

[HIGH COURT OF AUSTRALIA.]

BURKARD PLAINTIFF ;

AGAINST

OAKLEY (COMMONWEALTH PUBLIC TRUSTEE) }
AND ANOTHER DEFENDANTS.

H. C. OF A. *War Precautions—Enemy shareholder—Shares vested in Public Trustee—Power to*
1920. *sell—Beneficial interest in person not an enemy subject—Regulation—Validity*
—*War Precautions Act 1914-1916 (No. 10 of 1914—No. 3 of 1916), sec. 4—*
SYDNEY, *War Precautions (Enemy Shareholders) Regulations 1916 (Statutory Rules 1916,*
Aug. 10. *No. 38—1919, No. 46), reg. 11.*

KNOX C.J.,
ISAACS, HIGGINS,
RICH and
STARKE JJ.

Reg. 11 of the *War Precautions (Enemy Shareholders) Regulations 1916* provides that “(2) The Attorney-General may, if he think fit, . . . direct the Public Trustee to sell the whole or any part of any shares which have been transferred to him.”

Held, that the regulation authorizes the sale of shares which have been transferred to the Public Trustee, notwithstanding that some beneficial interest in the shares is held by a person who is not an enemy subject, and in that respect it is a valid exercise of the power conferred by sec. 4 of the *War Precautions Act 1914-1916*.

Burkard v. Oakley, 25 C.L.R., 422, followed and applied.

SPECIAL CASE.

In an action brought in the High Court by Louis Burkard against Robert McKeenan Oakley, the Commonwealth Public Trustee, and William Henry Barkley, his delegate, a special case was stated which, as amended, was substantially as follows :—

1. The plaintiff is and at all material times has been a person of German nationality and a subject of the German Empire, and was from 9th March 1915 until 3rd March 1920 interned in New South Wales by the Commonwealth military authorities.

1 (a) On 4th March 1920 the Governor-General, acting in pursuance of the powers vested in him in that behalf by the *Termination of the Present War (Definition) Act* 1919, declared by Proclamation that Saturday, 10th January 1920, should be deemed to be the date of the termination of the war between His Majesty the King and Germany. The said Proclamation was published in the *Commonwealth Gazette* of 8th March 1920.

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2. Prior to 26th September 1916 the plaintiff was the registered holder of 4,500 shares in the Whipstick Mines Ltd., a company duly incorporated under the laws of the State of New South Wales, and was also entitled to be registered in the books of the said company as the holder of 750 other shares therein.

3. By virtue of the *War Precautions (Enemy Shareholders) Regulations* 1916 the said 4,500 shares and the said 750 shares were, on the said 26th September 1916, transferred to the defendant the Commonwealth Public Trustee against the plaintiff's wish and without any consideration to him.

4. In or about the month of October 1917 the plaintiff was informed by the defendant William Henry Barkley that it was intended in accordance with the direction of the Solicitor-General of the Commonwealth, made under the provisions of the said *War Precautions (Enemy Shareholders) Regulations*, to sell the said shares by public auction at the Stock Exchange, Sydney, on Tuesday, 27th November 1917.

5. On 24th November 1917 the plaintiff commenced this action, claiming a writ of injunction against the defendants, their servants and agents to restrain them and each of them from selling the aforesaid shares, and for a declaration that reg. 11 (2) of the said *War Precautions (Enemy Shareholders) Regulations* 1916 was invalid.

6. The said action came on for hearing before his Honor Mr. Justice Barton at Sydney on 21st August 1919, whereupon, after the pleadings had been read, certain exhibits put in evidence, certain admissions made and certain evidence given, the following question, namely, "Does Mr. De Leeuw own, or has he any interest in, any of the shares the subject of this suit?" was put to the plaintiff by counsel for the plaintiff and was objected to by counsel on behalf of the defendants.

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7. The Mr. De Leeuw referred to in the said question was alleged by the plaintiff, in his statement of claim, to be a Belgian subject resident at Antwerp in Belgium; and it was further alleged in the said statement of claim that at the date of the transfer of the said 5,250 shares as aforesaid and at all material times the said shares were the joint property of the plaintiff and the said De Leeuw, and that the plaintiff's interest in the said shares had in or about the month of May 1914 been mortgaged by the plaintiff to the said De Leeuw to secure certain moneys then and still owing by the plaintiff to the said De Leeuw.

8. In support of his objection to the said question, it was contended by counsel for the defendants that under reg. 9 of the said *War Precautions (Enemy Shareholders) Regulations* 1916 the allegations in the statement of claim set out in par. 7 hereof and the question so objected to were not relevant to the issues in the said action.

9. It was contended by counsel for the plaintiff that under the said reg. 9 the said allegations and the said question were relevant to the said issues, and, further, that if the contention of counsel for the defendants as to the construction and effect of the aforesaid reg. 9 were correct the said regulation was invalid.

10. By an order of his Honor Mr. Justice *Barton* in the said action made on 21st August 1919, it was ordered that the points of law arising on the case of the plaintiff and on the said question so objected to as aforesaid be stated in a special case to be submitted for the opinion of the High Court.

12. The questions of law for the opinion of the Court are :—

- (1) Are the allegations referred to in par. 7 of this special case or any of them material for the purposes of this action ?
- (2) Is the question referred to in par. 6 of this special case material for the purposes of this action or relevant to any of the issues therein ?
- (3) Is reg. 9 (1) of the *War Precautions (Enemy Shareholders) Regulations* 1916 invalid ?
- (4) Is the *War Precautions Act* 1914-1918, if and so far as it purports to authorize the making of the said reg. 9 (1) aforesaid, invalid ?

