H. C. OF A. 1922.

THE COMMONWEALTH v. MELBOURNE HARBOUR TRUST COMMISSIONERS.

proper means for raising the question as to the nature of the bond which the Customs has power to require.

I concur in the order proposed by the Chief Justice. *Gavan Duffy* and *Starke* JJ.

Demurrer to statement of claim overruled. Demurrer to pars. 4, 5, 6 and 7 of the defence allowed.

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

Solicitors for the defendants, *Malleson, Stewart, Stawell & Nankivell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MENARD AND ANOTHER . . . . . APPELLANTS; PETITIONERS,

AND

HORWOOD AND COMPANY LIMITED . . RESPONDENT. RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *Sept.* 11, 12.

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

Company—Compulsory winding up—"Just and equitable"—Fraud of director—Restrictions on alienation of shares—Companies Act 1899 (*N.S.W.*) (*No.* 40 *of* 1899), *sec.* 84 (*e*).

The governing director of a company, who with his wife held the majority of the shares in the company, had, in respect of a contract by the company to buy goods on commission for a principal, fraudulently charged, on behalf of the company, a higher price than had in fact been paid and commission on

that higher price, but in circumstances which did not justify an inference that systematic or recurring dishonesty on his part in the future was to be anticipated. Under the articles of association of the company no shareholder could sell his shares without first offering them to the governing director at a price not exceeding the value fixed at a general meeting of the company. On a petition by shareholders who held a minority of the shares for the winding up of the company,

Held, that in the circumstances it was not "just and equitable" that the company should be wound up, within the meaning of sec. 84 (*e*) of the *Companies Act* 1899 (N.S.W.), and therefore that an order should not be made under that section for the winding up of the company by the Court.

Decision of the Supreme Court of New South Wales (*Street* C.J. in Eq.): *Re Horwood & Co. Ltd.*, (1921) 21 S.R. (N.S.W.), 750, affirmed.

APPEAL from the Supreme Court of New South Wales.

By a petition presented to the Supreme Court in Equity on 26th August 1921, John Louis Menard and Frederick Ford Cowdroy prayed that Horwood & Co. Ltd., a company incorporated under the *Companies Act* 1899 (N.S.W.) and the Acts amending the same, should be wound up by the Court under the provisions of those Acts. The Company was formed in May 1920 for the purpose of taking over as a going concern an agency business carried on by one William Spencer Gordon Horwood. Its nominal capital was £25,000, divided into 25,000 shares of £1 each, of which 11,857 were issued. 850 shares were employees' shares which did not carry any right to vote, and 11,007 were ordinary shares. Of these shares Horwood held 5,501, his wife 501, each of the petitioners 2,001 and Robert Percival Roberts 1,000. The articles of association provided that Horwood should be the governing director of the Company until his resignation or death, or until he ceased to hold one-fourth of the shares originally allotted to him, and that the other directors should be Menard, Cowdroy and Mrs. Horwood. It was also provided that no shareholder should sell his shares without first offering them to the governing director at a price which should not exceed the value fixed at the general meeting of the Company in each year. This value was fixed in July 1921 at 10s. The petitioners alleged that at that time the shares were worth £1 13s. 4d. each. Menard resigned his position as director on 13th April 1921, and Cowdroy on 19th April 1921; and on 12th July 1921 Roberts was appointed a

H. C. OF A. 1922.

MENARD v. HORWOOD & CO. LTD.

