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27.1961

IN THE PRIVY COUNCIL

No. 3 of 1961

ON APPEAL FROM
THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

B E T W E E N :

CHARLES MacDONALD WHITEHOUSE	(Plaintiff) Appellant
- and -	
THE STATE OF QUEENSLAND THOMAS ALFRED HILEY and ALAN WHITESIDE MUNRO	(Defendants) Respondents
- and -	
THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA	Intervener

RECORD OF PROCEEDINGS

MESSRS. FRESHFIELDS,
Garrard House,
31-45 Gresham Street,
London, E.C.2.
Solicitors for the Respondents

MARKBY STEWART & WADESONS,
Solicitors,
5 Bishopsgate,
London, E.C.2.
Solicitors for the Appellant

COWARD, CHANCE & CO.,
Solicitors,
St. Swithin's House,
Walbrook,
London, E.C.4.
Solicitors for the Intervener

IN THE PRIVY COUNCIL — No. 3 of 1961

ON APPEAL FROM
THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

B E T W E E N :

CHARLES MacDONALD WHITEHOUSE — (Plaintiff) Appellant

- and -

THE STATE OF QUEENSLAND
THOMAS ALFRED HILEY and
ALAN WHITESIDE MUNRO — (Defendants) Respondents

- and -

THE ATTORNEY-GENERAL OF THE
COMMONWEALTH OF AUSTRALIA — Intervener

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

IN THE PRIVY COUNCIL No. 3 of 1961

ON APPEAL FROM
THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

B E T W E E N :

CHARLES MacDONALD WHITEHOUSE (Plaintiff) Appellant

- and -

THE STATE OF QUEENSLAND
THOMAS ALFRED HILEY and
ALAN WHITESIDE MUNRO (Defendants) Respondents

- and -

THE ATTORNEY-GENERAL OF THE
COMMONWEALTH OF AUSTRALIA Intervener

RECORD OF PROCEEDINGS

No. 1

WRIT OF SUMMONS

In the High Court of Australia

No. 1

Writ of Summons.

19th December 1958.

IN THE HIGH COURT OF AUSTRALIA } 1958 No. 92

QUEENSLAND REGISTRY

BETWEEN:

CHARLES MacDONALD WHITEHOUSE Plaintiff

- and -

THE STATE OF QUEENSLAND,
THOMAS ALFRED HILEY and
ALAN WHITESIDE MUNRO Defendants

ELIZABETH THE SECOND by the Grace of God of the United Kingdom Australia and Her Other Realms and Territories Queen Head of the Commonwealth Defender of the Faith

To:

The State of Queensland,
Thomas Alfred Hiley, and
Alan Whiteside Munro,
of
Brisbane.

In the High Court of Australia

No. 1

Writ of Summons.

19th December 1958 - continued.

WE command you that within 14 days after the service of this Writ on you inclusive of the day of such service you do cause an appearance to be entered for you in Our High Court of Australia in an action at the suit of

CHARLES MacDONALD WHITEHOUSE,
Queen Street,
BRISBANE.

And take notice that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

Witness: The Honourable Sir OWEN DIXON G.C.M.G. Chief Justice of Our said High Court, the nineteenth day of December in the year of Our Lord one thousand nine hundred and fiftyeight.

J. Shannon

(L.S.)

DISTRICT REGISTRAR.

N.B.- This Writ is to be served within Twelve Calendar months from the date hereof, or if renewed, within six Calendar months from the date of the last renewal, including the day of such date, and not afterwards.

If a defendant resides or carries on business in the State of Queensland his appearance to this Writ may be entered either personally or by Solicitor at the Queensland Registry of the High Court Supreme Court House Brisbane.

If a Defendant neither resides nor carries on business in the State of Queensland he may at his option cause his appearance to be entered either at the Registry abovementioned or at the Principal Registry of the High Court at Melbourne in the State of Victoria.

The Plaintiff's claim is for:

1. A declaration that the provisions of Section 18 (1) of "The Liquor Acts 1912 to 1958" of the State of Queensland are and have at all material times been invalid in so far as the said provisions purport to provide that the fees which shall be charged, levied, collected and paid

annually for a Licensed Victualler's License shall be a sum equal to 4 per centum of the gross amount (including any duties and other charges whatsoever thereon) paid or payable for or in respect of all liquor which during the 12 months ended on the last day of June in the preceding year was purchased or otherwise obtained for the licensed premises.

