HIGH COURT OF AUSTRALIA

Clements And Marshall Pty. Ltd.

Vs.

Field Peas Marketing Board (TAS.)

Williams J.(1)

11 April 1947

WILLIAMS J.

This is a motion for an interlocutory injunction in an action brought by the defendants, the Field Peas Marketing Board of the State of Tasmania, and the State of Tasmania, for declarations that the Marketing of Primary Products Act 1945 (Tas.), hereinafter called the Principal Act, which commenced on 15th May 1946, and the Marketing of Primary Products (Field Peas) Act 1946 (Tas.), hereinafter called the Field Peas Act, which commenced on 9th January 1947, contravene s. 92 of the Commonwealth Constitution, and are invalid; and for consequential relief in respect of the plaintiff's inter-State business. The interlocutory injunction claimed is an injunction until the hearing of the action restraining the defendants and each of them, their respective agents and servants, from taking any steps to enforce the provisions of these Acts against the plaintiff. (at p403)

2. The Principal Act is intituled an Act to provide for the constitution of boards for the marketing of certain classes of primary products and for matters incidental thereto. It defines "commodity" to mean any product which the Governor by proclamation declares to be a commodity for the purposes of the Act. Section 3 provides that, upon receipt of a petition signed by a certain number of producers of a product praying that the product may be declared to be a commodity for the purposes of the Act and that a marketing board may be established in respect of the commodity, the Governor may by proclamation declare the product to be a commodity for the purposes of the Act. Section 4 provides that, subject to the taking of a poll as therein provided, the Governor may by a further proclamation establish a marketing board in respect of the commodity to which the proclamation relates. (at p403)

3. Section 19 provides that - (1) Where a product has been declared a commodity and a board has been constituted in relation thereto, the Governor, upon the recommendation of the board, may by proclamation declare that all the commodity shall forthwith upon the date of publication of the proclamation, or from a later date specified therein, be divested from the producers of the commodity, and become vested in and be the absolute property of the board as the owner thereof, and that upon any of the commodity coming into existence within a time specified in the same or a subsequent proclamation it shall, by virtue of this Act, become vested in and be the absolute property of the board as the owner thereof. (2) On the date of publication of the proclamation, or on such later date as is specified therein, (a) the commodity shall become the absolute property of the board, freed and discharged from all mortgages, charges, liens, pledges, interests, trusts, contracts, and encumbrances affecting the same; (b) the rights and interests of every person in and to the commodity shall thereupon be converted into a claim for payment in accordance with this Act. (3) Nothing in this Act and no proclamation or agreement made under this Act with any Government or persons shall in any way interfere with the free operation of s. 92 of the Commonwealth

Constitution. Section 21 provides that, (1) Subject to this Act and for the purposes thereof, a board may sell any commodity in relation to which it is constituted and which is vested in or delivered, or to be delivered to it, and may do or execute all such acts, matters, and things as it deems necessary or expedient in that behalf and in particular, but without limiting the generality of the foregoing powers, the board may . . . (c) so far as is practicable, provide the commodity for consumption in Tasmania, and for its supply during any period of shortage to those places within Tasmania wherein a shortage is experienced; (d) make such arrangements as it deems necessary with regard to the sale of the commodity for export or for consignment to other States or countries. Section 22 provides that - (a) Where a proclamation has been issued vesting any commodity in a board, all the commodity so vested except such portion as the producer requires for his own use and except such portion as is the subject matter of a contract for sale or delivery of the same made in the ordinary course of business before the application of the Act to the commodity shall be delivered by the producers thereof to the board; (b) every producer who sells or delivers any commodity so vested in the board to any person other than the board and every person other than the board who buys or receives any of such commodity from a producer shall be liable to a penalty of 100 pounds. Section 28 provides that a board shall make payments to the persons by or for whom the commodity was delivered to the board on the basis of the net proceeds of the sale of all the commodity of the same quality standard variety or grade delivered to the board during the prescribed periods and the proportions of the commodity so delivered by those persons during such periods or on such other basis as the board may determine. Section 30 provides that subject to this Act every contract made after its commencement (whether made before or after its application to a commodity), so far as it relates to the delivery of the commodity in Tasmania, or to the sale of the commodity for delivery there shall, when specified by the appropriate board in a notification published in the Gazette, be deemed to be, and to have been void, as from the date upon which it was made to the extent to which it has not then been completed by delivery: provided that nothing in this sub-section shall apply with respect to any contract made in the ordinary course of business before the application of this Act to the commodity. (at p405)

