Privy Council Appeal No. 31 *of* 1951

The Perpetual Executors Trustees and Agency Company (W.A.) Limited as Executor of the Will of Patrick Andrew Connolly, Deceased – – *Appellants*

v.

George Alfred Maslen and Others – – – – – *Respondents*

AND

The Commonwealth of Australia – – – – – *Intervener*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER, 1951

Present at the Hearing :

LORD PORTER
LORD SIMONDS
LORD OAKSEY
LORD REID
LORD RADCLIFFE

[*Delivered by* LORD PORTER]

This is an appeal by special leave from an order of the High Court of Australia dated the 5th December, 1950, by which that Court by a majority reversed a decision of Walker, J. in the Supreme Court of Western Australia dated the 14th June of the same year. Fullagar, J. who dissented would have upheld the order made by Walker, J. in the Supreme Court.

In granting special leave their Lordships reserved to the respondents the right to object that no appeal lay in the absence of a certificate of the High Court under section 74 of the Australia Constitution Act, 1900, which withholds the right of appeal from a decision of the High Court on any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States unless the High Court shall certify that the question is one which ought to be determined by His Majesty in Council.

The appellants are the Executors of the will of one Patrick Andrew Connolly who died on the 28th December, 1946, and had until the 30th June of that year been in equal partnership with one Claude Ashley Laffer in a pastoral business in Western Australia known as the Mardathuna Pastoral Company (hereinafter referred to as " the Company ").

By a deed dated the 17th June, 1946, and operating from the 1st of July of that year Mr. Connolly assigned the beneficial interest of his half share in the Company to the respondents in equal shares as tenants in common. Since the question as to what the property assigned included is in dispute between the parties, the exact terms in which the assignment was made should be quoted in so far as they are material to their Lordships' decision.

By Clause 1 of the Assignment it is provided that Mr. Connolly assigns to the respondents " all his right title and interest in . . . (*d*) . . . the benefit of all contracts and engagements and book debts to which Patrick Andrew Connolly and Claude Ashley Laffer may be entitled in connection with the said business together with all other assets of the said business." The said business referred to is that of the Company.

By another Deed dated the 2nd October, 1946, Mr. Laffer assigned his half share to the first of the respondents. Mr. Laffer's Assignment is in no wider terms than that of Mr. Connolly's and need not be further referred to.

Under section 51 of the Commonwealth of Australia Constitution Act, 1900, which by (vi) and (xxxi) gives power to the Commonwealth to make laws for the naval and military defence of the Commonwealth and of the several States and to acquire property on just terms from any State or person for those (among other) purposes, the Parliament of Australia passed the National Security Act of 1939. That Act empowered the Governor General in Council to make regulations and in pursuance of those powers, on the 28th September, 1939, he made the National Security (Wool) Regulations in order to carry out an arrangement between the British and Australian Governments for acquiring the whole clip of Australian wool in connection with the war with Germany. The regulations provided (A) that all wool grown in Australia should be compulsorily acquired, (B) that the regulations should be administered by the Central Wool Committee, (C) that all growers of wool should submit their wool to authorised persons for appraisement, and (D) that every grower should be paid the appraised value.

Regulation 30 was in the following terms:—

> " (1) All moneys payable by the Government of Great Britain under the arrangement made by that Government with the Commonwealth for acquiring Australian wool shall be received by the Central Wool Committee and out of such moneys the Central Wool Committee shall defray all costs, charges and expenses of administering these Regulations.
>
> (2) Any moneys which may be received by the Central Wool Committee from the Government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such Government thereunder for the wool and any surplus which may arise shall be dealt with as the Central Wool Committee shall in its absolute discretion determine."

The Company supplied wool under the Regulations to the Central Wool Committee through the Westralian Farmers Co-operative Limited in some cases, and through Elder Smith and Company Limited in other cases, until the compulsory acquisition of wool ceased on the 30th June, 1946.

