IN THE PRIVY COUNCIL No. 54 of 1960

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

SUNSHINE PORCELAIN POTTERIES PROPRIETARY LIMITED ... ... Appellants

- and -

IRIS DOREEN NASH ... ... Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from an order of the High Court of Australia dated the 2nd day of March, 1959. The said order allowed an appeal by the Respondent against an order of the Full Court of the Supreme Court of Victoria dated the 21st day of March, 1958. The said order of the Full Court answered a question stated for its opinion by the Workers' Compensation Board, as to whether upon its findings of fact the Board was justified in law in making a certain award in favour of the Respondent, by saying that the Board was not justified in making the said award or any part of it, and set aside the award. The said order of the High Court set aside the said order of the Full Court and answered the question by saying "Yes". This appeal is brought pursuant to special leave of Her Majesty in Council granted by Order in Council dated the 16th day of March, 1960. pp.65-66 pp.30-31 pp.1-3 pp.7-8 pp.67-68

2. By the said award the Workers' Compensation Board declared that the Respondent was suffering from silicosis, an industrial disease contracted while she was in the employment of the Appellants and due to the nature of such employment, and ordered that the Appellants should pay to the Respondent weekly payments of compensation as for total incapacity for a period of one hundred and pp.7-8 p.8,ll.5-10 p.8,ll.11-22

RECORD

four weeks at the rate of £2.2.0. per week, and further that weekly payments of compensation as for total incapacity were to continue from February 21st, 1957 at the rate of £2.2.0. per week until the same was ended, diminished increased or redeemed in accordance with the provisions of the Workers' Compensation Acts of Victoria.

pp.3-5

3. The Respondent made an application for compensation dated the 9th day of February, 1956 to the Workers' Compensation Board, pursuant to the Workers' Compensation Act, 1951 of Victoria (No.5601) as amended by the Workers' Compensation Act, 1953 (No.5676).

4. The said Workers' Compensation Act, 1951 (No.5601) (as so amended) provided in Section 12(1) as follows:-

"12.(1) Where -

(a) a medical practitioner certifies that a worker is suffering from a disease and is thereby disabled from earning full wages at the work at which he was employed; or
(b) the death of a worker is caused or is materially contributed to by any disease

and the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of disablement, then subject to the provisions hereinafter contained the worker or his dependants shall be entitled to compensation under this Act as if the disease were a personal injury arising out of or in the course of that employment and the disablement shall be treated as the happening of the injury".

5. The amendments to this provision effected by the Workers' Compensation Act, 1953 Section 6(3) consisted of the insertion after the word "caused" of the words "or is materially contributed to", the deletion after the word "injury" of the words "by accident" and the substitution for the word "accident", where

last occurring, of the word "injury". These amendments do not affect any issue in this case.

6. The said provision (without such amendments) was a re-enactment in the consolidating Workers' Compensation Act, 1951 (No.5601), which repealed the Workers' Compensation Act, 1928 (No.3806), of a provision in the same terms introduced into the said Workers' Compensation Act, 1928, as Section 18, by the Workers' Compensation Act, 1946 (No.5128), which came into operation on the 1st day of September, 1946.

7. In the Report of the Judicial Committee referred to in the said Order in Council granting special leave to appeal, it is recited that the Appellant's Petition set forth (inter alia) that the issue is whether or not a change made in September, 1946 in the provisions of the Victorian Workers' Compensation Acts is to be given retrospective operation so as to impose upon employers in respect of events which occurred prior to September, 1946 a liability which the employers did not have prior to that date. p.67,l.42-p.68,l.5

8. The Respondent does not concede that the issue is as stated in these terms. She does not concede that the issue is whether the said Section 18 introduced in September, 1946 is to be given a retrospective operation. She submits that a statute 'is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing' (per Lord Denman, C.J. in R. v. St. Mary Whitechapel (Inhabitants) (1848), 12 Q.B. 120 at p.127). In the Respondents' submission, her interpretation of Section 18 of the Act of 1946 does not attribute to that Section any retrospective operation, and accordingly there is no room for the application of the presumption against retrospectivity.

