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ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

QUEENSLAND FORESTS LIMITED

V.

UNION TRUSTEE CO. OF AUSTRALIA
LIMITED.

21.7.0

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on Tuesday, 23rd August, 1955.

QUEENSLAND FORESTS LIMITED

v.

UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED

ORDER

Appeal allowed with costs. Order of the Full Court of the Supreme Court of Queensland set aside, and in lieu thereof order that the appeal to that court be allowed with costs and that the order of Townley J. and the judgment entered pursuant thereto be set aside and that judgment in the consolidated action be entered for Queensland Forests Limited for the sum of £273:2:10 (being the amount claimed by that company in action No. 246 of 1954) together with the costs of the action No. 246 of 1954, the costs of the action No. 1337 of 1953 subsequent to the entry of the final judgment already entered therein, and the costs of the consolidated action.

Further order that reserved costs (if any) be included in each ^{Such} ~~case~~ case.

QUEENSLAND FORESTS LIMITED

v.

UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED

JUDGMENT

DIXON C.J.
FULLAGAR J.
KITTO J.
TAYLOR J.

QUEENSLAND FORESTS LIMITED

v.

UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED

This is an appeal from an order of the Full Court of the Supreme Court of Queensland affirming a judgment given by Townley J. at the trial of two actions which had been consolidated. In one action the present respondent sued, and in the other it was sued, as being the trustee of a certain deed made in 1927 between the appellant therein called the company and itself therein called the trustee. The purpose of the deed, as appears from its recitals, was to make provision for the protection of the purchasers of an issue of 18,000 bonds at £5 each, which the company was about to make as a means of obtaining the necessary financial resources to enable it to afforest an area of 3000 acres in the Johnstone River district of Northern Queensland. The land was referred to as Section A, and the operations to be carried out included improving, regenerating, cultivating and preserving the indigenous trees on the land, and planting thereon trees of substantial commercial value, with a view to pulp-making, sawmilling and the sale and export of timber.

The material provisions of the deed must first be mentioned. Clause (1) contained a covenant by the company with the trustee (subject to a qualification not material to the case) to observe and perform the obligations imposed upon or undertaken by it in the deed and the bonds, and it provided (in clause 19) that the bonds should be read with and be deemed to form part of the deed. It also contained a covenant by the company with every reasonable despatch to regenerate, cultivate and preserve the indigenous trees existing on Section A and to plant and afforest the same with trees of commercial value according to the best principles and practice of forestry cultivation, and to complete such operations in respect of the

whole 3,000 acres of Section A within five years of the sale of the first bond: (clause 3).

By clause 11 the company covenanted to pay and defray all expenses of management and maintenance of Section A until such time as the marketable trees or timber thereon should have reached maturity or been sold realised marketed or converted as provided by the conditions endorsed on the bonds. This obligation was subject, however, to the right of the company to have a sum of £15,000 and interest mentioned in clause 5 of the bonds paid to it in the manner specified in that clause to provide and be applied by the company for the proper maintenance and protection of the trees on Section A from the fifth year to the end of the twentieth year after planting.

By clause 15 the trustee was given a right to commission at the rate of 5% on the income of sums invested, and at the same rate on all moneys received by it from the sale of Section A or any part of it and the produce of any kind thereof.

Clause 16 gave the trustee wide powers exercisable in the event of default being made by the company in performance of its covenants or of the company's ceasing to carry on business or going into winding-up or of a receiver of its undertaking being appointed prejudicially to the interests of the bondholders. These powers included a power to sell Section A and the timber and produce thereof, and it was provided by clause 17 that the money to arise from any such sale should be held upon trust to pay or retain the costs charges and expenses incurred and to apply the residue in or towards payment of all sums payable to the bondholders in respect of the bonds and in payment of any surplus to the company.

It is convenient now to turn to the bonds. Endorsed upon them are a number of conditions which, as already stated, are to be read with the deed. The first and ninth clauses of the conditions define the main rights of the bondholders. Clause (1) describes each bond as part of a series of 18,000

bonds all of which are to share equally in the whole of the net proceeds of the produce of Section A without any preference or priority as between themselves. Then, after intervening clauses have dealt with the afforestation of Section A for five years, the maintenance and protection of the trees for another fifteen years, the sale realisation marketing and conversion of the timber, and the payment of the net proceeds to the trustee, clause (9) provides that the bondholders shall be entitled to receive the net proceeds from the trustee until £100 for each £5 bond (exclusive of interest) shall have been paid to them, when the bonds are to be deemed fully paid and satisfied and to be cancelled. It is not specifically said that any surplus shall belong to the company, but that is the plain inference, and indeed it is put beyond doubt by clause 17 of the deed, which has already been mentioned.

