[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT;
PLAINTIFF,

AND

MILLARS' KARRI AND JARRAH CO. (1902) LTD. . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1911.

MELBOURNE, *June* 6, 7, 8.

Griffith C.J. Barton and O'Connor JJ.

Contract—Construction—Commission on profits—Deduction for depreciation.

By an agreement in writing the appellant was appointed manager of the respondent company for five years at a yearly salary and a commission of 3 per cent. on "the profits (as hereinafter defined) of the company in each financial year. Profits for the purposes of this clause shall mean all profits earned after payment of all expenses properly chargeable to revenue but without making any allowance or deduction for depreciation (except as hereinafter mentioned) . . . If any allowance is made for depreciation in any one financial year and such sum so allowed shall be shown in the balance sheet for that year the company shall be entitled to deduct therefor a sum equivalent to three pounds per centum on the nominal capital of the company but not exceeding in any one financial year the sum of £42,000. . . . The said commission is to be payable half-yearly on profits as and when ascertained by the auditors' certificates."

Held, that, for the purpose of estimating the profits of any one year upon which the commission was payable, the company were entitled to deduct the sum only which in the balance sheet for that year was actually allowed for depreciation, provided that the sum so deducted should not exceed either 3 per cent. upon the nominal capital of the company for the time being or £42,000.

Decision of the Supreme Court of Western Australia: *Smith* v. *Millars' Karri and Jarrah Co.* (1902) *Ltd.*, 13 W.A.L.R., 33, reversed, and judgment of *McMillan* J. restored.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Supreme Court of Western Australia by Henry Teesdale Smith against the Millars' Karri and Jarrah Co. (1902) Ltd. to recover certain commission which he alleged to be due to him under a written agreement dated 13th January 1904 the material portions of which are set out in the judgment of *Griffith* C.J. hereunder.

The question of law as to the meaning of the agreement was referred to *McMillan* J., and for the purpose of the case it was admitted that the financial year of the defendants ended on 31st December in the years 1902 to 1907 both inclusive; that the plaintiff had completely performed his part of the agreement; that the amount of allowance made for depreciation in each of such years, and shown in the defendants' balance sheet for each year was £35,000; that, in ascertaining the amounts of commission due to the plaintiff, the defendants had deducted from the profits of each year the sum of £42,000 in respect of depreciation; and that the nominal capital of the defendants was at all material times £1,400,000.

McMillan J. held that, in estimating the profits upon which the commission payable in each year was to be based, the defendants were not entitled to deduct in respect of depreciation a sum greater than that which actually appeared in the balance sheet as having been allowed for depreciation. On appeal to the Full Court, that Court (*Parker* C.J. and *Rooth* J., *Burnside* J. dissenting) held that in estimating those profits, if any allowance for depreciation was made in any one year and the sum so allowed appeared in the balance sheet for that year, the defendants were entitled to deduct in respect of depreciation a sum of £42,000 irrespective of the actual sum so allowed: *Smith* v. *Millars' Karri and Jarrah Co.* (1902) *Ltd.* (1).

From this decision the plaintiff now appealed to the High Court.

Schutt (with him *C. Gavan Duffy*), for the appellant. The words "equivalent to" in the phrase "equivalent to three pounds per centum on the nominal capital of the company" mean to the

(1) 13 W.A.L.R., 33.

H. C. OF A. 1911.

SMITH v. MILLARS' KARRI AND JARRAH CO. (1902) LTD.

extent of. The governing idea of clause 4 is that there is to be a limitation in the amount of the deduction for depreciation, not that the amount shall be fixed and invariable. The Court should not adhere to the language so literally as to defeat the plain intention of the parties: *Smith* v. *McArthur* (1); *Caledonian Railway Co.* v. *North British Railway Co* (2). The context must be looked at: *Butler* v. *Trustees Executors and Agency Co. Ltd.* (3). If the intention had been that a fixed sum should be deducted for depreciation irrespective of the facts, the parties could have used words which would have left no possible doubt: *Waugh* v. *Middleton* (4).

