Privy Council Appeal No. 157 *of* 1923.

John Cooke and Company Proprietary, Limited, and others . . *Appellants*

v.

The Commonwealth of Australia and others . . . . *Respondents*

FROM

THE HIGH COURT OF AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MARCH, 1924.

Present at the Hearing:

VISCOUNT CAVE.
LORD BUCKMASTER.
LORD ATKINSON.
LORD WRENBURY.
LORD DARLING.

[*Delivered by* VISCOUNT CAVE.]

This appeal raises questions as to the extent to which sellers of skin wool (or wool taken from the skin of the sheep after slaughter) are entitled to share in a fund arising out of the purchase by the British Government of the wool clip of Australia for the years 1918–19 and 1919–20. The facts leading up to the dispute may be shortly stated as follows:—

In the month of November, 1916, the Imperial Government, being anxious to insure an adequate supply of wool for the military needs of the British and Allied Armies, entered into negotiation with the Government of the Commonwealth of Australia with a view to the purchase of the wool clip of Australia for the season 1916–1917; and by a series of telegrams exchanged between the two Governments it was arranged that the Imperial Government should acquire through the Commonwealth Government the entire crossbred and merino clip of the Dominion for the wool year ending on the 30th June, 1917, except wool which had passed under the hammer before the 23rd November, 1916, and except wool

required for local manufacturing purposes. The price of the clip as a whole was fixed at $15\frac{1}{2}d.$ per lb. of greasy wool f.o.b. Australia, with a further sum not exceeding $\frac{5}{8}d.$ per lb. for handling charges; but it was agreed that, in the event of any profit being realised from the sale by the British Government of any surplus wool which might remain after the military requirements of the British and Allied Armies had been satisfied, such profit should be shared by the British Government with the Government of Australia. During the negotiations for this agreement the Prime Minister of Australia, Mr. Hughes, summoned a Conference of persons representing the different interests in the Australian wool industry (growers, dealers and fellmongers) and took their advice on the question of price; but the agreement ultimately made was entered into between the two Governments only, and it was left to the Australian Government to make its own arrangements for the acquisition of the clip and the distribution of the price among the wool-owners.

The arrangement with the British Government having been concluded, and the preliminary assent of the wool-owners having been thus obtained, the Commonwealth Government proceeded to make its arrangements for carrying out the scheme. On the 20th December, 1916, the Governor-General, acting under the powers conferred by the War Precautions Acts, 1914–16, made regulations called the War Precaution (Wool) Regulations, 1916, and the War Precautions (Sheepskins) Regulations, 1916. By the Wool Regulations it was provided, among other things, (2) that for the purposes of the regulations there should be a Central Wool Committee consisting of two wool growers, three wool sellers, one wool buyer, one manufacturer, and one scourer or fellmonger, with an independent chairman, and also in each State a State Wool Committee constituted in like manner; (5) that the Central Committee should have the control of the administration of the regulations subject to the directions of the Prime Minister; (6) that the State Committees should comply strictly with all instructions issued to them by the Central Committee; (10) that no person should sell any wool or tops except through or to or with the consent of the Central Wool Committee or otherwise in accordance with the regulations; (12) that the limits for each description of wool throughout the Commonwealth should be fixed by the Central Committee as far as possible in proportionate relation to the prices ruling for that description in the Australian market during the months of October and November, 1916, but so that the average of the total payments per pound should not exceed the price to be paid by the Imperial Government for the wool; (13) that it should be the duty of each State Committee to arrange for the appraisement of the prices to be paid for each parcel of wool in accordance with the list of limits fixed by the Central Committee; and (24) that the general policy to be observed in the administration of the regulations should be equality of treatment. Provision was also made by the regulations for the appraise-

ment by sworn appraisers of each parcel of wool submitted according to its value. By the Sheepskin Regulations it was provided that fellmongered wool should be subject to appraisement in accordance with the Wool Regulations.

