[HIGH COURT OF AUSTRALIA.]

THE BROKEN HILL PROPRIETARY COMPANY LIMITED . . . . } APPELLANT;

AND

WARNOCK . . . . . RESPONDENT.

ON APPEAL FROM A JUSTICE OF THE HIGH COURT.

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MELBOURNE, *Feb.* 20-22; *Mar.* 20-22; *May* 11.

Knox C.J., Isaacs and Gavan Duffy JJ.

Trading with the Enemy—Enemy company—Winding up business in Australia—Controller—Order of Minister for Trade and Customs—Application to High Court to determine questions—Jurisdiction of High Court—Questions as to claims arising out of contract—Discretion—Contract—Suspension by war—Declaration by Attorney-General as to contract being enemy contract—Trading with the Enemy Act 1914-1921 (*No.* 9 *of* 1914—*No.* 23 *of* 1921), *secs.* 2, 9H—*Enemy Contracts Annulment Act* 1915 (*No.* 11 *of* 1915), *secs.* 2, 3.

Sec. 9H of the *Trading with the Enemy Act* 1914-1916 authorizes the Minister for Trade and Customs to make an order conferring on the controller of a company appointed under the section such powers as are exercisable by a liquidator in a voluntary winding up of a company, including power to apply to the High Court to determine any question arising in the carrying out of the order for winding up, or those powers subject to such modifications, restrictions or extensions as the Minister thinks necessary or convenient for the purpose of giving full effect to the order.

Held, that that section authorizes the Minister to confer upon a controller powers under which neither the right of that controller to apply to the High Court nor the jurisdiction of that Court to determine questions on his applications is to be measured by the standard which has been laid down with regard to similar applications by a liquidator, and that, on the application of a controller under an order conferring power to apply to the High Court to determine any question arising in the carrying out of the order, the High Court has jurisdiction to determine questions which arose between the company in carrying on its business before an order was made for the winding up of its business and parties claiming adversely to the company so as to bind those parties.

Held, also, that where the controller and the parties claiming adversely to the company desire the Court to determine such questions, the Court should determine them if it is satisfied that the necessary materials on which to base a decision are before it.

By an agreement made in March 1914 for the sale by the A company to the B company of zinc concentrates to be delivered from time to time up to the year 1921, it was provided that on the happening of any of certain events, including "war," either of the parties might suspend the contract, and that in the event of such a suspension any quantities of concentrates, delivery of which had been thereby deferred, should be delivered after the delivery of the quantity contracted for for the year 1921 should have been delivered.

Held, that the contract was not rendered illegal by the provision for suspension, since the contract should not be read as intending by the word "war" a war in which the parties would be in the position of enemies.

A contract was made in 1911 for the sale by the C company to the B company of the whole of the output of the C company of leady sulphide concentrates. In September 1914 an agreement was entered into between the parties by which the terms of payment were varied. On 15th July 1915, pursuant to the *Trading with the Enemy Act* 1914, the B company was declared by the Attorney-General of the Commonwealth to be managed or controlled, directly or indirectly, by or under the influence of or carried on wholly or mainly for the benefit or on behalf of persons of enemy nationality, or resident or carrying on business in an enemy country, and thereupon under the proclamation of the Governor-General of 7th July 1915 transactions with the B company were declared to be trading with the enemy and to be prohibited. On 2nd March 1922, pursuant to the *Enemy Contracts Annulment Act* 1915, the agreement of September 1914 was declared by the Attorney-General not to be an enemy contract.

Held, that the agreement of September 1914 was not, in view of the declaration of the Attorney-General of 2nd March 1922, rendered null and void by sec. 3 (6) of the *Enemy Contracts Annulment Act* 1915, nor was it unlawful and void as being within the class of transactions prohibited by the *Trading with the Enemy Act* 1914.

Decision of *Higgins* J.: *In re Australian Metal Co. Ltd.*, (1921) 29 C.L.R., 347, reversed.

APPEAL from *Higgins* J.

By an order dated 7th December 1917 the Minister for Trade and Customs, purporting to act in pursuance of sec. 9H of the *Trading with the Enemy Act* 1914-1916, ordered that the business carried on in Australia by the Australian Metal Co. Ltd., a company incorporated in England, should be wound up; he appointed Samuel James Warnock, who had been appointed Controller of the Company by

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the High Court on 25th March 1915, as Controller to control and supervise the carrying out of the order and to conduct the winding up of the business; and he conferred upon the Controller the following powers (*inter alia*): (1) To get in and collect all moneys owing to the Company and to sell the real and personal property of the Company; (5) to bring or defend any action or other legal proceeding in the name and on behalf of the Company; (6) to settle a list of contributories and to make calls; (10) subject to the provisions of the *Trading with the Enemy Act* to pay the debts and discharge the liabilities of the Company; (11) to compromise any claim of whatsoever nature or character by or against the Company; (14) with the consent of the Minister for Trade and Customs to apply to the High Court or a Justice thereof to determine any question arising in the carrying out of the order. In carrying out the winding up of the Company claims were made and proofs of debt were lodged by the Broken Hill Proprietary Co. Ltd. for £128,778, by the Broken Hill South Silver Mining Co. No Liability for £15,327 and by the City of Sydney Council for £7,027. On 13th March 1917 an order was made by the High Court of Justice in England ordering the Company to be wound up under the provisions of the *Companies (Consolidation) Act* 1908.

The Controller, with the consent of the Minister, pursuant to the order of 7th December 1917, moved to have certain questions determined by the High Court, which, as amended at the hearing of the motion, were as follows:—

(1) Is the Broken Hill Proprietary Co. Ltd. entitled in respect of the spelter contents of 35,000 tons of concentrates delivered by it to the Australian Metal Co. during the period 1st January to 30th June 1914 to claim payment calculated on an average of the *Public Ledger* quotations and the unofficial quotations of the Committee of the London Metal Exchange for the period 30th June to 31st December 1914, or upon what other basis ought such payment to be calculated?

