(47 - 31) 1937

IN THE HIGH COURT OF AUSTRALIA.

William Inglis & Son Ltd.

v.

Inglis

REASONS FOR JUDGMENT.

Judgment delivered at Sydney

on 16th December 1937

H. J. GREEN, Government Printer, Melbourne.
C.5000.

WILLIAM INGLIS & SON LIMITED V. INGLIS.

ORDER

Appeal dismissed with costs.

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WILLIAM INGLIS AND SON LIMITED

v.

BEATRICE BLANCHE INGLIS.

Reasons for Judgment — The Chief Justice.

WILLIAM INGLIS AND SON LIMITED v. BEATRICE BLANCHE INGLIS.

The executrix of the late Joseph Ernest Inglis claimed from William Inglis and Son Limited payment of a retiring allowance alleged to be due to the deceased and his executrix. A claim was also made for amounts alleged to be payable by way of commission of 12½% upon the net profits of the defendant company in certain years. The claims depends, directly or indirectly, upon the terms of an agreement in writing dated 1st September 1921 whereby Inglis was engaged by the company for five years as auctioneer. The agreement provided that, unless it had been previously determined, either party should have the option of renewing it for a further period not exceeding two years (clause 9). Thus the agreement expired or 30th August 1926 or on 30th August 1928. There is no evidence as to

whether or not it was extended for a further term of two years. Inglis continued in the service of the company until 1934 and continued to draw the same percentage of profits as before but there is no evidence of any new express agreement. The only evidence as to the terms of the new agreement is to be found in the fact that he continued to act as auctioneer, that he was paid the same salary as under the written agreement and that he was paid 12½% of the profits of the company in the same way as under the written agreement. He ceased to be employed by the company on 31st December 1934. Inglis died after the institution of the action and his executrix continued the proceedings.

I propose to deal first with the claim for the retiring allowance based upon the terms of the written contract.

Clause 10 of the agreement is as follows :-

" The Company agrees with the Auctioneer that provided this agreement has not been determined under Clause Six hereof upon his retirement or in the event of his dying during the currency of this agreement or any extension hereof and provided he shall not either alone or in partnership with any person or persons commence or carry on the business of Stock Agents or any other business of a similar nature to any business carried on by the Company at the time of the determination of the Auctioneer's employment and shall not enter the employment of or act as clerk servant or agent to or in any manner solicit or seek to obtain business for any person firm or company carrying on any such business without the written consent of the Company it shall allow him his executors or administrators the sum of Five hundred

pounds (£500) per annum for Six years from the date of his retirement or death such sum to be payable quarterly the first of such quarterly payments to be made Three months from the date of his retirement or death as the case may be. "

In order to determine the meaning of this clause it is desirable to consider also clauses 1, 6, and 8. They are as follows :-

" 1. The engagement shall extend over a period of Five years from the First day of July One thousand nine hundred and twenty one subject to determination or renewal as herein provided.

6. The Auctioneer's employment hereunder may forthwith be determined by the Company without notice or payment in lieu of notice in case the Auctioneer shall be guilty of misconduct or breach of any of the stipulations herein contained.

8. In case the Auctioneer shall be incapacitated by illness or any other cause from duly attending to his duties for a

period or periods exceeding in all twentysix weeks in any fiftytwo consecutive weeks the Company may at its option determine the Auctioneer's employment hereunder forthwith without notice whereupon he shall become entitled to the retiring allowance as provided in Clause Ten hereof. "

The plaintiff contends that Inglis retired, within the meaning of clause 10, when he finally left the service of the company, i.e., on 31st December 1934. The Full Court accepted this view and accordingly entered judgment for the quarterly payments, amounting to £375, which had fallen due at the date of the issue of the writ.

The defendant contends that the words " during the currency of this agreement or any extension thereof" in clause 10 apply to both ~~the~~ events of death and retirement. As Inglis did not die or retire during the currency of the agreement no event has happened

upon which the retiring allowance became payable. This view had been adopted at the trial by Milner Stephen J. who had accordingly directed the jury to find a verdict on the relevant count for the defendant.