9. It is submitted that Section 12(1) of the Workers' Compensation Act, 1951 states, as did Section 18 of the Workers' Compensation Act, 1928 (introduced in 1946), conditions on the fulfilment of which a right to compensation arises, and the issue is as to the meaning of the conditions and their application to the Respondent.

10. The conditions required by Section 12(1) are -

(a) that the person concerned is a "worker" within the meaning of the section;

(b) (i) that a medical practitioner has certified under the Section that the person concerned is suffering from a disease and is thereby disabled from earning full wages at the work at which he was employed; or

(ii) that the death of the person concerned has resulted from any disease;

(c) that the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of disablement (being by virtue of Section 20 deemed to be such date as the medical practitioner certifies as the date on which the disablement commenced; or, if he is unable to certify such a date, the date on which the certificate is given; or, where an appeal is allowed against the refusal of a certificate or against its contents, such date as the medical referee or the Board (as the case may be) may determine; or, in the case of the death of a worker without obtaining a certificate, or when not in receipt of a weekly payment on account of disablement, the date of death).

11. As to the word "worker" in this context, it is submitted -

(a) that it means that the person concerned should have been employed at some time prior to the date of disablement (or death) in some employment to the nature of which the disease, which he is certified as suffering from or which his death results from, is due;

(b) that it does not require that the person concerned should be employed by the employer from whom the compensation

is recoverable, or in an employment to the nature of which the disease is due, or at all, either at the date of the application or at the date of the certificate or at the date of the disablement or at the date of the coming into operation of the Section.

12. As to the expressions "the work at which he was employed", and "employment" and "that employment", it is submitted they all refer to employment, to the nature of which the disease is due, at any time prior to the date of disablement.

13. If, in respect of a living person, it is established -

(a) that a medical practitioner has certified, after the coming into operation of the section, that the said person is suffering from a disease and is thereby disabled from earning full wages at the employment hereinafter mentioned; and

(b) that the date of commencement of the disablement mentioned in the certificate, or the date of the certificate if the medical practitioner is unable to certify such a date, is a date after the coming into operation of the section; and

(c) that the person concerned has been employed at any time prior to the date of disablement, ascertained in accordance with the Act by reference to the certificate, in some employment to the nature of which the disease referred to in that certificate is due (whether before or after the section came into operation);

the person concerned is entitled to compensation under the Act as if the disease were a personal injury arising out of that employment, happening at the disablement so ascertained.

14. If, in respect of a person who is dead, it is established -

(a) that the death was caused by any disease after the coming into operation of the section; and

(b) that the person concerned has been employed

at any time prior to death in some employment to the nature of which that disease is due (whether before or after the section came into operation);

the dependants of the person concerned are entitled to compensation under the Act as if the disease were a personal injury arising out of that employment happening, if he had not obtained a certificate of disablement and was not in receipt of a weekly payment on account of disablement, at the date of the death.

p.2,ll.6-12 15. The Board found (inter alia) that between the years 1931 and 1938 the Respondent was employed by the Appellants as an insulator cleaner; she was about fifteen years of age when the employment began; she married in December 1937 and ceased work for the Appellants in May 1938; during her employment
p.2,ll.22-27 with the Appellants she was exposed to dust containing silica and as a result of this exposure she developed the disease of silicosis, although it was not known to her or manifested by any signs or symptoms.

16. At the time referred to in the said finding the Workers' Compensation Act, 1928 was in operation. Section 18 was in the following terms:-

"18. Where -

(i) the certifying medical practitioner for the district in which a worker was employed certifies that the worker is suffering from a disease mentioned in the Fifth Schedule and is thereby disabled from earning full wages at the work at which he was employed; or

(ii) the death of a worker is caused by any such disease;

and the disease is due to the nature of any employment in which the worker was employed within the twelve months previous to the date of the disablement whether under one or more employers, the worker or his dependants shall subject to the provisions hereinafter contained be entitled to compensation under this Act

as if the disease were a personal injury by accident arising out of and in the course of that employment and the disablement shall be treated as the happening of the accident".

Silicosis was not a disease mentioned in the Fifth Schedule.

