CASE NOTES

B.H.P. PETROLEUM PTY LTD v. BALFOUR[1]

On its face, this case appears to be little more than an unexciting instance of statutory construction. Admittedly, it involved intricate analysis but nothing more. It is not a case from which one would expect to glean anything of interest concerning the operation of administrative law in the context of revenue laws. Despite its apparent narrowness, the case does raise two quite interesting points. Both points are more implicit in the reasoning of the High Court than express.

Facts

This case concerned the extent of the liability of B.H.P. Petroleum Pty Ltd and its other joint venture partner to pay a royalty in respect of petroleum production from their Cobia No. 2 Well in Bass Strait. That well, at seabed level, was fitted with a 'Christmas tree' assembly[2] designed to control the production flow from the well. Flowlines were connected to this assembly to take the oil some four kilometres to the joint venturers' Mackeral A platform where it was mixed with oil from other wells and pumped to the mainland for processing.

The statutory mechanism for the calculation of the required royalty payments was set out in s. 5 of the Petroleum (Submerged Lands) (Royalty) Act 1967 (Cth) (the 'Royalty Act') taken together with s. 42 of the Petroleum (Submerged Lands) Act 1967 (Cth) (the 'Submerged Lands Act').[3] The relevant provisions of section 5 of the Royalty Act[4] which were in force during this dispute, were as follows:

(1) The conditions subject to which a permit or licence is granted shall include a condition that the permittee or licensee shall subject to this section, pay to the Designated Authority a royalty at the prescribed rate in respect of all petroleum recovered by the permittee or licensee in the permit or licence area.

(2) Subject to the succeeding provisions of this section, the prescribed rate in respect of petroleum recovered under a permit or licence is ten per centum of the value at the well-head of the petroleum.

(3) The prescribed rate in respect of the petroleum recovered under a secondary licence is the percentage determined by the Designated Authority in pursuance of sub-section (1) of s. 42 of the Petroleum (Submerged Lands) Act 1967 in respect of petroleum so recovered.

Section 42(1) of the Submerged Lands Act, in effect, set the prescribed rate[5] in respect of 'the value *at the well-head* of that petroleum'. Sections 8, 9 and 10 of the Royalty Act further defined what was the 'well-head', 'the value at the well head' and 'the quantity of petroleum recovered' respectively for the purposes of that Act. They were in these terms:

8. For the purposes of this Act, the well-head, in relation to any petroleum, is such valve station as is agreed between the permittee or licensee and the Designated Authority, or, in default of agreement within such period as the Designated Authority allows, is such valve station as is determined by the Designated Authority as being the well-head.

[1] (1987) 61 A.L.J.R. 345. High Court, 11 June 1987, Mason C.J., Brennan, Deane, Toohey, Gaudron JJ.

[2] A description of the term 'Christmas tree' can be found in the reasons for judgment of Nicholson J., unreported, Supreme Court of Victoria, 8 February 1986 (hereinafter referred to as 'Full Court decision'), 5.

[3] This legislation is part of a co-operative scheme between the Commonwealth and the States to provide a constitutionally sound framework for petroleum exploration and recovery in the offshore areas surrounding Australia. For a detailed account of this scheme see Harders, C. W., 'Australia's Offshore Petroleum Legislation' (1968) 6 M.U.L.R. 415 and Cullen, R., 'Australian Federalism Offshore' (1985) *Special Project Series* 1 (Intergovernmental Relations in Victoria Program) 9 ff. This scheme involved the Commonwealth and each State passing 'mirror' legislation. In this note, the statutory references will be to the Commonwealth provisions unless otherwise indicated.

[4] See also Petroleum (Submerged Lands) Act 1967 (Vic.) s. 149.

[5] The relevant rate in this case was 12½ *per cent*.

9. For the purposes of this Act, the value at the well-head of any petroleum is such amount as is agreed between the permittee or licensee and the Designated Authority, or, in default of agreement within such period as the Designated Authority allows, is such amount as is determined by the Designated Authority as being that value.

10. For the purposes of this Act, the quantity of petroleum recovered by a permittee or licensee during a period shall be taken to be —
(a) the quantity measured during that period by the measuring device approved by the Designated Authority and installed at the well-head or at such other place as the Designated Authority approves; or
(b) where no such measuring device is so installed, or the Designated Authority is not satisfied that the quantity of petroleum recovered by the permittee or licensee has been properly or accurately measured by such a measuring device — the quantity determined by the Designated Authority as being the quantity recovered by the permittee or licensee during that period.

