[HIGH COURT OF AUSTRALIA.]

KEITH HENRY AND COMPANY PROPRIETARY LIMITED
PLAINTIFF,

APPELLANT;

AND

STUART WALKER AND COMPANY PROPRIETARY LIMITED AND ANOTHER
DEFENDANTS,

RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

H. C. OF A. 1958.

SYDNEY, *May* 2, 5, 6, 7; *Aug.* 13.

Dixon C.J., McTiernan and Fullagar JJ.

Equity—Importing of goods—Plaintiff importer—Goods sold to defendant through agency of plaintiff—Imported for defendant on licences held and made available by plaintiff—Change in import licensing procedure—New licences issued on quota system in relation to imports over base period—Imports under plaintiff's licences included by both plaintiff and defendant in respect to totals for base period—Minister of Customs—Benefit of imports on plaintiff's licences given to defendant—Licences granted accordingly—Discretion of Minister in granting licences—Claim by plaintiff for equitable relief—Declaration sought that licences held in trust by defendant for plaintiff—Doctrine of Keech v. *Sandford—Want of equity in plaintiff.*

In November 1950 K.H., having been in communication with certain manufacturers of hog casings in Ireland, ascertained that a quantity of hog casings was available for importation into Australia. It offered this quantity to S.W., and S.W. said that it would take them. K.H. then obtained an import licence for the goods under the *Customs (Import Licensing) Regulations* 1939, and ordered the goods from the suppliers in Ireland. The goods were ordered for delivery direct to S.W., and S.W. established a letter of credit for the price. K.H., with the consent of the Department of Customs, made available to S.W. its import licence for the purpose of obtaining the letter of credit and later for the purpose of clearing the goods through the Customs. The goods were invoiced to S.W. and cleared through the Customs by a customs agent employed by S.W., and delivery was made direct to S.W. Later the Irish suppliers paid to K.H. a commission on the transaction. A large number of transactions carried out in the same way took place between 1950 and 1955. In 1955 the policy of granting import licences was altered by the Department of Trade and Customs which thereafter proposed to issue licences for the importation of goods based upon the value of, in the instant case, hog casings imported during a base period of fifteen months ended 31st March 1955. Both

K. H. and S. W. sought licences in respect of hog casings and both claimed to include in the value of the hog casings imported during the base period the value of the hog casings cleared through Customs in the manner above mentioned. K. H., knowing of the inclusion of the value of such hog casings in S.W.'s claim, demanded that S. W. exclude them but this S. W. refused to do. The department with knowledge of the facts allocated licences for the importation of specified quotas of hog casings both to K. H. and S. W. upon the basis that S. W. was in fact the importer of the goods brought in under K. H.'s licences. K. H. then instituted proceedings in the equitable jurisdiction of the Supreme Court of New South Wales seeking declarations that S. W. held the licence quota allotted to it to the extent to which such quota was calculated upon the value of the hog casings in question in trust for it and that S. W. was liable to account to K. H. for all profits made by it by the use of such licence.

Held, that K. H. had established no title to equitable relief and that the suit was properly dismissed.

The doctrine of *Keech* v. *Sandford* (1726) Sel. Cas. Ch. 61 [25 E.R. 223] explained.

Decision of the Supreme Court of New South Wales (*McLelland* J.), affirmed.

APPEAL from the Supreme Court of New South Wales.

Keith Henry and Company Proprietary Limited commenced proceedings in the Supreme Court of New South Wales in its equitable jurisdiction against Stuart Walker and Company Proprietary Limited and the Minister for Trade and Customs seeking declarations that the defendant company held certain licensed quotas for the importation of goods allotted it by the defendant Minister, to the extent to which such licensed quotas were based upon the value of goods entered by the defendant company for home consumption by means of import licences of the plaintiff, in trust for the plaintiff and that it was accountable to the plaintiff for the profits resulting from the quotas, to the extent aforesaid, and from all licences issued to the defendant company in pursuance thereof. An injunction was sought restraining the defendant Minister from dealing further with the defendant company on the basis that it was beneficially entitled to the said licensed quotas.

The suit came on for hearing before *McLelland* J., who dismissed it with costs.

