

The Australian Woollen Mills Ltd. - - - - - *Appellant*

v.

The Commonwealth of Australia - - - - - *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 23RD NOVEMBER, 1955

Present at the Hearing:

VISCOUNT SIMONDS
LORD OAKSEY
LORD REID
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW

[*Delivered by* LORD SOMERVELL OF HARROW]

This is an appeal by special leave from an Order of the High Court entering judgment for the respondent with costs.

The appellant manufactures woollen and worsted goods for the Australian market. During the war years the respondent bought all the Australian wool clip. The sale of that wool to the United Kingdom excluded wool required for local manufacture. There was control by the respondent of prices for woollen and worsted goods. The sales by the respondent to the appellant and other manufacturers were at a price fixed with reference to the controlled prices of the manufactured articles. This is described by the High Court as 'in effect' a subsidy. There is a small item of claim in this case £2,121 which relates to wool purchased by the appellant in the period 1942-46 when the position was as above. For reasons which will appear the decision in this case does not require an investigation of the provisions of that procedure. This appeal arises out of and depends on the arrangements made for 1946-47 and 1947-48.

The respondent ceased as from June, 1946, the beginning of the season, to buy all the wool clip and auctions were then reintroduced. The prices of woollen and worsted goods were still controlled. It was realised that the auction prices which local manufacturers with others would have to pay might be such that the manufacturers could not manufacture to sell at the controlled prices unless they got financial assistance. There was therefore a scheme of subsidies in respect of purchases of wool to be manufactured into articles for the home market.

The appellant claims that under this scheme the subsidy payments became due to it under a series of contracts. There was no contract form signed by each party. The appellant contends that the letters to which reference will be made later constituted offers, the terms of which were varied from time to time, to be accepted by a purchase by a manufacturer, and further contends that under these contracts it is entitled to subsidy on all purchases between June, 1946, and June, 1948. The actual way in which the sums claimed are arrived at depends on later complications, which will emerge in due course.

The first answer of the respondent to this claim is that there were no contracts; that the basis of the scheme was not contractual but administrative, and that the letters contained statements of policy and not contractual offers. In the alternative the respondent submits that if there were contracts nothing is due under them. This is based on a contention that the respondent was entitled to refuse to pay subsidy on stocks over a certain amount held at the end of the scheme and to reclaim subsidy on such stocks if already paid. The respondent maintains that if there were contracts they contained a term to that effect.

There are other issues which it is desirable to indicate in outline. The subsidy was discontinued as from 31st July, 1948. Price control of woollen goods by the respondent came to an end in September, 1948. It passed to the States. There is no evidence as to what was the exact position after that date.

Under the scheme the subsidy had been paid shortly after the purchases of wool. The object of the subsidy was to enable manufacturers to sell in the home market at the controlled prices and if the products made with the wool were exported it is not disputed that the subsidy had to be repaid, whatever the legal position. The respondent also claimed that reasonable stocks only were eligible for subsidy. If when the scheme came to an end subsidy had been paid on stocks purchased in excess of a reasonable quantity it had to be repaid. A fortiori no subsidy was claimable on such stocks if there had been no payment. Reference has already been made to the respondent's contention that if there were contracts this was a term of them.

Correspondence passed between the parties in the period following June, 1948. The respondent claimed that the appellant had to repay £67,282 on the grounds hereinbefore set out. The appellant paid this sum on 9th May at the same time putting forward a claim to £92,000 the basis of which will be explained later.

The appellant's main claim includes this £67,282 which, apart from the small item of £2,121, represents subsidy on wool bought in the period June, 1946, to July, 1948. It submits in the first instance that the repayment should be disregarded or treated as provisional. It has however an alternative claim for this sum as money had and received to its use, it having been paid, as it is alleged, under protest and without prejudice. This claim is maintained, though it be held that there were no contracts, on the following ground. Although a scheme of this kind be administrative and not contractual in that the party subsidised could not sue at law, still the respondent, it is said, could not recover back money that had once been paid. In the present case the respondent did not suggest that if wool had in fact been turned into goods which had been marketed in the home market, there could be a claim for repayment of subsidy already paid. The respondent does however submit that having regard to the general and special provisions of this scheme it was entitled to demand the repayment of the sums which made up the £67,282.

