

Court in thinking that the Comptroller-General of Customs is an officer within the meaning of these sections.

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*Plaintiffs' first demurrer allowed, and their second demurrer overruled. Questions raised as points of law in par. 4 of the plaintiffs' replication answered as follows :—*  
*(a) Yes. (b) Yes, against the Commonwealth, unless the facts proved under par. 12 of the defence establish a justification under the war power. (c) Yes. Costs to be costs in the action.*

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Solicitors for the plaintiffs, *Dalrymple & Blain.*
Solicitor for the defendants, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

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Alt
Common-
wealth v
Zacharassen
& Blom
(1920) 27
CLR 552

[HIGH COURT OF AUSTRALIA.]

BLOM APPELLANT ;
PLAINTIFF,

AND

THE COMMONWEALTH RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Ship—Foreign ship—Clearance—Refusal by Comptroller-General and Collector to issue—Liability of Commonwealth—Placing of armed guard on ship to prevent sailing without clearance—Customs Act 1901-1910 (No. 6 of 1901—No. 36 of 1910), secs. 117-122.

The master of a ship, of which the port of registry was in Russia, applied to the Collector of Customs at Sydney for a certificate of clearance and tendered to him all the documents required by law to be tendered for the purpose of

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SYDNEY,  
Dec. 7, 10, 20.

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Barton,
Isaacs,
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obtaining a clearance for the ship. The Comptroller-General of Customs and the Collector refused to grant a clearance unless a cargo of wheat for the United Kingdom or France was accepted by the ship.

Held, by Barton, Isaacs and Rich JJ., that on these facts the owner of the ship was entitled to maintain an action for damages against the Commonwealth.

Zachariassen v. The Commonwealth, ante, 166, followed.

An armed guard was placed on the ship by the Commonwealth for the purpose of preventing the ship from sailing without a clearance. On a special case stated by the parties stating this fact and asking whether it entitled the owner of the ship to recover damages against the Commonwealth,

Held, by Barton, Isaacs, Gavan Duffy and Rich JJ., that the question should not be answered without evidence being given as to the circumstances under which the armed guard was placed on the ship.

Decision of the Supreme Court of New South Wales : *Blom v. The Commonwealth of Australia*, 17 S.R. (N.S.W.), 469, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales by Axel E. Blom against the Commonwealth the parties stated the following special case for the opinion of the Court :—

1. The plaintiff has commenced an action in the Supreme Court of New South Wales by virtue of the provisions of the *Judiciary Act* 1903, sec. 56, against the Commonwealth claiming damages under the following circumstances :—

2. The plaintiff, a Russian subject and a citizen of Nystad, Finland, is the owner of a certain ship called the *Lindisfarne* whose port of registry is Nystad, Finland.

3. The said ship arrived at Adelaide in the Commonwealth in June 1916 with a cargo of oil from New York.

4. The said ship was not under time charter to any person, firm or company resident or carrying on business in the Commonwealth.

5. Prior to the arrival of the said ship as aforesaid the defendant had assumed control of the export of wheat from Australia to the United Kingdom and France.

6. In July 1916 the said ship sailed from Adelaide and proceeded to Sydney in ballast for docking purposes.

7. During July 1916 the said ship was chartered by persons not resident or carrying on business in the Commonwealth through the

agents of the plaintiff in London to carry nitrate from Caleta Calosa in Chile to France.

8. On 9th August 1916 the plaintiff by his master made application in the manner prescribed by the *Customs Act* 1901-1910 and the regulations thereunder to the Collector of Customs at Sydney, the duly appointed officer in that behalf under the *Customs Act*, for a clearance for the said ship to proceed to Chile in ballast.

9. At the time of making such application for a clearance as aforesaid the plaintiff by his master duly tendered to the said Collector of Customs at Sydney all the documents required by law to be tendered for the purpose of obtaining a clearance for the said ship, and informed the said Collector of Customs of the contract under which the said ship was engaged to carry nitrate from Chile to France.

10. On or about 15th August 1916 the said master made further application to the said Collector of Customs at Sydney for a clearance as aforesaid in accordance with the said application of 9th August.

11. In reply to such application as in the last preceding paragraph mentioned the said Collector of Customs at Sydney informed the said master that no application for a clearance for the said ship would be dealt with unless a cargo of wheat for the United Kingdom or France was accepted by the said ship.

