

IN THE PRIVY COUNCIL No. 3 of 1977
ON APPEAL
FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN: THE TAUPO TOTARA TIMBER COMPANY LIMITED
Appellant

AND: DARCY KEVIN ROWE
Respondent

CASE FOR THE RESPONDENT

RECORD

10 1. THIS is an appeal from a Judgment ([1976] 2 N.Z.L.R. 506) dated 5 July 1976 of the Court of Appeal of New Zealand (Richmond P. Woodhouse and Cooke JJ.) allowing an appeal from a Judgment dated 21 October 1975 of the Supreme Court of New Zealand (Moller J.).

2. THE Respondent was employed by the Appellant Company as its managing director and the contractual terms of such employment were recorded in a Service Agreement dated 20 January 1972 (Exhibit 1A.).

pp. 124-5

3. IN terms of such Service Agreement the Respondent could resign on giving not less than 6 months notice in writing (Clause 3) or in the event of a take-over, not less than 3 months notice in writing (Clause 7).

20 4. AGAIN in terms of such Service Agreement the Appellant Company could give notice of termination of the Respondent's employment to the Respondent leaving the Respondent with a remedy in damages only (Clause 5) or, in the event of a take-over, giving the Respondent 5 times his gross annual salary (Clause 7).

5. THE Respondent's resignation dated 28 May 1973 (Exhibit 1C) was a valid 3 months notice in writing in terms of Clause 7 of the Service Agreement and the Respondent is entitled to 5 times his gross annual salary pursuant to the said Clause 7 (1st cause of action).

p.148

pp. 1-2

30 6. THE Respondent's resignation can only be interpreted as given pursuant to Clause 7 of the Service Agreement and could not be accepted by the Appellant Company as notice pursuant to Clause 3 thereof without a variation of the terms of the Service Agreement. Such a variation of the terms of the Service Agreement would need to be agreed to by the Respondent and evidenced by writing – there is none such. Again neither the Respondent's conduct or correspondence can be construed as a waiver of the strict terms of the Service Agreement.

7. IF the Respondent's resignation was not valid in terms of the said Clause 7 then the reply of the Appellant Company was notice of termination of his employment to the Respondent within the period of 12 months after take-over to entitle the Respondent to 5 times his gross annual salary pursuant to the said Clause 7. (2nd cause of action).

pp. 2-3

8. THE Appellant Company rejected the Respondent's claim for 5 times his

- gross annual salary pursuant to the said Clause 7 (Exhibit 1D(c)) and thereby raised the question of interpretation of the Service Agreement subsequently canvassed both in the Supreme Court of New Zealand and the Court of Appeal. p. 151
9. FURTHER matters raised by the Appellant Company to the Respondent's claim by its Statement of Defence were the validity and enforceability of the Service Agreement (Paragraphs 10(a), (b) and (c)) and an estoppel arising from his involvement in the Directors' Statement Exhibit 1F (Paragraph 11). These issues of validity and estoppel were argued in the Court of Appeal of New Zealand at which time the following points were made on behalf of the Respondent:- pp. 4-5
p.127 ll.1-4
- 10 10. PARAGRAPH 10(a) ignores the dual positions held by the Respondent, that of Director and that of Managing Director. The Service Contract was made with the Respondent as Managing Director and clearly differentiates between the Respondent's position as Managing Director and the Board of Director's authority over him (Clause 4). The Articles of Association of the Appellant Company in Articles 116 to 118 makes specific provision for a Managing Director. The provisions of Sections 191 to 194, and Section 199 of the Companies Act, 1955 clearly relate solely to Directors whereas the Respondent is claiming not as a Director but, as the Managing Director. p.5 ll.10-14
p.124 ll.24-33
p.87 ll. 2-19
- 20 11. PARAGRAPH 10(b) is answered by the provisions of Articles 84 and 93(3) of the Appellant Company's of the Appellant Company's Articles of Association. p.5 ll. 15-16
pp.80-81 ll.40-6
p.83 ll.1-12
12. PARAGRAPH 10(c) The entry in the Seal Register of 28 January 1972 and the Board Resolution of 17 February 1972 when the Respondent was absent overseas establishes that the Agreement and its execution were authorised by the Appellant Company's Board of Directors. Because of the specific provisions in the Articles of Association of the Appellant Company it was not necessary to obtain the approval of the Appellant Company in general meeting. p.5 ll.17-18
p.100 ll.43-44
p.104 ll.31-33
- 30 13. PARAGRAPH 11 refers to a statement by the Appellant Company under Section 5 of the Companies Amendment Act 1963. The Service Contract did not provide for any payment to the Respondent as Director, only as Managing Director, and the provisions of Clause 7 of the Service Agreement did not come into force on or after the take-over unless or until the requisite resignation or notice of termination was given. p.5 ll. 21-29
14. AT the hearing in the Supreme Court of New Zealand on the 25 August 1975 evidence was led by the Respondent and no evidence was called by the Appellant Company. The evidence comprised that of the Respondent himself, Dr. O. F. Haylock, the Chairman of Directors of the Appellant Company at the relevant time, and J. N. Thompson the Secretary of the Appellant Company. pp. 6-19
- 40 15. IN a reserved decision dated the 21 October 1975 Moller J. in the Supreme Court of New Zealand gave Judgment for the Appellant Company indicating that pp. 21-24

