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IN THE HIGH COURT OF AUSTRALIA

TAGNI AND OTHERS

V.

THE STATE OF VICTORIA AND OTHERS

ORAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on THURSDAY, 8TH OCTOBER, 1959.

W. M. Houston, Govt. Print., Melb.

TAGNI AND OTHERS

v.

THE STATE OF VICTORIA AND OTHERS

JUDGMENT
(ORAL)

JUDGMENT OF THE COURT
DELIVERED BY DIXON C.J.

CORAM: DIXON C.J.
FULLAGAR J.
KITTO J.
TAYLOR J.
WINDEYER J.

TAGNI AND OTHERS

v.

THE STATE OF VICTORIA AND OTHERS

This is an appeal and a cross appeal from an order made in Chambers by Mr. Justice Menzies, striking out certain paragraphs of a statement of claim. The action was commenced on 11th March 1958. There are four plaintiffs. Three of them are ordinary carriers, the fourth is a company, Motor Transport Company Limited, which undertakes to do carrying business but performs its obligations by contractors. The defendants are the State of Victoria, the Country Roads Board, the Chief Commissioner of Police and a Senior Constable.

The purpose of the action is to relieve the plaintiffs of the operation of sec. 33(1)(b) of what now is the Motor Car Act 1958. It is convenient to use the numbering of that Act, although it was not the Act actually in operation at the time when the events happened on which the action is founded. Section 33(1)(b) provides that: "A motor car shall not, except under and in accordance with a special permit granted under this Division, be used on any highway in any of the following cases:- . . . (b) If the height of the motor car together with the load (if any) carried thereon exceeds twelve feet six inches".

The plaintiff company, according to the statement of claim, engages with a manufacturer of motor cars to carry motor bodies, and the journeys involve journeys from South Australia into Victoria and into other States. Some of the actual work of carrying the bodies appears to be done by contract with the other three plaintiffs or one or other of them.

The attack made upon sec. 33(1)(b) is that it violates sec. 92 of the Constitution in so far as it applies,

or may be applied, to traffic among the States. The appeal concerns the operation of the order made by Mr. Justice Menzies which strikes out certain paragraphs of the statement of claim and certain phrases contained in other paragraphs of the statement of claim. It is not necessary to traverse what has been said by his Honour in detail, for we are of opinion that the order he made was in itself justified but ought to have gone further, and that in the exercise of his Honour's discretion it would have been better if he had struck out the whole statement of claim and allowed the plaintiff to plead again. That is the course we shall take.

The statement of claim appears really to address itself to four topics. In the first place there is the question of why sec. 33(1)(b) is invalid. On the face of it, sec. 33(1)(b) would appear to be a direction controlling the height of loads in the interests of stability, safety and perhaps other matters connected with the use of the highway. It is, however, suggested that by reason of facts concerning the operation of the restriction on interstate commerce and its alleged needlessness or unreasonableness in relation to the considerations that I have mentioned, the provision should be considered void in so far as it applies to loads, or loads perhaps of a relevant character, carried on interstate journeys. That is one subject.

It is suggested that sec. 35(1) may aid the validity of sec. 33(1)(b) but for that reason may itself be the subject of control or attack. So far as the attack on its validity or its effect goes, it depends, as it seems to me, on allegations that an insufficient number of places are provided by the State for the grant of permits to make it a section which enables interstate trade to be carried on under permit. That is the second subject.

Then the statement of claim addresses itself to a further subject, namely that in the exercise of discretion to grant a permit, the authorities have been governed by considerations which are said to involve a violation of sec. 92.

Lastly, the statement of claim seeks to develop some reason - I will not say cause of action - for granting damages against the defendants, which of course will include some or one of them.

In addition to these four matters concerning the substance of the complaint there is of course the plaintiffs' locus standi to seek the relief claimed.

The order made by his Honour Mr. Justice Menzies treats the chief allegation by which it was sought to attack sec. 33(1)(b) as involving an allegation of law and not of fact, that is paragraph 14 of the statement of claim. It was struck out for that reason, properly as we think.

