

The Midland Railway Company of Western Australia Limited *Appellant*

v.

The State of Western Australia - - - - - - *Respondent*

AND

The State of Western Australia - - - - - - *Appellant*

v.

The Midland Railway Company of Western Australia Limited *Respondent*
(consolidated appeals)

FROM

THE SUPREME COURT OF WESTERN AUSTRALIA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 11TH JULY, 1956**

Present at the Hearing :

LORD OAKSEY
LORD RADCLIFFE
LORD TUCKER
LORD COHEN

[*Delivered by* LORD COHEN]

This appeal relates to petroleum on or below certain lands which were granted to the appellant in fee simple pursuant to a contract (hereinafter referred to as the Waddington agreement) made the 27th February, 1886, between the government of Western Australia of the one part and John Waddington (hereinafter called the contractor) of the other part.

That agreement obliged the contractor to build a railway from Guildford to the southern terminus of a railway then about to be built from Geraldton to Greenough Flats. The railway was to be some 250 miles in length and was to be built by sections. Their Lordships were informed that the terms of the agreement showed that the railway was expected to take some seven years to build. The agreement further obliged the contractor within that period to procure the introduction into the Colony from Europe of 5,000 adults of European extraction. The provisions of the agreement which gave rise to the present dispute are those obliging the government of the Colony to make fee simple grants of land to the contractor. Those provisions are to be found in clauses 46 and 49 which read as follows:—

“46. The Government will at the expiration of three calendar months from the arrival in the Colony of any such immigrants grant to the contractor or his nominees in fee simple for each such statute adult 50 acres of land to be selected as next hereinafter provided in blocks of not less than 10,000 acres each in extent, to be held in accordance with and in the form prescribed by the Land Regulations of the Colony.”

“49. In consideration of the premises the Government agrees to grant in fee simple to the contractor by Crown Grants in the form prescribed by the Land Regulations of the Colony a subsidy in land for and in respect of each section or deviated section as hereinbefore defined at the rate of 12,000 acres for every mile of the Railway

which shall be duly completed and open for traffic in accordance with the provisions of these presents and a proportionate quantity for and in respect of such length of line less than 20 miles which shall be over from the end of the last of such sections to the actual completion of the line."

The agreement entitled the contractor subject to certain conditions to select the lands to be granted to him under those provisions and provided (clause 52) that on the completion and opening of each section of the line and as soon as he had made his selection the Government would issue to him certificates or deeds of grant of one moiety of the land so selected and (clause 53) that on the completion and opening of the whole railway the Government would issue to the contractor like certificates or deeds of grant for the remaining moiety of the lands so selected.

On the 23rd June, 1890, the contractor's rights and interest under the Waddington agreement were assigned to the appellant. Prior to June, 1898, the appellant encountered financial difficulties. As a result an agreement (hereinafter referred to as the Debenture agreement) was entered into on the 29th June, 1893, between the appellant and the respondent and others pursuant to which the appellant issued certain Debentures which were guaranteed by the respondent. It was a condition of the Debenture agreement that by way of security for any monies which the respondent might pay under its guarantee the respondent should have a first charge on inter alia 2,400,000 acres of the land which the appellant was or might be entitled to select by way of subsidy under clause 49 of the Waddington agreement and that such 2,400,000 acres should accordingly be vested in nominees of the Government to be held subject to the charge aforesaid in trust for the appellant its successors and assigns.

At this stage their Lordships must refer to the provisions of the Law of Western Australia in relation to Crown Lands.

At the date of the Waddington agreement the governing provision was section 7 of the Australian Waste Lands Act, 1855, an act of the Imperial parliament. It provided as follows:—

"It shall be lawful for Her Majesty, by Instructions under Her Signet and Sign Manual, or through One of Her Principal Secretaries of State, to regulate the Sale, Letting, Disposal, and Occupation of Waste Lands of the Crown in Western Australia, and the Disposal of the Proceeds arising therefrom, until Parliament shall otherwise provide."

In exercise of the powers thereby conferred Regulations were made on the 11th October, 1882. The material regulations for the purpose of this appeal are regulations 3 and 8 which read as follows:—

"3. The Governor is authorised, in the name and on behalf of Her Majesty, to dispose of the Crown lands within the Colony in the manner and upon the conditions prescribed by these Regulations, or by any Regulations amending or substituted for the same, and all grants and other instruments disposing of any portion of Crown Lands in fee simple or for any less estate made in accordance with such regulations shall be valid and effectual in the law to transfer to and vest in possession in the purchasers the land described in such grants or other instruments for the estate or interest therein mentioned.

