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LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

IN THE PRIVY COUNCIL

No. 54 of 1960

ON APPEAL

FROM THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

BETWEEN :

SUNSHINE PORCELAIN POTTERIES PROPRIETARY LIMITED — Appellants (Respondents)

- and -

IRIS DOREEN NASH — Respondent (Applicant)

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal by Special Leave, granted by Order in Council dated 16th March, 1960 from the judgment and order dated the 2nd day of March 1959 of the High Court of Australia which by a majority of three Judges to two allowed an appeal of the above named Respondent from an order of the Full Court of the Supreme Court of Victoria. — p. 67, p. 65, p.30

2. The proceedings between the parties commenced before the Workers Compensation Board of Victoria with an application by the Respondent for compensation. Her application, which was dated 9th February, 1956, was supported by viva voce evidence and there was no dispute on the facts. The following facts were either admitted by consent of the parties or found on the evidence by the Board :- — p. 3

(a) Between the years 1931 and 1938 the Respondent was employed by the Appellants as an insulator cleaner. She was about 15 years of age when her employment began.

(b) She married in December 1937 and ceased to work for the Appellants in May 1938. Since that time she has been supported by her husband.

(c) At no time since she ceased to work for the Appellants has she worked for wages and at the time of hearing of this application she had no intention of again taking up any employment. At the date of hearing she had two children under the age of 16 years and was fully engaged in the domestic duties involved in being a housewife.

(d) During her employment 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 nor manifested by any signs or symptoms until within the last few years. The first symptom noticed by her was breathlessness from about 1950 onwards.

(e) On the 20th day of December 1955 Dr. K.J. Grice certified that she was disabled from earning full wages by reason of silicosis. It was admitted by the Appellants that the Respondent had been physically totally disabled for work by reason of the disease for the last 24 months preceding the date of hearing. By reason of the disease she incurred expenses for medical treatment since 1953, and she was in Fairfield Hospital for about a month in 1956.

(f) No notice of injury nor claim for compensation was given or made before the 5th January 1956 and the Appellants have not paid any sums by way of compensation.

p. 7 The Board made an award of compensation in her favour
p. 1 in the form of weekly payments. An appeal by way of Case Stated on a question of law was made to the Full Court of the Supreme Court of Victoria at the request of the Appellants seeking an answer to the question "whether upon its findings of fact the Board was justified in law in making the said award or any and what part of it?" The hearing before the Full Court took place on 11th and 12th February, 1958. By an Order dated 21st March, 1958 a majority of the Full
p.30 Court answered the question in favour of the
pp.12-21 Appellants - "No." The majority comprised the Chief
pp.22-30 Justice (Sir Edmund Herring) and Smith J. A dissenting judgment was delivered by Duffy, J. The hearing before the High Court occupied 16th, 17th and 20th

October, 1958. By an Order dated 2nd March 1959 the Court allowed the appeal. In the High Court the majority reversing the decision of the Supreme Court comprised the Chief Justice (Sir Owen Dixon) and McTiernan and Windeyer JJ. The dissenting judges were Fullagar and Taylor JJ. Thus of the eight Judges of the superior courts who have considered the matter, four have reached a conclusion favourable to the Respondent and four have taken the contrary view. The taking of the matter by way of appeal from the Supreme Court of Victoria to the High Court of Australia was the choice of the Respondent. pp. 65, 66 pp.34-47 63-65. pp.47-63

3. The issue in the case is whether or not a change made in September 1946 in the provisions of the Victorian Workers Compensation Acts is to be given a retrospective operation so as to impose upon employers in respect of events which occurred prior to September 1946 a liability which such employers did not have prior to that date.

4. Before September 1946, compensation for incapacity for work brought about by disease due to the nature of employment was confined to such incapacity resulting from certain specified diseases only. Silicosis, for example, was not one of such diseases. In 1946 the law was changed so as to entitle a worker to compensation in respect of any industrial disease due to the nature of his or her employment. In the present case the Respondent who is suffering from silicosis due to the nature of her employment with the Appellants ceased her employment with the Appellants in 1938, at which time she relinquished all employment upon marrying. Her disability from the silicosis did not manifest itself until 1950. The question which arises is whether her employer, who ceased to employ her about eight years prior to the 1946 amendment to the legislation, is liable to pay compensation to her in respect of a disease which was not compensable at the time of the employment and did not become a compensable disease until approximately eight years after that employment had terminated. The Appellants respectfully contend that to impose liability in such circumstances would be to give the 1946 amendment to the Workers Compensation Acts a far reaching retrospective operation contrary to well established rules of construction.