(2) Is the Broken Hill Proprietary Co. Ltd. entitled in respect of the spelter contents of 20,000 tons of concentrates delivered by it to the Australian Metal Co. in 1914 to

claim payment calculated on an average of the *Public Ledger* quotations and the unofficial quotations of the Committee of the London Metal Exchange for the period 1st January 1914 to 31st December 1914, or upon what other basis ought such payment to be calculated ?

(3) Is the Broken Hill South Silver Mining Co. No Liability entitled in respect of the lead contents of 2,000 tons of concentrates delivered by it to the Australian Metal Co. in 1914 to claim payment on the basis of lead at £30 per ton (November average) with a returning charge of £4 10s. per ton or on the net amount realized from the concentrates, or upon what other basis ought such payment to be calculated ?

(4) What procedure should be followed for trying and deciding the questions of law and fact arising in relation to the claim for £7,027 made by the City Council of Sydney against the Australian Metal Co. ?

The first and second questions arose out of a contract under seal dated 27th March 1914 whereby the Australian Metal Co. agreed to buy from the Broken Hill Proprietary Co. certain quantities of zinc concentrates. The contract provided that each parcel of concentrates should be paid for on *pro formâ* account at certain rates subject to adjustment subsequently. It then provided in clause 11 as follows :—"Spelter and Silver Prices.—The market value of spelter (ordinary brands) and silver for adjustment of final invoice subject to the exception in par. (*c*) of this clause shall be the average market price for spelter as per *London Public Ledger* and as to silver as per *Sharp and Wilkin's Prices Current* as set out hereunder : (*a*) As to quantity to be delivered during the half-year from 1st January to 30th June in each year on the average market prices for the six months from 1st July to 31st December of the same year ; (*b*) as to the quantity to be delivered during the half-year from 1st July to 31st December of each year the average of the market prices for the six months from 1st January to 30th June of the year following ; (*c*) as to 20,000 tons of the quantity to be delivered in 1914 the adjustment under this clause shall be subject to revision and correction so far as necessary to agree with the average market prices for either

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the year 1914 or 1915 at the buyer's option which must be declared in writing prior to 31st March 1914." (This option was exercised in favour of the year 1914.) Another provision of the contract was as follows:—"(23) On the happening and during the continuance of any of the following causes or events preventing or interfering with the carrying out of this agreement sellers and/or buyers to have the right to suspend this agreement." Among the causes or events mentioned was "war." The contract continued: "Should any suspension occur from any of the causes mentioned in this clause any quantity or quantities delivery of which has or have thereby been deferred shall be delivered" at a certain rate "or as mutually to be arranged after the delivery of the quantity contracted for the year 1921 has been completed." The contract also contained a provision for the reference of all matters in dispute to arbitration. Under the contract 35,000 tons were delivered in 1914 from 1st January to 30th June, and the 20,000 tons mentioned in the contract were delivered in 1914, before the beginning of the War.

The third question arose out of a contract under seal dated 22nd July 1911, whereby the Australian Metal Co. agreed to buy from the Broken Hill South Silver Mining Co. the latter Company's output of leady sulphide concentrates of a certain grade from 1st January 1912 to 31st December 1914. The contract provided (*inter alia*) that "The whole of the lead contents as per agreed assay to be paid for in full at the price of soft foreign lead as ascertained from the London commercial report of the *London Public Ledger* without discount or deduction of any kind." The contract also provided that there should be a returning charge allowed to the buyer of £4 10s. per ton of concentrates, that the price of lead and silver for final settlement should be "the average of the quotations during the third month after delivery," and that the mean of the two quotations for lead each day should be taken. The contract also contained a provision for suspension of the contract in the event of war similar to that in the case of the contract with the Broken Hill Proprietary Co., and a provision for the reference of all matters in dispute to arbitration. By certain letters, which are set out in the judgment of *Knox* C.J. and *Gavan Duffy* J. hereunder, a variation was made in respect of the price to be paid for the lead contents.

The fourth question arose out of a claim by the Municipal Council of Sydney alleging a breach of an agreement between the Council and the Australian Metal Co. relating to the sale by the Company to the Council of a turbo-alternator.

Other material facts are stated in the judgments hereunder.

The motion was heard by *Higgins* J., who dismissed the application: *In re Australian Metal Co. Ltd.* (1).

From that decision the Broken Hill Proprietary Co. now appealed to the High Court.

At the hearing of the appeal leave was given to H. E. Burgess, the Official Receiver in England of the Australian Metal Co., to intervene on the condition that no order would be made as to his costs.

Latham K.C. (with him *Richardson*), for the appellant and for the Municipal Council of Sydney. In construing sec. 9H (3) of the *Trading with the Enemy Act* 1914-1916 the meaning of the word "liquidator" should not be so restricted as to limit the powers conferred on a controller to those which a liquidator of a company in a voluntary winding up is given by the *Companies Acts* of England or any of the States. The only object of using the word is to indicate that the powers are to be of the same character as those of a liquidator. Sec. 9H (3) gives authority to confer a general power of applying to the High Court; and that is what has been done in this case. The questions asked in this case are questions which arise in the carrying out of the order of the Minister. The Controller's duty is to wind up the business of the Company, and to do that he must get in the assets and pay or compromise the debts; and the question whether he is to recognize a claim made against the Company is one that must arise in carrying out the order. Sec. 2 of the *Trading with the Enemy Act* 1921 gives a specific power to the Controller to ask questions relating to the liability of the Company, and the Court should determine the question of jurisdiction upon the law as it now exists. [Counsel referred to *Holt* v. *A.E.G. Electric Co.* (2).] The grounds given by *Higgins* J. for refusing to answer the questions as a matter of discretion are not such as should induce the Court to so refuse. As to the first and second questions, they should be answered in the

(1) (1921) 29 C.L.R., 347. (2) (1918) 1 Ch., 320.