Section 8, in essence, provided that, in the absence of agreement as to which 'valve station' would be taken as the well-head, the Designated Authority had the power to determine the issue. Similar legislative mechanisms existed in relation to the value at the well-head[6] and the quantity of petroleum recovered.[7] A 'well' was defined in s. 5 of the Submerged Land Act to be the hole drilled in the seabed rather than any of the equipment affixed to that hole for the purposed of extracting the petroleum. A 'valve station' was also defined in s. 5 to mean 'equipment for regulating the flow of petroleum . . .'. At all relevant times, the Designated Authority in Victoria was the Victorian Minister for Mines.

The joint venturers and the Minister for Mines could not agree on the appropriate location of the 'well-head' of the particular well involved. In January, 1980, when no agreement had been reached, the Designated Authority, purporting to exercise his power under s. 8 of the Royalty Act, determined certain valves on the Mackeral A platform be the well-head for the purposes of the royalty calculations. The decision resulted in the joint venturers being liable to pay more in royalties than they considered they were required to under the legislation. This resulted from the fact that the value of the petroleum at the valve station selected by the Designated Authority was higher than its value at valves on the seabed principally because of the maintenance costs of the pipeline to the Mackeral A platform which were added to that value.

The joint venturers challenged the determination of the Designated Authority in the Victorian Supreme Court seeking a declaration that it was a nullity and other consequential relief.

Full Court, Supreme Court

The plaintiffs were successful at first instance before Marks J.,[7a] but an appeal by the Designated Authority to the Full Court of the Supreme Court of Victoria was allowed.[8] The leading judgment was delivered by Nicholson J. with whom Murray J. agreed.[9] The key to the reasoning of the Full Court lies in an observation made by Nicholson J. at the end of his judgment. He noted that prior to recovery, petroleum is at the disposal of the Crown on account of its sovereignty, as a matter of international law,[10] over the seabed from which the petroleum was recovered. With this in mind, his Honour concluded that the purpose of the relevant part of the legislation was 'to provide for the payment of royalties to the Crown for the right to extract and take possession' of the petroleum and therefore '[a]ll that the [Royalty] Act does is . . . to determine the point at which the mineral is to be treated as having been recovered for the purpose of assessing the royalty.'[11] He, therefore, did not

6 Royalty Act, s. 9.
7 Royalty Act, s. 10.
7a Unreported, Supreme Court of Victoria, 8 February 1985. (Hereinafter referred to as 'Trial Court decision'.)
8 Unreported, Supreme Court of Victoria, 8 April 1986.
9 Brooking J. delivered separate reasons agreeing generally with the judgment of Nicholson J.
10 The reference to sovereignty *as a matter of international law* is surely beside the point. The issue of sovereignty over the seabed for the purposes of international law is only concerned with Australia's rights to that area as against other nation states and not with the internal division of sovereignty within Australia. The issue as between the Crown (presumably in right of the Commonwealth) and individuals is, therefore, solely a matter of domestic law: see *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337, 444-5 *per* Stephen J.
11 Full Court decision, 14-5 *per* Nicholson J.

think it 'unreasonable for the Designated Authority as representative of the Crown to be given the final right to determine the point at which the assessment should take place.' It was against this perception of the legal regime for the recovery of petroleum that Nicholson J. was able to carve out of s. 8 a discretionary function for the Designated Authority.

The arguments which had found favour with the trial judge were rejected by the Full Court. The joint venturers had argued that s. 8 did not confer an unlimited administrative discretion on the Designated Authority and this was made clear by a comparison of s. 8 with s. 9, in which the power was expressed in similar terms. Section 9 was concerned with the ascertainment of the value of the petroleum for royalty purposes and it was argued that it would be absurd to construe the Designated Authority's power as unfettered as to the proper value to impose in default of an agreement. It followed, therefore, that the power in s. 8 must be limited in a similar way. The most sensible limitation, according to this view, was to give the word 'well-head' in s. 8 its generally accepted meaning in the petroleum industry.[12]

The contrary argument put by the Designated Authority was attractively simple. The word 'well-head' may be a term of art within the petroleum industry but its meaning for present purposes was to be determined entirely from the legislation, in particular s. 8 of the Royalty Act. Applying this approach, as there had been no agreement and as the valves chosen by the Designated Authority were a valve station within the definition of that term in the legislation, they could validly be selected as the well-head pursuant to s. 8 of the Royalty Act. On a plain reading of the legislation, no other restrictions were placed on the Designated Authority's discretionary power. He had, therefore, validly exercised the power reposed in him under s. 8.[13]

