[HIGH COURT OF AUSTRALIA.]

THE METROPOLITAN GAS COMPANY . . APPLICANT;

AND

THE FEDERATED GAS EMPLOYEES' INDUSTRIAL UNION AND ANOTHER } RESPONDENTS.

H. C. OF A. 1925.

MELBOURNE, *Mar.* 9, 10.

SYDNEY, *April* 9.

Isaacs, Higgins and Rich JJ.

Industrial Arbitration—Strike—Prohibition of strike—Limit of prohibition—Strike in relation to subject matter of award—Application for injunction—Proof of offence—Validity of sec. 6A—*Commonwealth Conciliation and Arbitration Act* 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 4, 6, 6A, 8, 48—*Acts Interpretation Act* 1901-1918 (*No.* 2 *of* 1901—*No.* 8 *of* 1918), *sec.* 13—*Crimes Act* 1914-1915 (*No.* 12 *of* 1914—*No.* 6 *of* 1915), *sec.* 5.

Held, by *Isaacs* and *Rich* JJ., that the effect of sec. 6A of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 is to prohibit the doing of anything in the nature of a lock-out or strike in relation to an industrial dispute, which has been settled by an award of the Commonwealth Court of Conciliation and Arbitration, by any person or organization bound by, or entitled to the benefit of, that award; and that the section does not prohibit members of an organization of employees which is bound by an award from striking by ceasing in concert to work while in the employment of an employer who is not bound by the award, such ceasing to work being in consequence of an industrial difference between the organization and that employer only.

Per Higgins J.: (1) The applicant for an order in the nature of an injunction under sec. 48 of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, restraining the respondent from committing or continuing a contravention of the Act, must satisfy the Court, not only that the circumstances are consistent with the guilt of the respondent, but also that they are inconsistent with any other rational conclusion; (2) if sec. 6A means that men engaged in a single-State dispute are forbidden to pursue the remedy of strike, it is probably invalid.

ORDER NISI.

On the motion of the Metropolitan Gas Co. of Melbourne, an order nisi was made by the High Court calling upon the Federated Gas Employees' Industrial Union and Charles Crofts, the secretary

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of that Union, to show cause why an order in the nature of an injunction should not be made restraining the respondents and each of them from directly or indirectly (a) committing or continuing a breach of an award of the Commonwealth Court of Conciliation and Arbitration dated 21st February 1922 and/or of an agreement between the Union and the applicant Company dated 10th December 1920 by striking; (b) committing or continuing a contravention of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 by doing anything in the nature of a strike or taking part in a strike; or (c) ordering, counselling or encouraging persons who are members of the Union to strike or to do anything in the nature of a strike or to refuse to offer or to accept employment from the applicant Company.

The order nisi now came on for argument.

The other material facts appear in the judgments hereunder.

Latham K.C. (with him *Owen Dixon* K.C. and *Russell Martin*), for the applicant. On the evidence there was a strike by members of the Union employed by two firms of contractors, Rodgerson and Kilby Brothers, with the object of preventing the Metropolitan Gas Co. from having work done for it by the contractors, and the Union incited or encouraged that strike and under sec.8 (1) itself was guilty of a strike. That strike is within the very words of sec. 6A of the *Commonwealth Conciliation and Arbitration Act* 1904-1921. Sec. 6 applies generally, irrespective of whether there has or has not been a strike. Sec. 6A is confined to strikes by persons or organizations bound by or entitled to the benefit of an award; and there is nothing to indicate that the strike which it prohibits is limited to a strike in relation to the dispute which has been settled by the award or to some inter-State dispute. That is shown by the omission from sec. 6A of the words " on account of any industrial dispute " which are in sec. 6. The intention is that an organization which is bound by award shall not strike at all, and that in so far as it attempts to obtain further benefits for its members it shall utilize the provisions of the Act. Unless this view be correct, an organization of employees might obtain an award against a number of employers, leaving itself free to strike with regard to employment

by other employers whom it had deliberately omitted. Under sec. 48 the contraventions of the Act which an organization or person may be enjoined from committing or continuing need not be a contravention in relation to the award to which the applicant and the organization are parties. In this case the Court should make an order, for the circumstances which led the Court in *Whittaker Bros.* v. *Australian Timber Workers' Union* (1) to refuse to exercise its discretion do not exist here.