- (5) Do the *War Precautions (Enemy Shareholders) Regulations* authorize the sale of the plaintiff's interest in the said shares or any of them ?
- (6) Are the said *War Precautions (Enemy Shareholders) Regulations*, if and so far as they purport to authorize the sale of the plaintiff's interest in the said shares or any of them, valid ?
- (7) Are the Acts under which the said Regulations were made and continued, if and so far as they purport to authorize any regulation giving power to sell the said shares under the circumstances hereinbefore set out, valid ?

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Maughan K.C. (with him *Bavin*), for the plaintiff.

Blacket K.C. (with him *Flannery* K.C.), for the defendants, took a preliminary objection that, by reason of the *Treaty of Peace Act* 1919 and the *Treaty of Peace Regulations* made thereunder, this action is incompetent, and any question that might have been raised under the *War Precautions (Enemy Shareholders) Regulations* 1916 cannot now be raised in this Court. [Counsel referred to the *Treaty of Peace Regulations* (Statutory Rules 1920, No. 25), regs. 2, 3, 20, First Schedule, arts. 296 and 297 of the *Treaty of Peace between the Allied and Associated Powers and Germany*; *War Precautions (Supplementary) Regulations* (Statutory Rules 1919, No. 176), reg. 54.]

Maughan K.C. The *War Precautions (Enemy Shareholders) Regulations* do not authorize the Public Trustee to deal with the property of a person who is not an enemy subject. The only shares those Regulations purport to affect are shares the beneficial ownership of which is in an enemy subject.

[ISAACS J. Regs. 14 and 15 seem to indicate that what the Regulations are dealing with are shares of which enemy subjects are the registered holders, no matter who has a beneficial interest in them].

The only thing reg. 11 authorizes the Public Trustee to sell is the beneficial interest of an enemy subject in these shares. He may only sell shares which wholly belong to an enemy subject. If that

H. C. OF A. view is correct the matter is not affected by the Treaty of Peace.
1920. Even if the Public Trustee has power to sell the 4,500 shares, he has
BURKARD none with regard to the 750 shares which were not registered in the
v. plaintiff's name.
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[KNOX C.J. The Court is against you on the interpretation of the Regulations.]

KNOX C.J. I feel no doubt that these shares are amply covered by the *War Precautions (Enemy Shareholders) Regulations*, and that under those Regulations the Public Trustee has power to sell them whether or not De Leeuw had some interest in them. When this case was before this Court previously, *Barton J.* said (1):—"Granted that the power conferred by the *War Precautions Act* will support an order declaring that the shares are transferred to the Public Trustee, and a vesting of the shares in him by virtue of the order, it does not seem to me to be an unwarranted exercise of that power to authorize a sale of the shares so transferred. It may be that in some instances a beneficial interest remains in some person, firm or company, notwithstanding the transfer to the Public Trustee; but the shares are to be transferred in the books of the company to the name of the Public Trustee, who then has the sole control of the shares and of their disposal, subject to the Regulations. It is contended that the enemy shareholder may deal with his beneficial interest in the shares. That may or may not be so. If he has that right it may, on the one hand, be a due precaution for the public safety to take away that power to deal with the beneficial interest by disposing of the shares and handing the money, under reg. 11 (3), to the person by whom the shares were transferred unless the Attorney-General otherwise directs. On the other hand, it may be a wise precaution in the interest of the enemy shareholder himself that the Public Trustee should be able, by selling the shares, to prevent any undue loss to the beneficial interest through a fall in the market value." I respectfully agree with that. I also think that the matters pointed out by my brother *Isaacs* in connection with regs. 14 and 15 show clearly that this decision is equally applicable to the 750 shares and the 4,500 shares.

(1) 25 C.L.R., at p. 425.

ISAACS J. I agree. The *War Precautions (Enemy Shareholders) Regulations* seem to me to be entirely applicable. I must say that it was obviously assumed in the case of *Burkard v. Oakley* (1) that those Regulations did, on their true construction, extend to permit a sale of these shares. In addition to the passage read by the learned Chief Justice from the judgment of *Barton J.*, my brother *Rich* in his judgment said (2): "If the Public Trustee may not sell and transfer the shares a winding up must follow." Those words show clearly that the Court had that in view in deciding the validity of the Regulations, and so I think it was involved. If it was not, I am clearly of opinion that the Regulations are valid, and do cover this case.

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HIGGINS J. I should like to say that I take the point to be covered by the previous case (1), that is, the point that the *War Precautions (Enemy Shareholders) Regulations* authorized the sale. I do not understand, indeed, how what was done as to the 750 shares was properly done. The decision, however, in principle covers these shares too; and either we are bound by that decision or else what was laid down in that case has not been shown to be manifestly wrong.

RICH J. Apart from the decision already cited, which covers the matter, I think the Regulations are valid.

STARKE J. I agree with my brother *Higgins* that the matters involved in this case are covered by the decision of this Court in *Burkard v. Oakley* (1), and that we are bound by that decision.

*Questions answered as follows: (1), (2), (3)
and (4)—No; (5), (6) and (7)—Yes. Costs
to be costs in the action.*

Solicitors for the plaintiff, *Villeneuve-Smith & Dawes*.

Solicitor for the defendants, *Gordon H. Castle*, Commonwealth
Crown Solicitor.

B. L.

(1) 25 C.L.R., 422.

(2) 25 C.L.R., at p. 426.