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FOGGITT, JONES & CO. LTD. v. STATE OF NEW SOUTH WALES.

export by the plaintiffs of their stock from New South Wales to Queensland. Reserve further consideration. Inquiry as to damages. Defendants to pay costs of action and of motion.

Solicitor for the plaintiffs, *T. J. Purcell.*

Solicitor for the defendants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the interveners, *Gordon H. Castle*, Commonwealth Crown Solicitor.

B. L.

[HIGH COURT OF AUSTRALIA.]

R. S. HOWARD & SONS LIMITED . . . APPELLANTS; DEFENDANTS,

AND

BRUNTON AND OTHERS . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 3, 4.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Contract—Validity—Contract declared by Statute to be void—Contract rescinded before passing of Act—Contract for rescission—Retrospective legislation—Wheat Acquisition Act 1914 (*N.S.W.*) (*No.* 27 *of* 1914), *sec.* 8.

Practice—Supreme Court of New South Wales—Costs—Issues—Verdict—Judgment non obstante veredicto—Common Law Procedure Act 1899 (*N.S.W.*) (*No.* 21 *of* 1899), *sec.* 164.

Sec. 8 of the *Wheat Acquisition Act* 1914 (N.S.W.) provides that "(1) Every contract made in the State of New South Wales prior to the passing of this Act, so far as it relates to the sale of New South Wales 1914-15 wheat to be

delivered in the said State, is hereby declared to be and to have been void and of no effect so far as such contract has not been completed by delivery. (2) Any transaction or contract with respect to any wheat which is the subject matter of any contract or part of a contract which is hereby declared to be void shall also be void and of no effect, and any money paid in respect of any contract hereby made void or of any such transaction shall be repaid."

Held, that the section only applies to contracts which at the date of the passing of the Act were existing and unperformed.

Therefore, where before the passing of the Act a contract had been made whereby the plaintiffs agreed to cancel a prior contract for the purchase by them from the defendants of a certain quantity of 1914-15 wheat to be delivered in New South Wales and the defendants agreed to pay to the plaintiffs by way of compensation a certain sum per bushel of the wheat agreed to be purchased,

Held, that sec. 8 was not an answer to an action by the plaintiffs to recover from the defendants the amount of such compensation.

In such an action in the Supreme Court of New South Wales the plaintiffs in their declaration set out the contract sued upon omitting those parts which would only be material if sec. 8 applied to it. The only plea of the defendants set out the facts which would bring the contract within sec. 8 if it applied to such a contract. Those facts were not contested. The plaintiffs did not demur but joined issue on the defendants' plea, and the case was sent down for trial by a jury. The trial Judge was asked to enter a verdict for the defendants, and he did so, reserving leave to the plaintiffs to move to enter a verdict for the plaintiffs. On the hearing of the motion the Full Court, holding that sec. 8 did not apply to the contract, ordered judgment to be entered for the plaintiffs and that the plaintiffs should pay the defendants' costs of the trial.

Held, that the proper order was that judgment should be entered for the plaintiffs *non obstante veredicto*, with such directions as to costs as would follow under sec. 164 of the *Common Law Procedure Act* 1899.

Decision of the Supreme Court of New South Wales: *Brunton* v. *R. S. Howard & Sons Ltd.*, 15 S.R. (N.S.W.), 465, varied, and, as varied, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by John Spencer Brunton, Walter Thomas Brunton and Stewart Dudley Brunton, trading as Brunton & Co., against R. S. Howard & Sons Ltd., wherein the plaintiffs by their declaration alleged that, by a contract dated 29th July 1914, the plaintiffs had agreed to buy from the defendants 12,000 bushels of wheat at a certain price upon terms that the defendants should deliver 2,000 bags of such

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wheat in December 1914 and 2,000 bags in January 1915; that the defendants had requested the plaintiffs to permit them to cancel the contract, and that thereupon it was agreed between the plaintiffs and the defendants on 3rd November 1914 that, in consideration that the plaintiffs would agree with the defendants that the contract should be cancelled and rescinded and would agree to discharge the defendants from their obligations under it, the defendants would pay to the plaintiffs in the month of December 1914 the difference between 4s. 6d. per bushel and 3s. 9½d. per bushel on 12,000 bushels, amounting to the sum of £425 8s. 6d.; that the plaintiffs did agree with the defendants that the contract should be cancelled and rescinded, and did agree to discharge the defendants from their liability under it; but that the defendants did not and would not pay to the plaintiffs the sum of £425 8s. 6d.