This alternative claim of the appellant raises two issues. First, was the respondent entitled under the scheme to demand the repayment of the money? Second, if it was not so entitled, was the "protest" of such a nature as to entitle the appellant to sue for the recovery of money paid?

These in outline are the issues.

The first, contract or no contract, turns on the construction of the letters. The appellant submitted that in construing them the Board should have regard to the fact that the respondent had substantial stocks of wool of which it would be anxious to dispose. Their Lordships get no assistance from this fact. There is no ground for suggesting that this "interest" of the respondent in any way entered into this scheme.

The appellant further submitted that the respondent wanted the manufacturers to purchase so that there could be woollen goods on the home market. There was therefore an implied request to do so. Let this be admitted. It does not appear to their Lordships to advance the argument. There may be cases where the absence of a request negatives the

existence of a contract. The presence of a request does not however in itself establish a contract. Manufacturers may be requested to come into and work a non-contractual scheme. On this aspect of the argument their Lordships think with all respect there was force in the criticism of that passage in the judgment of the High Court in which it is said that there was nothing in the nature of a request or invitation.

The terms of the contracts are said to be contained in some thirty-six letters covering the period from 1946 to 1948. In considering whether a series of contracts were made the first two or three letters setting out the lines of the scheme are decisive. If these letters constituted a contractual offer the later letters could be read as varying its terms; if they do not constitute a contractual offer there is nothing in the later letters which does so. The first letter is from the Commonwealth Prices Branch to the Associated Woollen and Worsted Textile Manufacturers of which the appellant is a member. The second letter is from the Wool Realization Commission to the appellant. It is desirable to set out these two letters in full.

Commonwealth Prices Branch to Associated Woollen and Worsted
Textile Manufacturers.

20th June, 1946.

Dear Sir,

I refer to recent discussions between the Wool Advisory Committee and the Associated Woollen and Worsted Textile Manufacturers of Australia, the Chairman and the Executive Member of the Australian Wool Realization Commission and the representatives of the Commonwealth Prices Commissioner, relating to the subsidisation of raw wool purchased by Australian Manufacturers for domestic consumption under auction conditions which will operate after the 30th June 1946.

The Commonwealth Government has decided that subsidy will be paid to maintain the price of wool purchased for domestic use by Australian manufacturers when auctions recommence after the 30th June, 1946.

The Subsidy will be calculated as the difference between the present basic price of wool for domestic consumption and the average market price for each auction series. Manufacturers will be required to carry any excess cost by purchasing above average market level, but under certain specified conditions, will be allowed the benefit of keen buying at lower than average market level. The amount of subsidy payable will be as determined by the Australian Wool Realization Commission.

The administration of the Scheme will be vested in the Australian Wool Realization Commission and complete details of procedure will be made available to your members as soon as possible.

A copy of a press statement issued by the Minister for Trade and Customs is attached.

Yours faithfully,

(Sgd.) P. D. KEWISH,

Secretary.

The Secretary,

Associated Woollen and Worsted
Textile Manufacturers of Australia,
Flinders Street,
Melbourne. Vic.

The Secretary,

National Council of Wool Selling
Brokers of Australia,
120 King Street,
Melbourne. Vic.

PRESS STATEMENT of Minister for Trade and Customs.

The Minister for Trade and Customs (Senator J. M. Fraser) announced today that subsidy would be paid to maintain existing prices of wool to Australian Manufacturers for utilisation in goods for domestic consumption, when auction sales recommence after the 30th June, 1946.

The purpose of the subsidy is to enable Australian manufacturers to compete with overseas buyers in a manner that will avoid interference with normal auction purchases.

