CASE NOTES

IN RE ADAMSON; EX PARTE W.A. NATIONAL FOOTBALL LEAGUE

Restraint of trade — Trade Practices Act 1974 (Cth) s. 45(2) — Meaning of 'trade corporation' and 'interstate trade' within s. 4 of Trade Practices Act 1974 (Cth) and the Constitution — Writ of prohibition — Powers of the High Court with respect to prohibition

THE FACTS

Brian Adamson was an Australian Rules footballer with West Perth Football Club in the West Australian Football League. At the end of 1977 he attempted to negotiate a written contract with the club but was unsuccessful. Subsequently Norwood Football Club in the South Australian Football League approached him to play football with them, and as a result of those representations he signed a contract for the three years to 1980 and moved to South Australia.

Adamson could not play for Norwood, however, without a clearance in the form demanded by the National Football League. The regulations of the N.F.L. bind the W.A. and S.A. Leagues and its affiliate clubs, including West Perth and Norwood. Their effect, *inter alia*, is to require a player of a League club in one State to receive a clearance from the League of that State before he can apply for a permit to play with a League club in another State. Without a clearance he cannot play for a club in the second State unless he has *bona fide* lived there for two complete seasons without playing competition football in the meantime, and if he does the Club risks loss of premiership points. Adamson applied to the W.A. League for a permit to play in South Australia on the requisite form, which included a provision for West Perth to indicate its attitude to the application. West Perth objected and the clearance was refused.

As a consequence, Adamson applied to the Federal Court of Australia for injunctions against the West Australian Football League, West Perth Football Club and the South Australian Football League, the effect of which would be to secure a clearance. He alleged that those bodies contravened section 45(2) of the Trade Practices Act 1974 (Cth) as amended which, *inter alia*, prohibits corporations as defined by section 4 thereof from making or giving effect to contracts, agreements or understandings, *et cetera*, which restrict the supply of services or substantially lessen competition. The W.A. League and West Perth (hereinafter referred to as the prosecutors) applied to Barwick C.J. who granted an order *nisi* for a writ of prohibition directed to the judges of the Federal Court and the respondent Adamson, which was designed to prevent the Court from hearing Adamson's application.

There were two grounds for the application:

(1) that the prosecutors and the S.A. League were not corporations, and were not 'trading corporations' formed within the limits of the Commonwealth within the meaning of section 4 of the Trade Practices Act and of section 51(xx) of the Constitution (Cth), so as not validly to be subject to the contraventions of the Act;

(2) that the prosecutors and the S.A. League were not persons relevantly engaged in interstate trade and commerce, so as validly to bring them within the purview of section 6(2) of the Act for the purpose of the proceedings.

These proceedings were to determine whether the order should be made absolute.[1]

THE DECISION

The Availability of Prohibition

Prior to the determination of the substantive grounds upon which prohibition was sought the High Court had to decide whether the remedy was in any event an appropriate one in the circumstances of the case.

Four members of the Court (Barwick C.J., Gibbs, Stephen and Aickin JJ.) were clearly of the view that the writ was potentially available,[2] Barwick C.J. (with whom Stephen J. essentially agreed)[3] pointed out that the High Court was given jurisdiction to grant prohibition against federal officers by section 75(v) of the Commonwealth Constitution and sections 38 and 33(1) of the Judiciary Act 1903 (Cth),[4] and that 'Federal Officers' included Judges of the Federal Court.[5] Further, use of the word 'prohibition' in section 75(5) imports the common law appertaining to the grant of prohibition into the High Court's jurisdiction.[6] It is implicit in this recognition that the Court could only issue the writ where it would be appropriate according to the established law, that is, where there was a manifest event or excess of jurisdiction in a lower Court or tribunal (here the Federal Court).

The Federal Court is given jurisdiction to enforce Part IV of the Trade Practices Act 1974 (Cth) (under which Adamson sought to bring his claim) by Part VI of that Act. However this jurisdiction is dependent on the defendant or defendants[7] being corporations as defined by section 4 of the Act.[8] For present purposes this would require the prosecutors to be shown to be 'trading corporations', this expression not being defined in the Act but being derived from section 51(xx) of the Constitution, which gives the Commonwealth power to legislate with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. Much importance was attached by the Court to the problem of ensuring that the Federal Court was constitutionally competent to accept jurisdiction.

