

Commonwealth Dairy Produce Equalisation
Committee Ltd

Goulburn District Co-operative Dairy
Society Ltd

No. 58 of 1934

Reasons
for
Judgment

GOULBURN DISTRICT CO-OPERATIVE DAIRY SOCIETY LTD

This application relates to a special case stated in an action pending in the Supreme Court of New South Wales. The action is for the recovery of levies made by the plaintiff company upon the defendant under an agreement under seal. The agreement is one of many in the same form made with cheese and butter manufacturers as part of the plan for stabilizing the domestic price of the commodities and equalizing the returns from overseas and domestic sales. Apparently, if the agreement is enforceable according to its

tenor, the defendant has no answer. But the contention of the defendant is that, as a direct ~~result~~ or indirect result of sec. 92 of the Constitution, the agreement is inoperative or has been discharged. It is said that the foundation of the agreement is the assumed validity of the Commonwealth Dairy Produce Act 1933-1935 and of the State Dairy Products Act 1933. If these Acts are invalid, the defendant says that the agreement is discharged on the ground of frustration or by reason of some resolute condition which the defendant seeks to imply in the agreement.

The plaintiff does not support the validity of the Commonwealth Act which apparently is regarded as destroyed by the decision of the

Privy Council in James v Commonwealth 1936 55 C.L.R. 1

On the other hand the plaintiff does not admit that the State Act is invalid. But, on the assumption that both Acts are invalid, the plaintiff nevertheless contends that their invalidity is irrelevant to the obligation of the agreement and that it remains in full force and effect.

The defendant has an argument that sec. 92 strikes directly at the agreement independently of any consequential effect upon it that might be thought to ensue from the invalidity of the statutes or either of them.

After the argument of the special case before the Supreme Court had been opened the plaintiff applied for an adjournment for

the purpose of making an application to this Court for an order under sec.40 of the Judiciary Act 1903-1937 removing the cause into this Court. The Supreme Court granted the adjournment. I do not understand that, in doing so, the Supreme Court intimated any opinion that it was a proper case for removal under sec.40 or that removal would be a convenient course.

It is now clearly settled that questions arising under sec.92 do not fall within the description of sec.74 of the Constitution. They are, therefore, outside sec.38A and 40A of the Judiciary Act. For my part, I do not think that the discretionary power to remove causes arising under the Constitution or involving its interpretation

should be exercised in such a case as the present. The first contention which I have ascribed to the defendant depends much more upon the law of contract than upon constitutional interpretation.

The second contention has not been developed before me and my apprehension of it is, doubtless, imperfect. But it is clear that before any question of constitutional interpretation can arise as a result of the argument, the meaning and effect of the agreement must be ascertained and must be found to affect the defendant's freedom to sell its products in other States. If in the end it should become necessary to interpret sec. 92, there is no reason why the Supreme Court should not decide the matter in the first instance. It is a mistake to suppose that because at some point or another the

contentions relied upon by a party to a cause touch the Constitution this Court should at once remove the cause for determination by it as a Court of first instance. In many cases, on the contrary, it is desirable that the question should be dealt with in the ordinary course of litigation. This appears to me to be an example. On the one hand, it is not a case where there is a clear and definite constitutional question and where special reasons exist calling for its immediate decision by this Court. On the other hand, it is a case which turns on much else besides the Constitution.

Some reliance is placed by the defendant on sec. 90 of the Constitution. The argument based upon it was not definitely

formulated, but, in any case, it does not appear to possess any features demanding the instant intervention of this Court.

The application will be dismissed with costs.