Stocks of wool however had been accumulated during the war, and an agreement for their orderly disposal was made between the Governments of the United Kingdom, Australia, New Zealand and South Africa. In Australia statutory approval to the agreement was given by the Wool Realisation Act, 1945, which provided, *inter alia*, that the National Security (Wool) Regulations should be continued in force, that the disposal of stocks should be carried out by a company entitled " The Joint Organisation " in which the shares were to be held by nominees of the four Governments and that there should be set up an Australian Realisation Commission, the subsidiary in Australia of the Joint Organisation,

to have and perform all the duties and all the powers, authorities and functions of the Central Wool Committee under the National Security (Wool) Regulations and other statutory regulations governing the disposal of wool and sheepskins.

That Act was followed by the Wool Realisation (Distribution of Profits) Act, 1948, which provided for the distribution of any ultimate profits accruing to the Commonwealth under the Wool Disposals plan and for other purposes.

The latter Act, in section 18, directed the preparation of a list showing (*a*) the persons who, in the opinion of the Commission, are entitled to share in the distributions under it and (*b*) the appraised values of the wool in relation to which each such person is, in the opinion of the Commission, so entitled.

Subject to certain provisions as to the exclusion of dealers which are not material to the question now in issue, the Act contained in section 4 a number of definitions and in Part III clauses dealing with and determining the persons entitled to payment under the Act. Of these the more material are that part of section 4 which defines "participating wool", and sections 7, 9, 10 and 11 which must be set out in full. They are as follows:—

"4.—(1) . . .

"'Participating wool' means wool appraised under the National Security (Wool) Regulations (whether under those Regulations when in force under the *National Security Act*, 1939, or that Act as amended, or under those Regulations when in force under the *Wool Realization Act*, 1945, or that Act as amended), being wool which was listed as participating wool in the appraisement catalogue used by the appraisers for the purpose of that appraisement."

. . . . . .

"7.—(1) Subject to this Act, an amount equal to each declared amount of profit shall be distributed by the Commission in accordance with this Act.

"(2) There shall be payable by the Commission, out of each amount to be distributed under this Act, in relation to any participating wool, an amount which bears to the amount to be distributed the same proportion as the appraised value of that wool bears to the total of the appraised values of all participating wool.

"(3) Subject to this Act, an amount payable under this Act in relation to any participating wool shall be payable to the person who supplied the wool for appraisement.

"(4) Where two or more persons jointly supplied participating wool for appraisement, those persons shall, for the purpose of determining their claims in relation to that wool in any distribution under this Act, be treated as one person."

. . . . . .

"9.—(1) Where any participating wool was supplied for appraisement by—

(*a*) a person whose affairs have at any subsequent time been administered, or are being administered, under any of the provisions of the *Bankruptcy Act*, 1924-1948, by a trustee;

(*b*) a person who has died and whose estate has at any subsequent time been, or is being, so administered; or

(*c*) a personal representative in the administration of an estate which has at any subsequent time been, or is being, so administered,

an amount which would otherwise be payable under this Act to the person who supplied the participating wool or his personal representatives shall, subject to this section, be payable to the trustee.

"(2) An amount received by a trustee by virtue of this section shall, for all purposes of the *Bankruptcy Act*, 1924-1948, and of any instrument executed in pursuance of that Act, be deemed to be received by him in his capacity as trustee.

"(3) This section shall not apply in any case in which—

(*a*) the creditors who were entitled to share in distributions by the trustee have been paid in full; or

(*b*) the trustee was acting under a sequestration order, and that order has been annulled.

"10.—(1) Where participating wool was supplied for appraisement by a company which is defunct, an amount which would otherwise be payable under this Act to the company may be paid by the Commission to such person as appears to the Commission to be justly entitled to receive it.

"(2) Where participating wool was supplied for appraisement by a partnership which has been dissolved, an amount which would otherwise be payable under this Act to the partnership may be paid by the Commission to any former partner or partners (including the personal representatives of a deceased former partner).

"(3) Where an amount has been paid in pursuance of this section, the rights, duties and liabilities of the person to whom it is paid in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the company or partnership, made at the time of the supply of the wool for appraisement.

