Privy Council Appeal No. 119 of 1919.

The Commonwealth of Australia and another - - - *Appellants*

v.

Alexander Gabriel Zachariassen and another - - - *Respondents*

Privy Council Appeal No. 120 of 1919.

The Commonwealth of Australia - - - - - *Appellant*

v.

Axel E. Blom - - - - - - - *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH MAY, 1920.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
LORD SUMNER.
LORD MOULTON.
LORD PARMOOR.

[*Delivered by* VISCOUNT FINLAY.]

These appeals arise out of actions brought against the Commonwealth of Australia in respect of refusal to grant clearance outwards to two vessels in Australian ports. The appeals have been brought by the Commonwealth in pursuance of special leave. The two cases were argued together, but, though they have some features in common, they must be dealt with separately for the purposes of the judgment.

I.—Zachariassen's Case.

The action was commenced on the 18th April, 1917, and the amended statement of claim alleges that the plaintiffs were Russian subjects and owners of a vessel called the "Samoena," which

arrived at Melbourne in July, 1916, with a cargo of oil. The statement of claim avers that the captain was notified by the chartering agents for the Government of Australia that it was desired that the "Samoena" should take a cargo of wheat on board for the United Kingdom and that the Government had issued instructions that no clearance should be granted for the ship unless she were laden with wheat. The captain, it is said, was notified that it was useless to apply for a clearance unless his vessel was so laden. The captain had instructions from his owners to proceed in ballast to Chili to take on board a cargo of nitrates, and it is alleged that he was excused from making any formal application for a clearance by the notification that it would be granted only if he shipped a cargo of wheat. In the result it is said that the vessel was detained for a long period and that the action which led to this result was taken by the authority of the Government of the Commonwealth of Australia. The circumstances are set out in the statement of claim in considerable detail, and it concludes by claiming from the Commonwealth damages for the detention of the vessel.

The defence traverses the allegations in the statement of claim and denies the authority of the persons alleged to have acted as agents for the Commonwealth Government.

Paragraph 8 of the statement of defence is pleaded to paragraph 14 of the statement of claim (which avers that nothing had happened to disentitle the ship to clearance) and is as follows :—

> "8. As to paragraph 14 of the amended statement of claim, the defendants say that the plaintiffs failed to comply with certain requirements of law, a compliance with which was a condition precedent to the granting by the Comptroller-General or Collector of Customs of a certificate of clearance for the said vessel. These requirements were *inter alia* as follows :—
>
> "(*a*) The making of an application in the prescribed form for a grant of the said certificate of clearance.
>
> "(*b*) The delivery to the Collector of an outward manifest in duplicate.
>
> "(*c*) The production of documents relating to the ship and her cargo.
>
> "(*d*) A statement duly accounting for all her inward cargo and stores to the satisfaction of the Collector.
>
> "(*e*) The furnishing of particulars as to the name of the ship, the name of the master, the cargo, the destination and the date and time of the intended sailing of the said ship.
>
> "(*f*) Proof to the satisfaction of the Collector of the payment of light dues and tonnage and pilotage dues."

Paragraph 12 of the statement of defence is as follows :—

> "The defendants further say that the alleged refusal to grant a certificate of clearance to the said vessel and the imposition of the alleged restrictive conditions in regard to the granting of such certificate, in so far as the same were acts of the defendants or either of them, were acts of a belligerent Power in right of war and are not justiciable in this Court."

To the defence the plaintiffs filed the following replication :—

> "1. The plaintiffs join issue on the statement of defence of the defendants.

"2. The plaintiffs demur to so much of the defendants' statement of defence as is contained in the eighth paragraph thereof and say that the same is bad in law on the following grounds :—

"(*a*) That the requirements of law in the said paragraph referred to are not conditions precedent to the right of the plaintiffs to have an application for a certificate of clearance dealt with by the Comptroller-General or Collector of Customs.

"(*b*) That the alleged failure of the plaintiffs to comply with the said requirements of law affords no defence in this action to the defendants or either of them.

And on other grounds sufficient in law.

"3. The plaintiffs demur to so much of the defendants' statement of defence as is contained in the twelfth paragraph thereof, and say that the same is bad in law on the following grounds :—

"(*a*) That no act of the defendants or either of them alleged in the statement of claim was an act of a belligerent Power in right of war.