Robert Menzies, for the respondents. No act has been proved to have been done which is an act of the Union. The acts of the Victorian Branch cannot be attributed to the Union (*Commonwealth Steamship Owners' Association* v. *Federated Seamen's Union of Australasia* (2)). Secs. 6 and 6A of the *Commonwealth Conciliation and Arbitration Act* must be read together. Sec. 6 deals with a strike in reference to a dispute before an award has been made in respect of it, and sec. 6A deals with a strike in reference to a dispute in respect of which an award has been made. The meaning of sec. 6A is that after an award has been made the parties to it must not seek to go behind it or to alter any of its provisions by direct action. This view is supported by the reasons for the decision in *Stemp* v. *Australian Glass Manufacturers' Co.* (3). If sec. 6A goes beyond this so as to prohibit strikes generally, it is beyond the power conferred by sec. 51 (xxxv.) of the Constitution. Sec. 48 only applies to a breach of the Act in respect of the particular award to which the person who applies is a party.

Latham K.C., in reply, referred to *R.* v. *Associated Northern Collieries* (4).

Cur. adv. vult.

April 9.

The following written judgments were delivered :—

ISAACS J. AND RICH J. An order nisi was granted on 21st February 1925 under sec. 48 of the *Commonwealth Conciliation and Arbitration Act*, on the application of the Metropolitan Gas Co., calling upon the Federated Gas Employees' Industrial Union and Charles Crofts to show cause why an order should not be made against the

(1) (1922) 31 C.L.R. 564.
(2) (1923) 33 C.L.R. 297.
(3) (1917) 23 C.L.R. 226, at p. 240.
(4) (1911) 14 C.L.R. 387.

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respondents to restrain them from (a) committing or continuing a breach of a Federal award between the Company and the Union and an agreement between the same parties; (b) committing or continuing a contravention of the Act by doing anything in the nature of a strike; or (c) ordering, counselling or encouraging members of the Union to strike against the Company. The order nisi also sought an order against the Union and its members to compel them to perform work of the Company in alleged compliance with the award and agreement. The matter came on for argument on 26th February. In consequence of a question from the Bench at the conclusion of the applicant's argument, a conference took place between the parties, resulting in an undertaking on the part of the Union that its members would return to the Company's service. But it was also stated by learned counsel for the Union that no undertaking could be given that certain of its members, who were in the employ of two independent contractors, Rodgerson and Kilby Brothers, would resume work in the service of those employers. The employees of Rodgerson and Kilby Brothers had not struck when the order nisi was granted nor up to 26th February, but had not been at work because the contractors had no work for them to do in consequence of the strike against the Company. However, the undertaking as offered was accepted, and the case adjourned till 2nd March. On that day it was stated that, though the Company's employees had observed the undertaking and had returned to work, the contractors' employees had not returned and had struck. Learned counsel for the Company then stated he would not proceed with the mandamus part of the order nisi nor with claim (a) of the injunction part. The proceeding was at that point dropped as to the strike against the Company's service. But learned counsel for the applicant proceeded to ask for an order under claims (b) and (c) of the injunction part of the order nisi.

Strictly speaking, the order nisi was inapplicable to that proceeding in respect of the contractors' men. No such strike had occurred when the order nisi was obtained; as worded, claim (c) against the Union does not include it. No objection of form was taken, and the proceeding was treated as a motion there and then in presence of all the parties and was contested on that footing, all the affidavits

being accepted as relevant to that proceeding and further affidavits being filed. We therefore deal with it on that footing, referring to the course of procedure only in order to prevent future misapprehension both as to practice and as to the dates of events.