In the High Court of Australia

No. 1

Writ of Summons.

19th December 1958 - continued.

2. A declaration that none of the Defendants is entitled to charge, levy or collect the said fees from the Plaintiff.

3. An injunction restraining the Defendants and each of them from imposing and collecting fees prescribed by Section 18(1) of the said Acts.

T.J. Pender & Whitehouse

Solicitors for the Plaintiff.

This Writ was issued by T.J. Pender & Whitehouse of 92 Adelaide Street, Brisbane in the State of Queensland, whose address for service is 92 Adelaide Street, Brisbane aforesaid, Solicitors for the Plaintiff, who resides at Queen Street, Brisbane aforesaid.

In the High Court of Australia

No. 2

Statement of Claim, as amended.

19th December 1958.

No. 2

STATEMENT OF CLAIM, AS AMENDED

WRIT ISSUED THE NINETEENTH DAY OF DECEMBER 1958.

Delivered the Nineteenth day of December 1958.

AMENDED by Consent this Twentyfourth day of April 1959.

1. The Plaintiff is and was at all material times the holder of a Licensed Victualler's License in respect of premises known as the Carlton Hotel, Brisbane in the State of Queensland pursuant to the provisions of the Liquor Acts 1912 to 1958 of the said State.

2. The Defendant Thomas Alfred Hiley is the Treasurer of the said State and is sued as such. The Defendant Alan Whiteside Munro is the Minister for Justice of the said State and the responsible Minister of the Crown for the time being administering the said Liquor Acts and is sued as such.

3. The Plaintiff in the course of conducting his business as a Licensed Victualler, purchases liquor within the meaning of the said Acts for re-sale to the public in the course of such business and sells such liquor to the public ~~at prices including, inter alia, the percentage fee payable under the provisions of Section 18 (1) of the said Acts.~~

4. Section 18 (1) of the said Acts purports to provide, inter alia, that the fees which shall be charged, levied, collected and paid annually for a Licensed Victualler's License shall be a sum equal to 4 per centum of the gross amount (including all duties and other charges whatsoever thereon) paid or payable for or in respect of all liquor which during the 12 months ended on the last day of June in the preceding year was purchased or otherwise obtained for the licensed premises.

5. All liquor purchased by the Plaintiff as aforesaid is liquor coming within the terms of Section 18 (1) of the said Acts, being liquor purchased or otherwise obtained for the licensed

premises of the Plaintiff and the same is purchased only for re-sale and is in fact resold other than an insignificant quantity of such liquor which is requisitioned by the cook at the Hotel and added to foods and supplied to customers in that form.

6. The Plaintiff alleges as a matter of law that the said fees imposed by Section 18 (1) of the said Acts are indirect taxes levied by the State of Queensland on or in respect of commodities namely liquor as aforesaid and are paid into the revenue of the said State.

7. Since 1956 The Licensing Commission, constituted under the said Acts, has charged, levied and collected and the Plaintiff has been required to pay and has paid or caused to be paid by way of License fees in respect of the said Hotel the sum of £4117.12.10 calculated on a percentage basis on such liquor as aforesaid in accordance with the said provisions of Section 18 (1) of the said Acts.

8. The said provisions of Section 18 (1) of the said Acts purport to impose a duty of excise contrary to Section 90 of the Commonwealth of Australia Constitution Act and are and at all times have been invalid.

9. The Plaintiff intends to continue to carry on the business of a Licensed Victualler and to sell and dispose of liquor in the course of such business.

10. The Defendants by the said Licensing Commission intend to continue to require the Plaintiff to pay the aforesaid fees calculated on a percentage basis and to prevent the Plaintiff from carrying on his said business unless such fees are paid by the Plaintiff.

11. The Plaintiff alleges that the matter is one within the original jurisdiction of this Honourable Court in that it involves the interpretation of the Constitution and it makes this allegation upon the basis of the facts hereinbefore stated.

AND the Plaintiff claims -

1. A declaration that the said provisions of Section 18(1) of the said Acts are and have at all material times been invalid.

