[HIGH COURT OF AUSTRALIA.]

THE COAL CLIFF COLLIERIES LIMITED AND ANOTHER . . . . . } APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

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SYDNEY, *Nov.* 30; *Dec.* 3, 10.

Barton, Isaacs and Gavan Duffy JJ.

Land Tax—Assessment—Owner of leasehold estate—Onerous conditions—Covenant to employ certain number of men—Taxable interest of lessee—Land Tax Assessment Act 1910-1914 (*No.* 22 *of* 1910—*No.* 29 *of* 1914), *sec.* 28.

A covenant in a lease of Crown land for mining purposes requiring the lessees during the term of the lease to employ in the construction of works or in mining operations on or under the land a certain number of able and competent workmen and miners, is an onerous condition for expending money upon the land, within the meaning of the proviso to sec. 28 (3) of the *Land Tax Assessment Act* 1910-1914.

So *held* by *Barton* and *Isaacs* JJ., *Gavan Duffy* J. dissenting.

Apperly v. *Federal Commissioner of Land Tax*, 17 C.L.R., 535, applied.

Held also, that notwithstanding a provision in the lease empowering the Crown to cancel the lease after giving short notice of its intention so to do and without becoming liable to pay any compensation to the lessee, the lessee had a taxable interest in the land.

CASE STATED.

On an appeal to the Supreme Court of New South Wales by the Coal Cliff Collieries Ltd. and E. Vickery & Sons Ltd. against an assessment of them jointly by the Federal Commissioner of Land Tax, *Pring* J. stated a case for the opinion of the High Court under sec. 46 of the *Land Tax Assessment Act* 1910-1914, which was substantially as follows:—

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1. This is an appeal from the assessment of land tax made by the respondent in respect of certain leasehold estates in land held by the appellant the Coal Cliff Collieries Ltd. at noon on 30th June 1914, and from the assessment of land tax made by the respondent in respect of the same leasehold estates held by the said appellant at noon on 30th June 1915.

2. The said leasehold estates were created by the leases enumerated in the schedule hereto, and at noon on the said dates the appellant the Coal Cliff Collieries Ltd. was the holder of all of the said leases enumerated in the said schedule (other than the lease therein referred to as lease Number 198) under and by virtue of transfers thereof duly registered in the Department of Mines of the State of New South Wales. At the said times the appellant the Coal Cliff Collieries Limited was also the holder of the said lease Number 198 as being beneficially entitled thereto. Neither of the appellants has ever at any time been the owner of a freehold estate in the land comprised in the said leases or in any part thereof.

3. Prior to the said dates all of the said leases (other than the said lease Number 198) had been amalgamated under the provisions of the *Mining Act* 1906.

4. The leases referred to in the said schedule as Numbers 690 and 709 respectively are mineral leases of Crown lands in the said State granted under the provisions of the *Mining Act Further Amendment Act of* 1884 for the sole purpose of enabling the lessee, his executors, administrators and transferees to mine for coal in the said lands, and are in the form annexed hereto marked "A," with certain modifications thereof which are not material to be herein mentioned.

5. The leases referred to in the said schedule as Numbers 9, 65, 94, 95, 96, 97, 98, 99, 70, 71, 72, 73, 31, 45 and 198 are coal or coal and shale mining leases under the *Mining Act* 1906, and are in the form annexed hereto marked "B," with certain modifications thereof not material to be herein mentioned.

6. Each of the said leases contains a covenant on the part of the lessee to employ in the construction of the works or in mining operations on the land, the subject of the lease, a certain number of able and competent workmen and miners.

7. Each of the said leases contains a provision that if at any time during the term thereby created any part or parts of the land thereby demised or any part or parts of the surface thereof should be required for the purpose of any township, village, railway, road, canal, watercourse, reservoir, or for any other public purpose, it should be lawful for the Governor for the time being, with the advice of the Executive Council, on giving short notice of his intention so to do, to take certain steps whereby the part or parts of the said land or of the surface thereof which should be so required would cease to be included in the land thereby demised without the lessee, his executors, administrators or transferees becoming entitled to any abatement of rent or royalty or any compensation whatever in respect thereof.

