CASE NOTE

CLARK KING & CO. PTY LTD v. AUSTRALIAN WHEAT BOARD[1]

Constitutional law—freedom of interstate trade and commerce—section 92

Introduction

The High Court considered the actions brought by the four plaintiffs, Clark King & Co. Pty Ltd, KMM Pty Ltd, Victorian Oatgrowers Pool and Marketing Co. Ltd and Bunge (Australia) Pty Ltd against the Australian Wheat Board jointly. In each case, the plaintiff sought a declaration "that, by reason of s. 92 of the Australian Constitution, certain provisions of the Wheat Industry Stabilization Act 1974 (N.S.W.) (the State Act) are inapplicable to certain wheat" in the possession of the plaintiff.[2] The State of New South Wales was also named as a defendant by the plaintiff Clark King & Co. Pty Ltd. The States of Victoria, South Australia and Western Australia and the Commonwealth were granted leave to intervene. The defendants demurred to the plaintiffs' action.

The trading activities of the plaintiffs varied in certain ways so that slightly different considerations arose in respect of some plaintiffs. Each plaintiff was incorporated in accordance with the law in Victoria. Clark King & Co. Pty Ltd, a stock feed producer, purchased wheat from growers in New South Wales in accordance with a standard contract which specified that the growers had an obligation to deliver the wheat across the border to the purchaser's mill in North Melbourne. However, the carrier, who was named by the plaintiff in accordance with the contract, sometimes stored the wheat, pending transportation to Victoria, within New South Wales in stores leased by the plaintiff. KMM Pty Ltd, flour millers, and Bunge (Australia) Pty Ltd, stock feed millers, purchased wheat from New South Wales growers and stored the wheat in bulk stores within New South Wales before transporting it to Victoria. Victorian Oatgrowers Pool & Marketing Co. Ltd, stock feed millers, purchased the wheat from growers in New South Wales but transported the wheat to its stores in Victoria.

In each case, the Australian Wheat Board (the "Board") issued a notice under section 10 of the appropriate State legislation[3] requiring the delivery of the wheat so stored by the plaintiffs to the Board. The

---

[1] *Clark King & Co. Pty Ltd* v. *Australian Wheat Board and the State of New South Wales; KMM Pty Ltd* v. *Australian Wheat Board; Victorian Oatgrowers Pool and Marketing Co. Ltd* v. *Australian Wheat Board; Bunge (Australia) Pty Ltd* v. *Australian Wheat Board* (1978) 21 A.L.R. 1; (1978) 52 A.L.J.R. 670. High Court of Australia; Barwick C.J., Stephen, Mason, Jacobs and Murphy JJ.

[2] (1978) 21 A.L.R. 1, 3 *per* Barwick C.J.

[3] The Wheat Industry Stabilization Act 1974 (N.S.W.) in the case of wheat owned by Clark King & Co. Pty Ltd, KMM Pty Ltd and Bunge (Australia) Pty Ltd and the Wheat Industry Stabilization Act 1974 (Vic.) in the case of the Victorian Oatgrowers Pool & Marketing Co. Ltd.

relevant provisions (sections 10 to 14) of the New South Wales Act were set out in full in the judgment of Barwick C.J.,[4] who referred to that legislation throughout his judgment. Mason and Jacobs JJ. preferred to refer to the relevant provisions of the Wheat Industry Stabilization Act 1974 (Cth).[5] Although the validity of this Act was not in fact challenged by the plaintiffs, it was understood that this Act could not continue to operate effectively if the mirroring State legislation was held to be invalid or inoperative in its application to wheat owned by the plaintiffs.

The relevant sections provided—

(i) for the giving of notice by the Australian Wheat Board to require the delivery of wheat to the Board[6] and for the vesting of wheat so acquired in the Board;
(ii) for the delivery of wheat so acquired to a licensed receiver;[7]
(iii) that wheat should not be sold except to the Australian Wheat Board;[8] and
(iv) that payment should be made by the Board for the wheat so acquired.[9]

The plaintiffs claimed that the notices for the delivery of the wheat were issued in accordance with legislation which was either invalid or inoperative in relation to wheat in the course of interstate trade and commerce because of the protection of freedom of interstate trade granted by section 92 of the Constitution. The High Court[10] held that the legislation was valid in its operation to vest the wheat owned by each of the plaintiffs in the Board. However, this decision was not based on the same reasoning in each of the majority judgments, so that it is difficult to positively state a principle for the application of section 92 which could be supported by the decisions of a majority of the judges in the case.