In the High Court of Australia

No. 2

Statement of Claim, as amended.

19th December 1958 - continued,

2. A declaration that none of the Defendants is entitled to charge, levy or collect the said fees from the Plaintiff.

3. An injunction restraining the Defendants and each of them from imposing and collecting fees prescribed by the said provisions of Section 18 (1) of the said Acts.

D.B. O'Sullivan.

Counsel for Plaintiff.

Delivered with the Writ

T.J. Pender & Whitehouse,
Solicitors for the Plaintiff,
92 Adelaide Street,
BRISBANE.

To: the abovenamed Defendants.
And to: their Solicitor,
L.E. Skinner,
Crown Solicitor for the State of Queensland,
Treasury Building,
Queen Street,
BRISBANE.

No. 3

DEFENCE AND DEMURRER AS AMENDED

(Delivered the 27th day of April 1959).

In the High Court of Australia

No. 3

Defence and Demurrer, as amended.

27th April 1959.

AMENDED by consent this Twenty fourth day of April 1959

1. The Defendants admit the allegations contained in paragraphs 1, 2 and 9 of the Statement of Claim.

2. The Defendants admit that this action is within the jurisdiction of this Honourable Court in that it involves the interpretation of the Constitution of the Commonwealth.

3. The Defendants admit that the Plaintiff conducts the business of a Licensed Victualler and in the court of conducting that business purchases or otherwise obtains liquor within the meaning of "The Liquor Acts, 1912 to 1958" for the purpose (inter alia) of resale to the public in the course of such business. ~~The Defendants deny that the prices at which the Plaintiff sells liquor to the public include the percentage fee payable under Section 18 (1) of the said Acts.~~

4. The Defendants admit that the said Acts provide, inter alia, that the fees which shall be charged, levied, collected and paid annually for a Licensed Victualler's License under the said Acts shall be a sum equal to four per centum of the gross amount (including all duties thereon) paid or payable for or in respect of all liquor which during the twelve months ended on the last day of June in the preceding year was purchased or otherwise obtained for the licensed premises.

5. The Defendants admit that all liquor within the meaning of the said Acts purchased by the Plaintiff as aforesaid is liquor coming within the terms of Section 18(1) of the said Acts but does not admit that all such liquor is purchased for resale only and denies that all other than an insignificant quantity of such liquor is in fact resold.

6. The Defendants admit that the Licensing Commission appointed and constituted under the said Acts has levied and collected and the Plaintiff has paid the sum of £1,808.16.10 being the license fee payable

In the High Court of Australia

No. 3

Defence and Demurrer, as amended.

27th April 1959 - continued.

for the year ended 30th June 1957 in respect of the Carlton Hotel calculated in accordance with the provisions of Section 18(1) of the said Acts on a percentage basis on certain liquor purchased during the year ended 30th June 1956 by a previous licensee of the said hotel.

The Defendants further admit that the said Licensing Commission has levied the sum of £2,308.16. 0 being the license fee payable in respect of the said hotel for the year ending 30th June 1958 but deny that the Plaintiff has paid such sum to the said Licensing Commission.

~~7. As to paragraph 6 of the Statement of Claim~~ the Defendants deny that the said fees imposed by Section 18(1) of the said Acts are indirect taxes levied by the State of Queensland on or ~~in~~ respect of commodities and further say that ~~the~~ said Acts provide, inter alia:

(a) that all fees received under the provisions of the said Acts shall be paid into Consolidated Revenue of the first Defendant; and

(b) that ~~there~~ shall be established in the Treasury a Trust Fund into which shall be paid, inter alia, an annual sum equal to one-sixteenth of the aggregate amount of the annual fees paid for their licenses ~~by licensed victuallers~~.

~~8. The Defendants say that the fees imposed by~~ Section 18(1) of the said Acts ~~in respect of licensed victuallers' licenses are~~ not duties of excise within ~~the meaning~~ of Section 90 of the Constitution ~~of the Commonwealth~~.

7. As to paragraph 10 of the Statement of Claim the Defendants say that the Licensing Commission intends to levy and collect license fees payable under the said Acts in respect of licensed victuallers' licenses but save as aforesaid do not admit the allegation in the said paragraph.

