Privy Council Appeal No. 7 of 1961

Dennis Hotels Proprietary Limited – – – – – *Appellant*

v.

The State of Victoria and another – – – – – *Respondents*

and

The Attorney-General of the Commonwealth of Australia and others – – – – – – – – – – *Interveners*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JUNE 1961

Present at the Hearing:
VISCOUNT SIMONDS.
LORD REID.
LORD RADCLIFFE.
LORD TUCKER.
LORD HODSON.
[*Delivered by* LORD RADCLIFFE]

The appeal in this case comes before the Board by special leave granted by Her Majesty by Order in Council dated the 3rd August, 1960. By this Order leave was reserved to the respondents to raise as a preliminary point at the hearing of the appeal the plea that in the absence of a certificate of the High Court of Australia granted under section 74 of the Commonwealth of Australia Constitution the appeal was incompetent.

This preliminary objection to jurisdiction was duly raised and argued before the Board concurrently with the opening of an appeal in similar circumstances *Whitehouse* v. *The State of Queensland and others*, and at the conclusion of the argument their Lordships intimated that in their opinion the objection succeeded and that it was not open to them to proceed to the hearing of the substantive appeals. It is now for their Lordships to state their reasons for this opinion.

Section 74 of the Constitution preserves the prerogative right of Her Majesty in Council to grant special leave of appeal from the High Court but subjects that right to certain limitations which are set out in the section. The main limiting provision is to the effect that no appeal is to be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court itself certifies that the question is one which ought to be determined by Her Majesty in Council. A lengthening line of judicial opinions of some complexity has by now made it clear that the meaning of these words is more elusive than at first sight it would appear to be.

The nature of the decision of the High Court from which it is sought to appeal can be stated with fortunate brevity. It is convenient to relate it in terms of the action that is the subject of the appeal now under consideration,

Dennis Hotels Proprietary, Ltd. v. *The State of Victoria and Henry Edward Bolte;* but there is no difference of any materiality between the facts and circumstances of this appeal and the considerations relevant to it and those of and relevant to the second appeal. Whatever is said with regard to the one is therefore equally valid with regard to the other.

The appellants were the plaintiffs in the action. The relief which they claimed against the respondents as defendants was (i) a declaration that two provisions of the Licensing Act, 1928, of the State of Victoria, section 19 (1) (*a*) and section 19 (1) (*b*), were invalid, and (ii) the return of certain fees paid thereunder in respect of what were called a " victualler's licence " and a " temporary victualler's licence " prescribed by those provisions. The ground upon which this claim of invalidity was rested was set out in paragraph 12 of the appellant's statement of claim, which ran as follows:— " The said provisions of the said section 19 of the said Licensing Acts purport to impose a duty of excise contrary to the provisions of section 90 of the Constitution of the Commonwealth and are and at all times have been invalid." There was no other ground alleged: the whole issue lay in the question whether the fees imposed by section 19 (1) (*a*) and (*b*) were duties of excise within the meaning of the Constitution and, as such, within the exclusive legislative power of the Federal Parliament.

The respondents demurred to the whole of this statement of claim on the ground that neither of the impugned provisions imposed a duty of excise contrary to section 90 of the Constitution and that each of them was a law validly made by the Parliament of the State of Victoria.

By the judgment of the High Court, from which it is now sought to appeal, this demurrer has been sustained so far as it relates to section 19 (1) (*a*) by a majority of four to three, but overruled, also by a majority of four to three, so far as it relates to section 19 (1) (*b*). The Court thus decided that section 19 (1) (*a*) did not amount to the imposition of a duty of excise, but section 19 (1) (*b*) did amount to the imposition of such a duty. The respondents do not seek to disturb the judgment in its application to section 19 (1) (*b*), but the appellants seek its reversal so far as it relates to section 19 (1) (*a*).

It is apparent therefore that success or failure in the appeal would turn entirely upon the question whether section 90 of the Constitution applies to the statutory enactment which is contained in the impugned section of the State Licensing law. The material words of section 90 are as follows:— " On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and excise, and to grant bounties on the production or export of goods, shall become exclusive." If section 19 (1) (*a*) of the State Act does purport to impose a duty of excise within the meaning of section 90, then the State does not possess legislative power to enact this because under the Constitution only the Commonwealth has legislative power in that field. On the other hand if the State's enactment is not to be read as imposing an excise duty, then there is nothing in the Commonwealth's powers under the Constitution which impairs the State's legislative authority to make section 19 (1) (*a*) into law.