"11. Subject to section nine of this Act, where participating wool was supplied for appraisement by a person who has died—

"(*a*) any amount which would otherwise be payable under this Act to that person shall be payable to the personal representatives of that person; and

"(*b*) the rights, duties and liabilities of the personal representatives in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the deceased person made at the time of the supply of the wool for appraisement."

To these must be added section 29 which is in the following terms:—

"29. Subject to this Act and the regulations, a share in a distribution under this Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution, or otherwise,"

and section 21 (1) which provides that the payment should reach the participants through their several brokers.

In these circumstances a sum of £2,132 9s. 2d. was, towards the end of 1949, paid through a firm of brokers to the appellants, as the personal representatives of Mr. Connolly, in his capacity as a former partner of a dissolved partnership as the share of that partnership in a distribution of sums payable under the Act in respect of participating wool supplied by it.

Later on a further sum of £562 14s. 11d. was paid to the respondents through other brokers as representing another share of a distribution of sums payable in respect of wool for appraisement supplied by the partnership.

The respondents on the one hand and the appellants and Mr. Laffer's representatives on the other claimed to be entitled to these two sums and, in these circumstances, the latter took out originating summonses in the Supreme Court of Western Australia for the purpose of ascertaining to whom these sums were properly payable. All parties agreed that meanwhile the monies should be held in trust pending the conclusion of

the proceedings. In the Supreme Court of Western Australia the issue was determined in favour of the plaintiffs' claim but the High Court reversed that decision. No question, however, now arises as to that portion of the sums paid as are attributable to the half share in the partnership formerly belonging to Mr. Laffer, inasmuch as his representatives have not appealed to His Majesty in Council. But the right to Mr. Connolly's share is in dispute, the respondents claiming that it has been assigned to them, whilst the appellants maintain that it did not pass under the assignment.

Two questions therefore are posed for their Lordships' determination:

(1) Is the appeal open to the appellants or does it involve an "inter se" question so that it is, for that reason, withdrawn from their Lordships' jurisdiction, and

(2) If not, what is the true destination of these two sums and any other sums which may be paid by the Commission in respect of participating wool furnished by the partnership of Messrs. Connolly and Laffer?

Inasmuch as the first question might require the determination of the extent to which the right of appeal from the High Court to their Lordships' Board has been limited by section 74 of the Constitution Act, Mr. Barwick applied to and obtained leave from their Lordships to intervene on behalf of the Commonwealth of Australia, and their Lordships are much indebted for the assistance so given.

As to the question of the attitude which should be adopted in deciding an "inter se" matter, their Lordships have dealt fully with the problem in three recent decisions, viz.:—the *Bank* case [1950] A.C. 262 and in *Nelungaloo Pty. Ltd.* v. *Commonwealth of Australia* [1951] A.C. 34, and *Grace Brothers Pty. Limited* v. *Commonwealth of Australia* [1951] A.C. 53.

In the first their Lordships decided that, if the determination of a case presented for their consideration involved the decision of an "inter se" question, the Board were precluded from hearing the appeal even though the High Court had found it possible to come to a conclusion in favour of the respondents without deciding the "inter se" point and though the point was raised only by the respondents before their Lordships' Board, provided that its decision was necessary if the matter in dispute was to be determined in favour of the appellants. In the two latter cases they went further. In the words of their judgment as prepared by Lord Normand they said: "Their Lordships are not disposed to allow exceptions to the broad construction which they have adopted that an appeal involving the determination of any 'inter se' question is excluded from their jurisdiction in the absence of a certificate from the High Court. . . . An appellant may accept the determination of the High Court on an 'inter se' question and present a petition for special leave to appeal on other questions only, but if he insists in his appeal on raising an 'inter se' question whether as part of his main ground of appeal or as part of an alternative ground of appeal, he must obtain a certificate of the High Court under section 74."

If then an argument involving an "inter se" point is persisted in before their Lordships' Board even as an alternative to an argument which does not raise an "inter se" question the appeal is beyond their Lordships' jurisdiction.

The argument on behalf of the respondents in the present case on this point was based upon the existence of section 29 in the Act of 1948. The appellants, they said, had relied upon the provisions of that section both in the Courts in Australia and in their case before the Board, and in any event that section involved an "inter se" question and whether relied upon or not formed a vital factor in the construction of the Act as a whole.