8. Save as aforesaid the Defendants deny each and every allegation in the Statement of Claim contained or implied as if the same were set forth at length

herein and denied specifically.

AND the Defendants demur to the whole of the Plaintiff's Statement of Claim on the ground that it does not show a cause of action to which effect can be given by the Court as against the Defendants in that -

1. Section 18(1) of "The Liquor Acts, 1912 to 1958" is a law validly made by the Parliament of the State of Queensland.

2. The provisions of the said Section 18(1) do not impose or purport to impose a duty of excise contrary to Section 90 of the Constitution of the Commonwealth of Australia.

H.T. Gibbs

M.B. Hoare

Counsel for the Defendants.

In the High Court of Australia

No. 3

Defence and Demurrer, as amended.

27th April 1959 - continued.

In the Full Court of the High Court of Australia

No. 4

Reasons for Judgment.

(a) His Honour the Chief Justice (Sir Owen Dixon).

26th February 1960.

No. 4

REASONS FOR JUDGMENT

(a) His Honour the Chief Justice (Sir Owen Dixon)

This is a demurrer to a statement of claim seeking among other relief a declaration that the provisions of sec. 18(1) of the Liquor Act 1912 to 1958 of Queensland are invalid. The plaintiff is a licensed victualler and relies on that status for his locus standi. The ground he takes for impugning the validity of sec. 18(1) is that it imposes, or forms part of the imposition of, a duty of excise and accordingly is placed outside the legislative power of the State by sec. 90 of the Constitution. Sec. 18(1) and (2) imposes under the heading or description of "fees" what no doubt is a tax and the plaintiff maintains that it amounts to an excise duty or duties. The case is in pari materia with that of Dennis Hotels v. The State of Victoria and others upon the Victorian Licensing Act. The Queensland legislation differs in not unimportant respects from that of Victoria but after a full consideration of the case I have reached the conclusion that the so called "fees" constitute a tax which is a duty of excise.

Sec. 18(1) begins with the words "the fees which shall be charged, levied, collected, and paid annually for the following licenses under this Act shall be"; then follows an enumeration. Subsec. (2) deals with brewers; it provides that there shall be charged, levied, and collected from and paid by a registered brewer a fee, which the provision proceeds to describe. Of the fees listed in subsec. (1) there are certain, scil. those for a bottler's licence, a billiard licence and a bagatelle licence, that may be disregarded; they have nothing to do with the matter. As to subsec. (2), that deals separately with the imposition on a brewer because brewers are neither licensed nor registered under the Liquor Acts. The reference

to registered brewer may be to those registered under the federal law. Brewer is defined as any maker for purposes of sale of beer, ale, porter or stout or any other fermented liquor brewed wholly or in part from malt; and a registered brewer is defined as meaning a brewer whose brewery is registered under any law in force in Queensland relating to the registration of brewers or breweries or a person licensed to make beer pursuant to the Beer Excise Act of the Commonwealth or any Act in substitution therefor: sec. 4.

Unlike the Victorian law the Queensland Liquor Acts do not require the annual renewal of licences. Licences continue indefinitely: see sec. 16(3). The law is administered by the Licensing Commission: see secs. 6 to 8. That body may forfeit or cancel a licence for certain offences (sec. 22A) or defaults (sec. 47A) and so on, including failure to pay fees when assessed (sec. 18(7)).

Now the reason why, in my opinion, the effect of the material provisions amounts to an attempt to impose an excise is simply that when you put those provisions together their operation would be, if valid, to impose on liquor at a point in the course of distribution to the consumer a tax of four per cent of its wholesale price. The percentage is charged annually and is based on a period of twelve months ending on 30th June immediately preceding the commencement of the year or period in which it is payable. In the case of a registered brewer it is calculated on the gross amount paid or payable to the brewer of all liquor which during that twelve months was sold or disposed of by him to persons not licensed under the Acts: see sec. 18(2). In the case of persons licensed under the Acts, including clubs, it is calculated on the gross amount (including duties thereon) paid or payable for or in respect of all liquor which was purchased or otherwise obtained during that twelve months for the licensed premises. The licences referred to are a victualler's licence, a wine-seller's licence, a spirit merchant's licence (unless the liquor is sold or disposed of to persons licensed) and a club licence. Sec. 18(1), in imposing the tax (for it appears incontestable that tax it is) says "the fees which shall be charged, levied, collected and paid annually for the following licences shall be respectively:-", and then are set out the licences. It

In the Full Court of the High Court of Australia

No. 4

Reasons for Judgment.