5. Inquiries that the Appellants have caused to be made reveal that there are in Victoria at the present

time at least some 16 other pending claims the issue in which would be determined or affected by the final decision in the present case. In a number of instances the Workers Compensation Board has made awards following the High Court decision and such awards have been stayed pending the final decision in the present case. The amount involved in such cases can be very large. The Acts provide for weekly payments during incapacity of £12.16.0. in the case of a man with a wife and dependant children. Payments continue during incapacity up to £2,800 automatically (unless redeemed by a lump sum) and the Board has jurisdiction under certain conditions to authorise payments for life in excess of £2,800 and without any upward limit. Further in the event of death from the disease a surviving widow is entitled to a further £2,240 with additional amounts for dependant children. In the present case the Board awarded compensation to the Respondent at the rate of £2 per week. However since that award was made the Respondent has applied for an increase of that payment to £8.16.0. per week pursuant to the provisions of the legislation empowering the Board to review weekly payments. Where such a review takes place more than three months after the injury the amount of the weekly payment may be increased to such an amount as would have been awarded if the average weekly earnings of the worker before the injury had been the same as the average weekly earnings which the worker would have been earning on the date of the review if the worker had remained uninjured. Her application has been adjourned pending the outcome of this appeal, but if such review takes place her weekly payments may be increased to the amount of £8.16.0. per week claimed. In the event of an award for £8.16.0. per week being made the Appellants' liability in the present case could continue automatically during her lifetime until £2,800 had been paid; and the Board has a discretion under certain conditions to authorise the continuance of weekly payments throughout the life of the person receiving compensation without any upward limit in amount.

6. The main statutory provisions relevant in the present case are as follows; prior to 1946 the relevant section was Section 18 of the Victorian Workers Compensation Act 1928 which was in the following terms :-

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"Industrial Diseases.

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."

The fifth schedule therein referred to specified a number of particular diseases of which silicosis was not one. In 1946 by section 8 of Act Number 5128, which came into operation on the 1st day of September 1946, it was provided that for the above Section 18 there should be substituted the following section - In pocket

"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."

In 1951 the Victorian Workers Compensation Acts were consolidated. Section 5(1) of the 1951 Act provided as follows :- In pocket

"S.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 Acts of 1928 and 1946 were repealed, and the former Section 18 of the 1946 Act became Section 12(1) in the following terms :-

"Compensation for Industrial Diseases.

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 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 by accident arising out of or in the course of that employment and the disablement shall be treated as the happening of the accident."

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In 1953 by Act Number 5676 the words "or is materially contributed to by" were inserted in Section 12(1)(b) after the word "caused", the words "by accident" were repealed and for the words "the accident" the words "the injury" were substituted. References hereafter to the Act and its sections unless otherwise indicated are to the 1951 consolidation as so amended and its sections.

7. The Appellants submit that the 1946 amendment produced two results. In the first place it removed the limitations on the diseases for which a worker could claim compensation. Thus silicosis became a compensable disease for the first time. In the second place it abolished the provision under which a worker was unable to claim compensation unless the disease from which he suffered was due to an employment in which he had been engaged during the twelve months previous to his disablement. The second of these results was brought

about by substituting for the words "within twelve months previous to the date of disablement" the words "at any time prior to the date of disablement." But in the Appellants' submission the substitution of these words did not, on their true construction, have the effect of imposing new liabilities on employers in respect of the employment of workers who had ceased to be employed by them before the date of the amendment, namely, September 1946. Such a construction would give a retrospective effect to the words used, and would therefore, in the Appellants' submission, be contrary to well-established rules of construction.

10. The Appellants respectfully contend that if the employment to the nature of which the disease was due terminated prior to September 1946 no liability for compensation is imposed on the employer. They further contend in the alternative that if the actual cause of the disease occurred at a time and in an employment prior to September 1946, there is no liability for compensation. It has been argued for the Respondent that the statute is not being given retrospective effect provided that the disablement from any disease occurs after the date of the amendment, no matter when the employment to which the disease was due terminated, and no matter that the disease was not compensable at the date of employment. It may further be argued for the Respondent that the statute is not be given retrospective effect if the medical practitioner's certificate, referred to in section 12(1)(a), is given subsequent to the date of the amendment, no matter when the disablement occurred. In the Appellants' submission, the arguments are fallacious. What matters is when the disease was caused, and whether the employment in which it was caused was subsequent to the amendment. It is the causing of the disease, like the causing of the personal injury under section 5(1) that imposes on the employer the liability to compensate his worker. The disablement of the worker is merely the occasion or "happening" of the "injury" on which the liability if any becomes enforceable. Accordingly where any disease was caused in the course of employment before the amendment in September 1946, and a fortiori where the employment itself had terminated before September 1946, the existence of any liability on the part of the employment must be tested by the legislation then in force. The 1946 amendment should be given effect only in relation to diseases caused, and therefore to liabilities arising, after the date of the amendment. Otherwise the statute is being given

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unwarrantable retrospective effect.