Another possible view is that the retirement contemplated by the agreement refers to retirement from the employment contemplated by the agreement, but not to retirement at any time from the employment of the company. Upon this view the retirement of Inglis took place in 1926 or 1928, and, subject to the Statute of Limitations, he would be entitled to recover the total amount of six annual payments.

The solution of this problem of construction depends upon consideration of the whole of the agreement. Clause 10 is, in itself, quite

ambiguous. It is capable of ~~every~~ each one of the three constructions suggested. But other provisions of the agreement make it possible to make a reasoned selection of one of these meanings as expressing the intention of the parties. Clause 1 provides that the engagement shall extend over a period of five years subject to determination or renewal. Clauses 3 and 4 refer to the terms of the employment and the continuance of the employment. Clause 6 provides for the "determination" of the employment in case of misconduct. Clause 8 provides that the company may "determine" the employment if the employee is incapacitated for a specified time. ~~[illegible]~~ If this power is exercised, so as to bring about what is referred to as a "determination" of employment, the clause expressly provides that

the employee shall become entitled to the retiring allowance as provided in clause 10. Such a determination of the employment clearly involves the retirement of the employee during the currency of the agreement. But the agreement does not simply allow clause 10 to operate in such a case. Clause 6 makes a substantive provision that, in this possible event of retirement during the currency of the agreement, the retiring allowance shall be paid. Such a provision would have been unnecessary if clause 10 meant, and meant only, that the allowance was to be paid upon retirement during the currency of the agreement. Thus, in my opinion, the construction of clause 10 suggested on behalf of the defendant should be rejected.

The question remains whether "retirement" in clause 10 is limited to retirement at the end of the period of employment under the agreement or under the extension thereof which the agreement contemplates as a possibility. Upon this construction the allowance would become payable when the agreement ended and not otherwise. If this were the intention of the parties the result would be that the employee would be entitled to the allowance at a fixed or determinable time independently of any act of the employee in retiring. "Retirement is a word which in its natural meaning includes both leaving employment at the expiry of a fixed period of employment and also the voluntary act of a person in leaving any employment in which he has been engaged. There is no reason why this meaning should not be

attached to the word in this agreement.

Thus I am of opinion that the contention of the plaintiff as to the construction of clause 10 is right and that the judgment of the Full Court on this point, which is a question of law, should be affirmed.

The second question relates to the employee's right to receive a percentage of profits alleged to have been made by the company in connection with what has been described in the case as the Camden property. The relevant clauses of the agreement are the following:-

" 2. The remuneration of the Auctioneer for such service shall consist of

(a) A fixed annual salary of Five hundred and twenty

pounds (£520) payable weekly

(b) By way of further remuneration a commission calculated at the rate of Twelve and a half per cent (12½%) upon the net profits of the Company in each year after deducting therefrom an amount equal to the dividend payable to the Preference Shareholders."

" 7. For the purpose of computing the amount of the said commission payable in each year and for all other purposes (if any) the Balance Sheet or Profit and Loss Account of the Company prepared and certified by the Company's Auditor shall be conclusive and binding on both parties. "

No claim for commission can be based upon the written agreement because it expired in 1926 (or 1928) and the Camden enterprise was not commenced until 1933. But the claim was also based upon an agreement to be implied from the conduct of the parties. This claim went to the jury, who found for the defendant. The Full Court set

aside that verdict and made an order which did not result in the entry of a verdict for any fixed amount but which ordered that a verdict be entered for the plaintiff for an amount of commission taking into account the Camden property profits. This unusual form of order (in a common law action) is not objected to, as, if the view of the Full Court is right, there is no difficulty in arriving at the proper amount.

The claim is based, as I have said, upon an agreement implied from the conduct of the parties. That conduct consists in the making of the written agreement, the continuance of Inglis in the employment and the payment by the Company and acceptance by him of a salary

and an amount of 12½% commission on the profits of the company as shown by the accounts of the company as certified by the Company's Auditor. The agreement alleged in the relevant plea is that Inglis would remain and continue in the defendant's service (not for any definite period) after the termination of the period of engagement under the written agreement, and that, during the period in which he so remained in the defendant's service, the defendant would pay to him a commission on the same basis as provided in the written agreement. The only evidence in the case is the evidence which establishes the conduct of the parties to which I have referred. From such evidence a jury might have inferred an agreement such as is alleged. But there is no finding of the jury to that effect. The

