

**Leung Chow Public Car Company (a firm)**        -        -        *Appellant*

v.

**The Attorney General**        -        -        -        -        -        *Respondent*

FROM

**THE COURT OF APPEAL OF HONG KONG**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 7TH OCTOBER 1982

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*Present at the Hearing:*

LORD DIPLOCK

LORD KEITH OF KINKEL

LORD BRIDGE OF HARWICH

LORD BRIGHTMAN

SIR SEBAG SHAW

[*Delivered by* LORD DIPLOCK]

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On 15th July, 1976, the appellant ("the firm") applied to the Commissioner for Transport ("the Commissioner") to have registered as public cars 47 Datsun Sedans identified by their chassis and engine numbers. At that date the Commissioner, acting under regulation 18B of the Road Traffic (Registration and Licensing of Vehicles) Regulations then in force, had limited to 1,388 the number of public cars permitted to be registered. This limit, imposed by a notice published in the Gazette on 5th December, 1975, left 95 vacancies for public cars unfilled on 15th July, 1976; but there had already been applications (although not on the prescribed form) by other applicants for all such vacancies. These informal applications had been processed and found to be in order by the Commissioner prior to the formal applications in respect of them being lodged with him. The Commissioner regarded himself as already committed to grant these applications when the prescribed forms were lodged by the applicants so that when that formality was completed all the vacancies would be thereby exhausted leaving none available for the firm. On that ground, and no other, by letter dated 22nd July, 1976 he refused to entertain the firm's application.

The firm then commenced proceedings against the Attorney General in respect of this refusal and a refusal on similar grounds to entertain an application by the firm for registration of 4 public light buses. With the bus application, however, their Lordships are not concerned. The proceedings came on for hearing before McMullin J. on 6th July, 1977; in his judgment the following relevant declarations were made:—

- “(1) that the Commissioner for Transport was wrong and had no authority when entertaining or considering the Plaintiffs’ applications all of 15th July, 1976 for the registration of 47 vehicles as public cars to have taken into account applications for the registration of motor vehicles as public cars unless such latter mentioned applications had been made in the form prescribed by the Commissioner under the provisions of Regulation 4 of the Road Traffic (Registration and Licensing of Vehicles) Regulations, Cap. 220 of the Laws of Hong Kong;
- (2) that the Plaintiffs are entitled to have application for registration of 47 vehicles as public cars entertained under the provisions of Regulation 6 of the Road Traffic (Registration and Licensing of Vehicles) Regulations.”

No appeal was brought against this judgment of McMullin J. It is thus *res judicata* between the parties to the present proceedings.

On 2nd July, 1977, on the instructions of a Mr. Leeds, who was acting temporarily as deputy for the Commissioner, there was published a further notice under regulation 18B, dated 30th June, 1977, limiting the number of public cars permitted to be registered to 1,376. This figure, after deduction of the 1,329 public cars already registered, left for the time being 47 vacancies. Shortly after, however, on 7th July, 1977, before any application for those vacancies had been made by the firm, a further notice dated 6th July, 1977, was published in the Gazette on the instructions of Mr. Leeds, reducing the limit upon the number of public cars permitted to be registered to 1,329, thus leaving no vacancies available for which the firm could apply.

On 11th July, the firm applied on the prescribed form for registration as public cars of 47 Datsun Sedans identified by chassis and engine numbers, in respect of which it had entered into a contract with some motor dealers, Honest Motors Limited, (“the dealers”). It will be necessary for their Lordships to revert to this contract later.

On 14th July, the Commissioner refused the application upon the ground that, as a result of the limit imposed by the notice of 6th July, 1977, there were no longer any vacancies. Such refusal was made by the Commissioner himself, a Mr. Macpherson, Mr. Leeds having ceased to be acting Commissioner on Mr. Macpherson’s return to work on 8th July.

Two other applications for the registration of 50 cars each had been made by other applicants on 5th and 6th July, respectively, and had been refused by the Commissioner on 12th July, 1977, upon the same ground: that there were no vacancies.

In the meantime on 16th June, 1977, the Road Traffic (Amendment) (No. 2) Ordinance 1977 (No. 45 of 1977), (“the amendment Ordinance”), which had been passed by the Legislative Council on 15th June, 1977, received the Governor’s approval. It was to come into operation upon a date to be appointed by the Governor, who subsequently appointed 1st November, 1977, as the operative date. By that Ordinance the Commissioner’s power to register or licence public cars was terminated as from the operative date; existing licences for public cars were not to be renewed at the expiry of the licence which was then current; but registered owners of public cars were to be entitled to convert their registrations into registrations as taxis on the payment of a premium of \$75,000 per car.

