Privy Council Appeal No. 125 *of* 1931.

The Great Boulder Proprietary Gold Mines, Limited - - *Appellants*

v.

Frank Scriven - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF WESTERN AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND NOVEMBER 1932.

Present at the Hearing:—

LORD ATKIN.
LORD TOMLIN.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

The question at issue between the parties to this appeal is whether the appellants are liable to account to the respondent for certain sums of money received by the appellants from the Royal Mint at Perth, Western Australia. If these sums of money are premiums received by the appellants on the sale of gold, within the meaning of section 152 (*b*) of the Western Australia Mining Act, 1904, as amended and consolidated by subsequent statutes, it is not questioned that the appellants must account for and pay to the respondents not less than fifty per cent. of such premiums.

The suit brought to determine this controversy was raised by the present respondent as plaintiff in the Supreme Court of Western Australia and was heard before the Acting Chief Justice (Northmore, J.) on the pleadings and an agreed special case without oral evidence. By a judgment pronounced on the 3rd August, 1931, in the present respondent's favour, it was decided that the sums of money in question were premiums within the statutory meaning. The appellants having, on the 20th October, 1931, obtained leave from the Supreme Court to appeal against this judgment, have now submitted it for review by their Lordships.

The facts of the case may be shortly summarised. The appellants are lessees of a gold mine in the Kalgoorlie goldfield of Western Australia known as the Great Boulder Mine. The respondent is a tributer (sometimes spelt " tributor ") who worked a portion of the appellants' old workings under an agreement dated the 2nd September, 1929. A tributer is defined by section 3 of the Mining Act as :—

> " A person who works a mine or portion of a mine under an agreement with the lessee or owner of the mine to pay to or receive from such lessee or owner a portion or percentage of the product taken from the mine or of the proceeds of the sale of such product."

The term presumably derives its origin from the mining vocabulary of the Stannaries, and in this connection it occurs in section 298 of the United Kingdom Companies Act of 1929.

The agreement of the 2nd September, 1929, is a complicated document, but for the present purpose it is necessary to set forth only some of its main features. The appellants thereby let a gold-bearing area forming part of their mine workings to the respondent (therein called " the tributor "), who in return for certain royalties was empowered to search for, win and dispose of the gold ore which he might find there. As regards the disposal of the ore, the respondent agreed to have it crushed at such battery or treatment plant as the appellants' manager might direct, " provided that the tributor shall not be directed to crush at any battery or treatment plant that pays on less than ninety per cent. of the assay value or pays the tributor less than fifty per cent. of any gold premium, and should the company [*i.e.*, the appellants] at any time undertake to crush the material from the demised premises it shall be at the rates and on the conditions ruling in the district for the treatment of ore by companies for their tributors." The respondent further undertook to direct the manager of the plant at which the ore should be crushed to hand all proceeds from the material treated to the appellants' manager.

As regards the disposal of " the proceeds of all gold including premium on gold handed to the appellants " the agreement provided that the same should be applied in paying (1) the cost of mining, treatment and realisation exclusive of wages for the tributors ; (2) wages to the tributors at the rate of £3 10*s*. per week ; (3) royalties to the appellants ; (4) any arrears of royalties ; and (5) the balance to the respondent.

The agreement was subject to the provisions of the Mining Act, which provides as follows regarding the conditions of contracts for the treatment of ore :—

> " 152. In all contracts between a tributer and the owner of a treatment plant (whether the lessee of the mine under tribute or not) relating to the treatment of gold ore the following provisions shall apply :—
>
> (*a*) It shall be obligatory on the part of the owner of such plant when the ore is purchased on assay value to account for all ores received by him from the tributer for treatment on the basis of not less than ninety per centum extraction of the assayed value of the ore . . . ; and

(*b*) The owner of the treatment plant shall also account for and pay to the tributer *not less than fifty per centum of any premium received by such owner on the sale of the gold obtained from the ore treated.*"

The words which their Lordships have italicised are the critical words in the case.

In point of fact the ore won by the respondent was delivered to the appellants' plant and there treated. On the occasion of each delivery, as the special case states, " the ore was the subject of a contract of sale and purchase " between the parties. After it had been sampled and assayed, the appellants sent to the respondent a purchase note, a specimen of which is appended to the special case, containing a statement of accounts based on the results of the assay, and made payment to the respondent of the sum thereby brought out. The statement shows deductions for treatment charges, royalties, etc., but not for smelting, transportation, insurance, bank and minting charges and risk of pilferage which are borne by the appellants. The special case proceeds :—

" In each such statement the gold content of the ore is taken at the price of £4 per fine ounce in accordance with the terms of the contract of sale and purchase. The price of gold throughout the world (which is determined by the London price) is and at all material times has been £4 4*s*. 11½*d*. sterling per fine ounce.

The gold extracted from the ore treated as aforesaid was from time to time deposited with the Royal Mint at Perth by the Bank of New South Wales (the bankers and agents of the [appellants]) for final assay and conversion into sovereigns (standard gold). The value of standard gold is and at all material times has been £3 17*s*. 10½*d*. sterling per ounce and this value is determined by the legal weight of the new sovereigns. The Mint issues a memorandum as to the result of the treatment of the gold so deposited, and therein sets out the value on the basis of standard gold (sovereigns) and also the net amount due to the depositor after deduction of mint charges which are specified.

* * * *

The gold having been deposited and the Mint having coined the same the resultant sovereigns (less mint charges) are handed to the depositor and the broken amounts are paid for by cheque.