12. On or about 16th August 1916 the plaintiff by his said master made application to the Comptroller-General of Customs at Melbourne for a direction to the said Collector of Customs at Sydney to grant a clearance on the said application of 9th August.

13. The said Comptroller-General of Customs thereupon informed the said master that a clearance for the said ship to leave the Commonwealth would not be granted unless a cargo of wheat was shipped.

14. During the time the said ship was at Sydney as aforesaid, that is to say, on or about 18th August 1916, the defendant, for the purpose of preventing the said ship from sailing without a clearance, placed an armed guard on board the same and caused the said armed guard to remain on board for the space of two days, and thereby and to that extent took the control of the said ship out of the hands of the said master.

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15. From 9th August 1916 until 10th October 1916 the plaintiff by his said master made frequent application to the said Comptroller-General of Customs for a direction to the said Collector of Customs at Sydney to grant a clearance for the said ship to sail as aforesaid.

16. Owing to the refusal as aforesaid of the said Collector of Customs at Sydney to grant, and of the said Comptroller to direct the said Collector to grant, a clearance in pursuance of the said application the said ship remained at Sydney for two months.

17. On 10th October 1916 the said Comptroller-General of Customs directed the said Collector of Customs at Sydney to grant a clearance for the said ship to sail as aforesaid, and such clearance was duly granted by the said Collector.

18. The plaintiff submits that the refusal of the Collector and Comptroller of Customs to grant the said clearance gave rise to a cause of action for which the plaintiff was entitled to recover damages from the defendant.

19. The defendant submits that the refusal of the Collector and Comptroller as aforesaid gave rise to no cause of action as alleged against the defendant.

20. The plaintiff further submits that the placing of a guard on the said ship as alleged in par. 14 hereof was wrongful, and claims to recover damages in respect thereof from the defendant.

21. The defendant further submits that the facts alleged in par. 14 hereof give rise to no cause of action for which the plaintiff is entitled to recover damages against the defendant.

22. The questions for the opinion of this Honourable Court are:—

(1) Whether the plaintiff is entitled to recover damages in an action against the defendant for the refusal of the Collector or Comptroller of Customs to grant the said clearance.

(2) Whether the plaintiff is entitled to recover damages in an action against the defendant for the grievances set forth in par. 14 hereof.

The Full Court answered the first question in the negative, and the second in the affirmative: *Blom v. The Commonwealth of Australia* (1).

The plaintiff now, by special leave, appealed to the High Court from so much of that judgment as answered the first question in the negative, and the defendant gave notice that on the hearing of the appeal it would contend that the second question should not have been answered in the affirmative.

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(The case was argued immediately after the argument in *Zachariassen v. The Commonwealth* (1).)

Maughan (with him *Halse Rogers*), for the appellant. As to the second question, there being no suggestion that the act done was in right of war, or that the master of the ship had threatened to leave port without a clearance, the plaintiff is entitled to maintain the action against the Commonwealth. As to the first question, the Commonwealth is responsible, on the authority of *Baume v. The Commonwealth* (2), for the acts of the Comptroller-General and the Collector. Neither of them has a discretion to refuse the application when he has been satisfied as to the matters referred to in secs. 119-122 of the *Customs Act*. The ministerial and the discretionary functions of a Collector may be separated (*Randall v. Northcote Corporation* (3)).

[ISAACS J. Do not secs. 265-269 exclude the liability of the Commonwealth?]

No: those sections merely afford an optional means of bringing a dispute between an officer of Customs and another person before the Minister, and cannot take away a right of action against the Commonwealth if it exists. See *R. v. Gillespie* (4).

Knox K.C. (with him *H. E. Manning*), for the respondent. Irrespective of its nature, if a duty is imposed by Statute on a designated officer, his failure to perform that duty does not give a right of action against the Commonwealth. The authority of the officer is derived from the Statute, and the Commonwealth, not having power to control the act of the officer, cannot be liable for non-performance of the duty (*Enever v. The King* (5); *Fowles v. Eastern*

(1) *Ante*, p. 166.

(2) 4 C.L.R., 97.

(3) 11 C.L.R., 100, at p. 115.

(4) (1904) 1 K.B., 174, at p. 180.

(5) 3 C.L.R., 969, at p. 983.

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and Australian Steamship Co. Ltd. (1) ; *Baume v. The Commonwealth* (2)). A Collector of Customs is such an officer. If the ministerial and discretionary duties of the Collector could be separated from one another, the facts do not show that he was satisfied as to the matters. He had not entered upon his discretionary duty. As to the second question, whatever may be the case in time of peace, in time of war the putting of an armed guard on a ship to prevent her sailing without a clearance might be justifiable, so that on the facts stated the question should not be answered.