From this decision the plaintiff appealed to the High Court.

The relevant facts appear in detail in the judgment of the Court hereunder.

Dr. F. Louat Q.C. and *R. T. H. Barbour*, for the appellant.

B. P. Macfarlan Q.C. and *A. F. Mason*, for the respondent Stuart Walker and Co. Pty. Ltd.

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J. S. Cripps, for the respondent Minister for Trade and Customs, sought and was granted leave to withdraw.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This is an appeal from a judgment of the Supreme Court of New South Wales (*McLelland* J.) in an equity suit, in which the present appellant was plaintiff and the present respondents were defendants. The second defendant, the Minister for Trade and Customs of the Commonwealth, though he is still technically a party to the proceedings, was not represented—apart from a formal appearance and withdrawal of counsel—upon this appeal, and no relief is sought against him. For the purposes of this appeal the facts, which are set out in detail in the judgment of *McLelland* J. may be stated fairly shortly, but first it is necessary to refer to certain regulations which form, so to speak, the background of the case. These are the *Customs* (*Import Licensing*) *Regulations*, which were made under the *Customs Act* 1901-1936 (Cth.) and came into force on their publication in the Commonwealth *Gazette* on 1st December 1939.

Regulation 3 of these regulations prohibits the importation of any goods without a licence. Succeeding regulations provide for the making of applications to the Minister for licences. By regs. 10 and 11 an absolute discretion is given to the Minister to grant or refuse a licence or to grant a licence subject to such terms and conditions as he may approve or determine. Regulation 12 provides that the Minister may revoke any licence, and reg. 13 that a licence shall not be transferable. It should be mentioned that, at the time when the events with which we are concerned began and for some years thereafter, it was not the practice, in the administration of the regulations, to grant a licence except for goods which were actually available abroad for exportation.

The plaintiff, which is a company incorporated in New South Wales, carries on the business of an importer and distributor. The defendant company (which we will call the defendant) is also incorporated in New South Wales. It carries on a business of supplier of butchers' requisites, including hog casings used in the manufacture of sausages. At all material times hog casings were in short supply in Australia. In 1948 the plaintiff interested itself in the obtaining of casings from Ireland, and by 1950 it had established business relations with three suppliers in Ireland. These were Dillon & Sons, Clover Meats Ltd. and Roscrea Bacon Factory Ltd. Although Mr. Keith Henry spoke in his evidence of "correspondence and written agreements" with these firms, no written agreement was

tendered in evidence, but what was proved was that a course of dealing was adopted which, with minor variations in individual cases, was followed throughout. The Irish suppliers from time to time made known to the plaintiff—either of their own motion or in response to an inquiry from the plaintiff—the quantities of casings which they had available for export to Australia. The plaintiff then offered these quantities to purchasers in Australia. There was never any difficulty in disposing of them.

The first dealing between the plaintiff and the defendant in Irish hog casings was in November 1950. The plaintiff, having ascertained that certain quantities were available in Ireland, offered a quantity to the defendant, which the defendant said that it would take. The plaintiff then, after obtaining a licence to import the goods, sent to the Irish supplier an order for this quantity. The order was in the following terms :—

13 November 1950

"

Messrs. Dillon & Sons,
Balleymacthomas, Cork, Ireland.

ORDER No. 1

1000 (one thousand) bundles of HOG CASINGS—unselected
@ 24/6 f.o.b. Ireland.
Plus £2 per cask.

2/6 Sterling per bundle to be paid to our Commission Account.
Veterinary Certificate covering this shipment MUST be supplied.

SHIPMENT : As soon as possible by steamer to Sydney.

INVOICES : Direct to : Messrs. Stuart Walker & Co. Pty. Ltd.,
Butchers' Suppliers,
174 Clarence Street,
Sydney, N.S.W., Australia.

PAYMENT : Irrevocable Letter of Credit for £1350 Sterling will be established your favour by Messrs. Stuart Walker.