(a) His Honour the Chief Justice (Sir Owen Dixon).

26th February 1960 - continued.

does not seem to me to matter what is the meaning or application of the word "for" in this description. It can be at most descriptive, and even if it describes a legislative conception of a quid pro quo, a tax it remains and a tax calculated by reference to the purchases or sales of liquor by wholesale, as the case may be.

The Licensing Commission assesses the fee (see sec. 18(5)(i)). For that purpose, the brewers and the holders of the various licences must send in returns not later than 31st August: sec. 18(4). If no information is produced to the Licensing Commission or if it is incomplete or insufficient or if there is no previous period of twelve months or if information cannot be produced covering that period or if the licence has been cancelled, surrendered or removed, the Licensing Commission is empowered to assess such sum as it thinks reasonable. Notice of assessment is given "to every person liable" (sec. 18(6)) and payment must be made to the Commission or a clerk of petty sessions (sec. 18(7)). The "fees" must be paid to the Treasurer and placed to the credit of the Consolidated Revenue Fund: see sec. 157. It may not be easy to say exhaustively who are comprehended under the expression "every person liable". But at all events it includes the brewer, the licensee and the holder of a licence that has been cancelled, surrendered or removed.

Now it appears to me that the tax of four per cent of the wholesale price is laid upon the liquor on its way to the consumer and a plan or system plainly appears whereby the liquor as it is purchased must bear that imposition. It is substantially for that reason that I think the imposition is a duty of excise. It seems to me nothing to the point that a period is taken which does or may end six months earlier than the actual incurring of the immediate liability to make payment. But the system does involve certain exceptions or exemptions, or perhaps one may call them an allowed escape of tax, and these do call for consideration. The first to mention can be of little importance, but it is a curious fact that, so far as I can see, liquor sold on a ship under a packet licence does not bear the four per cent charge or tax: see sec. 16(1)(c), sec. 18(1)(ii) and sec. 24. It seems to me also that liquor sold in a military canteen or

in a parliamentary refreshment room does not necessarily bear the tax: see sec. 5(c) and (d).

Bankruptcy and death are specially dealt with: see sec. 33 and sec. 5(h). But it is not necessary to discuss these somewhat difficult provisions, which in any event probably do not allow of any escape of tax that matters.

Subsec. (8) of sec. 18 says that the levy of fees shall be for the period of twelve months commencing on 1st July (scil. of every successive year) and the annual period for which returns are to be furnished on which assessments are to be based shall be the period of twelve months ending on 30th June (scil. the immediately preceding twelve months). Subsec. (4) requires the return to be made before 31st August. It is said that if the licence is cancelled or surrendered before 30th June, the obligation to make a return and pay the "fee" or tax will not arise. There is power in the Licensing Commission to cancel or accept the surrender of a licence: see secs. 36 to 40. But under sec. 39 the Licensing Commission fixes the date as from which it is deemed cancelled or surrendered. I doubt very much whether there is a practicable method of escaping the tax by surrender or through cancellation.

The foregoing account of the system suffices, as it appears to me, to shew that liquor cannot go forward in the course of distribution to the consumer through lawful channels without bearing a tax of four per cent of the purchase price by wholesale of the liquor. I advisedly use the absolute expression "cannot go forward" notwithstanding the qualification required in respect of packet licences, canteens and the exceptions or possibilities I have noted. They are so trifling that in my opinion they may be ignored in making a generalization as to the fiscal operation of the provisions. Indeed to state the qualifications almost serves the purpose of confirming the existence of the rule that four per cent is levied on liquor and will be collected annually.

In the very clear argument in which Mr. Gibbs defended the validity of the imposition, he took three positions. In the first place he put forward the thesis that an imposition cannot be an excise unless it is a tax upon goods and that that means a

In the Full Court of the High Court of Australia

No. 4

Reasons for Judgment.

(a) His Honour the Chief Justice (Sir Owen Dixon).

