Thus T. had not lost his lease when he assigned to Mrs F. The contract to assign was in writing but was not signed by T., and it therefore came within the Instruments Act 1928, s. 128. Despite s. 53 of the Property Law Act 1928, s. 55 of that same Act admits the doctrine of part performance, and His Honour found that Mrs F.'s acts of entering into possession, and managing the business there, were sufficient acts of part performance.

This would seem to give Mrs F. a good equitable assignment under the doctrine of *Walsh v. Lonsdale*,[6] but His Honour saw the difficulty of granting specific performance (which is the supposed basis of an equitable interest) to enforce a contract in breach of a covenant not to assign without consent (*Willmott v. Barber*).[7] 'With some hesitation', His Honour chose to follow the Australian High Court authority of *Dougan v. Ley*,[8] where specific performance was ordered conditional on the consent of some public officer necessary to the transfer, being obtained.

I submit, however, that His Honour was quite right when he suggested that that Australian case was 'not directly in point'; and also, this present case seems a far cry from the ministerial consent case[9] which His Honour cited to substantiate his argument. To add that specific performance could be decreed here because 'the assignment T. agreed to make has not yet been made, and no breach of the covenant against assigning without consent has been committed',[10] seems tantamount to the court authorizing the breach.

But on that basis Mrs F. was granted possession, she having 'a good equitable assignment' from T.

This case shows clearly the effect of a breach of a covenant not to assign without the landlord's consent, and the operation both of the doctrine of part performance and of the principle expressed in *Walsh v. Lonsdale*;[11] but perhaps the most important feature of the case is the concise statement it contains on the law regarding surrender of leases by operation of law.

J. D. PHILLIPS

[6] (1882) 21 Ch. D. 9. [7] (1880) 15 Ch. D. 96.
[8] (1946) 71 C.L.R. 142. [9] *Re E. D. White Ltd.* (1929) 29 S.R. (N.S.W.) 389.
[10] [1955] A.L.R. 512, 519. [11] *Supra.*

CERTIORARI — ERROR OF LAW UNRELATED TO JURISDICTION — LABOUR AND INDUSTRY ACT — EXEMPTION OF EMPLOYER FROM PROVISIONS REQUIRING GRANT OF LONG SERVICE LEAVE

Re Industrial Appeals Court
Ex Parte Henry Berry & Co. (Aust.) Ltd.[1]

The provisions of Division 4 of Part VIII of the Labour and Industry Act 1953 require the grant of long service leave to employees who have served for certain prescribed periods. S. 153 (1) of the Act em-

powers the Industrial Appeals Court (hereafter called the I.A.C.) in certain circumstances to exempt any employer from the operation of those provisions. As familiarity with its terms is essential to an understanding of the case, full quotation of the sub-section is necessary.

> The Industrial Appeals Court may, subject to such conditions as it thinks fit to impose from time to time, exempt any employer in respect of all or any class of his workers from the operation of the provisions of this Division in any case where the Court is satisfied—
>
> (a) that such workers are under the terms of employment with the employer entitled on a basis not less favourable than that prescribed by this Division—
>
> (i) to long service leave; or
>
> (ii) (whether or not solely at the cost to the employer, but at not less cost to the employer than the cost involved in providing long service leave under this Division) to superannuation benefits or to superannuation benefits and long service leave; and
>
> (b) that it is in the best interest of such workers that such exemption should be granted—
>
> and may at any time revoke any such exemption.

The prosecutor—Henry Berry & Co. Ltd.—had applied for such exemption on the ground that the 'Henry Berry & Company (Australasia) Limited Staff Superannuation Plan' provided benefits to members of its staff in excess of the benefits conferred by the Act, and that the cost of it was not less than the cost of providing long service leave as required by the Act, and that it was in the best interests of the staff that an exemption should be granted.

The prosecutor had submitted the superannuation plan, which was constituted by a trust deed between itself and three trustees, for the perusal of the I.A.C.

The I.A.C. rejected the application for exemption on two grounds:

(a) that employees of the company were not entitled to the superannuation benefits 'under the terms of employment with the employer' within the meaning of s. 153 (1) (a) and,

(b) that it was not satisfied that it is in the best interests of such employees that an exemption should be granted.

The I.A.C.'s view, expressed in (a) above, was that the requirements in s. 153 (1) (a), that employees should be entitled to superior internal superannuation benefits 'under the terms of employment with the employer', meant that the employee should be entitled to these benefits by virtue of some obligation resting on the employer and owed directly to his employee as part of the contract of employ-

[1] [1955] A.L.R. 675. Supreme Court of Victoria, Hudson J.

ment. The benefits contained in the Berry plan, however, accrued by virtue of a tripartite agreement between employer, employee and trustees, and there was no direct obligation on the employer to confer them in any case. For convenience this may be called the 'direct obligation' view.

