Privy Council Appeal No. 52 of 1980

Caltex Oil (Australia) Pty. Limited – – – – *Appellant*

v.

Paul Leslie Feenan and Others – – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH MARCH 1981

Present at the Hearing:

LORD DIPLOCK
LORD EDMUND-DAVIES
LORD KEITH OF KINKEL
LORD SCARMAN
SIR JOHN MEGAW

[*Delivered by* LORD DIPLOCK]

This is an appeal from an order of the Court of Appeal of New South Wales dismissing an application by the appellant (" Caltex ") for a declaration that an order that the Industrial Commission of New South Wales had purported to make under section 88F of the Industrial Arbitration Act 1940 was made without jurisdiction, and for an injunction restraining the respondents (" the Feenans ") from enforcing it.

The order of the Industrial Commission, which was made by Macken J. related to an agreement of 26 September 1975 (" the Solus Contract ") between Caltex and the Feenans setting out the terms on which the Feenans were to operate a service station for the sale of petroleum products supplied exclusively by Caltex at premises at Hexham owned by Caltex. His Honour's order declared that agreement void *ab initio* and ordered Caltex to pay to the Feenans various sums of money totalling $17,600.

Section 88F of the Industrial Arbitration Act 1940 is in the following terms:

> " 88F. (1) The commission may make an order or award declaring void in whole or in part or varying in whole or in part and either ab initio or from some other time any contract or arrangement or any condition or collateral arrangement relating thereto whereby a person performs work in any industry on the grounds that the contract or arrangement or any condition or collateral arrangement relating thereto—

(a) is unfair, or

(b) is harsh or unconscionable, or

(c) is against the public interest. Without limiting the generality of the words 'public interest' regard shall be had in considering the question of public interest to the effect such a contract or a series of such contracts has had or may have on any system of apprenticeship and other methods of providing a sufficient and trained labour force, or

(d) provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work, or

(e) was designed to or does avoid the provisions of an award, industrial agreement, agreement registered under Part VIIIA or contract determination.

(2) The commission, in making an order or award pursuant to subsection (1), may make such order as to the payment of money in connection with any contract, arrangement, condition or collateral arrangement declared void, in whole or in part, or varied in whole or in part, as may appear to the commission to be just in the circumstances of the case.

(3) . . . . . .

(4) . . . . . "

Although the order of the Industrial Commission that is appealed against referred not only to the Solus Contract, which is in writing, but also to collateral arrangements between the parties to the contract, the facts found by Macken J. do not disclose any agreement, understanding or course of conduct which conflicted with or extended beyond the terms of the written contract; and the appeal to their Lordships has been argued on the basis that the terms that regulated the relationship between Caltex and the Feenans are to be found in the Solus Contract alone.

Mr. Justice Macken found the Solus Contract to be harsh, unfair and unconscionable and also contrary to paragraph (d) of section 88F(1) inasmuch as it provided a total remuneration to the Feenans that was less than persons who performed the work the Feenans in fact did pursuant to the contract would have been paid for doing it as employees. These findings are open neither to appeal nor to review by the Supreme Court or by their Lordships. The only question open to review is whether the Industrial Commission had *jurisdiction* under the section to entertain an application to declare the Solus Contract void upon those grounds; and this turns upon whether it was a " contract . . . . whereby a person performs work in any industry ".

The Solus Contract was made on Caltex's standard printed form of contract by which it licenses persons to use and operate, for the sale of petroleum products supplied by Caltex, service stations of which Caltex is the actual owner or lessee. This is one of the methods most commonly used by Caltex for marketing its products. It has been found to be more economical to Caltex than running the service stations with its own employees. In the case of the Hexham service station itself, this had been run by a previous licensee who had terminated his licence in February 1975. Caltex advertised for a successor, representing that a profit of $20,000 per annum could be gained by its operation. No takers appeared in response to the advertisements until the Feenans came along in July 1975, and, as a result of negotiations in the course of which Caltex's estimate of the potential annual profits rose to $24,000, the Feenans were persuaded to enter into the Solus Contract which took effect from 1 November 1975. In the meantime from February to October Caltex had been running the service station directly by its own employees.