the Appellant Company was entitled to an award of costs and disbursements and giving a certificate in respect of the extra day.

16. MOLLER J. began by reviewing the pleadings and setting out the primary dispute over the interpretation of Clause 7 of the Service Agreement. After reviewing the evidence pertinent His Honour held that the Respondent's 1st cause of action failed. His Honour then proceeded to consider the evidence in respect of the Respondent's 2nd cause of action and concluded that it could not succeed. p.22 ll. 27-34
p.23 ll. 19-26
p.24 ll.12-34
- 10 17. THE Respondent appealed to the Court of Appeal of New Zealand from the Judgment of the Supreme Court on the grounds that the Judgment was erroneous in fact and in law. The hearing took place on 1 June 1976 and Judgment of the Court of Appeal was delivered on 5 July 1976 when the Court, in separate Judgments delivered by Richmond P. and Woodhouse and Cooke JJ. allowed the Appeal. p. 26
- 20 18. IN his Judgment Richmond P. began by reviewing the evidence and then set out the 4 substantial issues of the Appeal. On the 1st such issue he considered the various possible constructions available in interpreting Clause 7 of the Service Agreement before coming to the conclusion to accept that interpretation urged for the Respondent (1st cause of action). His Honour, in dealing with the 2nd cause of action was not minded to regard the Appellant Company's letter of 25 July as a notice of termination. The 3rd issue dealing with the provisions of the Companies Act 1955 His Honour considered was answered by the decision in *Lincoln Mills (Aust.) Ltd v Gough* [1964] V.R. 193. The 4th issue questioning the vires of the Appellant Company or alternatively its Board of Directors was then referred to and rejected. pp. 32-34
p.34 ll. 9-18
p.34-36 ll. 40
p.37 ll. 7-9
p.37 ll. 10-p.38 ll. 31
p.38 ll.32 – p.40 ll. 8
19. RICHMOND P. concluded his Judgment by allowing the appeal and remitting the case to the Supreme Court in order that Judgment might be entered for the Respondent for such amount and including any other relief as the Supreme Court determined, allowing costs to the Respondent. p.40 ll. 9-23
- 30 20. COOKE J. in his concurring Judgment dealt firstly with the issue of interpretation and concluded that the Respondent was entitled to his compensation. His Honour then dealt with and rejected the Appellant Company's arguments dealing with the provisions of the Companies Act 1955 before considering and dismissing the Appellant Company's claim of ultra vires. p.41-42 ll. 17
p.42 ll. 18-25
p.42 ll. 26-43
p.42 ll.44 – p.43 ll. 27
21. WOODHOUSE J. in a further concurring Judgment dealt only with the interpretation question at length and adopted the conclusions of Richmond P. and Cooke J. on the Companies Act 1955 provisions and the ultra vires arguments. p.44-45 ll. 25
p.45 ll. 26-29
- 40 22. THE Court of Appeal of New Zealand on 1 November 1976 granted the Appellant Company final leave to appeal from the Judgment of the Court of p. 47

Appeal to Her Majesty in Council.

