ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

6

TROLLOPE

V.

PETER LLOYD LIMITED

REASONS FOR JUDGMENT

£2.2.0.

Judgment delivered at Sydney

on Thursday, 10th June, 1954

J. J Gourley, Govt. Print., Melb.

C.7163/51

TROLLOPE

V.

PETER LLOYD LIMITED

O R D E R

Appeal dismissed with costs.

TROLLOPE

v.

PETER LLOYD LIMITED

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

JUDGMENT

TROLLOPE

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DIXON C.J.
WEBB J.
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TAYLOR J.

JUDGMENT

This is an appeal from an order of the Full Court of the Supreme Court of New South Wales setting aside the verdict of a jury in an action in which the appellant was the plaintiff and the respondent was the defendant. In the action the appellant claimed to recover the sum of £5,000 as and for commission payable to him for services performed on behalf of the respondent. At the conclusion of the trial the jury returned a verdict for the appellant for the amount claimed and judgment was entered accordingly. The order from which this appeal is brought set aside this verdict and directed that judgment should be entered for the respondent.

The respondent company, of which George Arthur Lloyd was at all material times the managing director, carries on, as one of its activities, the business of motor vehicle distributors. The appellant was acquainted with Lloyd and during the year 1948 the former was contemplating proceeding to the United States of America on a business trip. The business in which the appellant was then engaged was not associated in any way with the sale or distribution of motor vehicles but some years previously he had been intimately connected in the United States with the motor vehicle industry. In particular, he had been employed by the Ford Company at Detroit and San Francisco and at a later

stage by other motor vehicle organisations, including the Chrysler Corporation and the Chrysler Export Corporation both at Detroit and in Australia. In all, the appellant claims to have had experience in this industry extending over some thirty years and to have become acquainted with many of the executive officers of organisations operating in the industry. No doubt it was with this background in mind that some discussion pertinent to this case took place when, about the middle of 1948, the appellant informed Lloyd that he proposed to make a business trip to the United States early in 1949. The appellant says that on this occasion Lloyd said he was very interested in obtaining "an American franchise". His company, he said, held "the Wolseley and Riley franchises" and, according to the appellant, Lloyd added that American cars were more suitable to Australian conditions and "that his company would certainly like to get hold of an American franchise". At this stage the appellant says the names of the Kaiser-Frazer and Nash organisations were mentioned. According to the appellant's evidence he informed Lloyd that he had worked for fifteen years with one Carlson, of the Nash organisation, and, after some further discussion, he suggested that it would be preferable, first of all, to approach that organisation because he knew Carlson so well. He added that he knew Carlson well enough to walk into his office and say: "Here I am, Si. I have a proposition and I would like to talk to you about it". During the remainder of 1948 the matter was mentioned between the appellant and Lloyd on a number of occasions and it is said that towards the end of that year he told Lloyd that for the purpose of making an approach to an American organisation for a franchise it was desirable that a document should be prepared outlining the complete organisation of the respondent company and giving detailed information concerning its sales, service

facilities, finance and personnel set up. The suggestion that this should be done was agreed to and there seems little doubt that the appellant gave some substantial assistance in completing a brochure in an attractive form setting out details of these matters.

The appellant left Australia on the 23rd March 1949 and there is no doubt that he had the authority of the respondent company to interview various motor vehicle organisations in the United States, and particularly the Nash organisation, for the purpose of endeavouring to arrange for the granting of a franchise to the respondent. But before his departure the appellant had, on the 7th January 1949, written to Carlson telling him of his projected visit and informing him of his intention to visit Detroit in a few weeks' time "with a view to obtaining an American franchise for a N.S.W. Nuffield (England) distributor with whom I am associated". After giving some general information concerning the respondent company the appellant added that he was reliably informed that if he made "representations for an increase in the present dollar allocation for U.S.A. vehicles for the 1944-1950 licensing period it will be favourably received". To this letter the appellant received a reply some little time before his departure. By this reply he was informed that the Nash organisation already had a distributor for New South Wales and that with the very low import quota established for Nash cars "there would be no desire on our part to make a change". It was further stated that it was felt that American automobile quotas would be cut rather than increased and that there was very little likelihood of the organisation making any change in its existing arrangements for distribution in New South Wales. It should, perhaps, be mentioned at this stage that the Nash franchise for New South Wales was held at this time by a company known as Clyde Industries Limited, and that the distribution of Nash vehicles and their servicing