8. Each of the said leases was duly executed by the lessee named therein, and was duly registered in the said Department of Mines.

9. For the purpose of assessments of the land tax payable by the appellant the Coal Cliff Collieries Ltd. for the financial years beginning on 1st July 1914 and 1st July 1915, respectively, the said appellant duly furnished the respondent with the returns required for that purpose by the *Land Tax Assessment Act* 1910-1914, including a return of the said leases.

10. The respondent made the said assessments without assessing any amount as one which under the proviso to sec. 28 (3) of the said Act ought, for the purposes of that section, to be added to the value of the rent of the said leaseholds in respect of the conditions which are imposed upon the appellant the Coal Cliff Collieries Ltd. by the covenants in par. 6 hereof referred to.

11. The appellants, having at all material times been incorporated companies consisting substantially of the same shareholders, were jointly assessed by the said assessment.

12. The appellants contend: (*a*) that the conditions imposed upon the appellant the Coal Cliff Collieries Ltd. for expending money on the said lands in the employment of labour thereon are "onerous conditions" within the meaning of that expression as used in the said proviso, and that the respondent in making the said assessment should have assessed an amount to be added to

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the value of the rent of the said land in respect of the said conditions and that the value of the said rent should have been deemed to be increased by the amount so assessed; and (*b*) that by reason of the provisions contained in the said leases empowering the Crown to cancel the said leases after giving short notice of its intention so to do, without becoming liable to pay any compensation to the lessee, his executors, administrators or assigns, the appellants have no taxable interest in the land, the subject of the said leases.

13. The respondent does not admit either of these contentions.

14. The appeal came on for hearing before me on 5th October, when the facts hereinbefore set forth were admitted, and at the request of the parties I consented to state a case for the opinion of the High Court upon the following questions arising in the appeal, which in my opinion are questions of law.

15. For the purposes of this case the Court may refer to all documents on the file in this Court in the appeal or mentioned or referred to in this case.

16. The questions of law for the opinion of the High Court are :—

(1) Whether the conditions imposed upon the appellant the Coal Cliff Collieries Ltd. for expending money on the said lands in the employment of labour thereon are " onerous conditions " within the meaning of that term as used in the proviso to sub-sec. 3 of sec. 28 of the *Land Tax Assessment Act* 1910-1914.

(2) If so, whether the respondent in making the assessments referred to in par. 9 hereof should have assessed an amount to be added to the value of the rent of the said land in respect of the said conditions.

(3) Whether, by reason of the provisions contained in the said leases empowering the Crown to cancel the said leases after giving short notice of its intention so to do, without becoming liable to pay any compensation to the lessee, his executors, administrators or assigns, the appellants have no taxable interest in the land, the subject of the said leases.

It is not material to set out the schedule to the case.

The form marked "A" contained covenants by the lessee in the following terms:—

"2. And" the lessee, &c., "shall and will, after the expiration of six months from the date of delivery hereof, upon and during all lawful working days, except when prevented by inevitable accident or during the execution of repairs, work the said land, mine and premises, or the land, mine and premises adjoining thereto and proposed to be worked in connection therewith, in the best and most effectual manner and to the best advantage without interruption and shall and will with reasonable expedition make and construct all necessary works with a view to diligently explore and search for coal in, on and under the said land, mine or premises.

"3. And shall and will, after the expiration of the said six months or after the underground works shall have reached the said land, employ in the construction of the works, or in mining operations on or under the said land, during the first three years of the said term and during the usual hours of labour, five able and competent workmen and miners at the least; and during the remainder of the said term, and during the usual hours of labour, shall and will employ as aforesaid not less than ten such workmen and miners, unless prevented by inevitable accident or during the execution of repairs: Provided that the lessee, or, if there be more than one lessee, each lessee who shall work as aforesaid, shall count as and be deemed for the purposes of these presents to be a workman or miner employed as aforesaid.