17. The Board in the course of its findings further found that since May, 1938, when she ceased to work for the Appellants, the Respondent had been supported by her husband, and that at no time since she ceased to work for the Appellants had she worked for wages. It further found that the disease was not manifested by any signs or symptoms until the last few years. The first symptom noticed by her was breathlessness from about 1950 onwards. p.2,ll.12-15 p.2,ll.26-30

18. On the 1st day of September, 1946, the Workers' Compensation Act, 1946 came into operation. It amended the Workers' Compensation Act, 1928 in many respects. It contained the following provisions:

"1.(1) This Act may be cited as the Workers' Compensation Act 1946 and shall be read and construed as one with the Workers' Compensation Act 1928 (hereinafter called the Principal Act) and any Act amending the same all of which Acts and this Act may be cited together as the Workers' Compensation Acts".

.....

"8.(1) For section eighteen of the Principal Act there shall be substituted the following Section :-

"18. Where -

(a) a medical practitioner certifies that a worker is suffering from a disease and is thereby disabled from earning full wages at the work at which he was employed; or

(b) the death of a worker is caused by any disease -

and the disease is due to the nature of any employment in which the worker was employed at any time prior to the date of

the disablement, then subject to the provisions hereinafter contained the worker or his dependants shall be entitled to compensation under this Act as if the disease were a personal injury by accident arising out of or in the course of that employment and the disablement shall be treated as the happening of the accident.

8.(2) Section twenty of the Principal Act as amended by any Act is hereby amended as follows:-

(a) For the words "during the said twelve months" (wherever occurring) there shall be substituted the words "prior to the date of the disablement"; and

(b) At the end of the section there shall be inserted the following sub-sections:-

"(2) The notice of the death or disablement shall be sufficient if it is given in the same manner as notice of an accident may be given under this Act and if it conveys to the employer that the worker is suffering from the said disease and that the said disease is due to the nature of the employment and if it is accompanied by a copy of the certificate given pursuant to section eighteen of this Act.

(3) (a) Where the said employer who last employed the worker is dead or cannot be found or (in the case of a company) has been wound up the notice of the death or disablement shall be given to a nominal defendant to be named by the Board.

(b) The nominal defendant shall not be liable to pay

any compensation but the same shall be paid by the insurer with whom the employer was insured at the relevant time in respect of liability to pay compensation under the Workers' Compensation Acts or, if such insurer cannot be determined to the satisfaction of the Board, then by insurers approved at the relevant time in proportions determined by the Board which in so determining shall have regard so far as practicable to the premium income in respect of Workers' Compensation insurance received by each such insurer during the relevant financial year.

(4) The worker or his legal personal representative or dependants shall if so required by writing produce for inspection by the employer the certificate given pursuant to section eighteen of this Act".

8.(3) For Sections twenty-four and twenty-five of the Principal Act as amended by any Act there shall be substituted the following sections:-

"24. The Governor in Council, after consultation by the Minister with the Board, may by proclamation published in the Government Gazette specify diseases in relation to processes or occupations for the purposes of the next succeeding section, and may from time to time in the like manner amend the proclamation by the addition thereto of any disease process or occupation.

25. Without limiting or affecting the generality of section eighteen of this Act, if a worker within five years prior to the date of the disablement was employed in any process or occupation specified in the said proclamation (as in force at the date of the disablement) and the disease contracted is a disease specified in

the said proclamation (as in force at the said date) in relation to the said process or occupation, then the disease shall be deemed to have been due to the nature of that employment unless the employer proves the contrary."