INSURANCE : Please Declare under our Open Policy with
Blom & Van der AA,
23 Birchin Lane,
London, England. "

It is to be noted that the invoices are to be sent direct to the defendant, and that it is the defendant who is to establish the letter of credit. On the other hand, the insurance is to be effected under the plaintiff's open policy. The order having been despatched, the next step was for the defendant to establish its letter of credit. In

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order to obtain this, it was necessary that a licence to import the goods should be produced to the defendant's bank, and the plaintiff made its licence available to the defendant for this purpose. In due course the goods, preceded no doubt by the shipping documents, arrived in Sydney, invoiced to the defendant. The goods were cleared through the Customs by a customs agent employed by the defendant, and the defendant took delivery of them. For the purpose of clearing them through the Customs it was, of course, necessary again that an import licence should be produced to the officers of the Customs Department. For this purpose the plaintiff again made its import licence available to the defendant, having previously obtained from the department an indorsement upon it to the effect that there was " no objection " to the entry by the defendant of the goods to which it applied. Later the Irish supplier paid to the plaintiff its commission of 2/6d. sterling per bundle. The price originally quoted to the defendant by the plaintiff was the price quoted to the plaintiff by the Irish supplier plus the amount of the plaintiff's " commission ". The sale of goods effectuated in this way would seem to have been a sale of goods by the Irish supplier to the defendant. The goods were delivered by the supplier to the defendant, and the defendant paid the price to the supplier. In and about the transaction the plaintiff rendered services in bringing the parties together, in giving the order, in causing the goods to be insured under its open marine policy, and (last but not least) in obtaining and making available its import licence. The entire transaction might, of course, have taken another form, and, if it could possibly have foreseen what was going to happen five years later, it is at least probable that the plaintiff would have seen to it that it did take a different form. But it could not foresee the future, and the form which the transaction did take was doubtless adopted, as *McLelland* J. observes, because, from a business point of view, it seemed convenient and advantageous both for the plaintiff and for the defendant.

Between 1950 and 1955 there were a large number of similar transactions in hog casings, in which the plaintiff and the defendant and one or other of the three Irish firms took part. The transaction took the same form in each case. There appear, indeed, to have been three cases in which the letter of credit was established by the plaintiff. It would appear also that after 1952 the insurance was effected with the defendant's insurer. But for the purposes of the present case these variations are immaterial.

Government policy with regard to the licensing of imports naturally varied from time to time during the relevant years. In

the earlier years, so far as hog casings are concerned, a quota appears to have been fixed. That is to say, the total quantity for which licences would be granted in a given period was subject to a fixed maximum. One would gather that the quota was never in danger of being exceeded, for there seems to have been no difficulty in obtaining a licence for any hog casings shown to be available abroad. Between April and September 1954 the quota was removed, and this period is referred to in the evidence as the N.Q.R. (no quota restriction) period. On 1st October 1954 a quota restriction was again imposed. These things were matters merely of administrative discretion and practice, which were doubtless made known from time to time to those concerned. Changes made do not appear to have affected transactions between the plaintiff and the defendant in respect of Irish hog casings up to the end of 1954. About this time, however, there was a new departure in administrative policy, and it is out of this new departure that the trouble between the plaintiff and the defendant has arisen.

Up to this point, as has been seen, the practice was to issue licences for specific quantities of hog casings shown to be available for export in a specific country. Each licence was, so to speak, an *ad hoc* licence. The new departure lay in a departmental decision to issue general licences on a quarterly basis, i.e. licences authorising the importation in each quarter of a year of a fixed quantity of casings from Canada, Northern Ireland, Eire, or New Zealand. These countries were the only then available sources of supply. In explaining the new policy the department referred to the new proposed licences as " global " licences. The new policy obviously involved (1) the fixing of a total or " quota " for a given period, and (2) the proportionate allocation of that quota among applicants for licences. So far as the second matter is concerned, it was decided to make the allocation on the basis of the value of hog casings imported during the fifteen months ended 31st March 1955. This decision was notified to importers by a circular letter of 29th April 1955, which read :—" To assist the Department in determining the extent to which each importer should be granted licences to cover the importation of hog casings, it is desired that the following information be furnished to this office not later than 13th May 1955, covering imports of hog casings entered at the Customs on either ' import entries ' or ' warehousing entries ', during the 15 months ended 31st March 1955 :—(1) Importer's name and address. (2) Entry number, date of entry and nature of entry. (3) Country of origin. (4) Value for duty £A." This circular was received both by the plaintiff and by the defendant.

