

## THE HIGH COURT

BETWEEN:

UNITED STATES TOBACCO INTERNATIONAL, INC.

AND

JOSEPH R. TADDEO

Plaintiffs

and

THE MINISTER FOR HEALTH, IRELAND AND THE  
ATTORNEY GENERALDefendants

Judgment of the President of the High Court delivered on the <sup>7th</sup>  
day of September 1987

The first named Plaintiff herein is a company incorporated under the laws of the State of Delaware in the United States of America.

It is the manufacturer and distributor of a number of tobacco products including one in the form of finely-cut, moist tobacco contained in sachets or pouches. This product is distributed under the brand name Skoal Bandits.

The second named Plaintiff is the Managing Director - Europe of the said company.

On or about the 20th day of December 1985 in purported exercise of the powers conferred upon him under Section 66 of the Health Act, 1947 (No. 28 of 1947) the first named Defendant made the Health (restricted Article) Order, 1985 (S.I. No. 429 of 1985).

This Order provided that:-

"Whereas the Minister for Health is of opinion that tobacco in the form of finely-cut, moist tobacco contained in sachets or pouches and intended for use by being placed in the mouth, is likely, when accessible to the general public, to be used for purposes involving risk of serious injury to health or body; now therefore the Minister for Health hereby orders as follows:-

- (1) Tobacco in the form of finely-cut, moist tobacco contained in sachets or pouches and intended for use by being placed in the mouth shall be a restricted article for the purposes of Section 66 of the Health Act, 1947 (No. 28 of 1947)".

Attached to the said Statutory Instrument was an Explanatory Note which provided that:-

"The effect of this Order is to make the tobacco product referred to a restricted article under Section 66 of the Health Act, 1947. Under this Section, it is an offence for a person, unless authorised by a permit granted by the Minister for Health, to import, manufacture, sell or otherwise dispose of or offer to keep for sale or other disposal, or advertise, a restricted article. Persons found guilty of an offence under the Section are liable to a fine not exceeding £100 or imprisonment for a term not exceeding six months or to both such fine and imprisonment and, in every case, to forfeiture of the restricted article."

Section 66 - (1) of the Health Act, 1947 states that:-

"The Minister may by order provide that -

- (a) any instrument, appliance or apparatus of a class as respects which he is of opinion that the use by the general

public of instruments, appliances or apparatuses of that class involves risk of serious injury to health or body or  
(b) a substance as respects which he is of opinion that it is likely, when accessible to the general public, to be used for purposes involving risk of serious injury to health or body, shall be a restricted article for the purposes of this Section. "

Sub-section (2) provides that:-

"In the subsequent sub-sections of this Section, the expression "restricted article" means an article declared by an order under this section to be a restricted article for the purposes of this section."

Sub-section (3) provides that:-

"The Minister may grant to a registered medical practitioner a permit for the importation, manufacture, sale or other disposal of a restricted article and may attach to the permits such conditions (if any) as he thinks proper."

Sub-section (4) provides that:-

"Save so far as may be authorised by a permit under Section (3) of this section, it shall not be lawful for a person to import, manufacture, sell or otherwise dispose of, or offer to keep for sale or other disposal, a restricted article."

Sub-section (5) provides that:-

"It shall not be lawful for a person to advertise a restricted article

Sub-section (6) provides that:-

"A person who contravenes sub-section (4) or (5) of this Section or who, having been granted and having availed of a permit under sub-section (3) of this Section, does not comply with the condition attached to the permit, shall be guilty of an offence under this Section, and shall be liable on summary conviction thereof to a fine not exceeding £100 or, at the discretion of the Court, to imprisonment for a term not exceeding six months or to both such fine and such imprisonment and, in every case, to forfeiture of the restricted article in relation to which the offence was committed."

The Plaintiffs in this case claim:-

- (a) A declaration that the Health (restricted article) Order, 1985 (Statutory Instrument No. 429 of 1985) is ultra vires and void.
- (b) A declaration that the Health (restricted article) Order, 1985 (Statutory Instrument No. 429 of 1985) is ultra vires the powers of the first named Defendant under Section 66 of the Health Act, 1947 by reason of the failure of the said Defendant to comply with the principles of natural and constitutional justice and the principles of basic fairness of procedure as provided for in Article 40.3 of the Constitution of Ireland.
- (2) A declaration that Part 6 of the Health Act, 1947 (No. 28 of 1947) as amended, laying down provisions in relation to medicinal and toilet preparations and certain other articles, has no application to the first named Plaintiff's tobacco product in the form of finely-cut, moist tobacco contained in sachets or pouches known as Skoal Bandits or to any tobacco product.

