37/1955

No. 31 of 1955.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

PERPETUAL TRUSTEE COMPANY (LIMITED)
(Plaintiff) . . . . . *Appellant*

AND

PACIFIC COAL COMPANY PTY. LIMITED
(Defendant) . . . . . *Respondent.*

Case for the Appellant.

RECORD.

1. This is an Appeal, pursuant to Special Leave granted on the 21st March, 1954, from a Judgment of the High Court of Australia dated 20th August, 1954, allowing the Respondent's Appeal from part of a Judgment of the full Court of the Supreme Court of New South Wales dated 30th November, 1953. p. 47. p. 30.

2. The Appellant, who was Plaintiff, had demurred to all the six Pleas of the Respondent. Issue was joined on the demurrers and this Appeal is against the decision of the High Court to the effect that the fourth and fifth Pleas of the Respondent are valid. p. 7, l. 20 to p. 8, l. 45.

3. By his Declaration dated 13th December, 1951, the Appellant claimed the sum of £28,367 7s. 2d. arrears of rent due under a Mining Lease dated 1st September, 1919 (hereinafter referred to as " the Mining Lease "). By the Mining Lease the Appellant demised to the Respondent for a term of 43 years computed from the 1st September, 1919, all and singular the mines, veins and seams of coal under certain land identified in the Mining Lease with full liberty to the Respondent to search for, win and carry away the said mines of coal. The Mining Lease provided that a minimum annual rent of £819 be paid by the Respondent to the Appellant but it further provided that the actual rent payable should exceed the minimum rent in the event of the Respondent mining and carrying away mineral in excess of a stipulated minimum. In such event the rent so payable had to be ascertained by a formula contained in the Mining Lease. pp. 1–2.

4. It is common ground that if the Appellant succeeds on the fourth Plea, the Appellant will also be entitled to judgment on the fifth Plea. The only further reference to the fifth Plea is in paragraph 25 hereof wherein this matter is explained.

5. The third and sixth Pleas are not relevant to this Appeal.

p. 6, ll. 6–29. 6. The first and second Pleas of the Respondent relate to all relevant periods up to 31st December, 1947, and involve in all the sum of £9,547 11s. 5d. In such Pleas the Respondent contended that the said Mining Lease was a lease within the meaning of the Reduction of Rent Act, 1931, and the Landlord and Tenant (Amendment) Act, 1932–1947 (Statutes of the State of New South Wales) and that accordingly up to the 31st December, 1947, the contractual rent actually payable was reduced by 22½ per cent. Judgment was given in favour of the Respondent on such Pleas by the full Court of the Supreme Court of New South Wales. There has been no appeal from such Judgment and it is now judicially determined between the parties that—

(1) the Mining Lease is a lease within the meaning of the said Statutes ;

(2) the totality of the sum payable under the Mining Lease is rent ;

(3) that the Landlord and Tenant (Amendment) Act, 1932-1947 of the State of New South Wales operated on the Mining Lease during the period 1st April, 1939–31st December, 1947, so as to modify the total sum payable by the Respondent according to the terms of the Mining Lease.

The relevance of the above to the decision on the fourth Plea is dealt with in paragraphs 20–22 hereof.

p. 7, l. 20 to p. 8, l. 6. 7. In the fourth Plea the Respondent contended that part of the rent under the Mining Lease payable in respect of the period 1st July, 1948, to 30th September, 1948, was controlled by the Prices Regulation Order 985, dated 18th March, 1943, made and promulgated by the Commonwealth Prices Commissioner in pursuance of powers vested in him by the National Security (Prices) Regulations which, in turn, were made and enacted pursuant to the National Security Act, 1938–1949. The Respondent further contended that the effect of this Order was that such part of the rent during this period should be computed on the contractual basis of the selling price of coal as at 31st August, 1939, less 22½ per cent. In contradistinction to the Statutes referred to in the preceding paragraph, the Legislation herein relied upon by the Respondent is Federal Legislation.

8. The Appellant contends that the rent payable under the said Mining Lease is not affected by such Legislation and/or Order and this, subject to the contentions raised in paragraphs 20–22 hereof, is the sole issue between the parties.

9. There is no conflict between the parties as to the scope or validity of the National Security Act, 1939–49. This Act of the Federal Parliament empowered the Governor-General of the Commonwealth for the purposes of the defence of the Commonwealth to make regulations controlling (*inter alia*) rents payable under all leases including mining leases, to control prices of goods and moneys payable under contracts or otherwise.

10. Manifold regulations were in fact made and from time to time amended by the Governor-General in the exercise of such powers. The regulations which are material to this Appeal are the National Security (Prices) Regulations (hereinafter called " the prices regulations ") and the National Security (Landlord and Tenant) Regulations (hereinafter called " the Rent Regulations ").

11. The prices regulations were first made on the 22nd August, 1940. They were amended from time to time, and on the 18th March, 1943, being the date of the making of the Prices Regulation Order by the Commonwealth Prices Commission, which is relied upon in the fourth Plea. The material parts of the regulations read as follows :—

" 3. In these Regulations, unless the contrary intention appears—

' declared service ' means any service declared by the Minister, by notice in the Gazette, to be a declared service for the purpose of these Regulations ;

' Service ' means—

(*a*) any service supplied or carried on by any person or body of persons, whether incorporated or unincorporated engaged in a public utility undertaking or an industrial or commercial enterprise ; and

(*b*) any rights or privileges for which remuneration is payable in the form of royalty, stumpage, tribute, or other levy based on volume or value of goods produced,

and includes any other undertaking or service which is declared by the Minister, by notice in the Gazette, to be in his opinion essential to the life of the community.

' rate ' includes every valuable consideration whatsoever, whether direct or indirect ;

22. (2) The Minister may, by notice in the Gazette, declare any service to be a declared service for the purpose of these Regulations ;

Provided that the Minister shall not make any declaration under this sub-regulation with respect to any service supplied or carried on by the Government of any State except with the concurrence of the Executive Government of that State.

(3) Any declaration by the Minister in pursuance of this regulation may be made generally or in respect of any part of Australia or any proclaimed area or in respect of any person or body or association of persons.

(4) Any such notice may, by notice in the Gazette, be amended, varied or revoked by the Minister.

