

IN THE PRIVY COUNCIL

No. 26 of 1968

O N A P P E A L

FROM THE SUPREME COURT OF HONG KONG

(in the Full Court of the Colony of Hong Kong)

B E T W E E N :-

THE ATTORNEY GENERAL OF HONG KONG for and
on behalf of himself and all other members
of the Legislative Council of Hong Kong
(First Defendant) First Appellant

10 GEOFFREY CATZOW HAMILTON (Second Defendant)
Second Appellant

- and -

REDIFFUSION (HONG KONG) LIMITED (Plaintiffs)
Respondents

AND

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B E T W E E N :-

20 REDIFFUSION (HONG KONG) LIMITED (Plaintiffs)
Appellants

- and -

THE ATTORNEY GENERAL OF HONG KONG for and
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(First Defendant) First Respondent

GEOFFREY CATZOW HAMILTON (Second Defendant)
Second Respondent

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
6 - DEC 1971
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LONDON W.C.1

CASE FOR THE RESPONDENTS REDIFFUSION
(HONG KONG) LIMITED ON THE APPEAL BY
THE FIRST APPELLANT THE ATTORNEY
GENERAL OF HONG KONG AND THE SECOND
APPELLANT GEOFFREY CATZOW HAMILTON

- p.39* 1. This is an appeal with Special Leave from an Order of the Full Court of Hong Kong in Chambers (The Honourable The Chief Justice of Hong Kong Sir Michael Hogan C.M.G. and the Honourable Mr. Justice Alan Huggins Puisne Judge) made on the 1st day of June 1968, after hearing on the 27th, 28th, 29th and 30th days of May 1968, dismissing the Summons herein (hereinafter called "the First Summons") wherein application was made for relief under Order 12 Rule 8 of the Hong Kong Rules of the Supreme Court 1967. The applicants on the First Summons were Sir David Trench K.C.M.G., M.C., M.D.I. Gass C.M.G., J.P., D.T.E. Roberts O.B.E., Q.C., J.P. for and on behalf of themselves and all other members of the Legislative Council of Hong Kong (hereinafter called "the original First Defendants") and the above named Geoffrey Catzow Hamilton (hereinafter called "the original Second Defendant"). 10
- p.25
p.46 ll.20-43*
- p.27 ll.1-7
p.40 ll.31-34* 2. The Respondents (hereinafter in this Case called "the Plaintiffs") are a company registered in Hong Kong and a wholly owned subsidiary of a United Kingdom company. The said Sir David Trench is the Governor of Hong Kong and as such is President of the Legislative Council of Hong Kong. The said M.D.I. Gass is the Colonial Secretary of Hong Kong and as such is ex officio a member of such Legislative Council, the said D.T.E. Roberts is the Attorney-General of Hong Kong and as such is ex officio a member of such Legislative Council and the said Geoffrey Catzow Hamilton is or was at all material times Deputy Colonial Secretary of Hong Kong and as such is an ex officio member of such Legislative Council. 30
- p.35 l.29 -
p.36 l.10*
- p.36 ll.17-19.*
- p.1* 3. On the 10th day of April 1968 the Plaintiffs issued a Writ against the original First Defendants 40

and the original Second Defendant (hereinafter together called "the original Defendants") as Defendants claiming the following relief.

10 "1. A declaration that it would not be lawful for the Legislative Council of Hong Kong to pass an Ordinance provisionally entitled "A Bill to modify the Copyright Act 1956, in its application to Hong Kong and to make further provision with respect to copyright law in Hong Kong" such Ordinance being ultra vires the Legislative Council of Hong Kong having regard to the terms of Section 31(3) of the United Kingdom Copyright Act 1956 as extended (or proposed to be extended) to Hong Kong and repugnant to the provisions of that Act as so extended (or proposed to be so extended).

20 2. An injunction to restrain the First Defendants and each of them and every other member of the Legislative Council of Hong Kong and the Second Defendant by themselves their respective servants or agents or otherwise howsoever from passing the said Ordinance and from presenting it to the Governor of Hong Kong for his assent.

3. Further or other relief.

4. Costs."

30 4. The present copyright law of Hong Kong is and has been since the proclamation thereof in Hong Kong on the 1st day of July 1912 the Imperial Copyright Act 1911 (hereinafter called "the 1911 Act"), other than provisions thereof expressly restricted to the United Kingdom. The 1911 Act was extended to Hong Kong by Section 25 of the 1911 Act. However the legislature of Hong Kong has power to modify or add to any of the provisions of the 1911 Act in its application to Hong Kong under Section 27 of the 1911 Act save that, except so far as such modifications and additions relate to procedure and remedies, they are to apply only to works the authors whereof were, at the time of the making of the work, resident in Hong Kong and to works first published in Hong Kong. The 1911 Act was amended

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by an Ordinance in 1918 in accordance with Section 27.

5. The 1911 Act was repealed and replaced in the United Kingdom by the Imperial Copyright Act 1956 (hereinafter called "the 1956 Act") as from the 1st day of June 1957, but is preserved in respect of Hong Kong by paragraph 41 of the 7th Schedule to the 1956 Act.

p.28 l.28 -
p.29 l.10
p.43 ll.28-43

6. The 1956 Act for the first time created a separate copyright in sound and television broadcasts. "Television broadcast" and "sound broadcast" are defined for the purposes of the 1956 Act by Section 14(10) in conjunction with Section 48(1) of that Act. Section 48(1) provides that in that Act "television broadcast" and "sound broadcast" are to have the meanings assigned to them by Section 14 of that Act and Section 14(10) provides that in that Act "television broadcast" means visual images broadcast by way of television, together with any sounds broadcast for reception along with those images and "sound broadcast" means sounds broadcast otherwise than as part of a television broadcast. Although under the 1956 Act relaying a broadcast is an infringement of the underlying copyrights in the works the subject of the broadcast, it is not an infringement of the copyright in the broadcast itself. Relevant Sections of the 1956 Act are Sections 1, 2, 3, 13, 14, 16(6) and 48(2) and (3). 10
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7. However Section 40 of the 1956 Act affords protection to the relayer of a broadcast in respect of such underlying copyrights. Thus Section 40(3) (4) and (5) provide as follows, "the Corporation" being the British Broadcasting Corporation and "the Authority" being the Independent Television Authority. 30

"(3) Where a television broadcast or sound broadcast is made by the Corporation or the Authority, and the broadcast is an authorised broadcast, any person who, by the reception of the broadcast, causes a programme to be transmitted to subscribers to a diffusion service, being a programme comprising a literary, dramatic or musical work, or an 40

adaptation of such work, or an artistic work, or a cinematograph film, shall be in the like position, in any proceedings for infringement of the copyright (if any) in the work or film, as if he had been the holder of a licence granted by the owner of that copyright to include the work, adaptation or film in any programme caused to be transmitted by him to subscribers to that service by the reception of the broadcast.