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It would appear from a passage in the cross-examination of Mr. Stuart that at some earlier date the defendant had communicated with the Irish suppliers with a view to dealing with them direct and so avoiding the payment of commission to the plaintiff. It is to be inferred that the Irish suppliers replied that the plaintiff was their agent in Australia, and that they would only deal with the defendant through the plaintiff. The defendant had also on 1st December 1954 itself made an application to the department for a licence to import hog casings from Ireland to the value of £2,000, but *McLelland* J. was not satisfied that any licence had issued on this application. The impending change in licensing policy must have become known before the circular of 29th April 1955 went out, for on 29th March 1955 the defendant wrote to the department enclosing a list of what it said were its importations of hog casings from 1st January 1954 to 31st December 1954. It did not in this letter mention the fact that all, or almost all, of these importations had been made under the plaintiff's licences.

After receipt of the circular of 29th April 1955 both the plaintiff and the defendant made returns in which were included the hog casings imported from Ireland during the fifteen months under the plaintiff's licences. In other words, as *McLelland* J. put it, "the casings coming to the defendant from the three Irish principals of the plaintiff were common to the returns of the plaintiff and the defendant". It must be mentioned that the defendant this time put the position quite straightforwardly to the department. In a letter accompanying its return it said :—"We would like to point out in connection with the Irish Hog Casings, that these were purchased through Messrs. Keith Henry & Co. Pty. Ltd., who are the Australian Agents for three large Hog Casing Packers in Ireland, and the Import Licences covering all these, were issued by your Department to Messrs. Keith Henry & Co. Pty. Ltd., but this does not alter the fact that we, Stuart Walker & Company Pty. Ltd., were, in actual fact, the Importers of the Casings."

The plaintiff knew that the defendant had included these importations in its return, and it demanded that they should be excluded, but the defendant refused to exclude them. The plaintiff also urged upon the department that these importations should be credited to it and not to the defendant. The department, in the exercise of its discretion, ultimately decided to make the quarterly allocations on the basis of a twelve-months period (31st March 1954 to 31st March 1955), and, apparently taking the view that the defendant, and not the plaintiff, was the "importer" of the casings in question within the meaning of its circular of 29th April 1955, issued quarterly

import licences to the plaintiff and the defendant respectively on that basis. For the quarter July to September 1955 the plaintiff's allocation was £1,141 and the defendant's £2,820. If the importations under the plaintiff's licences had been credited to the plaintiff, it is said that the plaintiff's allocation would have been £2,332 more (i.e. £3,473) and the defendant's £2,332 less (i.e. £488). It is of no consequence in the present case whether the departmental view that the defendant was really the " importer " of the casings in question was sound or not. When the circular of 29th April 1955 was drafted, the problem which would arise as to the respective positions of the plaintiff and the defendant was presumably not foreseen. When that problem did arise, it affected nobody except the plaintiff and the defendant, and one would not have expected a rigid adherence to the formula of the circular. Since future licences were in question, and since in the past nobody could have imported without a licence, one would rather have expected that the allocation would be made on the basis of past licences to the extent to which they had been acted upon. But the problem which arose was a problem for the department to solve. It was a matter for the discretion of the department, and (provided, of course, that it did not act on wholly irrelevant considerations) that discretion was absolute.

Only one other matter need be mentioned. On 1st November 1955 the defendant wrote to the plaintiff, asking it to obtain quotations for hog casings from its " principals " in Ireland. The plaintiff did not reply to this letter, and on 7th November 1955 the defendant sent a cable and a letter to each of the three Irish suppliers, saying that it had written to the plaintiff and received no reply, and asking them to forward quotations direct. None of the Irish suppliers replied to the cable or to the letter.

