7/1945

IN THE HIGH COURT OF AUSTRALIA.

McANULTY

*V.*

PATERSON & ORS.

ORIGINAL

# REASONS FOR JUDGMENT.

*Judgment delivered at* MELBOURNE

*on* TUESDAY, 15th OCTOBER, 1946.

H. J. Green, Govt. Print., Melb.

C.2774

McANULTY v. PATERSON & ORS.

REASONS FOR JUDGMENT. LATHAM C.J.

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By the judgment of the Supreme Court of Queensland (Mansfield J.), against which this appeal is brought, it was declared that the plaintiffs, who are the respondents to the appeal, were entitled to receive one half of the net profits from the manufacture and sale of canned meat products packed by the defendant between 9th August 1939 and 9th August 1944. It was ordered that an account be taken of such profits, and a separate account was ordered to be taken of the profits derived from the business carried on by the defendant between the dates mentioned at Finnie.

The plaintiffs and F.T. Grove (of whom the plaintiff Mrs. Grove is the legal personal representative) had been associated as shareholders in companies which had conducted an unsuccessful meat preserving enterprise on leased land at Finnie, near Toowoomba. The defendant carried on in South Brisbane a cheese manufacturing business under the registered name of Maxam Cheese Products Pty./ Before 1939 he had had no experience in the business of meat preserving. By an undated indenture which was executed on or about 9th August 1939 the plaintiffs (called "the Syndicate") agreed to permit the defendant O.K. McAnulty (called "the manufacturer") to occupy the works at Finnie, he paying a rent of £300 per annum. The indenture refers to the four first named plaintiffs/ and F.T. Grove, together with A.C.V. Bligh and J.J. Bloomer, as the lessees of the premises. But Bligh and Bloomer did not execute the deed, and the leases which the other plaintiffs held during the currency of the agreement were in fact made on 29th September 1939 and 25th November 1939 for periods of five years from 9th August 1939 with rights of renewal for five years.

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By the indenture the defendant agreed that he would faithfully work, carry on and conduct a meat preserving and canning business "or any other allied industry" in on or about the premises and that he would employ therein the plant, machinery, slaughterhouses etc. as he might consider necessary with any additional plant or machinery as he might deem advisable.

Clause 1 of the agreement provided that in the working and carrying on of the business McAnulty should be free from any interference whatsoever by the syndicate save and except as thereinafter provided. The plaintiffs provided £700 (clause 2) and McAnulty £150 (clause 8A) for the purpose of carrying on the business. Proper accounts were to be kept by the manufacturer (clause 3) and he was to render half yearly accounts to the syndicate. The profits were to be divided, one half to the syndicate and one half to the manufacturer and losses were to be borne as provided in clause 4. Clause 8 limited the liability of the syndicate for losses to the amount of £700 paid by the syndicate to the manufacturer. The agreement further provided (clause 5) that the manufacturer should be absolutely untrammelled in the work of production, sales, marketing and distribution of the products of the business, and that he should be empowered to sell to himself the products of the business and to conduct the business as if it were his own sole business, provided that he paid for such products at the prices then current in Brisbane as on a cash basis. The term of the agreement was five years (clause 9) but the manufacturer was at liberty to cancel and determine it at any time on one month's notice (clause 6). There were provisions as to disposition of the goodwill (clause 7) and as to a final settlement of accounts at the end of the period of the agreement (clause 8). Clause 10 provided that the manufacturer might appoint any substitutes to carry out the agreement, that he should not be bound personally to render any services, and that he might "even refrain from working the said business at such periods as he shall consider proper". Clause 12 contained a covenant by the syndicate

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(but not by the manufacturer) not to enter into competition with "the said business of the manufacturer" during the continuance of the indenture.

Immediately after the execution of the agreement, the defendant began to conduct a meat preserving business at the Finnie works, turning out minced beef products, and he continued the operation of the works to November 1939. The works were then closed down, but they were re-opened for working during the period March to May 1940. Otherwise the works at Finnie were not used by the defendant during the five year term of the agreement. He did not use his right to cancel the agreement under clause 6. He continued to pay, during the five year period, the rent of £300 per annum for which the agreement provided.

In 1941 he erected works of his own in Stanley Street, South Brisbane, where he manufactured large quantities of canned meat products to carry out defence contracts, and made substantial profits. He had registered two names under the Registration of Firms Act 1942- Maxam Cheese Products Pty. and Preserved Food Products Pty. In each case he was described in the certificate of registration as the only member of the "firm".

In August 1942 the plaintiffs made some objections to the accounts rendered by McAnulty, and in November 1942 the writ in this action was issued. In the statement of claim delivered on 5th March 1943 the claims were for accounts of the business carried on at Finnie, for breach of contract in ceasing to carry on this business, and for the return of certain machinery removed from Finnie or damages for conversion and detention thereof. It has not been suggested that the plaintiffs were not aware of the defendant's operations in South Brisbane. The plaintiff Paterson occasionally visited the defendant's works. No claim that the plaintiffs had any rights in connection with those operations or with the defence contracts mentioned was made until the statement of claim was amended on 27th June 1944.

The plaintiffs contended, first, that the indenture created a partnership between them and the defendant and that the defendant's business in South Brisbane was part of the partnership business, so that the defendant was bound to account as a partner for /

for all the profits derived from that business. The learned trial judge rejected this contention, but the plaintiffs have renewed it upon the appeal to this court.

In the alternative the plaintiffs claimed that the indenture established a fidicuary relationship between them and the defendant of such a character that he was bound to account to the plaintiffs for any benefits received by him by reason of the connection which he had obtained with the Finnie works by virtue of the indenture. This claim succeeded, the learned judge holding that the connection of the defendant with the Finnie works enabled him to obtain the defence contracts out of which profits were made at the Brisbane works. His Honour held that, while the defendant was entitled to refrain from carrying on business at Finnie, he could not so refrain and at the same time carry on elsewhere a business which under the indenture he was under a duty to carry on for the benefit of the plaintiffs - except upon the basis of treating the business so carried on as subject to the terms of the agreement, so that the plaintiffs became entitled to half the profits of that business.

The plaintiffs made a further alternative claim for breach of contract. The alleged breach was in substance that the defendant failed to open and conduct the Finnie works when it was possible to do so. The view taken by the learned judge of the fiduciary character of the agreement, involving an obligation on the part of the defendant to account for profits, made it unnecessary for him to consider the claim for breach of contract. The plaintiffs have again raised this claim as an alternative before this court.

On the question of partnership the appellant supports and the respondent challenges the decision of the Supreme Court. The determination of the question of partnership or no partnership depends entirely upon the terms of the indenture, because it was not suggested that any other agreement (express or implied) was made.

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The appellant contends that it was wrongly decided that a fiduciary relationship was established by the indenture. He concedes that he may have been a trustee of the £700 subscribed by the plaintiffs towards the enterprise, but it is not alleged that he did not apply this sum as required by the agreement. As to other matters, the defendant says that the terms of the agreement expressly allowed him to open or close the works at Finnie as he should determine - the plaintiffs by the agreement left the decision on this matter to him. He points out that the agreement required him to find £150 towards the venture, but that it did not bind him to provide any further money. He spent some £3000 in buying land for his South Brisbane works and £89,000 in building the works and purchasing and installing the plant in the works. He has been ordered to account for all the profits from this business, though he agreed only to conduct a small business at Finnie with existing plant (worth, according to him, about £2000, or about £7000 including land and buildings) and such other plant as he might voluntarily choose to add to it. The Finnie works were equipped only to produce minced meat in various forms - camp pie, minced luncheon beef, minced corn beef and beef galantine - but not solid meat, or sausages or meat and vegetable rations. It is not disputed that the only profitable avenue of disposal of minced beef was to be found in Great Britain. For 29 months of the 5 years period the import of minced meat into Great Britain was prohibited. The defendant made profits out of minced beef, meat and vegetable rations, out of various forms of preserved solid (not minced) meat, and out of canned sausages. The Finnie works were not able to produce any of these articles (except minced beef) without large expenditure, which he was under no obligation to make. He was entitled under the agreement to refrain from working the business at Finnie during any period that he thought proper. Finally, the defendant calls attention to the clause in the indenture expressly prohibiting the plaintiffs from competing with the Finnie business and to the absence of any corresponding provision applying to himself.