was carried out by that company under the name of Clyde Motors, a division of the company which had been organised for that purpose. That both the appellant and the respondent knew this was so is clear from the evidence.

Until within a day or two of the appellant's departure from Australia no arrangements had been made concerning remuneration for his services and, indeed, no definite proposal as to remuneration had been made by either party. But on the 22nd March 1949 the appellant received a letter from Lloyd which, among other things, proposed that upon the appellant securing a suitable American franchise, "we would enlarge the capital structure of the Company to recompense you adequately for your efforts in the form of a share-holding and we would arrange for your appointment to the Board of this Company if we handle the Franchise direct or, as is more probable, the Board of a subsidiary Company, which, we feel, would probably be necessary to form to give a separate front to the American side of the business". The appointment as director, it was added, would be as a working director with remuneration on a basis to be arranged. Some communications passed between the parties concerning this proposal. The appellant, however, did not wish to undertake the duties of a working director and on the 7th April 1949 the respondent wrote to him and made the suggestion which both parties accept as the basis of the arrangements between them. This suggestion was made in the following terms:

> "Our basis of consideration for you for acquiring for us the Nash Franchise, in which we are primarily interested, is as follows. Firstly, a seat on the Board with the usual non-working Director's remuneration of £250 a year. The appointment would be put through immediately the Franchise was obtained. If it is arranged for you also to hold an Executive position with the Company as Technical Director, a further basis for remuneration could be arrived at easily.
> However, in the light of your cable, we believe that you are primarily interested in additional security for yourself, apart from your own efforts. We, therefore, suggest that consideration for your obtaining the Franchise should be £5,000, which we

> would be prepared to pay you in cash, at the same time giving you the additional right, if you so desire, to take up shares in the Company at their asset value, as determined at 30th June, 1949, to that figure. That date mentioned is when our next firm Balance Sheet will be produced".

It will be seen at once that the stipulated remuneration of £5,000 became payable upon the appellant obtaining the Nash franchise for the respondent and unless that franchise was obtained as a result of the appellant's efforts it is clear that the remuneration did not become payable. But, as counsel for the appellant contended, it was not necessary in order to entitle himself to the stipulated remuneration that the plaintiff should have successfully concluded negotiations for the franchise before returning to Australia, nor is the mere fact that some time elapsed before it was granted to the respondent a material matter for consideration. The question for consideration is whether there was evidence capable of establishing that the subsequent granting of the franchise "was brought about or, materially contributed to" by the efforts of the appellant (see per Lord Shaw of Dunfermline in Bow's Emporium Limited v. A. R. Brett & Co. Limited (44 T.L.R. 194 at 199) adopting the statement of Lord Dundas in Walker, Fraser and Steele v. Fraser's Trustees (1910 S.C. 222)) or whether the granting of such a franchise was "really brought about by the act" of the appellant (per Chief Justice Erle in Green v. Bartlett (14 C.B.N.S. 681 at 685).