"4. And shall and will during the said term effectually drain the said mine, and pump all water likely to cause injury thereto, or which would prevent or interfere with the working thereof; and if the said mine shall be affected or be liable to be affected by the same flow or body of water as any other mine or mines contiguous thereto, shall and will, if and whenever requested so to do, contribute with the lessee or lessees or owner or owners of such other mines a reasonable proportion of the machinery and labour necessary to free and keep such mine or mines free from water to a workable extent, or if the said mine shall be kept free from water to a workable extent either wholly or partially by means of the machinery and labour of a contiguous mine or mines, or by reason

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of any works constructed or money expended by the lessee or lessees, owner or owners of such contiguous mine or mines, then shall and will pay to such lessee or lessees, owner or owners, as aforesaid, a reasonable proportion of the cost of such machinery, labour, or works or a reasonable proportion of the money so expended, and the Secretary for Mines for the time being may, if and whenever he shall think fit, depute some efficient person who shall have access to and inspection of all such mines, to determine when the said mine is so freed or kept wholly or partially free from water and what are the reasonable proportions of such expenses aforesaid, and to whom and when the same are to be paid—such decision to be final and conclusive on all parties."

That form also contained a provision in the following terms:—"And if at any time during the term hereby created any part or parts of the land hereby demised or any part or parts of the surface thereof shall be required for the purpose of any township, village, railway, road, canal, watercourse, reservoir, or for any other public purpose, it shall be lawful for the Governor for the time being, with the advice of the Executive Council, on giving three months' notice of his intention so to do, to cause to be set out the part or parts of the said land or of the surface thereof which shall be so required; and as soon as the same shall be so set out, such part or parts of the said land or of the surface thereof shall cease to be included in the land hereby demised, and the lessee his executors administrators or transferees shall not be entitled to any abatement of rent or royalty, or any compensation whatever in respect thereof."

The form marked "B" contained covenants by the lessee in the following terms:—

"2. And shall upon and during all lawful working days except when prevented by inevitable accident or during the execution of repairs work the said mine in the best and most effectual manner and to the best advantage without interruption and shall with reasonable expedition make and construct all necessary works with a view to diligently explore and search for coal in and under the said mine.

"3. And shall employ in the construction of the works or in mining operations in the said mine during the first twelve months

of the said term and during the usual hours of labour not less than two able and competent workmen and miners and during the remainder of the said term and during the usual hours of labour shall employ as aforesaid not less than two such workmen and miners unless prevented by inevitable accident or during the execution of repairs."

It also included a covenant in terms substantially identical with that numbered 4 in the form marked " A."

Form " B " also contained a provision in the following terms :— " And if at any time during the term hereby created any part or parts of the land hereby demised or any part or parts of the surface thereof shall be required for the purposes of any township, village, railway, road, canal, watercourses, reservoir, or for any purpose which the Governor may declare a public purpose, it shall be lawful for the Governor, with the advice of the Executive Council, on giving one month's notice of his intention so to do to the lessee, to cancel the said lease so far as it relates to any right to the surface and the specified depth below the surface of the said part of the land, and thereupon the said part shall subject to the right of the said lessee to mine thereunder but without any compensation payable by Us our heirs or successors to the said lessee become Crown lands within the meaning of the Crown Lands Acts and may be dealt with thereunder."

Knox K.C. (with him *W. A. Parker*), for the appellants. The covenant imposes on the lessee the obligation of spending money in employing men who, by their labour, must construct works upon the land. See *Barwick* v. *Duchess of Edinburgh Co.* (1). The covenant is an onerous condition, because it compels the lessee to employ the men whether it is or is not profitable to employ them at the particular time, and it falls within the principle of *Apperly* v. *Federal Commissioner of Land Tax* (2). The employment of workmen in a proper and workmanlike manner must result in the improvement of the land. As to the second question, the Commissioner should assess some amount in respect of the covenant. As to the third question, since the appellants were in possession of

(1) 8 V.L.R. (Eq.), 70, at p. 78. (2) 17 C.L.R., 535.

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the land it appears that they had a taxable interest. See *Commissioner of Land Tax* v. *Nathan* (1).

