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IN THE HIGH COURT OF AUSTRALIA.

WHITNEY & ANOR

V.

VEGETABLE SEEDS COMMITTEE & ORS.

REASONS FOR JUDGMENT.

Delivered at SYDNEY

on FRIDAY, 28th SEPTEMBER, 1945

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WHITNEY & ANOR V. VEGETABLE SEEDS COMMITTEE & ORS.

JUDGMENT WILLIAMS J.

On 11th December 1944 the plaintiff Whitney contracted in writing to sell the seeds of four vegetable crops which he was then growing to the plaintiff company. He applied to the defendant, the Vegetable Seeds Committee, a body incorporated under the National Security (Vegetable Seeds) Regulations, to be registered as a vegetable seed grower in respect of these crops. Regulation 15 provides so far as material that (1) any person who engages in the production of vegetable seeds may at any time before sowing the crop from which those seeds are to be produced (or, where the Committee, in special cases, permits, after sowing but during the growth of the crop) apply to the Committee to be registered as a vegetable seed grower in respect of that crop. (2) The Committee may, in its absolute discretion, register any such person as a vegetable seed grower, and may, at any time, for reasons for which it thinks fit, cancel the registration of any registered vegetable seed grower. Regulation 16 provides that (1) A person shall not sell, exchange or in any way dispose of for valuable consideration any vegetable seeds produced by him unless he is a registered vegetable seed grower in respect of those seeds. (2) A registered vegetable seed grower shall not sell, exchange or otherwise dispose of any vegetable seeds for valuable consideration otherwise than in accordance with such direction, if any, as the Committee gives to him in writing.

On 21st December 1944 he received a letter from the Chief Inspector of Horticulture, Department of Agriculture, Victoria, which, it is now admitted, was written with the authority of the Committee, stating that his application for registration as a vegetable seed grower under the regulations had been referred to that Department for report, and that the registration had been provisionally accepted subject to certain conditions which were enumerated. The letter then proceeded to state that an inspection would be made as soon as practicable, and that if on this or any subsequent inspection these conditions

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had not been complied with or if any other conditions were found, which in the opinion of the Committee were likely to cause the resultant seed crop to be inferior, diseased or not true to type, registration might at any time be withdrawn. The letter concluded by reminding Whitney that under the Regulations, it was an offence to sell, or offer for sale, seed from an unregistered area, and that every crop grown for sale must be registered at the time of planting.

Early in January 1945 Whitney's crops were inspected during growth by an agent of the Committee and found satisfactory in every respect.

On 10th February 1945 Whitney received a further letter from the Committee, headed "Re registration of vegetable seed crops", stating that his application for registration of the crops in question had been received, that the policy of the Committee was to estimate the quantity of seed of these varieties required per annum for Australia and also the amount which should be carried as a reserve, that it then registered crops of a sufficient area to produce the seed required but refused registration after "target" had been reached, that as the area required for the varieties for which he sought registration had already been filled the Committee could not register his crops, but as it was possible that some of the crops already registered or part thereof would fail the Committee would then give consideration to registering his crop, but this could not be done at present. The letter concluded with a similar warning to that contained in the letter of 21st December and a statement that since his crop was not registered he would not be able to dispose of the seeds for valuable consideration.

At the date of this letter Whitney had harvested portions of the crops and the remaining portions werereaching maturity.

On 8th March the plaintiffs issued the writ in the action and on 14th March delivered the statement of claim, the only defendant then being the Committee. The plaintiffs claimed declarations that Whitney since 21st day of December had been a

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registered vegetable seed grower in respect of the crops, that the letter of 10th February was void and of no effect, and injunctions to restrain the Committee from preventing or attempting to prevent him from selling the produce of the crops and in particular from fulfilling his contracts with the Company.

On 9th April the Committee again wrote to Whitney stating that upon a review of the matter in the light of recent information concerning the likely production from previously registered crops it appeared that the seed to be produced from his crops could be absorbed, and that the Committee had therefore decided to register them. A certificate of registration of the same date was enclosed.