Before turning to the terms of the contract itself, it is convenient to complete the history. The Feenans ran the service station for five months until the end of March 1976. Although both worked very long hours, Mr. Feenan 85 to 90 hours per week and Mrs. Feenan, who also ran a snack bar which formed part of the premises, 75 hours per week, they soon found that they were unable to make anything like the promised profit of $20,000 to $24,000 per annum. In the five months during which they were running it they made a cash profit of only $1,500 each (*i.e.* at the rate of $7,200 per annum) though they also had the benefit of free (two-bedroomed) accommodation on the premises and some saving of expense on food bought at wholesale prices for the snack bar and used for family consumption. Disappointed in their hopes of a reasonable return for the hard work they were putting in, the Feenans gave up the service station in March 1976; and eventually, in March 1979, they started these proceedings in the Industrial Commission.

The Solus Contract, which bore the heading " Licence ", recited that Caltex was the owner of the premises on which the service station was situated and of the plant, equipment and facilities thereon and was also owner of the goodwill of the business of a service station conducted on those premises. It went on to grant to the Feenans a licence to use the premises in common with Caltex, its workmen, servants and agents for a period of twelve months subject to earlier determination as provided in later clauses. The fee payable for this non-exclusive licence was to be $600 per month. The contract also granted what it described as a lease of the goodwill of the business at a monthly rental of $100, the lease to be co-terminous with the licence. Their Lordships find the concept of a " lease " confined to goodwill a highly artificial one; but presumably it was designed to give to the Feenans protection against Caltex selling its own petroleum products on the premises in competition with the Feenans, which the non-exclusive character of the licence might otherwise have permitted it to do.

A number of other clauses in the contract call for mention. Although the term of the licence was expressed to be for twelve months, Caltex reserved the right to terminate it at any time on giving 30 days' notice without assigning any reason. If the Feenans held over after the expiry of the first twelve months it became a licence from year to year terminable by the Feenans by three months' notice expiring at the end of any twelve months' period, but continuing to be terminable by Caltex on thirty days' notice at any time. Caltex also retained a right of termination without notice if any debt owing by the Feenans to Caltex remained unpaid for seven days.

The Feenans undertook to conduct the business on the premises during all lawful hours and to use their best endeavours to secure any necessary authority or permission to secure that those lawful hours should be as long as possible. If they should fail to carry it on for any period during lawful trading hours, Caltex could terminate the licence immediately without notice. In fact while the Feenans were running it, the service station was open from 7 a.m. to 10.30 p.m. each day and from 8 a.m. to 10.30 p.m. on Sundays, or 107½ hours a week. Needless to say, the Feenans were required to purchase all petroleum products sold at the service station from Caltex only although no price was specified. They also undertook not to be concerned in the sale of petroleum products from any other place within a five-mile radius of the service station.

With these features of the contract in mind their Lordships turn to the crucial question of jurisdiction. Was this a " contract whereby a person performs work in any industry "? As a result of numerous decisions in the Industrial Commission of New South Wales, the Supreme Court of New South Wales and in the High Court itself, it is well established that

the phrase is to be treated as broad and comprehensive in its scope. Their Lordships do not find it necessary to refer to any of the earlier authorities, which were helpfully cited in the cases lodged by the parties on the appeal to their Lordships' Board. The argument at the hearing was largely concentrated on the latest relevant authority in the High Court, *Stevenson v. Barham* (1977) 136 C.L.R. 190. In that case, which was about a share-farming agreement, their Honours were split three to two; the majority (Barwick C.J., Mason and Jacobs JJ.) were of opinion that the agreement was caught by section 88F, the minority (Stephen and Aickin JJ.) were of opinion that it was not. The share-farming agreement bore no resemblance to the Solus Contract with which their Lordships are presently concerned. It bore many of the features of a partnership; and on whichever side of the borderline of section 88F it fell, it lay very close to it, as the division of opinion in the High Court shows. The majority and the minority used somewhat different language to express their understanding of the meaning of the crucial phrase: " any contract whereby a person performs work in any industry ", and it has formed the main burden of the argument by Caltex that the way that the minority put it is to be preferred, and that the language that they used in doing so, if properly " construed ", excludes the Solus Contract from the ambit of section 88F. Their Lordships, it was submitted, unlike Mr. Justice Macken and the Court of Appeal, were not bound by any gloss placed upon the section by the majority in *Stevenson v. Barham*. Their Lordships were invited to say that it was wrong.