26th February 1960 - continued.

tax upon persons in respect of the manufacture or production by them of goods or the dealing by them in goods or, it was added dubiously, their ownership or their use of goods. Not every tax fulfilling this condition would be an excise but, so it was argued, nothing which did not fulfil it could amount to a duty of excise. The reason why, according to the argument, the condition is not fulfilled in the present case is that the person liable to pay the tax might not himself have any connexion with the goods: for example, he might be no more than the person holding for the time being the victualler's licence, the spirit merchant's licence or the wine-seller's licence in respect of the premises for which they were ordered. The tax is imposed without regard to what he sells, or what becomes of the liquor. It is needless to multiply the examples of the fact that the man who buys the liquor in any twelve months may not be the man who pays the tax and of the fact that the man who pays the tax may have no handling of the identifiable liquor upon which it is calculated. I certainly would not deny that the essence of an excise is that it taxes goods. Explanation and elaboration of the statement is of course needed. But the more you examine the system of the legislation the more it is apparent that it is the goods that are taxed and that the tax is not aimed at the man who is taxed. The licensing system is seized on to ensure that the liquor as it passes into and through it bears a tax of four per cent on the wholesale price. It is precisely because the liquor obtained for the licensed premises or for sale under the licence is made the subject of the tax that the liability to pay goes with the licence. If an imposition is so made in respect of goods that it naturally forms part of their cost, that the acquisition of the goods means that it must be paid, it appears to me to be unimportant how the machinery for ensuring that it is paid is constructed. The machinery under the Liquor Acts is based upon the reality of the connexion of the business of the spirit merchant, the wine-seller and the licensed victualler with the distribution of liquor. The brewer and the club take their due place too. If there is a transfer or devolution of the business the new licensees take with it the burden which belongs to it.

The argument for the State of Queensland denied that the tax is indirect, and it is said, that none

but indirect taxes have been held to be excise duties. Now it is true that a licensed victualler and the holder of a wine licence, if he be a tenant, may, by deduction from the rent or directly, recover one-fourth of the "fee" from his landlord; see sec. 18A. It is true also that since the Act of 1958 the Licensing Commission is empowered to fix maximum prices for liquor; see sec. 134A. It is a power not so far exercised. But notwithstanding these provisions the percentage naturally forms part of the cost of the liquor and carries all the characteristics of an excise, including the susceptibility of passing on or the natural tendency to be regarded as cost to be recovered "from" the goods. There is an "indirectness" of the economic burden.

The claim that really it represented the State's recompense for conferring a monopoly appears to me to be neither relevant nor correct. From the standpoint adopted by sec. 90 of the Constitution what matters is the burdening of commodities. If a commodity is burdened with tax, it is none the less an excise if it is collected through a limited class of traders to whom the entire distribution of the commodity is entrusted and who therefore escape the disadvantages of unrestricted competition.

The tax is not levied (except perhaps in the case of brewers) upon production as such. If sec. 90 means that nothing is excluded from State authority under the description of excise but the power to levy a tax upon the manufacturer or producer at the point of production, then of course the tax now in question does not do that. It burdens the commodity as it passes to the consumer. But it seems impossible that sec. 90 should exclude only duties placed on goods as and when produced within the State or in virtue of their production within the State. That would mean a frustration of its manifest object in confiding to the hands of the federal Parliament the power to deal with the taxation of commodities entering or produced within Australia as a matter of essential economic policy.

I shall not repeat what I have said upon this subject in Matthews v. Chicory Marketing Board (Vic.) (1938) 60 C.L.R. 263 at pp. 292: 299-303 and Parton v. Milk Board (Vic.) (1949) 80 C.L.R. 229 at pp. 258-261. The latter case appears to me to be a decision of the court upon the question.

In the Full Court of the High Court of Australia

No. 4

Reasons for Judgment.

(a) His Honour the Chief Justice (Sir Owen Dixon).

26th February 1960 - continued.

This judgment should be read with that I have prepared in Dennis Hotels Pty. Ltd. v. The State of Victoria and anor. For the reasons which appear from the two judgments I am of opinion that the demurrer to the statement of claim should be overruled.

(b) His Honour Mr. Justice McTiernan.

26th February 1960.