On 11th May an order was made striking out certain paragraphs of the statement of claim and giving the plaintiffs leave to amend. Pursuant to this leave the plaintiffs added further declarations to the statement of claim and purported to join the Commonwealth of Australia and the Attorney-General of the Commonwealth as defendants. The further declarations claimed were that regulations 16 and 18 were void and of no effect as being beyond the power of the Commonwealth Parliament and the Governor-General under the National Security Act; and (4A) that the Committee had no power to refuse registration to a vegetable seed grower in respect of any vegetable seed crops upon any of the grounds appearing in the letter of 10th February. Upon the summons to strike out parts of the statement of claim, the Court was not asked to strike out the Company as a plaintiff, so that after the order of 11th May the name of the Company still continued on the record, but the only allegations that remained in the statement of claim, apart from those relating to Whitney's crops, were that the Company was incorporated, that it carried on business as seed merchants seed growers and nurserymen and was at all material times a registered vegetable seed merchant within the meaning of the regulations.

When the action came on for hearing, as it appeared that leave had not been given to add further parties, it was

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then granted to join the Commonwealth and the Attorney-General as defendants.

Prior to the hearing, the whole of the crops had been harvested, and the contracts of 11th December completed by delivery of the seeds by Whitney to the Company.

At the dates of the writ and statement of claim, the substance of the plaintiffs' complaint, apart from the paragraphs which were subsequently struck out, was that the Committee, by refusing to acknowledge the letter of 21st December as a registration were preventing Whitney from selling his seeds to the Company. The added claim for a declaration that regulation 16 was beyond power was bound up with this complaint because, if the regulation was invalid, the sale would be lawful although the Committee refused registration.

Regulation 18 provides inter alia that (1) a person shall not sell, exchange, or otherwise dispose of any vegetable seeds for valuable consideration unless he is a registered vegetable seed merchant in respect of the seeds (2) a registered vegetable seed merchant shall not sell, exchange or otherwise dispose of any vegetable seeds for valuable consideration otherwise than in accordance with such directions, if any, of the Committee gives to him in writing. As the statement of claim alleges that the company has been registered as a vegetable seed merchant, and there is no allegation that the Committee has repudiated the registration or is otherwise interfering with the carrying on of the company's business, no case has been made in support of the claim for the declaration that Regulation 18 is beyond power, and at the hearing this claim was not pressed: but it is to be noted that both regulations 16 (2) and 18 (2) provide that seeds shall not be disposed of for valuable consideration otherwise than in accordance with such directions, if any, as the Committee gives in writing, so that a decision upon the proper construction of these words in regulation 16 (2) will be in effect a decision upon their true meaning in regulation 18 (2).

/Declaration

Declaration (4A) relates to the policy of the Committee referred to in the letter of 10th February of only registering sufficient crops of each variety of vegetable to provide an ample supply of seeds for the growth of that variety in Australia, and of refusing to register any additional crop. It was contended that upon their true construction, the Regulations, read in the light of the objects clause (Regulation 4), only empower the Committee to ensure that there is not under-production of any particular seeds and that it cannot refuse to register a particular crop on the ground that it will cause over production. But the proper way to raise such a question would be for a grower whose application for registration has been refused on this ground to apply for a mandamus to hear and determine his application according to law, and as the question is an abstract one in relation to the present proceedings, it would not be proper for me to express an opinion upon it: Luna Park Ltd. v. The Commonwealth 32 C.L.R. 596. It would appear therefore that the substantial question that remains for determination is that of costs. For this purpose it is necessary to consider whether the Court has jurisdiction to entertain the action and, if it has, whether, on the facts existing at the date of the writ, the plaintiffs were entitled to the relief claimed.

A cause of action has been defined to mean every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. See the authorities cited in Carter v. Egg Pulp Marketing Board 66 C.L.R. 557 at p. 600. I have already stated the facts which existed at the date of the writ. The plaintiffs were then contending that the effect of the letter of 21st December was to register Whitney as a vegetable seeds grower within the meaning of regulation 15. Subsequently the statement of claim was amended to claim a declaration that regulation 16 was beyond power. In this event registration under regulation 15 became unnecessary. It was necessary to prove the same facts if traversed to obtain either of these declarations.