Whether the plaintiffs engaged in interstate trade

Obviously, the first issue in the case was whether the plaintiffs engaged in interstate trade and whether the wheat stored by the plaintiffs continued to be the subject of that trade during the period of storage so that section 92 applied to that wheat. Those justices who considered this question[11] agreed, at least, that the plaintiffs engaged in interstate trade. However, they had differing views as to when the interstate nature of the trade of each plaintiff commenced and ended.

In their dissenting judgments, both Barwick C.J.[12] and Stephen J.[13] found that in the case of the trade carried on by Clark King & Co. Pty

---

[4] (1978) 21 A.L.R. 1, 3-8.
[5] *Id.* 42-45.
[6] S. 10 of the N.S.W. Act; s. 21 of the Commonwealth Act.
[7] S. 11 of the N.S.W. Act; s. 22 of the Commonwealth Act.
[8] S. 12 of the N.S.W. Act; s. 23 of the Commonwealth Act.
[9] S. 13 of the N.S.W. Act; s. 24 of the Commonwealth Act.
[10] Mason, Jacobs and Murphy JJ., Barwick C.J. and Stephen J. dissenting.
[11] Murphy J. allowed the defendants' demurrers without considering the arguments put by both parties.
[12] (1978) 21 A.L.R. 1, 12-13.
[13] *Id.* 33.

Ltd there was an additional reason for finding that such trade was of an interstate character in that the contract providing for the delivery of goods over State borders committed the goods to "interstate transportation and thus to interstate trade and commerce",[14] despite the artificiality of that contract. This was not, however, critical to that plaintiff's case in the opinion of the Chief Justice as it could "also rely upon his interstate trade in the purchase and transport of wheat as an essential activity of his gristing business",[15] as could the other plaintiffs.

In the opinion of the Chief Justice, the wheat purchased and committed to interstate trade continued to form part of interstate trade until used for the business for which it was purchased, that is, the wheat formed part of interstate trade until gristed. He found that it was a question of fact whether the plaintiffs' intention to move the wheat in the course of interstate trade continued during the period of storage. In his opinion, the transaction could not:

> properly be analysed into two separate intra-state transactions, one of purchase and one of use, accidentally joined by interstate transportation, so as to regard that transportation as the only element of interstate trade and commerce.[16]

Precedent, in particular the decision in *W. & A. McArthur Ltd* v. *Queensland*,[17] supported his conclusion that the commitment of the wheat to interstate trade operated so that the wheat so committed immediately formed part of that trade. On the facts, he found that the wheat which was the subject of the notices issued by the Wheat Board formed part of interstate trade.

Stephen J. relied heavily on the decision in *North Eastern Dairy Co. Ltd* v. *Dairy Industry Authority of New South Wales*[18] to reach his conclusion that the wheat held in storage pending further movement to its ultimate destination at a mill formed part of interstate trade. He quoted at length from several of the judgments in that case,[19] where it was found that New South Wales legislation which took effect immediately on the entry into New South Wales of milk brought by the Victorian owner across the border was invalid because of section 92. He found that there was no difference in principle between the position of an owner of goods who moves those goods interstate for the purpose of selling them and an owner who moves his goods interstate for the purposes of manufacture. In each case, the interstate carriage was a critical feature and the period of storage in the bulk store formed an inseparable part of the complete process so that it formed an integral part of the interstate trade.[20] He thought that "it might be otherwise if the bulk stores were located alongside the Victorian mills as part of

---

[14] *Id.* 12.
[15] *Id.* 13.
[16] *Id.* 14.
[17] (1920) 28 C.L.R. 530.
[18] (1975) 134 C.L.R. 559; (1975) 7 A.L.R. 433.
[19] (1978) 21 A.L.R. 1, 31.
[20] *Id.* 32.

those mills"[21] but this was not the case. It was unnecessary to decide whether the original purchase or the process of gristing formed part of the interstate trade.

Mason and Jacobs JJ., in their joint judgment, stated positively that the interstate nature of the transaction ended when the transportation ended so that the gristing of the wheat did not have the quality of a transaction of trade and commerce among the States. In the case of the wheat which had been transported to and stored in Victoria by the Victorian Oatgrowers Pool & Marketing Co. Ltd, therefore, the act of trade and commerce among the States was completed and that wheat had become wheat situated in Victoria, and consequently subject to the laws of Victoria.[22] Their Honours referred to *Wragg* v. *New South Wales*[23] as the appropriate precedent to be applied here and observed:

> If resale is not itself such trade and commerce, then we cannot see how use in the course of a process of manufacture can be so in the absence of some discrimination against the product arising from its interstate origin.[24]