10 (4) If, in the circumstances mentioned in either of the two last preceding sub-sections, the person causing the cinematograph film to be seen or heard, or the programme to be transmitted, as the case may be, infringed the copyright in question, by reason that the broadcast was not an authorised broadcast, -

(a) no proceedings shall be brought against that person under this Act in respect of his infringement of that copyright, but

20 (b) it shall be taken into account in assessing damages in any proceedings against the Corporation or the Authority, as the case may be, in respect of that copyright, in so far as that copyright was infringed by them in making the broadcast.

(5) For the purposes of this section, a broadcast shall be taken, in relation to a work or cinematograph film, to be an authorised broadcast if, but only if, it is made by, or with the licence of, the owner of the copyright in the work or film."

30 8. As a result a person wishing to relay a broadcast is not required by the 1956 Act to obtain the permission either of the owner of the copyright in the broadcast itself or of the owner or owners of the underlying copyrights in the works broadcast.

40 9. Under Section 31(1) of the 1956 Act, Her Majesty may by Order in Council direct that any of the provisions of that Act specified in the Order shall extend, subject to such exceptions and modifications (if any) as may be specified in the

1947 and the Plaintiffs now distribute sound and television programmes on a commercial basis, the majority of the sound and all the television programmes being originated by the Plaintiffs and certain of the sound programmes being originated by others.

10 (b) The programmes are distributed under licences issued under the Telecommunications Ordinance, issued for sound in 1965 and for television in 1957, both being due to expire on the 13th day of April 1973.

*p.27 ll.17-21
p.41 ll.2-6
pp.66 and 77*

The sound licence gave to the Plaintiffs :-

20 "The exclusive right to distribute broadcast messages and programmes, specially intended to be received by the public in general, by means of wires connected to the premises of other persons in the said colony ... and to the intent that the subscribers may receive in their respective premises such broadcasts, messages and programmes as transmitted from broadcasting stations included in the official list of broadcasting stations issued by the International Telecommunications Union at Geneva ...".

*p.41 ll.7-17
p.67 ll.9-24*

Similarly, the television licence gave to the Plaintiffs :-

30 "(b) The exclusive right to maintain a service to the public consisting of television programmes and matter....by means of wires connected to the premises of other persons in the said Colony, and

*p.41 ll.18-32
p.78 l.20-
p.79 l.3*

(c) the right to establish maintain and work television broadcast receiving station or stations... and to relay from the distribution station any television programme broadcast from any broadcasting station included in the official list of broadcasting stations issued by the International Telecommunications Union at Geneva."

40 Such licences contain references to copyright which, in the television licence, are expressed as

follows :-

*p.42 l.46-
p.43 l.19
p.88 ll.14-28.*

"17(1) Except when it is known to be contractually permissible to do so the licensee shall not record, reproduce, publish or otherwise disseminate or allow to be recorded, reproduced, published or otherwise disseminated any matter sent for general reception by any broadcasting station and received by means of the broadcast receiving station.

(2) It is hereby declared that nothing herein contained authorises the licensee to do any act which is an infringement of any copyright which may exist in any published programme or other printed matter or in any matter received by means of the broadcast receiving station". 10

*p.27 ll.33-39
p.41 ll.33-38.*

(c) In August 1965 the Plaintiffs applied for a licence to broadcast under Section 7 of the Television Ordinance 1964 but the application was not accepted and a licence was granted to Television Broadcast Limited (hereinafter called "T.V.B.") another company registered in Hong Kong. 20

*p.27 l.40-
p.28 l.10
p.42 ll.1-45.*

(d) Satisfactory reception of television signals cannot, because of the mountainous terrain and density of population, with many tall blocks of flats and offices, be achieved in many areas of Hong Kong without transmissions through wires, or the use of a relay system, that is the use of special aerials erected on such blocks of flats and offices and in other shadow locations, such aerials being connected by wires to the television receivers. 30

*p.29 ll.11-29
p.44 ll.17-30.*

(e) In or about September 1967 the Plaintiffs learned that the United Kingdom Government intended to extend the 1956 Act to Hong Kong by Order in Council and, also, that the Hong Kong Government intended to introduce an Ordinance to modify the provisions of that Act as extended to Hong Kong. Copies of a draft Order in Council and a draft Ordinance were sent to the Plaintiffs by the original Second Defendant in the course of correspondence between the Plaintiffs and the 40

*pp.89 and 201.
pp.100 and 210.*

original Second Defendant. The Order in Council as drafted proposed to extend Sections 14 and 31(3) of the 1956 Act to Hong Kong, but not to extend Section 40(3), and to amend Section 40(4) and (5).

(f) The provisions of the draft Ordinance caused great concern to the Plaintiffs because it purported, by Section 2, to define a television broadcast for the purposes of the Ordinance not only as having the meaning assigned to it by Section 14 of the 1956 Act but in addition including :-

p.29 l.36-
p.30 l.44
p.44 l.30-
p.45 l.13.

10 "Visual images transmitted to the premises of subscribers to a diffusion service over wires or other paths provided by a material substance together with any sounds transmitted along with those images".

This was an attempt to enlarge the definition in the 1956 Act and was neither a modification or addition relating to procedure or remedies nor otherwise consistent with the requirements of the proviso to Section 31(3) of the 1956 Act.

20 Having purported to modify such definition Section 4(1) of the draft Ordinance sought to provide that, subject to subsection (2), the 1956 Act as extended to Hong Kong should apply in Hong Kong to every television broadcast made by any organisation specified in the Schedule thereto from a place in Hong Kong as it applies to every television broadcast made by the British Broadcasting Corporation or the Independent Television Authority from a place in the United Kingdom. The Plaintiffs and T.V.B. were listed in such Schedule. The draft
30 Ordinance then, in Section 4(2), sought to provide that it should be an act restricted by the copyright in a television broadcast to broadcast the television broadcast or to cause the television broadcast to be transmitted to the premises of subscribers to a diffusion service over wires or other paths provided by material substance. Since the latter is not an act restricted by the copyright in a television broadcast by Section 14 of the 1956 Act,
40 this was an attempted enlargement of the copyright in television broadcasts as such. This was made

clear by Section 4(3) of the draft Ordinance and was in excess of the powers conferred by Section 31(3) of the 1956 Act.

p.30 l.45-
p.31 l.8
p.45 ll.14-22.

(g) At the moment broadcasts as such are not protected under the existing copyright law of Hong Kong. The effect of passing the Ordinance in the form proposed would seriously affect the Plaintiffs' rights under their licences since it would mean that, if passed, it would then be an infringement of the new copyright in television broadcasts as such to relay such broadcasts without permission. This was not the position in the United Kingdom nor, so far as the Plaintiffs were aware, in any other country to which the provisions of the 1956 Act have been extended. As a result the Plaintiffs would need to obtain the permission of T.V.B. in respect of the copyright in T.V.B. broadcasts, before relaying such a broadcast.

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p.31 l.9 - p.34
l.25.
p.45 l.33 - p.46
l.14.

(h) The Plaintiffs were advised that it would be unlawful for the Legislative Council of Hong Kong to pass such an Ordinance as being ultra vires and/or repugnant. Consequently the Plaintiffs entered into correspondence with the original Second Defendant which correspondence (in particular the letters of the 5 September 1967, the 7 October 1967 and the 10 February 1968) makes it clear that the attitude of the Hong Kong Government vacillated, first indicating an intention to include, then to exclude and finally to include Section 4(2) of the draft Ordinance.