The Governor is authorised to make such grants and other instruments upon such terms and conditions as to resumption of the land or otherwise as to him shall seem fit."

"8. The Governor in Council may from time to time by order under his hand, to be published in the Government Gazette, prescribe the forms of Crown grants, leases, licences, and other instruments requisite for carrying these Regulations into effect.

Until otherwise notified, Crown grants, leases, and licences will be issued in the forms given in the Schedules hereto, with such variations as may be necessary to meet the circumstances of any particular case.

The forms given in the Schedules hereto for applications and other matters under these Regulations may be used with such variations as circumstances may render necessary in any particular case."

The relevant form is that in the Second Schedule to the Regulations which provided for a grant in fee simple to the grantee subject to a peppercorn rent and to the reservation of "all mines of gold, silver and other precious metals in and under the said land with full liberty at all times to search and dig for and carry away the same and for that purpose to enter upon the said lands or any part thereof."

In 1887 these regulations were repealed, and new regulations substituted. Section 1 of the new regulations contained a saving clause for transactions under the previous regulations but it is not necessary to consider the effect of the 1887 regulations in detail since the relevant form scheduled thereto corresponded in all relevant respects to that set forth in the 1882 regulations.

In 1890 the Imperial Parliament passed the Western Australia Constitution Act. The new constitution which had been passed as a bill by the legislative council of Western Australia was scheduled to the Act and by section 1 of the Imperial Act Her Majesty was authorised to consent to the bill. Prior to the passing of the Act the management and control of Crown Lands in Western Australia had been exercisable by the Colonial Office. Special provision was therefore necessary to vest that control in the West Australian legislature. Section 3 of the Act provided as follows:—

"The entire management and control of the waste lands of the Crown in the Colony of Western Australia, and of the proceeds of the sale, letting and disposal thereof, including all royalties, mines and minerals, shall be vested in the legislature of that Colony."

It was a necessary corollary of this provision that section 7 of the Australian Waste Lands Act should be repealed. Section 4 (1) of the Act accordingly provides, as follows:—

"Section seven of the Act of the Session held in the eighteenth and nineteenth years of Her present Majesty, chapter fifty-six, is hereby repealed, but all regulations made under that section, and in force at the commencement of this Act, shall continue in force until altered or repealed in pursuance of the powers conferred by this Act; . . ."

Section 4 (2) the effect of which on the appellant's rights under the Waddington agreement has been the principal topic of discussion before their Lordships reads as follows:—

"Nothing in this Act shall affect any contract or prevent the fulfilment of any promise or engagement made before the time at which this Act takes effect in the Colony of Western Australia on behalf of Her Majesty with respect to any lands situate in that Colony, nor shall disturb or in any way interfere with or prejudice any vested or other rights which have accrued or belong to the licensed occupants or lessees of any Crown lands within that Colony."

Returning to the facts of the case no Crown grants had been made pursuant to the Waddington agreement before the coming into force of the West Australian Constitution Act 1890.

From time to time after the 20th October, 1890, Crown Grants pursuant to the Waddington agreement were made to the appellant of various lands in Western Australia between Perth and Geraldton. All such grants were made in a form which corresponded to that prescribed by the Land Regulations, 1882. The grants contained no reservation of petroleum or mineral oil. The last such grant was issued on the 20th May, 1953, and grants of a total of approximately 41,866 acres were made to the appellant after the commencement of the Petroleum Act, 1936, hereinafter mentioned.

Further from time to time prior to 1911 Crown Grants of various lands in Western Australia between Perth and Geraldton were made, in similar

form pursuant to the Waddington agreement and the Debenture agreement, to the Commissioner of Crown Lands and the Minister for Lands as nominees of the Government.

By 1911 the debentures had been redeemed and in that year the nominees of the Government to whom grants had been made pursuant to the Debenture agreement assigned to the appellant all lands then vested in them pursuant to the Debenture agreement and the benefit of all reservations of minerals made by such nominees on the sale of portions of the land which had been vested in them under that agreement. In the result it is plain that subject to the question as to the effect on the Waddington agreement of any statutes passed by the Western Australia Parliament after the coming into force of the Western Australia Constitution Act 1890 the petroleum in or under the land granted to the appellant pursuant to the Waddington agreement became vested in the appellant.