Campbell K.C. (with him *Pike*), for the respondent. A condition cannot be onerous within the meaning of the proviso to sec. 28 (3) unless at the moment of inquiry it necessarily is onerous. A condition which may enure for the benefit of the lessee cannot be onerous in any sense. There must be a burden imposed upon the lessee both in fact and in law. A covenant can only be onerous if it can be predicated of it that it will be burdensome in all circumstances, and that cannot be said of a covenant which has reference to carrying into effect the purposes for which the lease was obtained. A covenant to employ labour under the terms stated is not a condition for the expenditure of money on the land within the meaning of the proviso. In order that it may be such a condition, the covenant must expressly require the expenditure of money, and not merely the doing of something which involves the expenditure of money. The expenditure of money must be such that it necessarily adds to the value of the land. This case is concluded by the reasoning in *Apperly* v. *Federal Commissioner of Land Tax* (2). There it was held that a covenant to repair was not an onerous covenant. [Counsel referred to sec. 86 of the *Mining Act* 1906 (N.S.W.).]

Knox K.C., in reply.

Cur. adv. vult.

Dec. 10.

The following judgments were read :—

BARTON J. Under sec. 46 (3) of the *Land Tax Assessment Act* a case has been stated for the opinion of this Court by the Supreme Court of New South Wales (*Pring* J.). It is unnecessary to repeat in full the facts set out for our opinion. The particular covenant or condition on which the questions arise is substantially identical in the two sets of leases, which were granted respectively under the provisions of the *Mining Act Further Amendment Act of* 1884 and of the *Mining Act* 1906 for the purpose of enabling the lessee

(1) 16 C.L.R., 654. (2) 17 C.L.R., 535.

to mine for coal in the lands demised. The appellant the Coal Cliff Collieries Ltd. on the material dates held all of the leases under transfers. A copy of one lease belonging to each set is appended to the special case and incorporated therein. The respondent assessed the land tax payable by the appellants without including in the assessment any amount to be added to the value of the rent in respect of certain conditions alleged by the appellants to be "onerous conditions" within the meaning of the proviso to sub-sec. 3 of sec. 28 of the *Land Tax Assessment Act* 1910-1914.

The first question asked is whether the conditions "for expending money on the said lands in the employment of labour thereon" are "onerous conditions" within the meaning of the proviso.

The portion material to the question runs thus: "Provided that, where onerous conditions for constructing buildings, works, or other improvements upon the land, or expending money thereon, are imposed upon the lessee, . . . the Commissioner may assess the amount (if any) which ought, for the purposes of this section, to be added to the value of the rent in respect thereof, and the value of the rent shall be deemed to be increased by that amount accordingly." The proviso, as was conceded in argument, applies to both the preceding paragraphs of the section, namely, (*a*) and (*b*).

The scheme of sec. 28 is explained, and the section expounded, in the judgments of this Court in the case of *Apperly* v. *Federal Commissioner of Land Tax* (1).

I think the covenant in question, as contained in the leases, is distinctly an "onerous condition" according to the meaning given to that term in those judgments. It is a burdensome obligation. The specified number of men are to be employed during the lease for the specified purpose and in all events; it may happen that their work results in a profit, but the condition is still onerous, for it has to be performed whether profit results or not, unless the Secretary for Mines grants permission to suspend work for a period not exceeding six months on proof that the mine cannot be profitably worked. The grant of that permission is purely discretionary, and the non-performance of the condition in the absence of such permission may lead to a declaration of the voidance of the lease. The condition

(1) 17 C.L.R., 535.

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then is clearly onerous. But to entitle the Commissioner to act under the proviso it is necessary that it should be not only onerous, but should be "for constructing buildings, works, or other improvements upon the land, or expending money thereon." The obligation in both leases is to "employ in the construction of 'the works' or in mining operations" the specified number of men. The works are "all necessary works with a view to diligently explore and search for coal," which the lessee is to "make and construct." The men, then, are to be employed either in constructing works for coal-mining on the land, or in mining operations thereon. It is contended that employing the necessary men in mining operations on the land is not within the words "expending money thereon." I cannot agree. It is true that a lessee is allowed to count himself for the purposes of the lease as a workman or miner employed. But all the other men engaged in the mining operations must be paid, unless we suppose a mining community so altruistic as to work without wages. Is not a condition which cannot be performed without the expenditure of money to the extent necessitated for its performance a condition for "expending money"? And is it not here for the expenditure of money on the land demised? I cannot see any alternative to answering these two queries in the affirmative. The expenditure is an absolute necessity, and it is quite visible in these leases, as in all Crown leases of a similar character, that the performance of the conditions generally or mainly by the employment of miners at wages is one of the objects for which the leases are granted, although an equal or greater object may be to open up the mineral treasures of the State and increase her wealth. The attainment of the first of these objects is clearly regarded as necessary to the attainment of the others. As it cannot be denied that the labour condition is a large part of the consideration given for the lease (and see per *Higinbotham* J. in *Barwick* v. *Duchess of Edinburgh Co.* (1)), I have no doubt that the Commissioner may properly exercise his discretion under the proviso if he has not already made any addition to the value of the rent on account of this covenant.