director. The material grounds stated in the petition for submitting that it was just and equitable that the Company should be wound up were substantially as follows: (*a*) that the Company had been employed by the Meridian Trading Corporation (a company incorporated in the United States of America) to buy wool on its account under an agreement between the Corporation and the Company that the Company should buy such wool and receive as commission for such buying 2 per cent. of the purchase price of the wool and no more; that Horwood in his capacity as governing director had, in addition to charging the Corporation commission as so agreed upon, falsely and fraudulently represented to it that the purchase price for the wool was greater than it in fact was and had fraudulently received and retained the difference between the actual purchase price of the wool and the amount so falsely represented to be the purchase-money; (*b*) that Horwood had constantly acted, both in matters of policy and administration, without reference to or consultation with the petitioners as his co-directors; (*c*) that he had threatened and intended to conduct the affairs of the Company entirely as he thought fit; (*d*) that he had antagonized the members of the staff by his offensive attitude towards them; and (*e*) that he had improperly allowed some of his wife's expenses while travelling abroad to be paid out of the Company's funds. It was further alleged in the petition that the improper conduct of Horwood in the above respects compelled the petitioners to resign their position as directors; that the petitioners could not under the articles of association procure the removal of Horwood from his position of governing director, or do anything to remedy the state of affairs complained of; that the petitioners were prevented from severing their connection with the Company except at a great pecuniary loss, since the price fixed for the shares in July 1921 was much less than their real value; and that this price was so fixed for the sole purpose of prejudicing the petitioners.

The petition was heard by *Street* C.J. in Eq., who dismissed it with costs. In his reasons for his judgment the learned Chief Judge said in reference to the transaction with the Meridian Trading Corporation:—"In connection with the wool buying agency I have no doubt that Horwood acted fraudulently, and in point of fact Mr.

Leverrier did not defend his conduct. He charged his principals with a higher price than that actually paid, and then charged his commission on this fictitious price. Thus he was doubly dishonest. I cannot accept his explanation that he acted as he did merely for the purpose of having a fund in hand to meet possible claims and with a view to an ultimate adjustment on a proper basis, and I have no doubt that his intention was fraudulent. It is fair to him to say, however, that his idea was to benefit the Company. It is not suggested that he intended to put the money in his own pocket. The petitioners contend that his conduct in this respect is in itself a justification for the order for which they ask. They say that the regulations of the Company prevent them from severing their connection with it, and that they should not be compelled to remain associated with a business which is likely to fall into disrepute and to dwindle away if left in the absolute control of Horwood, who is backed by a subservient majority, and who has proved himself to be dishonest. The tendency of the Courts in recent times is to construe the words "just and equitable" with less narrowness than before, and in the case of *Re Thomas Edward Brinsmead & Sons* (1) it was held that a minority of shareholders who believed that they were embarking their money in an honest business were not bound to continue members of a company erected in fraud and used for the purposes of fraud ever since its incorporation. Similarly under the *Partnership Act*, a partnership may be dissolved where a partner has been guilty of such conduct as in the opinion of the Court is calculated prejudicially to affect the carrying on of the business. The present case, however, is not a case of a company which had a fraudulent origin, or which is systematically carrying on fraudulent practices, nor am I satisfied that the retention of Horwood at the head of affairs, reprehensible as his conduct was, will prejudicially affect the carrying on of the business. He has been engaged in business as an agent for some years, and the petitioners have been associated with him for several years. If he were habitually dishonest and untrustworthy one would not have expected to find them, concerned as they say they are for their good names, continuing in association with him, and

(1) (1897) 1 Ch., 406.

H. C. OF A. 1922.

MENARD v. HORWOOD & CO. LTD.

the inference I draw from the facts is that this lapse from the path of honesty is not shown to be fairly characteristic of his general business methods, but ought to be regarded as an isolated occurrence which may not recur. He has built up the business, and it is his means of livelihood, and I am very far from feeling satisfied that because in this one transaction, or series of transactions, he acted dishonestly, the just and equitable thing to do is to put the Company out of existence. If I thought that the proper inference to be drawn from the facts was that there was fair ground for anticipating systematic or recurring dishonesty in the future the case might be different, but I do not think that that would be a fair inference. Mr. *Wickham* commented upon the fact that he did not appear to show much contrition for his action, and I cannot say that he impressed me favourably, but the petitioners and their witnesses (most of whom have been in his employment for some time) were, I think, not prepared to spare him, and if they had known of other things to his discredit they would have mentioned them. I do not lose sight of the fact that in view of the restrictions surrounding the alienation of shares it may be difficult for the petitioners to dispose of theirs, and that they may be compelled to continue as shareholders in a company the reputation of which may have been blown upon by the misconduct of its governing director; but I should view this aspect of the matter more seriously if I were satisfied that they had no ulterior motives for their action. I am not satisfied of this. They knew of the misconduct to which they call attention as early as February of this year, but they said nothing about it until they resigned in the following April, and they did not communicate with the American corporation until May. Moreover, while they were still shareholders and servants of the Company they were secretly making arrangements to set up in business for themselves in competition with the Company, and to carry with them the greater part of the Company's staff. Menard tendered his resignation on the 13th April, and Cowdroy followed suit on the 19th. At that time the new partnership was an established fact with offices of its own in Sydney and Melbourne; and customers of the Company were being solicited for their patronage. Menard admitted that he was contemplating this partnership while away on