In this case a franchise for New South Wales was subsequently granted by the Nash organisation to the respondent. This took place at the end of 1950 in circumstances to which it will be material presently to refer. But before doing so it is desirable to make some mention of the appellant's activities in the United States after his arrival there and before his return to Sydney at the end of May 1949. It is clear, of course, that he had not at that time become entitled to any remuneration but he had

spent some time in Detroit and had interviewed the senior executives of the Nash organisation on more than one occasion. His own account of these interviews and his reports to the respondent strike a note of optimism concerning the prospects of his mission which is not altogether reflected in the letter written by the Nash organisation to the respondent on the 24th June 1949 after the appellant had returned to Australia. Nevertheless the jury was entitled to give full weight to his evidence for the purpose of determining the extent to which the appellant's efforts contributed - if they can be said to have contributed in any material way at all - to the subsequent granting of the franchise to the respondent.

The appellant says that the first interview with officers of the Nash organisation took place on the 29th March 1949. On that occasion he saw Carlson and one Todd, the assistant export manager. Apparently there was a good deal of general discussion and the appellant produced the brochure which had been prepared and the set up of the respondent company and its capacity to represent the Nash organisation effectively in Australia was discussed at some length. According to the appellant, Carlson indicated that his company was not altogether satisfied with its present distributor in New South Wales and said that he was very interested in obtaining a new distributor for that territory. The discussion lasted for some hours and upon its termination Carlson is alleged to have said that the matter was important and that he would like time to think it over. Later, in April, the appellant had a further interview with Carlson and Todd. Again, there was a long discussion and at its conclusion Carlson is alleged to have said to him "you know we are dissatisfied with the present set up. Do something, such as increase the quota, or anything, to more or less give us a reason for cancelling Clyde Motors'

franchise". The Nash organisation, it was said, had had trouble in Sydney some years previously when it had cancelled an earlier franchise granted by it and Carlson is said to have added that the appellant might "find some reasonable excuse, you might say, such as increased quota, or some suggestion to put up to him, and he said, 'Charlie, the Nash franchise is yours'". It was following upon this interview that the appellant reported as follows: "I have been to the Nash Company and consider your company can acquire this franchise if we can improve their present figures ..... The Nash Company suggest no change would be advantageous to them unless an increase in business was obtained."

On 31st May 1949, the day after his return to Sydney, the appellant saw Lloyd and said: "Well, Peter, we have got the Nash franchise. Carlson told me quite frankly that they were dissatisfied with their present N.S.W. - Queensland set-up. He said that they merchandised lawnmowers, and that they were definitely interested."..... "All they need" he said, "is an alibi such as an increase in the quota or any reasonable suggestion put to them and the franchise is yours". Thereupon, the appellant says, Lloyd congratulated him and told him he had done a "swell job". In cross-examination the appellant agreed that the Nash organisation had made it quite plain to him that unless its quota for cars imported into Australia was increased it did not propose to change its distributor in New South Wales; but it was, it was said, prepared to consider the appointment of the respondent if and when its import quota was increased. This, undoubtedly, was the position upon the appellant's return to Australia though the claim was also made that the evidence established that the Nash organisation had undertaken to give favourable consideration to the matter if some other reasonable excuse or "alibi"

could be provided for terminating its existing arrangements with Clyde Industries Limited. We should have thought, upon consideration of the appellant's answers in cross-examination, that this suggestion was not open, but whether it is or not is a matter of little consequence for the termination of the appointment of Clyde Industries Limited as distributors in New South Wales and the appointment of the respondent was not brought about either by an increase in the import quota for Nash vehicles or by any circumstance which could on any view of the matter be regarded as some other reasonable excuse or "alibi" provided by the appellant or respondent. The fact is that the import quota for Nash vehicles was not increased and at a comparatively early stage after the appellant's return to Sydney it must have become evident to the parties that there was no immediate prospect of this occurring in spite of the representations which were made. Nevertheless, neither party appears to have regarded the negotiations with the Nash organisation as a completely closed chapter and on occasions up to the end of 1949 they appear to have spoken of the matter to one another. No doubt they both looked forward to the time when ultimately the import quota might be increased and negotiations re-opened with the Nash organisation.