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affirmative. There are market prices in the *London Public Ledger*, and the method by which the average market price has been obtained is the proper one. [Counsel referred to *Hirsch* v. *Zinc Corporation Ltd.* (1); *Zinc Corporation Ltd.* v. *Hirsch* (2).]

Owen Dixon K.C. (with him *Tait*), for the Broken Hill South Silver Mining Co. The variation of the terms of payment under the contract of 22nd July 1911 was made at a time when the Australian Metal Co. was not an enemy subject within the meaning of the *Trading with the Enemy Act* or the *Enemy Contracts Annulment Act*, and that variation was not affected by those Acts. The agreement for a variation was not a contract within the meaning of those Acts. There was, at the time the variation was agreed to, an unbroken obligation by specialty to pay a sum of money thereafter to be ascertained, and a variation by parol of the method of ascertaining that sum is not a contract to which those Acts apply. The object of the *Enemy Contracts Annulment Act* was to put an end to the obligation of a subject to perform acts towards an enemy, and the only contracts affected were those which bound a subject for the future. Here the original contract had ceased to be executory. Under that Act a contract does not become an enemy contract until the Attorney-General so certifies. [Counsel referred to *Steeds* v. *Steeds* (3); *Nash* v. *Armstrong* (4).]

H. I. Cohen K.C. (with him *Claude Robertson*), for the Official Receiver of the Australian Metal Co. The Controller by his affidavit has stated that the business of the Company in Australia has been wound up. If that is so, he is *functus officio* (*In re Fr. Meyers Sohn Ltd.* (5)). The winding up of the business being the purpose of sec. 9H of the *Trading with the Enemy Act*, the order of the Minister goes beyond the winding up; and the whole order is therefore *ultra vires*. Sec. 9H (3) does not authorize the giving to the Controller a greater right to obtain a determination of the Court than that which is conferred on a liquidator in a voluntary winding up. The power is so indefinite in its terms that the Court cannot give effect to it. At most, the

(1) (1917) 24 C.L.R., 34.
(2) (1917) V.L.R., 289.
(3) (1889) 22 Q.B.D., 537.
(4) (1861) 10 C.B. (N.S.), 259.
(5) (1918) 1 Ch., 169, at p. 172.

sub-section enables the Controller to obtain a determination of questions of law only, and not of questions of fact. The order of the Minister of 7th December 1917 is invalid, because it contains provisions which are not authorized by the *Trading with the Enemy Act—e.g.*, clause 6. These proceedings, other than that part of them relating to the Municipal Council of Sydney, should be stayed, for there is in the contracts an agreement for deciding disputes by arbitration. (See *Hirsch* v. *Zinc Corporation Ltd.* (1); *Rules of the High Court*, Order XLIV., r. 1).) The Court should refuse to answer the questions in respect of the two Broken Hill companies, and should leave those companies to have the matters between them and the Australian Metal Co. determined by the Supreme Court of Victoria, in which State the contracts were made.

[KNOX C.J. referred to *Lady Carrington Steamship Co.* v. *The Commonwealth* (2).]

Sec. 2 (2) of the *Trading with the Enemy Act* 1914 had the effect of prohibiting and annulling contracts with persons with whom trading is prohibited by a proclamation, and trading with a company such as the Australian Metal Co. was prohibited by the proclamation of 7th July 1915. That prohibition should be read retrospectively so as to extend to contracts made before the War. The effect of secs. 2 and 3 of the *Enemy Contracts Annulment Act* is to declare contracts to which an enemy subject is a party to be enemy contracts, and the Attorney-General is not authorized under that Act to declare them not to be enemy contracts. He has, by his declaration of 16th July 1915, in effect declared the Australian Metal Co. to be an enemy subject, and he cannot subsequently declare a contract with that enemy subject not to be an enemy contract. His declaration of 2nd March 1922 that the contract contained in the letters of September 1914 was not an enemy contract is of no effect. As to the claim of the Broken Hill Proprietary Co., the case is distinguishable from *Hirsch* v. *Zinc Corporation Ltd.* (3). In that case 90 per cent. only of the price had been paid at the time of delivery. In this case the then market price had been paid on the delivery of the ore. If the parties had considered the question of war breaking out, it is reasonable to

(1) (1917) 24 C.L.R., at p. 73. (2) (1921) 29 C.L.R., 596.
(3) (1917) 24 C.L.R., 34.

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suppose that they would have provided that no further payment should be made. The method of fixing the price has failed, and in that event a reasonable price should be fixed. As to the claim of the Broken Hill South Silver Mining Co., the effect of the alteration in September 1914 was to eliminate all the provisions as to price from the original contract, including the provisions as to the returning charge, and to substitute for them the actual price realized for the metal contents of the ore. As to the claim of the Municipal Council of Sydney, the answer to the question should be that the matter should be determined by an action brought in the ordinary Courts.

Ham and *C. Gavan Duffy*, for the Controller.

Cur. adv. vult.

May 11.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. The respondent Samuel James Warnock is the Controller of the Australian Metal Co. Ltd., having been duly appointed under the *Trading with the Enemy Act* 1914-1916 by order of the Court dated 25th March 1915. By this order he was empowered to take possession of the property of the Company then existing or which might thereafter arise in the course of the business of the Company, and to control the business operations of the Company so far as might be necessary or proper to secure that none of the property of the Company should pass to enemies, and subject to these powers he was directed to afford facilities to the Company to carry on its lawful business in the ordinary course. By order made under sec. 9H of the Act on 7th December 1917 the Minister for Trade and Customs ordered and required that the business of the Company should be wound up, and appointed the said respondent as Controller to control and supervise the carrying out of such order and to conduct the winding up of the business. By this order the following powers were conferred on the respondent, viz. :—(1) To get in all moneys owing to the Company and to sell property and things in action of the Company ; (5) to bring or defend any legal proceeding in the name and on behalf of the Company ;

(10) subject to the provisions of the Act to pay the debts and discharge the liabilities of the Company; (11) to compromise any claim by or against the Company; (14) with the consent of the Minister to apply to the High Court or a Justice to determine any question arising in the carrying out of that order. Under this order the respondent proceeded to wind up the business of the Company in Australia. On 13th March 1917 the High Court of Justice in England ordered that the Company should be wound up under the *Companies (Consolidation) Act* 1908, and one of the Official Receivers of that Court was appointed liquidator.