For example, Barwick C.J.[9] was concerned that if prohibition could not lie in the present case the Federal Court could make a determination that was constitutionally invalid by deciding incorrectly that it had constitutional competence to assert jurisdiction. Thus, while accepting that a statute may give a Court or tribunal jurisdiction to determine conclusively the existence of any fact upon the existence of which the statutory jurisdiction depends, he held that this can never be the case where an issue

[1] (1979) 53 A.L.J.R. 273.

[2] The judgment of Murphy J. is at best unclear on this point, although note that the headnote firmly states that his judgment denies the availability of prohibition. It is submitted that it is difficult to justify such a certain conclusion.

[3] (1979) 53 A.L.J.R. 273, 284.

[4] *Ibid.* 276.

[5] See, for example, *R. v. Commonwealth Court of Conciliation and Arbitration and Others; ex parte Whybrow & Co. and Others* (1910) 11 C.L.R. 1; *R. v. The Commonwealth Court of Conciliation and Arbitration; ex parte The Brisbane Tramway Company Ltd and Another* (1914) 18 C.L.R. 54.

[6] (1979) 53 A.L.J.R. 273, 284.

[7] The prosecutors in the present action.

[8] Unless they could be deemed to fall within the additional operation of the Act; see s. 6.

[9] See also Gibbs J.'s detailed judgment to the same effect.

of constitutional competence is involved.[10] It may be that Parliament may create a tribunal, which, as an incident of its jurisdiction may enter upon an inquiry whether a particular constitutional fact necessary to its jurisdiction existed. But its conclusion cannot be definitive of the truth of the matter; only the High Court may conclusively determine the actual existence of the fact which grounds the constitutional power.[11] If it decides that such fact was not present, prohibition to restrain the making of any award or order would be appropriate because the lower body would have been attempting to exercise a jurisdiction which Parliament did not have constitutional power to confer upon it.[12]

Mason J. (with whom Jacobs J. agreed) held that there was no absence or excess of jurisdiction which would justify the grant of prohibition.[13] He recognized like other members of the Court that the legislature may confer jurisdiction upon a court or tribunal in two ways.[14] It may give the body power to determine a fact 'conclusively' which in this sense means that the fact's existence is not a condition of the exercise of jurisdiction and the tribunal's decision is free from collateral attack and not subject to prohibition. On the other hand, a tribunal may be given power to make a preliminary enquiry and reach a conclusion, but its decision cannot be conclusive of the actual existence of the fact and is subject to prohibition.

However he reached a different conclusion from the other Judges who formed a majority on this point. He appreciated the argument that had appealed to his brethren, that is, that constitutional facts must be treated as collateral facts for the purposes of prohibitions because to do otherwise would allow a court or tribunal, by an erroneous decision, to assert jurisdiction outside the reach of constitutional power.[15] In other words, the existence of a constitutional fact necessary for jurisdiction can only be finally determined by the High Court. According to Mason J., however, this is a fallacious argument. He emphasizes the distinction between cases where an appeal lies from the decision of the lower court or tribunal and where it does not. The Arbitration cases upon which Barwick C.J. had relied[16] were instances of the former situation, so that if prohibition were not available, the decisions of the Arbitration Commission would be unreviewable, which could lead to an unfettered extension of constitutional power. Mason J. similarly explained *R.* v. *Trade Practices Tribunal and Others; ex parte St. George County Council*,[17] where prohibition issued to the Trade Practices Tribunal, a tribunal from which no appeal lay.[18] The existence of a right of

[10] (1979) 53 A.L.J.R. 273, 277. Also see Gibbs J. at 282, 'However, where the court is one created by the Parliament acting under the limited powers given by the Constitution the existence of a state of things necessary to bring the case within the scope of those powers must be a condition of the jurisdiction of the Court'.

