37/1955

No. 31 of 1955.

In the Privy Council.

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN—

PERPETUAL TRUSTEE COMPANY (LIMITED)
Appellant

— AND —

PACIFIC COAL COMPANY PTY. LIMITED
Respondent.

CASE FOR THE RESPONDENT.

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A. INTRODUCTION.

PART I.—THE LEASE AND THE LEGISLATION.

RECORD.

1. This appeal is brought by special leave granted by Her Majesty by Order in Council dated 7th April, 1955, against a decision of the High Court of Australia given on 20th August, 1954, allowing an appeal by p. 48. p. 47.

p. 30. the Respondent (Appellant in the High Court) against an order of the Supreme Court of New South Wales dated 30th November, 1953. The Supreme Court had upheld demurrers by the Appellant (Plaintiff in the Supreme Court, Respondent in the High Court) to three pleas of the Respondent (Defendant in the Supreme Court) to the Appellant's declaration. In allowing the appeal the High Court varied the order of the Supreme Court by discharging so much thereof as related to two of the Respondent's pleas and ordered that judgment be entered for the Respondent on the demurrers to those pleas.

2. The Respondent is a Company incorporated according to the laws of the State of New South Wales and at all material times was and is carrying on the business of coal mining in New South Wales.

p. 1, l. 24. 3. By a memorandum of lease registered under the provisions of the New South Wales Real Property Act, 1900, the Appellant demised to the Respondent all and singular the mines, beds, veins, and seams of coal shale and minerals of a similar character in or under certain lands in New South Wales for a term of forty-three years computed from the 1st September, 1919. The lease provided that the Respondent should have full liberty to search for, win, get, convert, carry away, sell and dispose of the mines of coal shale or minerals of a similar character demised by the lease together with free way leave and right and liberty of passage and other rights enabling the defendant to load and carry away the same. The lease reserved a yearly rental of £819 payable quarterly each year, but provided that the Respondent should be permitted to win, work, carry away forth and out of the said mines such a quantity of coal shale and other minerals of a similar character as should at the rate per ton thereafter in the lease set forth produce in any one year of the term of the lease the said sum of £819 and at a royalty per ton of all coal wrought and brought to bank from the mines demised over and above such quantity as might be worked in respect of the fixed rental aforesaid. The lease then set forth the royalty as follows: When the selling price per ton of round or best coal obtained from the said mines free on board at Newcastle should be less than Six Shillings and Three Pence, the royalty to be Five Pence per ton; when the said selling price should be not less than Six Shillings and Three Pence but less than Seven Shillings and Three Pence the royalty to be Six Pence per ton; when the said selling price should be not less than Seven Shillings and Three Pence but less than Eight Shillings and Three Pence, the royalty to be Seven Pence per ton, and so on, the royalty to be increased by One Penny for every increase of One Shilling in the selling price provided that such royalty as aforesaid should be reduced to a fixed and constant royalty of Three Pence per ton in respect of all small coal so wrought and brought to bank as aforesaid and above such quantity as may be worked in respect of the fixed rent and provided further that fractions

of a Shilling on such selling price as aforesaid should not be taken into account in calculating the said royalty.

4. The question for decision in this appeal is whether a certain Prices Regulation Order applied to the mining lease set forth in paragraph 3 of this case, so as to reduce the amount payable by the Respondent by way of royalty for coal mined by the Respondent during the periods to which the Respondent's fourth and fifth pleas relate. If the Order applied, a further question arises as to how it applied. These questions involve a consideration of the following Acts and Regulations:

(1) National Security Act, 1939-1949 (Commonwealth).

(2) Defence (Transitional Provisions) Act, 1946-1947 (Commonwealth).

(3) National Security (Prices) Regulations, (Commonwealth).

(4) Prices Regulation Order No. 985 of 17th March, 1943 (at first operating under Commonwealth law, and later under New South Wales law).

(5) Prices Regulation Act, No. 26 of 1948 (New South Wales).

(6) Landlord & Tenant (Amendment) Act, 1932-1947 (New South Wales).

5. The National Security (Prices) Regulations, herein referred to as the Prices Regulations, were made on the 22nd August, 1940, under the National Security Act, 1939-1940, a Commonwealth statute. The following are the material provisions of the Prices Regulations as they stood at 1st July, 1948, the earliest date to which the Respondent's pleas here in question relate:—

"3. (1) 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 "purposes of these Regulations;

". . . . . .