23. (2) The Commissioner may, with respect to any declared service, from time to time, in his absolute discretion, by Order published in the Gazette—

(*a*) fix and declare the maximum rate at which any declared service may be supplied or carried on generally or in any part of Australia or in any proclaimed area ; or

(*b*) declare that the maximum rate at which any such service may be supplied or carried on by any person or body or association of persons shall be such rate as is fixed by notice by the Commissioner in writing to that person or body or association of persons.

(2A) In particular, but without limiting the generality of the last preceding sub-regulation, the Commissioner, in the exercise of his powers under that sub-regulation, may fix and declare—

(*a*) different maximum rates according to differences in the quality, description or volume of the service supplied or carried on or in respect of different forms, modes, conditions, terms or localities of trade, commerce or supply ;

(*b*) different maximum rates for different parts of Australia or in different proclaimed areas ;

(*c*) maximum rates on a sliding scale ;

(*d*) maximum rates on a condition or conditions ;

(*e*) maximum rates for cash or on terms ;

(*f*) maximum rates according to or upon any principle or condition specified by the Commissioner, and

(*g*) maximum rates relative to such standards as he thinks proper, or relative to the rates charged by individual suppliers on any date specified by the Commissioner, with such variations (if any) as in the special circumstances of the case the Commissioner thinks fit, or so that such rates will vary in accordance with a standard, or time, or other circumstance, or shall vary with profits or wages, or with such costs as are determined by the Commissioner.

(3) The Commissioner may at any time by Order published in the Gazette amend, vary or revoke any Order made in pursuance of this regulation.

(4) Every Order made under this regulation shall take effect upon the date specified in the Order or, if no date is so specified, upon the date of the publication of the Gazette containing it.

(5) Every Order which has been, or is, made under sub-regulation (1) of this regulation (not geing an Order in respect of specific goods) shall apply in relation to all goods which are declared, whether before or after the making of the Order, to be declared goods and in respect of which the declaration is in force."

12. On 30th November 1942 the Minister acting under the power conferred on him by the Prices Regulations had declared that, with certain immaterial exceptions all services supplied or carried on in Australia, were " declared " services for the purposes of the Prices Regulations.

It is therefore conceded that if the grant of a lease was the supply of a service, or a leasehold estate was a right or privilege for which remuneration was payable in the form of a royalty based on volume or value of the goods produced and therefore a service within the meaning of the Prices Regulations such service would be a " declared " service.

13. On the 18th March 1943 the Prices Commissioner made the Prices Regulation Order No. 985, which is the Order relied upon by the Respondent to support the 4th plea, the material parts of which are as follows :— (This Order is hereinafter referred to as " the Prices Order).

" ORDER 985 ISSUED BY THE COMMONWEALTH PRICES COMMISSIONER.

" 1. . . .

2. I fix and declare the maximum rates per ton of coal mined at which mining rights may be supplied in respect of coal mined from the classes of mining properties mentioned hereunder to be—

(*a*) Properties subject to Crown lease which are sub-leased by the Crown lessee on the 31st August, 1939—the amount per ton of coal mined now payable under the Crown lease plus the amount per ton of coal mined paid by the sub-lessee on the 31st August, 1939 (after deducting the amount then payable under the Crown lease).

(*b*) Properties subject to Crown lease which were not sub-leased on the 31st August, 1939, but have since been sub-leased—the amount at present payable under the Crown lease per ton of coal mined plus one penny.

(*c*) Properties not subject to Crown lease which were privately leased on the 31st August, 1939—the amount per ton of coal mined payable on the 31st August, 1939.

(*d*) Properties not subject to Crown lease which were not previously leased on 31st August, 1939—threepence per ton.

3. . . .

4. For the purpose of this Order ' lease ' includes any contract or agreement, express or implied, whereby rights to mine coal are granted or leased for some fixed or ascertainable period on a consideration of the payment of a royalty, tribute or other levy based on coal mined—and ' leased ' has a corresponding meaning."

14. After the making of this Order the Prices Regulations were amended from time to time in the following material aspects :—

A. On 1st September, 1943, Regulation 3 of the Prices Regulations was further amended by Statutory Rule 1943 No. 220, as follows :—

"3. . . .

'Service' means—

(*a*) . . .

(*b*) . . .

(*c*) Any rights under an agreement for the hiring of goods.

(*d*) Any rights under an agreement for the provisions of lodging."

B. On 22nd June, 1944, Regulation 3 of the Prices Regulations was further amended by Statutory Rule, 1944, No. 94, as follows :—

"3. . . .

'Service' means—

(*a*) . . .

(*b*) . . .

(*c*) . . .

(*d*) . . .

(*e*) Any rights under an agreement (not being a lease) or a licence for the hiring of a hall."

C. On 19th July, 1945, Regulation 3 of the Prices Regulations was further amended by Statutory Rule, 1945, No. 113, as follows :—

"3. (1) . . .

'Service' means—

(*a*) . . .

(*b*) . . .

(*c*) . . .

(*d*) . . .

(*e*) . . .

(2) A person who receives (otherwise than as agent) any valuable consideration from any other person of a service shall, for all purposes of these regulations, be deemed to supply that service to that other person, for the amount or value, or at the rate, as the case may be, of that valuable consideration."

The Regulation making these amendments further provided :

" Any declaration by the Minister of any services to be declared services in force at the commencement of this regulation, shall have effect as if this regulation had been in operation at the time of the publication in the Gazette of the notice of the declaration."

D. On 17th January, 1946, Regulation 3 of the Prices Regulations was further amended by Statutory Rule, 1946, No. 12, as follows :—

" 3. (1) . . .

' Service ' means—

(*a*) . . .

(*b*) . . .

(*c*) . . .

(*ca*) Any rights under an agreement for the hire, or use or occupation of any wharf or dock.

(*d*) . . .

(*e*) . . ."

E. On the 10th April, 1946, Regulation 3 of the Prices Regulations was further amended by Statutory Rule, 1946, No. 71, by the addition of two sub-regulations in these terms :—

" 3. (1) . . .

' Service ' means—

(2) . . .

