

*TC Distributors (NT) Pty Ltd & Ors v Northern Territory of Australia*  
[2002] NTCA 2

PARTIES: TC DISTRIBUTORS (NT) PTY LTD,  
CHRISTINA JENNIFER  
KALOGEROPOULOS, THEODOROU  
KALOGEROPOULOS  
v

THE NORTHERN TERRITORY OF  
AUSTRALIA

TITLE OF COURT: COURT OF APPEAL OF THE  
NORTHERN TERRITORY

JURISDICTION: AN APPEAL FROM THE SUPREME  
COURT EXERCISING TERRITORY  
JURISDICTION

FILE NO: AP3 of 2001 (20007826)

DELIVERED: 24 April 2002

HEARING DATES: 18 March 2002

JUDGMENT OF: MARTIN CJ, MILDREN & RILEY JJ

**REPRESENTATION:**

*Counsel:*

Appellants: J. B. Waters QC  
Respondent: T. I. Pauling QC, with P. McNab

*Solicitors:*

Appellants: Geoff James  
Respondent: Cridlands

Judgment category classification: B  
Judgment ID Number: ril0208  
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ril0208

IN THE COURT OF APPEAL  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*TC Distributors (NT) Pty Ltd & Ors v Northern Territory of Australia*  
[2002] NTCA 2

No. CA3 of 2001 (20007826)

BETWEEN:

**TC DISTRIBUTORS (NT) PTY LTD,  
CHRISTINA JENNIFER  
KALOGEROPOULOS, THEODOROU  
KALOGEROPOULOS**  
Appellants

AND:

**THE NORTHERN TERRITORY OF  
AUSTRALIA**  
Respondent

CORAM: MARTIN CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 24 April 2002)

**MARTIN CJ:**

- [1] I agree with the judgment prepared by Riley J and with the orders he proposes.

**MILDREN J:**

- [2] I agree entirely with the judgment prepared by Riley J and with the order which he proposes.

**RILEY J:**

- [3] In January 1999 the appellants were the owners and operators of ten commercial passenger road transport motor vehicles each designed to carry in excess of eight passengers. Prior to 1 January 1999 those vehicles were licensed under the *Commercial Passenger (Road) Transport Act* of 1991 as motor omnibuses. By virtue of the Act that licence was subject to such conditions as the Director of Commercial Passenger Transport thought fit and specified in the licence. The Director was empowered to, from time to time, “amend or revoke the conditions of the licence or add new conditions” (s 41).
- [4] Prior to 1 January 1999 the omnibus class of licence did not preclude omnibuses from plying for hire, ranking for customers or obtaining custom from people who flagged them down. They could operate anywhere in the Northern Territory except as a route service. At that time the appellants’ vehicles were used in the business of TC Distributors (NT) Pty Ltd to carry passengers for hire or reward in competition with motor vehicles registered as “taxis” under the Act.
- [5] Following a review of the industry the *Commercial Passenger (Road) Transport Act* was amended with effect from 1 January 1999 to introduce new licence classifications in relation to motor vehicles used for the carrying of passengers for hire or reward. The amending legislation changed the manner in which motor omnibuses were entitled to operate by limiting their operation to conducting pre-booked charters and tours,

conducting route services and plying for hire at any place outside a taxi area or minibus area as provided in the Regulations. The taxi and minibus “areas” are, broadly speaking, urban and suburban areas.