On 15th December 1920 the Controller gave notice of a motion before a Justice of this Court for an order that all persons having claims against the Company should prove their claims in such manner as the Court might direct, and on 16th June 1921, with the consent of the Minister, gave a further notice of motion for the determination of certain claims received by him in the winding up of the Company. These motions came on before *Higgins* J., the following questions being submitted for determination:—[The judgment set forth the four questions as stated above, and continued:—] On the hearing of the motion *Higgins* J. expressed a doubt whether, under the order of the Minister coupled with sec. 9H (3) of the Act, the Court had jurisdiction to determine questions which arose between the Company in carrying on its business and parties claiming adversely to the Company so as to bind those parties, but, without deciding this point, declined to determine the rights of the parties in a proceeding in which he thought the Company was not sufficiently represented, and in the exercise of his discretion declined to answer any of the questions. As the parties preferred to have the application dismissed rather than to have it adjourned for service of the notice of motion on the Company, he dismissed the application.

The Broken Hill Proprietary Company—one of the respondents to the motion—appeals against this order, and notice of the appeal was given to the Controller and to the other respondents to the motion, namely, the Broken Hill South Silver Mining Co. No Liability and the Municipal Council of Sydney. On the appeal coming on to be heard, leave was given to the Official Receiver in

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England of the Company on his application to intervene and be heard on behalf of himself and the Company.

The questions raised on the appeal are:—(I.) Has the Court jurisdiction to determine the questions submitted by the Controller? (II.) If so, ought the Court in the exercise of its discretion to determine them? (III.) If so, how should they be answered?

By sec. 9H (1) of the Act the Minister is empowered to make an order requiring the business of the Company to be wound up, and by sub-sec. 3 of that section to appoint a Controller to conduct the winding up and to confer on such Controller such powers as are exercisable by a liquidator in a winding up, including power to apply to the High Court or a Justice to determine any question arising in the carrying out of the order, subject to such modifications, restrictions or extensions as the Minister thinks necessary or convenient for the purpose of giving full effect to the order. Acting under this section the Minister in this case has appointed the respondent Warnock to conduct the winding up of the business, and has conferred on him power to pay the debts and discharge the liabilities of the Company and, with the consent of the Minister, to apply to the High Court or a Justice thereof to determine any question arising in the carrying out of the order. The Minister was authorized by the Act to confer these powers. The order itself contains no reference to the powers exercisable by a liquidator in a voluntary winding up, and we do not think that either the right of the Controller to apply to the High Court or the jurisdiction of the Court to determine questions on his application is to be measured by the standard which has been laid down with regard to similar applications by a liquidator, in view of the provision for modifications, restrictions or extensions set out above. No doubt the Court, on such an application as this, has discretion to refuse to determine the rights of parties by an immediate order, but we feel no doubt as to the jurisdiction of the Court to make an immediate order if in the exercise of its discretion it thinks proper to do so.

The next matter for consideration is whether the Court ought, on the materials now before it, to answer the questions submitted in this case? On this point it is open to the Court to give weight to

the wishes of the parties concerned. In the present case the Controller and the several claimants desire that the questions submitted should be determined in this proceeding, and we think it is right that we should determine them if we are satisfied that the necessary materials on which to base a decision are before us.

The determination of questions 1, 2 and 3 depends on the construction of agreements in writing, and on the inferences to be drawn from facts which are not in dispute. Question 4 asks only for a decision on the procedure to be adopted in trying a claim against the Company. On the hearing of the appeal it was urged on behalf of the Official Receiver that he was in some difficulty in not having before the Court evidence of Franz Wallach, and possibly other evidence which might affect the decision. To meet this objection leave was given to the Official Receiver to set out on affidavits to be filed by the Controller the nature of the evidence which it was suggested he could bring forward if he had the opportunity, and the case was adjourned for a fortnight for that purpose. Affidavits were filed in pursuance of this leave, and all the facts which the Official Receiver by his counsel desired to place before the Court have been taken into consideration. In these circumstances we think we ought to answer the questions.

Questions 1 and 2.—All deliveries of concentrates under this contract were made before the commencement of the War, but Mr. *Cohen* for the Official Receiver argued that, as it was provided by the contract that in the event of war either party might suspend the agreement and that in the event of suspension any quantity delivery of which had thereby been deferred should be delivered later, the whole contract was illegal. It is a sufficient answer to this argument to say that the contract should not be read as intending a war in which the parties to the contract were in the position of "enemies" to one another.

The adjustment of the price of concentrates delivered under the contract was provided for by clause 11, the material portion of which is as follows :—"11. Spelter and Silver Prices.—The market value of spelter (ordinary brands) and silver for adjustment of final invoice subject to the exception set out in par. (*c*) of this clause shall be the average market price for spelter as per *London Public Ledger* and

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as to silver as per *Sharp & Wilkin's Prices Current* as set out hereunder: (*a*) As to the quantity to be delivered during the half-year from 1st January to 30th June in each year on the average market prices for the six months from 1st July to 31st December of the same year; . . . (*c*) as to 20,000 tons of the quantity to be delivered in 1914 the adjustment under this clause shall be subject to revision and correction so far as necessary to agree with the average market prices for either the year 1914 or 1915 at the buyer's option which must be declared in writing prior to 31st March 1914." The option given to the Company by sub-clause (*c*) was duly exercised in favour of the year 1914.