But before anything else of moment occurred a new influence obtruded itself. On the 20th September 1950 Clyde Industries Limited indicated to the Nash organisation that it wished to relinquish its rights as distributors for New South Wales. The reasons for this, and some indication of antecedent discussions which had taken place with the respondent, sufficiently appear from the letter of that date written by Clyde Industries Limited to the Nash organisation. That letter is in the following terms:

"Dear Mr. Carlson,

You will appreciate that, with the limited number of dollars that have been allocated to Nash during the past 2 years, we have been forced to reconsider the development plans we originally had in mind for the expansion of our Clyde Motors organisation.
Although a dollar loan has now been arranged between the Governments of our two countries, this, we are given to understand, will not result in any increased dollar allocation for motor vehicles, and we therefor must face the fact that Nash cars will only be coming forward in the future at the reduced rate that is now current.
With this small volume, and bearing in mind the fact that we do not carry any other automotive franchise, it is not possible for us to operate the Clyde Motors Division on an economical basis. If we had some reasonable hope of securing increased licenses in the future, we would willingly carry on, but, as previously stated, any prospect of increased quantities is very remote indeed.
The most important aspect exercising our minds in considering this matter is the continuance of a full service and spare parts organization to satisfy the many Nash users in this State and in Queensland.
With this in mind, we had a discussion with one of our parent company Directors, Mr. Allen T. Anderson, who is also a director of Peter Lloyd Ltd., holders of the Riley, Wolseley and Denis franchises.
Peter Lloyd Ltd., have agreed not only to purchase outright our Clyde Motors organisation, including spare parts stocks, but also to retain the services of specialist mechanics and other service personnel, who, during the past few years, have concentrated exclusively on Nash cars.
Peter Lloyd Ltd. has a very vigorous management and, to illustrate the extent of their automotive activities, their turnover for the past twelve months exceeded £2,000,000. We believe that this organisation not only has the full facilities to handle Nash, including assembly, modern service stations, combined with a first-class showroom in the centre of Sydney, but, with its sales personnel and general over-all management, will do full justice to a franchise which we have always regarded very highly.
We feel sure that you will understand the reasons that have actuated our decision in this regard, and we recommend for your earnest consideration the transfer of the franchise to Peter Lloyd Ltd.
We would like to make it clear that Peter Lloyd Ltd. propose to carry on the Nash franchise under the name of Clyde Motors, as a separate and distinct entity to their other trading activities.
Whilst we obviously would appreciate early advice of your views on this matter, please do not hesitate to request further information, should it be necessary to enable you to consider fully our request.

Yours sincerely,
KENNETH O. HUMPHREYS
Financial Manager.

No reply having been received to this letter a further letter in the following terms was written by Clyde Industries Limited:

"Dear Mr. Carlson,

I refer to our letter of September 20 with regard to the transfer of the Nash franchise to Peter Lloyd Ltd. In this connection I confirm my cable reading as follows:-

'FOR CARLSON RELET SEPTEMBER 20 RE FRANCHISE stop PETER LLOYD APPOINTED MACK DISTRIBUTORS APPRECIATE EARLY CONSIDERATION OUR REQUEST stop JOHNSON OF PETER LLOYD PROCEEDING AMERICA IMMEDIATELY ON MACK FRANCHISE HAVE SUGGESTED HE CONTACTS YOU".

As time is going on and we have not heard from you on this subject, I thought it advisable to suggest that Mr. Johnson, of Peter Lloyd Ltd., who is proceeding to America immediately on the Mack franchise, should contact you during his visit. It has recently been announced here that Peter Lloyd Ltd. have been granted the Mack franchise in lieu of Dominion Motors, who held it for some years past.
We look forward to receiving your early comments on this franchise transfer matter."