The first question of fact is: Was there a strike of members of the Union in the employ of the independent contractors, and what was the nature of the strike? Apart from any statutory definition there was undoubtedly a strike in fact, because there was a concerted cessation of work on the part of a number of employees in consequence of an industrial difference between the employers and the Union to which the employees belonged. The strike arose out of demands formally made on the contractors Rodgerson and Kilby Brothers by letters of 11th February, which were as follows:—"Trades Hall, Melbourne, 11th February 1925.—Mr. Rodgerson, contractor, Railway Yard, Flinders St., Melbourne.—Dear Sir,—By instruction I desire to inform you that the above Union request that your firm adopt within seven days hereof the under-mentioned minimum weekly wages rates and maximum weekly hours with a limit to the number to be employed to ten men, and further grant to all members of the Union in the firm's employ all conditions applicable to members of the Union directly employed by the Metropolitan Gas Co. Wages: £5 per week. Hours: 47 per week. Conditions: As per copy of award and agreement enclosed. Trusting to have the favour of your reply within the time stated—Yours faithfully, (signed) C. Crofts, secretary." "Trades Hall, Melbourne, 11th February 1925.—Messrs. Kilby Bros, 5 Wright Street, Clifton Hill.—Dear Sirs,—By instruction I desire to inform you that the above Union request that your firm adopt within seven days hereof the under-mentioned minimum weekly wages rates and maximum weekly hours with a limit to the number to be employed to six men, and further grant to all members of the Union in the firm's employ all conditions applicable to members of the Union directly employed by the Metropolitan Gas Co. Wages: £5 per week. Hours: 47 per week. Conditions: As per copy of award and agreement enclosed. Trusting to have the favour of your reply within the time stated—Yours faithfully, (signed) C. Crofts, secretary." The demands were not acceded to. The demands were not made on anyone else in

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Australia, and the two contractors' businesses are limited to Victoria. The contractors are not parties to the Federated Gas Employees' award or in any way bound by it. There is no provision in the award forbidding a strike against others than respondents to that award. The question then arises, how has this application been brought within sec. 48 ? Has there been a contravention of either (1) the Act or (2) the award ?

A question of fact as to whether the Union as a Union " encouraged " the strike would have to be determined adversely to the Union before its responsibility was declared. If the result of this application depended on that question of fact, the Union would fail. Having regard to the principle stated in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1) and to the realities of the present case, it would, in our opinion, be the just conclusion to say that the Union as an organization was backing and encouraging the contractors' men to strike, and so helping to break down the contract system. If not so, then in each State the same thing might occur and yet the Union be held immune. But, assuming all that against the Union, the question still remains as to its legal responsibility.

First, as to the alleged contravention of the Act :—The only two possibly relevant provisions of the Act are secs. 6 and 6A. The argument for the Company did not suggest that the case fell under sec. 6, but it did press the view that the case fell within the literal terms of sec. 6A. That section is as follows :—" 6A. No person or organization bound by an award of the Court, or entitled to the benefit of an award of the Court, shall do anything in the nature of a lock-out or strike, or continue any lock-out or strike. Penalty : one thousand pounds." It is said that sec. 6A is satisfied because (1) the Union is a " person entitled to the benefit of an award of the Court " and (2) the men and Union are doing something " in the nature of a strike." " Strike," it is said, being unqualified is not confined to the award or the industrial dispute in respect of which the award was made or even an inter-State dispute, but includes any strike anywhere in Australia, in any person's employment, and whether an inter-State strike, or a strike confined

(1) *Post*, 462.