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Sec. 30 (a) of the Judiciary Act enacted under sec. 76 (1) of the Constitution provides that this Court shall have original jurisdiction in all matters arrising under the Constitution or involving its interpretation. It has been frequently held that where facts asserted or ascertained raise a constitutional question within the meaning of the section, this Court has jurisdiction to determine all the issues of fact and questions of law arising out of such facts necessary to enable the Court completely to adjudicate between the parties, irrespective of the success or failure of the constitutional challenge: R. v. Bevan 66 C.L.R. 452. But the jurisdiction does not extend to separate and distinct causes of action based on different facts which do not relate to any constitutional question, although these causes of action are included in the same statement of claim and are between the same parties. Carter v. Egg and Egg Pulp Marketing Board (supra). The attack on the constitutional validity of regulation 16 (1) was not pressed at the hearing, but it was contended that the words in regulation 16 (2) "otherwise than in accordance with such directions, if any, as the Committee gives to him in writing" are capable of meaning either (1) that unless and until the Committee gives directions a vegetable seed grower, even though registered, cannot dispose of his crop or (2) that unless and until the Committee gives directions such a grower is free to dispose of his crop, but if the Committee gives any directions they must be complied with, and that if the first construction is correct the sub-regulation is beyond power. There is a close connection between the construction and validity of regulation 16 (2) and the legality of the sale to the Company because if the former construction is correct, and on this construction the sub-regulation is valid, the sale would be invalid even if Whitney was registered on 21st December. The latter construction, which Mr. Sugerman supported, is in my opinion correct. The prohibition in regulation 16 (1) against a grower selling a crop unless it is registered implies a right to sell a crop in respect of which he is registered. The words "if any" indicate that the

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Committee may or may not impose conditions on the sale, and strongly support the meaning that, in the absence of conditions, the right of disposition is free and unfettered. The constitutional objection to regulation 16 therefore fails, but the jurisdiction of the Court to give the proper judgment upon the facts relevant to that objection is not, for the reasons already stated, thereby lost. Order IV of the Rules of Court provides that an action shall not be open to objection on the ground that a merely declaratory judgment or order is sought thereby; and the Court may make binding declarations of right in an action properly brought whether any consequential relief is or could be claimed therein or not. Apart from the addition of the words "in an action properly brought", which appear to me to mean in an action in which the Court has jurisdiction, the order is in the same terms as the English Order XXV Rule 5. But section 76 (i) of the Constitution only gives the Commonwealth Parliament power to confer original jurisdiction on this Court in any matter arising under the Constitution or involving its interpretation, and Mr. Sugerman submitted that in this action there was no matter between the plaintiffs and the defendants. In re Judiciary and Navigation Acts 29 C.L.R. 257 it was held that the word matter in the section does not mean a legal proceeding but rather the subject matter for determination in a legal proceeding, so that there is no matter within the meaning of the section unless there is some immediate right duty or liability to be established by the determination of the Court, and that the Court has no jurisdiction to determine abstract questions of law without the right or duty of any body or person being involved. The Committee has no power to seize unregistered crops, so that, apart from any effect the illegality might have upon the rights of the parties inter se, if an unregistered grower disposed of a crop for valuable consideration in breach of the regulations, the only result would be that he would render himself liable to a prosecution. I agree with Mr. Sugerman that no injunction could be granted to prevent the Committee instituting a prosecution, so that if