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pp.133-193 and
193-200.
pp.137, 172 and
193.

12. In these circumstances, and because the Plaintiffs apprehended that the Order in Council extending the 1956 Act to Hong Kong was shortly to be laid before the United Kingdom Parliament, the Plaintiffs issued the said Writ on the 10th day of April 1968 and on the 19th day of April 1968 filed a Notice of Motion seeking interlocutory relief. The Plaintiffs filed evidence as to the matters referred to in paragraph 11 hereof in support of such Motion, which evidence was incorporated by reference in the evidence filed by the Plaintiffs in opposition to the First Summons.

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p.34 l.26 - p.35
l.11.

p.1.

pp.26-35 and 66-
216.

pp.38 and 39.

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13. Pursuant to an Order of the Registrar of the Supreme Court of Hong Kong made on the 17th day of April 1968 giving the original Defendants leave to enter conditional appearance herein conditional appearances were duly entered for the original Defendants on the 19th day of April 1968 without prejudice to an application to set aside the Writ of Summons herein.

p.3.

10 14. The original Defendants filed the First Summons on the 1st day of May 1968 seeking the following relief :-

p.25
p.46 ll.20-43

"An order -

(a) that the Writ of Summons herein be set aside upon the grounds that the said Writ seeks reliefs outside the jurisdiction of this Honourable Court, namely reliefs designed to prevent members of the Legislative Council from proceeding with a lawful part of the legislative process of Hong Kong; and further and in the alternative

20 (b) that the Writ of Summons herein be set aside upon the grounds that the said Writ seeks reliefs outside the jurisdiction of this Honourable Court, namely -

(i) in that the said Writ seeks a declaration as to hypothetical and future questions to which declaration the Plaintiffs have no right; and

30 (ii) in that the said Writ seeks an injunction the granting of which is prohibited under Section 16 of the Crown Proceedings Ordinance."

First Ground. Interference with Legislative Process.

15. Contentions of the original Defendants

40 (i) The original Defendants dealt first with the case of sovereign parliaments and referred to instances in which the Courts of England had been prepared to interfere, or had considered interfering with the parliamentary process in the United Kingdom. These involved a sovereign parliament, which was necessarily different from the legislature in question here, but the original

p.47 l.1-
p.50 l.14.

Defendants submitted that they showed how slow the Courts should be to interfere with the legislative process. They submitted that the Courts would only interfere in two classes of case, first where some wrong step in the actual legislative process itself was alleged, reliance being placed on Harper & Anor. v. Secretary of State for the Home Department 1955 1 A.E.R. 331, secondly where some individual or body was acting inequitably in seeking the enactment of a private bill, reliance being placed on Bilston Corporation v. Wolverhampton Corporation 1942 Ch. D. 391, an article in Vol. 59 of "Law Quarterly Review" by Professor Holdsworth, Heathcote v. The North Staffordshire Railway Co. 42 E.R. 39 at 43, Merricks v. Heathcoat-Amory 1955 Ch. D. 567 and the introduction to the 10th edition of Diceys' 'Law of the Constitution' by Professor Wade.

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p.50 l.15-
p.52 l.36.

(ii) The original Defendants dealt next with the position of non-sovereign parliaments such as the Legislative Council of Hong Kong and referred to Attorney-General for New South Wales v. Trethowan 1931 44 C.L.R. 394 as an instance of the Courts interfering where some improper step was allegedly being taken. The original Defendants contended that this case was not very material to the instant case because, although the questions at issue may, in the lower courts, have involved one of jurisdiction, they were confined to the merits when the case came to the High Court of Australia and subsequently before this Committee. The original Defendants also claimed that the value of this case was considerably impugned by subsequent references to it, in particular the reference by Sir Owen Dixon C.J. in Hughes and Vale Proprietary Ltd. v. Gair 90 C.L.R. 203. The original Defendants also relied upon certain observations in Clayton v. Heffron 105 C.L.R. 214 in Hanburys Modern Equity 8th Edition p. 609 and by Professor Zelman Cowen in 71 Law Quarterly Review p.341.

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p.52 l.37-
p.53 l.50.

(iii) The original Defendants then turned to the precise terms of the Writ in this action. This

sought a declaration that it would not be lawful for the Legislative Council of Hong Kong "to pass an Ordinance provisionally entitled 'A Bill to modify the Copyright Act 1956'" and contended that the Legislative Council of Hong Kong, under the provisions establishing it, does not pass Ordinances, but passes Bills. These do not by the mere act of the Legislative Council move into the sphere of legislation, but remain in the sphere of advice and permission given to the Governor in Hong Kong to enact legislation if he thinks it appropriate to do so. The action of the members of the Legislative Council in debating a measure of this kind and in expressing their views on it was not an illegal act. There was no illegal act until the Bill reached the state of enactment. The document was not yet a Bill but no more than a draft. They submitted that the Full Court had no jurisdiction, alternatively that the Full Court should not entertain jurisdiction. The proper time for challenging the validity of this measure was after enactment as shown by the observations of Sir Owen Dixon C.J. in the Hughes case.

16. Contentions of the Plaintiffs

In reply the Plaintiffs relied on the following passage from the opinion of this Committee in Bribery Commissioner v. Ranasinghe 1965 A.C. 172 "A legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law." This was a view expressed to apply whether the legislature was sovereign or not and which was clearly applicable to the non-sovereign legislature of Hong Kong. Further the Plaintiffs contended that the Trethowan case was powerful authority for the proposition that, in dealing with the non-sovereign Legislative Council of Hong Kong, the Courts have jurisdiction to entertain the relief sought by the Plaintiffs in this case. This was implicit in the decisions in that case, both in the High Court of Australia and of this Committee (1932 A.C.526), because, if there had been any question of jurisdiction, that point would have been bound

p.55 l.10-
p.56 l.3.

to have been raised. The case of Montreal City v. Montreal Harbour Commissioners 1926 A.C. 299 indicated that where relief of the kind in question in this action was sought it should be sought promptly. The Plaintiffs emphasised that on the First Summons the question was whether the Full Court had jurisdiction, not whether the jurisdiction should in the circumstances be exercised. The Plaintiffs contended that, although it would not be strictly an error in procedure, if and when the Legislative Council considered the document furnished to the Plaintiffs as a draft Bill, yet if the Legislative Council should take into consideration and seek to pass a Bill which, if and when it was enacted would be illegal, all the proceedings up to that point would be tainted proceedings and consequently illegal.

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17. Decision of the Full Court

p.54 l.28-
p.55 l.9.

The Full Court, in its decision on the first ground, found difficulty in ascertaining whether the question of jurisdiction in the Trethowan case figured in the decisions of the various Courts concerned and came to the conclusion that the Judge of first instance must have been satisfied he had jurisdiction and subsequent references in the Hughes case indicated that the question must have been raised at a higher level. This was borne out by a remark of Professor Zelman Cowen in 71 L.Q.R. p.337.

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p.56 ll.4-35.

