TRADING STAMP ACT, 1924-1935

Coupons and Cut Prices

One of the closest points of contact between law and political economics is to be found in the trading stamp legislation which some governments have enacted in an effort to reduce what they regard as unfair competition.[1] The object of this legislation is to eliminate the practice of giving away coupons, called trading stamps in the statutes, with each purchase of certain goods, or of any goods from a given trader's premises, which if collected in sufficient number entitle the holder to exchange them for some more or less useful object without further payment.

The argument against this particular inducement to the prospective purchaser appears to be twofold: that it operates against the small trader who has not the resources to carry stock for the sole purpose of giving it away in return for worthless pieces of paper, and that it in effect compels the public to pay more for the original article than necessary because the trader offering the coupons will cover the cost of the subsequent "gift" in the price of the original purchase. It is occasionally perceived that these two lines of argument contradict one another, for if a large trader can cover the cost by putting up the price, so can a small one. A revised defence of trading stamp legislation is then put forward to the effect that the trader covers his additional costs, but at the same time increases his profits, not by putting up prices but by increasing his turnover through attracting more customers. This is said also to be against the interest of the purchasing public on the ground that they are induced by the free coupons to buy things they do not want. The answers to these points seem to be, first, that once again a small trader can increase his turnover by additional inducements to purchase in the same way as a large trader, although not of course in the same quantity, and secondly, that if the tendency of the public at large to buy things it does not want is to be taken seriously, a start ought to be made by drastically modifying the law relating to both hire-purchase and advertising.

It is not correct that trading stamps encourage cut throat competition because a much simpler, and more common, way of competing is by the use of discounts and trade-ins. Neither is it established that giving goods away free in return for coupons is a means of unloading stock which would not sell anyway. No doubt this happens sometimes, but if it were the rule rather than the exception trading stamps would not have flourished to an extent which required repressive legislation to eliminate them. Nevertheless some communities, of which South Australia is one, are fortunate enough to enjoy whatever elusive benefits are conferred by having a Trading Stamp Act on the statute book. It is, no doubt, no more than an unfortunate coincidence that

1. Apart from the South Australian statute referred to below, see e.g., Trading Stamp Act, 1948 (W.A.); Trading Coupons Act, 1931 (N.Z.). Trading stamps have attained constitutional significance in Canada: *Fleming* (1962) 35 D.L.R. 2d 483.

although there has been legislation of this kind in force in South Australia since 1904,[2] the only two reported cases on these Acts[3] were both prosecutions against traders whose headquarters were in Sydney, N.S.W.

The second of these cases, which is the subject of this note, was *Goodwin* v. *Brebner*.[4] The defendant was charged with an offence against the Trading Stamp Act, 1924-1935 (S.A.), s. 5 (1) (b), which so far as relevant runs as follows.

> "5. (1) No person shall, on the sale of, or in connection with the sale, free distribution, or advertising of any goods—
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> (a) . . .
>
> (b) issue or deliver with or about or concerning, relating to, or in connection with such goods or any of them any writing promising, offering, or representing, or purporting to promise, offer, or represent, that the purchaser or any other person will be entitled to or will receive any refund, gift, allowance, reward, valuable consideration, benefit or advantage of any kind whatsoever dependent on the purchase of goods or of any quantity thereof. . . . "

The subsection concludes with a proviso that it does not prevent the offering, etc., of a genuine cash discount. At the time of the prosecution there was a widespread practice in Adelaide, which has since ceased, no doubt as a consequence of this case, of publishing advertisements in the press and by television offering what amounted to free gifts for the purchasers of specified goods. The defendant's particular variation on this theme was an advertisement offering the purchaser from his Adelaide branch of either an automatic washing machine or a "De Luxe" refrigerator the option of buying in addition any one of a variety of other objects, including a television set, for the nominal price of ten shillings. This offer was perfectly genuine, incredible though it seems. The prosecution claimed that the issuing of a newspaper advertisement of this kind was an offence under s. 5 (1) (b).

Since on the face of things the advertisement came squarely within the statutory words, the argument made on behalf of the defendant before the Full Court[5] was that the advertisement was not within the scope and intendment of the legislation, properly construed, and therefore did not amount to a "writing" within the meaning of s. 5 (1) (b). This contention was based on the view that the Act was directed at one particular form of commercial activity, the use of trading stamps, and that the wide and imprecise words of s. 5 (1) (b) would have an

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2. The first such statute in South Australia was the Trading Stamp Act, 1904, repealed by the Trading Stamp Act, 1924. The 1924 Act was converted into the present Act by extensive amendment in 1935.
3. *Home Benefits* v. *Crafter* (1939) 61 C.L.R. 701; *Goodwin* v. *Brebner* [1962] S.A.S.R. 87. The first of these cases decided that s. 5A of the South Australian statute did not contravene s. 92 of the Constitution.
4. [1962] S.A.S.R. 78.
5. The defendant had been prosecuted summarily and convicted. From this conviction he appealed to the Supreme Court. The appeal was referred, by consent, to the Full Court for determination.

effect on the law far beyond what the legislature intended unless their *prima facie* meaning was cut down in accordance with this approach to the statute. Support for this argument was derived from the terms of the rest of the Act and its history.