if it is declared that the plaintiff became registered on 21st December, no consequential relief can be granted against the Committee. But the express purpose of order IV is to enable a declaration of right to be made where no consequential relief can be claimed. Under the English Rule the jurisdiction extends to give a general power to make a declaration whether there is a cause of action or not at the instance of a party interested in the subject matter of the declaration. Guaranty Trust v. Hannay 1915 2 K.B. 536: Simmons v. Newport Coal Coy. 1921 1 K.B. 616 at pp. 627, 630, 631. In Dyson v. A.G. 1911 1 K.B. 410 at p. 423 Farwell L.J. pointed out the convenience in the public interest of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government Departments and Government officials. This case and Burghes v. A.G. 1912 1 Ch. 173 indicate the particular benefits that flow from making declaratory decrees where such departments and officials are not acting in accordance with their statutory powers. The following words of Petersen J. in reference to these cases in Smeeton v. A.G. 1920 1 Ch. 85 at p. 96 are, mutatis mutandis, very apposite "In each case the Commissioners called attention to the statutory penalties which would be incurred by anyone who neglected to comply with their requirements; and in each case the only way of testing the legality of the Commissioners' requirement was by an action for a declaration or by defending proceedings for the enforcement of the penalties. Mr. Sugerman referred me to the statement of Buckley L.J. in Dysart v. Hammerton 1914 1 Ch. at p. 838 that the purpose of Order XXV Rule 5 is not "to enable a declaration to be made in a litigation between parties in which the plaintiff could under no circumstances obtain relief against the defendant. It is addressed to cases in which no substantive relief can at present be given, not to cases in which substantive relief could never be given". But His Lordship was not dealing with a case where a public official or body was acting in breach of its legal duties, but to a case where a declaration was sought in an action brought by one

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individual against another in which on the facts as found no question of any legal right arose between the parties. When the case went on appeal to the House of Lords: 1916 A.C. 57: Viscount Haldane at pp. 64 and 65 said "That as the learned judge had found that the plaintiff could have no relief against the defendant, the Court of Appeal thought that it was not proper, having regard to the character of the case, to make a declaration which might prejudge other cases," and from this (and the other speeches) it appears that the House refused to make a declaration not for want of jurisdiction but in the exercise of its discretion. The effect of the case is stated by Lord Wright in Odhams Press Limited v. London and Provincial Sporting News Agency Ltd. 1936 1 Ch. 357 at p. 362 to be that where the material issue is one which could not in fact arise between the parties the Court would not make a declaration because it would in fact be useless so that His Lordship appears to have regarded it as a question not of jurisdiction but of discretion. Mr. Sugerman referred to some remarks of mine in Toowoomba Foundry Ltd. v. The Commonwealth 1945 A.L.R. 282 at pp. 295-296 where I considered that the plaintiff company could sue the Commonwealth for a declaration that an award of the Womens Employment Board was void only because of the special circumstances that under the regulations the Attorney-General who represented the Commonwealth could sue for wages due to the employees under the Award. It followed he submitted that because the Committee unlike the Attorney-General could not sue Whitney to prevent him selling an unregistered crop, Whitney could not sue the Committee for a declaration that he was registered. But in the Toowoomba case the body in an analagous position to the Committee was the Womens Employment Board, and as I was of opinion that, as against the Board, the award could be challenged on the ground that it was made in excess of jurisdiction only upon an application for a writ of prohibition or certiorari and not in an action, and that consequently an action could not be brought against the Commonwealth for a declaration that an award was void on this ground unless

