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22/1952  
IN THE HIGH COURT OF AUSTRALIA

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*Burmeister*

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V.

*Maguire*

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**REASONS FOR JUDGMENT**

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*Judgment delivered at*

*on August 3, 1953*

BURMEISTER

v.

MAGUIRE

JUDGMENT (ORAL)

WILLIAMS J.

BURMEISTER

v.

MAGUIRE

JUDGMENT (ORAL)

WILLIAMS J.

This is an appeal by the defendant from an order of the Full Supreme Court of Queensland in an action brought by the respondent against the appellant to recover the sum of £756. 2. 6 and certain interest which was awarded to the plaintiff under an award of two arbitrators made on the 12th day of August, 1950. The plaintiff and defendant had been in partnership in the business of sawmillers at Maryborough in the State of Queensland. The partnership was dissolved and it was agreed that matters in dispute between the parties should be referred to the two arbitrators, and it was pursuant to that agreement that the arbitrators made the award of the 12th August, 1950. In the action the learned trial judge gave judgment for the plaintiff for the amount of £756. 2. 6 and the interest to which I have referred. There was an appeal to the Full Supreme Court of Queensland. The Full Court set aside the judgment below but found in favour of the plaintiff to the extent that they ordered that the award should be specifically performed. They did that because the award contained two conditions which the plaintiff had to perform in order to become entitled to the money. The defendant in appealing to us does not desire that the order of the Full Supreme Court should be set aside unless he succeeds in establishing that no order in favour of the plaintiff should have been made in

the action at all and that the action should have been dismissed with costs.

The two main grounds that have been argued before us appear in the Notice of Appeal. The first is that the award upon which the plaintiff's claim was based was invalid and unenforceable in that it did not constitute a final determination of the matters in dispute between the parties to the arbitration. That was one of the defences set up by the defendant in the action and it appears from the case of Harrison v. Creswick, 13 C.B. p. 399, 138 E.R. p. 1254, that such a defence is open in an action to enforce the award. It is plain that "The Court presumes, unless and until the contrary be shown, that the arbitrator or umpire has by his award determined those matters, and those matters only, which were referred to him. The burden of proving that he has awarded on matters not within the submission, or that he has failed or omitted to award on matters which were within the submission, lies on the party who seeks to impeach the award." I am reading from Halsbury 2nd Ed. vol. 1. at p. 664 and there are passages to the same effect in the case of Harrison v. Creswick to which I have just referred. The present award is a document of considerable length and it shows that the arbitrators went to considerable pains to hear and determine the matters that were in dispute between the parties. Almost at the commencement of the document they refer to the fact that in the terms of reference dated 8th June, 1950, they were told that both parties had agreed that all matters in difference between the parties thereto and all questions arising out of or in any way relating to the partnership theretofore existing between the parties or the dissolution thereof and the question of the amount payable by Burmeister to Maguire by way of purchase price of the share or interest of Maguire in and to the business and assets of the partnership and otherwise howsoever and the question of what

amounts are or were on the 23rd January, 1950, (this date was subsequently altered to the 20th January, 1950) due and owing by the partnership to Maguire for wages or salary due by the to Maguire and for logs supplied by Maguire to the partnership partnership/and otherwise howsoever were thereby referred to their award and final decision. Later in the document the arbitrators say that in order to determine fairly what amount should be paid by Burmeister to Maguire they have first to consider whether the differences and disagreements which arose between the parties and which ultimately led to the dissolution of the partnership would be likely to alter the monetary interest of either or both parties as set out in the balance sheet dated 31st May, 1950, which was tendered in evidence and which purported to show what their respective interests were at the date of dissolution which was fixed as the 20th January, 1950. Again, it seems to me, the arbitrators were clearly referring to the whole of the differences and disputes existing between the parties. They then point out that some of the differences and disagreements took shape only after the hearing commenced and that the charges brought by either party against the other if sustained would influence the determination of the amount which Burmeister should pay Maguire. Then occurs a passage on which Mr. Connolly relies. It commences: "Some of the charges brought by the parties either before or after the commencement of the hearing which affect their financial relationship were..." Then a number of charges are set out. The first series comprises seven charges made by Burmeister against Maguire. The second series comprises three charges made by Maguire against Burmeister. All these charges are discussed and dealt with. The arbitrators then proceed to deal with certain other matters which they call "Minor claims brought forward by both partners".