In accordance with these regulations a Central Wool Committee and State Wool Committees were duly appointed. The Central Committee divided the wool into classes or categories (848 in number) according to its description, sworn appraisers were appointed by the State Committees, and the wool-owners—whether growers, dealers or fellmongers—duly submitted their wool for appraisement. In theory a wool-owner was entitled to remain outside the scheme; but in view of Regulation 10 above quoted and of other circumstances this would have been a ruinous course, and in fact all the owners came into the scheme. Upon the completion of an appraisement the Commonwealth Government, being put in funds for the purpose by the Imperial Government, paid to the wool owner 90 per cent. of his appraisement, the remaining 10 per cent. being retained to cover any contingencies and being paid to the wool-owner at the close of the season on the 30th June. The Commonwealth Government also at the close of the season divided among the wool-owners in proportion to their appraisements any surplus of the total flat rate of 15½*d.* per lb. received from the Imperial Government for the total purchases for the season, and also all or some part of (1) the interest earned by the 10 per cent. retention money during the period of retention, and (2) the profit earned on the exchange between London and Australia; and the Commonwealth Government also expressed its intention of dividing in like manner (3) the Australian moiety of the profit from wool sold by the British Government for other than military purposes when received. No regulation or contract requiring the Commonwealth Government to divide in the manner above mentioned the items numbered (1), (2) and (3) appears to have been made; but the intention of that Government to make the division was announced by Mr. Hughes in Parliament, and effect was duly given to the announcement. In making these distributions the Commonwealth Government during the first season made no distinction between the sellers of shorn wool and of skin wool.

Towards the close of the wool season 1916–17 telegrams were exchanged between the Imperial and Commonwealth Governments by which it was agreed that the existing arrangement between them should be extended to cover the clip for the year 1917–18. These telegrams made no mention of the method of distribution in Australia of the price paid by the British Government and the earnings and profit above mentioned, but in fact the method was continued in the same manner during this second year.

By a telegram dated the 7th June, 1918, the British Government offered to purchase the Australian wool clip for the period of the war and for one full wool year commencing on the 30th June after the termination of hostilities, the appraisement prices

averaging 15½*d.* to be continued on the existing system and Australia to receive half of any excess profits from wool sold for other than military purposes. By a telegram dated the 12th June, the Commonwealth Government on behalf of the Australian wool-growers accepted this offer, the handling charges being increased to ¾*d.* per lb. This extension of the agreement was forthwith announced in Parliament by the Acting Prime Minister, Mr. Watt, who after referring to the flat rate of 15½*d.* per lb. and the handling charges added, "The Australian wool-growers will participate to the extent of 50 per cent. in any profit accruing from any sale of wool for other than British Government purposes."

Shortly after this announcement a change was made in the method of distribution which gave rise to these proceedings. On various occasions during the first two seasons the question had been raised in the Central Wool Committee (to which the administration of the regulations had been delegated) whether the fellmongers and other suppliers of skin wool should be allowed to share in the profits of the transaction over and above the flat rate of 15½*d.* per lb, or whether those profits should be divided among the growers and sellers of shorn wool only. The reason given for this proposed differentiation was that the skin-wool owners were not growers or producers of wool, but only middlemen who bought sheepskins and sold the resultant wool and accordingly did not (like the pastoralists) bear the risk incurred in rearing the sheep; and also that they did not deal in merino wool, upon which the profit would mainly accrue. But, although the matter had been discussed, no action had been taken, and the skin-wool suppliers had been permitted to share in these profits rateably with the suppliers of shorn wool. At meetings of the Central Wool Committee held on the 26th and 27th June, 1918, the question was again raised, and ultimately the following resolution was adopted:—

"Agreed unanimously:—

"That all skin wools shall be paid on the flat-rate price basis of 15½*d.* per lb. and shall not participate in any profits from any source over and above that flat-rate price. This decision shall operate from the 1st July, 1918."

This resolution was confirmed by the Acting Prime Minister and communicated to the fellmongers and other persons interested, who protested vigorously against any diminution of their share of the proceeds of future wool clips; but they were informed that skin wool would only be appraised and taken over on the terms laid down by the Committee. Ultimately the skin-wool owners under protest submitted their wool for appraisement on the above conditions, but expressed their intention of leaving their rights to be enforced by the proper tribunal.

It should be added that no question has arisen between the British and Australian Governments, the whole of the moneys payable by the former Government for the wool (which are said

to exceed £180,000,000) having been paid to the Commonwealth Government and placed to the credit of the Wool Committee; and also that (as their Lordships were informed) the Commonwealth Government have no intention of retaining for the public benefit the share of profits withheld from the skin-wool owners but propose to divide it among the owners of shorn wool.