(3) Where any agreement (including any lease) has been entered into, whether before or after the commencement of this sub-regulation, under which a person has become entitled to rights or privileges specified in paragraph (*b*), (*c*), (*ca*), (*d*) or (*e*) of the definition of ' service ' in sub-regulation (1) of this regulation, the person from whom the rights or privileges have been acquired shall, for all purposes of these Regulations, be deemed to be supplying those rights or privileges at all times during which the rights or privileges continue, at the rate of the remuneration charged therefor from time to time.

(4) Where the maximum rate of any such remuneration is, by virtue of any order or notice made or given before or after the making of any such agreement, and whether before or after the commencement of this sub-regulation, fixed under these Regulations at a rate lower than the rate otherwise payable under any such agreement the agreement shall, while that maximum rate is in force, be deemed to be varied by the substitution of the rate so fixed for the rate otherwise payable under the agreement in respect of the exercise or enjoyment of any such rights or

privileges after the commencement of this sub-regulation, or after the date on which the maximum rate becomes applicable, whichever is the later."

15. On the 28th November 1941 the Rent Regulations were first made and on the 18th March 1943. The material parts thereof are set out hereunder.

"1. . . .

2. . . .

3. . . .

4. In these regulations, unless a contrary intention appears—

'lease' includes every contract for the letting of any prescribed premises, whether the contract is made orally, in writing or by deed, and includes a contract for the letting of prescribed premises together with goods;

'lessor' and 'lessee' mean the parties to a lease, and include—

(*a*) a mesne lessor and a mesne lessee; and

(*b*) a sub-lessor and sub-lessee,

respectively;

'prescribed premises' means any premises (other than premises ordinarily leased for holiday purposes only and the premises of any grazing area, farm, orchard, market garden or dairy farm) and includes any land or appurtenances leased with any premises;

'rent' means the actual rent payable under a lease, and includes—

(*a*) the value to the lessor of any covenants, conditions or other provisions of, or relating to, the lease to be performed by the lessee other than covenants, conditions and provisions usually entered into by a lessee; and

* * * * *

10. . . .

11. . . .

12. . . .

13. . . .

14. Where the fair rent of any prescribed premises (including the fair rent of any goods leased therewith) is fixed by these Regulations or by a determination—

(*a*) a person shall not—

(i) let the premises, or goods leased therewith, at a rent exceeding the fair rent thereof; or

(ii) knowingly demand, receive or pay any sum as rent exceeding the fair rent thereof;

(*b*) the legal remedies for the enforcement of any covenant or agreement—

(i) to pay rent for the premises, or goods leased therewith, exceeding the fair rent thereof; or

(ii) which, directly or indirectly, would secure to any person the payment of rent or of money in respect of the occupation of the premises, or of the use of the goods leased therewith, so that the amount received by the person would exceed the fair rent thereof,

shall be limited to the enforcement of payment of the fair rent thereof; and

(*c*) any sum paid as rent for, or in respect of the occupation of, the premises, or for the use of the goods leased therewith, exceeding the fair rent thereof, shall be recoverable in an action for debt in any court of competent jurisdiction by the lessee from the lessor to whom it was paid;

* * * * *

(*b*) any rates or taxes payable by a lessee in respect of any prescribed premises other than excess water rates,

and where, in any lease—

(*c*) it is provided that a reduced amount, as rent, shall be accepted by the lessor upon any condition to be performed by the lessee, that reduced amount shall be deemed to be the rent payable under the lease; and

(*d*) any rebate, discount, allowance or other reduction is provided for, the amount payable after each such reduction is made shall be deemed to be the rent payable under the lease;

5. (1) Notwithstanding any term or covenant in any lease in force at any time after the commencement of these Regulations, the rent payable by the lessee of any prescribed premises (or of prescribed premises together with goods) in respect of any period after the date of the publication in the Gazette of the Order made under sub-regulation (4) of regulation 3 of these Regulations in respect of the State or Territory in which the prescribed premises are situated shall not exceed—

(*a*) the rent payable in respect thereof at the prescribed date; or

(*b*) if the premises were not in existence on that date or were not leased on that date—the rent fixed by a determination.

(2) . . .

(3) . . .

(4) . . .

(5) . . .

(6) Nothing in this regulation shall affect the operation of any determination.

(7) Until any rent fixed by virtue of paragraph (*a*) of sub-regulation (1) of this regulation is increased or decreased by a determination, the rent so fixed shall be the fair rent of the prescribed premises (or of prescribed premises together with goods) in respect of which it is so fixed.

(8) . . .

6. . . .

7. . . .

8. . . .

9. (1) The lessor or a lessee who has paid or tendered all rent due and payable under the lease up to a date not earlier than twenty-eight days before the date of the application, of any prescribed premises (not being prescribed premises in relation to which a Fair Rents Board is not authorized to exercise the powers conferred by these Regulations), or the owner of any such premises which are vacant may apply to the Fair Rents Board nearest to the prescribed premises or to any other Fair Rents Board if that other Board is satisfied that hardship will not be occasioned thereby to any party to the application, to have the fair rent of the prescribed premises determined by the Board.

(2) . . .

(3) . . .

(4) . . .

(5) . . .

(6) . . .

(7) . . .

(8) . . .

(9) . . ."

16. The Appellant contends that the rent payable under the Mining Lease was not capable of control and was not controlled by the Prices Order. It is contended that this is so because neither the grant of an estate in the mine itself nor the leasehold estate therein constituted a service or the supply of a service within the meaning of the Prices Regulations and further because the language of the Prices Order is inapt to control any part of the rent reserved upon the Mining Lease.

17. The Appellant makes an alternative submission upon the assumption that the Prices Regulations gave the Prices Commissioner power to make orders affecting rent. The Prices Commissioners' power under the Prices Regulations was " to fix and declare a maximum rate at which any declared service may be supplied or carried on."

Let it be assumed (contrary to the Appellant's submission) that the demise of land is the supply by the Lessor of a service to the Lessee, yet that " service " is " supplied " at the date when the demise is made and the estate in the land created in the Lessee. Thereafter the Lessee works the demised mineral not by virtue of any continuing " supply " by the Lessor but as a Proprietor and by dint of his own leasehold title. The power to fix the maximum rate at which a service may be supplied can operate only with respect to services supplied on or after the date of the Order purporting to fix the maximum rate for the supply of services. It cannot operate with respect to a service supplied before that date. The Order fixing the maximum rate cannot, therefore, operate upon rent reserved by Leases made and issuing out of estates created before the date of the Order. As stated in paragraph 3 hereof the Mining Lease was made in 1919.