to one person's employment isolated from everyone else. The first thing that impresses the mind when faced with that contention is the utter one-sidedness of the position. It would punish the men in the present case for striking in the employ of the "outsider," as he may be termed, but it would leave the "outsider" entirely free to lock them out. This is so because, as he is neither "bound by an award of the Court" nor "entitled to the benefit of an award of the Court," he is altogether outside the prohibition of sec. 6A. To impute to the Legislature an intention so obviously unfair would require language of the most intractable character. But there are further reasons opposed to the contention and based on ordinary rules of legal construction. It is a received canon of interpretation that every passage in a document must be read, not as if it were entirely divorced from its context, but as part of the whole instrument: *Ex antecedentibus et consequentibus fit optima interpretatio.* In construing an instrument "every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done; or, in other words, the construction must be made upon the entire instrument, and not merely upon disjointed parts of it; the whole context must be considered, in endeavouring to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause" (*Broom's Legal Maxims*, 9th ed., pp. 367-368, and cases there cited; and per Lord *Haldane* L.C. in *Toronto Suburban Railway* v. *Toronto Corporation* (1)). If, when so read, the meaning of the section is literally clear and unambiguous, nothing remains but to give effect to the unqualified words. But, unless that so appears, other considerations arise to assist the Court to the true construction. In the recent Privy Council case of *Shannon Realties Ltd.* v. *Ville de St. Michel* (2) Lord *Shaw* for the Judicial Committee said: "Where the words of a statute are clear they must, of course, be followed; but, in their Lordships' opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or

(1) (1915) A.C. 590, at p. 597. (2) (1924) A.C. 185, at pp. 192-193.

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confusion into the working of the system." And in such cases the respective consequences of the alternative constructions are not immaterial (*Brunton* v. *Acting Commissioner of Stamp Duties* (1)).

Our first duty, then, is to read the sections mentioned in their collocation. The Act of which sec. 6A forms part describes itself as " an Act relating to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." That is strictly conformable to the Constitution (sec. 51 (XXXV.)). By sec. 4 " Industrial dispute " means " an industrial dispute extending beyond the limits of any one State." The scheme of the Act is in accordance with the constitutional limitation. That is in itself a cogent reason for restricting the generality of a word as it might be read in another context (per Lord *Haldane* L.C. in *Watney, Combe, Reid & Co.* v. *Berners* (2) and per Lord *Loreburn* in *Drummond* v. *Collins* (3)). The Act as originally passed did not contain sec. 6A ; it came in by Act No. 31 of 1920, which inserted it " after section six of the Principal Act " : that is to say, sec. 6A was inserted as the second section in Part II., which is headed thus—" Prohibition of Lock-outs and Strikes in relation to Industrial Disputes." The *Acts Interpretation Act* by sec. 13 declares " the Headings of the Parts Divisions and Subdivisions into which any Act is divided shall be deemed to be part of the Act." The controlling effect of a heading of this nature is shown by *Inglis* v. *Robertson* (4). Consequently, both the general scheme of the Act, and the express heading governing the whole fasciculus of sections contained in Part II., operate to limit the generality of the words " lock-out " and " strike " in sec. 6A.

There are, in addition, some clear proofs of inconsistency, unfairness and indeed of absurdity in the opposite view. Inconsistency is shown in this way. By sec. 6 lock-outs and strikes are forbidden, but only if they are " on account of any industrial dispute," that is, an inter-State industrial dispute. That means that, where such a dispute exists and is unsettled by an award, it is an offence to attempt to settle it by direct action. But sub-sec. 3 excepts the case where this is " done for good cause independent of the industrial dispute."

(1) (1913) A.C. 747.
(2) (1915) A.C. 885, at p. 891.
(3) (1915) A.C. 1011, at p. 1017.
(4) (1898) A.C. 616.

Instances might occur where life or health were imperilled, and the Legislature did not intend that men should be bound to incur that risk on pain of a penalty. If sec. 6A has the unlimited application contended for on behalf of the Company, then, although the strike has no connection whatever with any inter-State dispute or any award made to settle an inter-State dispute—in other words, is in no sense "in relation to an industrial dispute" within the meaning of the Act—it is penalized, and, further, it is penalized without the benefit of the qualification which places human life and safety before mere considerations of business profit. The construction contended for gives no room to the saving clause of "good cause independent of the industrial dispute." Unfairness is shown by what has been already said, namely, that the Company, for instance, as a person entitled to the benefit of its own award may intervene to protect Rodgerson and Kilby Brothers from a strike of their employees, but by no possible construction could the Company intervene to protect the contractors' employees from a lock-out by their employers, because the employers are not brought within the words of the section. The absurdity is shown by indicating the extent to which the argument carries the section. It connotes that, if the Engineers' Union have an award with certain employers in (say) New South Wales, Victoria and Tasmania but none with any employers in Queensland, a strike with a single employer's business in Queensland, even in relation to a dispute unconnected with the subject of the award in other States and unconnected with any other person's business, and even if it could never be the subject of Federal arbitration, is an offence punishable under sec. 6A, and may also be made the subject of injunction or mandamus under sec. 48.