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

". . . . . .

" 'service' means—

"(a) any service supplied or carried on by any person "or body of persons, whether incorporated or unincor- "porated, engaged in a public utility undertaking or an "industrial, commercial, business, profit-making or "remunerative undertaking or enterprise . . . . . .;

"(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;

" 'the Commissioner' means the Commonwealth Prices Com- "missioner appointed for the purposes of these Regulations;

"(2) A person who receives (otherwise than as an agent) "any valuable consideration from any other person in respect of the "enjoyment by that 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.

"(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), ... 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 after the making "of any such agreement, and whether before or after the commence- "ment of this sub-regulation, fixed under these Regulations at a "rate lower than the rate otherwise payable under any such agree- "ment, 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.

". . . . . .

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

". . . . . .

"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;

". . . . . .

"(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—

". . . . . .

"(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 . . . ."

6 On 30th November, 1942, the Minister declared that, with certain exceptions not here material, all services supplied or carried on in Australia were "declared services" for the purposes of the Prices Regulations.

7. On 17th March, 1943, the Commonwealth Prices Commissioner made Prices Regulation Order No. 985, of which the material provisions were as follows:—

". . . . . .

"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—

". . . . . .

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

". . . . . .

"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."

8. When Prices Regulation Order No. 985 was made, the material provisions of the Prices Regulations were in substance the same as those set forth in paragraph 5 of this case with the exception of sub-regulations (2), (3) and (4) of Regulation 3. Sub-regulation (2) was added by amendment dated 19th July, 1945. The amendment which added Sub-regulation (2) provided at the same time that any declaration by the Minister of any services which was in force at the commencement of the amendment (viz., 19th July, 1945) should have effect as if the amendment had been in operation at the time of the publication in the Gazette of the notice of the declaration. Sub-regulations (3) and (4) were added by amendment dated 10th April, 1946.

9. The Prices Regulations and Prices Regulation Order No. 985 were continued in force under Commonwealth statute until 20th

September, 1948, by virtue of the Commonwealth Defence (Transitional Provisions) Act, 1946-1947. On that date the Prices Regulation Act, No. 26 of 1948, of the State of New South Wales, commenced to operate. That Act enacted provisions identical with those set forth in paragraph 5 of this case, except for substituting State officials for Commonwealth officials. The Act also provided that amongst other things all declarations and orders made, published or given under the Commonwealth Prices Regulations which were in force in New South Wales immediately before the commencement of the Act (namely, 20th September, 1948) under the Defence (Transitional Provisions) Act, 1946-1947, should, for the purpose of the Act, and except so far as they were inconsistent with the Act, be deemed to have been made, published or given under the Act and, subject to the Act, until repealed, amended or revoked under the Act, should be deemed to have force and effect accordingly as if made, published or given under the Act.

10. On the 20th September, 1948, the Minister of the State of New South Wales administering the Prices Regulations Act, 1948, declared, *inter alia*:—

"

". . . . . that, as from the commencement of the Prices "Regulation Act, 1948, services (as defined in the aforesaid Act) "specified in Schedule 'B' to this Declaration which are supplied "or carried on by any person in the State of New South Wales shall "be declared services for the purposes of the aforesaid Act."

Schedule "B" contained, *inter alia*, the following:—

"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."

11. The Landlord & Tenant (Amendment) Act, 1932-1947, of New South Wales is relevant in this case for the reason that it was in force on 31st August, 1939, the date mentioned in Prices Regulation Order No. 985 (see paragraph 7 of this case). The material provisions of the Act are as follows:—

"Section 13. In this part, unless the context or subject matter "otherwise indicates or requires—

"'Lease' includes every letting of premises whether oral, "in writing, or by deed, and 'leased' has a corresponding "meaning.

"'Lessor and Lessee' mean the parties to a lease . . . . .

"'Premises' includes land and buildings . . . . . .

"Section 15. (1) Rent reserved by or under any lease to which "this part applies and accruing or to accrue due and payable during

"the period in which this Part remains in force is, subject to this "section, hereby reduced by twenty-two and one half per centum of "the amount thereof, and shall be calculated and payable at such "reduced rate accordingly.