However, the context of the legislation disclosed an intention to prohibit any dealing with the wheat at all so that the legislation did operate to impose a restriction on interstate trade.[25]

To summarise their Honours' conclusions, Barwick C.J. found that the wheat formed part of interstate trade from the stage of purchase until use or other disposal; Stephen J. found that the storage, at least, was an integral part of the interstate trade if the wheat so stored had not arrived at its ultimate destination; Mason and Jacobs JJ. found that the interstate nature of the transaction ended when the transportation across State borders ended. As the plaintiffs had established a *prima facie* right to challenge the legislation on the basis that in its application to wheat in the possession of the plaintiffs it infringed the constitutional guarantee of section 92, it was necessary to consider the arguments put forward by the defendants in support of the validity of the legislation.

Whether section 92 applies only to discriminatory laws

In the course of argument, the defendants submitted that only those laws which discriminate against interstate trade and commerce offend the prohibition of section 92. Only Barwick C.J. and Stephen J. applied themselves directly to this argument and both rejected it as insupportable by earlier decisions. Barwick C.J. found that the decision in *State of New South Wales* v. *Commonwealth* (the *Wheat Case*)[26] where discrimination was found to be the only *discrimen* for the operation of section 92, was no longer good law and he criticised the reasoning of Griffith C.J. in that case. He found that discrimination was not an essential element in the operation of section 92, although

---

[21] *Ibid.*
[22] *Id.* 49.
[23] (1953) 88 C.L.R. 353.
[24] (1978) 21 A.L.R. 1, 50.
[25] *Id.* 49.
[26] (1915) 20 C.L.R. 54.

the existence of such discrimination would attract section 92.[27] Stephen J. shortly expressed similar views, saying:

> the absence of discrimination is, of itself, a quality which is entirely neutral when it comes to questions of constitutionality.[28]

Mason and Jacobs JJ. referred to the element of discrimination in discussing whether a law operating on those activities immediately before and after the interstate transaction offends against section 92. They emphasised that in the absence of such an element of discrimination the protection of section 92 would not be attracted.[29]

Whether the legislation amounted to a "prohibition" or "reasonable regulation"

The defendants' main argument was that the legislation, in particular the State Act, formed part of a legislative scheme for the stabilisation of the wheat industry and that the nature and condition of the industry and of the scheme constituted circumstances in which a government monopoly over the sale of wheat was describable as a practical and reasonable manner of regulation. This submission was based on comments made by the Privy Council in *Commonwealth* v. *Bank of New South Wales* (the *Bank Case*),[30] where it was stated that a reservation must be made to the general rule that legislative prohibition, as distinct from regulation, of interstate trade is invalid. This reservation was stated as follows:

> For their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free.[31]

Barwick C.J. and Stephen J. both rejected the argument that the relevant statutory provision could be described as reasonably regulatory. Barwick C.J. took the opportunity to expressly reject the approach consistently taken by Murphy J. that section 92 operated only to prevent the imposition of fiscal burdens[32] while stating the accepted principles of law restated in the *Bank Case*. He referred to his previous

---

[27] (1978) 21 A.L.R. 1, 18.

[28] *Id.* 42.

[29] *Id.* 50. The importance of the element of discrimination has since been particularly stressed by Jacobs J. in his judgment in *Bartter's Farms Pty Ltd* v. *Todd* (1978) 52 A.L.J.R. 697, 705 where he stressed that the element of discrimination is important in deciding whether a law affecting trade, commerce and intercourse between the States is merely regulatory.

[30] (1949) 79 C.L.R. 497.

[31] *Id.* 639-641.

[32] (1978) 21 A.L.R. 1, 21.

statements[33] as to the proper meaning of permissible regulation, that is, that laws accommodating the "relationship of free men in trade and commerce each to the other in an ordered society provides that limitation".[34] He acknowledged that a gap in legislative power existed throughout Australia because of the operation of section 92 and stated that the gap could not be reduced by taking into account public interest considerations. He stressed that the paramount rule was absolute freedom, with regulation "but the exception".[35]

He then considered the context of the reservation made by the Privy Council that in some circumstances prohibition may be the only practical and reasonable method of regulation to the general rule that prohibition of interstate trade was not regulation and found that it was not a substantial qualification of that rule. He explained this conclusion in terms of his personal interpretation of what amounts to reasonable regulation.[36] In his opinion, the legislative scheme for wheat stabilisation was not the *only* practical and reasonable means of regulation. The Chief Justice referred to the material placed before the High Court by the defendants. He found that this material failed to show that the legislative scheme was the only practical and reasonable manner of regulation and found that the I.A.C. Report on Wheat Stabilisation supported the conclusion that other possibilities existed. In his opinion "that extremity of necessity which their Lordships imagined might some day eventuate has not been shown currently to be present".[37] In fact, the existence of interstate trade outside the scheme indicated that control of that trade was not essential to the operation of the scheme.