The Full Court conceded that it might well be necessary[6] to imply some limit on the generality of the expression "benefit or advantage of any kind whatsoever", for it could hardly be the law, to take a random example, that a manufacturer of honey is forbidden to advertise that purchasers of his product will get the benefit of a container which can be used as a drinking glass when the honey is finished. The delimitation of this restriction on the section the court left to another time, however. The advertisement in the instant case, although admittedly not a trading stamp because it did not authorise anyone to get anything and made no reference to any such transaction, was "well within the scope and mischief of the enactment" because it was "designed and intended to produce the same result as a 'trading stamp'."[7] The defendant's appeal from conviction was therefore dismissed.

In any problem of statutory construction where a line has to be drawn between the literal meaning of words and a meaning so much in conformity with the rest of the statute as to make the section in question practically superfluous, the solution is bound to be arbitrary and to appear more or less satisfactory according to one's views on the utility of the legislation in question. There would therefore be no point in trying to prove that the decision of the Full Court was in some sense wrong. *Goodwin* v. *Brebner* establishes, and not before due time, that in South Australia the Trading Stamp Act is not a dead letter and, so far as the courts are concerned, will be given a reasonably wide interpretation where borderline commercial activities are in question.

Nevertheless it is to be regretted, in view of the rarity of reported cases on this statute, that the court did not take the opportunity to enlarge a little on the meaning of s. 5 (1) (b). Just what is meant by a benefit or advantage that a trader must not advertise as being dependent upon the previous purchase of goods remains almost as obscure as before. Suppose a shop receives a limited supply of some commodity much in demand and advertises, not unreasonably, that it will be sold to established customers only; or suppose a trader issues an advertisement which merely says that customers will learn something of advantage when they arrive at his shop, and when they get there they receive a verbal offer of the same kind as was made in writing in the *Goodwin* case; are these advertisements within the statute? If the answer in the first case is no, but in the second yes, as one is inclined to suspect, does this not reduce the statute to an elaborate cloak for the exercise of an almost unlimited discretion by the court?

Perhaps the basic problem is not so much obscure drafting, although no-one could pretend that this particular statute is a model of clarity, as the inherent difficulty of translating politico-economic policies into legal terms. One wonders, for instance, whether the omission of

6. [1962] S.A.S.R. 78, 80.
7. [1962] S.A.S.R. 78, 81.

unwritten advertisements from s. 5 (1) (b) is deliberate or accidental. The utility of *Goodwin* v. *Brebner* would have been much increased if the court had seen fit to make some observations on these and similar questions.

ANTICIPATORY BREACH

Right of Plaintiff to Perform

The concept of anticipatory breach in the law of contract has not as yet been subjected to any systematic analysis by English or Australian Courts. The principle that a plaintiff is under a duty to minimise the consequences of the defendant's breach is likewise subject to considerable doubt in particular aspects of its operation. When the more obscure features of these doctrines interact, and the issue involves a principle fundamental to the law of contract, one might expect some enlightening analysis from reports and appraisals of the case, particularly if the decision is given by a bare majority of the House of Lords. The decision in *White and Carter (Councils) Ltd.* v. *McGregor*[1] presented such an opportunity but, although the consensus of opinion regards it as unfortunate in its practical consequences, criticism seems to have generally ignored important questions of law which appear vital to the issue it involved.[2]

In this case, advertising agents agreed with the representative of a garage proprietor to display advertisements for his garage, on refuse containers, for a period of three years. On the same day the proprietor wrote requiring them to cancel the contract on the ground that his representative had mistaken his wishes. They refused, however, and began the display in accordance with the contract. A clause provided for acceleration of payments, making all due when an instalment was in arrears for a certain time. The garage proprietor having refused to pay any sums due under the contract, the appellant sued him for the whole amount.

The action was heard at first instance by the Sheriff-Substitute of Dumbarton, who found for the defendant. The Second Division of the Scottish Court of Session unanimously dismissed an appeal from this decision. From there the appellants proceeded to the House of Lords. The House of Lords (Lord Reid, Lord Tucker and Lord Hodson; Lord Keith and Lord Morton dissenting) held that the advertising agents were entitled to carry out the contract and claim the full contract price and were not obliged to accept the repudiation and restrict their remedy to an action for damages.

The substantial issue in the case seemed relatively simple: could the appellant be prevented from earning his right to the defendant's performance after the latter had repudiated the contract? The comparative novelty of this issue in English Law has been explained by the fact that in most cases of this type the plaintiff would require the co-operation of the defendant in order to complete his performance

1. [1962] 2 W.L.R. 17.
2. Notes appear in 36 *A.L.J.* 86; 25 *M.L.R.* 364; 233 *Law Times* 381; 78 *L.Q.R.* 265.