8.(4) The Principal Act is hereby amended as follows:-

(a) In sub-section (1) of section three the interpretation of "Certifying medical practitioner" is hereby repealed;

(b) In section twenty-two -

(i) the word "certifying" is hereby repealed; and

(ii) after the word "aforesaid" there shall be inserted the words "or by the contents of any certificate given as aforesaid";

(c) In section twenty-three -

(i) the word "certifying" (wherever occurring) is hereby repealed; and

(ii) in paragraph (a) of the proviso after the words "a certificate of disablement" there shall be inserted the words "or against the contents of any such certificate";

(d) For sub-section (1) of section twenty-six there shall be substituted the following sub-section:-

"(1) The Governor in Council may make regulations as to the duties of and fees to be paid to medical practitioners (including dentists) in relation to the giving of certificates under this Act and the carrying out of other

functions connected with the operation of this Act and prescribing for the purposes of section four of the Workers' Compensation Act 1935 as re-enacted by any Act fees for all or any of the services referred to in sub-section (2) of that section";

(e) In section twenty-seven the words "to which this Act does not apply" are hereby repealed; and

(f) The Fifth Schedule as re-enacted by section fourteen of the Workers' Compensation Act 1935 is hereby repealed.

8.(5) In paragraph (a) of sub-section (1) of section eleven of the Workers' Compensation Act 1936 for the words "in the case of diseases mentioned in the Fifth Schedule to the Principal Act" there shall be substituted the words "in the case of disablement caused by any disease due to the nature of the employment"."

19. It is apparent that if the only person in respect of whom an entitlement to compensation would arise under Section 18 after these amendments had been made was a person who was, at the date of the amendment, employed, or employed in an employment to the nature of which the disease is due, or by the employer against whom the compensation was recoverable, then a person suffering from a disease mentioned in the Fifth Schedule due to the nature of some employment in which he was employed within the twelve months previous to the date of the disablement, who had left his employment but who had not obtained a certificate under the former Section 18, could not qualify under that section, because it was repealed and the machinery provided by it and associated sections abolished, and could not qualify under the new section, because he was not employed as required. On the other hand, if he could qualify by obtaining a certificate under the new section, notwithstanding he was not employed after the section came into operation, it must also follow, it is submitted, that a person suffering from any disease, whether formerly in the Fifth Schedule or not, who had at any time been employed in some employment to the nature of which

the disease was due, would qualify in a similar way, notwithstanding he was not employed after the section came into operation.

20. The like considerations apply to the case of a person suffering from a disease in the Fifth Schedule due to the nature of some employment in which he was employed within twelve months previous to the date of his death who had left his employment before the new section came into operation and who died thereafter; and to the case of a person suffering from any disease, whether formerly in the Fifth Schedule or not, who had at any time been employed in some employment to the nature of which the disease was due and had left his employment before the new section came into operation and who died thereafter.

21. These contentions, it is submitted, are not answered by saying that the person suffering from the disease mentioned in the Fifth Schedule would have a "right ... acquired (or) accrued" under the old Section 18 which its repeal would not affect, by virtue of Section 6(2)(c) of the Acts Interpretation Act, 1928 (No.3630) of Victoria. Section 6(2)(c) (the language of which is in contrast with that of Section 2(2) of the Workers' Compensation Act 1951 (No.5601) hereinafter referred to) was (as at 1946) in the following terms:

"6.(2) Where any Act passed on or after the first day of August One thousand eight hundred and ninety, whether before or after the commencement of this Act, repeals or amends any other enactment, then unless the contrary intention appears the repeal or amendment shall not -

(a) .....

(b) .....

(c) affect any right privilege obligation or liability acquired accrued or incurred under any enactment so repealed or amended; or

(d) .....

(e) ..... "

Such a person would have had no "right" under the old Section 18 before a certificate was issued or his death. Moreover the abolition of the machinery by which the right could alone be implemented would be a strong indication of a "contrary intention" within the meaning of sub-section 6(2).

22. It is further submitted the new Section 18 was so framed that the alternative conditions for an entitlement to compensation seized on as essential by the section were the disablement evidenced by the certificate or the death, and not the employment, and it is the disablement or the death which the section would presumptively look to as happening prospectively and not the employment. It is the disablement which Section 18 equates to the accident under Section 5, the main provision, and, if the accident must be prospective under Section 5, it is the disablement which must be prospective under Section 18. In the form in which it appeared in the Workers' Compensation Act, 1928 (as at 1946), Section 5(1) provided:

> "5(1) If in any employment personal injury by accident arising out of or in the course of the employment is caused to a worker his employer shall subject as hereinafter mentioned be liable to pay compensation in accordance with the provisions of this Act".

