47/85

No. 22 of 1985

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N:-

ABEL LEMON & COMPANY PTY. LTD.

Appellant

- and -

BAYLIN PTY. LTD.

Respondent

CASE FOR THE APPELLANT

A. INTRODUCTORY.

RECORD

1. This is an appeal from a judgment of the Full Court of the Supreme Court of Queensland (Kelly, Macrossan and Ryan JJ.) given on 14th December 1984, whereby the court allowed a demurrer in proceedings between the defendants in the action. The demurrer was to the appellant's defence to the respondent's statement of claim against the appellant. The Supreme Court also ordered that the respondent recover its costs of the demurrer against the appellant. That court granted final leave to appeal to Her Majesty in Council against its decision on 25th February 1985.

p.38 l.1-10

p.40 l.10-60

2. The issue on the demurrer was whether s.86 of the statute 14 Geo.III c.78 (the Fires Prevention (Metropolis) Act 1774) applied in Queensland on 19th December 1982.

3. The Full Court of the Supreme Court held, so far as material:

(a) The provisions of s.86 of the Fires Prevention (Metropolis) Act were impliedly repealed so far as they applied in New South Wales (which then included what is now Queensland) by an 1837 enactment of the colonial Legislative Council, 8 Wm.IV No.6, s.74 (the Sydney Building Act) which transcribed the English section;

p.32 1.10

(b) Consequently, the proviso to s.20 of the Supreme Court Act 1867 (Qld.) had the effect that the Fires Prevention (Metropolis) Act was not to be applied in Queensland.

p.33 1.2-18

In this appeal, the appellant submits that step (a) in this chain of reasoning was wrong.

B. SUMMARY.

4. (a) The relevant passage in the authority relied on by the Supreme Court consisted of obiter dicta and the dicta were unpersuasive;

(b) An implied repeal occurs only when a later enactment is inconsistent with an earlier one, not when the later repeats the earlier;

(c) Alternatively, s.74 of the Sydney Building Act applied only in Sydney, and therefore could not have effected a repeal of s.86 of the Fires Prevention (Metropolis) Act in what is now Queensland;

(d) A finding that s. 86 of the Fires Prevention (Metropolis) Act applied in Queensland on the relevant date would upset no body of case law, nor would it reverse any widely held view of the law.

C. SUBMISSIONS.

5. The Full Court cited Hazelwood v. Webber (1934) 52 C.L.R. 268 as authority for holding that s.86 of the Fires Prevention (Metropolis) Act was impliedly repealed upon its transcription into the colonial enactment of 1837. The relevant passage in Hazelwood v. Webber was obiter. It was unnecessary in that case to decide whether s.86 of the Fires Prevention (Metropolis) Act 1774 applied in New South Wales because it was settled law that in any event, it did not apply where a fire was intentionally lit, as was the case in Hazelwood v. Webber.

6. The obiter dicta in Hazelwood v. Webber are of little weight because:

(a) the reasoning in the relevant passages was not the subject of argument by counsel for the appellant in that case;

(b) no authority supported the proposition that the colonial enactment applied outside Sydney;

(c) only one authority, Reid v. Fitzgerald (1926) 48 W.N.(N.S.W.) 25 supported the proposition that repetition of a section in later legislation could operate as an implied repeal of early legislation;

(d) that authority is unpersuasive: it was a decision of a single judge in New South Wales, reported only in the Weekly Notes of that State, and it remained unreported for nearly five years until the judge

himself suggested it be reported; it cites no authority for the proposition for which it was itself cited in Hazelwood v. Webber;

(e) both Hazelwood v. Webber and Reid v. Fitzgerald were decided without reference to the 1849 colonial enactment 13 Vict.No.39 (the Melbourne Building Act) - as to which, see below.

7. (a) The proposition that an enactment can impliedly repeal an earlier consistent enactment is contrary to principle:

Jenkins v. Great Central Railway Co. [1912] 1 K.B.1.

(b) An implied repeal occurs only when a later enactment is inconsistent with an earlier enactment:

Butler v. Attorney-General (Victoria) (1961) 106 C.L.R.268 at pp.275-6,280,290.

Hack v. Minister for Lands (1905) 3 C.L.R.10 at 23-24, applying Kutner v. Phillips (1891) 2 Q.B. 267 at pp.272-2.

Re Berry [1936] Ch.274.

(c) It is a fortiori when the later enactment is one of a subordinate legislative body, especially a council of the type which passed the Sydney Building Act.

Australia Courts Act 1828 (U.K.) 9 Geo.IV c.83, ss.19-22.

8. (a) In 1849, the New South Wales Legislative Council enacted 13 Vict. No.39 (the Melbourne Building Act -Victoria was not separated from New South Wales until 1851). Section 58 of that enactment was materially identical to s.74 of the Sydney Building Act. If, contrary to our submissions, s.74

of the Sydney Building Act repealed s.86 of the Fires Prevention (Metropolis) Act, it would follow that s.58 of the Melbourne Building Act impliedly repealed s.74 of the Sydney Building Act. That would be a curious intention to impute to the legislature in the context.