As to the alleged breach of contract, the defendant denies any breach, contending that he was not bound to operate the Finnie works at all, and that, if there was some obligation to operate them, that obligation was subject to its being a commercial proposition to use the works, and it never was a commercial proposition to do so. during the period of closure of the works.

No question now arises as to a claim of the plaintiffs based on removal of certain plant from Finnie, but there are controversies between the parties as to matters of account in connection with the business which was actually carried on at Finnie.

The first question to be determined is whether the indenture created the relation of partnership between the plaintiffs and the defendant. Whether there is a partnership or not depends upon the intention of the parties as disclosed by their agreement - upon "the real nature of the agreement into which they have entered" - Walker v. Hirsch, 27 Ch.D., 460 at p. 474. It is plain that this is not a case in which it can be contended that the defendant became the servant of the plaintiffs.

The interest of the plaintiffs in the leased land and in the plant did not become partnership property. It is clear that the defendant did not become a co-lessee with the plaintiffs of the land or acquire any rights as to the plant as against the owners of the land and plant. If the agreement had been determined there could not have been a sale of any such rights as partnership assets. These assets were plainly not partnership property.

There may nevertheless have been a partnership in the business. "Partnership is the relation which subsists between partners carrying on a business in common with a view of profit": Partnership Act 1891 (Queensland), sec. 5. The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business: sec. 6(3). The agreement between the parties provides in clause 4 that after repayment of advances and interest the balance of the net profits shall be divided equally

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between the syndicate and the manufacturer. Accordingly there is prima facie evidence of a partnership between the parties in the business which was to be carried on in pursuance of the agreement. But, further, clause 4 also provides that losses shall be payable "(a) out of the moneys advanced by the syndicate (that is the £700 already mentioned); (b) and in the next place one half by the syndicate and one half by the manufacturer"; but with a provision in clause 8 that in no case will the syndicate be finally liable for any loss that may exceed the said amount of £700 Thus there is an agreement between the parties to share both profits and losses. The recognised legal principle is stated in Lindley on Partnership, 9th Edn., p. 49, in the following words:- "Whatever difference of opinion there may be as to other matters, persons engaged in any trade, business, or adventure upon the terms of sharing the profits and making good all losses arising therefrom, are necessarily to some extent partners in that trade, business, or adventure; nor is the writer aware of any case (unless it be In re Jane 110 L.T. 556) in which persons who have agreed to share profits and losses in this sense have been held not to be partners." But it is not necessary that all losses should be shared. At p. 51 the learned author says:- "Persons who agree to share the profits of an adventure in which they engage are prima facie partners, although they stipulate that they will not be liable for losses beyond the sums they engage to subscribe: Brown v. Tapscott, 6 M. & W. 119." The present case is just such a case. The parties agreed to share profits equally, and to share losses, but with a limit of liability for losses to £700 in the case of the syndicate - the amount which the members of the syndicate agreed to subscribe.

Clause 5 of the agreement provides "That the Manufacturer shall be absolutely untramelled in the work of production sales marketing and distribution of the products of the said business including the prices to be paid the persons to be employed by him commissions and terms of sale whether cash or credit." Thus the plaintiffs had no right to take any part in

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the management of the business. But this fact does not prevent the relationship of partnership existing between the plaintiffs and the defendant. A person may, by reason of sharing profits and losses, be a partner in a business and yet have no right to interfere with or control the management of the business: see Walker v. Hirsch, 27 Ch.D., 460, Lindley, p. 50. Many partners are dormant partners.

Thus the agreement for sharing profits and losses prima facie creates a partnership, and the provisions as to limitation of the liability of the syndicate for losses and the exclusion of the syndicate from the management of the business are not sufficient to displace this prima facie conclusion.

Clause 7 of the agreement provides that the manufacturer will not take any steps to sell or otherwise dispose of any goodwill of the business without the consent of the syndicate, and there is a provision for bringing into account any profit arising from the sale of goodwill. This provision in my opinion strongly supports the view that the business was intended to be the business of the plaintiffs and defendant. The syndicate and the defendant were regarded as each having an interest in the goodwill of the business.

On the other hand it is contended for the defendant that there are provisions in the agreement which show that it was not intended that the parties should carry on business in common, but that the business contemplated by the agreement was to be a business owned by the defendant and carried on by him upon land which he had the permission of the plaintiffs to occupy. Emphasis was laid upon clause 5, which gave the defendant complete control of the business. This clause contains a provision that he shall be at liberty to conduct the business "as if it were his own sole business" subject to a provision as to the prices at which he is to be entitled "to sell to himself the products of the said business". Clause 10 further underlines the complete personal control of the business by the defendant by providing that he may even refrain from working the business for such period as he shall consider proper. Finally, clause 12 contains the following provision - "The Syndicate covenant and agree that they will not enter into competition with the said business of the Manufacturer during the continuance of this Indenture". This provision shows, it is said, that the business contemplated by the agreement was to be the business "of the manufacturer" and not a partnership business of the plaintiffs

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and the defendant.

In my opinion the proper conclusion, upon the agreement as a whole, is that it creates a partnership between the plaintiffs and the defendant in the Finnie business. Important indicia of partnership are present - a business to be carried on for the purpose of profit, sharing profits and losses and a common ownership of good-will. As already stated, the facts that there is a limitation as between the parties with respect to the amount of losses to be borne by certain of them and that one person is made a managing partner do not displace the conclusion that a partnership was created. The provision in clause 5 that the manufacturer may sell to himself the products of the business of the manufacturer: - would not be necessary if the business were the business in that case the products would be his property as of course without any supposed "sale to himself". The provision that the manufacturer shall be at liberty to conduct the business "as if it were his own sole business" indicates that the manufacturer was not the only person interested in the business. The effect of this provision is to confer upon him a right (which he would not otherwise possess) to conduct the business as if it were his own business, though in truth and in fact it was not his own business. The reference in clause 12 to "the said business of the said Manufacturer" is in my opinion only a phrase identifying the business which has been mentioned in the earlier parts of the agreement.

I am therefore of opinion that a partnership in the business to be conducted at Finnie was created by the indenture.

The next question which arises is as to the scope of the partnership. It is contended for the plaintiffs that the business conducted by the defendant at South Brisbane was partnership business. I am unable to accept this contention. The indenture gives a permit to occupy land at Finnie and provides that the manufacturer will conduct a meat preserving etc. industry "in on or about the premises contained in the said leases and will employ therein the preserving plant and canning plant machinery etc.". There is no provision in the deed for the carrying on of any business elsewhere than at Finnie. It is not suggested that any agreement affecting the matter other than that contained in the deed was ever made between the parties. The plaintiffs would, I think, have been justifiably astonished if the defendant had claimed that they were liable for any of the expenditure /

expenditure of the defendant at South Brisbane. The overdraft in connection with the defendant's business there was about £170,000 at the time of the trial. It is, I think, clear that the defendant had no authority to pledge the credit of the plaintiffs in respect of that business. In my opinion, therefore, the plaintiffs fail in their claim so far as it is based upon the contention that the business established and carried on by the defendant at South Brisbane was partnership business.

If, however, the parties were partners in respect of the Finnie business (as in my opinion is the case) the defendant was bound by certain fiduciary obligations to the plaintiffs. These obligations associated with partnership are now in statutory form. The Partnership Act 1891, sec. 33, provides "If a partner without the consent of the other partners carries on any business of the same nature as and competing with that of the firm he must account for and pay over to the firm all profits made by him in that business." The defendant did carry on at South Brisbane a meat preserving business which was of the same nature as that of the firm and it was a competitive business. But he did not do this without the consent of the other partners. In the first place the agreement contemplates that the defendant will have or may have a business of buying and selling preserved meat products. Clause 5 of the agreement provides that "The Manufacturer further is expressly empowered to sell to himself the products of the said business or any part thereof or to any business in which he may be a proprietor or may be interested". These words show that he had a right to deal in the products of the business at Finnie and to be a proprietor of or interested in a business which dealt with such products. Further, clause 12 provides that the syndicate will not enter into competition with the Finnie business. There is no provision that the manufacturer will not enter into competition with the Finnie business. The express provision against competition by the syndicate makes very significant the omission of any corresponding provision relating to the manufacturer. Further, the carrying on of the business of the defendant at South Brisbane was obvious and was certainly known at least to some of the plaintiffs, for example to Mr. F.J. Paterson, who gave evidence at

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the trial. Accordingly, in my opinion, the defendant is not liable to account for any of the profits of the South Brisbane business by reason of the provisions of sec. 33 of the Partnership Act.