The Full Court decided that neither the doctrine of separation of powers, in so far as it is recognised in England, or any other relevant doctrine compelled them to hold that they had no jurisdiction under any circumstances to grant an injunction against the members of the Legislative Council of Hong Kong. If they were satisfied that the original Defendants were right in their main contention that nothing illegal on the part of the original Defendants was in contemplation, that would not mean that they had no jurisdiction to enter upon and determine such an issue, but simply that there was no occasion for granting relief. Dealing with the original Defendants' contention that they should not entertain jurisdiction, the Full Court considered that it may

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be that there is only a very fine distinction between holding that there is no jurisdiction to give the relief asked and saying that the relief asked is such that the Court is unlikely ever to give it. But it was a distinction they must recognise. If, as the Bribery Commissioners case so clearly showed, the validity of the legislative process can be subsequently examined and pronounced upon them, leaving aside the factor of the "hypothetical question", it seemed illogical to say that there was no jurisdiction to pronounce on its prospective exercise. Consequently they refused to set aside the Writ on the first ground.

18. The Plaintiffs respectfully submit and contend that the decision of the Full Court on the first ground was correct for the reasons given in the Decision. Accordingly the Plaintiffs respectfully submit that this appeal should be dismissed in so far as it relates to the first ground.

20 Second Ground. First Part. Hypothetical and Future Questions.

19. Contentions of the original Defendants

The original Defendants referred to the procedure and powers prescribed for the Legislative Council by the Letters Patent and the Royal Instructions under which it operates and submitted that the role of the Legislative Council was "powerfully permissive" with regard to legislation. They relied on Re Barnato 1949 1 A.E.R. 515 at 520 as showing that where the matters put before the Court are hypothetical the Court has no jurisdiction to enter into them and make a declaration of the rights and obligations which would arise if the hypothetical suppositions should come to pass. They also relied on Nixon v. Att.-Gen. 1930 1 Ch. D. 566 at 575, Draper v. British Optical Association 1938 1 A.E.R. 115, Howard v. Pickford Tools Co. Ltd. 1951 1 K.B. 417 and on certain passages in "The Declaratory Judgment" by I. Zamir.

p.56 l.36 - p.60 l.22

pp107 and 124.

20. Contentions of the Plaintiffs

p.60 l.23 - p.61 l.17.

pp.33 ll.26-44
and 193.
p.36 l.31 - p.37 l.1.

The Plaintiffs submitted that, far from the facts on which reliance was placed in the present case being hypothetical, they were very certain as appeared from the Plaintiffs' evidence. Indeed the evidence filed on behalf of the original Defendants on the First Summons stated that a draft Order in Council and a draft Bill were on the 10th day of February 1968 forwarded to the Secretary of State for his comments thereon. It had thus been clearly indicated to the Plaintiffs that it was the intention of the officers against whom relief was sought to introduce and pass legislation along the lines indicated in such evidence in the immediate future. The Plaintiffs relied on Guaranty Trust Company of New York v. Hannay & Co. 1915 2 K.B. 536 for the proposition that the Courts would make a declaration even though no cause of action had actually arisen at the time when the declaration was made. Re Barnato was concerned with a remote contingency whereas, in the present instance, the Plaintiffs were concerned with a very proximate contingency likely to cause them serious damage.

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21. Decision of the Full Court

p.61 l.18-

p.64 l.28.

The Full Court, in its decision on the first part of the second ground, considered the authorities and went on to consider the history of declaratory judgments and the change in the Courts' attitude thereto. In considering the problem the Full Court stated that they derived considerable assistance from Mr. Zamir's book "The Declaratory Judgment" pages 31 and 44 and the authorities therein referred to. The Full Court concluded that there was jurisdiction and that, in certain circumstances, a declaration would be made although the question is hypothetical, it being a matter of discretion for the Court. Also that the Court would deal by declaration with "future rights". Consequently they refused to set aside the Writ on the first part of the second ground.

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22. The Plaintiffs respectfully submit and con-

tend that the decision of the Full Court on the first part of the second ground was correct for the reasons given in the Decision. Accordingly the Plaintiffs respectfully submit that this appeal should be dismissed in so far as it relates to the first part of the second ground.

Second Ground. Second Part. Section 16 Crown Proceedings Ordinance.

10 23. The original Defendants having agreed that they could not succeed on the second part of the second ground alone the Full Court made no comment thereon.

p.64 ll.28 and 29.

24. The Plaintiffs therefore respectfully submit that the Decision of the Full Court on the First Summons was correct and should be upheld for the following reasons amongst others.

REASONS

20 1. Because the Courts have jurisdiction to grant reliefs of the kind sought by the Plaintiffs in this action even if such reliefs interfere with the legislative process of a non-sovereign legislature such as the Legislative Council of Hong Kong.

2. Because the Courts have jurisdiction to grant a declaration of the kind sought by the Plaintiffs in this action even if such declaration relates to hypothetical or future questions.

30 3. Because it cannot be decided before the hearing of the Motion or the trial of this Action whether the consideration of the draft Ordinance by the Legislative Council was a lawful part of the legislative process of Hong Kong.

4. Because the relief sought in this Action relates not to a hypothetical or future question but to a definite threat of allegedly unlawful action damaging to the Plaintiffs.

5. Because the relief sought on the First Summons is not appropriate to be granted under Order 12 Rule 8.

No. 25 of 1968

CASE FOR THE APPELLANTS REDIFFUSION
(HONG KONG) LIMITED ON THEIR APPEAL

p.7. 25. This is also an appeal with Special Leave from another Order of the same Full Court of Hong Kong in open court made on the 7th day of June 1968, after hearing in Chambers on the 3rd, 4th and 5th days of June 1968, striking out the Writ of Summons on an application therefor by a further Summons herein (hereinafter called "the Second Summons") under Order 18 Rule 19 of the Hong Kong Rules of the Supreme Court 1967. The applicants on the Second Summons were again the original Defendants. 10

p.4
p.9 ll.5-20.

p.4
p.9 ll.5-20.

26. The Second Summons, which was also filed herein by the original Defendants on the 1st day of May 1968, sought the following relief :-

"An Order -

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(a) that the Writ of Summons herein be struck out upon the grounds that the said Writ discloses no reasonable cause of action in that the said Writ seeks reliefs designed to prevent members of the Legislative Council from proceeding with a lawful part of the legislative process of Hong Kong; and further and in the alternative,

(b) that the first relief claimed in the indorsement on the Writ of Summons herein be struck out upon the grounds that the said first relief discloses no reasonable cause of action, in that the said first relief sought is a declaration as to hypothetical and future questions; and further and in the

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alternative,

(c) that the second relief claimed in the indorsement on the Writ of Summons herein be struck out upon the grounds that it discloses no reasonable cause of action in that the second relief sought is an injunction the granting of which is prohibited under Section 16 of the Crown Proceedings Ordinance."

10 27. On the 5th day of June 1968 the Writ of Summons herein was amended,

p.5.
p.7 l.42-
p.8 l.34.

(i) as to parties by Order of the said Full Court under Order 15 Rule 12 of the Hong Kong Rules of the Supreme Court 1967 to substitute The Attorney-General of Hong Kong (the above named First Respondent who with the original Second Defendant are hereinafter called "the present Defendants") in a representative capacity in place of the original First Defendants, with consequential amendments.