18. The Appellant makes a further alternative submission: Let it be assumed, contrary to the Appellant's submission, that the leasehold estate in the mine can be regarded as a right or privilege for which remuneration was payable, it is nevertheless necessary that the remuneration should take the form of a royalty, stumpage, tribute, or other levy based on the value of goods produced in order to make such right or privilege a service within the meaning of the Regulations.

The Appellant submits that the remuneration under the Mining Lease was by way of rent and not by way of royalty, even though the rent was computed on a formula related to the produce of the mine; that the remuneration was not by way of royalty within the meaning of the Regulations, and particularly not by way of royalty based on the volume or value of goods produced within the meaning of the Regulations.

19. The Appellant's demurrers were heard by the Full Court of the Supreme Court of New South Wales (Street, C.J., Owen and Herron, JJ.) on the 28th, 29th and 30th September, 1953. On the 30th November, 1953, Judgment was given in favour of the Appellant on the fourth Plea, Herron, J., dissenting.

20. The Full Court were unanimous in their decision in favour of the Respondent on the first and second Pleas. In the course of his Judgment, in which Street, C.J., concurred, Owen, J., said:—

" First Plea. This is pleaded to so much of the rent and royalty as is alleged to have accrued between 1st January, 1932, the period during which the Reduction of Rents Act, No. 45 of 1931, was in force, and the question is whether the compulsory reduction in rent, for which that Act provided, applied to the payments covenanted to be paid under this lease. In my opinion, it did . . . p. 13, ll. 1–6.

" Now, the payments covenanted to be paid under this lease, whether fixed or uncertain, but ascertainable, were, in my opinion, rent. A royalty such as was here reserved is a true rent. It is a profit, capable of being rendered certain, issuing out of the land demised, for which the lessor could at common law distrain. (*Daniel* v. *Gracie*, 6 Q.B. 145; *The Queen* v. *Westbrook*, 10 Q.B. 178; p. 13, ll. 15–26.

Llewellyn v. *Rous*, L.R. 2 Eq. 27 ; *Edmonds* v. *Eastwood*, 2 H. & N. 811 ; *Coal Commission* v. *Earl Fitzwilliams Royalties Co.*, 1942 Ch. 365.) In the declaration, the pleas and in argument no attempt has been made to distinguish between the fixed and the uncertain payments covenanted to be made, and, in my opinion, rightly so. They are inextricably tied together and both are rent. In my opinion, the first plea is good.

" Second Plea : This plea is pleaded to the amount of rent and royalty alleged to have accrued between 1st January, 1933,
p. 13, ll. 27–33. and 31st March, 1934, and between 1st April, 1939, and 10
31st December, 1947, and is based upon Part III of the Landlord and Tenant (Amendment) Act, No. 67 of 1932. That part came into force immediately upon the expiration of the Reduction of Rents Act, 1931, and from time to time was continued until its expiry on 31st December, 1947 . . . Part III of the Landlord and
p. 14, ll. 8–10. Tenant (Amendment) Act of 1932 was for present purposes, a re-enactment of the Reduction of Rent Act, 1931, and in my opinion the second plea is good."

21. Herron, J., also dealt with these pleas in the passage set out hereunder :— 20

" With respect to pleas one and two the word rent means both the fixed rent and the royalty. Both parties agree that the matter should be so treated. This is a correct view. When examined for the purposes of the law relating to landlord and
p. 18, ll. 24–32. tenant royalty is a true rent although for other purposes, e.g., price fixing by statute or regulation, it may have to be regarded as a form of remuneration or price for coal actually won. However, if the rent comprised of a fixed or minimum sum together with a fluctuating royalty based on output is capable of ascertainment by calculation so as to become certain it is regarded by the law of real property 30 as rent."

22. Accordingly, the Respondent has a Judgment in its favour that the Landlord and Tenant Act, 1932–47, controlled the quantum of rent payable under the Mining Lease until the 31st December, 1947—see paragraph 6 hereof earlier.

The Prices Regulations and the Prices Order relied upon by the Respondent in respect of the period subsequent to the 31st December, 1947, and which are the foundation of the fourth plea, were respectively made in 1940 and 1943. The Respondent's reliance upon them necessarily involves the assertion that they were valid and operative during at least part of 40 the period between 1943 and 31st December, 1947, with respect to part of the rent reserved under the Mining Lease. That is to say, the Respondent seeks to contend that the Federal Law Act affected to control the rent of (*inter alia*) mining leases during the period of the operation of the State Landlord and Tenant Amendment Act, 1932–47 ; but Section 109 of the Federal Constitution would in that event have rendered the State law *pro tanto* inoperative.

The Appellant submits that the finding judicially made between the parties that State legislation effectively regulated the whole rent payable under the Mining Lease until 31st December, 1947, precludes the Respondent contending against the Appellant that the federal law effectively controlled the same rent or any part thereof during the same period.

The Appellant therefore respectfully submits that the Respondent is estopped from contending that the Prices Order in fact operated to control any part of the rent payable under the Mining Lease at any time and in this respect relies upon decisions of which *Clyde Engineering Co. Ltd.* v. *Cowburn*, 37 C.L.R., p. 466, is the principal, and upon the principles laid down in *Hoysted* v. *Commission of Taxation*, 37 C.L.R., p. 290.

