JAGODA

v.

THE STATE OF VICTORIA

JUDGMENT (Oral) DAWSON J.

Heard: 17 February 1987
Delivered: 20 February 1987

JAGODA

v.

THE STATE OF VICTORIA

In this matter the defendant by summons seeks an order that the statement of claim be struck out on the ground that it discloses no reasonable cause of action or is embarrassing. Other relief, to which it is unnecessary to refer specifically, is also claimed. There is a cross-summons by the plaintiff seeking an order directing the defendant to demur to the statement of claim or, alternatively, a case stated for the consideration of the Full Court. Other relief is claimed by the plaintiff to which it is similarly unnecessary to refer specifically.

The action is one in which the plaintiff claims a declaration that the defendant has no entitlement to recover from the plaintiff licence fees under the Business Franchise (Tobacco) Act 1974 (Vict.) in respect of the sale of tobacco products, a declaration that the plaintiff was not engaged in intrastate trade within the meaning of the Act and was engaged in trade or commerce among the States within the meaning of s.92 of the Constitution and a declaration that the provisions of s.6(1) of the Act, in so far as they

provide for the licensing of a wholesaler who is carrying on trade and commerce among the States, are contrary to the provisions of s.92 and are invalid.

Section 6(1) of the Business Franchise (Tobacco) Act prohibits tobacco wholesaling without a licence. "Tobacco wholesaling" is defined in s.2(1) as meaning the business of selling tobacco in the course of intrastate trade for the purpose of resale. Under s.2(5) the reference to "intrastate trade" is a reference to trade carried on in Victoria which is not trade or commerce among the States within the meaning of s.92 of the Constitution. Licence fees are payable pursuant to s.10. If the Commissioner of Business Franchises has reason to believe that a person is carrying on a business of tobacco wholesaling without having made an application for the appropriate licence under the Act, the Commissioner may make an assessment of the amount that in his judgment should have been paid had the application been made and that person shall be liable to pay that amount: see s.19A.

In Evda Nominees Pty. Ltd. v. Victoria (1984) 154 C.L.R. 311, an action previously commenced in this Court by the plaintiff, amongst others, the Business Franchise (Tobacco) Act was held not to impose a duty of excise.

On 28 October 1984 the plaintiff and others were committed for trial upon a charge of conspiring to defraud the State of Victoria by the evasion of payment of licence fees pursuant to the provisions of the Business Franchise (Tobacco) Act. Previously an application to remove the hearing of the committal proceedings into this Court had been refused. There has been a long history of delay in the trial of the plaintiff, the committal proceedings having been first listed on 27 June 1983. On 12 November 1986, the trial was adjourned to a date to be fixed and an order was made that if High Court proceedings were not commenced within seven days, the Crown should have liberty to apply for a date to be set for the trial. The time for the commencement of the trial was extended to 1 July 1987. This action was instituted on 19 November 1986.

I am not satisfied that I am fully apprised of all of the reasons for the adjournment of the trial on 12 November 1986, but the commencement of proceedings in this Court would seem to be an insufficient reason in the absence of special circumstances. No such circumstances have been made apparent to me. The undesirability of interrupting criminal proceedings once they have begun in order to obtain a declaratory order directly impinging upon those proceedings has frequently been referred to. See Crouch v. The

Commonwealth (1948) 77 C.L.R. 339, at pp.348-349; Sankey v. Whitlam (1978) 142 C.L.R. 1, at pp.20-27; Shapowloff v. Dunn [1973] 2 N.S.W.L.R. 468, at p.470; Imperial Tobacco Ltd. v. Attorney-General [1981] A.C. 718, at p.741. The plaintiff in this action must face some difficulty, to say the least, in establishing his entitlement to discretionary relief, having regard to the proceedings in the criminal courts.

However, what primarily concerns me in these applications is the adequacy of the plaintiff's pleading. He pleads that he is charged with conspiracy to defraud the State of Victoria by evading the payment of licence fees under the Act. He then pleads a number of facts, prefaced by the words "the Crown case against the plaintiff is as follows". The facts set out are to the effect that the plaintiff purchased tobacco products in the Australian Capital Territory and delivered them to retailers in Victoria in fulfilment of orders given by them with the purpose of evading the payment of licence fees under the Act. But, of course, these facts are not pleaded as facts but merely as the anticipated Crown case in the criminal proceedings. Reference is subsequently made to the "purchase of tobacco products in the Australian Capital Territory referred to", but no purchase has been referred

to; there has merely been a reference to an allegation made or to be made in other proceedings. The statement of claim goes on to recite various provisions of the Act and to allege that the plaintiff has been assessed under s.19A of the Act as being liable to pay a certain amount. The same claim is made in relation to a number of retailers, although this would seem to be irrelevant. The allegation is then made that "in the premises" the plaintiff was not engaged in intrastate trade within the meaning of the Act and was engaged in trade or commerce among the States within the meaning of s.92 of the Constitution. Of course, there are no "premises" or, at any rate, premises which could possibly support the conclusion alleged. All that is pleaded are certain allegations made or to be made in criminal proceedings. No doubt the pleading is framed in this way in order to avoid making any admission which might be used in those criminal proceedings but the result, in my view, is that no cause of action is made out. If there were a cause of action the pleading would in any case be embarrassing because the only issue which it could raise would be the content of the Crown case in the criminal proceedings which is a false issue having regard to the relief claimed.

There is also an allegation that s.6(1) of the Act is invalid as infringing s.92, but assuming it is possible to

plead a bare allegation of invalidity, such an allegation cannot, even if made good, establish the standing of the plaintiff to the relief which he claims and as a consequence the statement of claim is for this additional reason defective. See Associated Stevedores Pty. Ltd. v. Tasmania (1961) 35 A.L.J.R. 71; East-West Airlines (Operations) Ltd. v. Commonwealth (1983) 57 A.L.J.R. 783; 49 A.L.R. 323.

I think that I must accede to the defendant's claim that the statement of claim be struck out. I do not, however, think that I ought to order the action to be stayed or dismissed. Whatever difficulties might lie ahead for the plaintiff, a cause of action might be made out, if properly pleaded, involving the interpretation of s.92 of the Constitution and so within the original jurisdiction of this Court. I propose to give the plaintiff leave to replead. If a cause of action is made out involving the determination of issues of fact it may be appropriate to remit the matter to another court, but it is not appropriate to do that at this stage.

I order that:

(1) the statement of claim be struck out;

(2) the plaintiff have leave to file and serve an amended statement of claim on or before 2 March 1987;

(3) the defendant have leave to file and serve an amended defence or an amended defence and demurrer or a demurrer (as the case may be) on or before 16 March 1987;

(4) the plaintiff's summons be dismissed;

(5) the plaintiff pay the defendant's costs of both summonses.

I certify for counsel.