4. Section 1 (2) of the Field Peas Act provides that it shall be incorporated and read as one with the Principal Act. Sections 3 and 4 provide that field peas shall be deemed to be a commodity within the meaning of the Principal Act in the same manner, and to the same extent in all respects as if a proclamation had been made in respect thereof by the Governor under the authority of and in accordance with s. 3 of the Principal Act and that the defendant Board shall be constituted for the purposes of this Act. Section 5 provides - (1) It shall be the duty of the board to do all such acts and things as may be necessary for the purpose of making provision for the orderly marketing of field peas produced in Tasmania during the continuance of this Act. (2) For the purposes of this Act the board shall have the same powers and functions in all respects as if it were a marketing board established in respect of field peas in pursuance of the Principal Act, and the provisions of that Act shall apply to the board as if it had been so established, and shall, subject to this section, have effect in respect of that commodity in pursuance of that Act, and the board shall be deemed to be a board established under that Act. (3) In the application of the Principal Act to field peas, the provisions of s. 22 (a) shall have effect as if the words "except such portion of the commodity as is the subject matter of a contract for the sale or delivery of the same made in the ordinary course of business before the application of the Act to the commodity shall be delivered by the producers thereof to the board" were omitted therefrom. (4) Every contract whenever made relating to the sale of field peas coming into existence after the first day of July 1946, shall be void and of no effect, and any field peas the subject of any such contract shall be vested in the board upon the making of a proclamation in respect thereof under s. 19 of the Principal Act. (at p406)

5. On 23rd January 1947 a proclamation of the Governor of Tasmania, published in the Tasmanian Government Gazette on 29th January 1947, declared that all field peas should forthwith upon the date of publication thereof in the Tasmanian Government Gazette be divested from the producers thereof and become vested in and be the absolute property of the defendant board as the owner thereof, and that upon any field peas coming into existence before 30th June 1947, they should by virtue of the Principal Act and this proclamation become vested in and be the absolute property of the defendant board as the owner thereof. (at p406)

6. Between 15th May 1946 and 5th July 1946, the plaintiff, which has for many years carried on an extensive business as a merchant in the buying of field peas in Tasmania and the exporting of such peas to various States in the Commonwealth, made contracts with a number of growers in Tasmania for the purchase of blue peas to be delivered to the plaintiff in Tasmania. Between 9th April 1946 and 23rd September 1946 the plaintiff made similar contracts with other growers in Tasmania for the purchase of grey peas to be delivered to the plaintiff in Tasmania. The periods in which these peas should be delivered by the growers to the plaintiff are in many instances still current. Relying upon the due performance of these contracts by the growers, the plaintiff between 21st October 1946 and 15th February 1947 entered into a large number of contracts for the sale and delivery of the field peas which it had bought from the growers to purchasers in other States of the Commonwealth. (at p406)

7. The defendant board has by circulars and press notices notified producers of field peas in Tasmania, including the producers who have contracted to sell their crops to the plaintiff, that all blue and grey peas coming into existence after 29th January 1947 become its property and are to be delivered to its agents within twenty-one days of harvesting, that the Principal Act and the Field Peas Act cancel all contracts of sale which may have been entered into with merchants, and that all field peas, except those which the producer requires for his own use, must be delivered to the agents of the board. The board has also advised the plaintiff that its inter-State trade in field peas is subject to the board's control and claims that the field peas sold to the plaintiff by producers in Tasmania for resale by the plaintiff to customers in other States are the property of the board and has demanded delivery thereof to its agents. The board has commenced to prosecute the plaintiff for receiving such field peas from the producers. The board is actively interfering with the performance by the producers of their contracts to deliver field peas to the plaintiff in Tasmania and with the performance by the plaintiff of its contracts to sell the field peas to customers in other States. The board has offered to supply the plaintiff with a sufficient quantity of field peas at prices fixed by orders made under the National Security (Prices) Regulations to enable the plaintiff to fulfil its inter-State contracts provided the plaintiff undertakes not to dispose of any field peas which it has received direct from producers until after the hearing of this action. The board sells field peas in Australia at the price fixed by orders made under the National Security (Prices) Regulations. At the present time that price is 17s. 5d. per bushel for blue peas and 10s. 6d. per bushel for grey peas. The overseas prices for these peas is 22s. 6d. to 23s. per bushel for both blue and grey peas, Australian currency. The board expects that at least fifty per cent of the crop of field peas will be sold for export, and that the return to the producers will be considerably greater than it would have been if the whole crop had been sold on the Australian market. It therefore claims that the interests of the growers would be seriously affected if this Court were to grant an interlocutory injunction the effect of which would be to permit growers to deliver portion of their crops to the plaintiff for sale on the Australian market at prices substantially lower than the prices obtainable on the overseas market, and that it was for this reason that the board sought the undertaking already mentioned from the plaintiff. (at p407)