23. With respect to (*inter alia*) the fourth plea, Street, C.J., said :—

" It is clear that the relationship which existed between the parties was that of landlord and tenant, and the payments required to be made under the lease executed in 1919 were rent in every sense of the term. It is true that the amount payable in any particular year depended upon the amount of coal mined, but this does not alter the situation and create some other relationship than that of landlord and tenant. ' Rent . . . is the recompense paid by the lessee to the lessor for the exclusive possession of corporeal hereditaments . . . Rent does not necessarily represent the annual produce of the land ; a royalty, notwithstanding that it is reserved in respect of substances which are taken from the land so as to cause its permanent diminution is a true rent ' (Halsbury Laws of England, 2nd ed. vol. 20, p. 158 ; and see also *Coal Commission* v. *Earl Fitzwilliams Royalties Co.* 1942 Ch. 365). The effect of the agreement between the parties contained in the lease now in question was to require a minimum payment of £819 each year, and further additional payments if the amount of coal won from the mine and the land demised exceeded a certain figure. These payments were sums issuing out of the thing demised by virtue of the estate granted by the demise, and are properly to be regarded as rent paid for the subject-matter of the lease . . . The substantial question is whether in the present case the sums paid by the lessee to the lessor were paid for ' service ' within the meaning of the National Security (Prices) Regulations. In ordinary English the amount paid under the agreement between the parties in the present case cannot aptly be described as money paid for a service. The lessor does not render a service to his lessee, and unless the definition of ' service ' within the regulation requires that meaning to be put upon the word, it is clear that the rents paid under the lease now in question would not be a service. It is said, however, that the word ' royalty ' where it occurs in the definition makes the regulations applicable to the present case and entitles the Commissioner to promulgate an order in the terms contained in Order No. 985 of March, 1943 . . . Sub-Clause (B) of the definition deals with rights or privileges for which remuneration is payable. In one sense rent may be said to be paid for a right or a privilege, but it is more

p. 10, l. 41 to p. 11, l. 18.

p. 11, ll. 1–12.

p. 11, l. 28 to p. 12, l. 8.

than that, for it issues out of the land demised by virtue of the grant of that demise. The actual amount of the rent to be paid may fall to be determined by the application of a formula in the nature of a royalty formula, but it is still rent which is paid to the lessor . . . But in the present case the ' royalty ' is merged in and becomes part of the rent payable by the lessee to the lessor, and what the Commissioner purported to do by Order No. 985 was to fix the rent payable under a lease of land and a lease of the coal seam beneath the land. The Commissioner only had power to fix a price for a service, and had no power to fix rents. What was payable under the agreement between the parties in this case was a rent, and in my opinion, therefore, Order No. 985 was incapable of operation upon the agreement made between the parties in 1919. It is quite inapt to say that by this lease the lessor supplied to the lessee a service in the way of mining rights The mining rights were vested in the lessee because of the estate demised, and it was by virtue of that estate that the lessee was entitled to take coal from the lands in question. In no sense can it be said that the landlord supplied a service."

Owen, J., said :—

" . . . If, as I think, the whole of the payments for which this lease provided were in truth rent, it is to me somewhat surprising to think that one would find provisions relating to the fixation of rents in a set of Regulations designed to deal with the price of goods and services."

p. 14, ll. 23–27.

and after referring to the terms of the Regulations and Order His Honour continued :—

" In my opinion, a royalty which is in truth rent was not within the meaning which should be ascribed to the word ' royalty ' in Reg. 3, any more than was the fixed rent. I do not think it necessary to consider the practical difficulties which could arise where the payment per ton would vary not only with variations in the price of coal but with the quantity mined in any year. The simple method might perhaps have been merely to fix the selling price of coal, a course which, for aught I know was taken . . .

p. 14, l. 44 *to* p. 15, l. 44.

" The ' royalty ' of which Reg. 3 speaks should, in my opinion, be confined to payments such as, for example, might be made for the right to use a patent in the production of goods, or, to take another example closer to the present case, royalties payments made under a licence to extract minerals or to cut timber. Such a licence passes no estate in the land, and royalties payable under it are in no sense rent. It is, I think, in the set of laws dealing with the relationship of lessor and lessee and with the rent to be paid by the one to the other, and not to that which controlled prices, that one should look to find what, if any, interference there has been with that relationship ; and it is not, I think, to the point to say that when one goes to the landlord and tenant laws, it is found that it was not considered necessary to apply them to leases of coal mines. There cannot, I think, be any doubt that the

p. 15, ll. 31–46.

fixed rent payable under this lease was not within the Prices Regulations, and for my part I cannot, any more than could the parties, distinguish between that payment and the uncertain, but ascertainable, payments."

And on the assumption that the grant of a lease could be the supply of a service His Honour added :—

"If, however, Reg. 3 did apply to these payments, then a further difficulty arises. The Regulations, the Declaration and the Order are designed to operate on the price of goods thereafter sold and services thereafter supplied. To speak of the plaintiff supplying a service to the Defendant by 'supplying' mining rights is, to say the least of it, an inapt use of language, but, using this awkward phraseology, as must be done if the Regulations and Order apply to a lease such as this, the question arises as to when these rights were 'supplied.' I think the answer must be that they were 'supplied' in 1919, when they were granted. This difficulty did not escape notice, and in 1946 Reg. 3 was amended by adding to it a new sub-paragraph providing, *inter alia*, that 'a person from whom the rights or privileges mentioned in Reg. 3 (*c*) have been acquired shall be deemed to be supplying those rights or privileges at all times during which they continue'; but that amendment does not I think assist the Defendant. On the assumption, which I make for this purpose, that Reg. 3 as originally framed included payments of rent reserved by a mining lease for the 'supply' of mining rights, it applied only to future 'supplies' and the Declaration and Prices Order could operate only on future 'supplies.' If the effect of the 1946 amendment was to bring into the Regulations services which hitherto were not within them, I think that there would have had to have been a further Declaration and a further Prices Order to cover these additional 'services,' and no such Declaration or Order was made." p. 15, l. 47 to p. 16, l. 22.