Stephen J. reached the same conclusion for similar reasons. He looked to previous decisions[38] to determine the meaning of the term "reasonable regulation" and he concluded that the following laws could be classed as "strictly regulatory":

(1) laws prescribing rules as to modes of trade, such laws being non-discriminatory and relatively reasonable (*e.g.* road traffic laws);

(2) laws excluding particular classes of persons, things or behaviour because their characteristics are such that public interest requires such an exclusion; and

(3) laws imposing charges for the use of facilities and laws recovering the cost involved in the use by traders of highways.[39]

---

[33] See, in particular *Samuels* v. *Reader's Digest Association Pty Ltd* (1969) 120 C.L.R. 1, 14-15.

[34] (1978) 21 A.L.R. 1, 22.

[35] *Id.* 24.

[36] *Id.* 25.

[37] *Id.* 28.

[38] In particular, Stephen J. referred to *Hughes and Vale Pty Ltd* v. *New South Wales* (No. 2) (1955) 93 C.L.R. 127; *The Transport Cases; Australian National Airways Pty Ltd* v. *Commonwealth* (1945) 71 C.L.R. 29; *Wilcox Mofflin Ltd* v. *N.S.W.* (1952) 85 C.L.R. 488, *Williams* v. *Metropolitan and Export Abattoirs Board* (1953) 89 C.L.R. 66 and *North Eastern Dairy Case* (1975) 134 C.L.R. 559.

[39] (1978) 21 A.L.R. 1, 37.

Such laws, he thought, provided the "framework of an ordered community without which none can enjoy any real freedom to trade".[40] A law prohibiting all trade did not fall within one of these three classes and left trade completely unfree so that section 92 was attracted.

Stephen J. explained the Privy Council qualification in the *Bank Case* as a reluctance to close the door on a particular exercise of conferred legislative power.[41] However, that qualification was not satisfied here, first because there had been no material social development to justify a government monopoly and, secondly, because the stabilisation scheme was not shown to be the only reasonable method of regulating the industry. He discussed at length the conclusion of the I.A.C. Report on the Wheat Stabilisation Scheme[42] and found that those conclusions were "highly persuasive" so that it was clear that the stabilisation scheme was not the only practical and reasonable method of regulation.

Mason and Jacobs JJ. adopted a radically different approach to this question to find that in all the circumstances a comprehensive scheme was the only reasonable and practical manner of regulating the wheat industry. They rejected the argument that the legislation imposed a simple prohibition within the meaning of the words adopted by the Privy Council in the *Bank Case*. In their opinion, those words were not intended to mean that "all one need do is look at the trade of an individual trader and classify as simple prohibitions those which prevent him from trading as and with whom he wishes".[43] Although section 92 protects the individual trader, such an interpretation of the comments made by the Privy Council would be inconsistent with the "careful proviso" which their Lordships made.

Their Honours then looked to the whole context in which the prohibitions were found to determine whether in the circumstances the legislation formed the only practical and reasonable manner of regulation. They discussed the history and operation of the stabilisation scheme[44] and concluded from all the facts presented to the Court that the efficacy of the scheme depended upon the delivery of the whole wheat crop to the Wheat Board.

Their Honours found that although the acquisition of wheat after an interstate transaction may cause that transaction to be less attractive, such an effect was merely an economic consequence and the acquisition may not directly burden interstate trade. That being so, their Honours did not think that the legislation requiring delivery before the interstate acts were completed had "the same merely prohibitive effect as in other contexts it might be found to have".[45] In other words, because the operation of section 92 did not extend to protect activities prior to or after the interstate transaction from legislative burdens, in those cases

[40] *Id.* 38.
[41] *Ibid.*
[42] *Id.* 39-40.
[43] *Id.* 50.
[44] *Id.* 51-53.
[45] *Id.* 53.

where the legislative burden was imposed prior to, during and after the interstate transaction section 92 operated to a lesser degree to protect the interstate transaction from a legislative burden than in those cases where the burden was imposed on the interstate transaction alone.

