

AIR CALEDONIE INTERNATIONAL AND OTHERS

v.

THE COMMONWEALTH

JUDGMENT

GAUDRON J.

AIR CALEDONIE INTERNATIONAL AND OTHERS

v.

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Until its repeal with effect from 1 July 1988 s.34A of the Migration Act 1958 (Cth) ("the Act") provided, in sub-ss(1) to (4), as follows:

- "(1) Where a passenger, other than a prescribed passenger, travels to Australia on an overseas flight, the passenger shall pay the prescribed fee for immigration clearance of that passenger by an officer at the airport at which the passenger intends to enter Australia.
- (2) The fee shall be collected by the international air operator operating the flight.
- (3) The international air operator shall pay to the Commonwealth the amount of the fee payable by a passenger, whether or not the operator has collected that amount from the passenger.
- (4) An amount payable to the Commonwealth by an international air operator under subsection (3) is a debt due to the Commonwealth and may be recovered in a court of competent jurisdiction."

The plaintiffs, international airline operators, have brought proceedings challenging the validity of s.34A of the Act and seeking, inter alia, a declaration that no amounts are payable to the Commonwealth (the defendant) pursuant to s.34A(3) of the Act. The defendant has demurred to the plaintiffs' statement of claim and has counter-claimed

severally against each plaintiff for the amount of the prescribed fees. Alternatively, it has counter-claimed severally against each plaintiff for the amount of fees prescribed and collected from passengers as "moneys had and received by the plaintiff and not paid by it to the defendant." From argument in these proceedings it is clear that that is intended to be understood as "moneys had and received to the use of the defendant".

By amended defence to counter-claim the plaintiffs admit that they have collected the prescribed fee from some passengers, and that they have not paid the fees so collected to the defendant. They do not admit that they have collected fees from all passengers other than prescribed passengers. Otherwise, they deny the allegations contained in the counter-claim. Additionally they assert invalidity as an answer to the whole of the counter-claim.

The defendant now seeks interlocutory mandatory injunctions directing the plaintiffs to pay to it the moneys collected by them as prescribed fees. The defendant acknowledges that the plaintiffs are not presently in a position to identify precisely what moneys have been collected as prescribed fees by reason that stamps in the amount of the prescribed fee were pre-sold to travel agents and to individuals who did not enter or re-enter Australia prior to the repeal of s.34A of the Act on 1 July 1988. In some such cases refunds have been sought. The defendant

says that it is prepared to make appropriate allowance for this, including by way of an undertaking to indemnify the plaintiffs in respect of any refunds made by them or itself to make refunds. Additionally, the defendant offers an undertaking that in the event that s.34A is held to be invalid it will refund the fees paid by individuals who seek such refund, and give such other undertaking or undertakings as may be considered appropriate by the Court.

The defendant bases its application on the general principle that "it is the duty of the court to respect, indeed, to defer to the enactment of the legislature until that enactment is adjudged ultra vires": Richardson v. Forestry Commission (1987) 61 A.L.J.R. 528; 73 A.L.R. 589, at p.534; p.600 of A.L.R. See also Castlemaine Tooheys Ltd. v. South Australia (1986) 161 C.L.R. 148; Dauids Holdings Pty. Ltd. v. Byrnes (1987) 71 A.L.R. 251. Doubtless that principle will, in an appropriate case, ground the grant of an interlocutory injunction to restrain a breach of challenged legislation. However, as is clear from Richardson, the grant of such relief is conditional upon the applicant establishing that it will suffer irreparable harm, or upon the applicant establishing a real possibility of irreparable harm, to the subject matter of the proceedings.

In the present matter the defendant neither asserts that it will suffer irreparable harm nor that there is a real possibility of irreparable harm to the subject matter of the

proceedings. Nor is there any assertion that the plaintiffs intend to so arrange their assets or business activities as to defeat any judgment that may be obtained by the defendant. Rather, it was put that the plaintiffs have obtained a "windfall" in the nature of unjust enrichment by having the benefit of the fees collected by them pending determination of the matters in issue and that justice and the balance of convenience, when considered against the general duty of the court to defer to the enactment of the legislature, favour the Commonwealth having the benefit of the fees collected. The argument is superficially attractive, notwithstanding that the defendant can point to no authority supporting such a broad approach to the grant of interlocutory relief.

The defendant's argument loses much of its attractiveness when it is appreciated that a discrete issue raised by the counter-claim and defence to counter-claim is the indebtedness of the plaintiffs to the defendant in the sum of the fees collected from passengers even if the legislation is ultimately adjudged invalid. The effect of the grant of injunctions as sought would be to secure to the defendant, in advance of any hearing as to the merits, the debt which is directly in issue in the proceedings between the parties. Such a result could be achieved consistently with authority and basic principle only if necessary to prevent an abuse of the Court's process.

The application must be refused. The applicant (defendant) should pay the respondents' (plaintiffs') costs. It will be certified that this was a matter proper for the attendance of senior counsel in chambers.

AIR CALEDONIE INTERNATIONAL
& ORS

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REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on 19 AUGUST 1988

(GAUDRON J.)
