IN THE HIGH COURT OF AUSTRALIA

ANTILL RANGER & COMPANY PTY. LIMITED AND OTHERS.

V.

AUSTRALIAN WORKERS UNION AND OTHERS.

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on FOURTH MARCH, 1955.

J. J Gourley, Govt. Print., Melb.

7163/51

ANTILL RANGER AND CO. PTY. LTD.

V.

AUSTRALIAN WORKERS' UNION AND ORS.

O R D E R.

Order of McTiernan J. varied by omitting therefrom the words "and the Australian Builders' Labourers' Federation New South Wales Branch or some one or more of the following Industrial Unions namely:-" and substituting therefor the words "such one of the following Industrial Unions as the defendants the Australian Workers' Union and the Shop Assistants and Warehouse Employees' Federation of Australia may jointly nominate by letter addressed to the District Registrar of the New South Wales Registry of this Court, namely, the Australian Builders' Labourers' Federation New South Wales Branch,".

Subject to such variation appeal dismissed.

Appellants to pay respondents' costs of the appeal, the costs of the State of New South Wales, the Honourable the Attorney-General of that State, and the Honourable Abram Landa to be limited to costs as of submitting respondents.

ANTILL RANGER AND CO. PTY. LTD.

V.

AUSTRALIAN WORKERS' UNION AND ORS.

JUDGMENT

WEBB J.
FULLAGAR J.
KITTO J.
TAYLOR J.

ANTILL RANGER AND CO. PTY. LTD.

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WEBB J.
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TAYLOR J.

JUDGMENT

We have come to the conclusion that this appeal should fail.

It is an appeal against an order made in chambers on a summons asking that nine trade unions, each being registered as a trade union under the Trade Unions Act, 1881-1936 (N.S.W.) and as an industrial union under the Industrial Arbitration Act, 1940 -1953 (N.S.W.), be added as defendants in an action pending in this Court. The order made was that some one of the nine unions be added and be authorized to defend the action on its own behalf and on behalf of the others.

The plaintiffs in the action are nineteen in number. Seven of them are individuals comprising a firm known as New England Motor Company, which will be referred to hereafter as if it were a company, and two are individuals who are employees of other plaintiffs. Of the remaining ten, six are companies which fall into a group of employers comprising themselves and the members of New England Motor Company, and the other four form a second group of employers. Each of the first group carries on a business in which there exists, according to the statement of claim, some connection with interstate trade; and each of the second group carries on the business of a large retail store.

The action is concerned with the validity of s. 129B of the Industrial Arbitration Act, 1940-1953 (N.S.W.). The section was inserted in that Act by the Industrial Arbitration (Amendment) Act, 1953 (N.S.W.) and may be broadly described as providing for two matters: first, the giving by employers of absolute preference in employment to members of industrial unions (i.e. unions registered under the Industrial Arbitration Act 1940-1953 (N.S.W.)), and secondly, compulsory unionism in the sense that no adult person may be employed unless he either is a financial member of the industrial union whose members are employed in the relevant industry or calling or has applied to be admitted as a member of such industrial union. It contains ancillary provisions giving a person who is thus obliged to become a member of an industrial union a right to become a member thereof, and making the rules of industrial unions null and void insofar as they are inconsistent with the section.

It is to be gathered from the statement of claim that each of the plaintiff employers is concerned in this litigation with two broad questions. One is whether, and if so how far, s. 92 of the Constitution of the Commonwealth, which ensures absolute freedom for trade, commerce and intercourse among the States, entitles each plaintiff to disregard s. 129B in the conduct of its business; and the other is whether s. 109 of the Constitution of the Commonwealth enables each plaintiff to treat s. 129B as wholly or partially invalid for inconsistency with the provisions of Part VI of the Conciliation and Arbitration Act 1904-1952 (C'wlth) insofar as it purports to affect the operation of the rules of the industrial unions which are the appropriate unions for employees in the relevant business.

It is important to notice that on each question each of the plaintiff employers has to make out an individual case of its own. On s. 92 it has to show some relation

existing in fact between the employment of employees in its business and an activity of interstate trade, commerce or intercourse. Its title to sue depends upon proof that its business consists of or includes such an activity; and its right to succeed depends upon proof of facts which enable the Court to see that in the case of the particular plaintiff the operation of s. 129B according to its terms would prevent or burden the activities of that plaintiff in or in relation to interstate trade, commerce or intercourse. On s. 109 each employer has to show that the industrial unions which s. 129B would oblige employees in its business to join if that section were effective according to its terms are unions with whose rules the section cannot interfere without producing inconsistency with Part VI of the Conciliation and Arbitration Act 1904-1952 (C'wlth). This necessitates proof of the character of the various relevant kinds of employment in that business, the identification of the unions appropriate to those kinds of employment, and the application (if any) of the Conciliation and Arbitration Act to those unions; for failing such proof, the plaintiff will not have established that there exists between s. 129B and the Federal Act any inconsistency which entitles it to have s. 129B declared pro tanto invalid.

Thus the action is not one in which several plaintiffs join to achieve a result in which they have a common interest. It is one in which several plaintiffs join, each to obtain a result in his own case which is similar to, but not identical with, that which the others desire to obtain in their cases. The Court of Chancery would probably have held such a suit demurrable for multifariousness (cf. Cyclone Pty. Ltd. v. Stewarts & Lloyds Ltd. (1916) 16 S.R. (N.S.W.) 629; Maas v. McIntosh (1928) 28 S.R. (N.S.W.) 441. But the fact that despite its complexities the action proceeds as framed must not be allowed to obscure its multiple character.