8. The general principle is that, in order to obtain an interlocutory injunction, the court must be satisfied that there is a serious question to be tried at the hearing and that the plaintiff has made 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 favour of the plaintiff. The plaintiff must also show that it is probable that the plaintiff will suffer serious injury unless the interlocutory injunction is granted and that the balance of convenience is in favour of granting the injuction. In the present case it is clear that there is a serious question to be tried at the hearing. The facts are not at present in dispute, and it is unlikely that there will be any substantial alteration in the evidence at the hearing. (at p407)

9. The crucial question is whether it is probable that the plaintiff will succeed in establishing at the hearing that the rights conferred upon it by s. 92 of the Constitution are being infringed by the defendants or either of them. Section 92 provides, so far as relevant that "Trade, commerce, and intercourse among the States, whether by means of internal carriage, or ocean navigation, shall be absolutely free." There have been, of course, several decisions in this Court and two judgments of the Privy Council upon the meaning of this section. In the later appeal to the Privy Council, James v. The Commonwealth [1936] UKPCHCA 4; (1936) AC 578; 55 CLR 1 , Lord Wright, in delivering the judgment of the Privy Council, after discussing the previous decisions, said (1936) AC, at p 630; 55 CLR, at pp 58, 59 : "The true criterion seems to be that what is meant is freedom as at the frontier or, to use the words of s. 112, in respect of 'goods passing into or out of the State.' What is meant by that needs explanation. The idea starts with the admitted fact that federation in Australia was intended (inter alia) to abolish the frontiers between the different States and create one Australia, That conception involved freedom from customs duties, imports. border prohibitions and restrictions of every kind: the people of Australia were to be free to trade with each other, and to pass to and fro among the States, without any burden, hindrance or restriction based merely on the fact that they were not members of the same State. But it has become clear from the various decisions already cited that such burdens and hindrances may take diverse forms, and indeed appear under various disguises. One form may be a compulsory acquisition of goods, as in James v. Cowan (1932) AC 542; 47 CLR 386 or the Peanut Case [1933] HCA 11; (1933) 48 CLR 266 , if in truth the expropriation is directed wholly or partially against inter-State trade in the goods, that is, against selling them out of the State." (at p408)

10. The Peanut Case [1933] HCA 11; (1933) 48 CLR 266 was therefore a case in which the Privy Council approved the decision of this Court that The Primary Producers' Organisation and Marketing Acts, 1926 to 1930 (Q.) infringed s. 92. I am unable to distinguish the present legislation from the Queensland legislation in any substantial respect. The Tasmanian Acts are, like the Queensland Act, legislation depriving the producers and persons deriving title under them of their individual right freely to dispose of a particular primary product, and imposing upon them a scheme of collective marketing. To implement this scheme an attempt is being made by virtue of the Acts and the proclamation of 23rd January 1947 to vest the whole of the field peas produced in Tasmania in the defendant board, to which each producer or his successor in title is required to deliver any of the commodity in his possession. The whole crop of the State is then to be disposed of by the defendant board as the compulsory agent of the owners collectively, and the net proceeds of sale distributed according to their individual rights and interests in the aggregate crop. (at p409)

11. I adopt with respect, mutatis mutandis, in relation to the Field Peas Act, the words of Dixon J. in the Peanut Case (1933) 48 CLR, at p 288 : - "If directness of operation, purpose and subject matter be tests of infringement upon s. 92, these requirements are fulfilled. The provisions operate directly upon the individual grower's liberty of disposing of the peanuts he produces for sale; the object, as

disclosed by the statutory instruments themselves, is to substitute another mode of realization and to compel its adoption; the subject dealt with is commercial dealing in a commodity, and restraint is both aimed at and, apart from s. 92, achieved." (at p409)