The prominence allotted to the "employment" in the arrangement of Section 5 contrasts with the part allotted to the "employment" in the arrangement of Section 18. It is submitted that it cannot validly be argued that because the employment spoken of in Section 5(1) is a prospective employment, the same must be said of the employment referred to in Section 18. Moreover, the words "at any time prior to the date of the disablement" are too strong to permit of such argument.

23. It is submitted that the form of the said amendments made in 1946, the abolition of the machinery previously provided, the language of the new Section 18, and the above considerations do not permit of a construction of the new Section 18 involving a qualification by implication of the terms "worker", "work at which he was employed", "employment", "employed" or "that employment" therein so as to confine the application of the section to a person who at the time of operation of the new section was employed, or employed in an employment

to the nature of which the disease is due, or employed by the employer from whom compensation is to be recoverable.

24. It is further submitted that nothing in Section 18 or in other provisions of the Act justifies, nor does any principle of construction justify, the view that the entitlement to compensation was not conferred by the said section in respect of a disease contracted prior to the section coming into operation.

25. The Appellants have relied upon the decision of the Privy Council in the case of Victoria Insurance Co. v. Junction North Broken Hill Mine (1925), A.C.356. It was there decided by the Privy Council that, if workmen contracted a disease compensatable under the Workers' Compensation Act, 1916 of New South Wales while in the employment of a particular employer within a particular year specified in an insurance policy, and the policy provided that the insurance company would indemnify the employer against all sums the insured employer should be liable to pay as compensation under the Act to or in respect of any employee within that year, the employer was entitled to recover under the policy in respect of sums so paid, notwithstanding that the certificates of disablement named dates of disablement after the expiration of the year, and notwithstanding the provision in the Act that "the disablement or suspension shall be treated as the happening of the accident". It is submitted that that case merely decided that the conditions of that policy were satisfied as between the insurer and the insured by the coming into existence within the year of an inchoate liability, arising from circumstances which would found a complete liability if a certificate of disablement were given.

26. The said case of Victoria Insurance Co. v. Junction North Broken Hill Mine (supra) and the later decision of the House of Lords in Blatchford v. Staddon & Founds (1927), A.C.461 were discussed by the Court of Appeal in Ellerback Collieries, Ltd., v. Cornhill Insurance Co. (1932), 1 K.B.401 at pp.411, 418 and 421. An explanation of the judgment in Victoria Insurance Co. v. Junction North Broken Hill Mine given by the Victorian

Workers' Compensation Board in the case of Miller v. J.W.Handle Pty. Ltd. (1948), 2 Workers' Compensation Board 134, to the effect set out in the preceding paragraph hereof, was adopted by Dixon, C.J. in the instant case. Dixon, C.J. considered that the passages in the Privy Council judgment did not affect the real question in the instant case, and Fullagar, J. (who dissented) thought the judgment had only a very indirect bearing upon the instant case. It is submitted it should not be applied in this case.

p.43,ll.4-21

p.59,ll.11-12

27. The Workers' Compensation Board found that the first symptom of the disease of silicosis noticed by the Respondent was breathlessness from about 1950 onwards; and the certificate of the medical practitioner annexed to her application for compensation stated that her disablement commenced about 1950. At the time thus referred to, the Workers' Compensation Act, 1928 as amended by the Workers' Compensation Act, 1946 was in operation, and the said Section 18 was in the terms set out above in paragraph 18 hereof.

p.2,ll.28-30

pp.5-6

28. It will therefore be contended by the Respondent in accordance with the submissions set out above that the facts that the Respondent was from 1938 onwards suffering from the disease of silicosis developed while she was employed by the Appellants in an employment to the nature of which the said disease was due, and that she had become disabled thereby about 1950 and continued to suffer from the disease and to be disabled thereby until the repeal of the Workers' Compensation Act, 1928, constituted circumstances existing or continuing under the said Act which would have conferred on her an entitlement to compensation under Section 18 of the said Act as operating at its repeal, subject to the requirement of a medical practitioner certifying under the said section.

