IN THE HIGH COURT OF AUSTRALIA

Nos.19 & 20 of 1946

HUDDART PARKER LIMITED & ORS.

V.

THE STEVEDORING INDUSTRY COMMISSION & ORS.

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Wednesday, 4th December, 1946.

H. E. Daw, Gov. Print., Melb

C.12280/45

HUDDART PARKER LIMITED V. THE STEVEDORING INDUSTRY COMMISSION AND ORS. AND ORS.

No 20 of 1946.

O R D E R.

Injunction restraining the defendant Commission its members servants and agents until the hearing of the action or further order from enforcing or in any way giving effect to Order No. 50 of 1946. Costs reserved.

HUDDART PARKER LIMITED & ORS V THE STEVEDORING INDUSTRY COMMISSION & ORS.

No. 19 of 1946.

O R D E R.

Injunction restraining the defendant Commission its members servants and agents until the hearing of the action or further order from making or if already made from enforcing or in any way giving effect to any orders purporting to grant annual leave with pay to waterside workers.. Costs reserved.

HUDDART PARKER LIMITED & ORS.

v.

THE STEVEDORING INDUSTRY COMMISSION & ORS.
NOS.19 & 20 of 1946.

JUDGMENT.

WILLIAMS J.

HUDDART PARKER LIMITED & ORS.

v.

THE STEVEDORING INDUSTRY COMMISSION & ORS.
NOS. 19 & 20 of 1946.

JUDGMENT. WILLIAMS.

These are two applications for interlocutory injunctions which have been heard together made in two actions commenced between the same plaintiffs and defendants, the plaintiffs being companies and a firm engaged in the business of shipping or stevedoring or both and employing waterside workers in various ports in Australia in connection with their businesses, and the original defendants being the Stevedoring Industry Commission and the Commonwealth of Australia. On the hearing of the applications the Waterside Workers' Federation of Australia applied for leave to intervene in both actions and was added as a defendant to both actions without objection. The injunction claimed in Action No. 19 is an injunction restraining the defendant Commission from making or implementing or enforcing any order or orders purporting to grant annual leave with full pay to waterside workers in the waterfront industry until the trial of this action or further order. The injunction claimed in Action No. 20 is an injunction restraining the same defendant from implementing or enforcing or giving effect to Order No. 50 of 1946 made by the defendant commission on the 26th day of November 1946 until the trial of this action or further order.

A statement of claim has been delivered in Action No. 19 but not in Action No. 20, but the claims of the plaintiffs in both actions rest on the same contentions and can be disposed of together. The defendant commission is a body incorporated by Part V of the National Security (Shipping Co-ordination) Regulations and consists of a chairman appointed by the Governor-General and seven other members appointed by the Minister of State for the Navy of whom three represent employers, three represent the defendant federation, and one is an officer of the Commonwealth. Part V includes regs. 55 to 83

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inclusive. Reg. 56 provides that:-

> "The objects of this Part are, in view of the necessity, in the interests of the defence of Australia, of effecting speedy loading and unloading of ships, to secure that waterside labour is used to the best advantage, to provide sufficient labour for waterside work and to provide generally for the regulation, control and performance of waterside work and stevedoring operations, whether performed by persons registered under these Regulations or not, and this Part shall be administered and construed accordingly."

Reg. 62(1) provides that:-

> "The Commission shall have power to make such orders, give such directions and do all such other things as it thinks fit for carrying out the objects of this Part."

Reg. 63 provides that:-

> "(1) Notwithstanding anything contained in any other law but subject to the next succeeding sub-regulation, the terms and conditions of employment for waterside work and in stevedoring operations shall be such as the Commission, by order, determines.
>
> (2) Except insofar as the terms and conditions of employment for waterside work and in stevedoring operations are determined by the Commission under the last preceding sub-regulation, those terms and conditions shall not be affected by this Part."

Reg. 64 provides that:-

> "The Commission may, in respect of any port, establish and maintain -
>
> (a) a register of employers at that port.
>
> ....."

Reg. 67 provides that:-

> "(1) Where the Commission has reason to believe that an employer -
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> .....
>
> (b) has contravened or failed to comply with any provision of this Part or of an order under this Part,
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> the Commission may call on him to show cause why his registration as an employer should not be cancelled or suspended."