"(2) The reduction prescribed by subsection one of "this section shall be made from the rate of the rent which was "payable on the thirtieth day of June, one thousand nine hundred "and thirty, or the rate payable from a later date under any lease "made before the said thirtieth day of June, but in the case of a lease "which provides for a variation in the rate at a later date from the "rate for the time being provided for in the lease.

"(3) Unless and until an order has been obtained "from the Court under this Part determining the rent under the "lease at a rate higher or lower than that prescribed by the foregoing "provisions of this Section, the lease shall, during the period for "which this Part of this Act remains in force, be deemed to be "altered to such extent as is necessary to give effect to this Section.

"(4) The obligation of any lessee to pay rent "accruing or to accrue due and payable during the period in which "this Part of this Act remains in force at any higher rate than that "allowed by or under this Part is hereby extinguished."

A. INTRODUCTION. (Continued).

PART II.—SUPREME COURT AND HIGH COURT PROCEEDINGS.

12. The Appellant commenced proceedings in the Supreme Court of New South Wales by Writ of Summons dated 22nd August, 1951. In his Declaration the Appellant pleaded the lease and the covenant therein by the Respondent to pay rent and royalty calculated as in the lease set forth. p. 1, l. 20.

The Appellant claimed the sum of £28,369 7s. 2d. arrears of rent and royalty in respect of the following periods:— p. 2, ll. 24–48.

31st December, 1931, to 31st March, 1934	£880	12	7
31st March, 1939, to 31st December, 1950	£27,488	14	7
	£28,369	7	2

13. Originally the Respondent, in answer to the Appellant's Declaration, pleaded three Pleas and the Appellant demurred to those pleas. When the Demurrer came on for argument the Supreme Court gave leave to the Respondent to amend its pleas and pursuant thereto the Respondent filed six pleas and the Demurrer was argued as Demurrers to each of those pleas. p. 3. p. 4, l. 35.

p. 6, l. 6. (i) The first plea was limited to the sum of £333 17s. 7d., being the amount claimed in respect of the period 31st December, 1931, to 31st December, 1932, and alleged that that sum represented a deduction of 22½% of the rent and royalty payable in terms of the lease which the Respondent was entitled to make by virtue of the New South Wales Reduction of Rents Act, 1931.

p. 6, l. 17. (ii) The second plea was limited to the sum of £9,513 10s. 2d., being the amount claimed in respect of the periods 1st January, 1933, to 31st March, 1934, and the period 31st March, 1939, to 31st December, 1947, and alleged that that sum represented a deduction of 22½% of the rent and royalty payable in terms of the lease which the Respondent was entitled to make by virtue of the Landlord & Tenant (Amendment) Act, 1932-1947, mentioned in paragraph 11 of this case. The Reduction of Rents Act, 1931, had expired on 31st December, 1932, and was replaced by the Act last mentioned which itself expired on the 31st December, 1947.

p. 6, l. 30. (iii) The third plea was limited to the sum of £649 14s. 11d., being the amount claimed in respect of the period 1st January, 1948, to 30th June, 1948, and alleged that Commonwealth Prices Regulation Order No. 985 applied to the lease so as, in effect, to continue during the said period the right of the Respondent to make a 22½% deduction from the amount of the rent and royalty otherwise due under the lease. The plea alleged that the sum pleaded to was the amount of the deduction which it was so entitled to make.

p. 7, l. 20. (iv) The fourth plea was limited to the sum of £1,093 10s. 5d., being the sum claimed for the period 1st July, 1948, to 20th September, 1948, and again relied upon Commonwealth Prices Regulation Order No. 985, but alleged that the Order had an effect upon the lease different from that alleged under the third plea. It alleged that the effect of the Order was to fix the amount payable by the defendant for the period to which the plea related at the amount which would have been payable under the lease on the basis of the selling price of coal f.o.b. Newcastle at the 31st August, 1939, less a reduction of 22½%. It alleged that the sum pleaded to was a sum in excess of the amount so fixed by the Order.

p. 8, l. 7. (v) The fifth plea was limited to the sum of £16,778 14s. 1d., being the sum claimed in respect of the period 20th September, 1948, to 31st December, 1950, and relied upon the same Prices Regulation Order No. 985 as having the same effect upon the lease as alleged in the fourth plea but relied upon it as having force under a statute of New South Wales which took the place of the Commonwealth statute and Regulations which had ceased to operate on 20th September, 1948.

