 29 and 36. The reasoned judgments of Richardson and Casey JJ. made no reference to these issues, but Bisson J. expressed his agreement with all the other judgments.

Before their Lordships, the Board and the Federation have renewed their attack on the findings made against them by Holland J. and it is appropriate to refer to these, so far as necessary, before turning to the principal issue in the appeal concerning the application of section 43. The main submission in relation to section 27 is that the exercise of a statutory power, in this case the imposition of a levy under section 31 of the Act of 1971, cannot amount to an "arrangement" within the meaning of section 27 of the Act of 1986, notwithstanding that the person authorised to exercise the power, here the Board, may only do so with the approval of another person or persons, here the Federation and the Minister. Their Lordships cannot accept this as a proposition of general application. They reject the primary contention advanced in support of the proposition that the term "arrangement" in section 27 is used in a pejorative sense as necessarily involving some discreditable or conspiratorial element. "Arrangement" is a perfectly ordinary English word and in the context of section 27 involves no more than a meeting of minds between two or more persons, not

amounting to a formal contract, but leading to an agreed course of action. Whether in every case the exercise of a statutory power by one person with the required statutory approval of another would necessarily amount to an arrangement it is unnecessary to decide. Here there was much more. The evidence demonstrates clearly that the imposition of the second tier levy resulted from a strong initiative taken by the grower members of the Federation, expressed through their conferences, adopted as Federation policy and pressed on the Board. In the light of this evidence their Lordships have no doubt that Holland J. was right to find that the levy was imposed pursuant to an arrangement.

Having regard to the definitions of "competition" and "market" in the Act of 1986 the judge's findings that there was a relevant market in which apple growers in New Zealand were in competition and that the likely effect of the second tier levy at $1.35 per traycarton would be substantially to lessen that competition are essentially findings of fact which appear to be amply supported by the evidence and were concurred in by two of the four members of the Court of Appeal. Whether or not these are technically concurrent findings of fact, their Lordships are satisfied that there is no ground on which they can now be properly challenged. It is unnecessary to go beyond the judge's findings and consider the further findings which Cooke P. was willing to make in the appellants' favour since, if the appellants are not defeated by section 43, it is sufficient for their purpose to show a contravention of section 27 wihout resort to sections 29 or 36.

All the judges in the Court of Appeal appear to have approached the Board's defence under section 43 with a predisposition to believe that the legislature, when enacting the provisions of Part II of the Act of 1986 which outlaw restrictive trade practices, cannot have intended that they should apply to inhibit the Board's exercise of its powers under section 31. Cooke P. said:-

> "Further, to the extent that there may be any doubt or ambiguity, it is right in my view to have regard to the major and special position that producer boards have occupied in the New Zealand economy. The Commerce Act represents a new philosophy of promoting unrestricted market-forces. Its provisions are very general. The special statutory provisions about the raising of capital by the Apple and Pear Marketing Board antedate the new statutory philosophy. It is impossible to be confident that in 1986 Parliament meant to override them."

The judgment of Richardson J. related the history of the Board and its predecessor, the New Zealand Fruit Export Control Board established in 1926, and also contained an extensive examination and review of the

marketing system which now operates under the Act of 1971 and which reproduces the main features of a system which has now been in operation since the Apple and Pear Marketing Act 1948. He evidently regarded this background as having an important bearing on the question whether a levy imposed under section 31 of the Act of 1971 was exempt from control under Part II of the Act of 1986 by virtue of section 43. Casey J. adopted Richardson J.'s analysis of "the circumstances and economic theory behind the statutory monopoly granted to the Board" and added:-

> "I incline to the view that the relationship between it and the growers is so close to a producer marketing co-operative and differs so much from an ordinary marketing situation, that it may be questionable whether the Commerce Act was ever intended to apply to that relationship."

As already indicated Bisson J. agreed with all three judgments.

These approaches have been reflected and much pressed in the submissions made to their Lordships. Their Lordships fully recognise the great importance which the Judicial Committee of the Privy Council should always attach to the opinions of judges exercising jurisdiction in a Commonwealth country in any matter which may reflect their knowledge of local conditions. Yet, when an issue is wholly governed by statute, its resolution must be purely a matter of interpretation. Considering only the provisions of the Act of 1971 and the Act of 1986, which have been explored very thoroughly in argument, their Lordships, with all respect, can find nothing which should predispose the interpreting court to approach the issue which arises here on the footing that, if the imposition of a levy under section 31 of the Act of 1971 *prima facie* contravenes section 27 of the Act of 1986, one should look benevolently expecting to find a provision elsewhere in the Act of 1986 which excuses that contravention. On the contrary, whatever may be "the major and special position that producer boards have occupied in the New Zealand economy," section 6 of the Act of 1986 negates any intention that they should enjoy a general exemption from its provisions. Moreover, the Australian Trade Practices Act 1974, which clearly served in some respects as a model for the New Zealand Act of 1986 and which contains an exempting section similar to section 43 in relation to "any act or thing that is, or is of a kind specifically authorised" by other legislation, also contains express power to make regulations which "may provide that all or any of the provisions of this Act shall not apply to or in relation to conduct engaged in by a specified organisation or body that performs functions in relation to the marketing of primary products". There is a conspicuous absence from the New Zealand Act of any provision corresponding to the latter provision in the

Australian Act. Finally, it is to be observed that under Part V of the New Zealand Act the Commerce Commission may on application authorise the making of arrangements etc. which contravene the provisions of Part II including section 27 and that the criterion to be applied in determining whether to authorise such an arrangement is whether it "will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result ... therefrom".