Reg. 76 provides that:-

> "Where it is reported to the Commission that a person has been guilty of any breach of this Part, of an award of the court or of an order of the Commission, the Commission may inquire into the matter so reported and -
>
> (a) determine whether or not that person has committed any such breach; and
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> (b) if it is satisfied that any such breach has been committed, record its opinion as to the penalty which, in accordance with law, should be imposed."

Reg. 82 provides that:-

> "A person shall not contravene or fail to comply with any provision of an award or order of the Court relating to waterside work or stevedoring operations which is applicable to him."

At a meeting of the Commission held on 8th October 1946 it was resolved, the employers' representatives dissenting:-

> "(a) That annual leave of 14 days with full pay on the basis of pay operating immediately prior to leave being taken be allowed to waterside workers in permanent employment in the waterfront industry to date from 1st July 1946. The conditions under which the leave shall operate to be similar to those defined in the Mobile Crane Drivers Award for the waterfront.
>
> (b) That in respect to waterside workers employed on a casual basis an order to cover a scheme such as that put forward by the Federation or such other scheme as the Commission may decide to be drawn up and finalised by the Commission without delay such leave to operate as from a date to be fixed by the Commission with due regard to retrospectivity."

Pursuant to this resolution an order has been drafted for the grant of annual leave to waterside workers in permanent employment to date from 1st July 1946. Clause 2 provides that a period of 14 consecutive days' leave shall be allowed annually to an employee after twelve months' continuous service (less the period of annual leave) as an employee on weekly hiring. Clause 6 provides that annual leave shall be allowed at the rate of 7-1/3 hours for each complete one month of continuous service commencing on or after 1st July 1946. Clause 9 provides that annual leave shall be given at a time fixed by the employer within a period not exceeding six months from the date when the right to annual leave accrued. Clause 12 provides that if after one month's service in any qualifying twelve monthly period an employee lawfully leaves his employment or his employment is terminated by the employer through no fault of the employee the employee shall be paid at his ordinary rate of wage for 7-1/3 hours at the same rate in respect of each completed month of continuous service after 1st July 1946. Clause 14 provides that this order shall be deemed effective on and from 1st July 1946. There is at present no draft order for annual leave in the case of waterside workers employed on a casual basis, but the intention to make such an order and

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to make it retrospective clearly appears from the resolution of 8th October 1946.

The order complained of in Action No. 20 is in the following terms:-

> "The Stevedoring Industry Commission pursuant to the powers vested in it by the National Security (Shipping Control) Regulations and all other powers thereunto it enabling by this order declares:-
>
> The terms conditions and regulations covering all persons employed and/or engaged in waterside work and or stevedoring operations shall as from the date hereof be as follows:-
>
> (a) All the terms, conditions, provisions and regulations of the Awards of the Commonwealth Court of Conciliation and Arbitration and of any State Industrial Authority covering the work of waterside workers together with all amendments thereof enacted as at this date to the intent that the same shall be deemed to have been herein specifically set forth in detail and shall have effect accordingly as an order of the Stevedoring Industry Commission made as at this date.
>
> (b) All orders of the Stevedoring Industry Commission made to the date hereof altering amending or in any way affecting any of the provisions, terms, conditions and/or regulations of the said awards.
>
> It is declared that the intention of this order is that as from the date hereof the whole of the terms, conditions, provisions and regulations relating to persons being registered waterside workers employed and/or engaged in waterside work and/or Stevedoring operations shall henceforth be controlled and directed by the Stevedoring Industry Commission by virtue of this order to the exclusion of any other law and notwithstanding any such other law to the contrary.
>
> This order shall be binding upon all persons engaged and/or employed in waterside work and/or stevedoring operations and all other persons whether employers or otherwise engaged in waterside work and/or stevedoring operations whether mentioned as respondents to the said award or not.
>
> For the purposes of this order the Awards and/or Agreements referred to are those hereinafter specified in Schedule "A" hereto.
>
> DATE OF OPERATION This order shall come into effect on and from the 26th day of November, 1946.
>
> DATED this Twenty Sixth day of November 1946."