Sec. 32 of the Act contains the following provision: "Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership or from any use by him of the partnership property name or business connexion." The learned judge, though he was of opinion that no partnership was created between the parties, did reach the conclusion that a fiduciary relationship existed which created the same obligation as that which by virtue of sec. 32 would exist between the parties if they were partners - as in my opinion they were. His Honour held that the defendant derived a profit from a use of the partnership name and business connection in that by reason thereof he obtained defence contracts, and he has been held liable to account for the profits of those contracts.

On 24th January 1941 the defendant wrote to Sir Earle Page, who was Minister for Commerce, offering to supply canned meat for export. The letter was signed "Maxam Cheese Products Pty: Controlling Preserved Food Products Pty." It referred to past operations, and it was admitted in cross-examination that the references were to the Finnie plant. The letter offered to supply preserved meat for overseas requirements. At this time the defendant had no other works from which he could supply such products. This letter was acknowledged by a letter in which Sir Earle Page stated that he would give consideration to "your suggestions regarding the use of your canning plant". On 14th or 15th February 1941 the plaintiff Paterson and the defendant went to Sydney and saw Mr. A.W. Fadden, who was Acting Prime Minister. The defendant's evidence was to the effect that the interview was concerned only with the subject of the lifting of an embargo on the import into Great Britain of minced beef products and that it had no reference to obtaining Government contracts for the supply of meat. Mr. Fadden and the plaintiff Paterson, however, gave evidence that the conversation related to obtaining defence

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contracts for the Finnie works. The evidence of these witnesses was accepted by the learned trial judge as against the evidence of the defendant. Mr. Fadden sent Paterson and the defendant to Sir Earle Page, who sent them to Senator McBride, who was then Minister for Supply. Further correspondence took place with Senator McBride, and the defendant made offers to supply meat at a time when the Finnie works were the only works which were available to him. At this time the defendant was actually engaged in the construction of his South Brisbane works, and he stated that this was the case in the correspondence, but he professed that the Finnie works could produce much larger quantities than was in fact possible and professed also that they could produce meat and vegetable rations, which was not the case. There was no equipment at Finnie for handling vegetables. It could produce only minced meat. Ultimately the defendant obtained large contracts for the supply of minced beef, meat and vegetable rations and other meat products, and he fulfilled these contracts from the South Brisbane works, not from Finnie. The plaintiffs contend that these contracts were obtained by the use of the partnership name and business connection, and that therefore the defendant is bound to account for the profits which the contracts produced.

The nature of the fiduciary obligation owed by partners, directors of companies and other persons in confidential relations has been fully considered in Regal (Hastings) Ltd. v. Gulliver, 1942 1 A.E.R., 378. The learned trial judge quoted as setting out the law the following passage from the speech of Lord Russell of Killowen at p. 386:-

> "The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

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The plaintiffs contend that the application of this principle requires the defendant to account for the profits made from all the contracts which he obtained by reason of the negotiations which commenced with Ministers in Sydney in February 1941.

Sec. 32 of the Partnership Act, which has already been quoted, applies only where benefit has been derived "without the consent of the other partners". In the Regal case the secrecy of the transaction as against the shareholders of the company is emphasised at many points: see at p. 388 per Lord Russell of Killowen quoting Lord Cairns L.C. from Parker v. McKenna, 10 Ch. A.96- "All the court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency": at p. 389 the statement that the directors could have protected themselves completely by obtaining the consent of the shareholders in a general meeting: at p. 392 per Lord Wright "The rule .... is compendiously expressed to be that an agent must account for net profits (that is, without the knowledge of his principal) acquired by him in the course of his agency." At p. 394 Lord Wright says that the crucial fact was that the respondents made a secret profit out of their agency.

In the present case there was no secrecy whatever about the defendant's proceedings. The plaintiffs did not attempt to prove that there was any concealment from them of the defendant's activities at South Brisbane. Evidence was given that one of the plaintiffs, Paterson, visited the works in South Brisbane not infrequently, and it must have been obvious to all the plaintiffs that the defendant was engaged in the meat preserving business. No protest or complaint of any kind was made until a long time after this action was instituted. In my opinion it has not been shown that the profits which the defendant made by the operation of the South Brisbane works were benefits which were obtained without the consent of the plaintiffs, even if they may be regarded as benefits which were obtained by the use by the defendant of the partnership name or business connection.

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The plaintiffs further contended in the alternative, however, that even if the defendant was not bound by an obligation of a fiduciary character, which imposed upon him a duty to account for all or some of the profits made by him, yet there was a breach of the contract made between him and the plaintiffs by the indenture executed on 9th August 1939. The alleged breach consisted in ceasing to carry on business at Finnie under the terms of the indenture.

There are two views which may be taken of the obligations created by the indenture. Upon the first view the effect of the indenture may be described by saying that the plaintiffs were prepared to allow the defendant to use the Finnie works for a payment of £300 per annum together with a chance of profits, with a limitation of liability for losses to £700. The operation or non-operation of the works was left completely to the discretion of the defendant, the plaintiffs relying on the probability that the defendant (even if he might become interested in another meat preserving business) would find it profitable to operate the works in a joint interest. If the defendant decided that operating the works would pay, then the agreement as to profits and losses came into operation. The defendant then would fully perform his agreement if, operating the works as if he were the sole owner of the business there conducted, he accounted in accordance with the agreement. But the defendant was at liberty to carry on any other business for himself that he chose. He did not agree to devote all (or any) of his time to the Finnie business. Under clause 10 he was expressly empowered to appoint substitutes. It was agreed that he should not be bound personally to render any services under the agreement, and that he might refrain from operating the works at such periods as he should consider proper. As already pointed out, clause 5 contemplated that he could carry on another business, and clause 12, while binding the syndicate not to compete with the Finnie business, left the defendant free so to compete. The result of this view of the agreement between the parties is that, while the defendant must account in accordance with the terms of the

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agreement for all the proceeds of the Finnie business, he was under no kind of obligation to the plaintiffs in respect of the proceeds of the business conducted at South Brisbane.

The second view of the agreement is that the agreement went further than merely imposing upon the defendant an obligation to account for profits if he chose to operate the works. Upon this view the defendant was bound to do his best for the plaintiffs, jointly with himself, to make a profit at Finnie if a reasonable opportunity offered. Thus if a contract was available which the Finnie works could carry out, then it was the duty of the defendant to accept the contract for those works, and not to accept it for himself. The result of this view would be that it should be held that the defendant ought to have run the Finnie works, at least for the production of minced beef products during the period when the embargo upon the import of minced beef into Great Britain was lifted, at which time, it is contended for the plaintiffs, it would have been possible to operate the works profitably.

In my opinion the former view of the contract is to be preferred to the latter view. I base this conclusion upon the express provision that the defendant may refrain from operating the works at Finnie, upon the provisions in clause 5 which show that it is contemplated that the defendant may be interested in other businesses dealing with preserved meat, and upon the fact that clause 12 expressly requires the syndicate to refrain from competition with the Finnie business, whereas no such obligation is imposed upon the defendant. The evidence shows that the parties understood the contract in this way. No claim against the defendant in respect of operations at South Brisbane was made until long after it was well known to the plaintiffs what he was doing.