Nicholson J. rejected this approach because it amounted, in his opinion, to giving the Designated Authority no discretion at all! If the joint venturers' argument were correct, his Honour said that s. 8 had no real purpose to play in the legislative scheme. Parliament could simply have prescribed that the well-head be a valve station on the 'Christmas tree'. Because the determination of the well-head was a matter of some complexity, Parliament obviously, in his Honour's opinion, 'made the Designated Authority the final arbiter of the question.'[14] Moreover, the joint venturers' comparison between the power conferred by s. 9 and that in s. 8 did not in any way answer the central question, namely, whether in selecting the particular valve station as the appropriate well-head, the Designated Authority had acted *ultra vires*.[15]

On the construction of s. 8 which he favoured, Nicholson J. reasoned that he had no need to decide upon the limits of the discretion conferred upon the Designated Authority under that section. He was prepared, however, to concede that the power could not be exercised 'capriciously or unreasonably'.[16] He speculated that if the Designated Authority had nominated a valve station on shore as the well-head, that decision might (not would) be *ultra vires*.[17] It was also accepted that the discretion under s. 8 must be exercised by the Designated Authority *for the purposes of the Act* and that this would require the selection of a valve station from which the flow of hydrocarbons from the relevant well could be measured. In this case, the valve station chosen complied with this requirement.[18]

He also rejected the royalty argument. The trial judge had found support for deciding in favour of the joint venturers in the concept of a 'royalty'. As there was no definition of 'royalty' in the

[12] In the technical language of the petroleum industry, the well-head was at the top of the well casing or the christmas tree or both.

[13] Counsel for the Designated Authority did concede that the Designated Authority's discretion might be limited to the selection of those valve stations in the line before the petroleum was commingled with petroleum from other sources. Marks J. had rejected this as a possible limitation, noting that it was inconsistent with the main premise of the Authority's argument and in any case unnecessary if the argument were correct. A valve station after the mixing had taken place could, on the Designated Authority's construction, still be chosen provided that the amount of petroleum going into that valve station from particular wells was known: see Trial Court decision, 12.

[14] Full Court decision, 11-2.

[15] *Ibid.* 11.

[16] *Ibid.* 12.

[17] His Honour was not prepared to treat this as a firm conclusion but merely as a tentative one made no doubt for the purposes of exemplification of his reference to acting unreasonably or capriciously.

[18] Full Court decision, 14. But Nicholson J.'s perception of the purpose of the legislation was radically different from that of both Marks J. and the High Court.

legislation, he had held that it must bear its ordinary meaning, namely, a 'payment for the exercise of a right to remove substance from land belonging to another . . . commonly based on the value of what is taken.'[19] The emphasis in the plaintiffs' argument on the value of the petroleum recovered as pivotal to the selection of a valve station accorded with this notion of a royalty whereas the opposing construction gave the payments required to be made under the Royalty Act more the flavour of a tax.[20] Nicholson J. on the other hand, held that wherever the Designated Authority determined the well-head to be, the levy payable would still be referable to the quantity of petroleum recovered and so was properly called a royalty notwithstanding that the value of that petroleum could alter.[21]

High Court

The joint venturers further appealed, by special leave, to the High Court which unanimously allowed the appeal and restored the orders made by Marks J.[22] The High Court considered that the necessary consequence of the Designated Authority's construction of s. 8 of the Royalty Act was to 'vest in Designated Authority an arbitrary power of determination, qualified only by the need to identify a particular valve station.'[23] The High Court saw the issue from the producers' viewpoint, as raising the question 'whether a legislative intent *to impose such an arbitrary basis for the assessment of tax can be discerned in the legislation*'.[24] The Court concluded that this could not possibly have been the legislative intent. In the High Court's opinion, the legislative framework made it clear that the royalty provided for was to be determined objectively.[25] The determination of the Designated Authority referred to in s. 5 (the provision imposing the royalty and the appropriate rate) was not expressed in the language of discretion and ss 8, 9 and 10 of the Royalty Act, on their proper interpretation, did not confer any discretion on the Designated Authority as to the ascertainment of that royalty. Rather those sections cast upon the Designated Authority the straightforward function 'to permit agreement if such can be reached and, in the absence of agreement, to provide the means whereby the components of s. 5(2) can be determined without the need for litigation or arbitration.'[26]

The statutory task of the Designated Authority only required him to determine a relevant fact, in that he was permitted, under the legislation, 'to fix upon a valve station which fairly accords with the description of well-head'.[27] He had not properly performed this statutory function by selecting a particular valve station which *he* considered appropriate for the calculation of the royalty but one which did not fairly answer the description of a well-head. What he had done in applying himself to the task under s. 8 was to ask himself the wrong question, namely, which valve can be taken as the appropriate one for the calculation of the royalty?