Shortly before the amendment Ordinance came into operation, the firm, on 12th October, 1977, started the present proceedings. As originally framed the claim was one for damages only, composed of three elements. One was based upon the estimated loss of profit upon operating 47 public cars for the period between 15th July, 1976, the date of the first

application, until 31st October, 1977, after which the registration of any more public cars became unlawful. Of the other two elements (which would appear to be in the alternative), one was based upon the difference between the cost which the firm would have incurred in converting 47 public car registrations into taxi registrations under the amendment Ordinance and the cost of acquiring 47 taxi registrations by tender (which the firm did not do); the alternative claim was based upon the loss of profits on operating 47 taxis after 1st November, 1977, which was claimed to be still continuing.

By subsequent amendments to the statement of claim made in the course of the hearing in 1980, the firm sought various declarations, to one of which alone it is helpful to refer for the purposes of the present appeal:—

“(2) A declaration that the Commissioner was acting *ultra vires* knowing that he was so acting or maliciously in reducing the limit of the total number of the motor vehicles that might be registered as public cars in the terms of the Gazette Notice (Extraordinary) of 6th July, 1977.”

The action was tried by Liu J. He decided:—

- (1) As a matter of law that the Commissioner was not acting *ultra vires* in refusing the application of 11th July, 1977, on the ground that, by that date as a result of a limit imposed by the notice dated 6th July, 1977, there were no vacancies for additional public cars available to be filled;
- (2) That the firm were not the owners of the 47 cars identified by chassis and engine numbers in their application of 15th July, 1976, or of the 47 other cars identified by different chassis and engine numbers in their application of 11th July, 1977, and that for that reason as a matter of law the firm were not qualified to apply for registration of those cars under regulation 4;
- (3) As a matter of fact, the Commissioner (including Mr. Leeds while acting as his deputy), even if either of them was acting *ultra vires*, was not doing so knowingly nor was he acting with malice towards the firm; and
- (4) As a matter of law that, having regard to his finding of fact under (3), no action for damages would lie against the Commissioner, even if he were acting *ultra vires*.

Liu J. accordingly dismissed the firm's action.

The firm appealed to the Court of Appeal who upheld the judge's findings of law and fact on each of the four issues summarised above. Of these the most important for present purposes is (3), for the Court of Appeal's decision on this issue together with that of Liu J. amount to concurrent findings of fact by trial and appellate courts in the country from which the appeal is brought. With such concurrent findings, particularly when reached upon oral evidence, it is the invariable practice of the Board to refuse to interfere.

So this appeal must be approached upon the ground that, if the Commissioner was acting *ultra vires* in refusing to entertain the firm's application of 15th July, 1976, or 11th July, 1977, he was nevertheless acting in the *bona fide* belief that he was entitled in law to do that which in fact he did and in doing so he was not actuated by any personal ill will towards the firm.

Since the regulations that were in force at the relevant period have since been amended the question of whether the Commissioner acted *ultra vires* in dealing with the firm's applications in 1976 and 1977 has

ceased to be of general importance. Accordingly at the outset of the hearing of the appeal before this Board their Lordships invited counsel for the firm to deal first with the questions whether the firm were "owners" of the cars which were the subject of either of their applications of 15th July, 1976 and 11th July, 1977 respectively, so as to qualify the firm to make an application for the registration of those cars under regulation 4 of the Road Traffic (Registration and Licensing of Vehicles) Regulations. This regulation reads as follows:—

- "(1) Any person who wishes to have registered a motor vehicle, of which he is the owner, shall deliver to the Commissioner an application for registration in such form as shall be prescribed by the Commissioner, and shall pay to the Commissioner a fee of \$10.
- (2) An application for registration shall be duly completed and shall be signed by the owner of the motor vehicle or by some person duly authorized by him in writing."

The expression "owner" is given an extended meaning by the interpretation section (section 2(1)) of the Road Traffic Ordinance:—

"'Owner' includes the person in whose name a vehicle is registered and the person by whom the vehicle is kept and used and, in relation to a vehicle which is the subject of a hiring agreement or hire purchase agreement, means the person in possession of the vehicle under that agreement."

The firm's claim to ownership of the cars that were the subject of the application of 15th July, 1976, was based upon an agreement dated 30th June, 1976 between the dealers and the firm for the sale by description of 100 unascertained Datsun Sedan cars for public car use. No property in any car could pass to the firm under this agreement until specific cars were appropriated to it by the dealers.