20 (ii) as to indorsement of claim under Order 20 Rule 1 of the Hong Kong Rules of the Supreme Court 1967 to include, in the first relief sought by the Writ of Summons herein, a reference to Section 27 of the Imperial Copyright Act 1911.

28. General

30 (i) The present Defendants conceded for the purposes of the Second Summons that the entire Bill referred to in the Writ of Summons herein, if it became an Ordinance, would conflict with the provisions of the Imperial Copyright Act 1911 or the Imperial Copyright Act 1956 and would to the extent of such conflict be void by reason of Section 2 of the Colonial Laws Validity Act 1865.

p.8 l.35 - p.9 l.4.

(ii) The Appellants (hereinafter in this Case called "the Plaintiffs") contended that the principles upon which an order to strike out may be made under Order 18 Rule 19 aforesaid are as follows :-

p.9 ll.21-44.

(a) Order 18 Rule 19 is in terms permissive, not mandatory.

(b) Order 18 Rule 19 provides that no evidence is to be admissible on an application thereunder and therefore, where the application is to strike out a Writ before there have been any pleadings, the Court is only concerned with what appears on the face of the Writ.

(c) This summary remedy is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court; Nagle v. Feilden 1966 2 Q.B. 633; Kemsley v. Foot 1951 2 Q.B. 34; Wenlock v. Moloney 1965 1 W.L.R. 1238; Kellaway v. Bury 1892 66 L.T. 599.

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(d) A case is not "plain and obvious" where it raises an arguable question of general importance or a serious question of law; Dyson v. Attorney-General 1911 1 K.B. 410; Kemsley v. Foot 1951 2 Q.B. 34; Vacher & Sons Limited v. London Society of Compositors 1913 A.C. 107.

(e) Where it is sought to strike out a Writ before there have been any pleadings the Courts should be particularly careful in applying this summary remedy; Electrical Development Company of Ontario v. Attorney-General for Ontario 1919 A.C. 687; Wright v. Prescott Urban District Council 1916 115 L.T. 772.

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(f) The Court may permit amendment of a pleading and, if amendment will save the pleading, this summary remedy is not available.

First Ground. Interference with Legislative Process.

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29. Contentions of the present Defendants

p.9 l.45 - p.10 l.30.

p.124.

p.107.

The present Defendants contended (a) that the Legislative Council of Hong Kong, which derived its existence and powers from the Letters Patent constituting the office of Governor of Hong Kong and Royal Instructions to the Governor of Hong Kong, does not pass Ordinances at all and that, in effect, the Full Court was to treat the Writ as though the

words "pass a Bill" were substituted for the words "pass an Ordinance" (b) that the passing of a Bill, which, if assented to by the Governor, would become an Ordinance, and an Ordinance repugnant to an Imperial Statute applicable in Hong Kong, is not ultra vires the Legislative Council. The acts of the Legislative Council are to be considered as separate and distinct from the act of enactment and unaffected by any invalidity which may subsequently appear. The present Defendants submitted that there was no question of failing to comply with some statutory prerequisite or requirement for the passage of the Bill, so no question arose under Section 5 of the Colonial Laws Validity Act 1865. Section 2 of that Act on which the Appellants must rely, goes only to enacted law and the conflict which would make the Ordinance void and inoperative could only arise as and when the Bill was assented to by the Governor and became an Ordinance.

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30. Contentions of the Plaintiffs

In reply the Plaintiffs contended (1) That the Copyright Law in force in Hong Kong could only be altered or modified in specified ways of which the proposed Ordinance was not one and that consequently the anterior steps leading up to the enactment of the Ordinance would in themselves be unlawful. (2) That the subsequent invalidity would relate back to the proceedings of the Legislative Council and therefore it would be ultra vires the Legislative Council to pass and to present for the Governor's assent any Bill which would be invalid if assented to. (3) That the enactment of such a Bill would be ultra vires the Legislature of Hong Kong, that the Legislative Council is a constituent part of such Legislature and that therefore the passing of the Bill by the Legislative Council would be ultra vires the Legislative Council. The Plaintiffs relied upon Bribery Commissioner v. Ranasinghe 1965 A.C. 172, in particular the passage from the opinion of this Committee referred to in paragraph 16 hereof. The Plaintiffs also relied on Attorney-General for New South Wales v. Trethowan 1931 44 C.L.R. 394; 1932 A.C. 526 and contended

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that, for the purposes of the present proceedings, it was immaterial whether the alleged defect in the proposed legislation was attributable to a faulty step or failure in a particular part of the legislative process or to the contents of the legislation itself.

31. Ruling of the Full Court

p.9 ll.21 and 22.

The Full Court, in its Ruling on the first ground, after acknowledging that there was no real dispute as to the principles upon which an order to strike out may be made under Order 18 Rule 19 aforesaid, stated that the question in issue was not merely whether Section 2 of the Colonial Laws Validity Act 1865, which deals with the content of the legislation and not with the manner and form of its enactment, will operate to invalidate a law which may emerge from, or as a result of, a legislative process in Hong Kong, but whether it will also operate to invalidate and render (retrospectively) unlawful steps taken at an earlier stage when the contents of the proposed legislation are in the form of a Bill, prior and leading up to its enactment. The Full Court stated that they found difficulty in accepting the Plaintiffs' argument that it was immaterial to what the alleged defect was attributable in view of the differences between Sections 2 and 5 of the Colonial Laws Validity Act 1865. The Writ did not suggest that there was a positive prohibition which was being or was about to be violated as in the Trethowan case, nor was it suggested that there was failure or would be failure to comply with a particular procedure, form or manner which alone would give validity to the step which was being taken and the enactment which would follow it.

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p.12 l.9 - p.16 l.14.

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The legislation on which the Plaintiffs relied purported not to prescribe, limit or control the action of which the Plaintiffs complained, but merely to render ineffective the measure or law which would emerge or result if, at a later stage, the Governor exercised the power vested in him by the constitution and took the step of assenting to

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the measure which had been the subject of advice and consent by the Legislative Council, but which up to that moment of assent, did not purport to be more than a proposal for legislation which the Governor might or might not accept.

10 The Full Court considered the Trethowan and Ranasinghe cases less relevant than the case of Hughes and Vale Proprietary Ltd. v. Gair 90 C.L.R. 203 and, in particular, the statement by Sir Owen Dixon C.J. therein that "An application for an injunction restraining the presentation of a Bill for the Royal Assent is not unprecedented, but it is at least very exceptional. We do not think it should be granted on this occasion or later or in any case".

20 The Full Court also found assistance from passages in the judgment of the majority in the case of Clayton v. Heffron 105 C.L.R. 214 as illustrating the distinction, seen by the Full Court, between an enactment having the force of law and a Bill, or the substance of a Bill, which, prior to the assent of the Governor, is not law, but merely a proposed law or measure undergoing the process involved in the production of legislation. The Full Court considered that the judgment of the majority in the Clayton case was to the effect that they would not enquire into the procedure in Parliament, or at least they would not do so unless there was some allegation of a failure to observe
30 a statutory requirement; such a statutory requirement would be part of the general law of the land, while the Courts would recognise the right of Parliament to adopt any procedure it thought fit so long as it did not conflict with the general law.