No. 4

REASONS FOR JUDGMENT

(b) His Honour Mr. Justice McTiernan

I think that the reasoning upon which I have proceeded in Dennis Hotels Pty. Ltd. v. The State of Victoria and another applies in this case and it should therefore be decided in the plaintiff's favour. The demurrer should be overruled. 10

No. 4

REASONS FOR JUDGMENT

In the Full Court of the High Court of Australia

No. 4

Reasons for Judgment.

(c) His Honour Mr. Justice Fullagar.

26th February 1960.

(c) His Honour Mr. Justice Fullagar

For the reasons which I have given in Dennis Hotels Pty. Ltd. v. State of Victoria I am of opinion that the demurrer in this case should be allowed.

No. 4

REASONS FOR JUDGMENT

(d) His Honour Mr. Justice Kitto.

26th February 1960.

10 (d) His Honour Mr. Justice Kitto

For reasons similar to those which I have stated in the case of Dennis Hotels Pty. Ltd. v. State of Victoria I am of opinion that the Queensland tax which the present case challenges is not a duty of excise.

I would allow the demurrer.

In the Full Court of the High Court of Australia

No. 4

Reasons for Judgment.

(e) His Honour Mr. Justice Taylor.

26th February 1960.

No. 4

REASONS FOR JUDGMENT

(e) His Honour Mr. Justice Taylor

In this case it was pointed out to us that licensed victuallers' licences issued under the Liquor Acts, 1912-1958 (Queensland) are issued for indefinite periods and are not, therefore, required to be renewed annually. Accordingly, it was said that licence fees payable pursuant to the Act are not paid for the licence. But when it is seen that the Acts provide that the Commission may at any time forfeit any licence in respect of which any fee imposed under and in accordance with the Act has not been duly paid the difference in the form of the legislation has no significance. Nor does any other feature of the case differentiate it from the case which we have just decided. Accordingly, for the reasons given in that case, the demurrer should be allowed.

(f) His Honour Mr. Justice Menzies.

26th February 1960.

No. 4

REASONS FOR JUDGMENT

(f) His Honour Mr. Justice Menzies

By this action, the plaintiff challenges the validity of so much of s. 18(1) of the Liquor Acts 1912-1958 of the State of Queensland as requires the payment of annual fees for every licenced victualler's licence of a sum equal to 4% of the gross amount paid or payable for or in respect of all liquor which during the twelve months ended on the first day of June in the preceding year was

purchased or otherwise obtained for the licensed premises. What is claimed is that such licence fees are duties of excise and their imposition is therefore beyond the power of the State. To this the defendants have demurred.

The scheme of the Queensland Liquor Acts is much the same as that of the Victorian Licensing Act under consideration in Dennis Hotels Pty. Ltd. v. State of Victoria and Another, and s. 18(1) of the former corresponds with s. 19(1) of the latter. The circumstance that instead of being annual the licences provided for by the Queensland Act are indefinite but subject to forfeiture in the event of non-payment of annual licence fees is not to my mind a significant difference for present purposes; the fees are still fees for the licences to carry on business in the future assessed upon past turnover and are not taxes upon sales or purchases. The reasons I have given in that case for holding that s.19(1)(a) of the Victorian Act does not impose or authorise the collection of a duty of excise and is valid, require the conclusion that s.18 (1) of the Queensland Act is valid.

The defendants' demurrer should therefore be allowed.

In the Full Court of the High Court of Australia

No. 4

Reasons for Judgment.

(f) His Honour Mr. Justice Menzies.

26th February 1960 - continued.

No. 4

REASONS FOR JUDGMENT

(g) His Honour Mr. Justice Windeyer.

26th February 1960.

I have had the advantage of reading the judgment of the Chief Justice. I respectfully agree in it. I need not repeat the views that I set out in Dennis Hotels Proprietary Limited v. The State of Victoria and Another. In principle they are applicable in this case also.

In the Full Court of the High Court of Australia

No. 5

ORDER ALLOWING DEMURRER

No. 5

Order allowing Demurrer.

26th February 1960.