29. The said Workers' Compensation Act, 1928 was repealed by the Workers' Compensation Act, 1951 (No.5601), a consolidating Act, which came into operation on the 19th day of December, 1951. Section 2 thereof, so far as relevant, was in the following terms:-

"2.(1) The Acts mentioned in the Schedule to this Act to the extent to which the same are thereby expressed to be repealed are hereby repealed accordingly.

(2) Notwithstanding the said repeal, all persons things and circumstances appointed or created by or under any of the repealed Acts or existing or continuing under any of the repealed Acts immediately before the commencement of this Act shall continue to have the same status operation and effect under and subject to this Act as they respectively would have had under the repealed Acts if they had not been so repealed.

(3) .....

(4) The provisions of Section six of the Acts Interpretation Act 1928 shall be read and construed as in aid of and not in derogation from the foregoing provisions of this section."

The language of sub-section (2) is in contrast with that of Section 6(2)(c) of the Acts Interpretation Act, 1928 set out above.

30. The effect of the said sub-section (2) of Section 2 of the Workers' Compensation Act, 1951 was to enable the Respondent to obtain a certificate under Section 12(1) of the said Act, which was a re-enactment without alteration of Section 18 of the repealed Workers' Compensation Act, 1928 (as inserted in 1946).

31. By Section 6(3) of the Workers' Compensation Act, 1953 (No.5676), which came into operation on the 1st day of June, 1953, the said Section 12(1) was amended as set out in paragraph 5 hereof.

pp.5-6 32. On the 20th day of December, 1955 the Respondent obtained the certificate from a medical practitioner hereinbefore referred to.

p.2,ll.34-38 33. The Board found that the Respondent was physically totally disabled for work by reason of the said disease as from February, 1955.

34. The Respondent will contend that the Board was justified in law in making the said award on her application dated the 9th day of February, 1956.

35. In the Supreme Court of Victoria Herring, C.J. and Smith, J. delivered a joint judgment. Having summarised the facts and the statutory provisions, they held that the words "at any time" in the new Section 18 introduced by the Act of 1946 were not sufficient to exclude the general rule, that a Statute was to be taken as intended to apply to a state of facts coming into existence after the passing of the Statute. The question, however, remained open whether the employment, to the nature of which the disease was due, was part of the state of facts which had to exist after the passing of the Statute. The learned Judges said that, in their view, an applicant under the new Section 5 introduced by the Act of 1946 had to show that he had been in employment after that Act had come into force. It followed, they said, that an applicant under Section 18 must also show that he had been in some employment after the Act had come into force, otherwise he was not a "worker" for the purpose of that Section. Whether it was also necessary that the applicant should, after the section came into operation, be employed in an employment to the nature of which the disease was due they found it unnecessary to determine. They accordingly concluded that the Board had not been justified in making its award or any part of it.

pp.13-21
p.15,l.22-p.16,l.29
p.17,ll.10-39
p.17,l.40-p.19,l.41
p.19,l.49-p.20,l.7
p.21,ll.39-42

36. Gavan Duffy, J. dissented. He said there was a good deal to be said for treating the date of the occurrence of the disability as the date of the accident. If that were the right construction, there was no reason why the Respondent should not succeed, since her disability had occurred in 1950, a considerable time after the Act of 1946 had come into force. It was, however, difficult to regard the section in that way, in view of the reasons given in Victoria Insurance Co. v. Junction North Broken Hill Mine (1925), A.C.354 - though the actual decision was not on that point. However, even if the Section were not to be read in that way, there was a good deal to be said for regarding it as applying both to those workers who were in the last employer's service before it came into force and to those who were in that service thereafter. It was a new provision, for Section 8 of the Act of 1946 did not amend the original Section 18 of the Act of 1928, but repealed it and substituted a new Section. After the Act of 1946 had been passed, a worker employed before the date of its coming into operation could not recover compensation under the old Section 18 unless the possibility of his doing