The defendants, by their plea, alleged that the contract of 29th July 1914 was a contract made in the State of New South Wales prior to the passing of the *Wheat Acquisition Act* 1914 for the sale of New South Wales 1914-15 wheat, to be delivered in that State, and that such contract had not at the date of passing of the Act been completed by delivery; and that by the contract of 3rd November 1914 it was agreed that the prior contract should be cancelled provided that the defendants agreed to give the plaintiffs preferential rights to purchase from the defendants all the 1914-15 New South Wales wheat which might thereafter be offered by sellers to the defendants during the New South Wales 1914-15 season, such wheat to be delivered in the State of New South Wales and the plaintiffs to pay the defendants the same price as other buyers might offer to the defendants.

The plaintiffs did not demur to the plea, but merely joined issue upon it, and the case went down for trial before a jury.

At the close of the evidence the Judge, by consent, formally entered a verdict for the defendants, leave being reserved to the plaintiffs to move to enter a verdict for the plaintiffs.

Thereupon the plaintiffs moved before the Full Court, by way of appeal, to set aside the verdict for the defendants, and to enter a verdict for the plaintiffs or to grant a new trial. The Full Court ordered that the verdict for the defendants should be set

aside and a verdict entered for the plaintiffs for the amount claimed, that the plaintiffs should pay the defendants' costs of the trial, and that the defendants should pay the plaintiffs' costs of the motion, such costs being set off one against the other: *Brunton* v. *R. S. Howard & Sons Ltd.* (1).

From that decision the defendants now appealed to the High Court, and the plaintiffs gave notice by way of cross-appeal that they would contend that the order of the Supreme Court should be varied by omitting the order for the payment by the plaintiffs of the defendants' costs of the trial and for the set off of costs, and substituting an order for the payment by the defendants of the plaintiffs' costs of the trial.

Rolin K.C. (with him *Abrahams*), for the appellants. The contract of 29th July 1914 comes exactly within the words of sec. 8 (1) of the *Wheat Acquisition Act* 1914. That contract was not at the time of the passing of the Act altogether dead and gone. It was the basis of the contract of 3rd November 1914, and the effect of the Act was that that which was at the date of the contract of 3rd November a good contract should be deemed to have been void. There is, therefore, no consideration for the contract of 3rd November. The contract of 3rd November is within the terms of sec. 8 (2), and it is also, by reason of the provision giving to the plaintiffs an option of purchase of 1914-15 wheat which might be offered to the defendants, within the terms of sec. 8 (1). That part of the contract is not severable from the rest of it. [Counsel referred to *State of New South Wales* v. *The Commonwealth* (2).] As to the costs which were awarded to the defendants, they were entitled to them as they succeeded on the only issues there were. The motion to the Full Court was substantially a motion for judgment *non obstante veredicto.*

Delohery, for the respondents, was heard only as to costs. The trial was conducted on the footing that the evidence should be admitted subject to objection, and that there should be no finding of fact by the jury. The jury found nothing; for nothing was left

(1) 15 S.R. (N.S.W.), 465. (2) 20 C.L.R., 54.

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to them. The plaintiffs were entitled to a direction that a verdict should be entered for them, because the defendants' plea did not accurately paraphrase the agreement of 3rd November but attempted to make a proviso of what was not a proviso. The plaintiffs were therefore entitled to the costs of the issues. The verdict for the defendants having been entered by consent, the plaintiffs were, as a matter of law, on the allowance of the appeal by the Full Court, entitled to the costs of the action. [Counsel referred to *Rolin and Innes's Supreme Court Practice*, p. 151; *Supreme Court Procedure Act* 1900, sec. 7; *Common Law Procedure Act* 1889, secs. 265, 267.]

Rolin K.C., in reply. The trial of the issues was an unnecessary expense which was brought about by the plaintiffs, and they should pay the costs thereof. [Counsel referred to *Chitty's Forms*, 10th ed., p. 868.]