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the Commonwealth could sue to enforce the award. But, in the present case, if the plaintiffs are right, the Committee at the date of the writ was adopting the attitude that Whitney was unregistered and therefore it was unlawful for him to sell the seeds to the company. The material question had therefore arisen whether the letter of 21st December was a registration, and there was an immediate right to be established by the determination of the Court. And there is jurisdiction in the Court to determine that right because it is a matter which involves the interpretation of the Constitution. But Mr. Sugerman also submitted that the Court has jurisdiction to entertain actions for declarations that Commonwealth legislation is invalid only where the plaintiff is a State or the Attorney-General of a State suing on behalf of the general public of that State. He referred to Attorney-General for N.S.W. v. Brewery Employees Union of N.S.W. 6 C.L.R. 469 where the plaintiffs were the Attorney-General of N.S.W. and certain companies, and it was held that the plaintiff companies were persons aggrieved by the legislation and were therefore proper plaintiffs and also that the Attorney-General as representing the public of his State claiming to be injured by the legislation in question was a proper plaintiff. The right of the Attorney-General to sue the Commonwealth in such circumstances was again upheld in A.G. for Victoria v. The Commonwealth 52 C.L.R. 533. But it is apparent that in the earlier case this Court would have held that it would have ~~held~~ had jurisdiction in an action brought by the plaintiff companies for a declaration whether the Attorney-General had been made a plaintiff or not. Since Commonwealth legislation, if valid, is equally binding on States and subjects as individuals or members of the public of a State, I am unable to see on principle why an action for a declaration of invalidity should not be just as open to interested individuals as to States. As the Chief Justice has said in Toowoomba Foundry Limited v. The Commonwealth (supra) at p. 289 "It is now too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid." There

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is no reason that I can see why, in matters in which this Court has original jurisdiction, the powers of the Court to make declarations of right should not be as wide as they are in England. Of course here as in England such declarations should not be made where they would be useless or embarrassing. But it is quite impossible in my opinion to say that at the date of the writ a declaration of the effect of the letter of 21st December would have been useless. By the time of the hearing any declaration had become unnecessary. But the Committee has always maintained that at the date of the writ Whitney was not registered, and that, apart from the subsequent registration in April, he would not have been able to sell the seeds lawfully to the Company, and that if he had done so he would have been liable to be prosecuted. The facts bear a close resemblance to those in Grant v. Knaresborough Urban Council 1928 1 Ch. 310 where it was held that the plaintiff was justified in proceeding to trial to obtain a declaration to which he was entitled at the date of the writ but the making of which was no longer required at the date of the hearing, and the Court made the declaration claimed and ordered the defendant to pay the costs. At the date that Whitney applied for registration the crops had been planted, but under regulation 15 registration can be granted where the application is made after planting, and no objection has been taken on behalf of the defendants to the date of the application. By its statement of defence the Committee claimed that the letter of 21st December was written without its authority and that it was not a registration and that by the letter of 10th February his registration was refused. And the ~~Committee~~ defendants, although they ~~defendants~~ amended the statement of defence at the hearing and admitted that the letter of 21st December was written with its authority, still maintained that it was not a registration but a mere indication to Whitney that his application for registration would be finally considered if he complied with certain conditions. But under the regulations the Committee had power to register and power to cancel the registration. They had no power to grant a provisional registration. It must be presumed

presumed that the Committee intended to act according to law - omnia praesumunter rite esse acta. The statement in the letter of 21st December that registration had been provisionally accepted must be read in conjunction with the subsequent statement that on non-fulfillment of the conditions or the occurrence of other conditions affecting the quality of the crops registration might at any time be withdrawn (which must mean cancelled). No particular form of registration is required under the regulations. It may be that on its true construction the letter made the registration subject to the performance of the stated conditions some of which would be conditions precedent and other conditions subsequent. If so, the evidence is that the conditions were performed. But the preferable construction of the letter, read in the light of the concluding warning, is that the registration was intended to be provisional in the sense indicated, namely that Whitney was warned that it would not finally authorise him to dispose of his seeds for valuable consideration, because in certain events the Committee might cancel the registration and it would then be an offence so to do. A grower who received such a letter would, I think, be entitled to believe that he could sell his seeds if the registration was not cancelled, and if there is any ambiguity the letter should be construed contra proferentem.

For these reasons I am of opinion that the plaintiffs are entitled to claim that Whitney became a registered seed grower in respect of the crops of 21st December 1944. As the letter of 10th February 1945 was written on the basis that he was not registered, and was not intended to be a cancellation of a previous registration, it was, in the circumstances, devoid of legal effect. But for the reasons stated it is now unnecessary to make declarations to this effect, and the only judgment I give is that the defendants pay the plaintiffs costs of the action (including any reserved costs) other than the costs of the Summons, 6 Sept 1945, which I reserve liberty to apply