Before proceeding to deal with the facts in this particular case and the Statutory Instrument impugned, I think it desirable to refer to a number of cases and statements made in the course of the judgments thereon.

In the course of his judgment in Cassidy .v. Minister for Industry (1978 I.R. Page 297), the former Chief Justice stated at Page 305 of the Report that:-

"Under the Constitution the sole and exclusive power of making laws for the State is vested in the Oireachtas and there is no other legislative authority. As a consequence where, as in this case, a Statutory Instrument made by a Minister is impugned, the Courts have the duty to enquire whether such instrument has been made under powers conferred, and for the purposes authorised, by the Oireachtas. If the powers conferred by the Oireachtas on the Minister do not cover what was purported to be done, clearly, the Instrument is ultra vires and of no effect. Equally, if the rule-making power given to the Minister has been exercised in such a manner as to bring about a result not contemplated by the Oireachtas, the Courts have the duty to interfere. Not to do so in such circumstances would be to tolerate the unconstitutional assumption of powers by great departments of State to the possible prejudice of ordinary citizens. If what the Minister seeks to do was not contemplated by the Oireachtas then, clearly, it could not have been authorised

In the course of his judgment in the same case, Mr. Justice Henchy stated at Page 310 of the Report that:-

"The general rule of law is that where Parliament has by statute delegated a power of subordinate legislation, the power must be exercised within the limitations of that power as they are express

or necessarily implied in the statutory delegation. Otherwise it will be held to have been invalidly exercised for being ultra vires. And it is a necessary implication in such a statutory delegation that the power to issue subordinate legislation should be exercised reasonably. Diplock L.J. has stated in *Mixnam's Properties Ltd. v. Chertsey Urban District Council* at Page 237 of the report:-

"Thus, the kind of unreasonableness which invalidates a by-law (or, I would add, any other form of subordinate legislation) is not the antonym of 'reasonableness' in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires'.

I consider that to be the correct test."

In the course of delivering the judgment of the Court in *City View Press v. An Chomhairle Oiluina* 1980 I.R. Page 381, the then Chief Justice stated at Page 398 of the Report that:-

"The giving of powers to a designated Minister or subordinate body to make regulations or orders under a particular statute has been a feature of legislation for many years. The practice has obvious attractions in view of the complex, intricate and ever-changing situations which confront both the Legislature and the Executive in a modern State. Sometimes, as in this instance, the legislature, conscious of the danger of giving too much power in the regulation or order-making process, provides that any regulation or order which is made should be subject to annulment by either House of Parliament. This retains a measure of control,

if not in Parliament as such, at least in the two Houses. Therefore, it is a safeguard. Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution. In discharging that responsibility, the Courts will have regard to where and by what authority the law in question purports to have been made. In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power."

In the course of his judgment in Cooke and Walsh (1984 I.R. Page 710) the then Chief Justice stated at Page 728 of the Report that:-

"The interpretation of the Section is a pre-requisite to a determination of whether what purports to be done by the regulation, is in fact, within the Minister's powers under the Section".

and at Page 729 he stated that:-

"it is necessary to seek a meaning for these words which absolve the national Parliament from any intention to delegate its exclusive

power of making or changing the laws".

As stated by Mr. Justice Walsh in the course of his judgment in East Donegal Cooperative .v. Attorney General (1970 I.R. Page 317) at 341 of the Report he stated:-

"The whole or any part of the Act may be referred to and relied upon in seeking to construe any particular part of it, and a construction of any particular phrase requires that it is to be viewed in connection with the whole Act and not that it should be viewed detached from it. The words of the Act, and in particular the general words, cannot be read in isolation and their content is to be derived from their context. Therefore, words or phrases which at first sight might appear to be wide and general may be cut down in their construction when examined against the objects of the Act which are to be derived from a study of the Act as a whole including the long titled. Until each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or unambiguous."