Apparently the discussions with the respondent which are disclosed in the first of these letters commenced some little time after May 1950 when Mr. Anderson, referred to in that letter, joined its Board. The reply to these letters, dated 14th November 1950, is sufficiently important to speak for itself. It is as follows:-

"This will acknowledge, with thanks, receipt of your letter of September 20th which has not been answered heretofore due to the writer's illness and Mr. S. I. Carlson being in Europe.
Frankly we are very much interested in what you have to say and as far as we can see there is no good reason why this transfer could not be readily executed. However, we assume that it might be proper to await Mr. Johnson's arrival in Detroit, at which time matters can be finalized and a cabled decision sent to you by Mr. Johnson for final consideration.
We are communicating with Mr. Johnson today as per copy of letter attached.
We readily appreciate your thoughtfulness in explaining the entire situation to us, and we assure you that we are very much in accord with what you have to state. According to your letter of September 20th, Peter Lloyd Ltd. have agreed not only to purchase outright your Clyde Motors organization, including spare parts stocks, but also to retain the services of specialist mechanics and other service personnel, who have concentrated exclusively on Nash cars for the past few years.
We learned considerable about Peter Lloyd Ltd. through Mr. Charles Trollope who, as you know, contacted us sometime ago. We feel the new arrangement will work out to our mutual satisfaction.
It is also noted that Peter Lloyd Ltd. proposes to carry on the Nash franchise under the name of Clyde Motors, as a separate and distinct entity to their other

> trading activities. Their organization is most interesting and we are quite certain that matters can be worked out to the satisfaction of all parties. Again we wish to apologise for not having replied sooner but do wish to assure you that we are definitely interested in your proposal."

Subsequently on the 28th November 1950 the Nash organisation wrote to Clyde Industries Limited as follows:

> "This will supplement our letter to you of November 14th. You will be pleased to learn that we have now had a conference with Mr. Hal. C. Johnston of Peter Lloyd Ltd., and as a result, we are sending new contracts to Peter Lloyd Ltd. for signature and return to us for final approval.
> To clarify the situation, we are enclosing a copy of letter today addressed to Peter Lloyd Ltd. attention Mr. G. A. Lloyd, Jr., Managing Director.
> We certainly appreciate your thoughtulness in having worked out this arrangement for us and we honestly feel that it will work out to our mutual satisfaction.
> It would be appreciated if you would return the contract which you now hold, as it is not our desire to have two signed contracts covering the same territory.
> As stated in my letter to Peter Lloyd Ltd., we assume that all the service information will be turned over promptly to the new personnel so that the service end of the business can go on without any serious interruption. Furthermore, if you have any literature which might prove of interest to the new organization, we would appreciate your turning it over to them promptly.
> In closing we again wish to thank you for your thoughtfulness and assure you that we do appreciate all that you have done for us since we first got together. Assuring you that it would be a pleasure to be of assistance to you at any time, and wishing you all possible success, we are, "

Following upon these letters an agreement appointing the respondent the local distibutor for the Nash organisation was entered into.

It was in these circumstances that the learned trial judge, without objection from either party, instructed the jury, in effect, that the question for them was whether, upon the evidence, the appellant's activities were the cause of the Nash organisation ultimately granting its franchise to the respondent. It is, of course, not for us to express either our concurrence or disagreement with the conclusion upon this question which the jury must have reached; the question for us is whether there was any evidence in the case capable of supporting that conclusion.