pp.22-30
p.26,l.44-p.27,l.38
p.27,l.39-p.28,l.27

so had hardened into an accrued right, within the meaning of the Acts Interpretation Act, 1928, Section 6, before the repeal of the old Section, and it was obvious that that was not so. It was difficult to attribute to the legislature an intention that such a worker should have no right to compensation under either the old Act or the new. What was necessary for the recovery of compensation under the new Section 8 was a Certificate obtained after the Act of 1946 came into force and proof of the necessary employment, and this last condition was expressed in terms so wide as in their natural meaning necessarily to cover employment before that Act came into force. Furthermore, if there were any presumption which would tend to prevent the Section from covering the Respondents' claim, there was enough in the Act to rebut that presumption. The words "at any time" in Section 8 of the Act of 1946 were not consistent with the suggestion that the Section excluded employment before the time at which it came into force. Furthermore, the Act as a whole indicated that Parliament did not intend such an exclusion. There was also the rule of construction that the Statute, being remedial of a grievance, ought to be construed so as to afford the utmost relief which the fair meaning of the language would allow.

p.28,l.28-p.29,l.5

p.29,ll.6-28

37. In the High Court of Australia, Dixon, C.J. held that the Respondent was ontitled to compensation and her appeal ought to be allowed. He said the most material provision was the new Section 18. It stated conditions on the fulfilment of which a right to compensation arose. These were all stated in the earlier part of the Section, ending with the words "shall be entitled to compensation". The words which followed did not imply any further condition or impose any limitation on the preceding words. Whereas Section 5 was expressed in terms of the Employer's liability to pay compensation, Section 12 (the new Section 18) spoke of the worker's right to receive compensation. Since the employers sought to invoke rules of construction in order to limit the application of express words, it was not unimportant to notice that the legislature's concern in this connection was with conferring a right to compensation rather

pp.34-45

p.36,l.49-p.38,l.27

p.38,ll.37-49

than with imposing a liability. It would be a mistake to take the liability provisions as a guide for determining the scope of the right to compensation. Considerations affecting liability could not govern the question whether the worker's employment had to be employed after the Act of 1946 came into force. The essential difficulty of the case arose from the somewhat elusive references to the fact of employment. Must the worker have been employed in an employment to the nature of which the disease was due after the Act of 1946 came into force? Plainly, the date of disablement fixed by, or in consequence of, the certificate had to be after the commencement of the Act of 1946. If it were necessary that the worker was employed, or but for the disability would have been employed, at the time of the certificate, it would mean that even in the case of a disease contracted after the Act of 1946 came into force, but not making itself manifest for some time, it would be essential that the worker should be employed at the date of the certificate if he were to receive compensation. That implication was neither demanded by the words nor sufficiently supported by the context. In the phrase "arising out of or in the course of that employment" the employment mentioned was clearly the same as that mentioned in the phrase "any employment in which the worker was employed at any time prior to the date of disablement". That employment could not be restricted to the period after the Act of 1946 commenced, except by limiting the meaning of the words "at any time", but it was quite certain that those words were inserted to extend the time backwards. No presumption against the imposition of a liability by reference to an event happening before the enactment of a Statute could justify the limitation of those express words. Finally, the learned Chief Justice pointed out that such a limitation of the words "at any time" would leave without a remedy a worker who would have been entitled to compensation but for the passing of the Act of 1946. No right would have "accrued" to him to which the Acts Interpretation Act, 1928, Section 6(2) would have applied. It would be strange indeed if by an implied limitation of the words "at any time" his case were excluded from an Act directed at the removal of limitations of the category of diseases and the time of employment.

p.39,l.30-p.40,l.22

p.43,l.22-p.44,l.33

p.44,l.33-p.45,l.7

p.45,ll.3-39

38. McTiernan and Windeyer, JJ. agreed with the conclusion of the Chief Justice. McTiernan, J. said that the decisive fact in favour of the Respondent was that the disability from the disease occurred

pp.46-47

after the Act of 1946 came into operation. That disability was an event on which Section 8 of the Act of 1946 operated, and that was clearly a prospective operation. The learned Judge considered that the dissenting judgment of Gavan Duffy, J. in the Supreme Court had
p.64,ll.20-42 been right. Windeyer, J. said that in order to determine who was entitled to the benefit of the rights given by the 1946 amendment, the language of the Statute had to be applied quite literally, the new Section 18 being read in the context into which it was inserted. The words "at any time" were then decisive. The earlier reference to twelve months, when originally enacted, gave a retro-active operation limited to twelve months. That operation was extended by the amendment of 1946. The general presumption against retrospectivity could not displace or qualify
p.64,ll.43-46 the express meaning of these words. He did not think it necessary under the Section that an applicant be actually in employment at the time of the medical certificate or of the disablement.