BEFORE THEIR HONOURS THE CHIEF JUSTICE, SIR OWEN DIXON MR. JUSTICE McTIERNAN MR. JUSTICE FULLAGAR MR. JUSTICE KITTO MR. JUSTICE TAYLOR MR. JUSTICE MENZIES and MR. JUSTICE WINDEYER

Melbourne Friday the 26th day of February 1960

The Defendants having demurred to the whole of the Plaintiff's Statement of Claim delivered in this action on the 19th day of December 1958 and the Demurrer coming on for argument before this Court at Melbourne on the 21st and 22nd days of May 1959 A N D UPON READING the Demurrer Book and UPON HEARING what was alleged by Mr. Bennett Q.C. with him Mr. O'Sullivan of Counsel for the Plaintiff and Mr. Gibbs Q.C. with him Mr. Hoare of Counsel for the Defendants and This Court having on the last-mentioned date reserved its decision on the demurrer and the Demurrer standing for Judgment this day in the list of this Court in the presence of Counsel for both parties.

THIS COURT DOTH ORDER AND ADJUDGE that the Demurrer be and the same is hereby allowed and that the Defendants do recover from the Plaintiff their costs of and incidental to the Demurrer to be taxed.

(High Court of Australia Office Seal Brisbane Registry)

By the Court

J. Shannon

District Registrar.

No. 6

In the Privy Council

No. 6

Order of Her Majesty in Council granting Special Leave to Appeal.

3rd August 1960.

ORDER OF HER MAJESTY IN COUNCIL GRANTING SPECIAL LEAVE TO APPEAL

(ROYAL SEAL)

AT THE COURT AT BUCKINGHAM PALACE

The 3rd day of August, 1960

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

EARL OF PERTH
MR. SECRETARY MACLEOD (acting as Lord President)
MR. SECRETARY WARD
SIR MICHAEL ADEANE

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of July 1960 in the words following, viz.:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Charles MacDonald Whitehouse in the matter of an Appeal from the High Court of Australia between Charles MacDonald Whitehouse Petitioner and the State of Queensland Thomas Alfred Hiley and Alan Whiteside Munro Respondents setting forth (amongst other matters): that by an Action commenced in the High Court of Australia the Petitioner as Plaintiff sought a Declaration that the provisions of Section 18(1) of the Liquor Acts 1912-1958 of the State of Queensland were invalid: that the above-named Respondents were the Defendants in the said Action and they demurred to the whole of the Statement of Claim: that such Demurrer was heard by the Full Court of the said High Court which on the 26th February 1960 delivered Judgment allowing the Demurrer with costs: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the said Judgment of the High Court of Australia delivered on the 26th February 1960 and for such further or other relief:

In the Privy Council

No. 6

Order of Her Majesty in Council granting Special Leave to Appeal.

3rd August 1960 - continued.

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the High Court of Australia dated the 26th day of February 1960 upon the footing that at the hearing of the Appeal the plea that the Appeal does not lie without a certificate of the High Court of Australia may be raised as a preliminary point and upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. Agnew.

No. 7

In the Privy Council

No. 7

Order of Her Majesty in Council granting leave to Intervene.

3rd August 1960.

ORDER OF HER MAJESTY IN COUNCIL GRANTING LEAVE TO INTERVENE

(ROYAL SEAL)

AT THE COURT AT BUCKINGHAM PALACE

The 3rd day of August, 1960

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

EARL OF PERTH
MR. SECRETARY MACLEOD (acting as Lord President)
MR. SECRETARY WARD
SIR MICHAEL ADEANE

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of July 1960 in the words following, viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Attorney-General of the Commonwealth of Australia in the matter of an Appeal from the High Court of Australia between Charles MacDonald Whitehouse Appellant and the State of Queensland Thomas Alfred Hiley and Alan Whiteside Munro Respondents setting forth: that the Petitioner desires leave to intervene upon the hearing of the said Appeal which is pending before Your Majesty in Council as the question arises as to the construction of Section 90 of the Commonwealth of Australia Constitution Act and also as to whether the Appellant has a right to appeal to Your Majesty in Council without having first obtained a certificate from the High Court of Australia under the provisions of Section 74 of the said Constitution Act: And humbly praying Your Majesty in Council to grant the Petitioner leave to intervene upon the hearing of the Appeal:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have

In the Privy Council

No. 7

Order of Her Majesty in Council granting leave to Intervene.

3rd August 1960 - continued.

taken the humble Petition into consideration and Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to intervene in the Appeal to lodge a Printed Case and to be heard by Counsel."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. Agnew.