This interpretation of the agreement between the parties is open to the comment that it allows the defendant to prefer his own personal interest to that of his partners. The defendant said in evidence that he intended to use Finnie to supply Government contracts, if he should succeed in getting them. But he was, at

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the relevant time, actually building his large modern works in South Brisbane and the learned trial judge did not accept this evidence of the defendant as to his intention. His Honour stated the position very clearly in the following words:-

> "In such circumstances it was in the interests of the Defendant personally to obtain contracts which he could fulfil at Brisbane. It was his duty to obtain contracts to fulfil at Finnie.It was contrary to the Defendant's interest to extend or add to the plant at Finnie because he would have to bear the whole cost for a return of half the profits, whereas he would receive the whole of the profits from his activities in Brisbane."

The result was in His Honour's opinion that the defendant "was in a position where his fiduciary duty to the plaintiffs and his own interests were violently in conflict, and he bowed to the pressure of his own interests". The learned judge applied the rule that when a person subject to a fiduciary obligation gains a personal advantage by availing himself of his fiduciary position he commits a breach of the rule that a person who has a duty to perform shall not place himself in a position in which his interest conflicts with his duty - Birtchnell v. The Equity Trustees etc. Co., 42 C.L.R. 384. It was because His Honour held that the defendant had placed himself in such a position that he was ordered to account for the profits of the South Brisbane business.

I entirely agree that the defendant was in a position where the interests of himself as an individual and the interests of the plaintiffs jointly with himself were in conflict. But he did not "place himself" in that position in breach of any duty. He was, in my opinion, placed in that position by the terms of the very unusual contract which the plaintiffs were content to make with him. The possible conflict of interest must have been apparent ab initio. If he operated the Finnie works he would have to provide any necessary additional plant and would get only half the profits: if he operated works of his own (as in my opinion he was entitled to do) he would get all the profits. The plaintiffs took the chance of the defendant deciding that the Finnie establishment was worth using from his point of view. It was an existing plant, and, if circumstances

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had been propitious and if the defendant had not been able to command sufficient capital to erect other works, the operation of the Finnie works might have been quite profitable. It was doubtless an expectation that this would, or at least might, be the case, which made the plaintiffs consider it worth while to make a contract with McAnulty which left them in his hands to such an extent. In my opinion the plaintiffs themselves, by accepting the contract, placed McAnulty in a position which necessarily involved not only a possible, but an actually contemplated, conflict between his interests and their interests, and they cannot now complain because such a conflict in fact arose and he pursued his own interests in preference to pursuing theirs.

But even if the second view which I have stated above of the contract should be taken, I am of opinion that it has not been shown that there was a breach of contract by the defendant. It is clear that the defendant was not bound to spend money in improving or adding to the Finnie works. He gave evidence, which was not challenged in any way and which there is no reason to doubt, that the Finnie works could not be used during the summer months owing to the absence of sufficient provision for refrigeration. He gave evidence that the cost of installing necessary refrigeration would be about £8000. He also gave evidence that trouble had arisen with reference to the disposition of the effluent from the works. The effluent got away through a neighbour's property and the neighbour objected. Therefore it would have been necessary to evaporate the effluent, which would have involved further substantial expenditure. In order to equip the works for making meat and vegetable rations and sausages, large expenditure, amounting to about £20,000, would have been necessary. This evidence was not modified by cross-examination, and there was no contrary evidence. It therefore does not appear that it would have been possible for the defendant to perform at the Finnie works the contracts which he succeeded in obtaining from the Commonwealth Government. Accordingly, in my opinion, even upon the view of the contract for which the plaintiffs contend, there was no breach of contract by the defendant.

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I am therefore of opinion that the judgment of the Supreme Court should be varied by striking out the order for an account of profits from the manufacture and sale of canned meat products packed by the defendant from the business of meat preserving and canning carried on by the defendant between 9th August 1939 and 9th August 1944. This conclusion renders it unnecessary to deal with the claim of the plaintiffs that an order should have been made for the payment of interest upon the balance found due on the taking of those accounts as from the date of termination of the contract period instead of as from the date of the taking out of the judgment.

The judgment of the court ordered that an account be taken of the profits derived from the business carried on by the defendant between 9th August 1939 and 9th August 1944 at Finnie.

The defendant from time to time rendered accounts of the business carried on at Finnie, as he was bound to do under clause 4 of the agreement between the parties. Under clause 5 of the agreement the defendant was entitled to purchase the products of the Finnie business upon the terms therein set out, and the accounts rendered by him showed a purchase by him of the products of the works. The plaintiffs contend that the judgment of the court should be varied by ordering that the account to be taken of the Finnie business should be taken on the basis that the appellant had not himself purchased any of the products of the said business. The plaintiffs argue that the evidence shows that the defendant did not purchase the products and that he is therefore bound to account, subject to just allowances and deductions, for the moneys which he received upon the sale of the products, through Bruce Pie & Co., to the Shields Ice and Cold Storage Company Limited, a company which was referred to in the correspondence as the Shields Preserving Works. The contention of the defendant, which was accepted by the learned trial judge, was that he had purchased certain products of the business, that he re-sold them, and that he was entitled to retain the profit upon the re-sale.

The determination of this question involves, in the first place, a consideration of the terms of clause 5 of the agreement. Clause 5 is as follows:-

> "That the Manufacturer shall be absolutely untramelled in the work of production sales marketing and distribution of the products of the said business including the prices to be paid the persons to be employed by him commissions and terms of sale whether cash or credit. The Manufacturer further is expressly empowered to sell to himself the products of the said business or any part thereof or to any business in which he may be a proprietor or may be interested any in every respect without limiting the meaning of these words by any words previously or hereinafter expressed he shall be at liberty to conduct the business as if it were his own sole business provided however that all goods sold or delivered to himself or to any business of which he may be the owner or be interested shall be brought into account as sold when delivered at the prices then current in Brisbane for such products as on a cash basis and on that basis shall be taken into account before estimating any allowance chargeable as interest and as an expense under clause 4. hereof."

The learned trial judge, after referring to the fact that the defendant had in the Finnie accounts made charges against the syndicate for storage and commission which could not be justified if he had purchased the products on his own account, and to the fact that it was only after the transactions were completed that the defendant had invoiced the goods to himself as Maxam Cheese Products Pty., stated his decision in the following words:-

> "This was a loose method of recording sales, for which the Defendant must take the responsibility; but giving full weight to that factor, I find myself convinced that the Defendant intended to purchase the products of the Finnie business and that he did in fact purchase them, although the records were incorrect as to the date of the purchase."

Clause 5 provides that the manufacturer is expressly empowered to sell to himself the products of the Finnie business, provided that all goods sold or delivered to himself or to any business of which he may be the owner or in which he may be interested shall be brought into account as sold when delivered at the prices then current in Brisbane for such products as on a cash basis. It is difficult to understand and to apply the conception of a sale by a person to himself. The terms of the clause show that this difficulty was appreciated, and accordingly it was provided that goods sold should be brought into account

when delivered, that is, when delivered to the manufacturer or to any business in which he was interested. In my opinion it is a fair construction of the clause to say that the defendant should be taken to have purchased the goods when, but not before, the goods were delivered at premises which were under his control or subject to his direction(so far as the goods were concerned)and which were not at the Finnie works,if the goods were then treated as having entered the area of another business conducted by the defendant apart from the plaintiffs, so that they came entirely within his own control and disposition and the plaintiffs had no further interest in them.

The plaintiffs point to the facts that the correspondence relating to the disposition of the goods in question, with hardly an exception, was conducted in the name of Preserved Food Products Pty. (not Maxam Cheese Products Pty.) that the letter of credit under which the sale of the goods to the Shields Preserving Co. was financed was in the name of Preserved Food Products Pty., and that the licence to export the goods, which was an essential condition of the transaction of re-sale, was in the same name. But a consideration of the many exhibits in the action shows that the defendant used the names of Preserved Food Products Pty. and Maxam Cheese Products Pty. almost indifferently in his transactions. He had registered both names under the Registration of Firms Act 1942 as the firm name of himself as the only member of the firm and he was entitled to use either of them in his business. Accordingly, in my opinion, these facts are equivocal and cannot be regarded as decisive of the question whether he bought the Finnie products for himself.