McArthur and *Blackburn*, for the respondents. The literal meaning of the words is clear and the decision of the Full Court is correct, and that meaning does not lead to any absurdity or repugnancy. It might have been that in some years the amount allowed for depreciation would be much larger than £42,000, and the appellant may have preferred that there should be a fixed and regular sum deducted for depreciation. The amount to be allowed for depreciation in a balance sheet is always a matter of assumption and does not depend on the actual value of the property which is said to have depreciated: *In re Spanish Prospecting Co. Ltd.* (5); *Rishton* v. *Grissell* (6); *Dicksee on Auditing* p. 236; *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (7); *Encyclopædia of Accounting*, vol. II., p. 362. It is no more unreasonable to assume for the purpose of fixing the appellant's commission that, if any depreciation is allowed, it will amount to £42,000, than in each year to assume that it amounted to £35,000.

Schutt, in reply, referred to *Abbott* v. *Middleton* (8); *Broom's Legal Maxims*, 7th ed., p. 519.

Cur. adv. vult.

June 8.

GRIFFITH C.J. The question for determination in this case is purely one of construction, arising upon a document which has

(1) (1904) A.C., 389, at p. 398.
(2) 6 App. Cas., 114, at p. 142.
(3) 3 C.L.R., 435.
(4) 8 Ex., 352, at p. 358.
(5) (1911) 1 Ch., 92, at p. 99.
(6) L.R., 5 Eq., 326.
(7) 11 C.L.R., 223.
(8) 7 H.L.C., 68, at p. 107.

been before four learned Judges of the Supreme Court of Western Australia, and upon which they were equally divided in opinion.

The duty of the Court in construing a document purporting to express an agreement between parties is to construe it, if possible, so as to give effect to every part of it. If there is an apparent repugnancy between different parts of it, the Court must try to find a meaning which will reconcile them. The agreement in the present case is one by which the appellant was to be the manager of the respondent company for a term of five years from 1st September 1902 at a fixed salary of £2,000 a year, with a commission of 3 per cent. upon the profits. The stipulation as to commission, upon which the question arises, is contained in clause 4 of the agreement, of which I must read a good deal.

"The General Manager shall be entitled during such time as he shall act as General Manager of the company by way of further remuneration to a commission of three pounds per centum on the profits (as hereinafter defined) of the company in each financial year. Profits for the purposes of this clause shall mean all profits earned after payment of all expenses properly chargeable to revenue but without making any allowance or deduction for depreciation (except as hereinafter mentioned), or in respect of interest on any debentures or debenture stock or preference shares or other capital employed in the business or for dividends or any payments or deductions for providing a sinking or redemption fund in respect of any debentures or debenture stock for the time being outstanding but profits for the purposes of this clause shall not include any premiums on share or debenture issues." Then follows a stipulation around which the controversy principally raged. "If any allowance is made for depreciation in any one financial year and such sum so allowed shall be shown in the balance sheet for that year the company shall be entitled to deduct therefor a sum equivalent to three pounds per centum on the nominal capital of the company but not exceeding in any one financial year the sum of £42,000."

Then follows a provision for including in the profits the profits of certain companies which the respondent company had apparently absorbed. The clause then continues:—"The said commission is to be payable half-yearly on profits as and when

H. C. OF A. 1911.

SMITH v. MILLARS' KARRI AND JARRAH CO. (1902) LTD.

Griffith C.J.

ascertained by the auditors' certificates." Finally there is a provision that if commission should be overpaid in any half-year, and that fact should appear in the taking of the accounts for the financial year, the excess should be refunded to the company.

It is to be remarked that the sum of £42,000, which is the highest sum that might be deducted for depreciation, represents 3 per centum of the capital of the company, at that time £1,400,000.

We are told, also, as might be inferred from the above clause, that the nominal capital of the company might be reduced.

On these words I think four points are fairly clear.

First, there is to be no deduction for depreciation except as is expressly stated. The respondents must therefore bring themselves within the exception, and, as that exception is introduced for the benefit of the appellant, if there is an ambiguity he is entitled to the advantage of it.

Secondly, no allowance for depreciation is to be made at all unless such an allowance is made in the company's balance sheets.