(vi) The sixth plea was on equitable grounds and was limited to the sum of the amounts and to the same periods as were specified in the first and second pleas and was an alternative plea to both of them. p. 8, l. 44.

14. On 30th November, 1953, the Supreme Court (Street, C.J., Owen and Herron JJ.) gave judgment for the Respondent on the demurrers to the first and second pleas; judgment was given for the Appellant on the demurrers to the third, fourth, fifth and sixth pleas, with Herron J. dissenting as to the fourth and fifth pleas. pp. 9–29. p. 30.

15. On 23rd December, 1953, the Respondent, by leave granted 17th December, 1953, appealed to the High Court of Australia against so much of the judgment of the Supreme Court as related to its third, fourth and fifth pleas. The High Court (The Chief Justice, Webb and Fullagar, JJ.) allowed the Appeal and gave judgment for the Respondent on the demurrers to the fourth and fifth pleas. The High Court did not disturb the judgment of the Supreme Court on the demurrer to the third plea. p. 30, l. 29. pp. 33–46. p. 47.

B. REASONS OF THE JUDGES IN THE SUPREME COURT.

16. The Chief Justice, Sir Kenneth Whistler Street, agreed with the reasons of Owen J., but, for himself, stated his reasons for upholding the demurrer to the third, fourth and fifth pleas. He held— p. 9, l. 35.

(a) that the payments required to be made under the lease were properly to be regarded as rent paid for the subject matter of the lease, p. 10, l. 17.

(b) that the substantial question was whether the sums paid by the lessee to the lessor were paid for a "service" within the meaning of the Prices Regulations, p. 11, l. 1.

(c) that the lessor was not being paid by the lessee for a "service" rendered unless the definition of "service" in the regulation required that meaning to be put upon the word, p. 11, l. 5.

(d) that, although he entertained some doubt on the matter, the word "royalty" in the definition did not apply to the present case because what was paid under the lease, although paid according to a royalty formula, was really rent, p. 11, l. 31.

(e) that the Commissioner only had power to fix a price for a service and had no power to fix rents, p. 11, l. 46.

(f) that in no sense could it be said that the landlord supplied a service. p. 12, l. 7.

17. The Respondent respectfully contends that the Chief Justice was in error in holding, in effect, that because for the purpose of the relationship of lessor and lessee a royalty was to be regarded as rent, the royalty ceased to be anything else but rent. A royalty is a royalty

whatever else it might also be and the fact that it is a royalty paid by a person who stands in the relation of lessee to the person to whom it is payable does not result in its ceasing to be a royalty.

The Respondent further contends that the error of the Chief Justice came about by reason of his approaching the question by first characterising the royalty payments to be made under the lease as rent and then examining the regulations to see if the definition of service covered an obligation to pay rent. The Respondent submits that, the matter being one of statutory construction, the correct approach is first to see what the regulations provide. Having found (as it is submitted it should be found) that the regulations cover the case of rights or privileges paid for by way of royalty on goods produced, the next step is to see if the instant case comes within the regulations. It is submitted that in the present case the Respondent was, *inter alia*, paying for rights or privileges by way of royalty on goods produced and therefore the regulations applied.

p. 12, l. 17. 18. Owen, J. held—

p. 14, l. 17. (a) that the Prices Regulations were designed to enable control to be exercised over the price of goods and the cost of services;

p. 14, l. 23. (b) that if, as he thought, the whole of the payments for which the lease provided were "in truth, rent", it would be 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.

The Respondent contends, with respect, that Owen J. fell into the same error as the learned Chief Justice in concluding that the royalties payable were rent and nothing else. His Honour then appears, as does the Chief Justice, to have adopted an *a priori* conception of "services" as excluding the case of royalties payable by one who stood in the relation of lessee to the person to whom they were payable. Then, with his mind conditioned by these conclusions, His Honour appears to have examined the definition of "services" in the regulations and on finding it included payment of "royalties", was forced to the conclusions—

p. 14, l. 44. (c) that a royalty which was in truth rent was not within the meaning which should be ascribed to the word "royalty" in the regulation,

p. 15, l. 31. (d) that the "royalty" of which the regulations spoke should be confined to payments such as, for example, might be made for the right to use a patent in the production of goods, or royalty payments made under a licence to extract minerals or cut timber.