23. THE Respondent submits that the Judgment of the Court of Appeal of New Zealand was correct for the reasons therein set out in that:-

- (a) The Respondent's letter of 28 May 1973 was an effective notice as provided by Clause 7 of the Service Agreement.
- (b) Clause 7 of the Service Agreement was not unlawful having regard to the provisions of Sections 191 to 194 of the Companies Act 1955.
- 10 (c) Clause 7 of the Service Agreement was not ultra vires the powers of the Appellant Company under its Memorandum of Association or alternatively, ultra vires the powers of the Board of Directors of the Company.
- (d) Even if the Court of Appeal of New Zealand was wrong in holding that the Respondent's letter of 28 May 1973 was an effective notice as provided by Clause 7 of the Service Agreement then the Appellant Company's letter of 25 July 1973 was a notice of termination of the Respondent's employment as referred to in Clause 7 of the Service Agreement.
- 20 (e) If the Court of Appeal of New Zealand was wrong in holding that the Service Agreement was not unlawful having regard to the provisions of Sections 191 to 194 of the Companies Act 1955 or in holding that the Service Agreement was not ultra vires the powers of the Appellant Company under its Memorandum of Association or alternatively, ultra vires the powers of the Board of Directors of the Company, then the provisions of Section 7 of the Illegal Contracts Act 1970 are prayed in aid by the Respondent. Sections 3, 5, 6 and 7 of the Illegal Contracts Act 1970 provided as follows:-

3. "**Illegal contract**" defined – Subject to section 5 of this Act, for the purposes of this Act the term "illegal contract" means any contract that is illegal at law or in equity, whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether that provision is severable or not.

30 5. **Breach of enactment** – A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

6. **Illegal contracts to be of no effect** –

(1) Notwithstanding any rule of law or equity to the contrary, but subject to the provisions of this Act and of any other enactment, every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract:

Provided that nothing in this section shall invalidate:-

- 40 (a) Any disposition of property by a party to an illegal contract for valuable consideration; or

(b) Any disposition of property made by or through a person who became entitled to the property under a disposition to which paragraph (a) of this proviso applies –

if the person to whom the disposition was made was not a party to the illegal contract and had not at the time of the disposition notice that the property was the subject of, or the whole or part of the consideration for, an illegal contract and otherwise acts in good faith.

(2) In this section the term “disposition” has the meaning assigned to that term by section 2 of the Insolvency Act 1967.

10 **7. Court may grant relief** – (1) Notwithstanding the provisions of section 6, of this Act, but subject to the express provisions of any other enactment, the Court may in the course of any proceedings, or on application made for the purpose, grant to –

(a) Any party to an illegal contract; or

(b) Any party to a contract who is disqualified from enforcing it by reason of the commission of an illegal act in the course of its performance; or

(c) Any person claiming through or under any such party –

20 such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just.

(2) Any application under subsection (1) of this section may be made by –

(a) Any person to whom the Court may grant relief pursuant to subsection (1) of this section; or

(b) Any other person where it is material for that person to know whether relief will be granted under that subsection.

(3) In considering whether to grant relief under subsection (1) of this section the Court shall have regard to –

(a) The conduct of the parties; and

30 (b) In the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof; and

(c) Such other matters as it thinks proper;

but shall not grant relief if it considers that to do so would not be in the public interest.

40 (4) The Court may make an order under subsection (1) of this section notwithstanding that the person granted relief entered into the contract or committed an unlawful act or unlawfully omitted to do an act with knowledge of the facts or law giving rise to the illegality, but the Court shall take such knowledge into account in exercising its discretion under that subsection.

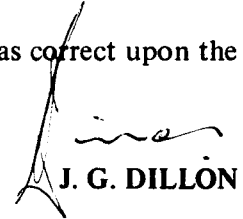
(5) The Court may by an order made under subsection (1) of this section vest any property that was the subject of, or the whole or part of the consideration for, an illegal contract in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings.

(6) Any order made under subsection (1) of this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit.

0 (7) Subject to the express provisions of any other enactment, no Court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with the provisions of this Act.

24. THE Respondent contends that this Appeal should be dismissed with costs for the following reason –

(a) The decision of the Court of Appeal of New Zealand was correct upon the facts.



J. G. DILLON