Herron, J., who dissented, said :—

"The word 'service' was intended to have the broadest possible application. The Regulations were intended to fix prices as an aid to the national security. The fixation of prices of necessity could not be limited to sales of goods. There were many transactions which were not sales for which a price was asked and given. These transactions were described by the word 'service.' It was not wholly apt so to describe every sort of transaction which resulted in a price but it was a 'label' which was given a very wide and expanded meaning in the definition clause. It was defined as meaning . . . I think the word was intended to cover every valuable consideration whatsoever, whether direct or with respect to indirect transactions, which were for actual services rendered as in (A) or for notional services as in (B). A Lease of land at a fixed rent of itself would not be a service as it is not an actual service rendered nor is it within the terms of (B). With respect to the minimum or fixed rent under the lease in this case the regulations would not apply. But the lease conferred a right beyond the mere employment of the leasehold hereditaments, it p. 22, ll. 15–28.

conferred a right to mine and take away part of the land itself. This was a right or privilege. Beyond a certain point in quantity the right was not conferred by the fixed rent. It was a right in respect of which a separate remuneration was payable in the form of royalty. The word 'service' was intended, in my opinion, to apply to transactions which resulted in production of goods and for which a valuable consideration was paid but which could not be classed strictly as a sale of goods. Such transactions included converting trees into standing timber hence the expression stumpage, also digging minerals or gravel, from, e.g., a quarry or river bed by a tributer and mining coal on a royalty basis. So that taking a broad view of the Regulations, having regard to their purpose and to the circumstances under which they came into existence, a right which one person conferred upon another for valuable consideration to mine coal under the land of the former became a service rendered to the latter. The owner of the coal did not perform any active service but under part (B) of the definition he was not required to do so. All that the definition envisaged was the conferring of a right or privilege and a payment by way of royalty on the volume produced."

With respect to the argument that to treat the grant of a lease as the supply of a service would be to allow the Prices Commissioner to control the whole rent reserved by the Lease, His Honour said :—

"It is said that regulation 23 did not empower the Commonwealth to fix the remuneration for the coal won by the defendant in this case, as this would confer on him a power to fix rents not prices for, as I have already said, the fixed rent and royalty together constituted a true rent. But this argument is, to my mind, unsound. No regulation passed under the National Security Act applied to leases of coal mines nor were the Prices Regulations concerned with the relationship of landlord and tenant as such. Their purpose was to fix a rate for mining coal where this was done on a royalty basis. In some cases the right to take away coal may be included in a fixed rent and not at so much per ton. In such case the regulations would not apply. Payment of royalty is essential to their operation. But once payment by royalty per ton of coal mined is the method adopted by the parties for fixing the consideration or price, the regulations take their stand at that point and empower the Commissioner to fix the rate and disturb the parties' agreement as to quantum only. It makes no difference to the right of the Commissioner that the parties to such transaction are landlord and tenant or that, according to the law of landlord and tenant and for ascertaining their rights *inter se* as such, royalties are regarded as rent. The fact that the royalty is fixed by the parties as the terms of a lease whilst it is rent for one branch of the law it is nonetheless a royalty when it is sought to determine the price per ton of coal won. The definition, I think, applied to this transaction so that the Commissioner was empowered to fix the royalty payable by a lessee of a coal mine based on a rate per ton."

p. 22, l. 29 to p. 23, l. 5.

With respect to the argument that the Prices Order could not apply to rent reserved under a lease granted before the date of his Order, His Honour said :—

" It is said that this order relates to the future supply of mining rights and does not speak as to past transactions. I agree. It operates on transactions on and from 17th March, 1943. Paragraph 2 is in the following terms :— p. 23, ll. 6–9.

* * * * *

The expression ' mining rights ' offers no difficulty. These refer simply to the right to mine coal and have no reference to miner's rights as a technical phrase in mining law. The word ' supplied ' offers greater difficulty. In this case the right to mine coal was granted in 1919. Was the ' mining right ' equally supplied then within the meaning of Order 985 ? I do not think so. The purpose of the order was to fix rates per ton for coal mined after the 17th March, 1943. Royalty is payable under the lease when and only when the coal is won. Prior to that date the grant or supply is a matter of indifference to a Prices Commissioner or to the economy of the country in wartime. It is at the point of time when the royalty becomes payable by agreement that the order takes its stand by an interference with the parties' agreement and fixes the price. This point of time is when the coal is won, before that no royalty is payable. So that, in my opinion, the word ' supplied ' as used in the order refers to the actual exercise of a right or privilege as and when that occurs. The right is supplied if and when the service is availed of, not when merely agreed upon. The remuneration is the part of the agreement struck at by the regulations and as this is only determined at the moment the coal is worked the regulations operate as from that moment of time." p. 23, l. 29 to p. 24, l. 1.

* * * * *

24. The Appellant with great respect adopts the reasons of their Honours, Street, C.J., and Owen, J. With respect to the reasons of Herron, J., the Appellant would respectfully point out that having decided, correctly in the Appellant's submission, that the rent under the Mining Lease includes the sum calculated upon the out-turn of the mine, His Honour arrived at the conclusion that this calculated sum, as distinct from the minimum rental, was a royalty within the meaning of the Prices Regulations ; by treating the Lease as if it demised land at the fixed minimum rent and in addition granted separate rights of mining and asporting coal for a distinct and separate consideration or remuneration. This step, the Appellant would submit, is clearly erroneous and further, on the terms of the Lease, the whole rental is a calculated sum and nonetheless, so because a minimum is stipulated. Thus, His Honour ought to have concluded either that the whole rent is subject to the Prices Order—a conclusion which His Honour rejects—or that none of the rent is subject to the Prices Order.

25. The position with regard to the Fifth Plea is simply explained in the following passage in the Judgment of Owen, J. :—

" Fifth Plea : For the same reasons, I think that this plea fails. It relates to the period between 20th September, 1948, and p. 16, ll. 31–36.

31st December, 1950. It differs only from the third and fourth pleas in that it has to rely in addition upon the State Prices Regulation Act No. 26 of 1948, which came into force on the 20th September, 1948, and which continues the National Security (Prices) Regulation as a State Law."

26. The decision of the full Court of the Supreme Court of New South Wales on the Fourth and Fifth Pleas was reversed by the High Court. Only one Judgment was delivered.

The High Court were of opinion that the rent, other than the minimum rent payable under the Mining Lease was a rate at which a service was supplied within the meaning of the Prices Regulations.

Their Honours in the course of their judgment said :—

p. 42, ll. 5–27. " In the Supreme Court the decision of the majority of the Judges was based on the view that such rights and such a royalty were outside the scope of the Regulations and were not covered by para. (B) of the definition of ' service ' in Reg. 3.