Stopping there, it may be said at once that so far as appears the company duly fulfilled its obligations in respect of afforestation, and as trees began to reach maturity it commenced the operations which were necessary to turn them into money in the interests of all parties according to their respective rights under the deed and the bonds. A difference of opinion, however, arose between the company and the trustee as to whether the company was entitled to deduct from the gross proceeds of sale of timber the wages and allowances of one of the company's employees, one McConaghie, and the purpose of the actions was to have the point of disagreement decided. The issue depends upon the meaning of two clauses of the bonds and upon the facts concerning the work which McConaghie did.

The clauses are numbered (7) and (8), and before setting them out it is desirable to mention briefly some of the provisions which precede them. Clause (3) expresses with additional particularity the company's obligation to afforest Section A, and clause (4) provides that the company shall safeguard and protect the growing trees until marketed, converted or otherwise disposed of "for the benefit of the bondholders." To provide

for the proper maintenance and protection of the trees after the early stages of cultivation or afforestation, clause (5) requires that, after completion of the payment of two-thirds of the £5 per bond by the purchasers of bonds, the balance as and when received by the company shall be deposited with the trustee, and that £15,000 of this amount shall be held on trust to be paid (with interest thereon) to the company in equal yearly instalments from the fifth year after 1st June 1927 (i.e. in effect, the end of the period within which the company bound itself to complete the process of afforestation) to the end of the twentieth year after that date, to provide for the proper maintenance and protection expenses of the company. Then clause (6) provides that the remainder of the one-third of the £5 per bond deposited with the trustee shall be held by the trustee until such time after 1st June 1939 as the company shall determine to sell realise and otherwise convert the produce of Section A, or, in default of its doing so within one year after 1st June 1947, then until such time as the trustee by direction of a majority in value of the bondholders shall instruct the company to sell, realise and otherwise convert that produce. The company is then to be at liberty to utilise such proportion of the fund as it shall think fit (separately or in conjunction with trust funds of sections other than Section A) to set up and establish pulp-mills, timber mills and such other business or enterprise as it shall deem necessary to ensure the sale realisation marketing and conversion of the produce of Section A under conditions most favourable to the bondholders.

Then follow the crucial clauses, which are in these terms:-

"(7) All costs charges and expenses paid or incurred by the Company in connection with the sale realisation marketing conversion of the timber produce and any produce of any kind of Section A shall be paid or deducted from the gross proceeds thereof and until such payment thereof shall be charged upon such proceeds.

(8) The Company alone shall direct and supervise all selling realisation marketing and conversion operations and shall be entitled to receive and be paid by the Trustee a commission limited to and not exceeding a sum equal to Five Pounds per centum of the gross proceeds as they accrue or are ascertained from time to time. The net proceeds of all sales realisation marketing and conversion shall from time to time immediately upon the receipt thereof by the Company be paid to the Trustee in trust for and on behalf of the Bondholders."

The deed had bound the company (by clause 9) to render and deliver to the trustee statements showing the details of all costs charges and expenses from time to time paid or incurred by the Company in connection with the sale realisation marketing or conversion of the produce of Section A. Accordingly, after realisation operations commenced the company supplied to the trustee periodical statements showing the gross proceeds of sales of timber, the company's costs charges and expenses, and the amount of the company's commission at 5% on gross proceeds. In statements for the period May 1940 to June 1942 and the ensuing period to June 1944 the company treated as a charge which it was entitled to deduct from the gross proceeds under clause (7) of the bonds amounts representing $12\frac{1}{2}$ per cent of the wages and allowances which it had paid to McConaghie. No similar item appeared in the statement for the period July 1944 to June 1950, but by letter the company made a claim in respect of that period for "logging supervision" at the rate of 1/- per 100 superfeet, the reference being again to the work done by McConaghie. Charges at the same rate in respect of the same work but described as "supervision charges", were made in the company's statements for the years ended 30th June 1951 and 30th June 1952 respectively. On 19th May 1953, the trustee for the first time challenged the right of the company to make these charges, contending in effect that the commission of 5% of gross proceeds provided for by clause (8) of the conditions endorsed on the bonds covered the work done by McConaghie. The company persisting in its attitude, the trustee commenced an action against it for the recovery of a sum consisting of the amount which the company had admitted as the net proceeds ascertained in accordance with the provisions of the