Their Lordships' attention was called to two such statutes, the Land Act (No. 37 of 1898) and the Petroleum Act 1936. The material provisions of the Land Act are sufficiently set forth in paragraph 10 of the appellant's case as follows:—

“This Act repealed inter alia the existing Land Regulations, including the Land Regulations of 1887 so far as not already repealed. Section 2 of the Act provided that such repeal should not affect any right, interest or liability already created, existing or incurred.”

The material provisions of the Petroleum Act 1936 are to be found in sections 2, 9 and 10 which read as follows:—

“2. This Act shall be read and construed subject to the provisions of section four of the Western Australia Constitution Act, 1890 (Imperial), so far as the same may be applicable.”

“9. Notwithstanding anything to the contrary contained in any Act, or in any grant, lease or other instrument of title, whether made or issued before or after the commencement of this Act, all petroleum, on or below the surface of all land within this State, whether alienated in fee simple or not so alienated from the Crown is and shall be deemed always to have been the property of the Crown.”

“10. All Crown grants and leases under any Act relating to Crown land issued after the passing of this Act shall contain a reservation of all petroleum on or below the surface of the land comprised therein, and also a reservation of the right of access, subject to and in accordance with the provisions hereinafter contained, for the purpose of searching for and for the operations of obtaining petroleum in any part of the land.”

Having stated the relevant provisions of the Imperial and Western Australia statutes, their Lordships must now turn to the facts which led to the present proceedings.

On the 23rd October 1952 a permit to explore for petroleum was granted to the West Australian Petroleum Proprietary Ltd. (hereinafter called W.A.P.P. Ltd.) under the Petroleum Act 1936 over lands which included lands granted to the appellant pursuant to the Waddington agreement. On the 16th July 1954 the appellant commenced proceedings against the respondent and W.A.P.P. Ltd. claiming inter alia a declaration that the Petroleum Act 1936 and in particular sections 9 and 10 thereof had no application to the lands granted to the appellant and that the permit granted to W.A.P.P. Ltd. in so far as it purported to extend to such lands was void and of no effect. At the hearing before the Supreme Court of Western Australia (Dwyer C.J.) it appeared that the permit granted to W.A.P.P. Ltd. had expired and all proceedings against that company were stayed. Dealing with the issues between the appellant and the respondent the Chief Justice decided that sections 9 and 10 of the Petroleum Act 1936 had no application to lands granted by Her Majesty to the appellant after the coming into force of that Act but that these sections did apply to all lands granted to the appellant or to a nominee as trustee for the appellant under the Debenture agreement. The *ratio decidendi* of the Chief Justice appears to have been as follows.

(1) As he construed the Waddington agreement, it bound the Government for all time to issue land grants to the appellant in the form prescribed in the Schedule to the 1882 regulations.

(2) Section 4 (2) of the Western Australia Constitution Act 1890 obliged the Government to continue to issue grants in that form but it went no further and did not restrict the plenary legislative powers conferred on the Western Australia Parliament by the 1890 Act. Therefore

(3) If the Parliament of Western Australia in exercise of its plenary powers passed an Act affecting grants of Crown Land effect must be given to such Act.

(4) The Petroleum Act 1936 was such an act but as he construed section 9 thereof it only applied to land alienated prior to the coming into force of the Act and was not appropriate to future grants. It is not clear from his judgment why he thought that section 10 did not apply to such grants.

From this decision both parties appealed to this Board. Two main questions were argued

(1) as to the construction of the Waddington agreement ;

(2) as to the effect of section 4 (2) of the Constitution Act, 1890.

On the first question Mr. MacKenna for the appellant supported the opinion of the Chief Justice. Sir Garfield Barwick for the respondent argued that the references in clauses 46 and 49 of the Waddington agreement to "the Land Regulations of the Colony" were references to the Regulations in force at the time when in accordance with the provisions of that agreement the Government might become bound to issue certificates or deeds of grant to the contractor.

