

14 April 1934

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IN THE HIGH COURT OF AUSTRALIA
NEW SOUTH WALES REGISTRY.

No. 67/1933

FLOOD AND COMPANY LIMITED

v.

N E E S O N.

BEFORE THE FULL BENCH OF THE HIGH COURT
CONSTITUTED BY THEIR HONOURS THE CHIEF JUSTICE
SIR FRANK GAVIN DUFFY, SIR GEORGE RICH J.,
STANER J., SWATT J. and McLEERAN J.

APPEARANCES. Mr. de Bann for the Appellant.

Mr. Miller, with him Mr. Maguire
for the Respondent.

J U D G M E N T.

SYDNEY, THURSDAY 19th April 1934 at 3 p.m.

CHIEF JUSTICE.

The majority of the members of the Bench have
arrived at a decision as to the form of Order to be made.

RICH J.

The Order of the Supreme Court will be discharged and the
case will be remitted to the Workers' Compensation Commission
to hear such further evidence as to the circumstances relating
to the Order of Mr. Justice Gordon, and to make such further
or other findings thereon as the Commission may think fit.
The costs of the proceedings before this Court and the Supreme
Court to abide the events of the proceedings before the
Commission.

STANER J.

STARKE J. I would like to add in explanation and if possible for the assistance of the parties, my reasons for concurring in the Order. The critical question, on which we think the evidence is insufficiently presented to the Court, relates to the Order made by Mr. Justice Gordon as to the consent of the parties to judgment being entered for the sum of £550. It is no fault of the Commission that the facts were not fully investigated, for it was the duty of the parties to present them, and they have left them in a very indefinite and unsatisfactory condition. But the matter we remit in substance to the Commission is to ascertain the circumstances in which the Judgment of Mr. Justice Gordon was obtained. Were the parties really endeavouring to commute the weekly payments to which the workman was apparently entitled under the Workers' Compensation Act, or were they in truth abandoning all rights and claims under the Workers' Compensation Act and claiming damages for an injury for which the common law gave them a right of action? That question is one of very great difficulty on the evidence. All the material available to us is a letter stating that the parties desired to commute the weekly payments under the Workers' Compensation Act, and the Consent Order made by Mr. Justice Gordon, merely directing judgment to be entered for a stated sum of money, - whether in pursuance of the letter or as a result of further investigations and so forth, we do not know. The Commission itself has stated some findings on the subject which some members of this Bench think ambiguous. Others do not. The Acting Chief Justice, Sir John Harvey, seems to have come to the conclusion that the judgment was a commutation of the rights under the Workers' Compensation Act, and to have acted upon that view. It may be that that is the right interpretation of the Commission's Award, or it may be that Sir John Harvey substituted a finding of his own for that made by the Workers' Compensation Commission, a course which was,

STARKE J.

probably, not open to the Supreme Court on the precise language of the Workers' Compensation Act. I hope that this explanation will assist the parties, and perhaps the Commission, in the duty which they still have to perform.

EWATT J. In agreeing with the Order proposed, I desire to make a short observation. There was evidence before the Commission as to the Supreme Court Consent Order made by Gordon J., giving leave to sign judgment; but some of the circumstances surrounding this Consent Order are not clear. On the re-hearing, the Commission will be able to determine whether the Supreme Court proceedings which commenced on July 6th, 1917, and concluded in the Consent Order of July 7th - the following day - and which included writ of summons, service of writ, appearance, notice of appearance, but did not include any pleadings whatever, were ^{the} no more than carrying into effect of the suggestion of H.A. Green, the plaintiff's Solicitor. On June 22nd 1927, he wrote a letter of demand, referable to Workers' Compensation payments. If the Commission find, as Sir John Harvey thinks they have already found - that the process in the Supreme Court in truth represented the mere execution of an agreement to commute Workers' Compensation payments without the consent of the Commission and to avoid having to obtain such consent - the applicant's present claim under the Workers' Compensation Act will not be defeated.