bonds, plus the amounts it had deducted in respect of McConaghie in ascertaining such net proceeds. The trustee obtained liberty to enter final judgment against the company for the sum claimed, less £757:11:1 which was the aggregate amount of the disputed deductions. As to that amount the company was given liberty to defend the action. The company then commenced an action against the trustee to recover the amount of its commission, the trustee having declined to pay the commission while the amount sued for in its action remained unpaid. These were the two actions which were consolidated and came for trial before Townley J.

At the trial, McConaghie gave evidence describing the work which he had done and in respect of which the company had made the deductions. He said that he had been the company's logging superintendent since May 1941. He was concerned with other properties of the company as well as Section A, the total area being about 9,000 acres. The company had engaged contractors to cut and fell trees and deliver the logs to mills, and McConaghie's duties included pointing out to the contractors the type and species of logs to be cut from time to time to meet the requirements of different markets. He had, of course, to keep a close watch on market fluctuations in respect of the various types of timber. He had to decide which logs should be discarded as faulty and which sent, according to class, to sawmills or to plymills or to particular buyers, and to instruct the contractors accordingly. Then he had to keep a check on the branding and numbering of logs, a process designed to identify each log and enable it to be traced from the time it was felled until it was disposed of at a mill or condemned in the scrub. His work involved following logs at each stage from the bush to the mill or rail siding and seeing that each was accounted for. This included measuring odd logs to see that the cutters' measurements were reasonably accurate, as a check on the work of the man at the mill. It was his responsibility to make up the statement on which the contractors should be paid for their cutting, hauling and

delivery, and to see that the loaders were paid where logs were loaded on to railway trucks, and that the timber was properly charged to the various mills. The general object of all this checking was to ensure that the contractor was not overpaid by the company and that the company was not underpaid by the purchasers from it. In addition to these duties, McConaghie had to ensure, by reference to the boundaries of each of the blocks into which Section A was divided, that the contractors were keeping to the company's land and that other persons were not taking timber from it.

McConaghie expressed the opinion at the trial that the charges made against the trustee in respect of his work were reasonable, and so also did the only other witness who was called, a man named Young who had had experience as a cutter, a log-hauler and a contractor. On this evidence the learned judge found that in all the circumstances the charges were reasonable in amount, and no challenge has been offered to this finding. If, however, the company is entitled to make any deduction in respect of McConaghie's work in connection with Section A, it must be a deduction of that portion of the wages and allowances paid to him as is properly attributable to that work; for no other amount, even though reasonable, fills the description (in clause (7) of the bonds) of "costs charges and expenses paid or incurred by the company in connection with the sale realisation marketing conversion of the timber produce and any produce of any kind of Section A." Except in the case of any allowances which may be identifiable as relating specifically to Section A, the apportionment between that Section and the other lands to which McConaghie attended should presumably be on the basis of the time which he devoted to each.

It is possible that this was in the mind of the company's managing director when he asked, in a letter which he wrote to the trustee on 30th July 1953, whether the trustee would prefer that, instead of a supervision charge, the company should

charge the same or a higher amount as logging supervisor's wages, adding that, after all, these were just as much an expense of marketing as the cost of cutting and hauling logs to the point of sale. But more probably he meant to suggest that clause (8) of the bonds was irrelevant, and that the wages of the logging superintendent, whom he described as ensuring on behalf of the bondholders that every foot of their timber was correctly accounted for, formed part of the costs charges and expenses covered by clause (7).

It may indeed be that, insofar as clause (8) intends to include direction and supervision in the services which the company was to perform in return for its commission of 5% of the gross proceeds, that clause is irrelevant because it should be understood as referring only to the making, by the company's board of directors or executive officers, of due provision for ensuring the efficient performance of all the work involved in the processes described as sale, realisation, marketing and conversion, and not as referring to the actual performance of any part of that work - not even to the performance of that part of it which may be called supervisory in the sense that it consists in overseeing and checking the work of others. There is much to be said for this view. The broad scheme which the documents reveal is that the company should bear the expense of bringing the timber on Section A to maturity, being put in funds to afforest the land by receiving the first two-thirds of the purchase moneys for the bonds and being assisted to provide for the maintenance and protection of the trees until maturity by the £15,000 mentioned in clause (5) of the bonds. (Of course the trees would not all mature simultaneously, but clause (6) of the bonds enables a time for commencement of the process of turning the timber to account to be fixed either by a determination of the company or a direction of a majority in value of the bondholders). In the proceeds of realisation, the company the bondholders and the trustee would all be interested, for it was out of those proceeds that each would derive the financial return which their mutual participation