"(*b*) That the statement of defence discloses no facts which show that any act of the defendants or either of them complained of in the statement of claim was an act of a belligerent Power in right of war.

"(*c*) That neither of the defendants is entitled to rely on the defence set out in paragraph 12 of the statement of defence in regard to any act of the defendants or of either of them which affects the property or interests of the plaintiffs who are subjects of an allied country.

"(*d*) That all of the acts alleged in the statement of claim were acts done within the territorial jurisdiction of the Commonwealth of Australia.

And on other grounds sufficient in law.

"4. The plaintiffs submit the following questions of law for the determination of this Honourable Court :—

"(*a*) Whether the defendant Commonwealth of Australia is responsible for the acts and omissions of the defendant Comptroller-General of Customs alleged in the statement of claim.

"(*b*) Whether under the circumstances alleged in the statement of claim the plaintiffs are entitled to maintain this action against the defendants or either of them, although no formal application was made for a certificate of clearance.

"(*c*) Whether the defendant Comptroller-General of Customs is an 'officer' within the meaning of sections 221 and 225 of the Customs Act, 1901, or of either of the said sections."

The demurrers and submissions in point of law filed by the plaintiffs were argued before Barton, J., Isaacs J., Rich, J., and Gavan Duffy, J. Judgment was entered allowing the demurrer to the eighth paragraph of the statement of defence and overruling the demurrer to the twelfth paragraph. As regards the questions of law submitted in the fourth paragraph of the replication, they were all answered in the affirmative. The Commonwealth of Australia now ask that the findings of the High Court on the demurrers and submissions in point of law should be reversed or varied. In the opinion of their Lordships this appeal fails.

The High Court were right in holding that paragraph 8 of the defence is insufficient in law. The effect of the allegations in the statement of claim is that the master had been informed by the authority of the Commonwealth Government that instructions

had been issued that no clearance would be granted unless the vessel were loaded with wheat and that the ship would not be allowed to leave port unless so loaded. The eighth paragraph of the defence alleges that there was no application for a clearance in the prescribed form and that other formalities were not complied with, but there is no traverse in it of the allegations in the statement of claim which are enough to show a waiver by the Commonwealth of the performance of the conditions relied on. The allegations in paragraph 8 are obviously insufficient if it be true that the Government had informed the captain that it was useless to apply unless he had shipped a cargo of wheat. It is true that the waiver of the performance of these conditions is put in issue in other parts of the defence, but for the purposes of this demurrer we must look at paragraph 8, which contains no such traverse.

There is in truth no substance in this question as to the sufficiency in law of paragraph 8. It raises at best a mere point of pleading, and the case must go to trial, when, so far as this part of it is concerned, the question will be whether it is established that there has been a waiver of the doing of any act which otherwise would have been a condition precedent to the right to clearance.

As regards the demurrer to paragraph 12 of the statement of defence, it appears to their Lordships that this demurrer was properly overruled. The allegations in the paragraph are very general, but there is no ground for saying that they are insufficient in point of law. It will be for the Court to say whether on the facts proved at the trial the Commonwealth make out the defence that the acts complained of were acts of a belligerent Power in right of war and are not justiciable in the High Court. Gavan Duffy, J., says that Australia was not a belligerent Power, but it is clear that the paragraph must be understood as alleging that the acts complained of were done by the King through the Government of Australia, part of his dominions.

As regards the questions of law submitted in paragraph 4 of the replication, the answers of the High Court in the affirmative appear to their Lordships to be right. This, of course, leaves open the question whether the Commonwealth can make good at the trial the defence raised by paragraph 12 of the statement of defence.

Their Lordships entirely agree with the observations made in the High Court to the effect that it is highly undesirable, even if it were possible, to enter by anticipation into a consideration of what might be the effect in point of law of circumstances the existence of which has not yet been ascertained and of which there is no definite allegation upon the record.

Their Lordships will humbly recommend to His Majesty that this appeal should be dismissed with costs.

II.—Blom's Case.

In the action brought by Blom against the Commonwealth the facts are stated in the form of a special case for the opinion of the Court.