Senator Fraser stated that subsidies would be paid to manufacturers to reimburse any excess paid in purchasing at prices for domestic consumption but not in excess of the average market level for individual wool types at a series of auction sales. This ensures that manufacturers will not bid extravagantly on the assumption that the Commonwealth Government will meet deficiencies resulting from unlimited bidding.

"The aim of the proposal," said Senator Fraser, "is to place Australian manufacturers as near as possible in the same bidding position as if they were buying in a competitive market prior to the war. As an inducement to efficient buying manufacturers will obtain benefits from purchases made below average market level. The scheme will be so designed as to ensure rapid payment of subsidy and will be administered by the Australian Wool Realization Commission on behalf of the Commonwealth Government and the amount of subsidy payable to manufacturers will be as determined by the Commission."

Canberra. A.C.T.

June, 1946.

Australian Wool Realization Commission to Australian Woollen Mills Pty. Limited.

Head Office: Pitman House,
540-542 Little Collins Street,
Melbourne.
C.1.

7th Aug., 1946.

Dear Sir,

The Commonwealth Government proposes to grant a subsidy on wool purchased at auction by Australian Manufacturers in the 1946/7 Season, and this Commission has been charged with the calculation and payment of the subsidy.

The Commission realises the necessity for as prompt payment of the subsidy as possible to Manufacturers, and full details of subsidy procedure will be made available to all Manufacturers at an early date. However, the following interim information is advised to you in respect of the procedure to operate *for subsidy on wools purchased for Australian Manufacturers at auction* :—

(A) In general, Subsidy on wool purchased at auction will be paid by this Commission in full immediately the amounts have been computed for each series.

(B) It is anticipated that payments will be completed within 28 days from the close of each series.

(C) *Payment will be automatically made from the Commission's records of auction results* and no claim will be required from the Manufacturer.

(D) With each payment, there will be forwarded a statement showing in respect of each lot purchased—

(i) The basic cost assessed, i.e. at present, appraisement plus 10% for Fleece wools and appraisement plus 5% for Skin wools.

(ii) The average greasy market price established.

(iii) The subsidy as calculated by the Commission.

In discussions between the Commission and the Advisory Committee of Woollen and Worsted Manufacturers on 19th and 20th

March, 1946, Manufacturers were advised of the Commission's responsibilities as to ensuring that the reserve prices for Australian-grown wool, provided for under the United Kingdom-Dominions Wool Disposals Plan, are made effective; and it was understood at that meeting that Members of your Association would be willing to purchase all wool required by your Members at auction with the following exceptions:—

(A) Wool produced by the Manufacturer himself and used by him in his own factory.

(B) Wool purchased by a country Manufacturer on a normal quantitative basis according to his normal policy from producers in his district.

(C) Wool the product of fellmongering the skins owned by the Manufacturer and used by him in a continuous process of manufacture.

You should note that auction purchases of raw wool will provide the basis of subsidy to Manufacturers in so far as such wool is used in the manufacture of goods sold for Australian domestic consumption, and therefore any Manufacturer who does not buy his wool at auction will have to submit to the Commission an application for Subsidy, and in each case he will need to supply:—

(A) The names of the persons from whom he has bought wool.

(B) The quantities purchased from each of these persons, and full details of the description and prices of such purchases.

As stated previously, when a Manufacturer purchases wool at auction, it will not be necessary for him to submit an application to the Commission for subsidy because the Commission will have available to it from its records of auction results all the necessary information for calculation of the subsidy and automatic payment to the Manufacturer.

It should also be noted that a Manufacturer purchasing wool other than at auction will not receive subsidy up to average market level when the price paid by him for such wool is below average auction level. The subsidy, in this case, will be the difference between basic cost and the actual price paid by the Manufacturer for the wool in question whereas in the case of wool purchased through auction, the subsidy will be the difference between the basic price and the average auction market level, irrespective of the auction price paid for the wool.