His Honour also dealt with the attempt to make a case that the discretion under sec. 35(1) which enables the defendant Board to grant a permit was exercised in a way which violated sec. 92. The paragraphs which were addressed to that subject were struck out.

For our part we think that these paragraphs, and indeed the allegations which relate to the exercise of discretion which occurred, are misconceived for more than one reason. In the first place, they relate to an event past and closed before the statement of claim was delivered. It happens that by arrangement with the parties, although the event occurred after 11th March 1958, it was included within the statement of claim, but the occasion was the refusal of a permit which related to journeys which were long over before any relief was sought. In the next place these paragraphs appear to be misconceived because

it is sec. 33(1)(b) which operates (subject to the grant of a special permit) to prohibit the use of a load of more than twelve feet six inches in height. Sec. 35(1) merely gives power to permit the relaxation of that prohibition. When the permit is refused it is the prohibition that operates and it is a misconception to suppose that sec. 35(1)(a) or the discretion exercised under it can be attacked. The attack is based on a suggestion that permits are granted or withheld in cases involving interstate trade for reasons which take no proper account of the interstate character of the transactions. We think that that part of the statement of claim was entirely misconceived.

So far as the damages are concerned, there is no cause of action pleaded in terms which would give any title to damages to any of the plaintiffs.

Coming back now to sec. 33(1)(b), paragraph 14 of the statement of claim is the paragraph which has been struck out. It does involve, in our view, a mere allegation of a conclusion of law and was rightly struck out for that reason. Paragraph 13 which precedes it states at length a number of considerations which might, if they were properly pleaded, be relevant to the thesis which is put forward as to why sec.33(1)(b) may be invalid. A perusal of paragraph 13 shows that it is not pleaded in a form which complies with the rules. It does not state succinctly the facts and the facts only which are relevant to the conclusion sought to be drawn. It in turn contains allegations which are little more than allegations of law.

The statement of claim as a whole is based, as the respondent's counsel has argued, very largely on the presence on the record of the plaintiff company, yet when you look for the facts which make the plaintiff company a proper party, you find them scattered through the statement of claim and not succinctly stated in any form providing a support for them as going to <u>locus</u>

standi only. The statement of claim thus based contains allegations which it is unnecessary to traverse in full because they have been discussed today, but which concern the relationship between the plaintiff company and the contractors of the plaintiff company, that is the three other plaintiffs and a great number of other unnamed people. These allegations then proceed to state how their rights have been infringed if the invalidity of sec. 33(1)(b) is made out notwithstanding that they are not parties to the suit and that the invasion of their rights can only be relevant because of its reaction upon the business of the company which is not a fact distinctly alleged or shown by any of the paragraphs. We think that the pleading is expressed in a manner and form that are embarrassing. Having struck out the paragraphs in question it would have been better, we think, if Mr. Justice Menzies had struck out the whole statement of claim.

What is needed in this case is a statement of claim which clearly states the facts which give the three plaintiffs a locus standi, separates them clearly enough from the facts supplying the reasons why sec. 33(1)(b) is invalid, and states those facts simply as matters of ultimate fact, by which I do not mean that they should be stated in the language of a conclusion of law but should be stated in proper detail as forming the real reasons on which the plaintiffs depend for saying that as matters stand at present sec. 33(1)(b) does operate as an interference with the freedom of interstate trade; and finally the notion that something can be made from the manner in which the discretion under sec. 35 has in the past been exercised in granting a special permit should be put on one side. There can be no objection, although it seems to be unnecessary, if the plaintiffs state facts on which they rely as reasons, if

there be such, why sec. 35(1) should be invalid in itself. For those reasons we think that it is proper in the exercise of our discretion that we should strike out the whole statement of claim and give the plaintiffs liberty to replead the statement of claim.

The appeal will be dismissed with costs, the cross appeal allowed with costs. The statement of claim will be struck out and the plaintiffs will be given one month in which to deliver a fresh statement of claim.