But there were some acts of the defendant which in my opinion were quite unequivocal. In the first place he charged in the Finnie accounts as against the syndicate a sum of £186:3:4 for storage charges in respect of the period after the goods were delivered into his own store. Such a charge against the syndicate could not possibly be justified if the goods had then been

purchased /

purchased by the defendant. In the second place he charged as against the syndicate a commission of £387:11:9 on the sale of the goods to the Shields Preserving Works. This again is a charge which could not be justified if the defendant was treating the goods as his own property. The defendant said that these charges were made by mistake. With all respect to the opinion of His Honour, it appears to me wrong to allow the defendant to escape in this manner from the plain significance of his actions, and to allow him to change the whole complexion of events by subsequently invoicing the goods to himself as Maxam Cheese Products Pty. and withdrawing the charges as against the syndicate. The acts of the defendant in making these charges after delivery of the goods to him in Brisbane are, in my opinion, conclusive against his claim that he had become the purchaser of the goods by treating them as no longer belonging to the enterprise conducted at Finnie. Accordingly, in my opinion, the judgment of the Supreme Court should be varied by ordering that the account of the business carried on by the defendant at Finnie should be taken on the basis that the appellant had not himself purchased any of the products of the said business.

In my opinion the appeal should be allowed, the first and third declarations in the judgment ordering accounts of the defendant's business carried on in South Brisbane should be omitted, and a direction should be included that the accounts of the Finnie business should be taken upon the basis which I have just stated.

The plaintiffs succeeded in the Supreme Court in relation to their main claim, but failed in the claim with respect to the basis upon which the accounts of the Finnie business should be taken. In this court they have failed upon the former issue and have succeeded upon the latter issue. I think that in the circumstances a fair order as to costs will be that the plaintiffs should pay to the defendant three-quarters of the costs in the Supreme Court and of the appeal to this court, together with the costs of the cross appeal.

Mc ANULTY v PATERSON AND OTHERS

JUDGMENT DIXON J.

The relationship established between the appellant and the syndicate comprising the respondents by the instrument of 9th August 1939 does not appear to me to be partnership, but I think, nevertheless, it involved some fiduciary obligation upon the part of the appellant towards the respondents.

The appellant's fiduciary duty arose from the fact that for the term of the agreement he was to carry on a business in the profits of which the respondents were to share and that he held a contribution of £700 from the respondents which they had placed in his hands to meet capital or other expenditure and, pro tanto, to answer possible losses that might be incurred. This placed him in such a situation that, within the scope of the agreement, he was bound to act fairly and in good faith and not to pursue his own advantage at the expense of the interests secured by the agreement to the respondents. He could not, consistently with the

obligations that the doctrines of equity placed upon him, keep the agreement on foot and at the same time conduct a rival business for his own benefit and so supply orders which otherwise would or might have come to the undertaking he was to conduct on the terms of the agreement. Nor could he turn to his own exclusive advantage any information or means of profit which formed part of or belonged to that undertaking. I do not think that the provision of the agreement,( cl. 5 ),which empowered the appellant to sell the products of the business to himself or to any business in which he might be a proprietor or might be interested,amounted to an express or implied recognition of a right on his part to conduct a business in rivalry with that covered by the agreement. It appears to refer to a distributing,not to a manufacturing,business . In any case, it is one thing to conduct another business or other businesses which may buy the products of the first and another to conduct a rival business of the same description. The clause goes no further

than recognizing the possibility of the appellant's being proprietor of another business buying the products of the first.

But the ambit of the appellant's fiduciary duty depends entirely on the scope of the operations he was bound by the terms of the agreement to perform. He was precluded from turning to his own sole use such benefits only as fell within the scope of the adventure which, under the agreement with the respondents, he was to conduct upon terms of the respondents sharing in the profits.

To define satisfactorily the scope of this adventure is the cardinal difficulty in the case. Once the scope of the agreed adventure is determined, it becomes a question of applying settled principles to the specific facts.

The agreement provided that the appellant should work, carry on and conduct a meat preserving and canning business or any other allied industry in on or about the specified premises and to employ therein the plant, which the document proceeds to describe in general terms.

Now the expression " meat preserving and canning business " " or any other allied industry " is extremely wide and capable of embracing every variety of meat preserving and meat canning and every form of production or operation that is subsidiary or ancillary thereto or connected therewith.

When the appellant established a general meat preserving works,without terminating his agreement with the respondents,he obviously did something which fell within the description of the foregoing general words. But in fact the plant comprised in the agreement was not a general meat preserving and canning plant. On the contrary,it was capable only of producing a minced pack, that is to say minced corned beef,camp pie,beef galantine, minced luncheon beef and the like. Without extension or alteration,it could not produce any solid preserved or canned meat and it could not produce the Army's meat and vegetable ration,nor could it fill sausages. It seems plain that the additions and changes in plant necessary to equip the factory

for the purpose of preserving and canning solid meat would be costly. Although the evidence on the subject is neither as detailed nor as clear as might be desired, I think that we should conclude that to enable the works to produce a solid pack or meat and vegetable rations, or, indeed, even sausages, meant, not a mere adjustment, but an extension and alteration of plant involving a major expenditure. The agreement referred to the possibility of the appellant's bringing additional plant into the works and provided ( cl. 8 B ) that it should remain his property. But the agreement also included the words - " with any further or " additional plant or machinery as he may deem advisable " in the provision that the appellant should carry on the business and employ therein the plant. " Advisable " is an expression apt to give an unfettered discretion and I cannot accept the view that it cast on the appellant a duty to exercise a fiduciary judgment upon the question whether the adventure would be advanced by adding plant, and, if he decided that question in the affirmative, then

to extend the premises at his own expense.

I think that the true view of the agreement is that it imposed upon the appellant an obligation to carry on the business for which the works were equipped with a discretion to change its form if he chose. But as the change of form was a matter depending on his own willingness to acquire plant and so, in effect, to invest capital of his own in the business, the discretion must be governed by his own interests.

The general words of the agreement were naturally framed in such a way as to cover all the possibilities which flowed from such an arrangement. But, in my opinion, they cannot be regarded as a description of the scope of the adventure imposing obligations of a fiduciary nature on the appellant. I think the scope of his fiduciary obligation depended on the ambit of the business as determined by the character of the plant for the time being. To turn out and sell the products which the plant was fitted to

produce or which,with variations involving no structural or major additions or alterations,it might be fitted to produce,constituted the business or adventure which he was bound to carry on fairly and in good faith and without prejudicial rivalry on his part or attempt to convert information or opportunity belonging to it to his own exclusive use.

It is not necessary in the facts of the present case to elaborate the flexibility allowed by the agreement in the scope of the adventure from time to time. For in fact there was no addition of plant and no extension of the kinds of preserved and canned meat the plant could produce.

The respondents were not entitled to call upon the appellant,if he found it expedient to enter the industry of preserving and canning solid meat, to equip the premises they held under lease for the purpose. It formed another and dis_tinct productive enterprise for which their premises were not equipped.

The appellant was not obliged to elect to abstain from every such enterprise unless he thought it advisable to equip

their premises and commence the business there.

In fact it was the entirely new demand for preserved and canned meat set up by the war that made it expedient, in the appellant's opinion, for him to enter the business of preserving and canning solid meat and producing meat and vegetable rations. Such a change in conditions had not been contemplated by the agreement and the substance of the industrial enterprise he established was remote from anything with which the respondents premises or plant could cope.

The appellant was to invest £150 in the adventure governed by the agreement, and to pay an annual rent of £300. The capital cost of the meat preserving works he built in 1941 amounted to something between ninety and a hundred thousand pounds. It is evident that it is an enterprise on an altogether different scale and one which could not grow out of any such exercise by the appellant of his discretion to add plant or pursue an allied

business as could have been in contemplation when the agreement was made. The product was different, viz. solid meat and meat and vegetable ration. It is true that some orders were executed for mixed pack, but that, I think, should be regarded as a separate cause of complaint. Subject to that, I do not think that the operations of the appellant's works constructed in 1941 were within the scope of the adventure covered by the agreement and that to build the works and to produce there and sell solid meat packs, meat and vegetable rations, or sausages, constituted a breach of fiduciary duty.