12. In my opinion a dealer in a State has a similar right under s. 92 to buy goods in that State for sale in another State to the right of the grower or manufacturer of goods in one State to sell them in another State. As Isaacs J. said in James v. Cowan [1929] HCA 47; (1930) 43 CLR 386, at p 418 , in a judgment which Lord Atkin, in delivering the judgment of the Privy Council on appeal (1932) AC, at p 561; 47 CLR, at p 398 , referred to as a convincing judgment, "the right of inter-State trade and commerce protected by s. 92 from State interference and regulation is a personal right attaching to the individual and not attaching to the goods." He then proceeded to say: - "To think that there can be no infringement of s. 92 when and in whatever circumstances a State expropriates property, is entirely to misconceive the nature of the situation. To say that on expropriation the new owner, the Government, is free to dispose of the property, and so the power of disposition of the property is not interfered with, is nothing to the point. The question is, how has the personal right of trading inter-State by the former owner been interfered with?" (1930) 43 CLR, at p 418 . The effect of the proclamation of 23rd January 1947 was, if valid, to vest all the field peas the subject matter of the contracts of sale by growers to the plaintiff in the defendant board, and therefore to prevent their redelivery by the plaintiff to purchasers to whom it has resold the field peas in the other States. The fact that there are two sets of contracts, the one for sale and delivery in Tasmania by the growers to the plaintiff, and the other for the sale of the commodity by the plaintiff to purchasers in other States, is immaterial. In James v. Cowan (1932) AC 542; 47 CLR 386 the dried fruits which the defendant was attempting to prevent the plaintiff selling in other States included fruit which he had grown himself or bought from others. In James' Case (1936) AC, at p 631; 55 CLR, at p 59 , Lord Wright said that "in every case it must be a question of fact whether there is an interference with this freedom of passage" of goods from State to State. In my opinion each transaction must for this purpose be looked at as a whole. (at p410)

13. It was pointed out on behalf of the defendants that from 1942 until the National Security Act expired at the end of 1946, all field peas grown in Australia were acquired by the Commonwealth under the provisions of the National Security (Field Peas Acquisition) Regulations and that Tasmania is the State where field peas are principally grown. It was contended that the Field Peas Act was passed to take the place of the Field Peas Acquisition Regulations in order to prevent chaotic conditions in the marketing of the commodity during the immediate post-war period; and was not therefore an Act directed wholly or partially at the freedom of inter-State trade, although it might have the indirect effect of preventing some inter-State dealings. I was referred to Matthews v. Chicory Marketing Board (Vict.) (1938) [1938] HCA 38; 60 CLR 263 , and I was pressed with the decisions of this Court in New South Wales v. The Commonwealth [1915] HCA 17; (1915) 20 CLR 54 , relating to the Wheat Acquisition Act 1914 (N.S.W.); in Crothers v. Sheil [1933] HCA 42; (1933) 49 CLR 399 and Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd. [1939] HCA 28[1939] HCA 28; ; (1939) 62 CLR 116 relating to the Milk Act 1931-1936 (N.S.W.) and in Andrews v. Howell [1941] HCA 20; (1941) 65 CLR 255 relating to the National Security (Apple and Pear Acquisition) Regulations. The case of Matthews v. Chicory Marketing Board (Vict.) [1938] HCA 38; (1938) 60 CLR 263 is clearly distinguishable from the present case because s. 16 (3) of the Marketing of Primary Products Act 1935 (Vict.) expressly provides that: "Nothing in this section shall affect such portion of any commodity as is the subject of trade commerce or intercourse between the States or as is intended by the producers thereof to be used for such trade commerce or intercourse." (at p410)

14. So much of the commodity therefore as was the subject of inter-State trade never became vested in the Chicory Marketing Board of Victoria, whereas under the Field Peas Act the proclamation of 23rd January 1947 expressly provides for the vesting of all field peas in the defendant board and for the avoidance of all contracts in relation to the commodity. The Wheat Case [1915] HCA 17; (1915) 20 CLR 54 has been received with a considerable mixture of assent and dissent in subsequent cases but it has never been expressly overruled. It was a case where the whole of the wheat grown in New South Wales was compulsorily acquired by the State of New South Wales, and the basis of the decision was that there is nothing in s. 92 to prevent the States or the Commonwealth for their own lawful purposes from becoming owners of the property possessed by their citizens and applying it according to law for the common welfare. It would appear that such legislation is not open to attack where in the words of Lord Atkin in James v. Cowan (1932) AC, at p 559; 47 CLR, at p 397 it is directed "to such matters as defence against the enemy, prevention of famine, disease and the like . . . because incidentally interstate trade was affected." It would seem therefore that the validity of the National Security (Apple and Pear Acquisition) Regulations may be defended, as Starke J. and McTiernan J. appear to have thought in Andrews v. Howell (1941) 65 CLR 255 , as a matter of defence against the enemy. But it is to be noted that in that case Rich J. said (1941) 65 CLR, at p 263 that "the facts of this case contain no inter-State element"; and that Dixon J. appears to have thought that in relation to a sale of apples and pears in one State for delivery in another State, the regulations would be obnoxious to s. 92 but could be read down so as not to apply to such a case under s. 46 (b) of the Acts Interpretation Act. (at p411)