On 13th July, 1976 the dealers executed another document described as a supplement to the agreement of 30th June, 1976. It was in the following terms:—

*"Supplement to Contract Nos. T1647 to T-1746 dated 30th June, 1976.*

We, Honest Motors Ltd. (hereinafter referred to as seller) hereby give in the following the engine and chassis numbers of forty-seven (47) units Datsun Cedric 220C Diesel Sedan being partial quantity available for delivery of the related contract to M/s. Leung Chow Public Car Co. (hereinafter referred to as buyer). However, seller is entitled to be free to sell the above mentioned vehicles to any other customer before buyer's taking delivery of the vehicles."

There followed the chassis and engine numbers of 47 cars.

In their Lordships' view the reservation of an unqualified right to sell the specified cars to any other customer before the firm takes delivery of them prevents this document from operating in law as an appropriation of specific goods to the contract of sale of 30th June, 1976, so as to transfer from the dealers to the firm the property in any of the vehicles whose chassis and engine numbers are listed and which formed the subject of the firm's application of 15th July, 1976.

"Owner", in their Lordships' view, apart from any extended meaning specifically ascribed to it in the interpretation section of the Road Traffic Ordinance bears its ordinary legal meaning as the person in whom the property in the vehicle is vested. The interpretation section extends its ordinary legal meaning to include specific categories of persons, and no others, whose particular connection with the vehicle does not amount to

ownership in law. The firm did not fall within any of these categories, nor were they owners in the ordinary legal meaning of that word. Their application of 15th July, 1976, was therefore invalid.

It was urged by counsel for the firm that unless the expression "owner" was interpreted as including also any person who had a reasonable expectation of becoming the owner of a particular vehicle if and when it was registered as a public car, this would not "ensure the attainment of the object of the Regulations according to their true intent, meaning and spirit", as required by section 19 of the Interpretation and General Clauses Ordinance. It would, it was submitted, be contrary to commercial common sense to require a person to purchase a fleet of cars adapted for use as public cars unless he was reasonably certain that he could obtain a registration that would enable him to use them for that purpose. But, in their Lordships' view, there is no merit in this argument. There is no practical commercial difficulty created by ascribing to "owner" its ordinary legal meaning except in its application to those persons only who fall within any of the categories expressly stated to be included by the interpretation clause. The applicant for registration of a specific vehicle as a public car can acquire the property in a vehicle from its previous owner under a contract of sale that is subject to a condition subsequent that the seller will repurchase the vehicle for the same price if registration of it as a public car is not obtained within a specified period of time, or upon some other terms that will invest him with the immediate property in the vehicle notwithstanding that it may be defeasible on the occurrence of a condition subsequent.

A not particularly elegant example of such a contract was that entered into by the dealers and the firm in respect of the cars that were the subject of the firm's subsequent application of 11th July, 1977. On 9th July they entered into a contract contained in two documents. The first was the dealers' standard form of contract for the sale by description of 47 unidentified Datsun Sedan cars. The second document described as a Supplement to the other contract was in the following terms:—

*"Supplement to Contract Nos. T-1647A to T-1693A dated 9-7-77"*

We, HONEST MOTORS LTD., Hongkong (hereinafter referred to as seller) hereby give in the following the engine and chassis numbers of forty-seven (47) units Datsun Cedric 220-C Diesel Sedan being the entire quantity available for delivery of the related contract to Messrs. Leung Chow Public Car Company (hereinafter referred to as buyer). However, seller is entitled to be free to sell the concerned vehicles to any other customers on or after 20th July, 1977 and in that case seller will re-arrange delivery to buyer from stock and or from their further arrivals.

"This contract will be automatically become invalid if buyer fails to take delivery the whole or balance quantity of the contract within 3 months from the date hereof whereby the deposit will be refunded to buyer."

There followed the chassis and engine numbers of 47 cars. These were different from the cars listed in the supplement to the agreement of 30th June, 1976, as the dealers had in the meantime disposed of those cars to other customers. The reference in the second paragraph to the refunding of the deposit is to a deposit of \$10,000 paid by the firm under the terms of the agreement of 30th June, 1976, and apparently still held by the dealers at the time of the agreement of 9th July, 1977.