The Court held that the legislation, on its proper construction, required him to ask, which valve could fairly be said to be the well head at which the petroleum was recovered?[28] The High Court held that the proper principle governing this case was to be found in the *dictum* of Lord Diplock in *In re Racal Communications Ltd*:

> [*Anisminic*][28a] proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is

19 Trial Court decision, 13-4, citing *Stanton v. Federal Commissioner of Taxation* (1955) 92 C.L.R. 630, 641-2.

20 Trial Court decision, 14.

21 Full Court decision, 13.

22 The Full Court of the High Court delivered a joint judgment: *coram* Mason C.J., Brennan, Deane, Toohey, and Gaudron JJ.

23 (1987) 61 A.L.J.R. 345, 347. It was also observed that this qualification was insignificant in this legislative scheme because the valve station chosen by the Designated Authority 'need bear no relation to the point at which petroleum leaves the well': *ibid.*

24 *Ibid.* (Emphasis added.)

25 So far as the royalty argument is concerned, the High Court held that s. 5(2) of the Royalty Act in prescribing the royalty payable by reference to quantity of petroleum recovered was consistent with the 'general understanding of royalty' citing with approval the definition in *Stanton's Case* (1955) 92 C.L.R. 630, 641-2: *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

28a *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 A.C. 147.

> a matter for courts of law to resolve in fulfillment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity.[29]

In this case, the Court held that the valve station determined by the Designated Authority did not answer the proper description of a well-head (as that term was to be understood in the Royalty Act) and therefore his decision was void.

Commentary

In the introduction to this note it is suggested that *Balfour* raises two points worthy of note. The first concerns the radically different approaches to the issue taken by the Full Court of the Supreme Court of Victoria and the High Court. In both courts, the matter in dispute was viewed not merely as a question of statutory interpretation, but as one relating to the proper exercise of power by an administrative decision-maker. The divergence lies in the totally different attitude to the construction of the legislative power conferred. Nicholson J. in the Supreme Court of Victoria construed s. 8 in such a way as to preserve a viable field of discretion for the Designated Authority. In his reasons, he was particularly concerned that the argument of the joint venturers removed from the Designated Authority any discretion with respect to the determination of the well-head.[30] This was inconsistent with his perception of the purpose of the relevant sections of the legislation. He placed great emphasis on the fact that the petroleum belonged to the Crown prior to recovery and therefore these provisions were simply a necessary device to fix a point at which the petroleum passed to the joint venturers for royalty purposes. In his Honour's opinion, that the Designated Authority, as the agent of the Crown should have the final say provided that he did not act 'capriciously or unreasonably' was entirely consistent with the legislative framework.

The High Court regarded this method of analysis as unsatisfactory. This is partly demonstrated by the fact that in its reasons for judgment, the High Court does not even refer to the reasoning of the Supreme Court. The decision of the High Court can be read as a complete negation of the Full Court's approach. The High Court held that the relevant legislation conferred *no* discretion at all on the Designated Authority. In arriving at this result, the Court was heavily influenced by the legislative context: the imposition of a royalty and the necessary corollary of such an imposition, namely that the amount of the impost should be ascertainable objectively and not open to manipulation at the will of the Crown's agent, the Designated Authority.[31]

Both decisions purport to apply the general test of construing the power in s. 8 in light of the policy and objects of the legislation. The High Court's reasoning suggests that where the administrative power is central to or involved directly in, the statutory calculation of the amount of a person's 'tax' liability, it is only if the legislation is expressed in clear and unambiguous language that the court will construe that power as conferring an arbitrary discretion. To approach the interpretation of a 'taxing' provision which confers such a power on an administrative official so as to preserve for him a measure of discretion is to stray from the correct path, more particularly where the relevant statutory provision is not cast in discretionary terms. On this aspect of the case, the High Court's approach, it is submitted, is correct and accords with modern developments in the area of judicial review of administrative decisions in this context.