The appellant claims that payment for the spelter contents of the concentrates should be adjusted on the quotations in the *Public Ledger* for the period from 1st January to 30th June 1914, and on the quotations in the *Public Ledger* and the monthly average quotations of the London Metal Exchange Committee for the period from 1st July to 31st December 1914. There is no dispute as to the method of ascertaining the price of the silver contents.

It appears that the Metal Exchange in London closed on 30th July 1914. It was reopened on 5th November 1914, but there were no official quotations until 16th November 1914. While the Exchange was shut the committee kept an unofficial record of prices, and at the end of August, September, October and November respectively, fixed an average price of spelter for each month. That for August was announced in the *Public Ledger* of 3rd September 1914 thus: "The Committee of the London Metal Exchange to-day fixed the following average price for the month of August: £29." The announcements of the average prices for September, October and November were published in the *Public Ledger* of 3rd October, 4th November and 2nd December respectively in this form: "The following are the averages for the month of the daily official quotations as fixed by the Committee," the respective amounts being £25 14s. $9\frac{3}{11}$d., £23 13s. $6\frac{3}{11}$d., £24 14s. $9\frac{6}{7}$d.

The question to be answered resolves itself into this: Are the quotations to which we have referred the "average market price for spelter as per *London Public Ledger*" for the respective periods to which they refer? Mr. *Latham* for the appellant handed in a

statement of calculations made on the basis of the information contained in the *Public Ledger*. Mr. *Cohen* for the Official Receiver objected to the use of this information as not being that contemplated by the contract, but did not challenge the accuracy of the figures or calculations assuming that the information could properly be used as a basis. We are clearly of opinion that this information is within the contemplation of the contract as a sufficient basis for ascertaining the price of the spelter contents of the concentrates, and that the price ought to be ascertained on that basis. This conclusion is supported by the decision of *Hood* J. in *Zinc Corporation Ltd.* v. *Hirsch* (1), which was affirmed by this Court (*Hirsch* v. *Zinc Corporation Ltd.* (2)). The facts suggested and the arguments advanced by Mr. *Cohen* in support of his contention on this point were all considered in that case.

Question 3.—In this case the Broken Hill South Silver Mining Co. before the commencement of the War delivered to the Australian Metal Co. Ltd. a quantity of leady concentrates, under a contract dated 22nd July 1911. The terms of that contract as to payment for lead contents of the concentrates delivered were as follows:—The whole of the lead contents as per agreed assay to be paid for in full at the price of soft foreign lead as ascertained from the London commercial report of the *London Public Ledger* without discount or deduction of any kind, subject to a returning charge of £4 10s. per ton of concentrates. The price of lead for final settlement to be the average of the quotations during the third month after delivery.

On 9th September 1914 the Australian Metal Co. wrote to the solicitors for the Broken Hill South Silver Mining Co. a letter in the following terms:—"In reply to your inquiry the suggested settlement with the South Company is as follows:—There are the May, June and July deliveries, all of which in the ordinary course would have to be settled on the basis of the average prices of lead and silver ruling during the third month after delivery, which would be on August, September and October quotations. The Metal Exchange has been closed during the whole of August and in September to date, and will probably be closed for some considerable time to come; as the fairest way out of the difficulty, we suggested that final payment

(1) (1917) V.L.R., at p. 307. (2) (1917) 24 C.L.R., 34.

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should take place on the prices which will be actually realized for the metal produced from this ore. This proposal was subsequently modified, at the request of the South Company, that we should guarantee them a minimum price of lead of £14 per ton, and this is the proposal that is now under consideration. Meanwhile, we shall pay the *pro formâ* invoices (as sent to us by the South Company in accordance with the contract). In short it amounts to the South Company receiving the prices actually realized for lead, but not less than £14 per ton." On 10th September the solicitors for the Broken Hill South Silver Mining Co. wrote to the Australian Metal Co. as follows :—" We hand you herewith receipt for £42,035 2s. due to the South Broken Hill Company on its *pro formâ* invoices for 4,208 tons 7 cwt. and 2 qrs. of leady concentrates. This payment is accepted upon the understanding arrived at between the South Company and your Company that, notwithstanding the terms of the contract under which the leady concentrates are sold to your Company, your Company guarantees the realized price the South Company eventually receives on final settlement for these leady concentrates will not be less than £14 per ton on the lead contents thereof."

The 2,000 tons of concentrates in respect of which the claim is made were sold by the Union Bank of Australia, on behalf of the Australian Metal Co., to the Associated Smelters Ltd. on a contract the material portion of which is as follows :—" Sale of 2,000 tons leady concentrates to the Associated Smelters. Grade.—Approximate 69 per cent. lead ; 23 ounces silver per ton ; zinc under 10 per cent. Price.—£13 10s. per ton of 2,240 lbs. net dry weight with adjustments on agreed assays on the basis of 3s. 9d. per unit of lead and 2s. 6d. per ounce of silver. The above price is based on the average London Metal Exchange price of pig lead for November 1916 (as advised by the Australian Metal Exchange) being £30 per ton and is subject to an adjustment of 6s. per ton of concentrates for each £1 rise or fall in such price and *pro ratâ*." The Union Bank in due course received in payment for these concentrates the sum of £26,704 16s. 10d., representing the value of the concentrates at £13 10s. per ton after deducting an amount by way of penalty for deficiency in metal contents. The London Metal Exchange price of pig lead for November 1916 was £30 per ton. By notice dated

2nd March 1922 published in the *Commonwealth Gazette* on 4th March 1922, the Attorney-General of the Commonwealth declared that the contract dated 10th September 1914 between the Broken Hill South Silver Mining Co. and the Australian Metal Co. contained in the letters set out above was not an enemy contract within the meaning of the *Enemy Contracts Annulment Act* 1915.