In their Lordships' view, the legal effect of the contract contained in these two documents was to transfer to the firm the property in the specific vehicles whose chassis and engine numbers were listed in the second document. The transfer of property was subject to two conditions

subsequent, neither of which was capable of operating until 20th July, 1977. The first condition subsequent operated in respect of any car sold by the dealers to some other purchaser on or after that date; the second condition subsequent operated in respect of any car of which the firm had not taken delivery by 9th October, 1977. It is, in their Lordships' view, a necessary implication from the provision relating to the return of the deposit that delivery of any vehicle was to be given only when delivery of that vehicle was requested by the firm. So the property in the 47 specific vehicles identified in the second document was vested in the firm at the date of their application of 11th July, 1977 for registration of those vehicles as public cars, and at the date of the Commissioner's refusal of that application on 14th July, 1977. This application, in their Lordships' view, was a valid application.

Their Lordships accordingly turn to consider whether, even assuming that the Commissioner was acting *ultra vires* in issuing the notice of 6th July, 1977 purporting to be made under regulation 18B and limiting the number of vehicles which might be registered as public cars to a figure which left no available vacancies on 11th July, 1977 (a matter on which their Lordships, having heard no argument, express no view), that fact would give to the firm any right of action in damages against the Commissioner who, as their Lordships are bound by the concurrent findings of fact in the courts below to accept, acted throughout in the *bona fide* belief that he was entitled in law to do that which in fact he did and in doing so was not actuated by any personal ill will towards the firm.

It is important to bear in mind that in relation to the application of 11th July, 1977, the only act by the Commissioner that is alleged to have been *ultra vires* was the issuing on 6th July, 1977 of a notice in the exercise of his powers under regulation 18B which is in the following terms:—

- “(1) Without prejudice to any other enactment the Commissioner by notice in the *Gazette* may limit the number of motor vehicles which may be registered or licensed as—
- (a) public omnibuses;
  - (b) public light buses;
  - (c) Hong Kong and Kowloon taxis;
  - (ca) New Territories taxis; or
  - (d) public cars.
- (2) The exercise by the Commissioner of his powers under paragraph (1) shall not thereby invalidate, operate to cancel, or render void the registration of a motor vehicle or of a motor vehicle licence.
- (3) If the Commissioner—
- (a) receives applications for—
    - (i) the registration; or
    - (ii) the licensing,
 of vehicles within any class of motor vehicle which is referred to in paragraph (1);
  - (b) has under paragraph (1) specified the maximum number of motor vehicles which may be registered or licensed within such class; and
  - (c) would, but for the limitation under paragraph (1) of the maximum number of motor vehicles that may be registered or licensed in the class in which the applications have been made, grant the applications,

the Commissioner may cause the applications to be determined by lot.”

Their Lordships accept the principle stated by Viscount Simonds in *Cutler v. Wandsworth Stadium* [1949] A.C. 398, 407, (as summarised by Megaw L.J. in *Thornton v. Kirklees Borough Council* [1979] Q.B. 626, 638) that where primary or subordinate legislation "imposes a duty on a public authority . . . for the benefit of a specified category of persons but prescribes no special remedy for breach of that duty, it can normally be assumed that a civil action for damages will lie". [sc. at the suit of a member of that specified category of persons who has suffered loss in consequence of a breach of that duty by the public authority upon whom it is imposed]. But the right of action for damages is dependent upon the person seeking to assert it being able to establish that upon the true construction of the legislation the duty was imposed for the benefit of a special category of persons of which he is a member. *Thornton's* case, which related to a particular subsection of the U.K. Housing (Homeless Persons) Act, 1977, may provide an example of a duty of this kind; but, in their Lordships' view, the decision is of no assistance to the firm in the instant case.

In the first place regulation 18B confers a power to limit numbers of specified kinds of vehicles; it does not impose a duty to do so. In the second place the power would appear to be exercisable for the benefit of the general public of Hong Kong as users of public and maybe also private transport. It might also be argued that the power is exercisable for the benefit of owners of existing licences for vehicles registered in the various categories since the effect of its use would be to limit increasing competition to which they might otherwise be exposed. The one category of persons for whose benefit the power was manifestly *not* conferred on the Commissioner was composed of those persons desirous of obtaining registration of additional vehicles in a class, of which public cars was one, in which the vehicles in respect of which the application was made were not already registered.

The firm in relation to their application of 11th July, 1977 were in this category. In their Lordships' view, given the concurrent findings of fact as to the Commissioner's *bona fides*, the firm had no right of action for damages against the Commissioner. They will humbly advise Her Majesty that this appeal should be dismissed with costs.

**In the Privy Council**

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**LEUNG CHOW PUBLIC CAR  
COMPANY (A FIRM)**

**v.**

**THE ATTORNEY GENERAL**

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**DELIVERED BY  
LORD DIPLOCK**