40 The Full Court found the Australian cases persuasive, both in the principles they recognised and endorsed and in their illustration of the approach adopted by the Australian Courts to the question of interference with a non-sovereign legislature. Some of the passages mentioned by the Full Court were used in the argument on jurisdiction, but the Full Court did not regard them as

necessarily and solely referable to jurisdiction. The Full Court thought they had a bearing on the question whether the relief, which they had held lay within their jurisdiction, should be granted in the circumstances of the present case.

Dealing with the Plaintiffs' contention that the enactment of the Bill in question would be ultra vires the Legislature of Hong Kong and, since the Legislative Council is a constituent part of the Legislature, the passing of the Bill by the Legislative Council would be ultra vires the Legislative Council, the Full Court considered the provisions of the said Letters Patent and the said Royal Instructions and concluded that the Legislative Council was a participant in the legislative process and, as such, was a part of the Legislature. However the Full Court decided that, notwithstanding that the Legislative Council was part of the Legislature, it did not follow that it was necessarily ultra vires the part to advise what would be ultra vires the whole. The Full Court saw no reason why the Legislative Council should not pass a Bill and ask the Governor to seek the necessary power to enable him to assent, or to seek the removal of any obstacle to assent.

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This, the Full Court held, did not involve any illegality. No repugnancy could arise until the Governor assented to a Bill which was ultra vires the Legislature to pass. The Full Court could see no justification for relating back to the proceedings in the Legislative Council any invalidity which might subsequently affect an enacted Bill.

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The Full Court held that the relief requested in the first paragraph of the Writ could not be granted because it was not, in the view of the Full Court, unlawful for the Legislative Council of Hong Kong to pass a Bill that contained provisions which, if and when the Bill was assented to and became an Ordinance, would be in conflict with the provisions of the Imperial Copyright Act 1911 and such provisions of the Imperial Copyright Act 1956 as may apply to Hong Kong. Whilst the provisions of the

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Ordinance would, in such circumstances, be void and inoperative in Hong Kong as a result of Section 2 of the Colonial Laws Validity Act 1865, the actions of the Legislative Council in entertaining such a Bill and giving it a first, second and third reading would not in themselves be unlawful.

For those reasons the Full Court struck out the first, second and third paragraphs of the Writ.

10 32. The Plaintiffs respectfully submit and contend that the Ruling of the Full Court on the first ground was wrong in that

(a) Although the Full Court acknowledged the correctness of the principles upon which an order to strike out may be made under Order 18 Rule 19 aforesaid, it failed to apply them in this case. The Second Summons was an application to strike out a Writ before there had been any pleadings, so that it was a case where particular care must be taken in applying this summary remedy. However, notwithstanding that Order 18 Rule 19 expressly provides that no evidence is admissible on an application thereunder and the Full Court should, therefore, only have been concerned with what appeared on the face of the Writ, the Full Court, in reaching its decision on the first ground, wrongly made reference to the evidence filed herein on the First Summons namely the said Letters Patent and the said Royal Instructions. Nor is it a plain and obvious case because the Writ raises serious questions of law, in particular at what stage, for what reasons, by what reliefs and against what persons the Courts will interfere with the legislative process of a non-sovereign Parliament. In this regard the Plaintiffs rely particularly on the facts that

p.9 ll.21 and 22.

*p.9 l.45 - p.10 l.30 ar
p.14 l.49 - p.16 l.10*

pp.107 and 124.

30 (i) The Full Court heard argument on the Second Summons for some 3 days upon which it delivered a Ruling after taking time for consideration. Hereunder the Plaintiffs will rely on the following passage from the judgment of Danckwerts L.J. in the Court of Appeal in Nagle v. Feilden 1966 2 Q.B. 633 at 648 who, after a hearing lasting

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2 days, said "As a result of the intense and interesting arguments which have taken place before us, it appears this case is not so simple and obvious that the summary power of the Court should have been applied. That is really sufficient to dispose of the matter before us". And

p.9 l.45 - p.10 l.30.
p.14 l.49 - p.16
l.10.

(ii) The Full Court, in reaching its decision on the first ground, considered and adjudicated upon arguments relating to the constitutional position of the Legislative Council of Hong Kong based in part on the said evidence. 10

p.13 ll.11-27
p.14 ll.40-48.

(b) The Full Court, in reaching its decision on the first ground, misdirected itself in that it considered the matter for decision was whether the Court, in the exercise of its discretion or otherwise, should grant the relief claimed in the Writ (which the Plaintiffs respectfully submit should properly be decided at the hearing of the Motion or trial of this Action) and thus reached a conclusion upon the substantive issues in this Action in order to reach a decision on the question before them namely whether there was or was not a reasonable cause of action. 20

p.15 ll.24-27.

p.14 l.49 -
p.16 l.10.

(c) The Plaintiffs respectfully submit that the Full Court was wrong, having decided that the Legislative Council of Hong Kong was part of the Legislature of Hong Kong, in rejecting the Plaintiffs contentions that the enactment of the proposed Bill would be ultra vires the Legislature of Hong Kong, that the Legislative Council was a constituent part of such Legislature and that, therefore, the passing of the Bill by the Legislative Council would be ultra vires the Legislative Council, on the basis that no repugnancy could arise until the Governor assented to a Bill which was ultra vires the Legislature to pass. 30

The effect of this decision must be that the Courts will not intervene in the steps leading to the commission of an ultra vires act until the act has been committed. This the Plaintiffs respectfully submit is contrary, not only to the general 40

principles upon which quia timet relief is granted by the Courts, but also to the particular principles applicable where ultra vires acts are threatened. Quia timet relief will be granted where a Plaintiff establishes an actual threat by the Defendant to commit an unlawful act damaging to the Plaintiff's rights. Hereunder the Plaintiffs will rely on Attorney-General v. Corporation of Manchester 1893 2 Ch. D. 87, Graigola Merthyr Company Ltd. v. Mayor Aldermen and Burgesses of Swansea 1928 Ch. 235 and Halsburys Laws of England 3rd Edition Vol. 21 pp. 355 to 357.

In the case of a threatened ultra vires act, the complainant should apply for relief at the earliest possible moment. Hereunder the Plaintiffs will rely on Parke v. Daily News Limited 1962 Ch. 927 and, in particular, on the following passage from the Judgment of Wilberforce J. (as he then was) in granting interlocutory relief in that case in respect of a resolution which the Directors of the Daily News Limited proposed to submit to a general meeting of that Company (1961 1 W.L.R. 493 at 501) "There remains the question of the balance of convenience: whether it is right that I should, at this stage, grant an injunction against the company and its directors from disposing of this particular sum. I think that it would be right. The normal course, where an ultra vires action is threatened by a company, is to prevent that ultra vires action being carried out".