[11] This argument is supported by reference to a line of Arbitration Cases beginning with *R. v. Hibble and Others; ex parte Broken Hill Proprietary Co. Ltd* (1921) 29 C.L.R. 290 and ending with *Re Heagney and Others; ex parte A.C.T. Employers Federation and Others* (1976) 50 A.L.J.R. 753.

[12] See also Gibbs J. at 282: 'In the present case the question whether the prosecutors are trading corporations is therefore a jurisdictional preliminary or collateral fact which this Court must decide for itself on an application for prohibition.'

[13] It should also be noted that prohibition is a discretionary remedy. While it may be granted at any stage before the Federal Court has concluded whether it has jurisdiction in many cases the issue of the writ should be deferred. For a discussion of the factors affecting of the exercise of the discretion, see Barwick C.J. at 278 f., Gibbs J. at 282 f., Murphy J. at 291 and Aickin J. at 292. All these judges were of the opinion that in the present case, the application for prohibition was not premature.

[14] (1979) 53 A.L.J.R. 273, 286.

[15] *Ibid.*

[16] *Supra* n. 11.

[17] (1974) 130 C.L.R. 533; (1974) 48 A.L.J.R. 26.

[18] (1979) 53 A.L.J.R. 273, 287.

appeal, on the other hand, makes it more likely the existence of the fact will be held not to be a condition of the exercise of jurisdiction, since a check could be maintained on the assumption of jurisdiction by the lower court.[19] In the present case an appeal lay from the Federal Court by section 33 of the Federal Court of Australia Act 1976 (Cth), and if the High Court had its jurisdiction invoked under this section it would not be bound by the Federal Court's determination of the constitutional fact. Thus since that body had not been armed with a conclusive power to determine constitutional facts which were unreviewable by the High Court, the grant of jurisdiction to it was not conditional upon the existence of such facts, and so, was not subject to prohibition.

It may be tentatively submitted that the opinion of Mason J. is more satisfactory. While it may mean that in some circumstances genuine challenges to the constitutional limits of a court's jurisdiction cannot be brought except on appeal from the decision of that body, it prevents frivolous litigation and encourages confidence in the minds of prospective litigants that their claims may be heard without undue interference. Further, many genuine challenges to jurisdiction may prove to be unnecessary if the proceedings in question be allowed to go to their conclusion. Dixon J., when commenting on the type of approach taken by the majority on this point in the present case, said it:

> produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed.[20]

Mason J. showed that the fears of several of his brethren that such an approach was impossible where a court's jurisdiction depended upon interpretation of a constitutional fact will often be ill-founded, particularly where there is a right of appeal from the lower court or tribunal.

Does the case fall within the Trade Practices Act?

It will be recalled that the prosecutors sought prohibition on two grounds, that they and the S.A. League were not 'trading corporations' within the meaning of section 4 of the Trade Practices Act and section 51(xx) of the Constitution, and that they were not brought within section 6(2) of the Act by virtue of being relevantly engaged in interstate trade and commerce. It is to these questions that the court had now to turn.

The second can be quickly disposed of. No judge seriously entertained the submission that the refusal to grant a clearance was conduct in the course of or in relation to interstate trade, a result which, it was argued, followed from the fact that the prosecutors and the S.A. League arrange, promote and participate in interstate matches. For example, Mason J. commented:

> the argument does not merit serious consideration. No one who has bothered to read the decision of this Court relating to the power to legislate with respect to trade, commerce and intercourse among the States . . . could conceive that there is any foundation for this argument.[21]

The question whether the prosecutors and the S.A. League were 'trading corporations' is more difficult, and probably the most significant aspect of these proceedings. There was no doubt that all of these bodies were corporations. The prosecutors were incorporated under the Associations Incorporation Act 1895 (W.A.) (as amended) and the S.A. League under the Associations Incorporation Act 1956 (S.A.) (as

[19] *Cf.* Barwick C.J., Gibbs and Aickin JJ. — the existence of a right of appeal is no bar to the grant of prohibition.
[20] *Parisienne Basket Shoes Pty Ltd v. Whyte* (1938) 59 C.L.R. 369, 391.
[21] (1979) 53 A.L.J.R. 273, 291.