The Respondent submits that with respect to the word "royalty" there can be no difference in the nature of payments by way of royalty

under a *licence* granting rights to extract minerals or cut timber and payments by way of royalty under a *lease* granting rights to extract minerals or cut timber.

19. Owen J. further held—

(a) that the Regulations, the Declaration of services and the Prices Regulation Order were designed to operate on the price of services thereafter supplied, p. 16, l. 1.

(b) that, if they applied to rights granted by lease, they nevertheless could not apply to the instant case because the rights "supplied" under the lease to the Respondent were "supplied" when the lease was granted, namely, in 1919. p. 16, l. 5.

The Respondent contends that in the sense in which, upon their proper construction, the Regulations and Prices Regulation Order use the word "supplied", the right to mine coal continues to be "supplied" to the Respondent throughout the term of the lease and that the right to take coal at any instant of time throughout the term is at that instant of time supplied by the Appellant.

20. Owen J. further held—

(a) that there could be no Declaration as a "service" of something which was not then a "service" within the Regulations, p. 15, l. 28.

(b) that, if the definition of "service" in the Regulations did not cover the present case when the Declaration of services was made no amendment thereafter which would operate so as to include the present case would avail the Respondent unless there was a fresh Declaration of services and a further Prices Order to cover the additional "services". p. 16, l. 18.

The Respondent contends that, if the definition of "service" prior to the amendments do not cover the present case, the amendments are effective to bring the present case within the operation of the Declaration of services and the Prices Regulation Order.

21. Herron J. held—

(a) that, when examined for the purposes of the law relating to landlord and tenant royalty was a true rent although for other purposes, e.g., price fixing by statute or regulation, it might be a form of remuneration or price for coal actually won, p. 18, l. 26.

(b) that, the word "service" as used in the Regulations was intended to have the broadest possible application; the regulations were intended to fix prices as an aid to the national security. (His Honour, in dealing with the intention of the regulations, referred to the circumstances in which they were enacted and cited passages from the judgment of the High Court in *Victorian Chamber of Manufacturers v The Commonwealth* (67 C. L. R. 335) of Latham, p. 20, l. 37.

C.J., (at pp. 339-40) and Williams J. (at p. 345) on the validity of
p. 21, l. 34. the Regulations); 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", which, although not wholly apt so to describe every sort of transaction which resulted in a price, was a "label" which was given a very wide and expanded meaning
p. 22, l. 4. in the definition clause; 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 set forth in paragraph (a) of the definition or for notional services as set forth in paragraph (b) of the definition,

p. 22, l. 10. (c) that the lease in the present case conferred a right beyond the mere employment of the leasehold hereditaments; it 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.

p. 22, l. 15. (d) that the word "service" was intended to apply to transactions which resulted in the 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.

p. 22, l. 21. (e) 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,

p. 22, l. 29. (f) that the argument that the Prices Commissioner could not fix the remuneration for coal won in the present case because he had no power to fix rents was unsound for the reason that once payment by royalty per ton of coal mined was the method adopted by the
p. 22, l. 40. parties for fixing the consideration or price, the regulations took their stand at that point and empowered the Commissioner to fix the rate and disturb the parties' agreement as to quantum only; it made no difference to the right of the Commissioner that the parties to the transaction were landlord and tenant or that, according to the law of landlord and tenant and for ascertaining their rights *inter se* as such, royalties were regarded as rent; the fact that the royalty was

fixed by the parties as a term of a lease whilst it was rent for one branch of the law it was none the less a royalty when it was sought to determine the price per ton of coal won,

(g) that the definition of "service" in the Regulations applied to the present case 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. 23, l. 3.

(h) that the purpose of the Prices Regulation Order was to fix rates per ton of coal mined after 17th March, 1943; the expression "mining rights" referred to the right to mine coal; the word "supplied" referred to the actual exercise of a right or privilege as and when that occurred; the right was supplied if and when the service was availed of, not when merely agreed upon; the remuneration was the part of the agreement struck at by the regulations and, as this was only determined at the moment the coal was worked, the regulations operated as from that moment of time; the Order applied, therefore, to the present case, p. 23, l. 34. p. 23, l. 42.