He pointed out that by the very terms of the contract the grants were not to be made until (1) each section of the rail was completed ; (2) the completed section was opened ; (3) the land had been selected. The period for completion of the railway was fixed by clause eleven at seven years, but there was power to postpone the opening until certain works of the government were completed. The selection of the land could be deferred until such time as the contractor or his assigns desired. It was therefore apparent that the contract was one with regard to the making of grants which might be called for at an indefinite future date under a system whereby the authorised form of grant at any particular moment would depend upon the form prescribed by regulations which were themselves subject to amendment from time to time.

Mr. MacKenna sought to meet this argument by saying (1) that the more natural construction of the agreement was that the reference to the Regulations was a reference to the Regulations in force at the date of the agreement and (2) that it was improbable that the contractor would have been willing to leave himself at the mercy of the government who would be free to extend the reservations beyond that of gold, silver and other precious metals for which provision was made in the second schedule to the 1882 Regulations.

The choice between these two constructions is by no means easy but their Lordships have come to the conclusion that Sir Garfield's argument must prevail. Reading the agreement as a whole and having regard to the provisions already referred to their Lordships are satisfied that it imposes upon the Crown no more than an irrevocable obligation to grant a fee simple of the surface of the land in whatever might be the form current at the date when any particular grant was called for, without the addition of a further obligation to ensure that the legislature will not at any time during the currency of the contract alter the prescribed form of grant. Such a construction does not by any means leave the contractor at the mercy of the government or the legislature, for he has as his security the fact that he will get no less favourable a grant than any other applicant could get at the time when it is made.

This conclusion is sufficient to decide the cross appeal in favour of the respondents since the grants made after the commencement of the Petroleum Act, 1936, were made at a time when under section 10 of that Act it had become obligatory to include a reservation of all petroleum in all Crown grants. What then is the effect of this conclusion on the appeal?

Their Lordships were not informed as to the dates on which the various deeds of grant were made but it is clear that many were made before the commencement of the Petroleum Act, 1936, and their Lordships will assume for the purposes of this judgment that some were made before the commencement of the Land Act (No. 37 of 1898) and therefore at a time when the form scheduled to the Land Regulations then in force did not require the reservation of petroleum. The question then is whether these last mentioned grants were exempt from the operation of section 9 of the Petroleum Act, 1936, by reason of the provisions of section 4 (2) of the Western Australia Constitution Act, 1890. In their Lordships' opinion this question must be answered in the negative.

If, as Sir Garfield argued, section 4 (2) was merely a saving provision intended to preclude any argument that the validity of pre-1890 agreements had been in some way affected either (1) by the fact of the transfer to the legislature of Western Australia of the management or control of the waste lands of the Crown in that Colony or (2) by the repeal of section 7 of the Australia Waste Lands Act, 1885, that would conclude the matter in his favour since the plenary powers in relation to peace order and good government conferred on the legislature of Western Australia would remain unaffected. But even if the true view be as Mr. MacKenna argued that section 4 (2) involved some restriction on those plenary powers, the appeal in their Lordships' opinion must fail.

On the construction which their Lordships have placed on the Waddington agreement, it would have involved no breach of it if the Crown the day after executing that agreement and before the date on which the Government were bound to issue any deed of grant had decided to modify the Regulations so as to extend the reservation in the form in the second schedule to cover petroleum. In these circumstances it seems to their Lordships impossible to hold that the provisions of either the Land Act of 1898 or the Petroleum Act, 1936 affected the Waddington Agreement or prejudiced the rights of the appellant thereunder. The contract by its terms exposed the appellant to the risk of such acts as the Petroleum Act, 1936, and accordingly the appellant cannot be heard to complain if the risk materialises.

In reaching this conclusion their Lordships have not overlooked section 2 of the Petroleum Act, 1936. That section cannot extend the ambit of section 4 (2) of the Act of 1890 and their Lordships have already expressed the opinion that whatever be the effect of the subsection it does not assist the appellant in the case before the Board.

In the course of the argument their Lordships' attention was called to a number of decisions of this Board, of Australian Courts, and of the Supreme Court of the United States. These might have been of great assistance had it been necessary for their Lordships to determine (1) whether section 4 (2) was a mere saving provision or a restriction on the powers of the legislature or (2) if it was restrictive, the extent of the restriction. Since their Lordships' conclusion depends solely on the construction they place on the contract no useful purpose would be served by a consideration of these authorities.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed, the cross appeal allowed and the action dismissed. The appellant must pay the respondents' costs in the Supreme Court of Western Australia and before this Board.

In the Privy Council

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