jury found on this count for the defendant. It cannot be said that a jury would be bound to find for the plaintiff. It would be open to a jury to take the view that there was an indefinite hiring on terms specifically agreed from year to year and that the defendant accepted each year ~~but~~ what was paid to him as a complete payment for his services. There is no evidence that, before the company dispensed with his services, Inglis made any suggestion or complaint that he was being paid, for the years in question, upon a wrong basis. If a jury found that the actual conduct of the parties, Inglis in doing the work which he did, and the company in paying the remuneration which it paid, was the only guide to the agreement of the parties and that, at the time both parties were satisfied with, and agreed to, what was

actually done, I have difficulty in seeing how such a verdict could be upset. Thus I am unable to see how the Full Court, in the absence of any finding for the plaintiff as to the terms of the contract, can properly find for the plaintiff on this issue. Thus, in my opinion, the plaintiff should fail upon this part of the case. It is therefore unnecessary for me to consider whether the plaintiff is bound by the certificate of the company's auditor to balance sheets which show that, though there was a profit on the Camden working account, the net profits of the company came out at an amount on which Inglis was in fact paid a commission of 12½ per cent. In my opinion the appeal should be allowed and the judgment of the Full Court varied by

striking out the part of the order which directs that a verdict be entered for the plaintiff for the amount of commission taking into account the Camden property profits.

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JUDGMENT. MR JUSTICE RICH.

WILLIAM INGLIS & SON LIMITED V. INGLIS.

JUDGMENT. RICH J.

The difficulties in this case arise chiefly from the manner in which it was conducted at the trial and from the changes of attitude adopted by the defendant company upon the appeal before the Full Court of the Supreme Court. Two questions of liability fell to be determined upon that appeal. The first was whether the defendant company was liable to the plaintiff's executrix in respect of a retiring allowance mentioned in a written agreement of service which had expired some years before the plaintiff left the defendant's service. The text of the agreement presents a good example of equivocation brought about by neglect of the rules affecting the positional characters of English speech - a matter upon which I have frequently remarked. The question has been dealt with by judgments in this Court which I have had the advantage of reading. It is sufficient to say that I agree as to the meaning which the agreement ought to receive upon/a proper interpretation and that is that the retiring allowance should become payable to the plaintiff on

his final retirement from the defendant's service whenever that should be and notwithstanding that his service should be continued under some further agreement, express or implied, not being inconsistent therewith. The second question which fell to be determined is whether in calculating, from and including 1933, the commission payable to the plaintiff, certain profits of the company should be included. The profits in question are those derived by the company from a property at ~~place~~ ~~called~~ Camden which the company appears to have acquired. The difficulties attending the solution of this question spring from the exiguous character of the evidence tendered by the plaintiff, the failure of the defendant to take defences and objections which on the face of the transcript suggest themselves but do not establish themselves, and from the election given by the order made by the Full Court under which the defendant might have had a new trial if it had chosen. Upon the evidence as it stands a prima facie case is made on behalf of the plaintiff from a continuation of his employment by implication from conduct upon the same terms as the written agreement. In the judgment of the

Full Court as first delivered this seems to have been taken for granted and their Honours addressed themselves to the construction of the agreement upon the footing apparently that the prolongation of the plaintiff' employment was governed by its terms. After the judgment had been pronounced but before the reasons had been published, as I gather, the defendant suggested that a mistake had been made and that upon proper amendments the defendant could make a case answering the whole cause of action on the facts. The Full Court made an order giving the defendant an election on terms to take a new trial with liberty to amend for the purpose of pursuing this course. An appeal to this Court from a new trial order lies only by leave. I should certainly have refused to agre to giving leave to the defendant if it had been sought. Leave was not sought but an appeal was instituted as of right. This means that the defendant chose not to avail himself of the new trial order but to appea as from a final order. I agree with the construction placed upon the agreement by the Full Court and think that they were right upon the materials in treating the plaintiff as prima facie entitled to the profits from the Camden Park, although no doubt this was strictly a jury question. But in the circumstances I do not think that the defendant is