Even if the conclusion of the Full Court that a discretion was conferred on the Designated Authority by the legislation were accepted, their analysis is still too narrow. It is no longer appropriate to construe statutory decision-making powers as if they are unreviewable save where they have been exercised 'capriciously or unreasonably'. Such limitations, unless the notion of 'unreasonableness' is read very widely, do not reflect the range of grounds upon which an aggrieved person can seek judicial review of administrative discretions. If the limitations mentioned by the Full Court were intended to have their technical meanings, then this approach turns back the clock to a time before *Padfield*[32] and ignores the judicial developments which that case impelled.[33]

29 [1981] A.C. 374, 382-3.
30 Full Court decision, 10.
31 (1987) 61 A.L.J.R. 345, 347 and compare Income Tax Assessment Act 1936 (Cth) s. 167.
32 *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.
33 See for example, *Murphyores Inc. Pty Ltd v. Commonwealth* (1976) 136 C.L.R. 1 and *R. v. Toohey; ex parte Northern Land Council* (1981) 151 C.L.R. 170 and generally, Hotop, S. D., *Principles of Australian Administrative Law*. (6th ed. 1985) 220-1.

The second point is somewhat more speculative. It concerns the High Court's reliance on the principle in *In re Racal Communications*.[34] The error of law made by the Designated Authority in this case was said by the High Court to be that he had asked himself the wrong question and so took himself outside his statutory function. The decision-maker in this case was a Minister exercising a statutory function and using conventional terms, this case would be seen as a *vires* case. In fact, given the High Court's view of the matter, we could even regard it as an application of what is sometimes called 'narrow' *ultra vires*.[35] It is, therefore, interesting to find the High Court resorting to a jurisdictional error case for a convenient expression of the appropriate principle to apply. The principle applied by the High Court has its foundation, as the Court itself recognized,[36] in *Anisminic*[37] the leading modern case on the review of jurisdictional error. In that case, Lord Reid explained the principle as it related to the case of a tribunal charged with the responsibility of awarding compensation to persons whose assets had been expropriated in the following terms:

> But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. *It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it.* It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do intend this list to be exhaustive.[38]

The *ultra vires* doctrine and jurisdictional error are theoretically indistinguishable; while each has a slightly different historical origin, both are concerned with the notion of a decision-maker exceeding the powers conferred on him or her. The traditional concept of jurisdictional error did not extend to errors within jurisdiction or to put it another way, there was no doctrine which corresponded to broad *ultra vires*. In the United Kingdom, *Anisminic* changed that, but in the nearly twenty years since *Anisminic* was decided, it has had comparatively little impact on the development of Australian administrative law. Certainly there is no decision of the High Court in which it has been fully applied.[39] Although *Balfour* can be classified as a *vires* case, by choosing the *Anisminic* doctrine to express the appropriate principle governing the case, this decision of the High Court can perhaps be read as impliedly accepting that nowadays the doctrines of ultra vires and jurisdictional error completely overlap. The High Court, if it had wished to use language more in the *vires* mainstream, could simply have adopted the often used notion of a decision-maker having misconstrued the empowering legislation.[40] If this implication is not stretching the Court's language too far,[41] then its importance lies more in the field of jurisdictional error where, as has already been noted, the High Court has been reluctant to adopt the full effect of the *Anisminic* principle.

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[34] [1981] A.C. 374.
[35] See Hotop, *op. cit.* 217.
[36] (1987) 61 A.L.J.R. 345, 347.
[37] [1969] 2 A.C. 147.
[38] *Ibid.* 171 (emphasis added); see also 195 *per* Lord Pearce.
[39] See Bath, V., 'The Judicial Libertine — Jurisdictional and Non-Jurisdictional Error of Law in Australia' (1982) 13 *Federal Law Review* 13 and the cases and discussion in Hotop, *op. cit.* 260-1. Also see *R. v. Gray; ex parte Marsh* (1985) 157 C.L.R. 351, 371 *per* Gibbs C.J.
[40] See *e.g. Padfield* [1968] A.C. 997.
[41] The High Court's use of this jurisdictional error formulation could be viewed more narrowly. The 'asking the wrong qustion' principle was introduced by the High Court with the words, '[t]he approach to be adopted can be expressed by using the words of Lord Diplock in *In re Racal Communications* . . .': (1987) 61 A.L.J.R. 345, 347. It may be that the High Court merely employed this fomulation as the most convenient so that the fact that the case from which it was taken was one concerned with jurisdictional error was irrelevant.

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