Mr. *Cohen* argued that the agreement of September 1914 varying the terms of the original contract was rendered null and void by the *Trading with the Enemy Act* 1914 and the *Enemy Contracts Annulment Act* 1915, as having been made with a company managed or controlled directly or indirectly by or under the influence of or carried on wholly or mainly for the benefit or on behalf of persons of enemy nationality, and he relied on the declaration of the Attorney-General of the Commonwealth made on 16th July 1915 with reference to a proclamation of the Governor-General dated 7th July 1915 as establishing that the Australian Metal Co. was such a company. He contended that the Court should hold that the facts declared by the Attorney-General to exist in July 1915 had existed all along, and that consequently the Australian Metal Co. was in September 1914 an enemy subject within the meaning of the *Enemy Contracts Annulment Act.* However this might be apart from any declaration by the Attorney-General under sec. 3 (4) of that Act, the fact is that the Attorney-General has by his declaration of 2nd March 1922, published in the *Government Gazette* of 4th March 1922, declared that this contract is not an enemy contract; and therefore, under the section, it must be deemed not to be an enemy contract.

A further argument was based on the *Trading with the Enemy Act* 1914. It was said that this agreement of September 1914 was within the class of transactions prohibited by that Act and was consequently unlawful and void. The answer to this argument is that at the time this agreement was made (September 1914) the Company was not an enemy within the meaning of that Act, and therefore so far as that Act is concerned the agreement was not rendered invalid. In this case also Mr. *Cohen* relied on a provision for suspension contained in the original contract of 1911 similar to

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that with which we have dealt in the case of the Broken Hill Proprietary Co. Our decision in that case covers this point.

We come therefore to consider the effect of the agreement of September 1914. Looking at the contract for sale of the concentrates by the Union Bank and the subsequent correspondence which was in evidence before us, it appears that as the basis of that contract the price of lead was assumed to be the average London price for pig lead for November 1916. That standard was fixed, whatever the price might turn out to be. The assumption of £30 was made for the purpose of fixing provisionally the price of the concentrates, adjustments being provided for with reference to that amount. But the actual average London price of pig lead for November 1916 turned out to be £30 per ton. That price answers the description in the letter of 9th September 1914 of "the price actually realized for the metal produced from the ore." That description ought, we think, to be taken as substituted for the provision in par. 9 of the original contract, namely: "The average of the quotations during the third month after delivery." The actual price accepted by the Australian Metal Co. through the Union Bank for these concentrates is based on the allowance of a very large returning charge, but this estimate does not affect the contract subsisting between the Broken Hill South Silver Mining Co. and the Australian Metal Co. with respect to the returning charge of £4 10s. to be allowed between these two companies, which remains as it was.

Consequently, we are of opinion that the claim of the Broken Hill South Silver Mining Co. to payment on the basis of lead at £30 per ton with a returning charge of £4 10s. is well founded.

Question 4.—During the argument we expressed the opinion, to which we adhere, that the proper procedure for trying and deciding the questions of law and fact arising in relation to the claim of the Sydney Municipal Council is by trial of issues before a Justice of this Court without a jury. The issues to be tried will be settled and the place and time of trial fixed by a Justice in Chambers on the application of either party on notice to the others.

We answer the questions submitted as follows:—(1) and (2) The Broken Hill Proprietary Co. Ltd. is entitled to claim payment calculated on the basis stated in the questions respectively. (3) The

Broken Hill South Silver Mining Company is entitled to claim payment on the basis of lead at £30 per ton, with a returning charge of £4 10s. per ton of concentrates. (4) The issues should be tried before a Justice of the High Court without a jury; such issues to be settled by a Justice in Chambers, who will also fix the time and place for hearing.

The costs of all parties other than the Official Receiver of the application and of this appeal (including the costs reserved by the order of *Starke* J. of 16th December 1920) to be paid by the Controller out of the assets of the Australian Metal Co. No order as to costs of the Official Receiver.

ISAACS J. The facts of the case have been fully set out in the judgment just delivered. My learned brother *Higgins*, in his judgment appealed against, doubted the jurisdiction, but determined on discretion to dismiss the application. It is right to say, at the outset, that he did not definitely pronounce against the jurisdiction, and as to discretion the case has on appeal altered in respect of the direct appearance of the Australian Metal Co.

There were several questions of very great importance argued, which may be enumerated at the outset. Mr. *Cohen*, who appeared for the Australian Metal Co., contended that (1) the Court had no jurisdiction to determine the questions submitted by the Controller; (2) alternatively, it should not disturb the discretionary order of the learned primary Judge; (3) the original contracts relied on were illegal *ab initio*; (4) the contract of September 1914 was illegal or void; (5) under the contract of September 1914, if that were enforceable, the sum due was £27,604 16s. 10d, the price actually received by the Union Bank; (6) the basis of payment under the original contract with the Broken Hill Co. had disappeared, and either no payment could be required, or only one based on a *quantum meruit*. In other words, there were no *London Public Ledger* quotations within the meaning of the contract. I address myself to each of these questions in order.

1. *Jurisdiction.*—The root of jurisdiction is sec. 9H of the *Trading with the Enemy Act* 1914-1916. That section, by sub-sec. 1, empowered the Minister for Trade and Customs, where it appeared to him that