(i) that the amendment of 1945 (Sub-paragraph (2) of Regulation 3) was merely declaratory of the true position; the amendment was not intended to create any new service or to travel outside the scope and intendment of the original regulation which defined "service", p. 24, l. 17.

(j) that the amendment of 1946 (Sub-paragraph (3) of Regulation 3) did not create any new class of service which did not already exist and, in effect, was declaratory only, p. 25, l. 2.

(k) that the true effect of the Prices Regulation Order was that set out in the fourth and fifth pleas; the Order required the ascertainment of the sum actually payable between the parties on the 31st August, 1939, which, in the present case, was the amount per ton actually payable under the lease on that date less $22\frac{1}{2}\%$. p. 26, l. 9.

22. The Respondent submits that in his conclusions his Honour Mr. Justice Herron is right and that the judgments of the Chief Justice and Mr. Justice Owen are wrong.

C. REASONS OF THE HIGH COURT.

23. The High Court delivered a unanimous judgment in favour of the Respondent. It held— p. 33.

(a) that paragraph (b) of the definition of "service" in the Regulation extended the application of Regulation 23 (2) beyond its natural meaning and must be read into the price fixing power conferred upon the Prices Commissioner by Regulation 23 (2); Regulation 23 (2) (a) thus should be understood as if expressed to authorise a fixing and declaring of the maximum rate at which any p. 37, l. 35.

declared service including any rights or privileges for which remuneration was payable in the form of royalty, etc. might be supplied or carried on;

p. 37, l. 45. (b) that the word "supply" was evidently intended to receive a flexible meaning in accordance with the context and subject

p. 38, l. 6. matter; in dealing with "goods and services" the Regulations assigned to the category of "services" the providing of rights and privileges to be exercised for the production of goods at a royalty; the word "supply" in relation to the category of "services" if it were not artificially extended would be equivalent to "perform" and, if it was to be moulded to fit the extension of the category, the analogous meaning was to maintain the enjoyment of the right rather than to grant it once and for all; the subject was "price-fixing" as a war measure and it was obvious that what must be controlled were the rates that affected the cost of production and went into the price of the goods; it was the royalty charged *de die in diem* that mattered, not the grant of the right and the initial fixing of a royalty;

p. 38, l. 21. (c) that the question whether the "supply" of "rights and privileges" was complete within the meaning of the regulation upon the making of the original grant or, on the contrary, the regulation meant to extend to the continued support of the right or the maintenance of the enjoyment of the right was one that must be decided in the light of the amendments of the regulations subsequently made;

p. 39, l. 36. (d) that, even if it were to be assumed that prior to the amendments the regulations did not cover rights created before the Prices Regulation Order was made, the amendments of 1945 (paragraph (2) of Regulation 3) and 1946 (paragraph (3) of Regulation 3) were sufficient to bring within the operation of the Prices Regulation Order rights for which remuneration was payable in the form of royalty notwithstanding the fact that the rights were created before the Order was made;

p. 38, l. 45 to p. 39, l. 35. (e) that the amendment of 1945 did not require a new declaration of services because the amendment itself expressly adopted the existing declaration and the amendment of 1946 did not require a new declaration of services because it did not add a new category of service to which the Minister's declaration did not already extend; it merely provided that certain persons should be deemed to be performing those services;

p. 40, l. 4. (f) that even if prior to the amendments there was no power in the Regulations to enable the Prices Regulation Order to operate on rights granted before the Order was made, it was not totally invalid since it would validly operate on rights granted after the Order was made by virtue of the effect of Section 5 (5) of the National Security Act, 1939-1946; Section 14 (3) of the Defence (Transitional

Provisions) Act, 1946-1952; Section 46 (b) Acts Interpretation Act, 1901 1950; *Fraser Henlein Pty. Limited v. Cody*, 1945, 70 C.L.R. 100; given a valid operation at least upon "supply" of mining rights granted after the date of the Order, there was no reason why the amendments which added paragraphs (2) and (3) to Regulation 3 should not bring within its scope mining rights exercised pursuant to grants made before the date of the Order. p. 40, l. 25.