15. The most important of the cases relied on by the defendants are perhaps Crothers v. Sheil [1933] HCA 42; (1933) 49 CLR 399 and Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd. [1939] HCA 28; (1939) 62 CLR 116 . These cases relate to the Milk Act 1931-1936 (N.S.W.). This Act provides that all milk supplied for consumption or use within the metropolitan milk distributing district of Sydney shall be absolutely vested in and become the property of the Board. It authorizes the Board to fix the price of milk to be sold in this district, and to make by-laws prescribing that the milk for sale shall be of a proper standard of quality and purity. In Crothers v. Sheil [1933] HCA 42; (1933) 49 CLR 399 there was no evidence that any milk so supplied was produced or purchased outside the State of New South Wales and the validity of the Act was upheld on this basis. Rich J. (in whose judgment Dixon J. concurred) said: "It is sufficient to say that even if an actual transaction of inter-State commerce is found to be impeded by the Milk Act so that the freedom of inter-State trade is impaired s. 92 will prevail over the Milk Act, but it is clear that merely because it cannot be foretold that such a state of things is impossible the whole of the relevant provisions of the Milk Act do not collapse" (1933) 49 CLR, at p 409 . In Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd. ([1939] HCA 28; 1939) 62 CLR 116 it was proved that milk was brought from Victoria to the metropolitan milk distributing district of Sydney for the defendant to sell for consumption and use in this district, but it was nevertheless held by Latham C.J., Rich J., Evatt J. and McTiernan J., Starke J. dissenting, that this milk became the property of the Milk Board under the Act. Latham C.J. said (1939) 62 CLR, at pp 134, 135 that although it was now clear that there was a substantial inter-State trade in milk supplied for consumption and use in the metropolitan district he was of opinion that the decision in Crothers v. Sheil [1933] HCA 42; (1933) 49 CLR 399 should be regarded as decisive against the defendant. Rich J. said (1939) 62 CLR, at p 138 : "I am content to say that the provisions of the Act so far as they are relevant to this case do not contravene s. 92 of the Constitution, and I adhere to the decision in Crothers v. Sheil (2)". As I understand the reasons of the Chief Justice, Rich J., Evatt J. and McTiernan J., the common ratio decidendi was that the main purpose of the Milk Act was to fix the price for the sale of milk in the metropolitan district and to safeguard the health of the inhabitants of that district, so that the expropriation was

not directed wholly or partially against inter-State trade, even if some such dealings were incidentally affected. (at p412)

16. The Tasmanian Acts in their relation to inter-State trade cannot be upheld on any such ground. They are not in pith and substance health or price fixing Acts, or Acts directed to such matters as defence against the enemy, prevention of famine, disease and the like. They are plainly directed partially against inter-State trade in field peas, that is against individuals selling them out of the State. (at p412)

17. That does not mean that the whole of the Acts are invalid. Section 19 of the Principal Act contains the express provision that nothing in the Act and no proclamation made under it shall in any way interfere with the free operation of s. 92. The Acts Interpretation Act 1931 (Tas.), s. 3, contains the general provision that every Act shall be read and construed subject to the legislative powers of the State and so as not to exceed such powers to the intent that . . . it shall nevertheless be a valid enactment to the extent to which it is not in excess of such powers. It would seem that the present legislation can be read down so as to be valid to the extent to which it does not infringe s. 92. But it is not necessary to express a final opinion on this point. I only express the opinion at this stage that the legislation infringes s. 92 and is void to the extent to which it purports to prevent the performance of the contracts made between the growers and the plaintiff and the plaintiff and its inter-State purchasers. In consequence any interference by the defendant board with the performance of these contracts is illegal. It is probable therefore that if the evidence remains the same at the hearing as at present the plaintiff will then succeed against the defendant board at the hearing. Further, I am unable to see that an offer by the defendant board to supply the plaintiff with field peas at higher prices than those payable under the contracts which it has made with the growers to enable it to perform its contracts with purchasers in other States is a sufficient reason to refuse an injunction on the balance of convenience. The balance of convenience is that the status quo should be maintained pending the hearing. (at p412)

ORDER

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