(b) It would further follow that the dicta in Hazelwood v. Webber were per incuriam, since the court in that case was not referred to the Melbourne Building Act and was apparently unaware of its existence. The repeal of the remainder of the Sydney Building Act by the 1879 enactment 42 Vict. No. 25 (N.S.W.) could not have affected the position of a section already impliedly repealed. The Melbourne Building Act continued on the statute book of New South Wales until 1898.

9. Alternatively, s.74 of the Sydney Building Act should not be construed as originally applicable outside the town of Sydney because:

(a) the reasons for construing ss.84 and 86 of the Fires Prevention (Metropolis) Act as having general application did not apply to the Sydney Building Act:

Filliter v. Phippard (1847) 11 Q.B. 347 at pp.354-5;
6 Anne c. 31 (Eng.)
10 Anne c.14 (Eng.)
14 Geo.III c.78, s.101 (U.K.);

(b) the numerous references in the Act to the town of Sydney suggest a purely local application see e.g. preamble, ss. 1, 55, 70, 72 and 73; and in particular, contrast the general terms of s.84 of the Fires Prevention (Metropolis) Act with the limited terms of its equivalent, s.72 of the Sydney Building Act;

(c) the colonial Legislative Council evidently regarded the Sydney Building Act as applicable only to Sydney. The town of Sydney had been delineated by survey only four years before the Sydney Building Act:

4 Wm.IV No.7, s.46 (N.S.W.)

and, although this definition was not expressly incorporated by reference in the Sydney Building Act, the Legislative Council must have been aware of it:

2 Vict. No.25 (N.S.W.)
3 Vict. No.14 (N.S.W.)
9 Vict. No.5 (N.S.W.).

(d) the repetition of s.74 of the Sydney Building Act in s.58 of the Melbourne Building Act also suggests that the Legislative Council regarded the former as applicable only in Sydney;

(e) The Melbourne Building Act was repealed in New South Wales (but not in Victoria) by the Statute Law Revision Act 1898 (N.S.W. No.28 of 1898). At that time, the New South Wales legislature regarded the Melbourne Building Act as "inapplicable in New South Wales" (schedule, column 4).

If it was not applicable outside Sydney it could not have repealed s.86 of the Fires Prevention (Metropolis) Act in respect of parts of New South Wales beyond Sydney, i.e. what is now Queensland.

10. No body of law has evolved in Australia upon the basis of, nor have there been reported decisions made in reliance upon the dicta from Hazelwood v. Webber. Insofar as the

case relates to the implied repeal of s.86 of the Fires Prevention (Metropolis) Act, it has been judicially noticed only once in reported Australian cases since 1934; and that reference was obiter.

Wise Bros. Pty. Ltd. v. Commissioner for Railways (N.S.W.) (1947) 75 C.L.R. 59 at p.67, per Latham C.J.

11. The applicability of s.86 of the Fires Prevention (Metropolis) Act in Queensland has long been assumed:

Kellett v. Cowan [1906] St.R.Qd. 116

Fleming: The Law of Torts, 6th ed. (1983), p.320

Luntz, Hambly and Hayes: Torts: Cases and Commentary, (1979), p.973

Higgins: Elements of Torts in Australia, (1970), p.209.

As the Full Court observed, the legislation is as desirable in Queensland today as ever.

Respectfully submitted.

H.G. Fryberg Q.C.

G.A. Thompson.

APPENDIX

CASES, STATUTES AND INSTRUMENTS

REFERRED TO HEREIN

1. CASES.

Hazelwood v. Webber (1934) 52 C.L.R. 268

Reid v. Fitzgerald (1926) 48 W.N.(N.S.W.) 25

Jenkins v. Great Central Railway Co. [1912] K.B. 1

Butler v. Attorney-General (Victoria) (1961) 106 C.L.R. 268

Hack v. Minister for Lands (1905) 3 C.L.R. 10

Kutner v. Phillips (1891) 2 Q.B. 267

Re Berry [1936] Ch. 274

Filliter v. Phippard (1847) 11 Q.B. 347

Wise Bros. Pty. Ltd. v. Commissioner for Railways (N.S.W.) (1947) 75 C.L.R. 59

Kellett v. Cowan [1906] St.R.Qd. 116

2. STATUTES AND INSTRUMENTS.

(a) England:

14 Geo.III c.78
9 Geo.IV c.83
6 Anne c.31.

(b) New South Wales:

8 Wm.IV No.6
13 Vict. No.39
42 Vict. No.25
10 Anne c.14
4 Wm.IV No.7
2 Vict. No.25
3 Vict. No.14
9 Vict. No.5
Statute Law Revision Act 1898.

(c) Queensland:

Supreme Court Act 1867.

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