entitled to an order for a new trial. For in the first place though it is true that the question whether the terms on which the deceased continued in the defendant's service is a question for the jury the prima facie case made by the plaintiff was not answered by any evidence. If nothing more appears than that after the expiration of an express contract of employment and employee continues in the service in the same position and at the same remuneration the presumption is that the terms are carried on into a new yearly or periodical hiring and a finding to the contrary will not be sustained, see Bullock v. Wimmera Fellmongery and Wool-scouring Coy. (1879) 5 V.L.R. 362 at p. 365 where Barry J. summarises the position by saying "In this case, the original contract was for a year "certain; nothing further being mentioned at the end of that year, a new "term was entered on, and an implied contract arose that the period of "service was to be for another year, on the same conditions as those "mutually binding on the parties during the previous year." A new trial was ordered the jury having found for the master against the implication. In the next place the defendant in appealing to this Court treated the

order as final and in doing so refused to elect for the new trial which it might have had under the Supreme Court's order. I do not think now that the defendant should be allowed to regain the advantage it so rejected and have the matter submitted to another jury. In the third place "a new trial ought never to be lightly granted". This observation was made by Lord Lindley in giving the reasons of the Privy Council in Turnbull v. Duval, 1902 A.C. 429 at p. 436 for declining to order a new trial to enable the parties seeking it to avail themselves of documents which with due diligence they might have used on the former trial. In the instant case the Supreme Court were disposed, on special terms, to relax the application of this salutary principle although the defendant having evidence in its possession which was not led was in a position, subject to amendment of the pleadings to make the case at the first trial which by the indulgence of the Supreme Court it would have been able to submit to a second jury had it elected in favour of a new trial.

In my opinion the appeal should be dismissed.

JUDGMENT STARKE J.

I concur in the opinion of the Chief Justice. But I desire to add some observations upon the claim to include in the net profits of the appellant the profit, if any, made in the business carried on by it at Camden Park: The working account of Camden Park showed an excess of receipts over expenditure which in the years 1933 and 1934 was written off the purchase account of Camden Park. This excess does not appear in the profit and loss account of the appellant certified by the Auditor.

The trial judge in directing the jury said that there was no evidence before him to show that the excess was wrongly dealt with in the appellant's accounts. It was, he added, for the respondent to make out her case and to his mind the jury could not take the matter into consideration. But he left the matter to the jury for their consideration and they found for the appellant.

On appeal the Full Court was of opinion that the excess shown on the Camden Park working account should be included in the net profits of the appellant. But, as I follow the judgment, that opinion was based upon the written agreement between the appellant and Joseph Ernest Inglis deceased whose executrix the respondent is. It is clear, however, that the claim cannot be based upon the written agreement for it expired at latest in 1928 and the Camden Park business did not commence until 1933. Any agreement as to profits from Camden Park must therefore be implied if at all from the conduct of the parties and whether there were any profits must depend upon the propriety of writing off the excess in the working account of Camden Park to purchase account and possibly upon the agreement of the parties as how and by whom profits should be ascertained e.g. by a Balance Sheet and Profit and Loss accounts prepared and certified by the appellant's auditors.

The jury has found a general verdict for the appellant. The Full Court set aside the verdict and, in the events which happened, directed "that a verdict be entered for the respondent for the amount of the commission taking into account the Camden property profits." Even upon the written agreement I should doubt whether the respondent was, as a matter of law, entitled to the verdict for whether there

were any profits arising from the Camden Park property depended upon considerations that had not been investigated. The direction must be supported upon some agreement implied from the conduct of the parties and upon proof of profits arising from the Camden Park business which are conclusions of fact. It cannot be said, I think, on the facts appearing in the Transcript that the respondent is entitled to a verdict as a matter of law. Supreme Court Procedure Act 1900 s. 6.