These considerations lead their Lordships to the view that the issue raised turns simply upon a narrow point of construction. What amounts to a "specific authorisation" under section 43 of the Act of 1986? Does section 31 of the Act of 1971 provide such a "specific authorisation"?

A provision in the earlier Commerce Act 1975 granted a similar exemption in respect of "a trade practice expressly authorised by any Act". This phrase had been construed in decisions at first instance in New Zealand as effectively embracing anything done under statutory authority or pursuant to regulations made under statutory authority. The effect of the convoluted language of section 43(2) of the Act of 1986 is to reverse these decisions and to ensure that the new statutory exemption is significantly narrower than the old. Express authorisation is the antonym of implied authorisation; specific authorisation is the antonym of general authorisation.

To appreciate the Court of Appeal's approach to the point of construction it is necessary to cite from their judgments at some length. Cooke P. said:-

> " Obviously what answers the description 'specifically authorised' is a question of degree. It could not seriously be suggested that the Apple and Pear Marketing Act would have to authorise in express terms a second tier levy in order to satisfy s.43. What must be of first importance is the purpose of Part II of the Commerce Act. It is legislation against restrictive trade practices and the sections with which this case is concerned are directed particularly at practices substantially lessening competition. The reasonable inference is that the exception in s.43 is meant to cover cases where the actual terms of an enactment show that limits on competition are inevitable, or at least highly likely, if the authority given is exercised. If the terms of the authorising enactment leave no doubt that anti-competitive measures were in contemplation, it will fall within the exception to the general regime of the Commerce Act intended to preserve competition.
>
> ...

When the actual terms of section 31 are approached in that light, the first significant feature is that subsections (1) and (2) authorise levies on growers with discriminatory incidence. Then subsection (4) shows that the primary purpose is payment for capital assets. A distinct Capital Reserve Fund is required. Subsections (5) and (7) with their provisions as to possible refunds emphasise that the proceeds of levies continue to be potentially earmarked for the particular growers who have contributed. The scheme of the section is that growers who generate added requirements for capital expenditure by the Board may be levied accordingly. In the perhaps unlikely event of a refund, it will be to the contributors, not to growers generally.

Thus the section undoubtedly contemplates the imposition of special capital burdens on some growers. That is the clear policy of the section. Such a policy will inevitably or is highly likely to lessen competition. The reasons leading one to say so are the same as lead one to say that the policy conflicts with the three Commerce Act sections alleged to be violated. In other words the manifest policy of s.31 of the Apple and Pear Marketing Act 1971 is directly contrary to the manifest policy of ss.27, 29 and 36 of the Commerce Act 1986. In my opinion this conflict is sufficiently clear on the face of the two statutes to justify holding that the give-way rule in the Commerce Act applies in favour of the Board as far as the Board's capital requirements are concerned. It is the scope of the exception in the Commerce Act that is all-important. I think that the kind of levies now in issue are 'specifically authorised' by the Apple and Pear Marketing Act within the true intent, meaning and spirit of that exception.

The point is not easy, because at first sight the authorisation in s.31 may seem general rather than specific. Yet, when the scheme and purpose of the section are more closely examined and compared with the Commerce Act provisions, as a matter of realistic statutory interpretation I prefer the conclusion just stated."

Richardson J. said, with respect to the requirement of specific authorisation under section 43,:-

"There is no litmus test. Whether a statutory authorisation is sufficiently direct to constitute the specific authorisation of an act of that kind must, I think, involve questions of degree and in the end depend on the impression the Court forms of the character of the act in question and the significance of that act in the statutory scheme.

In this case the nature and content of the authorisation must be determined by considering s.31 as a whole and in its statutory context. Subsection (1) authorises the imposition on growers of levies of such nature and incidence as the Board thinks fit. Subsection (2) goes on to authorise the Board to discriminate between different classes of growers and between growers in different parts of the country. In other words it directly authorises the imposition of a levy on the class of growers submitting new or additional production of apples and pears to the Board. And it does so regardless of any anti-competitive purposes and effects inherent in the exercise of the power.

Subsection (4) is of particular relevance in providing specificity. The proceeds of the levy must be paid into the capital reserve fund and the money in that fund can only be applied in the acquisition, development and improvement of capital assets, and for such other purposes as are for the time being approved by the Fruitgrowers Federation. Had the section simply authorised the Board to impose a second tier levy in respect of added production there could I think be no doubt that the exercise of that power would have been an act of a kind specifically authorised by statute. In my view there is sufficient particularity in the expressed purpose for which the levy may be utilised to satisfy the requirements of s.43. The specific role and functions of the Board under the legislation and the obvious need through the exercise of the statutory powers under s.31 and s.32B for it to assess and provide for its capital requirements, reinforce that conclusion."