Does the determination of this question involve a question as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of the State, as the respondents contend that it does? There are, at any rate, two generally accepted descriptions of what constitutes an *inter se* question in this sense and both of them lend support to the respondents' contention. First, it has always been recognised that the general purpose of the agreement enacted in section 74 is to reserve for the final decision of the High Court in Australia, unless the Court itself wishes to refer the matter to the Judicial Committee, " questions which arise in connection with the federal distribution of power between the Commonwealth on the one hand and the States on the other " (Quick and Garran, Constitution of the Australian Commonwealth, page 757). The clear intention of section 74, as was said by Isaacs, J., in *Pirrie* v. *McFarlane* 36 C.L.R. 170 at 196, is that " on the purely Australian question of the distribution of the totality of governmental powers on this continent, the High Court of Australia—the highest judicial organ created by the Australian people—was to be the final

arbiter, unless it voluntarily requested the intervention of the Sovereign in Council.". The questions so reserved are questions " characteristic of federalism " (per Dixon, J., *Nelungaloo Pty. Ltd.* v. *The Commonwealth* 85 C.L.R. 545 at 570). It would be a strange departure from this general conception if a case was not to be treated as raising an *inter se* question although the single proposition that it put in issue was that a State had no power to make a particular enactment because under the Constitution the power to pass such legislation had been allotted to the Commonwealth alone.

Secondly, the words " *inter se* " are pregnant words and what must be looked for is an issue that involves some reciprocal relation between the extent or nature of the powers on one side and the powers on the other. " The essential feature ", as was said by Dixon, J., in a well-known passage in *Ex parte Nelson* (No. 2) 42 C.L.R. 258 at 272, is that there should be " a reciprocal effect in the determination or ascertainment of the extent or the constitutional supremacy of either of them.". Here again it seems that in any ordinary sense of language there is plainly a reciprocal effect upon the extent or supremacy of Commonwealth and State powers respectively when a decision is given upon the question whether a State cannot pass a particular law simply because only the Commonwealth can. Indeed their Lordships see nothing unreasonable in the view of a recent commentator on the Australian Constitution (see Wynes—Legislative, Executive and Judicial Powers in Australia, 2nd Edition (1956) at page 681) that questions relating to the limits of the exclusive powers of the Commonwealth are " cases par excellence of *inter se* questions ", whatever be adopted as the precise definition of the test of reciprocity.

What is challenged in a case such as the present is the validity of a State law: what is argued is that having regard to the powers exclusively allotted to the Commonwealth under the Constitution, the State's power of law-making does not extend to cover the enactment impugned. Such a proposition does not differ in any essential respect from that advanced in *Baxter* v. *Commissioners of Taxation* (N.S.W.) 4 C.L.R. 1087, in which it was held that having regard to the executive functions and powers vested in the Commonwealth by the Constitution a State enactment was invalid to the extent that its full implementation according to its letter would trespass upon that field of power; or from that advanced in *Pirrie* v. *McFarlane* 36 C.L.R. 170, where the issue was whether a State law was within the legislative power of the State in so far as its operation trenched upon the defence power reserved to the Commonwealth by the Constitution. A similar question was present, though it may not have been exposed, in *Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* [1909] A.C. 345, in which the contest of power was between the exclusive power of legislation in the Commonwealth and the State executive powers. In all these cases (whatever the ultimate fate of the doctrine of the immunity of instrumentalities asserted in *Baxter's* case) it was held judicially that *inter se* questions were involved.