The building of these works, which occupied from January to July 1941, must have been notorious in Brisbane among those interested in meat packing, and it is hard to suppose that the respondents were not aware of what the appellant was doing. Yet they took no step to stop or warn him. These circumstances suggest a promising case of acquiescence and there are other matters which might be used to support it. But there is no plea

of consent or acquiescence and consent and acquiescence do not appear to have formed an issue fought at the trial. I, therefore, leave out of account the question whether any or all of the respondents consented to or acquiesced in the course taken by the appellant.

I have said that I do not regard the agreement as establishing a partnership between the appellant on the one side and the respondents on the other. I do not think that, in the view I have taken, it is a very material matter, and I shall, therefore, state only in a summary form the reasons for my view that it is not a partnership. Substantially I think that the agreement is one for the sharing of profits, but not of losses, in an adventure the complete control of which was to be placed under the appellant who was to have for the purpose exclusive occupation of the premises as a licensee at a so called rent and was to own the business and conduct it in his own name and on his own responsibility and to be the agent for the respondents

neither actually nor ostensibly. I say advisedly that the agreement is not one for sharing losses, although, perhaps, the statement needs qualification and explanation. From the very mixed up provisions affecting the matter, the substantial result to be deduced appears to me to be that the respondents committed £700 into the hands of the appellant for use in the business and that, among other purposes, it could be applied to or towards any loss and, moreover, as the primary fund to answer losses, but that on the whole account over the five years term of the agreement the respondents were not otherwise to bear losses. The clauses in the agreement which restrict the rights of the appellant and those which use language suggesting an interest on the part of the respondents are to be accounted for by the fact that the respondents looked to share in the profits and were lessees of the premises. The clauses appear to me to be quite natural and to express neither an intention that there should be, nor a belief that there was, a partnership. So far as intention

is concerned,I think that plainly the parties intended that there should be no partnership.

Setting up the new factory and producing there and selling preserved and canned meats is not the only matter claimed to be an infringement of fiduciary obligation. The respondents maintain that,pending the opening of his new works,the appellant took advantage of the claim,to which the existence of the syndicate's works at Finnie gave rise, to participation in the distribution of government work and contracts, and that he appropriated to himself,as owner of the new works,the opportunities or benefits growing out of his association with the works the subject of the agreement. About this part of the case I have felt some difficulty. I have no doubt that,in January 1941, the appellant was attempting to obtain orders from the government for the production of meat and vegetable rations and was doing so under colour of his occupation of the works at

Finnie. I think,too,that in January and February 1941 he was seeking both through political and administrative channels to obtain an allocation from the orders based on the requirements of the United Kingdom for preserved and canned solid meat. Again the appellant stood on his connexion with the works at Finnie. I am not prepared to draw the inference that it would have been a simple matter to put the plant in such a condition as to execute such orders had they been obtained. On the contrary,I think that the probabilities support the evidence given to the effect that it could not have been done readily and without a great deal of expenditure. But,on the whole,I have formed the opinion that, subject to an exception to be mentioned, a connexion between these representations and the obtaining of orders for the appellant's new works has not been shown,and that all the probabilities are against it. Actually I think that it was the fact of the building of the new works that secured the orders : see,for instance, ex I06. Mansfield J. used the same material

against the appellant as illustrating a conflict between duty and interest which resulted from his erecting works of his own in 1941. On the one hand, there were the opportunities for securing contracts for execution by an extended and altered plant at Finnie; on the other hand, there was the temptation to confine the erection of the plant to the new works. My reason for not adopting this view of the appellant's situation lies in what I have already said. I do not think that he was under any duty to extend or expand the plant at Finnie, even if advantageous and profitable business was in certain prospect and would have followed. The conflict with of interest with duty, therefore, did not arise because there was no duty upon the point to act otherwise that in his own sole interest.

The exception from the conclusion that no sufficient connexion has been shown between the obtaining of contracts and the representations made to the authorities based on the appellant's control of the works of the syndicate is the first order for

12,000 cases of meat and vegetable rations,an order communicated on 18th March 1941 ( ex. I08). It is said that the works at Finnie could not have performed this order,and I think that is true. But it appears to me that the question is not simply whether the adventure covered by the fiduciary duty to the respondents could have profited by the opportunity given by the order or out of which the order arose. The question is whether the claim or opportunity which gave rise to the order belonged to that adventure and yet was used by the appellant exclusively in his own interest. To this I think the answer must be in the affirmative. He obtained the order on the footing of the representations put forward as on account of the business at Finnie. Accordingly for the net profits,if any,arising from the execution of this order he is accountable to the respondents.

Another and more important matter depending on special considerations arises from the fact that,between October 1941 and September 1942,the evidence shows that orders for minced beef

loaf were given to and accepted by the appellant and that they were executed at his new works and not on account of the adventure governed by the agreement ; see ex. 194. Now minced beef loaf is within the very class of canned meat for the production of which the premises subject to the agreement were equipped. There is much evidence that, for a variety of reasons those premises could not have been put into operation so as to perform the orders,or,at all events,so as to fulfil them profitably. But that again is not the question. Here was business completely within the scope of the adventure as it existed. The works had been shut finally in May 1940 because minced pack was not then imported into Great Britain. The policy had changed and minced pack had been inclded in the importations. Under the provisions of the agreement enabling the appellant " even to " refrain from working the said business at such periods as he " shall consider proper ", the appellant had kept the works at

Finnie closed. However true it may have been that to open them would have been costly and unprofitable, it does not appear to me to be an answer to the fact that business was done exclusively on account of the appellant which fell within the scope of the adventure upon which he had embarked for the benefit of himself and the respondents. The situation is like that of an agent who says that the advantage he obtained in the course of his agency spelled no injury to his principal. In such a case " the " Court....is not entitled to .... receive evidence or suggestion " or argument as to whether the principal did or did not suffer " any injury in fact by reason of the dealing of the agent : " for the safety of mankind requires that no agent shall be able " to put his principal to such an inquiry as that." per James L.J. Parker v McKenna 1874 L.R. IO Ch. App 96 at p. 124. How can a court tell which was the true reason why the appellant kept the works at Finnie shut ? Was it because in the interests of all he thought it best to exercise his power under the foregoing provision ? Was it, on the contrary, because it was better for him to execute the orders at his new works for his own sole benefit ?

Under the clause entitling him to cahcel the agreement on a month's notice,the appellant might have handed back the works at Finnie to the respondents. As he preferred to keep th works closed and yet maintain the agreement on foot he must,I think,accept the consequences of the fact that he remained under obligations to the respondents. Those obligations were inconsistent with his doing for his own sole benefit the very work of the plant which he held under their licence.

I am,therefore,of opinion that the appellant is accountal to the respondents in respect of the net profits derived from minced packs.

It was argued that,independently of equitable relief,the appellant was liable for damages for breach of contract for failure to carry on the business. The question of breach,or no breach,depends on the sufficiency of the provision forming part of cl. I0 to authorize his keeping the works closed for so lon

and so continuously. I am disposed to think that the provision has a more limited application ;but,in any case,the evidence appears to me to show satisfactorily that,on the assumption that the appellant is accountable as I have indicated,there could be no damages ultra. Profits could not have been made,having regard to the condition of the plant and the difficulties involved in its operating.

Upon the cross-appeal,I agree in the view that upon the facts there never was an intermediate " purchase " under cl.5 by the appellant of the goods consigned to Bruce Pie & Co Ltd,who were the first purchasers.

The account ordered should,therefore, be taken upon the basis that the appellant did not purchase goods bought by or consigned to Bruce Pie & Co Ltd. This means that the question of storage charges and commission paid to Bruce Pie & Co Ltd must be reconsidered,though as the declarations in the formal

decree or order under appeal do not deal specifically with those matters,it is unnecessary to make any variation of the decree in order to throw those items open for re-examination. The view that the appellant never became a " purchaser " of the goods produced at Finnie and consigned to Bruce Pie & Co Ltd makes irrelevant,as I understand it,the question whether in arriving at the price payable by the appellant for goods taken over by him,or to be credited in the accounts of the business at Finnie,7½% should or should not be deducted. But I am by no means satisfied that Mansfield J. came to an incorrect decision on this point.