But it is said that the appellant is precluded from relying upon this objection to the direction because of the manner in which the case was conducted before the Full Court. It was admitted according to the judgment of Halse Rogers J. that the Camden Park business had been purchased by the appellant and that certain profits were derived from it. And in argument counsel for the appellant conceded that if the Court found that the Camden profits were disclosed on the Balance sheet he could not oppose the entry of a verdict for the respondent in respect to commission on those amounts but later he wished "to withdraw that admission." The admission of the facts mentioned left open the question of the actual agreement of the parties as to profits and the liability of the appellant thereunder. The concession made in argument but subsequently withdrawn was a matter of law and not of fact and was in itself a matter for the determination of the Court. It determined that the liability of the appellant rested upon the agreement in writing which cannot be sustained for reasons already mentioned. The conduct of the appellant at the time does not, I think, preclude it from complaining that its liability in respect of Camden Park profits has been founded on a basis of fact that is contrary to the finding of the jury and beyond any admission that it made.

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Judgment. Evatt J.;McTiernan J.

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Before the full Court of New South Wales only two parts of the plaintiff's claim were in dispute viz :- (1) the retiring allowance provided for in clause 10 of the agreement dated September 1st, 1921, between the auctioneer J.E.Inglis and the defendant and (2) the commission of 12½% on the profits of the Camden portion of the defendant's business. It is convenient to deal with the matters in that order.

J.E.Inglis was over 50 years of age when the agreement of 1921 was entered into. He finally retired from the employment of the company in December 1934. The terms of the agreement show that his services as auctioneer were regarded as valuable, particularly as the company appears to have evolved from an Inglis family concern. The agreement of 1921 was to extend over a period of five(5) years from July 1st 1921. Then either party had the option of reviewing the agreement for a further period not exceeding two years either on the same terms or subject to such modifications as were agreed to or determined by an arbitrator. The agreement was subject to termination at the instance of the employer in the event of the auctioneer's misconduct or breach of agreement. Further if the auctioneer became seriously incapacitated the employer was also at liberty to terminate the employment, but in such case the auctioneer became entitled to the retiring allowance specified in clause 10.

Under clause 10 the company promised that, if there had not been a termination of the employment by reason ofthe auctioneer's misconduct it would allow him £500 per annum for a period of 6 years from retirement or death. This promise was subject to the condition that the auctioneer should not (1) carry on the business of stock agent or any similar business carried on by the company at the time of the determination of the auctioneer's employment or (2) become an employee in any such business without the company's written consent. Subject to these conditions the retiring allowance was payable "upon his retirement or in the event of his dying during the currency of this agreement or any extension thereof". It is this adverbial phrase indicating when the allowance was to commence which has occasioned some difficulty but the

words "upon" and "in the event of" strengthen the grammatical conclusion that the words "during the currency of this agreement or any extension thereof" attach themselves to the word "dying". This prima facie view is also supported by a consideration of the nature of the restrictive covenant. Death would remove all danger of disadvantageous competition by the auctioneer but his retirement at once created the danger. Accordingly, the competition which is forbidden relates to any business carried on by the company "at the time of the determination of the auctioneer's employment". Clearly the covenant operated against the auctioneer after his retirement from employment, although such retirement took place after the running out of the agreement or any extension thereof. Normally the auctioneer might be expected to serve for seven years after which it was extremely probable that at least a day, a week, or a month would elapse before the auctioneer finally left the service. Upon such departure the restrictive covenant would immediately spring into full force and effect, but, according to the company's contention, the quid pro quo i.e. the retiring allowance, was not payable at all because the retirement did not take place "during the currency of this agreement or any extension thereof". Such a construction was rightly critised as producing a fantastic result. It is enough to say that it is opposed to the clear language of clause 10.

In the judgment of the Full Court Halse Rogers J pointed out the significant fact that the agreement conferred upon the auctioneer no right to retire during the currency of the contract. If he became incapacitated, the allowance had to be paid, and if he broke any of the stipulations of the agreement it could be terminated and the right conferred by clause 10 would be forfeited. But the recital states what is otherwise plain, that the auctioneer agrees to serve for the full term. Thus the auctioneer could not by unilateral action, retire until the full term had been served. It follows that he never possessed a right to retire "during the currency" of the agreement. This fact tends to destroy altogether the argument of the employer. It supports the conclusion of the Full Court that "retirement" in clause 10 includes, and indeed