On the 7th October, 1920, the extended period of purchase having expired and a large sum representing profits being in the hands of the Central Wool Committee, or being about to be paid to them for distribution, the appellants on behalf of themselves and all others, the vendors or suppliers of skin wool under the provisions of the regulations. brought this action in the High Court of Australia against the Commonwealth of Australia, the Prime Minister (Mr. Hughes). the Central Wool Committee and the members of that Committee, claiming a declaration that the vendors of skin wool were entitled to participate with the vendors of shorn wool in the distribution of all moneys paid or tc be paid by the Imperial Government in respect of wool appraised or sold, and in the distribution of all other moneys payable to suppliers or vendors of wool under the regulations, and claiming consequential relief. At the first hearing of the action the High Court (consisting of Knox C.J., and Gavan Duffy and Starke JJ.) delivered a judgment whereby they held that the plaintiffs were not (as they contended) entitled to recover on the basis that the Commonwealth had contracted with the plaintiffs or had placed itself in the relation of agent to the plaintiffs or any of them; but it having been suggested during the argument that the suit was in fact for the administration of a fund in the hands of the Commonwealth or of the Central Wool Committee or for the determination of the rights of skin-wool suppliers and shorn-wool suppliers in that fund, the Court declined to determine that question in the absence of some representatives of the shorn-wool suppliers as parties to the suit and gave leave to amend by adding parties for that purpose and otherwise. Thereupon the respondents Mackay and Murphy were added as defendants and were appointed by the Court to represent all vendors and suppliers of shorn wool, and the pleadings were duly amended. At the resumed hearing of the suit the learned judges of the High Court held that there was not (as then contended) any enforceable contract of purchase and sale between the Imperial Government and the owners of skin and shorn wool, but at the most an arrangement between the two Governments not cognizable by any Court of Law, and that the distribution of the moneys received from the Imperial Government had been left by the Commonwealth in point of fact and by the regulations in point of law to the wisdom, fairness and discretion of the Central Wool Committee; and the Court accordingly dismissed the action with costs. Thereupon leave was obtained to prosecute the present appeal.

The principal contention urged on behalf of the appellants was that on the true reading of the telegrams exchanged between

the two Governments and the other evidence in the case a contract was concluded between the Imperial Government and the Australian wool-owners (by the Government of the Commonwealth as their agent) for the purchase and sale of the wool clip during the currency of the arrangement; and in particular that the telegrams of the 7th and 12th June, 1918, by which the arrangement for the purchase of the clip was extended (in the events which happened) from the 1st July, 1918, until the 30th June, 1920, constituted such a contract. The contract so made, it was said, expressly or impliedly entitled the whole body of wool-owners to have the interest and profits in dispute (as well as the fixed price of 15½*d.* per lb.) divided among them according to the method followed in the two preceding years, and this right could not be modified by any action of the Commonwealth or of the Central Wool Committee. In support of this view counsel for the appellants rel.ed upon the terms of the telegrams of the 7th and 12th June, 1918, which were as follows :—

Cablegram dated 7th June, 1918, from the Secretary of State for the Colonies to the Governor-General ;—

> " As the existing arrangements for the purchase of wool are coming to an end His Majesty's Government are anxious to enter into negotiation to extend them on a basis suitable to both Governments. His Majesty's Government are willing to purchase the Australian clip for the period of the War and for one full wool year commencing the 30th June after the termination of hostilities. We propose that appraisement prices averaging 1*s.* 3½*d.* shall be continued on present system. We are willing to pay slight increase for handling charges if rendered necessary by the increased cost. We propose that the basis price shall be final as regards wool used for British Government purposes. We propose that as regards wool sold for other purposes Australia shall receive half of any excess which may be obtained over basis prices.
>
> " It is understood that during the currency of the contract the Imperial Government will not purchase the wool clips of other overseas countries on a higher basis than the Australian without first consulting Government of Commonwealth of Australia. Of course, in estimating a basis corresponding to all Australian basis reasonable allowance must be made for the value of the partnership arrangements with Australia."

Cablegram dated 12th June, 1918, from the Governor-General to the Secretary of State for the Colonies :—

> " Replying to your cable of the 7th June, the Commonwealth Government on behalf of Australian wool-growers accepts the offer of His Majesty's Government to extend the purchase of the Commonwealth wool clips for the period during the currency of the War and one full wool year commencing on the 1st July after the termination of hostilities and ending on the 30th June following.
>
> " The flat rate of 1*s.* 3½*d.* per pound of greasy wool as at present shall be continued, but the rate for handling charges shall be raised from ⅝*d.* to ¾*d.* per pound. Such prices shall be final as regards wool for British Government purposes. As regards wool sold for other purposes Australia shall receive half of any excess profits which may be obtained over basis prices. Provisions as to Australian control appraisement methods payment as under current agreement."