Casey J., after quoting section 31, said:-

"Those provisions clearly give authority for the Second Tier Levy referred to in the judgment which was imposed on specific classes of growers (i.e. those responsible for new or increased production), and the evidence demonstrates that the proceeds were to be applied for the subsection (4) specific purposes of acquiring, developing and improving capital assets. The levy seems to come fairly within s.43(1) of the Commerce Act as an act, matter or thing that is of a kind authorised by s.31. The expression 'of a kind' suggests that the terms of the levy do not need to be specified in the authorising Act; so long as it sets out in sufficient detail the kind of levy intended, and so long as the levy actually imposed is of that kind, then the s.43 exemption will apply. In this case s.31(4) authorised a levy (which may be differential in its effect) for express capital purposes. It thereby provided in specific terms for a particular kind of levy, to be distinguished from the provision of a levy in general terms, which subsection (2) would exclude from the effect of the section."

It is to be observed that all three judgments attach importance to the capital purpose to which levies may be devoted as "of particular relevance to specificity", to use Richardson J.'s phrase. Their Lordships have difficulty in understanding this relevance. They note that under section 31(4) the money in the fund to which levies are to be paid is to be "applied by the Board in the acquisition, development, and improvement of capital assets, and for such other purposes as are for the time being approved by the Fruitgrowers' Federation" and invested pending such application. It appears to their Lordships that authority to impose the levy is given by section 31(1) and (2) and that, if this authorisation is not of itself sufficiently specific to satisfy section 43, the provisions of section 31(4) cannot do so. It was part of the case for the Board and the Federation at the trial that the second tier levy was necessary to meet capital expenditure by the Board necessitated by increased production of apples. This was relevant to the Board's "purpose" under section 27 and would have been very relevant if the Board had sought authorisation for the levy from the Commerce Commission under Part V of the Act of 1986, but it could not, in their Lordships' judgment, assist in establishing that the second tier levy was, or was of a kind, specifically authorised within the meaning of section 43.

Section 43(2) makes it abundantly clear that a statutory authorisation embracing a class of acts which may or may not amount to restrictive practices is not a specific authorisation which will satisfy section 43(1). This is so even if, as here, the particular act in question is not only authorised generally by the statute, but also requires under the statute, and has obtained, the specific authority of the Minister. This seems to their Lordships to indicate that nothing less will do than either a statutory authorisation of the very act in question or, if it is one of a class or kind of authorised acts, that the whole authorised class would, if not so authorised, fall foul of the prohibitions in Part II of the Act of 1986.

If specific authorisation in this sense is to be found in section 31, it must be in the words in sub-section (2) "any such levy may be imposed ... on any specified class or classes of growers". It is, in their Lordships' judgment, impossible to predicate that a levy imposed on a class of growers must necessarily be anti-competitive. But even if one qualifies the requirement of necessity that every act of the kind authorised must be anti-competitive and substitutes, as Cooke P. suggested, a criterion of likelihood, this relaxation is surely only permissible to the extent that the statute authorises acts of a kind of which the preponderant majority will certainly operate in an anti-competitive way and will not be disqualified as a specific authorisation sufficient to satisfy section 43 by the circumstance that ingenuity is able to suggest a possible

act within the ambit of the kind authorised which may not be anti-competitive. It seems to their Lordships that the authority given to impose a levy on any specified class or classes of growers falls far short of this. Growers may be classified in many ways. The definition of "grower" itself includes growers of both apples and pears which immediately indicates one classification. The growers of apples alone may be classified according to the variety of apples which they grow or according to the acreage which they cultivate, to suggest only two classifications, and no doubt in many other ways. Since the section 43 point was never taken at the trial and the Board and the Federation energetically contended that a levy on the class of growers responsible for new and increased production was in no way anti-competitive, this issue was never explored in evidence. In the absence of evidence it seems to their Lordships that classification of growers by reference to new or increased production is the only one of a number of possible classifications for the purpose of a class levy under section 31(2) which is likely to have any anti-competitive effect. Thus a class levy is the genus of which a new and increased production levy is the only offending species and the relevant authorisation is general rather than specific.

With natural reluctance to differ from a unanimous Court of Appeal in New Zealand on a point of construction of New Zealand legislation, their Lordships have nevertheless been driven by these considerations to the conclusion that the second tier levy in question was not exempted by section 43 from the operation of section 27 of the Act of 1986 and was accordingly unlawful.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal set aside and the order of Holland J. restored. It is common ground that the formal order of Holland J. does not reflect his decision in respect of the second tier levy. The restored order should be amended to include a declaration that the levy imposed by the Board under section 31 of the Act of 1971 in February 1988 was in contravention of section 27 of the Act of 1986. The Board and the Federation must pay the appellants' costs in the Court of Appeal and before the Judicial Committee of the Privy Council.