is mainly directed to, actual retirement from the service after the full term of the agreement has run out. Accordingly on the facts proved at the trial the plaintiff became entitled to a verdict for £375 in respect of the retiring allowance. Butit was suggested before the Full Court that the defendant desired to amend its pleading inreference to the claim for retiring allowance so as to set up the defence that, by a new agreement, the deceased auctioneer barga ned away his rights under claim 10. In the absence of an original ~~exx~~plea to such effect, the defendant was not entitled to the amendment asked for, and certainly the Full Court did not err in refusing to allow it except upon onerous terms. A verdict for £375 would have entitled the plaintiff to the general costs of the trial as well as the costs of the appeal so the terms imposed were verification of any new pleas and payment by the defendant in any event of the costs of the trial and the appeal. But the defendant did not within the time allowed amend on the terms imposed. In the circumstances, the Full Court's construction of clause 10 being correct, the plaintiff should obtain a verdict for £375 in respect of the retiring allowance.

The second part of the appeal relates to the claim for commission. The extended agreement having terminated on June 30th 1928, the auctioneers employment by the company was continued indefinitely. But upon what terms? Until June 30th 1928, 12½% of the "net profits of the company in each year after deducting therefrom an amount equal to the dividend payable to the preference shareholders" in addition to the salary of £520 per annum was paid to the auctioneer under clause 2 of the written agreement. The particulars of claim and payments filed by the plaintiff and defendant show very clearly that, after June 30th 1928, a similar arrangement as the payment of commission was continued. For instance a comparison of the particulars filed for the year 1929 shows that the only ~~ma~~tter in dispute between the parties was whether, in calculating "net profits of the company" income tax could be deducted before the 12½% was estimated.

Under clause 7 of the original agreement it was provided that, for the purpose of computing the amount of the 12½% commis-

sion, the auditor's certified balance sheet and profit and loss accountshould be conclusive and binding on the parties. It is also clear that afterJune 30th,1928, these balance sheets and profit and loss accounts were still accepted by both parties as conclusive for the purpose of reckoning "net profits" and the commission payable thereon.

At the trial the dispute as to commission was resolved into two questions only viz, the deduction of income tax from profits and the non-inclusion of Camden profits therein. By its verdict the jury negatived the claim based upon the deductions of income tax but in his summing up the learned trial Judge refused to allow the Camden profits to be considered at all. For present purposes the importance of the conduct of the trial is that the Judge and both parties accepted the position that the commission of 12½% referred to in the written agreement was also payable in respect of the period when the auctioneer was employed without any written agreement. Strictly speaking, a finding of fact should have been made by the jury but the long course of dealing between both parties made it difficult for the defendant to raise any dispute as to the facts, and it refrained from doing so. Having regard to the defendant's refusal to accept terms imposed by the Full Court as the condition of a new trial, it is impossible for this Court to order a new trial for the purpose of litigating the question, undisputed at the trial, whether the arrangement as to commission continued upon the same footing as was expressed in the written agreement.

Accordingly the only point as to the Camden profits is whether they were properly excluded in assessing the "net profits" of the company. The plaintiff does not challenge the figures or accounts of the auditor but relies upon them, contending that, on the face of the company's profits and loss account, it appears that profits were made from the Camden business as an integral portion of the plaintiff's business. What has to be ascertained is "the net profits of the company in each year". The fact that, in the balance sheet, these profits were shown to be, "appropriated" "reserved", or "written off" is nothing to the point. What

the company chose to do with its monies after they had been already stamped with the chafacter of profits cannot prejudice the rights of the employee whose remuneration included a percentage of the profits, as shown by the certified accounts. Upon this point also the Full Court judgment should be affirmed.

An unusual position arises in this case. The order of the Full Court now under appeal is that of May 28th 1937. The notice of appeal dated June 11th purports to treat the appeal as one of right and the affidavit of appealable value states that the order is "a final judgment and order". But the Full Courts order was interlocutory. The order of the Full Court was for a conditional new trial. But it never became fully operative because the defendantdeliberately chose not to satisfy the Sonditions laid down. Thus the defendant treated itself as entitled to appeal to this Court as a result of its own conduct subsequent to the Full Courts order. In the circumstances the defendant should be prevented from canvassing all matters which concern the exercise by the Full Court of its discretion. The Full Court's order should be affirmed and the appeal dismissed with costs, the defendant being no longer able to avail itself of the Full Court's conditional order for a new trial.