In considering this question it is to be borne in mind that here and in England it has long been a practice in coal mining leases to reserve both a fixed minimum rent and royalties varying with the quantity of the coal worked. The fixed or dead rent ensures a minimum return to the lessor and encourages the lessee to work the mine : cf. Halsbury Laws of England, 2nd Ed. Vol. 22 p. 602, where the nature of the practice is mentioned and amplified in the following passage : ' A royalty, in the sense in which the word is used in connection with mining leases, is a payment to the lessor proportionate to the amount of the demised mineral worked within a certain period. Usually the royalties are made to merge in the fixed rent by means of a provision that the lessee may, without any additional payment, work, in each period for which a payment of fixed rent is made, so much of the minerals as would, at the royalties reserved, produce a sum equal to the fixed rent.' The lease declared upon is of this description. The words ' goods produced ' in para. (B) of the definition of ' service ' are of the widest possible application. It would indeed be surprising if they did not include fuel and basic natural products. ' Royalty ' stands unqualified in its generality. It is a word of various known applications."

Then, having given illustration of the manner in which the word " royalty " had been used in reported cases :—

p. 43, ll. 8–32. " This being the meaning and these being the characteristic applications of the word it is not easy to suppose that royalties on the production of coal and other minerals were outside the intendment of the paragraph. Once that is granted the next step seems almost inevitable, namely that it covers such royalties whether their character is rent or not. For in the first place the character of rent usually attaches to such royalties. In the second place whether it does so or not is irrelevant to the purpose of the

Regulations, namely to control charges which would affect the price or cost of commodities and to check some of the factors or incidents of monetary inflation.

The suggestion that, inasmuch as the control of rent was a purpose of the National Security (Landlord and Tenant) Regulations, the language of the Prices Regulations ought not to be understood as covering royalties having the character of rent does not sufficiently take into account the different purposes of the two sets of regulations. The Landlord and Tenant Regulations concerned the right to occupy premises and the compensation payable by the tenant therefor. Royalty on the production of coal and minerals may have the character of rent but its relevancy to war control is not to the occupation of premises or the compensation payable therefor but to the production of goods and the costs which go into the price of the goods. That was the concern of the Prices Regulations. There is accordingly no sound ground for placing upon para. (B) of the definition of 'service' or upon Reg. 23 (2) a restrictive interpretation which would exclude royalties on the production of coal or minerals forming part of the rent reserved on a mining lease."

With respect to the argument that the Prices Order could not apply to rent reserved under a lease granted before the date of such Order :—

" The incongruity of the word 'supply' with rights or privileges for which a royalty is payable is obvious. But another word inappropriately chosen is 'remuneration' to describe a royalty. These words evidently were intended to receive a flexible meaning in accordance with the context and the subject-matter. It seems almost undeniable that they cover royalties payable in connexion with the exercise of rights or privileges granted after the making of an order fixing or declaring the maximum royalty payable therefor. Do they cover royalties payable in connection with the exercise of rights or privileges granted before the making of an order fixing or declaring the maximum royalty, and before the making of the Regulations ? There is much to support the view that they do. The Regulations were dealing with 'goods and services,' a collocation familiar in economics, and they were assigning to the latter category the providing of rights and privileges to be exercised for the production of goods at a royalty, etc. The word 'supply' in relation to the category if it were not artificially extended would be equivalent to 'perform' and, if it is to be moulded to fit the extension of the category, the analogous meaning is to maintain the enjoyment of the right rather than to grant it once for all. The subject is 'price fixing' as a war measure and it is obvious that what must be controlled are the rates that affect the cost of production and go into the price of the goods. It is the royalty charged *de die in diem* that matters, not the grant of the right and the initial fixing of a royalty. It is to be noticed that royalties on the value of goods produced were included. That doubtless was because a rise in value would mean a rise in the royalty. And that would be so irrespective of the term for which

p. 37, l. 42. to p. 38, l. 27.

the right or privilege was granted. But, as will appear, the question whether the 'supply' of 'rights and privileges' is complete within the meaning of the regulation upon the making of the original grant or, on the contrary, the regulation means to extend to the continued support of the right or the maintenance of the enjoyment of the right, is one that must be decided in the light of amendments of the regulation subsequently made. Until these are examined it is better to suspend consideration of the question."

Their Honours then considered the effect of the amendments set out in sub-paragraphs (C) and (E) of paragraph 14 hereof and conclude :—

"Sub-regulations (2) and (3) of Reg. 3 are therefore sufficient to meet the objection, if it be a valid objection, that the Order could not operate upon rights for which remuneration was payable in the form of royalty, if the rights were created before the Order was made, because within the meaning of Reg. 23 (2) (a) the rights were 'supplied' once for all at the date they were granted; the sub-regulations are sufficient to do so subject to one possibility. That possibility is that the Order was totally void from its inception. The fact has already been noticed that the Order exhibits clearly an intention to govern the rates of royalty for the 'supply' of mining rights granted in the past, although it also shows an intention to govern rates in respect of mining rights granted subsequently. On the assumption that when the Order was made the grant constituted the 'supplying,' the former intention would exceed the power conferred on the Commissioner by the combined operation of Reg. 23 (2) (a) and para. (b) of the definition of 'service' in Reg. 3. Would this result in the total invalidity of the Order? The answer must be that it would not because the intended application of the Order is distributable and the presumption is that it is severable . . . Given a valid operation at least upon the 'supply' of mining rights granted after the date of the Order, there is no reason why sub-regs. (2) and (3) of Reg. 3 should not bring within its scope mining rights exercised pursuant to grants made before the date of the Order."

p. 39, l. 36 to p. 40, l. 6.

p. 40, ll. 25–28.

27. It is submitted that Their Honours have not correctly stated the respective functions of the Prices Regulations and the Rent Regulations. The intendment of the Rent Regulations in their application to the occupation of premises by persons engaged in the production of goods is not to be contrasted with the intendment of the Prices Regulations. The intendment of one is identical with the intendment of the other, namely, to control the cost of production of goods.

What is to be contrasted is the respective fields covered by such Regulations. It is axiomatic that rent payable by a producer for the occupation of premises used for the production of goods is a factor which governs the cost of such production. Notwithstanding such fact, it has been generally conceded, and it has been found by all the Judges that such rent is controlled by the Rent Regulations and is not controlled by

the Prices Regulations because it is not a rate at which a service is supplied within the meaning of the Prices Regulations. As has been submitted, the granting of a leasehold estate is not the supply of a service within the meaning of the Prices Regulations; nor does a lessor by continuing to recognise, as he must, his lessee's estate, together with all its attendant incidents, supply a continuing service to his lessee. It follows that the compensation for the grant of such estate cannot be a rate or a remuneration at which a service is supplied.