The whole of the relevant facts have now been stated. That Mr. Keith Henry should be resentful over what has happened is readily understandable. But it is impossible to find in the facts of the case any cause of action at law or in equity. If the defendant had induced any of the Irish suppliers to break a contract with the plaintiff, the plaintiff might have had an action for damages at common law. But there is no suggestion that anything of the kind has taken place. The immediate source of grievance to the plaintiff really lies in the decision of the department, and a secondary source lies in the fact that the defendant tried to procure that decision and succeeded in doing so. But, whether such conduct receives approval or disapproval in the commercial world, the defendant committed no legal wrong. If it had, in its approach to the department, been guilty of any misrepresentation or fraudulent concealment, the plaintiff again might have had its remedy at common law.

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But again there is no suggestion of anything of the kind. The position was put quite frankly to the department. It occurs to one that another remedy at common law might have been sought by the plaintiff, and that is by way of application for a writ of mandamus directed to the Minister. The difficulties in the way of such an application are obvious enough. But at least it would have had the merit of bringing the real issues—the real substance of the matter—out into the open.

The relief which the plaintiff has sought is purely equitable. *McLelland* J. could find " no recognisable equity " in the case, and in truth nothing resembling an equity can be found in it. The whole substance of the situation can be stated in a few words. The Minister for Customs has in his disposition certain rights, which are of value, and which he is entitled to grant at his discretion. He announces that he will grant them on a certain basis. A. contends that on this basis the rights should be granted to him. B. contends that on this basis they should be granted to him, B. The Minister, in the exercise of his discretion, makes the grant to B. There is really no more in this case than that. A. is very strongly of opinion that it was contrary to commercial ethics for B. to apply for the grant at all. But neither the making of the application nor the acceptance of the grant can be made a ground for any legal or equitable relief against B.

What the plaintiff has set out to do in this suit seems to be to bring his case somehow within the equitable principle laid down in *Keech* v. *Sandford* (1). The substantial relief claimed is by way of declarations that the defendant holds in trust for the plaintiff the rights given by the quarterly licences granted to it, and all profits made by it by the use of those licences. The doctrine of *Keech* v. *Sandford* (1) is shortly stated by saying that a trustee must not use his position as trustee to make a gain for himself : any property acquired, or profit made, by him in breach of this rule is held by him in trust for his *cestui que trust.* The rule is not confined to cases of express trusts. It applies to all cases in which one person stands in a fiduciary relation to another : it has been applied as between partners, as between principal and agent, and as between master and servant : see, e.g., *Re Biss* ; *Biss* v. *Biss* (2) ; *Prebble* v. *Reeves* (3) and *Wicks* v. *Bennett* (4). The case of *Birtchnell* v. *Equity Trustees Executors and Agency Co. Ltd.* (5) may be regarded as an instance of the application of the same rule. But there is no room

(1) (1726) Sel. Cas. Ch. 61 [25 E.R. 223].
(2) (1903) 2 Ch. 40.
(3) (1910) V.L.R. 88.
(4) (1921) 30 C.L.R. 80.
(5) (1929) 42 C.L.R. 384.

here for the application of any such rule. It cannot be suggested that the plaintiff and the defendant at any stage stood in any fiduciary relationship one to the other. The position is simply that business men—or business firms—were engaged in ordinary commercial transactions with each other, dealing with each other, as the saying goes, at arm's length. Nor is there, in any case, any ground for saying that the advantage gained by the defendant was gained by any misuse of its position *vis-a-vis* the plaintiff. It seems to be put in the statement of claim that the defendant's action in applying for and accepting the new quarterly licences involved some misuse—some unconscionable use—of the plaintiff's licences under which the casings were imported from Ireland between 1950 and 1955. But it cannot be said that the defendant in any intelligible sense "used" the plaintiff's licences for any purpose other than those for which they were entrusted to it—viz. first, the obtaining of letters of credit, and later the clearing of the goods through the Customs. The licences were returned to the plaintiff after they had served these purposes, and indeed there was then no further purpose that they could serve.

It seems clear enough that the decision of *McLelland* J. was right, and the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Joseph Thompson & Cottee.*

Solicitors for the respondent Stuart Walker & Co. Pty. Ltd., *Dawson, Waldron, Edwards & Nicholls.*

Solicitor for the respondent Minister for Trade and Customs, *H. E. Renfree,* Crown Solicitor for the Commonwealth.

R. A. H.