An actual threat that an unlawful act will be committed damaging the Plaintiffs' rights will only be revealed by evidence or pleadings. Evidence is inadmissible on the Second Summons and, as yet, there have been no pleadings but only a Writ. However the present Defendants have conceded, for the purposes of the Second Summons, that the entire Bill referred to in the Writ herein, if it becomes an Ordinance, will be void by reason of Section 2 of the Colonial Laws Validity Act 1865. Where Plaintiffs complain of an act which is threatened and Defendants concede that the commission of that act will be unlawful, the Plaintiffs respectfully

submit that there must be a reasonable cause of action entitling Plaintiffs to apply for relief, and at the earliest possible moment.

Second Ground. Hypothetical and future questions.

33. Contentions of the present Defendants and of the Plaintiffs

p.56 l.36 - p.60 l.22.
p.60 l.23 - p.61 l.17.

The contentions of the present Defendants and of the Plaintiffs on the second ground of the Second Summons followed their respective contentions on the first part of the second ground of the First Summons. In relation to Re Barnato 1949 1 A.E.R. 515, on which the present Defendants continued to rely on the Second Summons, the Plaintiffs contended that there was no analogy with the present case because the proceedings in the Barnato case were brought, not by a party apprehending an injury, but by Trustees seeking a Ruling from the Court on the question as to what effect in law a course of action they themselves contemplated taking would have.

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p.17 ll.5-24.

34. Ruling of the Full Court

p.16 l.32-
p.17 l.24.

The Full Court, in its Ruling on the second ground, referred to the statement by Sir Owen Dixon C.J. in Hughes and Vale Proprietary Limited v. Gair 90 C.L.R. 203 set out in paragraph 31 hereof. However the Full Court stated that they would not be prepared to go so far, that the judicial pronouncements on the extent to which the Courts will regard the presence of a hypothetical element as a bar to relief have been closely identified with, or related to, the historical reluctance of the Courts to give judgments that were merely declaratory without the accompaniment of any other relief and that this reluctance was tending to melt before new currents of legal opinion, and under the impact of new Rules of Court which make declaratory judgments more readily available.

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Nevertheless the Full Court were satisfied that they would go beyond the limits which the

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Courts had hitherto observed if, on the grounds set out in the Writ, they were to make, whether in the exercise of a discretion or otherwise, the declaration sought in this action and that it would be wrong to make it. In this regard the Full Court placed reliance on the case of Re Barnato 1949 1 A.E.R. 515 and, in particular, on a passage from the Judgment of Cohen L.J. (as he then was) at pp.520 to 521. The Full Court considered that the basis of that dictum was that the action was manifestly doomed to failure from the start. The Full Court could not conceive of circumstances in which a Court would be willing to grant a declaration against the Legislative Council which would inhibit the passing of a Bill, or its presentation for the Governor's assent, on the ground of its contents.

35. The Plaintiffs respectfully submit and contend that the Ruling of the Full Court on the second ground was wrong in that

(a) The Full Court again failed to apply the principles upon which an order to strike out may be made under Order 18 Rule 19 aforesaid and the Plaintiffs will rely on their submissions and contentions set out in paragraph 32(a) hereof in so far as they are not solely referable to the first ground.

(b) The Full Court, in reaching its decision on the second ground, again misdirected itself in that it considered the matter for decision was whether the Court, in the exercise of its discretion or otherwise, should grant the relief claimed in the Writ (which the Plaintiffs respectfully submit should properly be decided at the hearing of the Motion or trial of this Action) and thus reached a conclusion upon the substantive issues in this Action in order to reach a decision on the question before them namely whether there was or was not a reasonable cause of action.

(c) The Full Court failed to appreciate the true ratio decidendi of the Barnato case. The passage cited by the Full Court from the Judgment

p.16 l.32-
p.17 l.24.

p.17 ll.5-14.

of Cohen L.J. was, in fact, obiter and the Plaintiffs respectfully submit that the true ratio decidendi of that case was that the Courts will not make a declaration where there is no immediate question to be decided, and that where a party seeks a Ruling from the Court on the legality of a course of action he himself contemplates adopting the Court should not act as his legal adviser. In that case the Court decided that there was no immediate question having regard to the facts of that case whereas, in this case, the Plaintiffs respectfully submit it cannot be decided yet whether or not there is an immediate question for decision until the Court is in possession of all the facts. Evidence is not admissible on the Second Summons and there are as yet no pleadings, only a Writ. Hereunder the Plaintiffs will rely upon Goodson v. Grierson 1908 1 K.B. 761.

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Third Ground. Section 16 Crown Proceedings Ordinance.

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36. Contentions of the present Defendants

p.17 ll.25-36.

The present Defendants contended that the proceedings are either against the Crown or against officers of the Crown and the effect of granting an injunction would be to give relief against the Crown which could not have been obtained in proceedings against the Crown. The Sovereign has delegated the power to legislate for the Colony to the Governor "by and with the advice and consent of the Legislative Council"; the Governor is appointed as an instrument of the prerogative power and the Legislative Council is created as an instrument for helping the Governor to make law; therefore the Legislative Council would be itself exercising a prerogative power and is a part of the Crown.

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p.18 ll.25-31.

The present Defendants also contended that the First Respondent was sued as a councillor but that, in such capacity, he was an officer of the Crown in that he was one of the "working and speaking" parts of an instrument set up under the

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prerogative. The original second Defendant was an officer of the Crown.

37. Contentions of the Plaintiffs

10 In reply, on Section 16(1), the Plaintiffs contended that if the members of the Legislative Council were the Crown then the relief granted in the Trethowan case could not have been granted; that "Unofficial Members" of the Legislative Council were not officers of the Crown in any capacity and that Section 16(1) bore no relation to their position; that "Official Members" of the Legislative Council had a dual capacity and that a protection given them in their capacity as officers of the Crown did not extend to their actions as members of the Legislative Council.

20 The Plaintiffs also contended that, in regard to Section 16(2), the order asked would not have the effect of giving relief against the Crown. Members of the Legislative Council were not officers of the Crown by reason of their membership of the Legislative Council.

p.19 ll.1-5

On the face of the Writ relief was not sought against the original Second Defendant as an officer of the Crown, or as a member of the Legislative Council, but as a private individual.

38. Ruling of the Full Court

30 The Full Court, in its Ruling on the third ground and Section 16(1) of the Ordinance, referred to its finding that the Legislative Council is properly to be regarded as part of the Legislature, but did not think it followed that the members of the Legislative Council were themselves the Crown within the meaning of the statute. In this connection they referred to Attorney-General for New South Wales v. Trethowan 44 C.L.R. 394. Nor did they think that the part played by the Legislative Council in the legislative process was the exercise of a prerogative power. The task committed to it was to give the Governor advice and consent and

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*p.17 l.36-
p.18 l.24.*

the giving of such advice and consent was not a function of the prerogative; the Crown has no prerogative to advise and authorise itself. The Legislative Council and the members thereof as such could not be said to be servants of the Crown or otherwise caught by the definition of "officer" in Section 2(2) of the Ordinance and, in that connection, there was no material distinction between "servant" and "officer". Even if one regarded the function of the Legislative Council as being more than the giving of advice and consent and as being the making of laws, the same reasoning would preclude the Legislative Council being regarded as servants of the Crown. In this connection they referred to Metropolitan Meat Industry Board v. Sheedy 1927 A.C. 899.