The attention of Manufacturers is also drawn particularly to Section 17 of the Wool (Contributory Charge) Assessment Act, 1945, which reads:—

“Except in pursuance of an arrangement with the Commissioner, a person shall not subject any wool, other than wool purchased by him, to any process or treatment of manufacture, or export any wool, unless—

(a) The wool has first been submitted at an appraisement place or, with the approval of the Commission, at any other place, for appraisement by or on behalf of the Commission, and has been so appraised; or

(b) He is in possession of a certificate issued in respect of the wool under Section Fifteen of this Act.

Penalty: Two Hundred Pounds.”

In submitting wool purchased by a Manufacturer, otherwise than at auction, for appraisement for purposes of the Contributory Charge Assessment Act, the prescribed form must be completed and forwarded to the Commission.

To enable the wool to be properly examined and appraised it will be necessary for such wool to be displayed in accordance with instructions from the Commission and on premises approved by the Commission as suitable for the appraisement of wool. If the premises of the Manufacturer are unsuitable for this purpose, the Commission may order the wool elsewhere for appraisement.

The Commission is endeavouring to communicate with all Woollen and Worsted Textile Manufacturers understood not to be Members of the Association, and to advise them of the above arrangement which, of course, must apply on the same basis to all Manufacturers of goods made from wool.

The Commission is charged by the Government with the responsibility of doing all things necessary to ensure that the United Kingdom-Dominion Wool Disposals Plan is successful, particularly in regard to making effective the reserve prices provided for under the Plan, and the Commission feels sure that you will co-operate in every way possible.

Yours faithfully,

(Sgd.) H. B. LEIGH,
Secretary.

The Manager,
Australian Woollen Mills Pty. Limited,
46 Martin Place,
Sydney, N.S.W.

Their Lordships are of opinion that these letters cannot be read as an offer or offers to contract. They contain a statement of policy. The "scheme" is to be administered by the Commission which is itself to determine the amount of the subsidy. No single phrase or provision may be decisive. The letters must be read as a whole. If the intention had been to provide for a series of contracts one would as between these parties have expected a form containing the provisions which if disputes arose would be construed and applied by the courts. The number of uncertain factors make it natural that the basis should be administrative. Nor is there anything remarkable in the fact that the manufacturers should be content to act on the respondent's statement of policy. A further letter of 20th August elaborating the procedure emphasises the control which the respondent through the Commission was keeping on the scheme.

The later letters contain no sentences which support the appellant's contention and many which illustrate the administrative nature of the scheme. Some of these are cited below in dealing with the later points.

It is unnecessary therefore to consider the respondent's alternative claim that if there were contracts the terms have been fulfilled, but it is necessary to consider on the appellant's alternative claim whether the respondent under the scheme was entitled to demand the repayment of the £67,282.

It was not disputed that the subsidy could be demanded back if goods made with the wool "subsidised" were exported. This was referred to in a letter from the Commission of 20th August, 1946. As and from the 20th March, 1947, the appellant, with other manufacturers, was required to sign a Declaration to be forwarded with its subsidy statements. It contained the following provisions:—

"(a) that the wool shown in this statement will be used by the said manufacturer for purposes of manufacture of goods within the Commonwealth (excluding goods which are notified to me as being ineligible for such subsidy)

(b) that the above-mentioned wool or no part of that wool will be resold without prior notification being given to the Australian Wool Realization Commission (for these purposes "resold" is deemed to include any transfer of title in wool oddments or offsorts for a consideration or as remuneration or part-remuneration to any person processing such wool on behalf of a manufacturer)

(c) that if all or any of the wool is not for any reason used for manufacture of goods eligible for subsidy, the subsidy paid will be refunded to the Australian Wool Realization Commission as agent for the Commonwealth

(d) that the above information is a true and correct statement of wool for manufacture of subsidised goods within the Commonwealth purchased by the said manufacturer at the auction series for which this statement is submitted."

As the High Court point out the subsidy is regarded as on the manufactured goods rather than on the wool, though paid conditionally on the purchases of the wool.

The question of excess stocks is dealt with in a circular letter from the Commission of 21st April, 1947 :—

Pitman House,
540-542 Little Collins St.,
Melbourne, C.I.

21st April, 1947.