To speak of " construing " the words in which judges have chosen to express the reasons for their judgments involves, in their Lordships' view, a misuse of language that is all too common and reflects a mistaken approach to the use of judicial precedent. The only words that require to be " construed " are those of the statute itself. The language used by judges to explain the reasons why they think the statutory words do, or do not, apply to the particular circumstances of the case under consideration, is chosen with those particular circumstances in mind and is not intended as a paraphrase of the statutory words that is necessarily appropriate to all other circumstances.

Stevenson v. Barham itself is illustrative of this. The majority, after referring to the judgments in some previous cases, said (at p.201): " It follows, then, that if the contract is one which leads directly to a person working in any industry it has the requisite industrial character —it is a contract whereby a person performs work in any industry . . . . " Speaking of the expression " performs work " in section 88F Stephen J. in his dissenting judgment said (at p.193): " The sense it conveys is, I think, that of work being performed for another " while Aickin J. put it (at p.211): " The basic concept is of a contract whereby one person performs work in an industry for another ". The emphasis laid by the minority on the necessity of the work being performed *for another* was because of the view they took that the share-farming agreement was in all essential features a partnership agreement under which the applicant, who was the working partner, was performing work not for another individual but for the partnership of which he himself was part. In their Lordships' view it does not follow that even the minority in *Stevenson v. Barham* would have held that the Solus Contract, under which no question of partnership arises, fell outside the ambit of section 88F.

Their Lordships accordingly turn to what is the only real question of construction in this appeal. Was the Solus Contract a " contract whereby a person performs work in any industry ", *within the meaning of that phrase in section 88F?* " Industry " is defined in section 5 to mean " craft, occupation, or calling in which persons of either sex are employed for hire or reward ". It covers, therefore, the occupation of supplying petroleum

products and other services to motorists at a service station. Performing work in industry, in their Lordships' view, covers doing anything which a person employed in the same occupation for hire or reward might be expected to be required to do under a contract of employment. So the Feenans when running the service station by their own labours were performing work in industry. The remaining question of construction is whether the Solus Contract was a contract " whereby " they did so. In their Lordships' view this provision in the context of contract or arrangement bears its ordinary meaning of " in consequence of which " or " in fulfilment of which ". Either meaning is sufficient to bring the Solus Contract within the description of contracts to which section 88F applies. The Feenans were required to carry on the task of supplying petroleum products to motorists throughout all lawful working hours. In doing so they were fulfilling their contractual obligations to Caltex. The total remuneration which they received (to use the expression used in section 88F(d)) was the difference between the prices at which they were able to sell those products and the prices which Caltex chose to sell the products to them, together with licence fee and the so-called rental of goodwill. The benefit obtained by Caltex from the Solus Contract in addition to the licence fee and rental of goodwill, was an assured and profitable outlet for their products without incurring the expense of paying wages to employees for doing what, under the Solus Contract, the Feenans had bound themselves to do instead.

In their Lordships' view the Solus Contract falls fairly and squarely within the ambit of section 88F. The Industrial Commission had jurisdiction to hear and determine the Feenans' application, and since it had jurisdiction no appeal lies against the orders that it made.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

313085—3 Dd 0074336 70 3/81

In the Privy Council

CALTEX OIL (AUSTRALIA) PTY. LIMITED

v.

PAUL LESLIE FEENAN AND OTHERS

DELIVERED BY
LORD DIPLOCK

Printed by HER MAJESTY'S STATIONERY OFFICE
1981