As to the dates from which interest is calculated,I think th in the circumstances of this case the learned Judge was entitled to take the view that interest should not beordered as from an earlier date than his judgment and that his order on this point should not be interfered with.

In my opinion,the appeal should be allowed in part and the cross-appeal allowed in part: the judgment or decree of the Supreme Court should be varied by omitting the first declaration or order and by substituting for the third declaration or order the following orders:- (I) that an account be taken (a) of the net profits derived by the defendant from the supply of meat and vegetable rations pursuant to the order for 12,000 cases mentioned in the letter of 18th March 1941 from the secretary of the Australian Meat Board to the defendant,under the name of Preserved Food Products Proprietary ( ex. 108 ) ; (b) of the net profits derived by the defendant from the manufacture or production at his works in South Brisbane and the sale and supply c minced beef loaf either pursuant to the orders mentioned in ex.194 or otherwise and of any other form of minced packs such as camp pie,luncheon beef,or beef galantine and that in taking such account all just allowances be made ; (2) that the balance

certified upon such account be carried to the account of the business the subject of the agreement of 9th August 1939. Further consideration in the Supreme Court should be reserved.

It should be ordered that the appellant have the costs of th appeal but they be set off against the costs recoverable by the respondents under the judgment of the Supreme Court.

McANULTY

v.

PATERSON & ORS.

JUDGMENT. McTIERNAN J.

McANULTY

v.

PATERSON & ORS.

JUDGMENT. McTIERNAN J.

It appears from the deed sued upon in this action that the parties, described as the syndicate, contracted to grant a licence to the appellant to occupy certain land and premises and to use plant and machinery in and about the premises, for the consideration and upon the terms set forth in the deed. The appellant agreed to carry on a business described in the deed on the land and premises and to use the plant and machinery, or such part of it as he saw fit, in carrying on the business, and to pay for the licence an annual rental of £300. The terms and conditions upon which the appellant further agreed are set forth in fifteen clauses of the deed following the appellant's covenant to carry on the business and to pay the rental. The land and premises were at Finnie. One of the terms of the deed was a covenant by the syndicate not to enter into a competitive business. The appellant did not enter into a similar covenant. Apart from equity, he had no obligation to refrain from starting any business coming within the description in the deed. After the appellant signed the deed, and long before it had run out, he erected a meat-packing factory at Brisbane, outlaying a very substantial amount in this new enterprise. It is to be remembered that his only tenure of the Finnie Works was a licence held from lessees. He obtained, and carried out in his new factory, government contracts which are mentioned in the evidence. Only one of the products for which he got contracts had been produced at the Finnie Works. They were badly equipped to supply that product and not equipped at all to supply the other products for which the appellant got these government orders. The deed expressly empowered the appellant "to refrain from working the business (at Finnie) at such periods as he shall consider proper". The appellant was also expressly empowered to terminate his contract with the syndicate at any time. Relying upon the former power the appellant kept the Finnie Works closed for

most /

most of the period for which the contract was expressed to run. The respondents (the plaintiffs) claimed a share of the profits made in the new factory at Brisbane during the period of the contract. The Supreme Court decided that the deed made the appellant a fiduciary agent of the syndicate to carry on the business described in the deed: that the appellant violated his trust as such fiduciary agent by closing the Finnie Works and preferring to erect the Brisbane factory and carry on a meat-packing business there: that he obtained the government orders by virtue of "his Finnie connections", or in other words, by virtue of his fiduciary relationship to the syndicate; and that for these reasons he was a constructive trustee of the profits of his meat-packing factory at Brisbane, for the syndicate, and upon the terms and conditions of the deed relating to the division of the profits of the Finnie business. A statement by Turner L.J. in Clegg v. Edmondson, 8 De G.M. & G., 808, needs little adaptation to be apposite to the claim "If they had led to ruinous expenditure ... nothing would of course have been heard of this claim of the plaintiffs and there would have been no claim against them. Are they then in justice entitled to reap the benefit when they could not have been made subject to loss?" In Oliver v. Court, 8 Price, at p. 160: 146 E.R., at p. 1165, there is a convenient statement of the rule of equity which the Supreme Court applied in awarding the respondents one-half of the net profits which the appellant made during the period of the contract in his factory at Brisbane from the business of meat packing "... persons who are in any way invested with a trust, or an employment to be performed by them to the advantage of their cestui que trust, or principal, are prima facie, virtually disqualified from placing themselves in a situation incompatible with the honest discharge of their duty". See also Aberdeen Railway Co. v. Blackie Bros., 1 Macq., p. 461, at pp. 471, 472; In re Thomson, 1930 1 Ch., 203 at pp. 215 and 216. The appellant does not question the strictness of this rule of equity. He says that he did not assume an

obligation /

obligation of a fiduciary nature to the syndicate to carry on the business described in the deed and was therefore entitled to appropriate beneficially to himself the whole of the profits made in his meat packing business at Brisbane. If he assumed a fiduciary duty by signing this deed, he disqualified himself from entering a wide field of business unless the potentialities of the Finnie Works set limits to the forbidden area. Cf in re Thomson (supra)

The terms in which the appellant agreed with the syndicate to carry on the business at Finnie are as follows: "the said manufacturer agrees that he will faithfully work carry on and conduct a Meat Preserving and Canning business or any other allied industry in on or about the premises contained in the said leases and will employ therein the Preserving Plant and Canning Plant machinery and the said despatch and general equipment machinery plant and tools of the said Lessors or such of them as he may consider necessary with any further or additional Plant or machinery as he may deem advisable and the Manufacturer shall pay to the syndicate for the Licence or permit a rental at the rate of three hundred pounds per annum payable at the time and in the manner set out in the said leases". It appears from these terms that the appellant did not expressly agree to carry on the business as an agent or partner or in any capacity other than the sole principal of the business. It was an agreement that the appellant would carry on the business. Construing the words of the agreement, it meant that the appellant would carry on the business as his business, subject of course, to the other terms and conditions of the deed. In my opinion they do not raise the implication that the appellant was employed by the syndicate to carry on the business.

The word "faithfully" in the appellant's covenant to carry on and conduct the business at Finnie does not, in my opinion, import that duties of a fiduciary nature are superadded to the legal obligation imposed by the covenant; the word signifies only the strictness of the common law obligation which the appellant assumed to the syndicate to carry on the business.

Clause 2 /

Clause 2 of the deed was also relied upon to establish that the appellant owed duties of a fiduciary nature to the syndicate to conduct the business to their best advantage. This clause said "The Manufacturer will accept the sum of £700 from the Syndicate and shall utilise that sum in carrying on the said business." Clause 4 provided that "all moneys advanced including the sum of £700 advanced as aforesaid shall bear interest at 10%." The clause made this interest a first charge on the nett profits of the business. Clause 8(a) said that the appellant should contribute the sum of £150 "to supplement the funds supplied by the Syndicate which shall be utilised in the business". This clause also provided that this sum of £150 and these funds should be credited to the appellant and the syndicate respectively to arrive at their final share of profit or loss. Clause 4 (1)(a) provided that if there was a loss it should be payable "out of the moneys advanced by the syndicate" and in the next place, one half by the syndicate and one half by the appellant. Clause 8 provided that the syndicate should not be finally liable for any loss exceeding "the initial fund paid over to the manufacturer". That was the sum of £700. These provisions of the deed show in my opinion that the sum of £700 was an advance ~~as~~ or a loan. A loan does not give rise to anything like fiduciary duties on the part of one party to the other. See Kennedy v. De Trafford, 1896 1 Ch. at p. 774 (affirmed 1897 A.C. 180). The advance was coupled with a condition that it was to be utilised in the business. The appellant was bound to fulfil this obligation. So far as this obligation extended he may have been a trustee but when it was performed or discharged I think any supposed trust came to an end. The trust would in any case be limited to the application of the moneys. The conditions upon which these moneys were paid by the syndicate to the appellant did not, in my opinion, give them an interest in the business of which the appellant became a trustee. I think that upon the true construction of the deed the appellant was the sole owner of the business. His agreement to carry it on imposed a legal obligation upon him to do so and no more. This agreement was not affected with a trust. The appellant carried on and conducted the business and

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received the profits of the business in his own right as beneficial owner. He was bound to apply the profits in accordance with the terms and conditions of the deed. There was nothing fiduciary about his relationship except that the syndicate may sue in equity to enforce these terms and conditions relating to the application of the profits. It was not a fundamental condition of the deed that the syndicate reposed trust and confidence in the appellant to carry on the business to their best advantage. The parties contracted as to what their mutual rights and obligations were with respect to the licence and the business, and these constitute the only engagement between them. In my opinion the deed did not interfere with the appellant's freedom to conduct any business within the description of the business he agreed to carry on or to obtain the government contracts in question in the case and carry them out in his Brisbane factory or to appropriate beneficially to himself the whole of the profits derived from any such business and all of those contracts.