pp.47-61 39. Fullagar, J. dissented. He said he thought
p.54,l.36- it was clear that the worker's construction
p.55,l.1 of the Act of 1946 meant that a liability might be imposed on an employer in respect of the actual or presumptive contraction of an industrial disease which had happened long before the Act of 1946 became law. Such a construction, he held, was retrospective in the relevant sense, and ought to be avoided if a construction giving a mere prospective operation was reasonably open. The learned Judge held that there was no serious difficulty about such a construction. He did not think
p.55,ll.2-23 it was a tenable view that the Respondent was not a "worker" within the meaning of the Act because she had not been employed by anybody since 1938, but the majority of the Full Court had been right in deciding that the amendment made in 1946 applied only to cases in which the worker had been employed after the commencement of the Act of 1946 in an employment to the
p.55,l.24- nature of which the disease was due. Since the
p.56,l.30 only employer with whom the worker was primarily and directly concerned was the last employer in the hazardous employment, it seemed to follow that prima facie the legislation should be construed and limited to

cases where the last employment to which the disease was due was an employment subsisting after the legislation came into force. This view, Fullagar, J. said, was supported by the words "as if the disease were a personal injury by accident arising out of or in the course of the employment". These words referred to Section 5 of the Act, and it was clear that Section 5 applied only to an accident occuring after it had come into force. It therefore seemed to the learned Judge natural and right to infer that the same limit of operation was intended in Section 18. He did not agree that the result of this construction would be to leave without any right to compensation a worker who had contracted a scheduled disease before the Act of 1946 became law, which disease did not manifest itself until after that Act became law; for he held that such a worker would have a right preserved by Section 6 of the Acts Interpretation Act, 1938. Taylor, J., who also dissented, said that compensation could be recovered under Section 5 only for injuries arising out of employment after the commencement of the Act. In his view, Section 12 was no more than a deeming provision, under which a worker could bring a case not otherwise within Section 5 within the provisions of that Section. It would be strange if in such a case, in which the right to compensation ultimately depended upon Section 5, it was immaterial whether the relevant employment was before or after the commencement of the Act. He could not agree that in such a case the right to compensation was solely dependent upon Section 12.

p.56,l.31-p.57,l.40

p.58,ll.2-22

pp.61-63

40. The Respondent will contend that this appeal should be dismissed, and that the order of the High Court was correct and should be affirmed, for the following (among other)

R E A S O N S

1. Because the reasons given by the Justices constituting the majority in the High Court are correct.

2. Because the Respondent fulfilled the requirements of the Workers' Compensation Act, 1953 for entitlement to compensation and the said majority correctly so held.

3. That the said majority construed the provisions of the said Act, and in particular Section 12(1), in accordance with correct legal

principles, and correctly applied them to the Respondent's case:

4. That the said minority were in error -

(a) in holding that the Respondent did not fulfil the requirements of the said Act either because at the time of the coming into operation of the Workers' Compensation Act, 1946 or thereafter she was not employed in an employment to the nature of which the disease was due, or because she was not then employed at all; and

(b) in purporting to apply the presumption against the retrospective operation of statutes; and

(c) in not giving proper effect to the words "at any time prior to the date of disablement".

GREGORY GOWANS

J.G. LeQUESNE.

IN THE PRIVY COUNCIL No.54 of 1960

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

SUNSHINE PORCELAIN POTTERIES PROPRIETARY LIMITED ... ... Appellants

- and -

IRIS DOREEN NASH ... Respondent

CASE FOR THE RESPONDENT

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Solicitors for the Respondent.