Dear Sir,

The purpose of this letter is to inform you of an instruction received by the Commission from the Commonwealth Prices Commissioner, relating to a condition governing the payment of subsidy on raw wool purchased during the remainder of the 1946/47 season.

The Commonwealth Prices Commissioner has ruled that subsidisation of wool purchased by manufacturers during the 1946/47 season is proposed only on the quantity of wool necessary for the manufacturer to carry on his normal manufacturing activities to the 30th June, 1947, and for such period after that date during which he is unable to obtain supplies of wool from the market.

If any manufacturer is found to have purchased wool in excess of these requirements, payment of subsidy on such excess will be withheld by the Commission.

Yours faithfully,

(Sgd.) J. H. WILLIS,
for Secretary.

The point was further emphasised on 30th January, 1948.

At some date during that year the question of the respondent's ceasing to control the prices came under consideration and there was clearly no question of the respondent continuing the subsidy after that. As the whole purpose of the scheme was to enable manufacturers to keep in business at the controlled price it would be contrary to the scheme if there was a subsidising to any substantial extent of goods to be sold after control had ceased.

The last paragraph of a letter of 20th February, 1948 is relevant :—

It is important to note that there is no guarantee that stocks held at the 30th June, 1948, will remain subsidised to the present basis. All or portion of the subsidy on stocks held at that date may be adjusted by the Commonwealth Government if it deems such action necessary. This should be borne in mind in the formulation of purchasing programmes as well as the fact that subsidy may be withheld forthwith on purchases which are deemed excessive or inappropriate to a mill's functions.

Early in June, 1948, there was an announcement that the subsidy would be discontinued as from 31st July. In a letter of 18th June the Commission reminded manufacturers of the previous ruling as to reasonable stocks and invited discussions as to what would be reasonable stocks at the 30th June. The first results of these discussions was a decision by the Commission that 5½ months' stocks would be reasonable. Control ceased in September. There was a complication as to equalising stocks among manufacturers which does not help in the present issue. On 30th August, 1948, the Commission wrote a letter from which the following is an extract :—

" Adjustment of subsidy on stocks in excess of 5½ months requirements as from 30th June, 1948.

" The Commonwealth Prices Commissioner has now declared that goods manufactured from wool stocks in excess of 5½ months normal requirements from the 30th June 1948 are ineligible for wool subsidy.

Therefore, in accordance with sub-paragraph (c) of the conditions under which subsidy has been claimed on wool (see Declaration by Manufacturer on reverse of subsidy claim form) the subsidy on wool stocks in excess of this period will be either withheld in cases where payment has not yet been made or must be refunded to the Commission as agent for the Commonwealth Government if payment of subsidy has already been made."

In making these adjustments the Commission will adopt the following procedure:—

(A) Advise the manufacturer of the amount by which his stocks held, in the opinion of the Commission exceed $5\frac{1}{2}$ months requirements from the 30th June 1948.

(B) Invite him to give a considered estimate of what groups and styles of wool will be in stock at the Christmas 1948 close-down.

(C) In formulating the basis for refund or adjustment regard will be had initially for the level of wool values ruling over the last 6 months of the 1947/48 wool season and not necessarily to the level established on the last purchases made.

(D) An interim determination as to withholding or refund will be given by the Commission as soon as practicable in the case of each mill to give each a basis of adjustment. The interim determination may be reviewed by the Commission or the Commonwealth Prices Commissioner.

Payments will be made on outstanding claims forthwith within the framework of the procedure outlined.

Their Lordships are of opinion that those adjustments were plainly in accordance with the scheme. If a manufacturer had had subsidy on more than the $5\frac{1}{2}$ months' stock it could have been reclaimed. There was however a modification and a special circumstance affecting the appellant which must now be considered.