The view expressed in (b) above was that s. 153 (1) (b) requires the I.A.C. to compare the effect on the interests of the workers concerned of granting exemption on the one hand and of refusing it on the other, and unless on such a comparison it is satisfied that the best interests of the workers will be served by granting the exemption, it should be refused. The opposing viewpoint unsuccessfully advanced by the prosecution was that the section requires simply a comparison of the benefit under the scheme put forward by the prosecutor with those conferred by the Act so that, if on such a comparison the former appeared more beneficial to the worker, the I.A.C. should grant the exemption. Since it did not appear that the company's superannuation plan would terminate if the I.A.C. refused to grant the exemption sought, the effect of the refusal would be that the workers would be entitled to both benefits, which is obviously a better prospect from the workers' point of view than being entitled merely to the benefits of the internal scheme. In other words, it was not 'in the best interests of such workers that such exemption should be granted'. On this interpretation of s. 153 (1) (b) it would seem, incidentally, that an application for an exemption could only be granted where it appeared in evidence that the termination of the employer's superannuation scheme was an automatic result of a refusal to exempt.

Having been refused their application for exemption in the I.A.C., Henry Berry & Co. Ltd. would want to appeal to a higher court. This course was, however, impossible, since s. 159 (1) of the Labour and Industry Act 1953 provided that: 'The decision of the Industrial Appeal Court in any matter whatsoever under this Division shall be final and without appeal'. The Company could not appeal, nor could it deny that the I.A.C. had been competent to determine the matter – quite clearly the I.A.C. had had jurisdiction to try the application. How then could the matter be taken any further?

The Company saw its way out by moving for the grant of a writ of certiorari to quash the I.A.C.'s decision on the ground that an error of law had been made and appeared on the face of the record: this is the form of litigation which the instant case takes. Normally a writ of certiorari is used to quash the decision of an inferior tribunal on the ground that the tribunal lacked jurisdiction, but recent authority favoured the view that the writ is available to quash for error of law appearing on the face of the record – a non-jurisdictional objection. This view was espoused in *Shaw's* case[2] in

[2] *R. v. Northumberland Compensation Appeal Tribunal ex. p. Shaw*, [1952] 1 K.B. 338.

the Court of Appeal after an elaborate historical survey. The effect is similar to the exercise of appellate jurisdiction, although procedurally the grant of a writ of certiorari takes the form simply of the quashing of the decision under review, rather than the substitution of the reviewing court's decision. A writ of mandamus would be necessary to compel the inferior tribunal to rehear the matter. The effect is also to enlarge the supervisory functions of the courts, and some such motives of policy can perhaps be detected in the observation of Lord Goddard C.J. in the Divisional Court in *Shaw's* case,[3] that 'tribunals . . . are often given very difficult sets of regulations and statutes to construe. It certainly must be for their benefit . . . that this court should be able to give guidance to them.'[4]

Whatever the effects of, and motives underlying, the decision in *Shaw's* case, Hudson J. considered that he was bound by it. The next point to consider then was whether the I.A.C. had made an error of law, and secondly, if it had, whether the error appeared on the face of the record. Hudson J. thus directed himself to the I.A.C.'s construction of s. 153 (1) of the Labour and Industry Act. Following long argument on the matter, His Honour took the view that the I.A.C.'s construction of s. 153 (1) (a) was erroneous and that the 'direct obligation' view of the section was untenable: 'In my opinion the words "terms of employment" in their ordinary and natural meaning comprehend rights and obligations such as have been created by the trust deed in the present case.'[5]

Despite the error of law in construing s. 153 (1) (a) however, Hudson J. did not quash the I.A.C.'s decision, which he held was sustainable on the ground that the I.A.C. had not been satisfied that it was in the best interests of the employees that the exemption should be granted. His Honour agreed with the I.A.C's construction of s. 153 (1) (b) and this was sufficient to prevent the granting of an exemption.

Apart from its endorsement of the *Shaw* doctrine, this case is important for its discussion of what constitutes the record of a tribunal for the purposes of the doctrine[6] (His Honour reaches the conclusion that the trust deed formed part of the record, having been incorporated by reference in the judgment of the Court), and of what statutory language is necessary to remove the remedy of certiorari for error of law.[7]

GRAHAM FRICKE

[3] [1951] 1 K.B. 711.
[4] *Ibid.*, 724.
[5] [1955] A.L.R. 675, 684.
[6] *Ibid.*, 681.
[7] *Ibid.*, 679-80.