amended). The prosecutors sought to bring themselves within a proviso to section 4 of each of these Acts which provided that incorporation pursuant to their provisions was not available to 'associations for the purpose of trading or for the purpose of securing pecuniary profit to the members from the transactions thereof'. This claim, too, was rapidly rejected.[22]

All members of the Court were similarly in agreement that the prosecutors and the S.A. League were to some extent engaged in trade of a character that accorded with the constitutional interpretation of that term. However this is not sufficient to categorize them as 'trading corporations'. In *R.* v. *Trade Practices Tribunal and Others; ex parte St. George County Council*;[23] a body which in practice did nothing but trade in the relevant sense was held by a three to two majority not to be a trading corporation. It was formed under the Local Government Act 1919 (N.S.W.) for the *sole* purpose and object of supplying electricity and electrical appliances to the public, and was held to be rather a municipal corporation which happened to be engaged in trade.

In the present case, a bare majority of the Court (Barwick C.J., Mason, Jacobs and Murphy JJ.) held that the prosecutors and the S.A. League were trading corporations. Barwick C.J., like those other of his brethren who dealt with the question, thought that the description 'trading corporation' in section 51(xx) of the Constitution should be generously rather than constructively construed in accordance with the principles of constitutional construction. Further, its meaning 'must be allowed to embrace all that may fall within it according to its natural meaning and the circumstances of the time at which a decision as to validity or constitutional power has to be made' and not be restricted to its connotation at such time when the provision was enacted.[24]

In applying this principle, Barwick C.J. held that the constitutional description 'trading corporation' should not be limited to corporations whose sole or predominant purpose of incorporation was to trade. In today's modern society with its diversification of corporate activity, it is often impossible to discern the nature of a company from its memorandum or other public documents. 'The only sure guide to the nature of the company is a purview of its current activities, a judgment as to its nature being made after an overview of all those activities.'[25] Thus Barwick C.J. concludes that a corporation will be a 'trading corporation' if trading is a *substantial corporate activity*, that is, 'its activities rather than the purpose of its incorporation will designate its relevant character'.[26] In doing so he had to reject the prosecutors' argument ostensibly based on the majority view in the *St. George County Council* case,[27] that only corporations whose purpose of incorporation is to trade are trading corporations. He distinguished that case somewhat unconvincingly on the grounds that it was decided on special considerations relating to the particular origin of the body there in question and that it was a public service rather than a private enterprise and thus the decision was not laying down any rule of general application.[28] If he were wrong in this analysis, Barwick C.J. thought that in any case the *St. George County Council* decision should be disregarded.

Applying these principles to the present case, Barwick C.J. held that all the corporations in question were 'trading corporations'. The fact that they were engaged

[22] For example, Barwick C.J. at 275 f., Mason J. at 289.
[23] (1974) 130 C.L.R. 533.
[24] (1979) 53 A.L.J.R. 273, 279.
[25] *Ibid.*
[26] *Ibid.* (assumes valid corporate power to trade).
[27] (1974) 130 C.L.R. 533.
[28] This latter point has received some academic support: see Evans G., 'The Constitutional Validity and Scope of the Trade Practices Act 1974' (1975) 49 *Australian Law Journal* 654, 658.

in sport was not a bar to them being held to be trading. On the contrary, 'the presentation of a football match as a commercial venture for profit to the promoting body is an activity of trade'.[29] As well, the commercial activities of the West Perth Club and the two Leagues included a diverse range of advertising and television rights and other sundry activities beyond the mere promotion of matches. 'These activities, essentially commercial in nature, emphasize the trading quality of the manner in which the Club and the League "promote" Australian Rules Football.'[30]

Mason J. (with whom Jacobs J. agreed) also did not feel constrained to accept the majority view in the *St. George County Council* case, and preferred the view of the minority which was to the same effect as that of Barwick C.J. in the present case,[31] that is, that it is the current activities of the corporation which will determine if it satisfies the constitutional description, and not its purpose of incorporation. He concedes that some corporations engaged in trading will not be trading corporations if their involvement is so slight or incidental that they could not be characterized as such. In every instance it is a question of fact and degree.[32] In the case before him, Mason J. dismissed the prosecutors' submission that the trading activities of the two Leagues were incidental to their main objects of promoting sport as a recreation as being an inversion of the true position. He held that the sport is promoted and encouraged as a means of ensuring the receipt of the large financial returns which are associated with it, and that the trading activities of the prosecutors and the S.A. League are so extensive to leave no doubt that they are trading corporations.[33]