28. Their Honours did, however, accept in part the contention lastly set out in the preceding paragraph for Their Honours held that the minimum rent was not a rate at which a service was supplied. Their Honours said :—

> " But the fixed rent is not a royalty and is not a rate per ton of coal mined within the Order and it therefore seems to be unaffected by the Order." p. 44, ll. 12–14.

It is submitted that it is erroneous to attempt to divide the rent payable under the Mining Lease and to give a different character to one part from that given to the other. And, in any case, if the grant or maintenance of the leasehold estate is the supply of a service, the total " remuneration " or " consideration " becomes subject to the control of the Prices Commission—see definition of " rate " in the Prices Regulations (see para. 11 hereof). Thus Their Honours' reasoning ought to have led to the conclusion that the minimum rent was also subject to the control of the Prices Order.

29. The Appellant submits that the High Court erroneously treated the matter as if the inclusion in the rent of a sum calculated on the out-turn of the mine and styled between the parties, a " royalty," brought the Mining Lease, at least to the extent to which the rent included such calculated sum, within the definition of a " service " within the Prices Regulations. But, as the Appellant submits, the fundamental question was whether, if the grant of the leasehold estate was not a supply of a service in the ordinary significance of that term—and none of the Judges suggest that it is—the leasehold estate itself and the rights and incidents of ownership which it conferred constituted " rights and privileges " within the meaning of paragraph (b) of the definition of " service " in the Prices Regulations (see paragraph 11 hereof). Such " rights and privileges " must be susceptible of being " supplied " after the date of the Prices Order and, in respect of such supply, there would in addition need to be a receipt of remuneration. Unless an affirmative answer could be made to this inquiry, the inclusion of a royalty in the rent reserved by the Mining Lease would not, in the Appellant's humble submission, have any relevance. The functions of the reference to a royalty in paragraph (b) of the definition of " service " is to qualify those " rights and privileges " which may be regarded as a service for the purposes of the regulations. But first there must be found " rights and privileges " in the relevant sense.

30. The High Court does not appear to have decided the precise question as to whether the Prices Regulations as they stood at the date

of the making of the Prices Order included as a service which could be supplied Mining Leases granted before the date of such Order. But Their Honours concluded that the amendments to the Prices Regulations made subsequent to the date of the Prices Order (see sub-paragraphs (C) and (E) of paragraph 14 hereof) neither of which, as Their Honours appear to concede and the Appellant would submit, relevantly enlarged the definition of a service—so extended the scope of the Prices Order as to cover the royalty payable under a Mining Lease granted before the date of the Prices Order.

The Appellant submits that neither of the said amendments did increase the scope or meaning of the Prices Order which neither of them affected to amend. And, if contrary to Appellant's submission, the said amendments were effective relevantly to increase the power of the Prices Commissioner to make orders with respect to rent reserved under Mining Leases, such power was never exercised by the Prices Commissioner for no new Order was made by him in purported exercise of such powers. The Appellant would submit that the power could not be validly exercised by an instrument made before the creation of the power.

31. The Appellant respectfully submits that the Judgment of the High Court on the fourth and fifth pleas is wrong and ought to be reversed and the Judgment of the Supreme Court ought to be restored for the following, amongst other,

REASONS

(1) THE reasoning of Street, C.J., and Owen, J., was right and the reasoning of the High Court was wrong.

(2) BECAUSE the Respondent was estopped by a finding in its favour on the first and second pleas from contending that the Prices Regulations and the Prices Order controlled any part of the rent reserved by the Mining Lease.

(3) BECAUSE the Respondent, having obtained a judgment on the basis that the rent payable under the Mining Lease was up to the 31st December 1947 controlled by State Legislation is not entitled to dispute this fact on a claim for rent in respect of any subsequent period, and because this basis of fact is inconsistent with the rent under the Mining Lease being controlled by the Prices Regulations in its inception or at all.

(4) BECAUSE the demise of the mine was not the supply of a service within the meaning of the Prices Regulations.

(5) BECAUSE the leasehold estate of the Appellant in the mines was not a right or privilege for which remuneration was payable within the meaning of the Prices Regulations.

(6) BECAUSE the leasehold estate of the Appellant in the mines was not a right or privilege for which remuneration

was payable within the meaning of the Prices Regulations and one which was in fact supplied by the lessor after the making of the Prices Order.

(7) BECAUSE the leasehold estate of the Appellant in the mines was not a right or privilege for which remuneration was payable in the form of a royalty based on the volume or value of goods produced.

(8) BECAUSE the rent reserved under the Mining Lease was not nor was any part of it a rate at which a service was supplied by the Respondent to the Appellant within the meaning of the Prices Regulations.

(9) BECAUSE the rent reserved under the Mining Lease was not nor was any part of it remuneration payable for a right or privilege.

(10) BECAUSE the rent reserved under the Mining Lease was not nor was any part of it remuneration payable for a right or privilege supplied by the Lessor after the date of the Prices Order.

(11) BECAUSE the rent reserved by the Mining Lease was not nor was any part of it remuneration for a right or privilege payable in the form of a royalty or a royalty based on the volume or value of goods produced.

(12) BECAUSE assuming, contrary to the Appellant's contention, that the demise of land was a service within the meaning of the Prices Regulations the "supply" of it had taken place before the making of any Order under the Prices Regulations.

(13) BECAUSE the terms of the Prices Order were inapt to control or affect any part of the rent payable under the Mining Lease.

GARFIELD BARWICK.

IAN BAILLIEU.

No. 31 of 1955.

In the Privy Council.

ON APPEAL
from the High Court of Australia.

BETWEEN

PERPETUAL TRUSTEE COMPANY (LIMITED)
(Plaintiff) . . . . *Appellant*

AND

PACIFIC COAL COMPANY PTY. LIMITED
(Defendant) . . . *Respondent.*

Case for the Appellant.

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