(g) that, although paragraph (b) of the definition of "service" in the Regulations referred to royalty based on "volume or value" of goods produced and a ton was a measure of weight, not "volume or value" the subject matter and the context associated with the word "volume" as used in the Regulations required the word to be read as meaning "quantity"; therefore the Order was not invalid because it purported to fix a rate per ton of coal mined; p. 40, l. 35. p. 41, l. 35.

(h) that the Order could and did apply to royalties which in law form part of the rent reserved upon a lease; it covered such royalties whether their character was rent or not; in the first place the character of rent usually attached to such royalties; in the second place whether it did so or not was 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; p. 43, l. 12.

(i) that the fact that control of rent was the subject of a different set of regulations (namely, the National Security (Landlord and Tenant) Regulations) was no sound ground for placing upon paragraph (b) of the definition of "service" or upon Regulation 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; 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 might have the character of rent but its relevancy to war control was not to the occupation of premises or the compensation payable therefor but to the production of goods and the costs which went into the price of goods; that was the concern of the Prices Regulations; p. 43, l. 18.

(j) that the Prices Regulation Order fixed the rates per ton of coal mined at the amount per ton actually legally payable on 31st August, 1939; p. 43, l. 38.

(k) that, applied to the present case, the effect of the Order was to fix the amount payable per ton of coal mined at the *amount* which, by agreement under the lease, would have been payable for coal wrought and brought to bank on 31st August, 1939, less the reduction of $22\frac{1}{2}\%$ effected by the Landlord and Tenant (Amendment) Act 1932-1947; in arriving at the amount which p. 43, l. 44.

would have been payable under the lease on 31st August, 1939, the selling price per ton of coal f.o.b. Newcastle as at that date must be taken as the basis of computation;

p. 44, l. 21. p. 44, l. 27. (l) that for the foregoing reasons the third plea failed and the fourth plea was good and sufficient;

p. 46, l. 9. (m) that the New South Wales Prices Regulation Act, 1948, effectively brought Prices Regulation Order No. 985 into force under that Act; the same questions concerning the validity of the Order and its application therefore arose in relation to the fifth plea as arose in relation to the fourth, the conclusions reached on those questions were therefore as material to the fifth plea as to the fourth; it followed that the fifth plea was good and sufficient;

p. 46, l. 18. (n) that an independent reason for saying that as to the fifth plea there could be no question of the sufficiency of the declaration of services as declared services to cover rights and privileges for which remuneration was payable in the form of royalty, etc. was possibly afforded by the fact that the declaration made by the Minister of the State of New South Wales on the 20th September, 1948, expressly confirmed the operation of the declaration of services made by the Commonwealth Minister so far as it related to services consisting in such rights and privileges.

D. RESPONDENT'S SUBMISSIONS.

24. The Respondent respectfully adopts as its submissions the reasons for judgment of the High Court of Australia.

E. CONCLUSIONS.

25. The Respondent submits that the decision of the High Court of Australia is right and that this appeal should be dismissed and the order of the High Court affirmed for the following, amongst other—

REASONS.

(a) Because the Commonwealth National Security (Prices) Regulations and the New South Wales Prices Regulation Act, 1948, during the relevant periods of their respective operation applied to rights granted by lease to mine coal for which payment was to be made by way of royalty on the quantity of coal produced.

(b) Because the said National Security (Prices) Regulations authorised the making of Prices Regulation Order No. 985 and the said Prices Regulation Act, 1948, was effective to

give the provisions of the said Order the force of law under that Act.

(c) Because Prices Regulation Order No. 985 applied to the Respondent's obligations under the lease to make payments to the Appellant for coal mined by Respondent under the terms of the lease.

(d) Because Prices Regulation Order No. 985 applied to the Respondent's obligation in the manner and with the consequences alleged by the Respondent in the pleas here in question.

(e) Because as to those parcels of the moneys claimed in the Appellant's declaration to which the Respondent's fourth and fifth pleas are respectively limited, the said pleas are a good and sufficient answer to the Appellant's claim.

K. J. HOLLAND,
Respondent's Counsel.

No. 31 of 1955.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN—

PERPETUAL TRUSTEE COMPANY (LIMITED) *Appellant*

— AND —

PACIFIC COAL COMPANY PTY. LIMITED *Respondent.*

CASE FOR THE RESPONDENT.

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