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"the business carried on in Australia" by any person, firm or company was "carried on wholly or mainly for the benefit of or under the control of enemy subjects," to make an order requiring the business to be wound up. It will be observed that it is not the "company" to be wound up, any more than it is the "person" or the "firm." It is simply so much of its business as is carried on in Australia. An order so made had to be obeyed under severe penalties (sub-sec. 7). The "winding up" would be purely independent of State law unless the Minister consented (sub-sec. 8). Sub-sec. 3 gave the Minister further powers. If he thought it expedient in the interests of public safety he might appoint a Controller to conduct the winding up of the business, and he was given power to do so. He might further, as occasion required, arm the Controller so appointed with "such powers as are exercisable by a liquidator in a voluntary winding up of a company (including power . . . to apply to the High Court or a Justice thereof to determine any question arising in the carrying out of the order), or those powers subject to such modifications restrictions or extensions as the Minister thinks necessary or convenient for the purpose of giving effect to the order." Now, it must be remembered that this was part of war legislation and entirely within the defence power of the Commonwealth Parliament. The reference to "such powers as are exercisable by a liquidator in a voluntary winding up of a company" is a reference to powers of a perfectly well-known character and scope common in all essential particulars to every State in Australia. The authority to the Minister is not to confer on the Controller the powers of any State legislation as such, but to confer on him powers which, if conferred, he would have under Federal law, corresponding to powers which a liquidator ordinarily has under State law. And the words "as occasion requires" show that the Minister has to consider which of those powers he thinks it expedient in the particular case and at the particular time to confer. But specifically mentioned in the section is the "power to apply to the High Court or a Justice thereof to determine any question arising in the carrying out of the order." If such a power is conferred, it is plain that this Court is intended by Parliament to determine any proper question

submitted by the Controller, provided the proper materials and the proper parties are before the Court.

But, in order to see whether the Controller is empowered to make such an application, it is essential to find the power to do so conferred by the Minister's order because the Act is not self-operating in this regard.

On 7th December 1917 the Minister made an order as described under sec. 9H, (*a*) requiring the Australian business of the Metal Company to be wound up ; (*b*) appointing Warnock, the respondent, Controller, and (*c*) conferring on him (subject to special directions by the Public Trustee) certain powers, including the power (14) "with the consent of the Minister for Trade and Customs to apply to the High Court or a Justice thereof to determine any question arising in the carrying out of the order." It seems to me that the jurisdiction of this Court is clear, unless, as was contended, the order is vitiated by some further circumstance which destroys its legality.

It was, however, contended that the order was rendered illegal by reason of some additional powers conferred or assumed to be conferred by a later order of the Minister, dated 19th August 1920. The later order directed that the first order be "varied" by directing that the Controller should proceed with the winding up in accordance with a certain scheme set out in a schedule. The vitiating element is said to be that the Controller is in substance directed to wind up in co-operation with the winding up by the English liquidator acting under an English winding up, so as to apply equitably assets in both jurisdictions to the payment of debts. Without more detailed explanation, I can see no reason for imputing illegality in the added provisions. But, further, if they are illegal, they leave the fourteenth power of the original order above quoted unaffected, and consequently, *quacunque viâ*, the Court has jurisdiction.

2. *Discretion.*—The Controller having brought the matter before the Court, and there appearing to be a substantial and serious contention to be settled before the winding up can proceed, it seems to me that the Court, in the exercise of judicial discretion, can do no more than require proper parties and satisfactory materials, and then is bound to determine the matter. The Court may use all its ordinary

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powers to select the form of procedure, and, if necessary, the tribunal of fact, in accordance with recognized practice. But the limit of discretion as *to entertaining the application* is then reached: Parliament has placed the duty of decision on this Court, and if the requirements of procedure are complied with, the application must be heard and determined; if not, it must be dismissed, not as matter of discretion but of decision.

The presence of the Metal Company by its own counsel on the appeal, and the full opportunity it has had for presenting its case, and the elaborate argument addressed to the Court on its behalf, leave nothing to be desired with respect to complete representation, even if the Controller alone were not technically sufficient.

But an additional reason was advanced for the exercise of discretion to refuse to hear this application. This was because there is an arbitration clause in the agreements. Such a course has never been adopted by a Court except under statutory provisions, such as sec. 4 of the English *Arbitration Act* 1889, which has corresponding provisions in the Australian States. But no such provision applies here, and to give effect to the suggestion would err in two ways: first, it would offend against the law, as stated so clearly and explicitly by Lord *Moulton* (when Lord Justice) in *Doleman & Sons* v. *Ossett Corporation* (1); and, next, it would be refusing the duty expressly placed on the Court by sec. 9H when the necessary order of the Minister is made.

3. *Illegality of Original Contracts.*—It is contended that because of the word "war" in clause 23 of the Broken Hill Company's contract and clause 17 of the South Company's contract, those contracts were illegal *ab initio*. The view advanced is that "war" there means every war and therefore includes the late war, and, as the Metal Company was a company carrying on business wholly or mainly for the benefit of or under the control of enemy subjects, it must be treated as a German company. Following this reasoning with a further step, that such a contract between a German and a British subject containing a stipulation to suspend it during a war between the two countries is unlawful, the conclusion of initial illegality is reached. There are several answers. One is that the

(1) (1912) 3 K.B., 257, at pp. 269-270.

Metal Company is an Australian company; it was not an "enemy" —though later it was, by reason of subsequent legislation and proclamations, declared for certain purposes an "enemy subject." But when the contract was made it was a British company, and at the outbreak of war it was a British company; and by the King's proclamation of 9th September 1914 trading with such a corporation was not forbidden. The suggestion, if examined, points not to trading with the enemy but to treason, and no basis is made for that. Besides, the single word "war" in such a clause, even with an alien in time of peace, ought not, in my opinion, without compelling words, to be construed as including a future war between the King and his enemies. If that is not correct, if every such contract between a British subject and a foreigner is to be construed as including a war between this nation and the nation of the foreigner, there will be many contracts instantly invalidated, because the illegality does not depend upon the happening of the war contemplated. The point was not necessary for decision in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1); and, in view of the varying dicta in that case upon this subject, I may presume to express my own opinion on the point. My opinion is expressed in the case of *Hirsch* v. *Zinc Corporation Ltd.* (2), where special reference is made to *Brandon* v. *Curling* (3). I quote from that case the following words of Lord *Ellenborough* C.J. (4):—"Wherever the generality of the terms of assurance might in their actual application to the covering of any particular risk produce, if effect were given to them in their extended sense, a similar contravention of public interest" (that is, similar to the cases mentioned), "the insurance must be construed in such a manner as to exclude the particular event or peril which could not, for the reason above mentioned, be so made the subject of a legal insurance in direct terms by a British underwriter." There are other words of importance in the judgment referred to, which I refrain from quoting.