Their Lordships are not prepared to endorse the view that the appellants relied upon the section as nullifying Mr. Connolly's assignment even in the Courts of Australia. It is true that Fullagar, J. in the High Court made use of the section in order to point out the anomalies which would exist if the respondents' construction of sections 9, 10 and 11 prevailed, but the decision was given without the raising of or regard to any " inter se " question.

But whether or not an " inter se " question can be said to have been raised in Australia, a matter as to which their Lordships express no opinion, the appellants expressly declined to place any reliance upon section 29 before their Lordships and the Board are not prepared to carry their decision in the *Nelungaloo* case further and to say that if a point which may involve an " inter se " question has been raised at any time in the case, or even if it appears in the case presented by the appellants, they are precluded from considering the matter. As was said in the *Nelungaloo* case: " A party may accept the determination of the High Court on an 'inter se' question ". Nor are their Lordships precluded from hearing the appeal because at some previous period an " inter se " point has been raised. Their jurisdiction remains provided no " inter se " point is relied upon before them.

In the present case, as has been said, the appellants expressly refrained from any argument based on section 29. In these circumstances the only argument left to the respondents with reference to this part of the case is the allegation that section 29 throws light upon the construction of the earlier sections and therefore, in some way, an " inter se " point is involved. Their Lordships cannot accept this view. Whatever construction may be placed upon section 29 it is immaterial to the success or failure of the appellants' argument and, indeed, as will appear at a later stage, if the respondents' construction of Part III of the Act be correct, they would succeed and would no more require to refer to or rely upon section 29 than would the appellants if their construction is adopted. It follows that no point involving an " inter se " question arises upon the case as presented to the Board but there remains for consideration the true effect of the provisions of the Act of 1948 and its impact upon Mr. Connolly's assignment.

Admittedly, the two sums paid by the Commission are nothing but a gift. Under the Statutory Rules of 1939, Rule 30, any sum over the purchase price was to be dealt with at the absolute discretion of the Central Wool Committee.

The Wool Realization Act of 1945 substituted the Commission for the Central Wool Committee and provided by section 9 (3) that it should have and perform all the duties and should have and might exercise all the powers, authorities and functions of that body. As a result of the passing of that Act the Commission was entitled to dispose of any monies received in respect of participating wool over and above the price paid by the United Kingdom according to its absolute discretion. Whatever it did could not be challenged. No contract had come into being, no debt existed and no action could be brought against the Commission. Any sum beyond the appraised value was therefore a gift.

In these circumstances the Act of 1948 was passed to deal with the additional profit which, it may be, was formerly expected but was then known to exist.

The determination of the matters in issue in Australia, therefore, which are submitted to their Lordships' Board, falls to be decided upon the true construction of the provisions of Part III of the Act.

The appellants rest their argument on the terms of section 7 (3) and say that the share of the sums in dispute which they claim are payable in relation to participating wool and accordingly payable to the persons who supplied it for appraisement. Messrs. Connolly and Laffer are the persons who supplied the wool jointly and are to be treated as one person

(section 7 (3) and (4)). And accordingly the wool was supplied by a partnership which has been dissolved and the amount is properly payable to any former partner or partners including the personal representatives of a deceased partner.

The sums in dispute were, they say, properly payable to either of the claimants as representatives of Mr. Connolly or as representatives of Mr. Laffer, but not to the respondents.

The respondents, on the other hand, draw attention to the fact that the provisions of section 10 (3) are stipulated to be subject to the Act and rely upon the terms of sections 10 and 11 as distinguishing this from a case where a living partner claims the benefit of the payment.

Section 10 (3), they say, no doubt authorises payment, where a partnership is dissolved, to a former partner or his representatives. But when the money has been paid to him, his duties in dealing with it are prescribed by sections 10 and 11. Those duties, they contend, are to treat the payment as part of the proceeds of the sale of the wool made at the time of its supply for appraisement, i.e. as if the supplier was entitled to the payment at that time.