leave in February, and that he took steps in regard to it in March, and Cowdroy did not deny that before he had severed his association with the Company a letter came there addressed to the new partnership; although he did deny that Horwood was so impolite as to call him a snake in the grass. People who neglect the obligation to be off with the old love before being on with the new, and who act in this way, do not display that delicate sense of honour which one would expect from those who complain of the injury to their name and fame by being associated with a company whose governing director has on one occasion acted dishonestly; and I have a very strong suspicion that the real motive underlying this petition is not the ostensible reason put forward by the petitioners but some ulterior motive. The inability to dispose of their shares in the open market, and so to sever their connection with the Company, after their disagreements with Horwood have made it impracticable for him and them to work together in harmony, may be unfortunate for them, but they accepted the shares with full knowledge of all the circumstances, and I think that something more than this is required to make it just and equitable that the Company should be put an end to. Having regard to all the circumstances of the case, I am not satisfied that Horwood's conduct in the matter of the wool transactions affords a sufficient ground for winding up the Company, and I am not satisfied as to the sincerity of the petitioners in putting it forward as a ground for wishing to be relieved from their association with the Company." His Honor also found that there was nothing in the other grounds relied upon:—*Re Horwood & Co. Ltd.* (1).

From that decision the petitioners now appealed to the High Court.

Innes K.C. (with him *Wickham*), for the appellants. The words "just and equitable" in sec. 84 (*e*) of the *Companies Act* 1899 (N.S.W.) are words of the widest signification, and the sub-section means that whenever the Court, having regard to all the circumstances of the case, thinks it just and equitable to make a winding-up order, it will do so. One of the sets of circumstances in which the

(1) (1921) 21 S.R. (N.S.W.), 750.

H. C. OF A. 1922.

MENARD v. HORWOOD & CO. LTD.

Court thinks it to be just and equitable to make a winding-up order is when the person in practical control of the company, who is backed up by a subservient majority, has been guilty of misconduct and has thereby inflicted a wrong upon a member of the public, or on any shareholder as such, for which either there is no means of redress other than a winding up or a winding up is the most practical way of affording relief (see *In re Gold Co.* (1); *In re Thomas Edward Brinsmead & Sons* (2); *In re Bleriot Manufacturing Aircraft Co.* (3); *In re Newbridge Sanitary Steam Laundry Ltd.* (4); *Re Merchants and Shippers' Steamship Lines Ltd.* (5); *In re Yenidje Tobacco Co.* (6)). Where a company is substantially a partnership the same principles should be applied as in the case of a dissolution of partnership (*In re American Pioneer Leather Co.* (7)).

Leverrier K.C. and *Bonney*, for the respondent, were not called on.

The judgment of the COURT, which was delivered by KNOX C.J., was as follows:—We all think that the Chief Judge in Equity came to the right conclusion in this case, and we agree with and adopt his reasons for coming to that conclusion.

Appeal dismissed with costs.

Solicitors for the appellants, *Minter, Simpson & Co.*

Solicitors for the respondent, *Sly & Russell.*

B. L.

(1) (1879) 11 Ch. D., 701, at pp. 713, 721.
(2) (1897) 1 Ch., 45, 406.
(3) (1916) 32 T.L.R., 253.
(4) (1917) 1 I.R., 67.
(5) (1917) 17 S.R. (N.S.W.), 21, 146.
(6) (1916) 2 Ch., 426.
(7) (1918) 1 Ch., 556.