The effect of these statements of the law in relation to the exercise of the powers of Ministers to make regulations is that any regulations or instrument made by him must be made under the powers conferred and for the purposes authorised by the Oireachtas: that the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation: that powers conferred by the Oireachtas on the Minister must cover what was purported to be done: that the regulation made by the Minister must not bring about a result contemplated by the Oireachtas: that the power to make regulations must be exercised reasonably and the Courts have a duty to ensure that constitutional safeguards remain, that the exclusive authority of the

National Parliament in the field of law making is not eroded by a delegation of power which is neither contemplated or permitted by the Constitution and to interfere if the powers conferred by the Oireachtas on the Minister do not cover what was purported to be done or were exercised in such a manner as to bring about a result not contemplated by the Oireachtas.

The facts relevant to this case are not in dispute and may be summarised as follows:-

The first named Plaintiff is the manufacturer and distributor of a number of tobacco products including one in the form of finely-cut, moist tobacco contained in sachets or pouches.

This product is distributed under the branded name "Skoal Bandits".

This product is distributed throughout the United Kingdom of Great Britain and Northern Ireland and in some other Member States of the European Communities.

The first named Plaintiff contemplated the distribution and sale of the said product in the Republic of Ireland.

On or about the 10th day of June 1985, Tobacco Distributors Ltd., an Irish distribution agency, acting on behalf of the first-named Plaintiff wrote to the Minister for Health enclosing a sample of the said product together with a communication from the Chief Medical Officer of the United Kingdom, Department of Health and Social Security dated the 18th day of April 1985.

The said distribution agency, Tobacco Distributors Ltd. enquired as followed of the Minister for Health:-

- (a) If the importation of the said product would come within the advertising and sponsorship restrictions of the tobacco products (Control of Advertising, Sponsorship and Sales Promotion) Regulations, 1979, (Statutory Instrument No. 350 of 1979);
- (b) Whether or not the Minister for Health would consider the use of the said product "harmful";
- (c) Whether or not the Minister for Health would intend to implement legislation at a future date designed to prevent the use of the said product.

In response to the said letter, on or about the 12th day of July 1985 the Minister for Health informed Tobacco Distributors Ltd. that:-

- (a) The position in relation to the said product is that it is regarded as a tobacco product for the purpose of the tobacco products (control of advertising, sponsorship and sales promotion) Regulations, 1979;
- (b) If the said product were to be imported into the State it would be useful to arrange a meeting to discuss the proposed retail price of the product and the level of advertising expenditure that might be required for marketing purposes;
- (c) The said product will be treated like any other tobacco product and future attitudes will be determined by the scientific evidence which comes to light in relation to health risks associated with the use of the said product;
- (d) That before placing the said product on the Irish market, the first-named Defendant would have to be informed that the substitutes and additives used had been approved by the United Kingdom Independence Scientific Committee on Smoking and Health (Hunter Committee).

On or about the 30th day of July 1985, Tobacco Distributors Ltd. wrote to the Minister for Health and informed him that it was their understanding that any additives in the said product must have been approved by the Hunter Committee as the said product was on sale in the United Kingdom. In addition, they request information as to the legislation covering the request as to additives.

On or about the 22nd day of August 1985, Tobacco Distributors Ltd. were referred by the Minister for Health to the voluntary agreement with the tobacco industry in the State with regard to the use of additives in tobacco products.

By letter dated the 10th day of June 1985, Tobacco Distributors Ltd. had written to the Revenue Commissioners requesting a clarification that "Skoal Bandits" would be classified as snuff on importation to this country from an EEC source and therefore free of excise.

By letter dated the 5th day of September 1985, the Revenue Commissioners replied that:-

"Skoal Bandits" has described and is represented by the sample furnished appeared to be classified in the Customs Card of CTT, sub-heading 24.02D, Code No. 2402/400 and that "Skoal Bandits" are presently regarded as snuff for excise duty purposes and hence are not currently liable to excise duty.

On the 20th day of December 1985, the Minister for Health made the (restricted article) Order, 1985 (Statutory Instrument No. 429 of 1985).