Thirdly, in any case the allowance for depreciation is not to exceed a sum equal to three per centum of the nominal capital of the company, and, if the capital is increased, still the allowance is not to exceed £42,000.

Fourthly, the profits upon which commission is to be paid are to be ascertained from the auditors' certificates. The reference clearly is to the company's annual accounts and balance sheets, including the profit and loss account, in which the allowance for depreciation, if any, would appear.

The profits being thus ascertained, the commission is to be paid on the amount so ascertained, subject to the directions contained in the clause itself.

The appellant contends that this is the true construction. The respondents contend that if any allowance for depreciation is made in their balance sheet for any particular year, they are entitled, irrespective of the actual amount so allowed, to deduct a sum equal to three per centum of the nominal capital. If that is the meaning, it could be expressed in as many words as I have just used, and it is difficult to imagine why the parties should

have wrapped up their meaning in the mass of verbiage I have thought it necessary to quote.

The respondents rely on the words "shall be entitled to deduct therefor"—"therefor" means "in respect of it," that is, "in respect of depreciation allowed in the balance sheet"—a "sum equivalent to three pounds per centum on the nominal capital of the company but not exceeding £42,000."

If these words stood alone, they might bear the interpretation put upon them by the respondents. But, when they are read as creating a conditional exception to the rule that nothing shall be deducted for depreciation, I think that is not even the *primâ facie* meaning to be given to them. The stipulation is in substance this, that there shall be no deduction for depreciation unless an allowance for depreciation is made in the balance sheet. If there is, the company may make a deduction not exceeding (however large the allowance may be) £42,000, and not exceeding three per centum of the nominal capital if that is less than £1,400,000.

The words "equivalent to" indicate that the amount is to be arrived at by a calculation of which the basis is the amount of the nominal capital for the time being. But to read these words as authorizing a fixed amount of deduction, irrespective of, and opposed to, the truth, is inconsistent with the rest of the document, particularly that portion of it which provides that the commission is to be payable on the profits as ascertained by the auditors' certificates, which would necessarily show the profits after deducting the real depreciation as actually estimated, and not an arbitrary sum regardless of the truth.

I agree therefore with the conclusion at which *McMillan* J. arrived, and with which *Burnside* J. in the Full Court concurred. The words, in my judgment, denote a maximum and not a fixed and unvarying amount.

For these reasons I think that the appeal should be allowed.

BARTON J. I am of the same opinion. I felt some doubt at first, but after closely considering the reasons given by *McMillan* J. for his judgment, I think they fully justify the conclusion to which he came, irrespective of the reasons which have just been stated.

H. C. OF A. 1911.

SMITH v. MILLARS' KARRI AND JARRAH CO. (1902) LTD.

O'CONNOR J. I agree in thinking that the reasoning of *McMillan* J. is conclusive.

Appeal allowed. Order appealed from discharged. Appeal from McMillan J. dismissed with costs, and his judgment restored. Respondent to pay the costs of this appeal.

Solicitors, for the appellant, *Lawson & Jardine* for *James & Darbyshire*, Perth.

Solicitors, for the respondents, *Blake & Riggall* for *Stone & Burt*, Perth.

B. L.

[HIGH COURT OF AUSTRALIA.]

GREENWAY . . . . . APPELLANT;

AND

McKAY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

MELBOURNE, *June* 7, 8, 9.

Griffith C.J., Barton and O'Connor JJ.

Administration ad litem—Necessity for notice of application—Reasons for granting—Poverty—Action for death caused by negligence—Administration and Probate Act 1890 (*Vict.*), (*No.* 1060), *secs.* 14, 110—*Probate and Administration Rules* 1906 (*Vict.*), *rr.* 4, 15—*Wrongs Act* 1890 (*Vict.*), (*No.* 1160), *secs.* 14, 15, 16.

The Supreme Court of Victoria having jurisdiction under the *Administration and Probate Act* 1890 to grant administration *ad litem* may do so under r. 15 of the *Probate and Administration Rules* 1906 without the previous publication of the notice required by r. 4.