- [6] The amending legislation also introduced a new category of licence related to minibuses. A minibus was defined as being an approved motor vehicle that is, inter alia, “fitted, equipped or constructed to carry more than 8 passengers but no more than 15 passengers”. The vehicles owned and operated by the appellants fell within the definition of minibuses. The new regime provided for an annual licence that imposed restrictions upon the operation of the minibuses when compared with the pre-existing regime. For example it was a condition of all minibus licences that a minibus must not stand or ply for hire except at ranks approved by the Director.
- [7] Following the introduction of the amending legislation the holder of an existing motor omnibus licence had the option of continuing to operate as a motor omnibus in accordance with the new conditions or to operate in the manner of a minibus as provided for in the amended legislation. The appellants informed the Court that their omnibus licences were “withdrawn” and new minibus licences were substituted.
- [8] The appellants submitted that following the amendments, the business could no longer operate as it previously had and, in particular, could not operate in a similar manner to motor vehicles registered as taxis under the Act. The appellants described the situation as follows:

“The position, therefore, until 1998 was that, provided the omnibus was above a certain size (eight seats) and complied with the aforementioned restrictions and did not adopt without consent a formal route, it could be directed by telephone or radio to pick up individual customers and, as mentioned, rank for customers and accept charges from persons who hailed them. No other appreciable restrictions made them any different from taxis. In that regulatory context the appellants built up a business.”

Following the amendments to the Act the appellants submitted that the new licensing category for minibuses so restricted operations of their vehicles as to amount to “the deprivation of a right of property” which would entitle the appellants to compensation. It was contended that the “blanket cancellation” of all omnibus licences in the Northern Territory went beyond regulating the industry by refining the licensing regime and had the effect of “acquiring (and handing on to taxis and minibus operators) the business they operated and owned”. It was submitted that it was not just the licences of the appellants that were acquired by the cancellation but also their business.

- [9] The appellants applied to the Supreme Court for a declaration to the effect that the *Commercial Passenger (Road) Transport Amendment Act 1998* effected an acquisition of property otherwise than on just terms for the purposes of s 86 of the Act. That section is in the following terms:

“Where the application of a provision of this Act would, but for this section, result in an acquisition of property otherwise than on just terms, the person from whom the property is acquired shall be entitled to receive just compensation for the acquisition, and a court of competent jurisdiction may determine the amount of the compensation or make such order as, in its opinion, is necessary to ensure that the acquisition is on just terms.”

- [10] The respondent to this appeal resisted the application on the basis that the appellants' interests as holders of the motor omnibus licences did not constitute "property" for the purposes of the Act and further that there was no "acquisition" of property because no benefit or reciprocal liability was acquired, whether by transfer, vesting or otherwise. It was argued that the 1998 amendment constituted no more than a modification or extinguishment of a statutory entitlement which had no basis in the general law.
- [11] The matter came before the Court and judgment was delivered on 16 March 2001. In that judgment Angel J rejected the application. He concluded that the former omnibus licence was not an interest in property for the purposes of s 86 of the Amending Act or for s 50 of the *Northern Territory (Self Government) Act*. His Honour adopted what fell from Mason J in *R v Toohey; Ex parte Meneling Station Pty Ltd & Ors* (1982) 158 CLR 327 (at 342) where he said:

"In *National Provincial Bank Ltd v Ainsworth*, Lord Wilberforce said:

'Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.'

In my opinion, the rights of the holder of a grazing licence created under the *Crown Lands Act* fall short in two respects of the concept of property or proprietary rights expressed by Lord Wilberforce. Regulation 71 (the Minister's power to forfeit a grazing licence where the licensee fails to comply with a condition of the licence after having been given notice to do so) and reg 71B (the right of a

licensee to surrender his licence) are not inconsistent with the notion that a grazing licensee holds an interest in land. But reg 71A represents a substantial obstacle to the applicants' case. That regulation enables the Minister to cancel a licence, the only precondition being that he give three months' notice in writing of his intention to do so. No default on the part of the licensee is necessary. The regulation suggests that the licensee has no interest in the land at all. The future of his right to graze stock is, by virtue of the Minister's power to cancel, absolutely in the hands of the Minister and beyond his own control. A right terminable in the manner permitted by reg 71A lacks that degree of permanence of which his Lordship spoke."