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p.18 l.25-
p.19 l.13.

The Full Court then considered Section 16(2) of the Ordinance. "An officer of the Crown" must, the Full Court thought, be a person who holds office under the Crown and there was significance in the distinction in Clause 13 of the Royal Instructions between those styled "Official members" of the Legislative Council and those styled "Unofficial members" such as to indicate that an official member did not hold office under the Crown by virtue of his membership of the Legislative Council. The Full Court therefore concluded that members of the Legislative Council, as such, were not officers of the Crown by virtue of their membership which was enough to defeat the application on the third ground as against the First Respondent. On the other hand the Full Court was not prepared to find that the order asked would not have the effect of granting relief against the Crown if they were wrong in holding that the members of the Legislative Council were not officers of the Crown. The consent of the Legislative Council was a condition precedent to the making of laws in Hong Kong and the granting of an injunction against the Legislative Council would effectively prevent the exercise of the legislative power. If members of the Legislative Council were officers of the Crown and if the Crown includes the Legislature for the purposes of the Ordinance, the case

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p.114.

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would fall within Section 16(2).

In the result the Full Court refused to strike out the second relief claimed in the Writ as against the First Respondent on the third ground.

As regards the original Second Defendant the Full Court took judicial notice of the fact that he was the Deputy Colonial Secretary. As he was not sued as a member of the Legislative Council in so far as relief was claimed to prevent the passing of a Bill or Ordinance it could not be granted against him. What was sought against him was an injunction to prevent him, either as a private citizen, or as an officer of state, from conveying a Bill from the Legislative Council and presenting it to the Governor for his assent. Since the grounds for claiming relief against him were the same as those in relation to members of the Legislative Council the claim against him must fail for the same reasons as the claims against the First Respondent. To the extent that he was an officer of state he was an officer of the Crown within Section 16(2) of the Ordinance and an injunction could not be granted against him. Nevertheless a declaration could have been made if it had been appropriate. To the extent that he was sued as a private citizen it was inconceivable that the injunction asked for would be granted against him. The Full Court therefore struck out the second relief claimed in the Writ as against the original second Defendant.

p.19 ll.14-31.

39. The Plaintiffs respectfully submit and contend that the Ruling of the Full Court on the third ground as to the First Respondent was correct for the reasons given in the Ruling. On the other hand the Plaintiffs respectfully submit and contend that such Ruling on the third ground as to the original Second Defendant was wrong in that

(a) the only relief sought against the original second Defendant was the second relief claimed in the Writ.

(b) such relief was not on the face of the

Writ sought against him as an officer of state nor, therefore, as an officer of the Crown.

(c) nor on the face of the Writ was such relief sought against him as a member of the Legislative Council.

(d) relief was sought against him on the face of the Writ as a private individual and, until all the facts are known, by evidence or by pleadings, the Court is not in a position to decide whether or not an injunction could be granted against him in that capacity. 10

(e) the third ground seeks to strike out the second relief claimed in the Writ as against, inter alia, the original Second Defendant by reference to Section 16 of the Crown Proceedings Ordinance which does not relate to relief against private individuals.

40. The Plaintiffs therefore respectfully submit that the Ruling of the Full Court on the third ground of the Second Summons as against the First Respondent was correct and should be upheld for the following reasons amongst others. 20

REASONS

1. Because the second relief claimed in the Writ does disclose a reasonable cause of action as against the First Respondent in that Section 16 of the Crown Proceedings Ordinance does not prohibit the granting of an injunction against the members of the Legislative Council of Hong Kong.

2. Because the relief sought by the third ground of the Second Summons is not appropriate to be granted under Order 18 Rule 19. 30

41. The Plaintiffs also respectfully submit that the remainder of the Ruling of the Full Court on the Second Summons was wrong for the following reasons amongst others and that therefore that part

of the Ruling should be set aside and the Second Summons be dismissed with costs.

REASONS

1. Because the reliefs claimed in the Writ do disclose a reasonable cause of action even if such reliefs do interfere with the legislative process of a non-sovereign legislature such as the Legislative Council of Hong Kong.
- 10 2. Because the first relief claimed in the Writ does disclose a reasonable cause of action since the declaration sought thereby does not relate to a hypothetical or future question.
3. Because the second relief claimed in the Writ as against the original Second Defendant is, on the face of the Writ, sought in his capacity as a private individual and is therefore not prohibited under Section 16 of the Crown Proceedings Ordinance.
- 20 4. Because it cannot be decided before the hearing of the Motion or the trial of this Action whether the consideration of the draft Ordinance by the Legislative Council was a lawful part of the legislative process of Hong Kong.
5. Because where an ultra vires act is threatened the normal and proper course is to apply promptly to prevent that ultra vires act from being carried out.
- 30 6. Because the proposition implicit in the Ruling of the Full Court (in the light of the present Defendants' concession) that what is ultra vires the whole (that is the Legislature of Hong Kong) cannot be ultra vires the part (that is the Legislative Council of Hong Kong) is not so "simple and obvious" as to afford a proper basis for an order to strike out under Order 18 Rule 19.
7. Because until the Court is in possession of all the facts it cannot be decided whether or not

there is an immediate question for decision and, therefore, whether the relief sought in this Action relates to a hypothetical or future question.

8. Because the relief sought on the Second Summons is not appropriate to be granted under Order 18 Rule 19, and the Full Court was in error in deciding questions on the Second Summons that could only appropriately or rightly be determined on the hearing of the Motion or at the trial of this Action and in relying on evidence that was not before it on the hearing of the Second Summons.

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W. T. WELLS

E.P. SKONE JAMES

IN THE PRIVY COUNCIL

No. 26 of 1968

O N A P P E A L

FROM THE SUPREME COURT OF HONG KONG

(in the Full Court of the Colony of Hong Kong)

B E T W E E N :-

THE ATTORNEY GENERAL OF HONG KONG for and
on behalf of himself and all other members
of the Legislative Council of Hong Kong
(First Defendant) First Appellant

GEOFFREY CATZOW HAMILTON (Second Defendant)
Second Appellant

and -

REDIFFUSION (HONG KONG) LIMITED (Plaintiffs)
Respondents

AND

IN THE PRIVY COUNCIL

No. 27 of 1968

O N A P P E A L

FROM THE SUPREME COURT OF HONG KONG

(in the Full Court of the Colony of Hong Kong)

B E T W E E N :-

REDIFFUSION (HONG KONG) LIMITED (Plaintiffs)
Appellants

and -

THE ATTORNEY GENERAL OF HONG KONG for and
on behalf of himself and all other members
of the Legislative Council of Hong Kong
(First Defendant) First Respondent

GEOFFREY CATZOW HAMILTON (Second Defendant)
Second Respondent

CASE FOR THE RESPONDENTS REDIFFUSION
(HONG KONG) LIMITED ON THE APPEAL BY
THE FIRST APPELLANT THE ATTORNEY
GENERAL OF HONG KONG AND THE SECOND
APPELLANT GEOFFREY CATZOW HAMILTON

AND

CASE FOR THE APPELLANTS REDIFFUSION
(HONG KONG) LIMITED ON THEIR APPEAL

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