This order was made soon after the case of The Commonwealth Steamship Owners' Federation v. Waterside Workers' Federation of Australia, shortly reported in 20 A.L.J. 281, in which this court held that the effect of reg. 63 was not, as the defendant Federation contended,

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to preserve in operation the terms and conditions of awards of the Commonwealth Court of Conciliation and Arbitration except so far as varied by the Commission under reg. 63(1) and to exclude any action by that court to vary the terms and conditions of the awards under sec. 38(o) of the Commonwealth Conciliation and Arbitration Act but to allow that court to exercise all the powers conferred upon it by that Act and therefore to vary the award. If a variation was inconsistent with an order made by the defendant commission, it was ineffective, but except in so far as the awards became inconsistent with orders made by the Commission, the awards continued in operation and effect. The evident purpose of Order No. 50 is to transmute all the terms and conditions of the awards of the Commonwealth Court of Conciliation and Arbitration and of any State industrial authority into orders of the Commission and thereby to deprive that court of the power of subsequently varying such terms and conditions.

The actions are in form actions for declarations that the orders to be made referred to in Action No. 19 and the order already made referred to in Action No. 20 are beyond the powers conferred upon the defendant commission by Part V of the Shipping Co-ordination Regulations and for consequential injunctions. Objection was taken to the form of the actions by Counsel for the defendant federation. The Commonwealth of Australia is a defendant to the action, so that this court has original jurisdiction under sec. 75(iii) of the Constitution. In Carter v. Egg & Egg Pulp Marketing Board (Vic.), 66 C.L.R. 557, at 579, Latham C.J. said(in reference to this placitum):-

> "Thus the High Court has original jurisdiction, for example, whenever the Commonwealth sues or is being sued. In such a case the Court has jurisdiction in the legal proceeding, whatever the nature of the claim made or of the defence raised, simply because the Commonwealth is a party to the proceeding."

The Court also has jurisdiction under the combined effect of sec. 76(i) of the Constitution and sec. 30(a) of the Judiciary Act. It may also have jurisdiction under sec. 75(v) of the Constitution if a corporate body such as the defendant commission is an officer of the Commonwealth.

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But it is contended that the proper proceeding for the plaintiffs to adopt would be to apply for a writ of prohibition, and that the court has no jurisdiction to make declarations of right in an action under Order IV of the Rules of this Court that the orders of the defendant commission are void. The remarks of the members of this court in Toowoomba Foundry Ltd. v. The Commonwealth, 1945 A.L.R. 282, were relied upon. If orders made by the defendant commission under regs. 62 and 63 of the Shipping Co-ordination Regulations were, like decisions of the Women's Employment Board, of a quasi judicial character, I would give effect to these remarks. In performing some of its functions the defendant commission is under a duty to act judicially, but it is not under such a duty in performing its functions under regs. 62 and 63. Orders made under these regulations are either legislative or executive orders, and these remarks have no application to such orders. Orders made by the defendant commission under regs. 62 and 63 are in my opinion executive orders, and actions similar to the present actions for declarations that executive orders made under National Security Regulations are void have been frequently entertained by this court since the outbreak of war. In my opinion the plaintiffs are entitled to bring the present actions.

Executive orders are valid if they are authorised by the relevant legislation (in this case regs. 62 and 63) for the purpose for which they are conferred and are made bona fide.

A faint attempt was made by the plaintiffs to contend that the defence power has contracted to such an extent that it is no longer wide enough to support regs. 62 and 63, so that they are no longer operative and there is no legislative sanction for the orders which are impeached. These regulations were made under the authority delegated to the Executive by the National Security Act to exercise the constitutional defence power "for securing the public safety and defence of the Commonwealth and the Territories of the Commonwealth". They were made whilst hostilities were still raging, and by virtue of sec. 2 of the National Security Act 1946 will cease to have effect on 31st December 1946. It has been

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held in several recent decisions of this court that after the conclusion of hostilities the defence power must continue to be wide enough to enable the Executive under existing or fresh legislation to cope with the transition from hostilities to peace. As Dixon J. said in Dawson v. The Commonwealth, 1946 A.L.R. 461, at p. 468 "The whole edifice (of legislation passed during hostilities) does not collapse simply because the necessities which brought it into being have passed". For the reasons given in these decisions, I have no doubt that regs. 62 and 63 are still in force.