It seems to me that, reading the award down to this point, it is fair to construe it as meaning that when the arbitrators refer to some of the charges which affect the

financial relation of the parties they are picking out those charges to which they desire to call special attention and to discuss in some detail, and not as meaning that they are dealing with those charges only to the exclusion of the other differences and disputes which have occurred between the parties, some of which only took shape after they had commenced to arbitrate.

This meaning becomes clearer as one continues to read the award. There is a heading "Assessment of amount due by Burmeister to Maguire". Under this heading the arbitrators state: "In order to determine the amount due to Maguire it appears necessary to us to ascertain what was the result of the trading over the whole period commencing on the 23rd October, 1948, and ending on the date of dissolution 20th January, 1950. This we have done by consolidating Accountant Lowe's profit and loss accounts but discarding the items 'stock on hand'. This consolidated statement we have called 'Adjusted Trading Account' and we have respectively debited or credited to this account all those items which have the support of evidence or of probability or are representative of items not in dispute." It is only after the arbitrators have gone through all those adjustments that they make an award which purports to be an award of the amount due by Burmeister to Maguire which they have finally reached after considering all the disputes and differences that existed between the parties. They say: "We find that the amount due to Maguire by Burmeister in terms of an agreement made between them and dated 8th June, 1950, exclusive of compensation for loss of use of the amount to which he is entitled is the sum of £933.14.10." Then they make certain adjustments and find that the net amount payable by Burmeister to Maguire exclusive of this compensation is £756. 2. 6. Reading the award as a whole it seems to me that it is only fairly open to the construction that this figure was reached after taking into account all the matters in dispute between the parties.

The other ground argued by Mr. Connolly was that the award upon which the plaintiff's claim was based was invalid and unenforceable in that the arbitrators were wrong in law in holding that the plaintiff was entitled to charge for log timber at rates exceeding the Maryborough key-market rates. This is a reference to Clause 26 of the partnership agreement. This clause provides that Maguire shall have the sole right of supplying to the partnership log timber and the partnership shall pay to Maguire in respect thereof the Maryborough key-market rate for the time being prevailing less any royalties cutting or snagging charges paid by the partnership provided however that should Maguire fail or refuse to supply to the partnership all the timber required to allow the partnership to fill all orders which the partnership has for sawn timber then the partnership shall purchase the logs required by it to make up any deficiency in the supplies received from Maguire from some other person. Should Maguire not be prepared to supply to the partnership log timber at the prices or rates <sup>above</sup> mentioned and should the partnership be unable to procure from any other person the logs required by it at the said prices and rates, then Maguire shall have a right in priority to all other persons to supply the partnership with its log requirements or so much thereof as he shall decide at the same price or rate as the partnership is able to obtain the supply of not less than 50% of its requirements of log timber from any other person. It appears that Maguire did supply the partnership with logs and that those logs were paid for at a price to which Burmeister agreed because the payments were made with his authority. On this ground Mr. Connolly's argument really rests on the view that, under the concluding words of the clause, Maguire's sole right to supply the partnership with its log requirements was a right to supply the partnership in priority to all other persons so that, if he supplied the logs, he would have to supply the

partnership at the price specified in the clause. I think the argument is correct to this extent that, if a question of priority arose, then, if Maguire chose to exercise his right of priority, he was bound to supply the logs at that price. But there is nothing in the clause that prevents Maguire and Burmeister/ <sup>from</sup> agreeing that Maguire should supply the logs at any price mutually agreed upon. Therefore, when Maguire supplied the logs and Burmeister agreed that they should be paid for at a certain price, that was simply an ordinary transaction of the sale of goods by Maguire to the partnership at a price agreed upon between him and his partner. There is no evidence that the logs were supplied pursuant to the exercise by Maguire of his right to supply them in priority to all other persons who were also prepared to supply logs at the same time.

For these reasons it seems to me that both submissions of Mr. Connolly fail and that the appeal should be dismissed with costs.

WEBB J. : I agree.

KITTO J. : I agree.

TAYLOR J. : I agree.

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