As to question 2 I am not sure that I ought to say in bare terms that the Commissioner should have assessed a sum to be added to

(1) 8 V.L.R. (Eq.), at p. 78.

the value of the rent in respect of the condition, but I have no hesitation in saying that the case appears to be a proper one for the exercise of his judgment in that regard.

The third question should be answered in the negative, as the appellants' counsel conceded in argument.

ISAACS J. The proviso we have been considering applies to all leases within the section. *Apperly's Case* (1) settled the principle for ascertaining whether a given provision in a lease was an " onerous condition " within the meaning of the proviso. Any differences of expression in that case as to the clause for repair were dicta only, and do not affect the actual principle established. Applying that principle to the labour conditions as found in the leases before us, I am clear they are " onerous conditions " within the meaning of the proviso.

Such conditions are constant features in mining leases of Crown lands in Australia. They are designed for three objects : (1) to give employment to miners ; (2) to add to the national production ; (3) to prove and develop the mines and render their mineral deposits more accessible. Unquestionably the actual sums reserved for rents are affected by reason of the labour conditions, which are universally regarded as important. They are calculated to effect all three objects, and in these leases they necessarily involve the expenditure of money on the land, some portion at least of which the Commissioner may in his judgment think ought, for the purposes of sec. 28, to be regarded in order that something be added to the value of the rent.

It was argued that no condition was one " to expend money " within the proviso unless " money " was specifically mentioned. Thus a covenant to expend £50 in eradicating prickly pear would be such a condition ; but a covenant to eradicate all prickly pear at the cost of the lessee would not. In this case it was said that a covenant to expend a given sum in labour would, but that the present covenant does not, answer the description. Thinking the proviso is aimed at substantial justice between landlord and tenant, I am unable to accept the distinction.

The first question therefore ought, in my opinion, to be answered in the affirmative.

(1) 17 C.L.R., 535.

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The second question, so far as it is a question of law, appears to be included in the first, the answer to which applies.

The third question clearly, and without any dissent from either party, should be answered in the negative.

GAVAN DUFFY J. The appellants are owners of leases which contain covenants compelling them to construct certain works on the demised lands, and to employ a prescribed number of competent workmen in the construction of these works or in mining operations on or under such lands. We are asked to say whether these covenants impose onerous conditions for expending money on such lands within the meaning of the proviso to sec. 28 (3) of the *Land Tax Assessment Act* 1910-1914. In my opinion they do not. I shall assume, without deciding the point, that these are covenants to expend money. If so, are they covenants to expend money on the demised lands? The appellants can satisfy the conditions imposed on them by employing the prescribed number of men in any of the mining operations which they carry on, and a condition that men shall be employed in hewing or carrying coal on or under any of the demised lands is not, in my opinion, a condition for expending money thereon. I think what is contemplated by the words of the proviso is an expenditure of money for the purpose of benefiting or otherwise affecting the land itself. Here neither lessor nor lessee had any such object in view; the covenants are designed to encourage the search for and winning of coal in the demised lands, and the promotion and extension of the coal-mining industry, without any regard to the effect which a compliance with them might produce on the demised lands.

Questions answered as follows:—(1) *Yes.* (2) *It is a proper case for the exercise of the Commissioner's judgment in that regard.* (3) *The appellants have a taxable interest. Costs to be paid by the respondent.*

Solicitors for the appellants, *Allen, Allen & Hemsley.*

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

B. L.