The powers conferred upon the defendant commission by these regulations enable it to provide generally for the regulation, control and performance of waterside work and stevedoring operations but these wide powers are given for a particular purpose, namely the necessity, in the interests of the defence of Australia, of effecting speedy loading and unloading of ships. The word "secure" in sec. 5 of the National Security Act, as Dixon J. pointed out in Real Estate Institute of N.S.W. v. Blair, 1946 A.L.R. 499, at pp. 505, 506, governs the words "the defence of Australia" as well as the words "the public safety of Australia" so that to be within power the word "defence" in reg. 56 of the Shipping Co-ordination Regulations must be read in the same sense. As he said, the whole phrase in the National Security Act "looks, not to winding up after the close of the hostile war, but to the prosecution of the war against the enemy". It is apparent therefore that twelve months after the conclusion of hostilities the right of the defendant commission to make orders under regs. 62 and 63 in the interests of defence for the particular purpose specified must be on the wane. The Commonwealth Parliament has no general power under the Constitution to legislate to control and regulate the terms and conditions of employment in industry. This court held that the defence power was wide enough to authorise such legislation during the height of hostilities. But the ambit of the power could not continue to be wide enough to support such legislation for any considerable period after the conclusion of hostilities. Part V

of the Shipping Co-ordination Regulations recognises that, because of this constitutional limitation, the defendant commission must necessarily be an evanescent body. The terms and conditions of employment contained in the awards of the Commonwealth Court of Conciliation and Arbitration and the powers conferred upon that court by the Commonwealth Conciliation and Arbitration Act are therefore not repealed by the regulations. All that the regulations do is to confer upon the defendant commission very wide powers for a specific but temporary purpose to make orders which, during their limited existence, will override these terms and conditions so far as they are inconsistent with them or/vary or add to them. which will

I agree with the contention of the defendants that the defendant commission must be left with considerable freedom to judge whether the necessity still exists for making orders under regs. 62 and 63 to effect a speedy loading and unloading of ships in the interests of defence. The question of the extent of this necessity is one on which a court of law is loath to enter. Any order which could be reasonably capable of aiding this particular purpose of defence at the time that it was made would be within power. During some stages of hostilities, when the end of the active war could not be foreseen, it may have been within the power of the defendant commission to make the proposed orders and the order complained of. But I am unable to see how any of them could be reasonably necessary for this particular purpose in October 1946. There are still a considerable number of ships engaged on business connected with defence. There are still in Japan and other islands of the Pacific armed forces of the Commonwealth which have to be supplied. Considerable quantities of wheat are still being shipped as part of a general scheme to combat the famine caused by the war in Europe. Wool sold to the British Government during the war is still being shipped . But, in the main, the shipping business has returned to its normal peace-time basis. There is at present a bill for an Act before the Commonwealth Parliament to be called the Defence (Transition Provisions) Act 1946 by which it is proposed to continue the greater part of the Shipping Co-ordination Regulations, including

Part V, until 31st December 1947. Assuming that this bill will become an Act and that the defence power will still be wide enough to authorise the continuance in force of Part V during this period, it does not alter the fact that the defendant commission must necessarily be a body of limited tenure which can only make temporary orders for a particular purpose. The proposed orders for the grant of annual leave with pay would not create a term or condition of employment of a temporary character. It would be essentially a term or condition of employment of a permanent nature. The orders are intended to apply to all waterside workers and not merely to those still engaged on work in some way connected with defence. They are directed to the betterment of the terms and conditions of employment in the industry as a whole. They are intended to give waterside workers fourteen days' leave with pay at the end of each year of work. This intention could not be carried into effect during the existing currency of the regulations. Even if the regulations are validly extended for a further twelve months, only one period of annual leave could accrue during this further currency. Clause 12 of the proposed order for permanent employees could have an immediate operation, but this clause is plainly intended to be incidental and subsidiary to and inseverable from the operation of the order as a whole. These considerations all indicate that the right to annual leave with pay is not a term or condition of employment which at this stage of the war can have any specific relation to defence except in so far as the well-being of the industry as a whole has such a relation and that is a general and not a specific relation. But such a general relation is not sufficient: Victorian Chamber of Manufactures v. Commonwealth (Industrial Lighting Regulations), 67 C.L.R. 413. It is therefore a term and condition of employment fit only to be considered and implemented by the Commonwealth Court of Conciliation and Arbitration or some other permanent tribunal or body deriving its power from legislation passed under sec. 51(xxxv) of the Constitution or passed under sec. 51(i) of the Constitution to regulate waterside work in relation to trade and commerce with other countries and among the States. These