Maughan, in reply. The proposition that when a duty is cast upon a designated officer of the Commonwealth by Statute the Commonwealth is not responsible for the non-performance of the duty, cannot be deduced from any one of the three cases relied upon. The test is whether the officer was doing something in which he had a discretion. Nowhere in the *Customs Act* is the duty of granting a clearance imposed upon a Collector or upon the Comptroller-General. The whole matter of granting a clearance is within the control of the Minister. [Counsel referred to *Huddart, Parker & Co. Proprietary Ltd. v. Moorehead* (3) ; *New South Wales Mont de Piété Deposit and Investment Co. Ltd. v. Waters* (4).] As to the second question, the plaintiff is entitled to an answer to the question. The Court must assume that all the relevant facts are stated in the special case, and those facts do not afford a justification for the Commonwealth.

Cur. adv. vult.

Dec. 20.

The following judgments were read :—

BARTON, ISAACS AND RICH JJ. For the reasons given by us in the case of *Zachariassen* we are of opinion that a good cause of action is disclosed as to the refusal to grant a clearance.

With respect to the alleged trespass by armed guards, it is to be observed that the argument on both sides in the Supreme Court, as appears from the judgment of *Cullen C.J.*, was on the assumption

(1) 17 C.L.R., 149, at p. 188 ; (1916)
2 A.C., 556, at p. 562.
(2) 4 C.L.R., at pp. 107, 115, 122.

(3) 8 C.L.R., 330.
(4) 18 C.L.R., 704, at p. 710.

that the guard was a military guard, placed on board through the agency of the military authorities. The special case states that this was done "for the purpose of preventing the said ship from sailing without a clearance." Learned counsel for the Crown did not urge that a final answer should be given in favour of the Crown on the facts as stated. But he contended that no final answer in favour of the plaintiff should be given. We think that what he asked for should be acceded to. We are not prepared to say that, taking into account the state of war, and the nature and extent of it, and all those circumstances which are so notorious as to be judicially noticed, the placing of a military guard by way of precaution against a ship leaving without a clearance would not be a *primâ facie* justification. It is, however, unnecessary to decide so much. Following the *à fortiori* precedent in *Fowles v. Eastern and Australian Steamship Co. Ltd.* (1), the appeal should be allowed as to this part also, but the Court should refuse to answer the question, leaving the parties to go to trial in order to have the facts satisfactorily settled.

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GAVAN DUFFY J. In this action the parties have stated a case containing admissions made for the purpose of the case, but each party has reserved the right to go to trial and then rely on any facts which he may be able to prove and which he may be advised will have the effect of relieving him from the consequences of the opinions we are now asked to pronounce.

The questions submitted for our consideration are "(1) whether the plaintiff is entitled to recover damages in an action against the defendant for the refusal of the Collector or Comptroller of Customs to grant the said clearance; (2) whether the plaintiff is entitled to recover damages in an action against the defendant for the grievances set forth in par. 14 thereof."

In order to determine whether the plaintiff is entitled to recover damages it is necessary to inquire into the nature of the acts from which the damages are said to flow.

On the facts set out on the special case both Collector and Comptroller were apparently acting under the instructions of the Executive, and the Executive was probably acting under the authority and in

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Gavan Duffy J. pursuance of the King's prerogative powers. If so, the acts complained of may be lawful or the question of their legality may not be cognizable by this Court. In either case the plaintiff could not succeed. We are not at liberty to draw inferences of fact, and if we were at liberty to do so I should not feel disposed to pronounce on the legality of the acts complained of on the materials contained in the special case. I do not think that the question of the responsibility of the Commonwealth for the act of the Collector or Comptroller if he on his own initiative refused to grant a clearance is raised by the first question, and I say nothing about it. To affirm it would merely put us on an inquiry as to the legality of the officer's act, to deny it would open up the further question of the complicity of the Commonwealth in his act, and neither of these points can be determined without a finding of fact, which I am not at liberty to make.

I am unable to answer either of the questions submitted for consideration.

Appeal allowed. First question answered in the affirmative. In its discretion the Court does not answer the second question. Costs of the appeal to be costs in the action.

Solicitors for the appellant, *Dalrymple & Blain*.

Solicitor for the respondents, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

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