[12] In dismissing the application Angel J said (par 9):

"A motor omnibus licence is necessarily characterised by the statutory provisions enshrouding it. It was not capable of assumption by third parties and was without any degree of permanence or stability. It could be cancelled without fault on the part of the licensee. An omnibus licence was a statutory entitlement inherently susceptible of statutory modification or extinguishment. In my opinion, the amending Act modified a statutory right that had no basis in the general law. In my opinion the amending Act did not confer any interest in property or other benefit on the Territory or any other person and was not a law that could be characterised as a law with respect to the acquisition of property. Both before and after 1 January 1999 there was no restriction on the number of licensed omnibus operators. Unlike the case with taxis there was no subsisting statutory monopoly at the time of the amending Act."

[13] In their submissions to this Court the appellants complained that it was "not just their licences that were acquired (by cancellation) but their business".

The business which was said to have been acquired was, effectively, the goodwill that, it was submitted, attached to the business resulting from the use of the licenses. The appellants operated the business under the name TC Distributors (NT) Pty Ltd. There was no suggestion that the effect of the legislation was to acquire any other part of the business. The motor vehicles

remained available for registration under the amended legislation. However, it was said that the goodwill was a benefit lost since the minibus licences, when issued, had “an entirely different set of conditions from those attaching to the bus business carried out before”. It was submitted that the “business goodwill” was ‘property’ for the purposes of s 86 of the Act and that it had been acquired by the Government by virtue of the amending legislation.

- [14] Whilst the appellants did not abandon the argument that the licences themselves were “property” for the purposes of s 86 of the Act, they sought to demonstrate that the goodwill that flowed from the availability of the licence in its pre-amendment form was property and was acquired by reference to the post amendment conditions. However it is clear that no goodwill attaches to the omnibus licences as they existed prior to amendment: *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605. In that case Gaudron, McHugh, Gummow & Hayne JJ said (at 629-630) of a taxi licence:

“A taxi licence is a valuable item of property because it has economic potential. It allows its holder to conduct a profitable business and it may be sold or leased for reward to a third party. But neither inherently nor when used to authorise the conduct of a taxi business does it constitute or contain goodwill. A licence is a pre-requisite to the conduct of many professions, trades, businesses and callings. But it is not a source of the goodwill of a business simply because it is a pre-requisite of a business or calling. Nor is the situation different when only a limited number of licences are issued for a particular industry.



For legal purposes, goodwill is the attractive force that brings in custom and adds to the value of the business. It may be site, personality, service, price or habit that obtains custom. But with the possible exception of a licence to conduct a business exclusive of all competition, a licence that authorises the conduct of a business is not a source of goodwill. A taxi licence therefore is simply an item of property whose value is not dependent on the present existence of a business. It is not and does not contain any element of goodwill.”

[15] In my view Angel J was correct in concluding that an omnibus licence under the earlier legislation was not an interest in property. Under the legislation the holder of the licence was “immunised” from the criminal offence of plying a vehicle for hire without a motor omnibus licence (s 39). The licence itself was inherently susceptible of statutory modification or extinguishment. It was a licence that was issued for a period of three years “unless sooner cancelled or suspended” (s 43). The licence could be renewed but there was no obligation upon the respondent to renew (s 43). The motor omnibus licence was issued subject to such conditions as the Director thought fit and specified in the licence and those conditions were able to be amended or revoked at any time by written notice (s 41). Further, the Director could add new conditions at any time by written notice directed to the licence holder (s 41). The legislation did not include any provision enabling the transfer of the licence from one person to another and, in this regard, is to be contrasted with the situation regarding taxi licences (s 26). Also, by way of contrast to taxi licences, omnibus licences were unlimited in number and available to all who qualified and made application. They were unlimited in scope. There was no market in such licences.

[16] In my opinion the learned trial Judge was correct in concluding that the omnibus licenses were not “property” for the purposes of s 86 of the *Commercial Passenger (Road) Transport Act* or for s 50 of the *Self Government Act*. The appeal should be dismissed with costs.

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