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remarks apply a fortiori mutatis mutandis to Order No. 50. An order completely to transmute the whole of the awards of the Commonwealth Court of Conciliation and Arbitration into an order of the defendant commission and thereby to attempt to deprive a permanent tribunal of its rights to control and regulate the terms and conditions of employment of waterside workers under sec. 51(xxxv) of the Constitution could not be said to be reasonably necessary for the particular purpose of reg. 56 at this stage of the war. The proposed orders for annual leave and Order 50 appear to be based upon the surmise of the chairman expressed at the meeting of the defendant commission on 11th October that the commission was to be a permanent body and the sooner it took over control of all waterside matters the better. But even if this surmise should prove to be correct the defendant commission as a permanent body could not be authorised under the present Constitution to exercise its existing powers, but could only be authorised to exercise such powers as could be conferred upon it under sec. 51(i) or (xxxv) of the Constitution. As I have said powers must be exercised bona fide for the purpose for which they are conferred. There is no suggestion that the defendant commission did not act honestly, but it was, in my opinion, mistaken in its view that the powers conferred upon it by regs. 62 and 63 were sufficient to authorise the making of the proposed orders and Order No. 50 in October 1946 for the particular purpose of defence stated in reg. 56.

For these reasons I am of opinion that, as the evidence stands, the plaintiffs are entitled to declarations that the resolution of 8th October and any orders made pursuant thereto and Order No. 50 are void and are entitled to consequential injunctions.

But it has been contended that these declarations can only be made at the hearing of the actions and that no consequential injunctions should be granted until the plaintiffs have established their right thereto. It is said that if any civil or criminal proceedings are taken against the plaintiffs in the meantime they will not be seriously damaged because they will be able to plead the invalidity of the orders. The general principle is that, in order to obtain an interlocutory injunction, the plaintiff must make out

a prima facie case, that is to say,such a case that if the evidence remains the same at the hearing it is probable that the judgment of the court will be in his favour: Challender v. Royle, 30 Ch.D. 425. I am of opinion that if the evidence remains the same at the hearing as it is at present the plaintiffs will succeed. I am also of opinion that they are not actions in which the result is likely to be affected by any further investigation of the facts. It was for this reason I suggested that the present applications should be treated as the hearing, but the defendants did not agree. In the circumstances the balance of convenience favours the granting of the injunctions. In Dyson v. Attorney-General, 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. Attorney-General, 1912 1 Ch. 173, indicate the particular benefits that flow from making declarations where such departments and officials are not acting in accordance with their statutory powers. The judgment of Griffith C.J. in Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth, 15 C.L.R. 182, at pp. 192, 193 is on the point. This judgment was approved by the Privy Council on appeal, 1914 A.C. 237, at p. 250. Viscount Haldane L.C. said at p. 250: "Their Lordships agree with these learned judges (Griffith C.J. and Barton J.) that if the respondents were entitled to succeed, it was, under the circumstances of the case and for the reasons given in the judgment of the Chief Justice, right to grant an interim injunction". The present actions fall within the third class referred to by Griffith C.J. at p. 193 of a Government instrumentality attempting to exercise under cover of the instrument creating it,powers which that instrument does not confer.

For these reasons I am of opinion that the plaintiffs are entitled to the following interlocutory injunctions:-

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In action No. 19, an injunction restraining the defendant commission its members servants and agents until the hearing of the action or further order from making or if already made from enforcing or in any way giving effect to any orders purporting to grant annual leave with pay to waterside workers.

In action No. 20, an injunction restraining the defendant commission its members servants and agents until the hearing of the action or further order from enforcing or in any way giving effect to Order No. 50 of 1946.

I reserve all questions of costs.