This does not appear to have been appreciated by the respondents to this appeal. In the affidavit upon which they rely, it is said that none of the nine unions which desired to be added as defendants is an organization, or a branch of an organization, registered under the Federal Act, and that each of them desires to submit and prove that the cases of the three unions which are already defendants are not typical cases raising the question of identity or duality of industrial unions registered under the State Industrial Arbitration Act and organizations registered under the Federal Conciliation and Arbitration Act, but are cases that have a number of characteristics peculiar to those defendants and are not cases sufficient to enable the question of identity or duality to be effectually or completely adjudicated upon by the Court in the absence of evidence and submissions concerning more representative examples of industrial unions and organizations.

To put the matter in this way was to assume that the statement of claim made a case for relief on the basis that all industrial unions which are so connected with organizations registered under the Federal Act that in ordinary speech they might be called branches of those organizations are branches in the sense that a statutory interference with their rules would be a statutory interference with a part of the rules of those organizations. No such case is made. The statement of claim does allege that the Federated Clerks' Union of Australia, New South Wales Branch, is a branch of the defendant the Federated Clerks' Union of Australia which is an organization registered under the Federal Act and whose rules registered under that Act include the rules of the said branch; and it contains similar allegations as to the relationship between the Shop Assistants and Warehouse Employees' Federation of Australia, New South Wales, and the defendant the Shop Assistants and Warehouse Employees'

Association of Australia. It also alleges that the defendant the Australian Workers' Union, which is registered as an industrial union under the State Act, is an association registered as an organization under the Federal Act, with rules registered under the latter Act. But it contains no allegation of identity or relationship between any other Federal organization and a State industrial union. Insofar as the application to join the nine unions as additional defendants was based upon the passage in the affidavit to which I have referred it was, in our opinion, misconceived.

It seems to have been argued in chambers that the nine unions had an interest to contend that even where a State industrial union is in the strictest sense a branch of a Federal organization the operation of s. 129B upon the rules of the State union does not involve any inconsistency with the Conciliation and Arbitration Act. The answer which counsel for the appellants gave to this, however, must be accepted, namely that the categorical denial in the affidavit that any of the nine unions is a Federal organization or a branch of a Federal organization is a denial that they have any interest to support that contention.

The truth of the matter, so far as the s. 109 argument is concerned, is that the seventh and eighth prayers of the statement of claim are unsupported by allegations of fact which would enable declarations to be made in the terms of those prayers. Moreover, the plaintiff employers could not, while confining themselves to matters which they severally have an interest to litigate, allege facts which would support any wider declaration than one to the effect that by virtue of s. 109 of the Constitution s. 129B is invalid to the extent to which it purports to apply to the particular State industrial unions which are the appropriate unions to be joined by employees of the several plaintiff employers. If such a

declaration were to be sought, an amendment of the statement of claim would appear to be necessary in order to identify those unions and to allege that each of them is a branch of a Federal organization in the sense that its rules are part of the rules of a Federal organization. If such an amendment were made, then, according to the evidence before us, the nine unions would be among the unions so identified and made the subject of the desired declaration. They would thus become proper parties to the action. As things stand, however, they are unaffected by any of the allegations in the statement of claim so far as it seeks to invoke s. 109, and the opportunity which the affidavit says that they desire to have would be simply an opportunity to establish that the s. 109 argument leaves their withers unwrung.

But the s. 92 aspect of the case presents a different problem. The statement of claim takes separately each of the first group of plaintiffs and attributes to its business features connected with interstate trade, commerce and intercourse. Then it mentions certain classes of employees in that plaintiff's business and refers to their functions in the carrying on of that business. Then it alleges that in the case of each of the classes of employees mentioned, whose wages and conditions of employment are regulated by awards or industrial agreements, there exists an industrial union of employees registered under the Industrial Arbitration Act, 1940-1953 (N.S.W.) with members engaged in the industry or calling in which the said employees are employed. The unions thus referred to are not identified by name (except in the cases of the Australian Workers' Union, the Federated Clerks' Union (New South Wales Branch) and the Shop Assistants and Warehouse Employees' Federation of Australia, New South Wales), but the affidavit filed in support of the application to join the nine unions as defendants shows that those nine unions are among them.

The relevant prayers of the statement of claim must be considered as if they sought in respect of each plaintiff of the first group a separate declaration defining the extent to which, by reason of s. 92 of the Constitution and notwithstanding s. 129B of the Industrial Arbitration Act, 1940-1953 (N.S.W.) persons may be employed in its business without being, or applying to be admitted as, financial members of any of the particular industrial unions, including the relevant one of the nine unions, appropriate to their case. The unions which would be referred to by separate declarations of this character, though not named, are rendered certain by the description of the work done and the reference to an existing and applicable award or industrial agreement. This means that the nine unions are the subject of specific reference in the statement of claim as being unions of which the Court is asked to declare that the employees of the respective plaintiffs of the first group need not be financial members.

The question of parties must therefore be considered, not on the basis of a general attack upon the validity of s. 129B - in such an attack no one State industrial union would have a more particular interest than any other - but on the basis of an attack designed to limit the operation of s. 129B by excluding particular unions, which are or include the nine now in question, from obtaining the increased membership which the full operation of the section would necessarily produce.

Regarding the matter in this way, it seems to us that the nine unions have a special interest in the relief sought, and for that reason should be given an opportunity to defend the action. They have not objected to the joinder of only one of them to defend on behalf of all. The learned judge in his reasons intimated an intention to provide that the selection of the union to be added should be left to the

two defendants who applied, namely the Australian Workers' Union and the Shop Assistants and Warehouse Employees' Federation of Australia, and the order as drawn up, which omitted this provision, should be varied so as to include it.

In our opinion, subject to the variation mentioned, the appeal should be dismissed. The appellants should pay the respondents' costs of the appeal, but the costs of the State of New South Wales, the Attorney-General and the Honourable Abram Landa should be limited to costs as of submitting respondents.