There are however two recent opinions delivered in this Board which appear to contain general statements to the effect that no *inter se* question is capable of arising when the extent of an exclusive Constitutional power of the Commonwealth is the subject of dispute; and the forcible argument of Counsel for the appellants has naturally dwelt upon these statements and endeavoured to propound a theory of the interpretation of section 74 which would give support to such a view. The first passage consists of a sentence in the opinion of the Board in *Nelungaloo Pty. Ltd.* v. *Commonwealth of Australia* [1951] A.C. 34, in which Lord Normand said (page 48) " Equally, when a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits *inter se* of the powers of the Commonwealth and those of any State, and on this point the reasoning of Dixon, J., in *Ex parte Nelson* (No. 2) appears to their Lordships to be conclusive.". The second passage occurs in *Attorney-General for Australia* v. *The Queen and the Boilermakers' Society of Australia* [1957] A.C. 288 at 324, where Viscount Simonds, in delivering the opinion of the Board, said " If the power is one of which the exercise is exclusively vested in the Common-

wealth no such [*inter se*] question arises. It is only where the delimitation of the Commonwealth power necessarily implies a decision as to the extent of a subordinate State power that an *inter se* question truly arises.".

Their Lordships do not think that they can regard the law as settled by these statements. In neither case were they essential or even directly relevant to the decisions come to; in each case they appear as incidental to a more or less comprehensive summary of the various aspects in which *inter se* questions can arise under section 74. When the proposition which they appear to state is scrutinised at close quarters, as has to be done for the purpose of deciding the preliminary objection in the present case, its very generality is sufficient to arouse doubts as to its correctness. This has already been pointed out by the present Chief Justice when giving his judgment in the High Court of Australia in *Nelungaloo* v. *The Commonwealth* 85 C.L.R. 545 at 574. The first passage in question does not offer any reasoned analysis of the conclusion it states, since it merely assumes the point to have been established by the judgment of Dixon, J., in *Ex parte Nelson* (No. 2), to which it will be necessary to turn. The second passage is evidently intended to restate the same proposition without reconsidering its basis. The question to which their Lordships must now address themselves, therefore, is whether the reasoning employed by Dixon, J., in *Ex parte Nelson* (No. 2) when dealing with the connection between section 92 of the Constitution and *inter se* questions, can safely or even properly be transferred to the consideration of this other section, section 90, and its relation to *inter se* questions. For this purpose the *Nelson* case requires a few words of introduction.

Section 92 contains the well-known injunction, " trade, commerce and intercourse among the States.....shall be absolutely free ". It was accepted from the first that this overrode the exercise of constitutional powers by any authority to whom the injunction was addressed; but over the years judicial opinion in Australia fluctuated on the question whether it was addressed to the Commonwealth as well as to the States or to the States alone. At first the former view prevailed, and so long as it did no doubt seems to have been entertained that an *inter se* question was not raised by a case which involved the application of section 92. Whether legislation of State or of Commonwealth or some other exercise of the powers of one or other was the subject of challenge it was seen that a decision of the issue had no reciprocal bearing upon the extent or nature of any power of the other authority.

In course of time however judicial opinion changed and in *McArthur Ltd.* v. *Queensland* 28 C.L.R. 530, the High Court decided that section 92 bound the States alone. This view was later to be overruled by the opinion of the Judicial Committee in *James* v. *Commonwealth* [1936] A.C. 578; but the *Nelson* case came before the High Court at a time when the *McArthur* decision represented the prevailing doctrine. Upon those premises the Court had before it the issue whether an attack upon the validity of State legislation as infringing section 92 raised an *inter se* question and whether, if it did, the instant case was one which justified the grant of a certificate under section 74. Of the six judges who participated in hearing the application for a certificate, two, Knox, C. J., and Gavan Duffy, J., expressed no opinion on the *inter se* question, since they were not in any event in favour of granting a certificate; two, Isaacs and Starke, JJ., held that an *inter se* question did arise, while two others, Rich and Dixon, JJ., held that it did not. Both Isaacs and Starke, JJ., agreed that in any event there was no case for the grant of a certificate. The argument that was pressed upon the Court was that, as the Commonwealth had legislative power over " trade and commerce with other countries, and among the States " under section 51 (i), any decision that the State could not pass a particular enactment because its terms came within the prohibition of section 92 necessarily had a bearing upon the powers of the Commonwealth as well as of the State since it meant that over that matter at any rate the Commonwealth alone had legislative power. In essence it was an argument that a section 92 decision helped to define an exclusive power of the Common-

wealth and so raised an *inter se* question. It was upon the acceptance or rejection of this proposition that the four members of the Court divided. It seems plain from what was said by Rich and Dixon, JJ., that, had they been prepared to accept this premise that a decision on the effect of section 92 did " say something about " the Commonwealth power, which would thus become exclusive, they would have joined Isaacs and Starke, JJ., in holding that an *inter se* question was involved.