When the contention is thus traced out to its practical application, it answers itself. The true meaning of sec. 6A is that it is the counterpart of sec. 6. Sec. 6 prohibits industrial strife before award and as a means of settling a dispute by individual force. Sec. 6A meets the case where sec. 6 has been obeyed, and a settlement by award has been arrived at but not respected. It is as important to forbid individual force after an award as before. The award determines how much of the industrial demands shall be granted

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and how much refused. The law requires that determination to be adhered to. If, therefore, any person or organization bound by an award or entitled to its benefit shall do anything in the nature of a lock-out or strike—that is, *in relation to the industrial dispute settled by the award*—it becomes by sec. 6A an offence. The lock-out or strike may be because the party acting is dissatisfied at having received too little or at being bound to too much. In either case it is "in relation to," though not as in sec. 6 "on account of," the industrial dispute. In short, the parties to and all persons bound by an award are by sec. 6A mutually forbidden to attempt to supersede it by personal force. The result is that the application as to the contractors' men fails for want of legal subject matter.

Mr. *Latham* asked for the costs in any event up to the time when this phase was entered upon. The original application included a claim for injunction or mandamus in respect of the Company's own employees. That was not open to all the legal objections above dealt with as referable to the present phase. Having regard to the course the proceedings have taken, the Court is obviously not in a position to pronounce a judgment on the rights of the parties so far as the Company's own employment is concerned. That being so, the parties as to this part of the case must bear their own respective costs. The Company has failed entirely upon the contest as to the contractors' employees, and the costs of this must therefore be borne by the Company.

The order asked for should be refused with a direction that the Company pay the costs of the respondents occasioned by the claim with respect to the contractors' employees; in other respects the parties to abide their own costs.

HIGGINS J. The Metropolitan Gas Co. (of Melbourne) has obtained an order nisi against the Employees' Union and Charles Crofts, the secretary, directing them to show cause why an order in the nature of an injunction should not be made restraining them from committing or continuing a contravention of the *Commonwealth Conciliation and Arbitration Act* by doing anything in the nature of a strike.

The application for injunction is made as under sec. 48 of the Act, combined with secs. 6A and 4. Under sec. 48 the High Court or a Justice thereof may, "on the application of any party to an award," make an order in the nature of an injunction to enjoin any organization or person from committing or continuing any contravention of this Act; and under sec. 6A "no person or organization bound by an award of the Court" of Conciliation, "or entitled to the benefit of an award of the Court, shall do anything in the nature of a lock-out or strike, or continue any lock-out or strike." There is evidence of a strike of a few men in this case; but as it was a strike in the ordinary sense of cessation of work sec. 8 does not apply (see sec. 4 "strike").

There is no doubt that the applicant here—the Gas Company—is bound by an award of the Court, dated 10th December 1920; and there is no doubt that the Union is entitled to the benefit of that award. But the strike here alleged is a strike of men who, though members of the Union, are not employees of the Gas Company. They are employees of certain contractors who come to the gasworks to fetch coke for sale or for delivery. They—the contractors and these employees—are not bound by the award of the Court or entitled to the benefit thereof. The log of claims did not relate to these men at all. Whatever claims these employees now make, it does not appear that any persons elsewhere than in Victoria make common cause with them, or that any employer in any other State makes common cause with the Melbourne gas company; it does not appear that there is any dispute extending beyond the one State of Victoria.