GRIFFITH C.J. The substantial question raised in this case is as to the validity of a contract made in November 1914 between the plaintiffs and the defendants. In the previous July the defendants had sold to the plaintiffs, for forward delivery in December 1914 and January 1915, 4,000 bags of wheat. Afterwards the wheat crop of that season was expected to be very small, and on 3rd November 1914 the contract sued upon was made, by which the plaintiffs agreed to cancel the previous contract of July in consideration of the defendants paying them in December by way of compensation 8½d. per bushel of the wheat agreed to be sold. The contract contained another stipulation, namely, that the defendants should give the plaintiffs preference of any wheat that might be offered to them during the then ensuing season. On 11th December 1914 the *Wheat Acquisition Act* was passed, which authorized the Government of New South Wales to take possession of all wheat in the State. Sec. 8 of that Act provided that "(1) Every contract made in the State of New South Wales prior to the passing of this Act, so far as it relates to the sale of New South Wales 1914-15 wheat to be delivered in the said State, is hereby declared to be and to have been void and of no effect so far as such contract has not been

completed by delivery." The defendants contend that the contract of July, which had been cancelled by the contract of November, was affected by that section, and that under those circumstances there was no consideration for the promise of the defendants contained in the contract of November to pay 8½d. per bushel on the non-delivered wheat. In order to establish that position they must make out that sec. 8 applies to contracts which had been in existence but which when the Act was passed were no longer in existence—that is, not only to executory contracts but also to executed contracts and contracts which had been cancelled. No doubt the Legislature might pass a law to that effect. But it is a settled rule of construction of Statutes that a law is not to be construed as retrospective in its operation unless the Legislature has clearly expressed that intention, and a further rule that it is not to be construed as retrospective to any greater extent than the clearly expressed intention of the Legislature indicates. What, then, is there in the language of sec. 8 to show that the Legislature intended it to apply to any but existing unperformed contracts? I confess that I can see nothing. The only words suggested as indicating such an intention to affect other contracts are the words "relates," "to have been void" and "so far as such contract has not been completed by delivery." The latter words indicate an intention that so far as a contract has been performed it is not within the section. The other words are apt and necessary for other purposes. I cannot see any reason for any other conclusion than that the section applies only to existing unperformed contracts. The contract of July was therefore not affected by sec. 8, and the good consideration for the contract of November which existed when it was made did not cease to be good consideration. That is the only defence to the action.

An argument was based on the provisions of sec. 8 (2) that "Any transaction or contract with respect to any wheat which is the subject matter of any contract or part of a contract which is hereby declared to be void shall also be void and of no effect, and any money paid in respect of any contract hereby made void or of any such transaction shall be repaid." It is suggested that the contract of November was a contract in respect of wheat

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which was the subject matter of a contract which is declared by the section to be void. But, for the reasons I have already given, no wheat was at the time of the passing of the Act the subject matter of any contract. Sub-sec. 2 of sec. 8 has, therefore, no application to the case.

A curious question as to costs has arisen from the form of the order made by the learned Judge at the trial, no doubt by inadvertence. The plaintiffs in their declaration had set out the contract sued upon, not at full length, but omitting those parts of it which would only be material if sec. 8 applied to it. The only plea of the defendants set out the facts which would bring the contract within sec. 8 if that section applied to such a contract. One of those facts was that the wheat was New South Wales 1914-15 wheat; the other, some immaterial terms of the contract. Upon the view of the law which the Supreme Court took, and which we now take, the additional facts so pleaded were irrelevant inasmuch as the contract was not within the Statute. The plaintiffs, instead of demurring, joined issue on the defendants' plea, and the case was then sent down for trial by a jury. The only issue for the jury was whether the plea was proved. It was proved. Everyone agreed that the wheat was New South Wales 1914-15 wheat, and that the contract was as alleged by the defendants. Under those circumstances all that could be done was to enter a verdict for the defendants on the issue sent down for trial. The learned Judge was asked to enter a verdict for the defendants, and he did so, at the same time reserving leave to the plaintiffs to move to enter a verdict for the plaintiffs. According to the practice in New South Wales a Judge has power to make such a reservation, but reserving leave to move to enter a verdict does not imply that the verdict will be so entered when moved for. When the matter came before the Full Court it does not seem to have occurred to anyone that a verdict could not be entered for the plaintiffs upon the actual and sole issue. But it also appeared that the plaintiffs were entitled to judgment in the action. The proper order therefore for the Supreme Court to have made was to order judgment to be entered for the plaintiffs, *non obstante veredicto*, and the motion could have been moulded for that purpose. No

doubt *per incuriam*, the order made was that the verdict for the defendants be set aside and a verdict entered for the plaintiffs. The Court further ordered the plaintiffs to pay the defendants' costs of the trial. In the result what they did was almost exactly the same as if they had ordered judgment to be entered for the plaintiffs *non obstante veredicto*, but in form they did it by ordering that a verdict be entered for the plaintiffs, and that the plaintiffs should pay the defendants' costs of the trial. That, however, could not be done under the law of New South Wales. If, however, judgment had been entered for the plaintiffs *non obstante veredicto*, the rest would have followed under the statute law. When objection was made on behalf of the plaintiffs, by way of cross-appeal, that that part of the order of the Full Court was invalid, Mr. *Rolin* replied that this Court has power to correct the error into which the Supreme Court had inadvertently fallen. I think that that can and should be done by directing that the order of the Supreme Court be varied by substituting for the order that a verdict be entered for the plaintiffs an order that judgment be entered for the plaintiffs *non obstante veredicto* with such directions as to costs as follow under sec. 164 of the *Common Law Procedure Act* 1899, and omitting the order for payment of the costs of the trial. As so varied the order of the Full Court should be affirmed.