11. The Respondent's argument, if pushed to its limit, means that a worker who had been disabled by a disease many years before the 1946 amendment, who had retired from work equally long ago, and who may have had a claim for compensation specifically rejected by the Workers Compensation Board, could now recover compensation from his previous employers by the simple device of obtaining a fresh medical practitioner's certificate. Presumably the worker could further recover compensation retrospectively back to the date of his disablement. In the Appellant's submission, such far-reaching results cannot have been intended by the inclusion of the words "at any time prior to the date of disablement" in the 1946 amendment, and are far beyond the 'mischief' to which that amendment is directed.

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12. It is submitted further tha the words in Section 12(1) of the Act "as if the disease were a personal injury arising out of or in the course of that employment" produce the result that it is only employment subsequent to September 1946 to the nature of which a disease is due which imposes liability for compensation. The provision of the 1928 Act dealing with personal injury by accident was amended in 1946 by substituting the word "or" for the word "and" in the expression "arising out of and in the course of that employment". It is submitted that the substitution of "or" for "and" would be operative only in respect of injury by accident subsequent to September 1946. Accordingly as in the industrial disease section it was provided that "the worker shall be entitled to compensation under the Act as if the disease were a personal injury by accident arising out of or in the course of that employment", it is submitted that the relevant employment to the nature of which the disease was due must be subsequent to September 1946 in the case of a disease which was not compensable as such prior to that date. This was a consideration relied upon by Fullagar and Taylor JJ. in their dissenting judgments.

pp.47-63

13. The Appellants rely upon a decision of Her Majesty in Council in support of their contentions, namely Victoria Insurance Co. v. Junction North Broken Hill (1925) A.C. 354. The effect of this decision has been fully debated in the arguments in the Court below and the Appellants respectfully contend that insufficient weight has been given to its true significance. As

was said by Lord Wrenbury in that case (at p.357) "the date of contraction of the disease and not the date of its ascertainment or its certification is the date for fixing liability". The disablement establishes the happening of the accident or injury, but not the date at which it happened. It is submitted that the date cannot be later than the termination of the employment. But in the present case the employment had terminated before the passing of the Act which made the relevant disease an "injury".

14. Dixon, C.J. was one of the majority in the High Court. The learned Chief Justice said that the most material provision is contained in Section 12(1) of the 1951 Act and that the provision states conditions, on the fulfilment of which a right to compensation arises. He continued :- p.36

> "The question in the present case appears to me to depend entirely on the meaning of the conditions and they, I think, are all stated in the earlier part of the sub-section ending with the words "shall be entitled to compensation." Nothing which follows appears to me to state in terms or to imply any further condition or to state or imply any limitation of the meaning of what has preceded it." p.37

It is respectfully submitted that the concluding words of Section 12(1) state conditions of entitlement and that the conclusions of Fullagar and Taylor JJ. on this aspect were correct. Dixon, C.J. relied upon the fact that Section 12(1) speaks of the worker's right to compensation and said that the selection of a person to bear the burden which the creation of the right to compensation necessarily creates is another, but a secondary matter and that it would be a mistake to take the liability provisions as a guide for determining the scope of the right to compensation which the Act confers. It is respectfully submitted that in a provision for imposing liability for compensation on employers the provisions of the Act imposing that liability are an essential part of the total scheme and should be so regarded in determining the true meaning and effect of the legislation. pp.56-57 pp.62-63.

15. It is submitted that in section 12(1) the words "at any time" were not intended to extend the time backwards to before the date of their enactment. The reasons advanced in the judgment of Fullagar J. for confining these words to the period subsequent to the 1946 Act accord with the well known rules against p.60

giving statutes retrospective operation. Dixon, C.J. adverted to the argument for the Respondent that the
p.46 construction avoiding retrospection might leave without remedy a worker who, but for the passing of the Act of 1946, would have been entitled to compensation. He rejected the argument for the Appellants that section 6(2) of the Victorian Acts Interpretation Act applied in such a case. It is submitted that on this aspect Fullagar J. was correct
p.58 in deciding that Section 6(2) would preserve the rights of the worker in the situation contemplated. The disablement is evidential. The right has accrued when the disease is contracted, and the disablement is merely evidence to establish that the accident or injury occurred earlier. The words "at any time" are no more retrospective than the words which they replace, viz. "within the twelve months previous to the date of the disablement". In both cases, it is submitted there must be employment after the date of the relevant legislation. It is further submitted that in both cases the cause of the disease must occur after that date. The difference between these two submissions is illustrated by Miller v. J.W. Handley Pty. Ltd. (1948) 2 Workers Compensation Decisions (Vict.) 134, where tuberculosis was contracted by a worker prior to September, 1946 but incapacity was subsequent to that date and the employment to the nature of which the disease was due also continued subsequent to that date.