Before the making of this Order, neither the first-named Plaintiff or their agents Tobacco Distributors Ltd. were afforded any opportunity

to make representations to the Minister for Health on the question whether their product, "Skoal Bandits" which was tobacco in the form of finely-cut, moist tobacco contained in sachets or pouches and intended for use by being placed in the mouth, is likely, when accessible to the general public, to be used for purposes involving risk of serious injury to health or body and the order was made without prior notice to them.

It is clear from the evidence of Dr. Robins, an Assistant Secretary in the Department of Health, that the immediate concern of the Minister in the making of the order was the possibility of the introduction into the Irish market of the product "Skoal Bandits" and of the introduction of similar products. This is also clear from the term of the Press Release issued on behalf of the Minister for Health on the 3rd day of January 1986.

I am satisfied from the evidence of Dr. Robins that there was information available to the Minister for Health which would enable him to form the opinion that tobacco in the form of finely-cut, moist tobacco contained in sachets or pouches and intended for use by being placed in the mouth is likely, when accessible to the general public, to be used for purposes involving serious injury to health or body.

Mr. Fitzsimons has submitted on behalf of the Plaintiffs that:-

- (1) The Order impugned was aimed directly at "Skoal Bandits";
- (2) The Minister for Health acted ultra vires the powers conferred on him by Section 66 of the Health Act, 1947 because
  - (i) a "Skoal Bandit" is not a substance within the meaning of the said Section, and
  - (ii) the banning of a product such as a tobacco product is outside the scope of the Section.
- (3) The Minister for Health acted contrary to the principles of natural justice in making the impugned regulation with out

affording the Plaintiffs being the parties immediately affected by the said order an opportunity to make representations to him on the issue, and that he failed to follow fair procedures.

Mr. Clarke, on behalf of the Defendants herein, does not agree with or accept any of the submissions made by Mr. Fitzsimons on behalf of the Plaintiff herein.

Consequently, the first question that I have to consider is whether or not the Minister for Health was by virtue of the terms of Section 66 of the Health Act, 1947 empowered to make a regulation declaring tobacco in the form of finely-cut, moist tobacco contained in sachets or pouches and intended for use by being placed in the mouth to be a restricted article for the purposes of Section 66 of the Health Act, 1947 (No. 28 of 1947)

As already indicated in the course of this judgment, this Section empowers the Minister, inter alia, to provide that

- (b) a substance as respects of which he is of opinion that it is likely, when accessible to the general public, to be used for purposes involving risk of serious injury to health or body shall be a restricted article for the purposes of this Section.

The definition of the word "substance" contained in the said Act was amended by the provisions of Section 39 of the Health Act, 1953 which provided that:-

"Section 35 of the principal act is hereby amended.

- (a) By the deletion of the definition of substance in sub-Section 1 and the substitution therefor of the following:-

"the word 'substance' means a natural or artificial substance whether in solid or liquid form or in the form of a gas or vapour, including a preparation or manufactured article

or article which has been subjected to any artificial treatment or process".

Section 65 and 66 of the Health Act, 1947 are contained in Part 6 of the said Act which part is stated to deal with

"provisions in relation to medical and toilet preparations and certain other articles".

In considering the question, whether the amended definition of "substance" contained in Section 65 of the Health Act, 1947 is wide enough to enable the Minister, acting in pursuance of the provisions of Section 66 of the said Act, to declare a tobacco product such as "Skoal Bandits" is a restricted article, I must have regard to:-

- (1) the maxim noscitur a sociis, which means that a word or expression is known from its companions,
- (2) to the statement of Mr. Justice Stamp in Bourne .v. Norwich Crematorium Ltd. 1967 2 A.E.R. 576 where he stated at 578:-

"English words derive colour from those which surround them. Sentences are not mere collection of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you have assigned to them as separate words ....."

Which said statement was *cited* with approval by Mr. Justice Henchy in the course of his judgment in Andrew Dillon .v. Minister for Posts and Telegraphs unreported but delivered on the 3rd day of June 1981, and,

- (3) To the statement of Mr. Justice Walsh in the course of his judgment in East Donegal Co-operative .v. Attorney General

already referred to and in particular the portion wherein he states that:-

"The whole or any part of the Act may be referred to and relied upon in seeking to construe any particular part of it, and a construction of any particular phrase requires that it is to be viewed in connection with the whole Act and not that it should be viewed detached from it".