BARTON J. I think that in respect of this matter the Statute is as plain as it can be made, and I do not intend to add anything to the analysis which has been made by the Chief Justice. That there should be an argument as to its meaning with even an appearance of plausibility is due rather to the ingenuity of counsel than to any words of the Statute.

I quite agree with the variation which the learned Chief Justice proposes.

ISAACS J. read the following judgment:—How did Parliament intend sec. 8 of the *Wheat Acquisition Act* 1914 to be understood? To answer that question properly, we must look at the whole instrument of which that section forms part.

The Legislature has, apparently for the better understanding of its intention, divided the enactment into groups with indicative headings.

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One is "Acquisition of wheat," comprising secs. 3 and 4. Sub-sec. 2 of sec. 3 frees any wheat acquired from all individual rights and interests, and converts them into claims for compensation.

The third group is headed "Compensation," and provides by secs. 5 and 6 for the method of awarding compensation for wheat acquired.

The fourth group relates to what is called "Sale or disposal of wheat," and consists of sec. 7.

Then comes the group we have to consider, which includes secs. 8 and 9. It is headed "Variation and cancellation of contracts." To begin with, that naturally imports that there are in existence and operative between the parties certain contracts which the Legislature is about to vary or cancel, as part of its wheat acquisition scheme.

Sec. 8, in its ordinary natural signification, accords with that. By sub-sec. 1 it says in effect that every contract—that is, every contract which is operative at the moment the Act is passed—which was made in New South Wales before 11th December 1914, shall, so far as it relates to the sale of any of the particular season's wheat to be delivered in the State, be annulled as from the beginning so far as the wheat still remains undelivered. The section, therefore, does not include former contracts which by rescission ceased to exist before the passing of the Act—such as the contract of 29th July. That sub-section deals with what may be regarded as the basic contract. Then the purchaser, on the faith of that contract being carried out, may himself have entered into some other "transactions" or "contracts" with respect to the wheat the subject matter of the basic contract, and so every such dependent contract made on the assumption of the continued existence of the original contract is also annulled. The branch falls with the tree. Thus the way is cleared for Government acquisition, and justice is done as between individuals. Any money paid in respect of the annulment—which the Act calls the variation or cancellation—of a contract must be repaid. But when it is remembered that the annulment is only in respect of wheat undelivered, there is no difficulty as to the return of money which has been paid. The phrase "part of a contract" in sub-sec. 2 only emphasizes what is already clear.

Therefore, notwithstanding the very clear and strenuous argument of Mr. *Rolin*, I see no room to doubt the correctness of the decision appealed from. Mr. *Rolin* argued that the words of the section could be read so as to include what had been contracts, though they had ceased to exist before 11th December 1914. This construction, however, is not only a strain upon the words as they stand, and altogether beyond the scheme and object of the Act, as gathered from its language, but offends against a recognized rule of law which was thus stated by *Lindley* L.J. in *Lauri* v. *Renad* (1):—"It is a fundamental rule of English law that no Statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a Statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

On the main appeal, therefore, the defendants fail.

As to the question of costs, I agree that on the merits the order should be as proposed. But I personally am not prepared to assent to the view that at the trial the Judge is so powerless as to be unable in any case to direct the jury in favour of the party in whom the law clearly says the right to succeed exists.

GAVAN DUFFY J. I concur in the order proposed to be made.

RICH J. I agree that sec. 8 only applies to existing contracts. As to costs, I also agree in the order proposed by the learned Chief Justice.

Order appealed from varied by substituting an order to enter judgment for the plaintiffs notwithstanding the verdict for the order to enter a verdict for the plaintiffs, and by omitting the order as to costs of the trial. As so varied, order appealed from affirmed. Appellants to pay costs of appeal.

Solicitors for the appellants, *Sly & Russell.*

Solicitors for the respondents, *Minter, Simpson & Co.*

B. L.

(1) (1892) 3 Ch., 402, at p. 421.