16. The Appellants rely on the application of the presumption against giving a retrospective operation to the legislation if another interpretation is available. The Respondent's construction of the Acts of 1946 and 1951 means that a liability may be imposed on an employer in respect of something - viz. the actual or presumptive contraction of an industrial disease in his employment - which happened before the Act of 1946 became law. Fullagar J. agreed with the
p.55 view of the majority of the Supreme Court that the amendment of 1946 only applied where the worker was employed after that date in an employment to the nature of which the disease was due. He considered that since the scheme of the legislation was to give the worker a right to compensation against his last employer (irrespective of the possible existence of a number of employers),

p.56 "It would seem to follow, as a matter of general principle, that the legislation on which the appellant founds her claim should be construed

as limited in its application to cases where the relevant employment - the last employment to the nature of which the disease is due - is an employment subsisting after that legislation came into force."

The Appellants submit that the learned judge was correct in saying that this construction gave a reasonable operation to the 1946 legislation, and yet avoided attaching -

"new actual or potential legal consequences to facts which have ceased to exist before it came into force. The fact to which new or potential legal consequences are attached here is the employment of a worker in an employment of a particular nature. That fact had ceased to exist before the Act of 1946 came into force." p.56

17. Fullagar J. found his view "strongly supported - if not indeed directly suggested" by the assimilation of a case of industrial disease to one of personal injury, which assimilation is found in the words towards the end of Section 12(1): "as if the disease were a personal injury by accident arising out of or in the course of the employment." He held that since it is clear that Section 5(1), which gives the general right to compensation for injury, "is looking only to the future" it would be only - p.56

"natural and right to say that, just as Section 5 does not apply to an accident occurring in an employment which had ceased before it came into force, so Section 12 does not apply to a disease attributable actually or presumptively to an employment which had ceased before it came into force." p.57

The Appellants respectfully adopt these words of the learned judge. In replacing the limited period of twelve months the legislature did so only to the extent that they enabled the worker to go back to the date of the enactment of the relevant legislation, viz. 1946. There is correlation between the "injury" and the "disease" provisions. Just as the injury has to stem from an employment after the date of the relevant enactment, so the disease must do likewise. It is submitted that this approach is in accord with the decisions in Greenhill v. Daily Record Glasgow Ltd. (1909) 2 B.W.C.C. 244, and Bellambi Coal Co. Ltd. v. Clark (1953) 53 S.R. (N.S.W.) 440, and Victoria

Insurance Co. Ltd. v. Junction North Broken Hill Mine, supra.

p.62 18. Another way of putting the point is to say, as did Taylor J., that ".....s.12 is, in effect, no more than a "deeming" provision which, in appropriate circumstances will enable a worker to bring his case not otherwise within the provisions of s.5(1), within the provisions of that section."
The worker is put in the same position as if he had sustained personal injury arising in the course of his employment. As regards physical injuries, prima facie, at least, compensation can be recovered under s.5(1) only in respect of injuries arising out of an employment after the commencement of the Act. In the case of a worker suffering from an industrial disease (whose right ultimately equally depends upon s:5) the relevant employment must also, it is submitted, be after the passing of the Act. It is further submitted in this connection that the decision of Greenhill v. Daily Record Glasgow Ltd. (supra) is significant as a near-contemporaneous judicial view of the construction to be placed on amending workers compensation legislation similar to the industrial disease provisions of the Victoria Act.

19. The Appellants humbly submit that this Appeal should be allowed for the following amongst other

R E A S O N S

(1) BECAUSE it is a recognised rule of construction that an Act should not be held to operate retrospectively unless clear and specific provision is made therein to that effect;

(2) BECAUSE no such clear or specific provision is to be found in the Victorian workers compensation legislation;

(3) BECAUSE section 18 of the 1946 Act and Section 12 of the 1951 Act operate to give a right to compensation only where the cause of the disease occurred after the dates of their respective enactment;

(4) BECAUSE the said sections operate to give a right to compensation only where there is employment of the relevant kind after the said dates;

(5) BECAUSE the date of contraction of the disease and not the date of its ascertainment or certification is the date for fixing liability;

(6) BECAUSE the disablement does not of itself confer any right - it is merely evidence to establish that the accident or injury occurred earlier, this being established by the "deeming" provision of section 12 of the Act;

(7) BECAUSE the decisions referred to in paragraph 17 above are correct and should be followed;

(8) BECAUSE the decision of the majority of the Full Court of the Supreme Court of Victoria was correct and should be restored;

(9) BECAUSE the decision of the majority of the High Court of Australia was wrong.

EUSTACE ROSKILL

R. A. MacCRINDLE.

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CASE FOR THE APPELLANTS

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