Murphy J., the final member of the majority, formed the test in terms that a body will be a trading corporation as long as the trading is not insubstantial even if it is incidental to its other activities.[34] Here, the W.A. and S.A. Leagues, 'are engaged in very substantial trading, in charging for admission, putting on public spectacles for profit, selling television rights and selling goods; the West Perth Football Club (Incorporated) is a trader on a smaller scale. All three are trading corporations'.[35]

Gibbs, Stephen and Aickin JJ. dissented and held that neither the prosecutors nor the S.A. League were trading corporations. Gibbs J. followed his reasoning in the *St. George County Council* case[36] in concluding that:

> the words of [section 51(xx) of the Constitution] when read together leave no doubt in my mind that the word 'trading', like the words 'foreign' and 'financial', is used in that paragraph as an epithet describing a particular kind of corporation, and is not simply referring to what a corporation does, or to what its main activities happen to be.[37]

Thus whether a body is a trading corporation will be determined by characterizing it according to the purpose of its formation. To this end the corporation's actual activities have some relevance, for Gibbs J. recognizes that it will not only be the memorandum of association or other constitutional documents of a company which must be considered in seeing why it was incorporated. If he be wrong in this interpretation of the law, and it is a corporation's actual activities which satisfy the constitutional test, the learned judge considered its 'predominant and characteristic activity' must be trade for it to be a trading corporation. Under either test, none of the relevant bodies could be so classified in the present case.

[29] (1979) 53 A.L.J.R. 273, 280.
[30] *Ibid.*
[31] Barwick C.J. was a member of the minority in *St. George County Council.*
[32] (1979) 53 A.L.J.R. 273, 284.
[33] *Ibid.* 290.
[34] *Ibid.* 292.
[35] *Ibid.*
[36] (1974) 130 C.L.R. 533.
[37] (1979) 53 A.L.J.R. 273, 281.

Stephen J. (with whom Aickin J. agreed on this point) took a position some way between that of the majority and Gibbs J. He considered that both a corporation's intended purposes and its actual activities were of prime importance.[38] Although it is not entirely clear, it would appear that in relation to a corporation's activities he endorses Barwick C.J.'s opinion in the *St. George County Council* case that its 'predominant and characteristic activity' must be trading.[39] On the facts of the present case, he concludes that each of the prosecutors and the S.A. League were intended to be and *in fact were* engaged in the conduct and promotion of football and not trade. Any trading activities in which they participated were merely *incidental to and a by-product of* its principal activities. Consequently they were not trading corporations.

CONCLUSION

In this case, then, a four to three majority of the High Court held that the West Australian National Football League, the South Australian National Football League and the West Perth Football Club were trading corporations within the meaning of section 51(xx) of the Commonweath Constitution and section 4 of the Trade Practices Act 1974 (Cth). Thus a writ of prohibition would not lie to prevent the Federal Court from hearing the proceedings brought by Adamson alleging breaches of section 45(2) of the Trade Practices Act by those bodies.[40]

The interest in the decision lies primarily in the Court's considerations of what will constitute a trading corporation. It is tempting to be cynical and conclude that yet another decision will be necessary before this can be determined with any certainty. In *R.* v. *Trade Practices Tribunal and Others; ex parte St. George County Council*,[41] the Court was evenly divided between the 'purpose of incorporation' and 'current activities' tests,[42] and after *Adamson* there would still appear to be a marked divergence of views. However it is possible to make some positive observations on the decision's impact on the development of the law.

It is submitted:

(1) that the High Court has clearly endorsed the view that a corporation will be characterized as a trading corporation by consideration of its current activities, rather than the reasons for its incorporation.
The majority (Barwick C.J., Mason, Jacobs and Murphy JJ.) all based their decisions on this ground, while Stephen J. appears to have followed his decision in *St. George County Council*, that a body's current activities were of prime importance as well as its intended functions.[43] Only Gibbs J. remains a strong proponent of the 'purpose of formation' test.