4. *Validity of the Contract of September* 1914.—This contract is attacked in two ways:—First, on the basis of the *Enemy Contracts Annulment Act* 1915. Sec. 3, sub-sec. 6, says: "Every enemy

(1) (1918) A.C., 260.
(2) (1917) 24 C.L.R., at pp. 59-60.
(3) (1803) 4 East, 410.
(4) (1803) 4 East, at p. 417.

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contract made before or after the commencement of this Act, during the continuance of the present war, is hereby declared to be null and void and of no effect whatever." The contract being made in September 1914, several months before the Act but during the War, is said to have been an "enemy contract." The Company, it is said, came under par. (*b*) of sec. 2 as a company the business whereof was managed or controlled directly or indirectly by or under the influence of enemy subjects. But however the fact might have to be determined apart from the other provisions of sub-sec. 4, that sub-section is a very distinct enactment. It is recognized that while a company may in *fact* be *secretly*, as well as openly, so managed or controlled, other people may have been quite ignorant of the fact and may innocently have entered into the contract. Consequently the Legislature has made provision for any party to the contract laying the matter before the Attorney-General and asking for a declaration that the contract is or is not an enemy contract within the meaning of the Act. If the Attorney-General declares it is, then by sub-sec. 3 so it shall be deemed; if he declares it is not, then by sub-sec. 4 it is to be deemed not to be an enemy contract. In the present case the Attorney-General, on 2nd March 1922, declared it was not an enemy contract. That is conclusive evidence, and shuts out all evidence to the contrary. The point of illegality fails if that declaration was competent. It was at last said that the power of the Attorney-General ceased with the end of the War. If it did, that must be because the 4th sub-section of sec. 3 ceased to be operative. If, however, that sub-section ceased to operate, so did sub-sec. 6, on which the alleged illegality depends. But in truth the power of the Attorney-General continues as long as any contract of the kind operates. The Legislature left the enactment in sec. 3 to operate as a whole or not at all.

5. *The Amount Payable under the Contract of September* 1914.—That depends on the effect of the transaction of September 1916, being the contract of sale by the Union Bank of Australia to the Associated Smelters. The document is headed "Contract." It is obviously incomplete as a formal contract. Indeed, at the time it *was* written it was a mere offer. But it is to be taken and has been treated throughout as embodying all the terms agreed to. The

price, £13 10s. per ton, was the agreed price for the concentrates "with adjustment on agreed assays." The provision for adjustment indicates that what was taken as the basis of the contract was the price of the pure metal contents. As to lead, the price of the pure metal was, as the contract says, "based" on the average London price of pig lead for November 1916, being £30 per ton. The prescribed adjustments in case the London price varied from £30 either way, are immaterial, as there was no variation. The provisional basis of £30 a ton proved to be the permanent basis, and, though £13 10s. was the price of the concentrates as they were, that price was arrived at by conventionally fixing the price of the pure metal in London at £30, and making business allowances for the cost of getting the pure metal in London. Those allowances—which represent outlay, not profit—were, of course, the subject of arrangement between the Union Bank (representing the Metal Company) and the buyer. But the basic metal price which necessarily governed the transaction must be applied to the letter of September 1914, and answers the description in that letter "the prices which will be actually realized for the metal produced from this ore." That price —as appears from a perusal of that letter in conjunction with the principal contract—was substituted for the price in clause 9, namely, "the average of the quotations during the third month after delivery." Substituting, therefore, "£30 a ton" for the price to be ascertained, according to clause 9, and allowing the returning charge clause (clause 8) to operate, the net price recoverable is found.

6. *Ledger Quotations.*—What was agreed to in par. 3 of the contract is the price of soft foreign zinc, as ascertained from the London commercial report of the *London Public Ledger*. No other price was bargained for, and in the absence of any prevention attributable to the purchaser, which would be impossible in this case, I do not think any implied contract for a *quantum meruit* can be made to take the place of the actual written contract (*Selway v. Fogg* (1)). The Metal Company contends that the *London Public Ledger* for the prescribed period does not contain the information contemplated by clause 3 of the contract. What was contemplated, judging by the contract and the position of the parties? With regard to the

(1) (1839) 5 M. & W., 83.

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Broken Hill Company, it was provided by clause 11 that the final payment shall be made according to "the average market price for spelter as per *London Public Ledger.*" The "market price" does not mean merely a price in public market. "Market price" means ordinary selling price, the price at which without any extraordinary reason a seller and a buyer would arrive in the ordinary course of dealing. It includes private transactions of that character. But again, the decisive evidence is to be looked for in the *London Public Ledger.* The only basic assumption is that there will be found in that journal, and on its authority, a commercial statement of the recognized price of zinc during the given period. The statement may not be uninterrupted, but, if a commercial man could reasonably deduce from such a statement, accepting it as true, what sellers were understood to be getting or being offered and were understood to be taking or refusing on an ordinary business basis, having regard to the circumstances of the time and whether publicly or privately, that was to be sufficient. In my opinion the *Ledger* quotations satisfy the condition, and the summary analysis of them as submitted by Mr. *Latham*, and not quarrelled with mathematically by Mr. *Cohen*, appears to reduce the question to the necessary figured result.

Appeal allowed. Questions answered as stated in judgment of Knox C.J. *and Gavan Duffy* J. *Costs of all parties other than the Official Receiver of the application and this appeal (including costs reserved by order of Starke* J. *of 16th December* 1920) *to be paid by Controller out of the assets of the Australian Metal Co.*

Solicitors for the appellant, *Moule, Hamilton & Kiddle.*

Solicitors for the respondents, *Blake & Riggall*; *Lynch, Macdonald & Elliott*; *Malleson, Stewart, Stawell & Nankivell.*

Solicitors for the intervener, *Harwood & Pincott.*

B. L.