One or two quotations from the judgments will serve to illustrate the reasoning employed. On the one side Starke, J. (p. 269) said " The decision, it appears to me, affects the distribution of constitutional power as between the Commonwealth and the States: it affirms certain constitutional power in the Commonwealth which it denies to the States: it measures out the area over which the Commonwealth and the States can respectively operate ". On the other side, Rich, J., said that in his view the real question was as to the extent and application of the prohibition laid upon the States. The sole question was (p. 267) " whether the power was withdrawn from the State irrespective of the extent or existence of the Commonwealth power ". The word " irrespective " is the key word in this context. So too Dixon, J., speaking of section 92 (p. 272) " Whether these provisions deny much or little power to the States must be immaterial as well for the purpose of defining the subject matter of Commonwealth power as for the purpose of determining its supremacy, of measuring its constitutional strength ". And again (p. 273) " The ambit of the commerce power is the same because sec. 51 (i) defines it, not sec. 92. Indeed it is hard to see how a decision upon sec. 92 could even provide a judicial precedent which, if followed, would determine a question upon sec. 51 (i). For the power which is conferred upon the Commonwealth Parliament by sec. 51 (i) is not coextensive with that denied to the States by sec. 92. It is much greater....".

These observations of Rich and Dixon, JJ., as well as their conclusion evidently commended themselves to this Board in *James* v. *Cowan* [1932] A.C. 542, and their Lordships accept them as authoritative. But the quotations that have been made above show that they are far from supporting the conclusion that a decision as to the extent of a power which is in truth declared by the Constitution to be vested exclusively in the Commonwealth and so denied to the States does not raise an *inter se* question. On the contrary they tend to show that it does. For while it was impossible, when interpreting section 92, to say that the interpretation of it did anything to define the limits or nature of the Commonwealth legislative power over trade and commerce, it is equally impossible, when interpreting section 90, to say anything else than that the interpretation of such words as " duties of customs and of excise " and " bounties " bears at one and the same time upon the limits of the Commonwealth's powers in this field and upon the limits of the State's powers in everything that is not within this field or otherwise reserved to the Commonwealth. For it is the limits of the Commonwealth power themselves that exclude the State power. To put it shortly, the considerations arising from the proposition " the State has no power to do this, whether or not the Commonwealth has " cannot be equated with the considerations implicit in the proposition which is involved in the present case, " the State has no power to do this, because only the Commonwealth has ".

An explanation on these lines as to the different implications of section 90 and section 92 has already been offered by Evatt, J., in *Hopper* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) 61 C.L.R. 665. The learned Judge there says (p. 681) " in dealing with sec. 92 no question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States arises; but in relation to sec. 90 such a question is involved ..... The question whether a law passed by a State legislature imposes a duty of excise, however the question is answered, is a question as to the limits *inter se* of the constitutional powers of State and Commonwealth. For the question can be answered adversely to the State only by asserting that, however far the area of power of State powers is coextensive with Commonwealth powers in relation to taxation, the boundary of the State area of power falls far short of the power sought to be exercised.".

For the reasons which they have set out above their Lordships regard this as a correct statement of the constitutional position. In their opinion two points emerge with certainty from the analysis that they have made. One is that the considerations that would prevent a decision on section 92 from involving an *inter se* question, assuming that the section bound the States alone, do not apply to a decision on the effect of section 90 as denying to a State a power which it reserves to the Commonwealth. The second is that the reference to the position of an exclusive power of the Commonwealth in relation to the raising of *inter se* questions which is found in the *Nelungaloo* opinion of this Board and is repeated in the *Boilermakers* case is not well-founded.