An identical obligation is, they maintain, imposed upon a personal representative under section 11 since he is enjoined not to treat the sum paid as part of the personal estate but as having the quality of the proceeds of a sale made by the deceased supplier at the time when he furnished the wool for appraisement.

Their Lordships have to choose between these two constructions. Obviously the recipient, whether he be a former partner or a personal representative, cannot keep the money for himself. If he be a member of a dissolved partnership, he must account to his former partner, and if he be a personal representative, he must treat the money as part of the estate which he is administering. But do the provisions go further and stipulate that it is to be dealt with as if it were the result of a contract or debt which came into existence when the wool was supplied for appraisement? So to construe the wording would be to do violence to the admitted fact that it is a gift.

No doubt the wording might be clearer but prima facie the sums received are payable to the supplier and it is for the claimants to establish the contrary.

The correct view, in their Lordships' opinion, is that it is a true gift to the supplier of the wool. It is not and never was part of the assets of the partnership. If it were to be regarded as part of the assets of the partnership there would be no necessity for the provision in section 7 (4) that where two or more persons jointly supplied participating wool they were, for the purpose of determining their claims in relation to that wool in any distribution under the Act, to be treated as one person. As partners they would be so treated, but if they are individually entitled to a gift, a provision as to their joint right to receive payment would be required.

In the opinion of the Board the respondents have not made out their claim.

No doubt there are a number of anomalies whichever construction be adopted, e.g. the provisions as to what is to accrue on the bankruptcy or death of the persons entitled, but to construe the provisions in the manner suggested by the respondents would bring about the peculiar result that, whereas, in the case of an existing partnership or company, partners or the board who had assigned their profits for the years in which the wool had been supplied would be entitled to keep the extra proceeds, in the case of a dissolved partnership or company the proceeds would pass to the assignees.

Their Lordships cannot but think that a construction which effects so surprising a differentiation in the destination of the extra profit between existing and defunct bodies throws some light upon the true intent of the

section even though it can be claimed that the section itself is to some extent ambiguous.

As to the reliance placed by the respondents upon the provisions dealing with the rights and obligations of the supplier in the case of death or bankruptcy, in their Lordships' view a distinction must be drawn between those cases where the property would normally pass from the recipient by operation of law and those where a positive act on his part is required if a change of ownership is to be created. No doubt section 13, which provides that the supplier of participating wool who has mortgaged his rights in respect of it shall be subject to the same liabilities in regard to the additional payment as he is to the sum contractually due upon appraisement, is in a somewhat different category, since the assignment by way of mortgage is a positive act on his part. But the section, so far from being a support for the respondents' contention, is a two-edged weapon, since it may well be contended that if his argument be sound, the extra sum paid would pass without the necessity of an express stipulation.

In reaching this opinion their Lordships must not be taken to determine that, where an assignment by the supplier to a third party clearly includes the payment in question, the assignor is nevertheless entitled to retain it. Such a decision might well involve a consideration of the terms of section 29. But it is not this case since, as their Lordships have said, the sum paid is neither a debt nor an asset of the business nor was it ever partnership property.

In their view it is a personal gift to the parties concerned, not passing under either assignment, nor is its destination affected by the terms of sections 10 or 11 of the Act of 1948.

In the result they reach the same conclusion as Walker, J. in the Supreme Court of Western Australia and of Fullagar, J. in the High Court and will humbly advise His Majesty to allow the appeal and restore the judgment of Walker, J. in so far as it applied to the appellants and respondents herein. The respondents must pay the appellants' costs of the appeal to their Lordships' Board and of the hearing in the High Court of Australia. The Commonwealth will bear its own costs.

(13753) Wt. 8137—69 120 2/52 D.L./P1/3

In the Privy Council

THE PERPETUAL EXECUTORS TRUSTEES AND AGENCY COMPANY (W.A.) LIMITED AS EXECUTOR OF THE WILL OF PATRICK ANDREW CONNOLLY, DECEASED

v.

GEORGE ALFRED MASLEN AND OTHERS

AND

THE COMMONWEALTH OF AUSTRALIA

[DELIVERED BY LORD PORTER]

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS.
DRURY LANE, W.C.2.

1952