On these facts there arise several questions of difficulty. In *Stemp* v. *Australian Glass Manufacturers' Co.* (1) it was held that the sections of the Act rendering a strike an offence are valid on the ground (to put it shortly) that Parliament has power under sec. 51 (XXXV.) of the Constitution to clear the ground for the settlement of disputes on lines of reason by forbidding attempts to settle them by force—economic force. But if sec. 6A means that men engaged in a single-State dispute, having no award and no power to seek an award from the Commonwealth Court of Conciliation,

(1) (1917) 23 C.L.R. 226.

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are forbidden to pursue the remedy of strike (a remedy which is not forbidden by the common law), I do not see how the section is valid. The Commonwealth Parliament has not been given power by the Constitution to make laws with respect to single-State disputes.

But the application fails on the evidence. It has not been established by the affidavits that either the Union or Crofts aided, abetted, counselled or procured these contractors' men to strike, or was a party to the commission of the offence (see *Crimes Act* 1914, sec. 5). Therefore, in my opinion, the order nisi should be discharged. There is really no need to decide the points of construction of the Conciliation Act raised until facts are established showing that the Union or Crofts was a party to the alleged offence. It cannot be too clearly understood that this application is not made against anyone but the Union and Crofts.

The truth is that there is no evidence anywhere that the Union or Crofts urged these contractors' men to strike. The Union did on 11th February 1925 request each of the contractors, not the Gas Company, to grant certain conditions to these men ; but there the Union's action ended, so far as the affidavits show. It is true that according to the affidavit of Mr. Ternes, the assistant superintendent of the Company, something occurred which was very suspicious. Ternes saw one Kincade—whom he thought to be a works delegate—speak to two of the men employed by contractors who were at work loading coke, and the men immediately on being spoken to stopped work and did not thereafter do any more work. But it turns out that Kincade was not a works delegate at all ; he was a mere collecting steward of the Victorian Branch. It is sworn, without contradiction, that collecting stewards have no authority to direct men to cease work or to refuse duty ; and that neither the Union nor the Branch nor Crofts authorized anyone to get the men to cease work or to refuse duty. In short, there is no evidence of encouragement of the strike on the part of the Union or Crofts. Something more than suspicion is required to prove that the Union or Crofts was guilty of the misdemeanour alleged against them. To prove that a member of some friendly society has committed larceny is not sufficient proof that the friendly society itself encouraged the larceny. To prove that the Union and Crofts were guilty of the offence in

this case, the applicant must satisfy the Court, not only that the circumstances are consistent with the guilt of the accused, but that they are inconsistent with any other rational conclusion (*R.* v. *Hodge* (1)); *Trainer* v. *The King* (2)). No one would contend that the applicant must prove a formal resolution of the Union for strike; but complicity must be proved in some way. We have no right to act on conjecture, but must act on proof.

But, as my learned colleagues base their judgments on the points of law, it probably would be more respectful to them as well as more useful to the public, if I were to deal with the points as far as I can. At present I am inclined to agree with their view of the law. I am unable to see how a party to an award (say, an award as to shearers) can apply against a party to another award (say, as to boot factories) for an injunction against striking—at all events, unless there be shown some direct interest on the part of the applicant. Nor can I at present agree with the view that sec. 6A applies to a strike in a one-State dispute, or to a strike in a dispute as to which there can be no award.

But, in fairness to the Union and Crofts, I ought to say that I do not think their guilt to be established, if I think so, and leave my mind open, so far as possible, as to the construction of the Act.

I concur in the form of order proposed by my brothers Isaacs and Rich. But I am not justified in referring, as they refer, to what took place in Court on 26th February and 2nd March, as I was not present on those dates. I came into Court on 9th March to deal solely with the strike of the contractors' employees; and I must make up my mind on the contents of the affidavits only. There has been no cross-examination on the affidavits.

Application dismissed. Applicant to pay respondents' costs occasioned by the claim with respect to the contractors' employees.

Solicitors for the applicant, *Malleson, Stewart, Stawell & Nankivell.*
Solicitor for the respondents, *Maurice Blackburn.*

B.L.

(1) (1838) 2 Lew. C.C. 227.

(2) (1906) 4 C.L.R. 126.