in the scheme was designed to produce. But there was an obvious practical necessity to entrust the ultimate control of the process of realisation to one of the parties, to the exclusion of the others though in the interests of all; and it may well be that the whole office of the opening words of clause (8) is to entrust that control exclusively to the company.

But even if it be assumed that the direction and supervision to which clause (8) refers extends to the detailed field work done by the company's employees at the scene of each operation, in giving instructions to, and overseeing the work of, contractors and others engaged in the actual performance of the operation, it is difficult to see any sufficient reason for concluding that the cost to the company of that work was intended to be excluded from the indemnity provision made ⁱⁿ clause (7). The order in which the two provisions appear in the bonds may be thought to tend in favour of that conclusion, and some additional support for it may possibly be seen in the fact that clause (8), after stipulating that the company alone shall direct and supervise the operations referred to, proceeds immediately to provide for the company's right to commission as if the two matters were interrelated. But clause (7) is expressed in quite general and comprehensive language. "All" costs charges and expenses are covered which are "in connection with" the sale realisation marketing or conversion operations concerning the produce of Section A. No doubt the description excludes expenditure, such as the cost of head office management, which relates to the company's activities in general but has no specific relation to any of the particular operations mentioned in the clause. But McConaghie's wages and allowances are not of that character; and between, on the one hand, payments by a company to a person outside its own organisation (e.g. a contractor) for work done in the sale of timber and, on the other hand, payments to an employee on the company's own staff for work within the same general description, there is no distinction which can logically

be regarded as taking the latter outside, while leaving the former within, the conception of "costs charges and expenses in connection with the sale" etc.. The payments to McConaghie are the cost to the company of the actual work that McConaghie did; and an identifiable portion of that work entered into and formed an integral part of the operations by which timber grown on Section A was sold, realised, marketed and converted. A corresponding portion of those wages and allowances must therefore fall within clause (7) unless clause (8) exhibits an intention to except them from it. No such intention is expressed, and no sufficient reason appears for inferring it. Clause (8) does not wear the stamp of an exception or qualification to clause (7). It has every appearance of a provision intended to be cumulative upon clause (7), being drawn as it naturally would be drawn if the intention was that in ascertaining the net proceeds to be paid to the trustee for the bondholders there should be deducted from the gross proceeds the whole of the expenditure which clause (7) describes and, in addition, the stipulated commission to the company.

In the Supreme Court, both Townley J. and the Full Court read clauses (7) and (8) as meaning that the company was to direct and supervise the operations referred to without other remuneration than the commission, but was entitled to be paid or to deduct from the gross proceeds any other costs charges or expenses which it might pay or incur in connection with the operations. This is by no means an impossible reading of the provisions, but it reverses the order in which they appear, and in effect it introduces words which neither the general scheme of the instruments nor the context requires. The construction which treats the 5% commission on gross proceeds as a reward in the nature of gross profit to the company for undertaking the responsibility of realisation, and therefore as additional to the indemnity given by clause (7) against out-of-pocket expenditure incurred in connection with the realisation, attributes to the parties an intention which is neither irrational nor

unbusinesslike, and it is to be preferred as giving effect to to the language of the document in its natural sense.

Accordingly the decision of the Supreme Court should be reversed. We understand it to be common ground between the parties that the amounts deducted by the company in respect of McConaghie's services do not exceed the proportion of his wages and allowances which relates to Section A.

The appeal will therefore be allowed with costs. The order of the Full Court will be set aside, and in lieu thereof there will be an order allowing with costs the appeal to that Court, setting aside the order of Townley J. and the judgment entered pursuant thereto, and ordering that judgment in the consolidated action be entered for Queensland Forests Limited for the sum of £273:2:10 (being the amount claimed by that company in action No. 246 of 1954) together with the costs of the action No. 246 of 1954, the costs of the action No. 1337 of 1953 subsequent to the entry of the final judgment already entered therein, and the costs of the consolidated action. Reserved costs (if any) are to be included in each case.