But there is another question, namely, were the appellant and the members of the syndicate partners? Partnership cannot be constituted without an intention to be partners - Sutton v. Grey, 1894 1 Q.B., 285. The question whether the relationship of partnership exists "depends upon the whole contract between the parties" - Ross v. Parkyns, L.R. 20 Eq. at p. 335. What the Master of Rolls said in that case is apt here but, of course, not conclusive - "There is not a word about partnership in it (the agreement) from beginning to end, that is the first observation to be made upon it - they are mercantile men and if they were going to be partners why did not they say so?" If there was a partnership, the provisions of this deed would have made the members of the syndicate sleeping partners! ~~But~~ and if there was a partnership, the business would have been carried on by the syndicate and the appellant, he being the active partner. The syndicate agreed, in clause number 1 of the deed, not to interfere with the appellant

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"in the working, carrying on and conduct of the business " except in the manner in which the appellant agreed that they could interfere. The syndicate also agreed that there would be no such interference by any person claiming under them or by the lessees of the land the subject of the licence. Clause 5 provided that the appellant would be "absolutely untrammelled in the work of production, sales, marketing and distribution of the profits of the said business including the prices to be paid, the persons to be employed by him, commissions and terms of sale, whether cash or credit". It will have been noticed that the terms in which the appellant agreed to carry on the business leave the question of the plant and machinery to be employed in the business entirely to the appellant's discretion. Clause 8(b) provided that any additional plant the appellant brought on the premises was to be and remain the property of the appellant. Clause 6 gave him the right to terminate the agreement by a month's notice. Clause 10 said that the appellant was not bound personally to render any service under the deed, and that he could perform anything to be done under it through a substitute or substitutes, or in such manner as he may consider advisable". This clause said also that the appellant "might even refrain from working business at such periods as he shall consider proper". In Cox v. Hickman, 8 H.L.C., 312, Lord Wensleydale said - "I can find no case in which a person has been held liable as a dormant or sleeping partner where the trade might not fairly be said to be carried on for him together with those ostensibly conducting it and when therefore he would stand in the position of principal towards the ostensible members of the firm or his agents". See also Holme v. Hammond L.R. 7 Ex., at p. 230, per Bramwell B. I think that the inactivity which these clauses of the deed imposed upon the members of the syndicate did not make them sleeping partners, but prevented them from being partners at all. If the appellant and each member of the syndicate were partners the relationship would imply that each of the parties to the deed was a principal in the business and each was an agent of the other. I cannot collect any intention from the provisions to which I have referred other than that the business was to be carried on by the appellant as the sole principal.

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There is, however, an agreement for sharing profits and making good losses arising in the conduct of the business. The type of a partnership contract is an agreement to share profits and make good losses, if any are sustained. Persons who engage in any trade upon the terms "of sharing the profits and making good all losses arising therefrom are necessarily to some extent partners in that trade" - Lindley on Partnership, 6th Edn., p. 43. Clause 4 of the deed dealt with the division of profit and loss among the appellant and the syndicate. It provided that the appellant should make up half-yearly accounts showing the profit and loss of the conduct of the business. The clause enumerated the deductions which were to be made in order to ascertain net profits. The deductions include the rental which the appellant agreed to pay to the syndicate and interest at 5½% on all money "advanced or overdrawn by the Manufacturer in the conduct of the said business". The clause provided how the net profits were to be "applied". They were to be applied to the payment of interest at 10% on all moneys advanced by the syndicate and such interest was made the first charge on the net profits. One-half of the balance of the net profits was to be applied to the syndicate and the other half to the appellant. If there was a loss, clause 4 provided that it was to be paid out of the moneys advanced by the syndicate and in the next place one-half by the syndicate and one-half by the appellant. But clause 8 limited the amount of the syndicate's contributions to meet a loss to the sum of £700, the amount of the capital which the appellant agreed by clause 2 to accept from the syndicate and to utilise in carrying on the business. This agreement about profits and losses deviates far from an agreement to share profits and make good all losses. In Ross v. Parkyns (supra) Jessell M.R. said - "There may be cases where upon a simple participation in profits there is a presumption not of law, but of fact, that there is a partnership, yet whether the relation of partnership does or does not exist must depend upon the whole contract between the parties,and that circumstance is

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not conclusive. See also Pooley v. Driver, 5 Ch.D. at p. 479. Lindley L.J. said in Walker v. Hirsch, 27 Ch.D. at p. 472 - "It is not to be decided for or against the appellant merely by saying that there is in this document a clause which gives him a right to share in the profits and losses,therefore he is a partner and has all rights of a partner so far as the contract has not excluded those rights. This is a method of dealing with the case which appears to me to be erroneous. The question is what is the true construction of the document and the rights of the parties arising from it". See also, per Cotton L.J. at p. 472. In my opinion this agreement about profits and losses cannot support a presumption of intention to create a partnership strong enough to prevail over the terms and conditions of the deed which shows that the parties regarded the appellant as the owner of the business. The result is that the profits of the business accrued to the appellant but he was bound to apply them in accordance with the deed and any loss was to be borne by the appellant, except that he could appropriate the advance made by the syndicate to the payment of losses in the conduct of the business up to the amount of £700: this was the limit of their liability for losses. Clause 5 of the deed, having said that the appellant should be "absolutely untrammelled" in conducting the business, went on to say that he was "expressly empowered" to sell the products of the business to any business of which he was to be proprietor, and that "in every respect" he should be at liberty to conduct the business to which the deed applied "as if it were his own sole business", subject to a proviso designed to keep up the price level of the products of the business, the reason for this being, no doubt, that the deed provided for the application of the net profits to the payment of interest due to the syndicate, and if there was a balance, half of such balance to the syndicate. The power which the clause said was "expressly" given would have been implied from the fact that the appellant was the owner of the business. The hypothesis "as if it were his own sole business" avoided any restriction by implication on the appellant's

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rights. The proviso expressly introduced one restriction only. The adoption of this hypothesis is a slender foundation for a partnership or any fiduciary relationship. The syndicate had, in a sense, a common interest in the business under the terms and conditions of the deed and the hypothesis was adopted, no doubt, in view of such interest. But the nature of their interest is a question that must be decided from all the provisions of the deed.

Clause 7 says that the manufacturer, the appellant, undertook that "he" would not dispose of the good-will of the business without the consent of the syndicate and that "he" further undertook that if he sold the good-will with their consent any profit would be brought into account as profit arising from the conduct of the business and the net profit should be shared equally between the appellant on the one hand and the syndicate on the other hand. This clause clearly implies that the appellant was the owner of the business. Clause 12 contains a covenant on the part of the syndicate that they would not enter into competition "with the said business of the manufacturer". The appellant did not covenant that he would not enter into competition with the business which he agreed to carry on. If the intention of the deed was that he should be the owner of that business it is easy to understand the presence of the syndicate's covenant not to compete, and the absence of any promise by the appellant not to compete.

In my opinion it was not within the scope and intention of this deed that the appellant and the members of the syndicate would carry on the business at Finnie in partnership.

For the above reasons I think that the part of the judgment of the Supreme Court dealing with the profits which the appellant made from the business of meat packing carried on elsewhere than at Finnie should be entirely set aside.

Regarding the rest of the case it does not seem necessary to add anything.

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In the result I agree with the order proposed by the Chief Justice but I should make the part of the proposed order which would set aside the abovementioned part of the judgment of the Supreme Court for reasons different from those upon which His Honour would set it aside.