It appears upon that case that the vessel "Lindisfarne," after discharging a cargo of oil at Adelaide, proceeded to Sydney in ballast. Application was made for clearance and all formalities were complied with. The master of the "Lindisfarne" was informed by the Collector of Customs at Sydney and by the Comptroller-General at Melbourne that a clearance would not be granted unless a cargo of wheat was shipped, and, owing to the refusal of a clearance, the vessel was detained at Sydney for two months. The plaintiff claims damages from the Commonwealth for the refusal to grant a clearance. Two questions were submitted to the Court. The first was :—

> "Whether the plaintiff is entitled to recover damages in an action against the defendant for the refusal of the Collector or Comptroller of the Customs to grant the said clearance."

The second question had reference to an allegation in the statement of claim that the Commonwealth had placed an armed guard on board the vessel to prevent her from sailing without a clearance and had taken the control of the vessel out of the hands of the master; but it was agreed by counsel before their Lordships that no answer need be given to this question.

The special case was argued in the Supreme Court of New South Wales. The Court answered the first question above set out in the negative. The Chief Justice rested his judgment on the ground that the Collector was not a merely ministerial officer but had independent duties to discharge with reference to granting clearance of a ship. Gordon, J., said that his duties were quasi-judicial. Ferguson, J., concurred with the others.

From this judgment an appeal was brought to the High Court of Australia. The High Court reversed the finding of the Supreme Court of New South Wales, referring to the reasons given for their judgment in the *Zachariassen* case. The judgment of Barton, Isaacs and Rich, JJ., put their decision on the first question in the following terms :—

> "For the reasons given by us in the case of *Zachariassen*, we are of opinion that a good cause of action is disclosed as to the refusal to grant a clearance."

Gavan Duffy, J., said that he was unable upon the materials before the Court to answer the questions, and added that, even if he had been at liberty to draw inferences of fact, he should not feel disposed to pronounce on the legality of the acts complained of on the materials contained in the special case.

Their Lordships are of opinion that the answer given in the affirmative by the majority of the High Court to the first question was correct. Whether there was any justification for the course taken is a question not raised upon the special case. If the action taken was wrongful and damage resulted, the Government of Australia are *prima facie* responsible on the facts alleged. The special case does not raise the question of justification. No

authority was cited for the proposition put forward by the appellants that the plaintiff's only remedy would be by mandamus, and their Lordships are of opinion that, subject to all questions of justification, he has a remedy by damages if his rights have been infringed by the action of the officers of the Government in this matter.

Their Lordships are not in the possession of sufficient materials for deciding what may be the effect upon any subsequent proceedings of the answer to the first question in the special case. The order under which the special case was stated is not before them, and the special case itself is silent on the subject. Gavan Duffy, J., says in his judgment (Rec., p. 15, Appendix) :—

> " In this action the parties have stated a case containing admissions made for the purpose of the case, but each party has reserved the right to go to trial and then rely on any facts which he may be able to prove and which he may be advised will have the effect of relieving him from the consequences of the opinions we are now asked to pronounce."

On the other hand, their Lordships have been referred to an order said to have been made on the 4th June, 1918, by Sly, J., which appears to put a completely different aspect on the case and which goes to show that in effect the Commonwealth were to submit to judgment if the answers to the questions in the special case should be unfavourable to the Commonwealth. The admissibility of this order was, however, contested by the appellant.

It is, of course, impossible for their Lordships to decide what the agreement of the parties was as to the effect of the decision upon the questions put in the special case. This must be left to the Court below. All that their Lordships can do is to answer the question put.

Under these circumstances their Lordships will humbly advise His Majesty that the appeal from the decision of the High Court should be dismissed with costs and that the action should be remitted to the Supreme Court of New South Wales to direct such further proceedings and make such further orders as may be necessary for disposing of the action. Assuming that the respondent is at liberty under the arrangements arrived at in Australia to raise a defence to this action upon its merits, this must be dealt with in regular course. It would obviously be most undesirable to express any view upon mere hypotheses as to what the facts may turn out to be.

In the Privy Council.

THE COMMONWEALTH OF AUSTRALIA
AND ANOTHER

v.

ALEXANDER GABRIEL ZACHARIASSEN
AND ANOTHER.

THE COMMONWEALTH OF AUSTRALIA

v.

AXEL E. BLOM.

DELIVERED BY VISCOUNT FINLAY.

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