In arriving at this conclusion their Lordships have given full attention to two arguments on which the appellants naturally placed much reliance. It was said that the principle of Dixon, J.'s, judgment in the *Nelson* case was properly applicable to section 90 because the difference between the constitutional effects of section 90 and section 92 was merely one of form. Admittedly section 92 was no more than a prohibition but then, when section 90 itself was analysed, there was nothing more in it than a prohibition either. It did not " give " any power to the Commonwealth—it simply withdrew it from a State. But their Lordships do not think that it can be right to interpret the words of section 74 by recasting other sections of the Constitution in this way. The instrument that contains it was shaped as a whole and the structure that it assumed and the phrases and forms of expression that were adopted cannot be treated as of no importance in relation to each other, merely because it is thought that in substance a form that was not chosen might as well have been used in place of one that was. Section 90 was directly expressed in terms that relate to the distribution of powers. It is impossible therefore by reasoning on these lines to obliterate the distinction between section 90, a decision upon which plots at any rate one point as falling on one side or other of the line that separates what the State can do from what the Commonwealth alone can do, and section 92, a decision upon which, even given the *Nelson* premises, could plot no point in relation to any such imaginary boundary. This consideration was, after all, the basis of Dixon, J.'s, reasoning in that case and it is materially reinforced by the observation of this Board in *James* v. *Commonwealth* [1936] A.C. 578, at 632, " ....though trade and commerce mean the same thing in s.92 as in s.51 (i), they do not cover the same area, because s.92 is limited to a narrower context by the word ' free '....".

Lastly their Lordships have given most careful consideration to what was said by the present Chief Justice in *Nelungaloo Pty., Ltd.* v. *The Commonwealth* 85 C.L.R., at 574, in suggested explanation of the sentence in the Board's *Nelungaloo* opinion which has already been discussed. The purport of the explanation is to suggest that while it could not have been in the mind of the Board to lay down a rule about exclusive powers in the absolute terms that were apparently employed, they may have intended to rely on a distinction between an exclusive power over " part only " of a subject of Federal power (such as excise and customs, looked at as part of taxation) and an exclusive power that is coextensive with the whole legislative subject (such as bounties). With great respect to the learned Chief Justice, who was plainly seeking to find an acceptable interpretation of a passage that was bound to cause difficulty, their Lordships do not think that it would be a satisfactory development to adopt his explanation. It is not one which proceeds by any necessity of reasoning from the observations made in the *Nelson* case and the distinction between an exclusive power that forms part of a defined subject of a section 51 placitum and one that is coextensive with such a subject seems to them to be somewhat too refined for a useful application of the words of section 74. In their view the " powers " referred to in that section can be exclusive powers just as much as powers of any other quality, the only difference being that powers that are exclusive offer the most obvious occasion for the drawing of reciprocal limits. Moreover, it does not appear to them that it is a significant consideration in this connection that the words " excise " or " customs " are not the subject of a separate placitum in section 51. Reading the Constitution as a whole it

would be impossible to doubt that the combined effect of section 51, section 52 and section 90 is to confer on the Commonwealth alone what can properly be spoken of as the customs or excise power. In dealing with section 90 therefore their Lordships prefer to adhere to the simpler conception that any decision that directly bears upon the constitutional distribution of powers between State and Commonwealth and so has a reciprocal effect on their delimitation is an *inter se* question.

Their Lordships will therefore humbly advise Her Majesty that they have no jurisdiction to hear this appeal, no certificate from the High Court having been obtained, and that it must be dismissed. Having regard to the special circumstances their Lordships make no order for payment of costs with regard to the petition for special leave; the appellants must pay the respondents' costs of the appeal. There will be no order as to the costs of the interveners.

Their Lordships take this occasion to give notice that in future, when a petition for special leave discloses a question as to the Board's jurisdiction to hear the appeal, they will make it their general practice to endeavour to give their final decision on the point before advising the grant of leave. The practice of reserving such preliminary points for the opening of the appeal is of long standing and has, no doubt, advantages as well as disadvantages. Unfortunately it is impossible in any particular case to know on which side the balance of advantage inclines until the question of jurisdiction has been argued and decided: but their Lordships have come to the conclusion that under modern conditions the general rule which will be more likely to meet the interests of the parties and the convenience of their advisers, without prejudicing the cause of justice, would be to hear and express their opinion upon an objection to their jurisdiction before making any recommendation as to the granting of special leave.

(82904) Wt. 8233/71 150 7/61 Hw.

In the Privy Council

DENNIS HOTELS PROPRIETARY LIMITED

v.

THE STATE OF VICTORIA AND ANOTHER AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA AND OTHERS

PRESENTED BY

LORD RADCLIFFE

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