Mason and Jacobs JJ. did not refer to the evidence before the Court that alternative schemes existed but found that in the circumstances of an Australia-wide pooling scheme as well as the circumstances of the wheat industry they were satisfied that the scheme which imposed burdens on the interstate sale and transportation of wheat was "the only practical and reasonable manner of regulation" of trade and commerce in wheat.[46]

Whether legislation imposing an Australia-wide scheme attracts different considerations from a State-wide scheme

Mason and Jacobs JJ. placed considerable reliance on the fact that the legislation operated uniformly throughout Australia to support their conclusion that such legislation was merely regulatory. They commented:

> That the Commonwealth and all the States have passed complementary legislation to establish an Australia-wide pool of wheat, all of which is acquired by a single authority, the Wheat Board, distinguishes the circumstances from those which arise under a State marketing scheme created by a statute of one State only[47]

and they referred to the comments made by Dixon J. in the *Field Peas Case*[48] to support this conclusion.

Barwick C.J. expressly rejected this contention, saying:

> section 92 binds both the Parliament and the legislatures of the several States, no less in a joint or co-operative activity than individually.[49]

He alone questioned the nature of the power vested in the Board, observing that neither the States nor the Commonwealth could increase the legislative power of the other by passing identical legislation. In his opinion, the Board was exercising both Federal and State functions each appropriate to the legislative source of its authority.[50] He rejected the concept that a State Act which was not regulatory when considered individually could become regulatory in operation because of similar legislation in other States.[51]

Incidental Comments

Only the Chief Justice commented on the impropriety of adducing evidence to support a political objective, that is, of introducing one

---

[46] *Id.* 54.

[47] *Id.* 53.

[48] *Field Peas Marketing Board (Tas.)* v. *Clements & Marshall Pty Ltd* (1948) 76 C.L.R. 401; also (1948) 76 C.L.R. 414.

[49] (1978) 21 A.L.R. 1, 26.

[50] *Id.* 27.

[51] See Rose, "Federal Principles for the Interpretation of Section 92 of the Constitution" (1972) 46 A.L.J. 371, 375-376.

uniform stabilisation scheme. He was not prepared to consider the submission that such a scheme would obliterate State boundaries and he commented that this submission indicated "how far from legal considerations the court was invited to depart".[52] In reaching his conclusion, Stephen J. relied heavily on the evidence to form the conclusion that it was doubtful whether the scheme was a practical and reasonable method of regulation at all[53] while Mason and Jacobs JJ. looked to the policy of the scheme to decide to the contrary.[54]

The judgments in this case confirm the trend away from the early approach of considering whether legislation providing for compulsory acquisition as such necessarily offends against section 92. However, this decision casts doubt on the proposition that the compulsory acquisition of goods offends against section 92.[55] Only Stephen J. referred to the question of the validity of the legislation in terms of compulsory acquisition[56] but he answered the question by referring to the more general concepts of whether the legislation was prohibitory or merely regulatory.

Lastly, it is necessary to refer briefly to the judgment of Murphy J.[57] While it appears that the basis of his decision to reject the plaintiffs' argument was his often expressed view that section 92 applied only to restrict the imposition of fiscal burdens at State boundaries (a view he first expressed in *Buck* v. *Bavone*[58]), he made some comments which implied that section 92 would not operate to invalidate such a legislative scheme in any case. He stated that the nationwide scheme operated to support the wheat-growing community and he apparently found the concept of such a scheme being invalid, because of section 92, unacceptable. Such a conclusion would lead to other similar schemes introduced for different purposes being invalid and he implied that section 92 could not operate to achieve this result.[59]

It is unfortunate that such a major decision was delivered by only five members of the Full High Court, with a majority of three to two judges and without a majority with respect to the reasons for the decision reached. Indeed, it is open to speculation whether this decision will survive as good authority when one considers the real likelihood of another challenge[60] to the legislation to seek the views of those members of the High Court who have not yet had the opportunity to consider the question of the validity of the legislation.

B. PEARSON*

---

[52] (1978) 21 A.L.R. 1, 29.

[53] *Id.* 41.

[54] *Id.* 52-53.

[55] *James* v. *Cowan* (1929) 43 C.L.R. 386; *The Peanut Board* v. *Rockhampton Harbour Board* (1932-1933) 48 C.L.R. 266; *Clements & Marshall Pty Ltd* v. *Field Peas Marketing Board (Tas.)* (1947) 76 C.L.R. 401.

[56] (1978) 28 A.L.R. 1, 33.

[57] *Id.* 54.

[58] (1976) 135 C.L.R. 110.

[59] (1978) 21 A.L.R. 1, 55.

[60] An action commenced against the Australian Wheat Board by Mr Uebergang and others has not, to date, been heard.

* B.A., LL.B. (Hons) (A.N.U.); Barrister and Solicitor, Supreme Court of the Australian Capital Territory