It was urged that the acceptance of the British Government's offer by the Commonwealth Government "on behalf of Australian wool-growers" was proof of the alleged agency, and that the concluding words of the acceptance "provisions as to Australian control appraisement methods payment as under current agreement" were sufficient to import into the bargain the then existing method of distributing the purchase price and share of profits among all the suppliers of wool.

In their Lordships' opinion these contentions cannot be sustained. The proposal contained in the British Government's telegram of the 7th June was for a continuance during a further period of the existing arrangement between the two Governments; and when the documents on which that arrangement rested are examined it is found that from beginning to end the Commonwealth Government was treated as acting as the agent, not of the Australian wool suppliers, but of the British Government. In support of this view the following telegrams may be quoted :—

> 22nd November, 1916, Governor-General to Secretary of State :— "The Commonwealth Government to be the sole agent for Great Britain in the whole transaction."
>
> 30th November, 1916, Secretary of State to Governor-General :— "His Majesty's Government concur in proposal that Commonwealth Government shall act as sole agent of Imperial Government in the transactions."
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> 11th December, 1916, Governor-General to Secretary of State :— "Price arrived at, viz., 15½*d.* per pound greasy wool is the price fixed by growers and the price at which we are prepared to acquire clip on behalf of British Government."
>
> 13th December, 1916, Secretary of State to Governor-General :—"With reference to your telegram of the 10th December, His Majesty's Government agree to the proposal that wool clip should be secured on its behalf by Government of the Commonwealth of Australia on the basis of average price of 15½*d.* per pound greasy wool in good condition," &c., &c.

These expressions in the telegrams were confirmed by statements made by Ministers in Australia. For instance, at the Conference with representative wool-growers held on the 21st November, 1916, while the arrangement was being negotiated, the Prime Minister (Mr. Hughes) stated clearly that the Commonwealth Government would act as agents of the British Government; and like statements were made in Parliament by Mr. Hughes on the 14th and 20th December, 1916, by Sir John Forrest (the Treasurer) on the 6th March, 1917, and by Mr. Hughes on the 25th July, 1917. Mr. Hughes' statement on the 20th December, 1916, was in the following clear terms :—

> "The purchaser is the Imperial Government. The agent for the Imperial Government is the Commonwealth Government, and the head of the Commonwealth Government is in actual control of the scheme."

When the documents are read as a whole, it is plain that throughout the transaction the Commonwealth Government was acting as the representative of the Imperial Government authorised to secure the wool clip for that Government on the basis price of 15½*d.* per pound, and not as agent for an indeterminate body of

wool owners. The offer of the 7th June, 1918, was made to the Commonwealth Government in that capacity, and not through that Government to the wool growers, and the Commonwealth Government could not by purporting to accept the offer on behalf of Australian wool-growers, fix the British Government with a contract with a large number of persons of whom they knew nothing and with whom they did not intend to contract. The expression quoted probably meant only that the offer was accepted in the interest of the wool-growers.

Further, the offer of the 7th June did not contain any stipulation that the existing practice, by which not only the price of the wool but also the Australian share of profits and earnings was distributed among the wool owners, should be continued. This practice does not appear to have been even communicated to the Imperial Government, and it formed no part of the arrangement under which the purchase of wool was effected during the seasons 1918–1919 and 1919–1920. The expression "appraisement prices averaging 1*s.* 3½*d.*," contained in the telegram of the 7th June, plainly did not include the profits and earnings; and the reference in the concluding sentence of the telegram of the 12th June to "methods of payment," is naturally to be referred to the payments made by the Imperial Government to the Commonwealth Government rather than to those made by the latter Government to the wool owners. The attitude of the Imperial Government throughout was that described at a later period by the British Director-General of Raw Materials when (in a telegram quoted in the judgment of the High Court) he said "This Department is not concerned with the distribution in Australia of wool profits. Lump sums will be paid to Commonwealth Authorities, who will make the distribution on their own responsibility."