In our opinion there was no such evidence. No doubt there is abundant evidence that the appellant made known to the Nash organisation the respondent company's name and furnished it with particulars of its resources and activities. Probably the material with which he supplied the Nash organisation left its officers with a favourable impression of the respondent's capacity to render efficient service as a distributor of Nash vehicles in New South Wales. But to say that his efforts brought about or contributed in any causal sense to the appointment of the respondent is entirely another matter. The plain fact, as he himself admits, is that he did not succeed in persuading the Nash organisation to appoint the respondent in place of its existing distributor in New South Wales, and that at the most he secured a promise that such a course would be considered if and when the import quota for Nash vehicles should be increased or some other "reasonable excuse" or "alibi" should be provided. But the franchise was not granted to the respondent pursuant to any such arrangement; it was granted in circumstances which were quite unrelated in any way to the appellant's previous endeavours. It was not the appellant's case that the negotiations between Clyde Industries Limited and the Nash organisation, which are referred to in the correspondence set out above, did not take place, or, that the former company did not deal with the respondent in the manner therein referred to; nor is it suggested that these negotiations were undertaken for the purpose of defeating in some devious way the appellant's rights. His case before the jury and upon appeal was, and is, that notwithstanding these supervening events he is entitled to recover the remuneration for which his agreement provided. It is clear, however, that his efforts had no causal connection of any kind with the ultimate granting of the franchise. Counsel for the appellant, however, maintained to the contrary. It was, he claimed, due to the

appellant's efforts that when Clyde Industries Limited wished to relinquish its franchise the name of the respondent was favourably known to the Nash organisation. When its name was suggested as the successor to Clyde Industries Limited the Nash organisation was able to and did refer to the material supplied and supplemented by the appellant. That organisation, at least to some extent, relied upon and was influenced by that material. In these circumstances it was contended the jury was entitled to find that the appellant's efforts were a substantial or material cause in procuring the franchise for the respondent. The fact is, however, that this material was examined for information which, in its absence from the files of the Nash organisation, would, in the circumstances, have been procured from some other source. No doubt, as both Carlson and Todd were in their evidence prepared to admit, the availability of the material may have "speeded up" the matter a little but they made it quite clear that they did not intend by such evidence to concede for a moment that the fact that they already had this material before them in any way operated to influence their choice in the matter. They had a recommendation from Clyde Industries Limited; they had no real option of refraining from appointing a new distributor; they knew that another large automotive organisation in the United States had at that time approved of the respondent as a distributor and they had had the opportunity of discussing the matter with a representative of the respondent. They also knew that the respondent had undertaken to purchase for a large sum the Clyde Motor organisation, with its stock of Nash spare parts, and to retain the services of the specialist mechanics and other service personnel of that organisation. Again, they knew that it was the intention of the respondent to continue to carry on this organisation under the name of Clyde Motors. In all these circumstances

three things may be said of the case. In the first place, it would be quite wrong to regard the granting of the franchise to the respondent as a consummation, in any way, of the efforts of the appellant. To do so would be to disregard entirely the circumstances in which the appointment was made and it is not, and never was, the appellant's case that these circumstances should be ignored. Secondly, to say that the Nash organisation was influenced to some extent by the antecedent activities of the appellant is to confuse with the efforts of the appellant information which, though more readily available to the organisation by reason of the appellant's activities, was available to it and could, and would, undoubtedly, have been obtained from other sources. The final observation which should be made is concerned with a particular feature of the manner in which the appellant's case was put. He had, it was claimed, secured a promise from the Nash organisation that if and when some excuse could be found for the termination of that organisation's existing arrangements with Clyde Industries Limited, consideration would be given to the appointment of the respondent in place of the latter company. The events which took place during the latter part of 1950 constituted, it was said, such an excuse and accordingly it was said the granting of the franchise to the respondent was in pursuance of the promise secured by the appellant. We are quite unable to see any justification for this view but the hypothesis upon which it is advanced is that Clyde Industries Limited, of its own volition, wished to surrender its rights under its franchise and, quite independently of the appellant, that company recommended the appointment of the respondent. In no way can these circumstances be regarded as a "reasonable excuse" or "alibi" for replacing Clyde Industries Limited by the appointment of the respondent. On the contrary, though the franchise held by Clyde Motors was not transferable, the

substance of the transaction, assented to, as it was, by all three parties concerned, was that the franchise should, with the consent of Clyde Motors, be transferred to the respondent.

For the reasons given we are of the opinion that there was no evidence capable of supporting the jury's verdict and that the appeal should be dismissed.