(2) that a corporation will be classified as a trading corporation if trade is a substantial (or possibly not insubstantial, if there be any difference) part of its activities.

In *St. George County Council*, Barwick C.J. held that the relevant test was whether trade was the 'predominant and characteristic activity'.[44] This was approved in *obiter*

[38] It is not entirely clear, but he appears to follow his own judgment in *St. George County Council* to the same effect.

[39] (1979) 53 A.L.J.R. 273, 284.

[40] Adamson was ultimately successful, but on other grounds. Northrop J. held that there were no contraventions of the Trade Practices Act 1974 (Cth). See *Adamson v. West Perth Football Club Inc.* (1979) 27 A.L.R. 475.

[41] (1974) 130 C.L.R. 533.

[42] Of the majority, Gibbs and Menzies JJ. based their decisions on the purposes of the corporation; McTiernan decided the case on different grounds unrelated to the constitutional issue. Barwick C.J. in the minority preferred the 'current activities' test, while Stephen J. thought both tests of prime importance.

[43] (1979) 53 A.L.J.R. 273, 284.

by all members of the minority in the present case. However, Barwick C.J. himself relaxed the requirement to that of a 'substantial corporate activity', while Mason J. and Murphy J. spoke in terms of trade being, '*so slight and so incidental*' or 'not insubstantial' respectively.

It is to be hoped that courts will not hesitate to sanction this expansion of the law, particularly in view of the wide reading given to the concept of trade in other areas, notably the interpretation of section 51(i) of the Constitution. Such an extension of Commonwealth power might well be seen as essential with the vast increase in the amount and complexity of commercial corporate activity, and without a favourable reading of section 51(xx), the effectiveness and coverage of much Federal legislation will be significantly reduced. The Trade Practices Act is of course an obvious and important example, but the success of any proposed National Companies' legislation similarly depends much on a sympathetic court.

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PRUDENTIAL ASSURANCE CO. LTD v. NEWMAN INDUSTRIES LTD AND OTHERS

Practice — Parties — Representative proceedings — Action in tort — Suit by minority shareholder on behalf of itself and other shareholders — Shareholder seeking declaration of entitlement to damages for conspiracy against directors of company and seeking damages — Whether jurisdiction to entertain representative action where cause of action of each member of class a separate cause in tort for which proof of damage necessary — Whether court should exercise discretion to make representation order.

Proponents of the class action often cite the *dictum* of Moulton L.J. in *Markt v. Knight Steamship Co. Ltd*[1] as a major obstacle in the path towards an effective legal procedure to enable many persons to combine to recover damages in one action. His Lordship's statement that no representative action can lie where the sole relief sought is damages has been the accepted learning for some seven decades. Of course, this is not the only hindrance in the way of a useful procedure, but it is indicative of the pedestrian interpretation of the rules allowing representative actions.[2]

Though class action commentators readily admit that the ability to launch mass damage cases would not solve the myriad practical problems entailed in such large scale suits,[3] the possibility of suing might give rise to some pioneering actions which could point out limitations in the present procedure and, perhaps, suggest a few

[44] (1974) 48 A.L.J.R. 26, 29; (1974) 130 C.L.R. 533, 543.

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[1] [1910] 2 K.B. 1021, 1040 f. (C.A.).

[2] 'Though bearing different names, class actions and representative actions essentially seek the same objective, namely to permit one person to sue on behalf of others. But only in the United States may damages be recovered in this way'; The Law Reform Commission (Cth), *Access to the Courts: Class Actions; Discussion Paper*, (A.L.R.C. 11), 1979, 8.

[3] See generally 'Practice Notes: Seminar on Class Actions, Sydney, 28th May, 1979' (1979) 53 *Australian Law Journal* 670 f.; Mobbs M., 'Background to Class Actions' (1979) 9 *Australian Social Welfare* 21 f.; Robertson S., 'Case for Postponing Class Actions' (1979) 52 *Rydge's* 134 f.