

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of the
Southland Frozen Meat and Produce Export
Company, Limited, v. Nelson Brothers, Limited,
from the Court of Appeal of New Zealand,
delivered March 8, 1898.*

Present :

THE LORD CHANCELLOR.

LORD HERSCHELL.

LORD MACNAGHTEN.

LORD MORRIS.

SIR RICHARD COUCH.

— — — — — [Delivered by Lord Herschell.] — — — — —

IN this case the Appellants brought their action to recover damages in respect of the alleged breaches of an agreement which they entered into on the 26th June 1891, with the Respondents. They allege that there have been two breaches of the 8th clause of that agreement. The agreement, speaking generally, was an agreement by which the Respondents were to purchase all the output of the Appellants' freezing works at Bluff. There are only two clauses to which it is necessary to call any special attention, the one which gives rise to the complaint and the one which precedes it. The 7th clause provides, "That in the event of Nelson Brothers " Limited, during the said term of three years," which was the term during which this contract was to operate, "making a contract for a period " of one year or more with any company, body, " or person carrying on within New Zealand the " business of freezing for owners or growers of " stock, by which higher f. o. b. prices or better " terms than those named herein shall be offered,

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“ or given by Nelson Brothers, Limited, then
 “ Nelson Brothers, Limited, shall either give the
 “ same terms to the company”—that is the
 Appellants—“ or in the event of their declining
 “ to do so, shall allow the company, if it so desires,
 “ to terminate this agreement on the company
 “ giving one month’s notice.” The 8th clause
 is as follows:—“ That Nelson Brothers, Limited,
 “ shall not during the said term of three years
 “ erect or assist, or be in any way concerned or
 “ interested in the erection or use of freezing
 “ works on land or water at the Bluff or within
 “ the limits of the Southland or Wallace Counties
 “ without making special arrangements with the
 “ company, nor do anything of the like nature
 “ which may in any way interfere with, or
 “ restrict the output business trade or profits of
 “ the company.” Now, the first breach alleged
 is that during the currency of the three years
 Nelson Brothers, Limited, the Respondents,
 entered into a contract with a Mr. Ward, who
 had erected freezing works in the neighbourhood
 of Bluff, by which they agreed on certain terms
 to take the whole of the output of his freezing
 works. There can be no doubt that such an
 agreement is within the provisions of section 7,
 and that the Appellants were entitled to insist
 upon getting the same terms as Mr. Ward, and
 if they were refused such terms, could have
 terminated their agreement by giving a month’s
 notice; but it is said that section 8 was
 broken by the agreement entered into with Mr.
 Ward, and that, although that agreement was
 within the general terms of section 7, yet
 nevertheless section 8 takes it out of the general
 terms of section 7 and extends to it a more
 stringent provision.

Now, the question turns upon the meaning
 of the words “erect or assist or be in any
 “ way concerned or interested in the erection

“ or use of freezing works at Bluff.” Was the purchase under an agreement by which they were to take all the frozen meat produced at Ward’s works within any of these words? It certainly was not an erecting or assisting in the erection; but it is said that it was an assisting or being concerned, or interested in the use of the works. Their Lordships agree with the Court below, that it is not quite certain that the word “assist” is intended to apply to the word “use,” and may not be limited to the word “erection,” but their Lordships do not dwell upon that. They assume, for the purposes of the argument, that the word “assist” governs the word “use,” as well as the word “erection.” It seems to their Lordships that this agreement, especially in connection with clause 7, which has just been read, and which throws light upon it, must be construed in a business fashion, and that the words must not be applied to everything that might be said to come within a possible dictionary use of them, but must be interpreted in the way in which business men would interpret them, when used in relation to a business matter of this description.

It seems to their Lordships that the first matter dealt with and prohibited, is the erecting or assisting in the erection; but then it was not enough to prohibit the erecting or assisting in the erection, because somebody else might erect and complete the works, and the same prejudice would follow, whether they used the works, which they themselves erected, or used the works which somebody else had erected. Therefore it is also directed against the being interested, or concerned, or assisting in the use. Now, “the use” seems to their Lordships to mean the manufacturing use, the use as works for the freezing business which was carried on there. That is, in the opinion of their Lordships, the

business sense of "use" as found in this clause, in connection with the words "freezing works" and the word "erection." Now if that be the true meaning, it seems perfectly clear that a contract to buy all the produce of the works, is not in any reasonable sense, either an assisting in the use of the works or being interested or concerned in the use of the works. If that conclusion be arrived at, it seems equally to settle the question whether the latter part of the clause assists the Appellants, whereby the Respondents undertake not to do anything of the like nature which may interfere with, or restrict the output or profits or business of the Appellants. When the nature of the earlier part of the clause and what is there prohibited has been ascertained, and when the conclusion has been arrived at that its nature is such as has been indicated, then it seems that this agreement, to take all the output of Ward's freezing works, or the acting upon it, is not doing anything of the like nature, with that which is prohibited in the earlier part of the clause.

The other breach alleged is this: It is said that in May 1893, some months prior to the termination of the three years, an agreement was entered into by which the Respondents were to become the purchasers of Ward's works at the commencement of the year after the three years had terminated. Certainly an agreement for the purchase of the works at that date, could not of itself be said to be an erecting or an assisting or being in any way concerned or interested in their erection or use. It is not pretended that unless buying the output was an assisting or being concerned in the use, the Respondents were concerned in any other way, but it is said that in the agreement it was stipulated that by the time when the sale was to be completed certain ancillary or additional works were to be completed also, so as to make the works

completely satisfactory; and the suggestion is that although the agreement itself, if it had been an agreement for completed works, might not have been a breach of the 8th article, yet that inasmuch as the agreement provided for the erection of a boiler-house and certain cottages that constitutes a breach. Their Lordships are unable to adopt that view. It does not seem to them that, giving full effect to the argument, it can possibly be said that by reason of that agreement being entered into the Respondents assisted, or were in any way concerned or interested in the erection of the freezing works at Bluff.

One other point is made. On the 7th November 1893, less than two months before the three years expired, Mr. Ward appears to have been pressed for money. He asked Messrs. Nelson Brothers, the Respondents, to let him have a loan, not in the least in connection with the expenditure of money upon the freezing works. There is no evidence that any of it was spent or intended to be spent in that way. They gave him a bill at two months sight, which would be due in January. How can it be said that a loan so made, for which no doubt they had the security of the agreement that they had entered into, which was to take effect on the 1st January, was an erecting or assisting or being in any way concerned or interested in the erection or use of the freezing works? Their Lordships are unable to think that this question can be answered in any way but one, namely, that it was not a breach of that stipulation.

For these reasons their Lordships will humbly advise Her Majesty that the Judgment appealed from ought to be affirmed. The Appellants must pay the costs.