Owing to the prevailing position of exchange between London and Australia and to counterbalance to some extent the difference between the pound sterling on which the price of standard gold is based and the Australian currency the Mint will, if so desired by the depositor, purchase the sovereigns and pay the depositor in Australian currency at £3 17*s*. 10½*d*. per standard ounce plus an amount (often called a premium) in excess of the value of the Australian currency in which the Mint so pays for the gold."

In respect of the sovereigns coined by the Mint from the gold contents of the ore sold to the appellants by the respondent, the appellants between the 13th March and the 13th December, 1930, " received in Australian currency in addition to £3 17*s*. 10½*d*. (the standard value per ounce of the gold contents of the minted sovereigns) " certain percentages on such value. These percentages over the period stated amounted to a large sum of money and

the respondent's claim is to not less than 50 per cent. thereof in terms of the statute and agreement.

Annexed to the special case is a specimen form of the memorandum of out-turn furnished by the Mint to persons depositing gold with it for coinage. After providing spaces for recording the results of weighing and assaying and the number of ounces of standard gold yielded by the deposit, the memorandum sets out a form of account which begins with the entry "Value: standard gold content at £3 17*s*. 10½*d*. per oz.," provides for the deduction of Mint charges and brings out the "amount due on Mint account." During the material period the memorandum bore this note: "In consideration of receiving the sovereigns resulting from this deposit the Commonwealth Bank of Australia has authorised the Mint to pay a premium of £ per cent. on the value of the standard gold content." After the printed words "amount due on Mint account" the form contained in typewriting the words "Premium (paid on behalf of Commonwealth Bank of Australia)" and provided for the addition of this sum in order to bring out the "total payable to depositor."

The Mint issues circulars from time to time, and a specimen of those issued and in force during the material period is annexed to the special case. It opens with a section headed "Premium on Gold" and states that "owing to the exchange position Banks in Western Australia are now offering a premium for gold . . . The current rate of premium is £7 15*s*. per cent. on the gold value of the deposit from the 10th October, 1930. On gold issued to jewellers and others for trade purposes a premium of 7*s*. an ounce standard is charged."

It should be explained that standard gold used for minting sovereigns is an alloy of pure or fine gold, and that the value of £3 17*s*. 10½*d*. per ounce for standard gold corresponds to £4 4*s*. 11½*d*. per ounce for fine gold. During the whole of the period in question English currency was on the gold standard.

The appellants submitted that, notwithstanding the reiterated designation of the sums in question as "premiums" in the relative official documents of the Mint, these sums, though paid to and received by them under that designation, were not "premiums" within the meaning of the statute. The argument, as their Lordships understand it, is that gold cannot be accurately described as being at a premium unless its price or value in the world market, *i.e.*, the London price in sterling, is in excess of £4 4*s*. 11½*d*. for fine gold or £3 17*s*. 10½*d*. for standard gold, and that as the appellants have not received in Australian currency for the gold in question more than the equivalent at the prevalent exchange rate of £3 17*s*. 10½*d*. sterling per ounce of standard gold, they have not in fact received any premium at all. A premium, they say, denotes a payment in excess of par and the payment received by them has not been in excess of the only par applicable, namely, the London sterling price.

Their Lordships recognise the cogency of the appellants' contention as applied to the world market for gold, but what has to be sought in the present instance is the meaning to be attached to the term "premium" as used in a particular statute of the legislature of Western Australia. When in official documents of Western Australia dealing with transactions in the sale of gold their Lordships find the term "premium" used to describe certain payments it becomes exceedingly difficult to hold that the same term has a different meaning in a statute of the same State dealing with the same transactions. The whole business out of which this controversy has arisen has been conducted in Australian currency; the £4 paid by the appellants to the respondent on the purchase of the ore was payable in Australian currency, the legal tender of the country; the costs of mining, treatment and realisation, the wages of the tributors fixed at £3 10*s*. per week, the royalties payable to the appellants, and the Mint charges are all reckoned in terms of Australian currency. If in Western Australia gold is paid for at more than £3 17*s*. 10½*d*. per standard ounce in Australian currency, it is appropriately described in the vernacular of commerce as being at a premium in the Australian market, although the increased payment is due to the depreciation of the Australian currency rather than to the appreciation of gold in the world market. Section 152 of the Mines Act is designed for the protection of persons in the position of the respondent in their contracts with persons in the position of the appellants, and when it requires the owner of a treatment plant to account for and pay to the tributer not less than 50 per cent. of any premium received by such owner on the sale of gold obtained from the ore treated, their Lordships are satisfied that it is the conditions of the local market that are in contemplation. Accordingly, as the value of gold, measured by the standard of the legal tender currency of Western Australia, was during the material period at a premium and was so described in the official language of those concerned there with this class of business, their Lordships reach the conclusion that the sums of money in question were premiums within the intendment of the statute.

The appellants drew their Lordships' attention to the fact that the formal judgment of the Court below is so drawn up as to make them liable in respect of sales effected after the date of the judgment up to the date of the certificate of the Master who was to take an account thereunder, and moved that in the event of the judgment not being set aside it should in any event be altered so as to limit its effect to sales before the 3rd August, 1931, the date of the judgment. The respondent agreed.

Their Lordships will therefore humbly advise His Majesty that, subject to the variation that the account to be taken between the parties be limited to sales effected before the 3rd August, 1931, the judgment of the Supreme Court be affirmed and the appeal dismissed. The appellants will pay the respondent's costs of the appeal.

In the Privy Council.

THE GREAT BOULDER PROPRIETARY GOLD MINES, LIMITED

v.

FRANK SCRIVEN.

DELIVERED BY LORD MACMILLAN.

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