Taking the evidence as a whole their Lordships are of opinion that the only contract or arrangement into which the British Government entered was an arrangement with the Commonwealth Government, not enforceable by any Court, to purchase the clip through the Commonwealth Government at the all-round price of 15½*d.* per lb. with an addition for handling charges, and to pay to the Commonwealth Government one-half of any profits derived from the sale of wool for other than military purposes, and that it was left to the Commonwealth Government to make its own terms with the wool owners as to the distribution among them of the price paid for the wool and any share of profits. It may have been contemplated by both Governments that the flat rate should go to the wool-owners; but the share of profits was to be paid to the Commonwealth Government for the benefit of Australia, and it was left open to that Government either to pay the amount into the Consolidated Fund of the Commonwealth or to dispose of it in any other way. As to the earnings in interest and exchange, the British Government never attempted to control their disposition or even referred to their existence. As to these profits and earnings, therefore, there was no contract by the Imperial Government

with the wool owners of any kind, nor was there as between the wool owners and the Commonwealth Government any relation of principal and agent which would entitle the former to an account of them.

But it was argued in the alternative that even if this be so, at all events the Imperial Government instructed the Commonwealth Government as their agents to offer to purchase the wool at the price specified and upon the existing terms as to distribution of the profits, and that these instructions could not be modified by any resolution of the Central Wool Committee. To this alternative contention there are two answers, either of which is sufficient to dispose of it. In the first place (as already indicated) the Imperial Government gave no instructions for purchase on the existing distribution terms, with which that Government in no way concerned itself. And in the second place, even assuming that such instructions were given and that the conditions in fact laid down by the Wool Committee departed from those instructions, it is not open to any wool supplier to complain of the variation. The Wool Committee (whose action has been adopted and ratified by the Commonwealth Government) elected to make the offer of purchase upon the terms of their resolution and on no others. The wool owners could only accept or refuse the offer as made to them; and they could not, by purporting to accept a different offer or by sending in their wool under protest, put upon the Government a contract to purchase upon terms different from those contained in the offer actually made. This argument, therefore, also fails.

Reference was also made to the decision in *Carlill* v. *Carbolic Smoke Ball Company* (L.R. 1893, 1 Q.B.D. 256) and to similar cases in which it has been held that an offer made by advertisement, when accepted by any of the persons to whom it is addressed, may constitute a contract; and it was argued that, on the promise of the Commonwealth Government to divide the profits among the wool owners being announced in Parliament and accepted by those owners by the delivery of their wool, a contract ensued which entitled each owner delivering his wool upon the faith of the promise to have the terms performed in his favour. No precise evidence appears to have been given of the publication of the statement made by Mr. Watt in Parliament, but it may well be that the announcement was generally known among wool owners; and if it had been proved that the skin-wool owners had delivered their wool on the faith of that announcement they might have been held entitled to payment on the terms announced. But in fact no such proof was given. On the contrary it was clearly proved that before any skin wool of the 1918–19 and 1919–20 clips was accepted for appraisement notice was given to the appraisers, and through them to the wool suppliers, that the suppliers of skin wool would not participate in any dividends over and above the flat rate of 15½*d.* per pound greasy wool, and that skin wool would not be accepted for appraisement except on that condition. There was, therefore, when this skin wool was

delivered, no offer outstanding to purchase that wool except on the basis that the sellers would not participate in the profits or earnings in question, and accordingly there was no contract with them except on that basis.

As a last alternative it was suggested that the Commonwealth Government must be taken to have requisitioned the appellants' wool and accordingly must pay for it on requisition terms, which (it was said) would not be less favourable to the appellants than those which were conceded during the earlier period. In their Lordships' opinion there is no foundation for this suggestion. Regulation No. 10 of the Wool Regulations did indeed forbid the sale of wool except through or to or with the consent of the Central Wool Committee or otherwise in accordance with the regulations ; and this regulation no doubt made it difficult, if not impossible, for a wool owner to dispose of his wool except to the Commonwealth Government and on the terms offered by that Government. But there was no legal compulsion on any wool owner to bring in his wool for sale. The Commonwealth Government proceeded throughout by the method of agreement, and resort was never had to the method of requisition.

For these reasons their Lordships agree with the decision of the High Court that the action fails, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

JOHN COOKE AND COMPANY
PROPRIETARY, LIMITED, AND OTHERS

v.

THE COMMONWEALTH OF AUSTRALIA AND OTHERS.

DELIVERED BY VISCOUNT CAVE.

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