I have to seek to determine what was in the contemplation of the Oireachtas when they delegated to the Minister for Health the powers set forth in Section 66 of the Health Act, 1947 and in so doing, I have to have regard to the provisions of the Act as a whole.

The Health Act, 1947 is expressed to be

"an Act to make further and better provision in relation to the health of the people and to provide for the making of regulations by virtue of which certain charges may be made".

Part 1 of the Act deals with preliminary and general matters, Part 2 deals with the establishment of certain institutions, Part 3 provides for the establishment of a mother and child service, Part 4 deals with infectious disease and infestation, Part 5 deals with food and drink, Part 6 contains provisions in relation to medical and toilet preparations and certain other articles, Part 7 deals with officers of Health Authorities, Part 8 deals with acquisition and disposal of land by health authorities, Part 9 deals with the enforcement of the Act and Part 10 contains miscellaneous provisions.

It is quite clear that Part 6 of the Health Act, 1947 deals with and is stated to deal with "medical and toilet preparations and certain other

articles".

It is equally clear that the Plaintiff's product is neither a medical or a toilet preparation.

A medical preparation is defined as

- (a) a substance which is sold under a proprietary designation and which may be used for the prevention or treatment of any human ailment, infirmity, injury or defect, or,
- (b) any other prophylactic, diagnostic or therapeutic substance which may be used for the prevention or treatment of any human ailment, infirmity, injury or defect.

"Toilet Preparation" defined as a substance which is sold under proprietary designation to be applied for toilet or cosmetic purposes to the human body or any part thereof.

Then, does a Tobacco Product come within the meaning of "certain other articles"?

Having read the Act as a whole and in particular Part 6 thereof I am satisfied that the powers given to the Minister for Health by Section 66 of the Health Act, 1947 and, which were in the contemplation of the Oireachtas at the time of the enactment of the said Act, are limited to substances which are sold under a proprietary designation and which may be used for the prevention or treatment of any human ailment, infirmity, injury or defect, any other prophylactic, diagnostic or therapeutic substance which may be used for the prevention or treatment of any human ailment, infirmity, injury or defect and substances which are sold under proprietary designation to be applied for toilet or cosmetic purposes to the human body or any part thereof to articles such as

instruments, appliances or apparatuses of a class as respects which he is of the opinion that the use by the general public of instruments, appliances or apparatuses of that class involved risk of serious injury to health or body.

This view is confirmed by the provisions of sub-Section 3 of Section 66 of the Act which provides that:-

"The Minister may grant to a registered medical practitioner a permit for the importation, manufacture, sale or other disposal of a restricted article and may attach to the permit such conditions (if any) as he thinks proper".

This, in my view, clearly establishes that what the Minister was empowered to do by virtue of Section 66 was limited to substances and articles used for the prevention or treatment of any human ailment, infirmity, injury or defect or substances applied for toilet or domestic purposes to human body or any part thereof which if available to the general public involved a risk of serious injury to health or body but which under the control of a registered medical practitioner would not involve such risk of serious injury to health or body. Hence, the power given to the Minister to grant to a registered medical practitioner a permit for the importation, manufacture, sale or other disposal of a restricted article and to attach to the permit such conditions (if any) as he thinks proper.

I am quite sure that the Oireachtas did not envisage a situation whereby they were empowering the Minister to grant to a registered medical practitioner a permit for the importation, manufacture, sale or other disposal of a tobacco product such as "Skool Bandit".

I am satisfied that it was not in the contemplation of the Oireachtas when enacting the provisions of the Health Act, 1947 including Section 66 thereof that they were empowering the Minister to make a regulation providing that tobacco or tobacco products be a restricted article.

Consequently, I am satisfied that the Minister in making the Order impugned in these proceedings acted ultra vires the powers conferred on him by Section 66 of the Health Act, 1947 and that the said Order is consequently void.

Being so satisfied, it is in my opinion neither necessary nor desirable that I should express any view as to whether or not the Minister in making the said order acted contrary to the principles of natural justice on basic fairness of procedures.

*Approved  
R. Hamilton*