In September the appellant suggested that it would be fairer to take the actual figures of stocks used over $5\frac{1}{2}$ months from the 30th June rather than an estimate. The Commission accepted this in principle and in a long letter of 15th December set out their final basis for winding up the scheme. In effect subsidy was returnable or not claimable on stocks in hand at Christmas, 1948. This was to adopt the actual user test if over that period only wool bought in the subsidy period had been used. Wool bought before the 1946/7 season was if still on hand to be treated as "subsidised" having received an indirect subsidy as set out above. That explains how the item of £2,121 relating to wool bought before the scheme comes into the appellant's claim for the return of £67,282. It may be asked how the Commission was justified in going back to pre-1946 purchases or perhaps to purchases before March, 1947. No objection on this ground was taken by the appellant. These parcels had not in fact been used for goods for the home market though on hand for more than 21 months. It might also be said that these parcels should as it were be set against later purchases in fact used on which subsidy would be retained. This is speculation, no objection having been taken on these lines. Their Lordships are satisfied that the basis was in accordance with the general principles of the scheme as applicable to the situation which had arisen.

There remains the last paragraph of the letter which was as follows:—

"Usage of unsubsidised wool before the Christmas 1948 closedown.

"9. If any manufacturer has used unsubsidised wool in manufacture prior to the Christmas 1948 closedown, the Commonwealth Prices Commissioner may have regard to such usage in computing any

refund in respect of subsidised stocks in excess of the prescribed maxima. It is necessary for such consideration that the following conditions are observed :—

- (a) That the wool was purchased at auction.
- (b) That no relief has been obtained by means of price increase.
- (c) That subsidised goods have not been withheld from the consumer.
- (d) That the manufacturer has kept satisfactory records and otherwise complied with the requirements of the National Security (Prices) Regulations.”

In a letter of 12th January, 1949, the appellant stated that it had used unsubsidised wool and that the conditions of paragraph 9 had been complied with.

On 25th February, 1949, the Commission set out their claim against the appellant. The appellant had substantial stocks at Christmas, 1948, on which it had received subsidy. It had claims in respect of wool used before Christmas on which subsidy had not been paid. On balance and subject to final audit the amount refundable and claimed was £67,282 4s. 9d.

On 13th April there was a further demand and a statement that if no reply was received within ten days the matter would be referred to the Crown Law Authorities.

On 9th May the appellant wrote two letters. In one it enclosed a cheque for £67,282 4s. 9d. In the other it elaborated its claim in respect of the “unsubsidised” wool bought and used between June and Christmas, 1948. This was stated to be 2,115 bales and the claim in respect of it was said to be £92,000. Although paragraph 9 of the letter of the 15th December was referred to, the words used can be read as claiming subsidy on these bales which were bought after the scheme had come to an end. The claim was so treated by the Commission and the Commonwealth Prices branch by letters dated 19th May and 19th July and refused. In answer to this there was a solicitor’s letter and these proceedings were started in which no claim based on these bales, or on any adjustment consequent on their purchase was made. It is one of the curious features of this case that the appellant did not state clearly its present submission that the claim as then made was not for subsidy on the 2,115 bales as such but that the Commission should have regard to the usage of unsubsidised wool as suggested in paragraph 9 of the letter of 15th December. If this had been done there might have been some light on the Commission’s reasons for not operating paragraph 9. In their Lordships’ opinion it was within the discretion of the respondent not to have regard to the user referred to in paragraph 9. The respondent was therefore entitled to demand the £67,282 without regard to that user.

Their Lordships have thought it right to consider this issue on its merits rather than by approaching first the question whether circumstances which entitle a plaintiff to recover back money paid, which it was not liable to pay were present in this case. Although the appellant clearly preserved its right to proceed with the counterclaim as it was called based on the 2,115 bales, that is not what it is now seeking to do. It is unnecessary to decide the point but the appellant might well have failed to surmount the obstacles which the law places in the path of those who seek to recover back money paid.

In the result their Lordships agree with the decision of the High Court. They will humbly advise Her Majesty that the appeal should be dismissed. The appellant will pay the costs of the appeal.

In the Privy Council

THE AUSTRALIAN WOOLLEN MILLS LTD.

v.

THE COMMONWEALTH OF AUSTRALIA

DELIVERED BY
LORD SOMERVELL OF HARROW

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