[HIGH COURT OF AUSTRALIA.]

THE MUNICIPAL COUNCIL OF SYDNEY . APPELLANT;
APPLICANT,

AND

THE AUSTRALIAN METAL COMPANY LIMITED . . . . . } RESPONDENT.
RESPONDENT,

ON APPEAL FROM A JUSTICE OF THE HIGH COURT.

H. C. OF A. 1926.

MELBOURNE, *March* 2-5, 8.

SYDNEY, *April* 22.

Knox C.J., Isaacs and Higgins JJ

Contract—Validity—Company—Enemy subject—Proclamation of Governor-General—Declaration by Attorney-General—Contract made before War—Variations made during War—"Transactions"—Waiver—Trading with the Enemy Act 1914-1916 (*No.* 9 *of* 1914—*No.* 20 *of* 1916), *sec.* 2—*Enemy Contracts Annulment Act* 1915 (*No.* 11 *of* 1915), *secs.* 2, 3.

In March 1913 the respondent company contracted to supply and erect certain machinery for the appellant. In March 1914 the machinery was erected, and in June 1914 it broke down. By an agreement made in January 1915 the respondent agreed to replace the defective parts, and did so in April 1915. Shortly afterwards the machinery again broke down. On 7th July 1915 the Governor-General issued a proclamation under the *Trading with the Enemy Act* 1914 by which it was proclaimed (*inter alia*) that any transaction with or for the benefit of a company which the Attorney-General by notice declares to be, in his opinion, 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, was declared to be trading with the enemy, and was prohibited. By a notice dated 16th July 1915 and published on 22nd July 1915, the Attorney-General declared the respondent to be such a company.

Held, that by reason of sec. 2 of the *Trading with the Enemy Act* 1914-1916 and secs. 2 and 3 of the *Enemy Contracts Annulment Act* 1915, the agreement of January 1915 and, subject to the exception mentioned in sub-sec. 5 of sec. 3 of the latter Act, the agreement of March 1913 were null and void, and therefore could not be taken into consideration in determining the liability of the respondent to the appellant in respect of the break-down of the machinery.

Decision of *Starke* J. reversed on a point not raised before him.

APPEAL from *Starke* J.

On 19th March 1913 a contract was entered into between the Municipal Council of Sydney and the Australian Metal Co. Ltd. whereby the Company agreed to supply and erect for the Council a steam turbo-alternator. By an order dated 7th December 1917, made under the *Trading with the Enemy Act* 1914-1916, the business carried on by the Company in Australia was ordered to be wound up, and a Controller (Samuel James Warnock) was appointed to carry out the winding-up.

A claim having been made by the Council against the Company in respect of the contract of 19th March 1913 and of certain arrangements which were subsequently made for the replacement by the Company of certain damaged parts of the machinery, the Full Court of the High Court made an order on 11th May 1922 directing that the issues between the parties should be tried before a Justice of the High Court, and that such issues should be settled by a Justice in Chambers: *Broken Hill Pty. Co.* v. *Warnock* (1).

The issues as settled on 10th May 1923 were as follows :—

(1) Was the turbo-alternator delivered and installed by the Company under the contract of 19th March 1913 at all material times capable to produce electricity at the rate of steam consumption set out in the contract of 19th March 1913 ?

(2) Did the Company maintain the said turbo-alternator as provided by the said contract ?

(3) Did the Company, in consideration of the Council forbearing or promising to forbear to claim damages for breaches or alleged breaches of the said contract, promise (a) to replace effectively certain broken parts of the turbo-alternator with new and effective parts without cost to the Council; (b) that the turbo-alternator with its broken parts so replaced would produce electricity at the rate of steam consumption set out in the contract of 19th March 1913; (c) that the terms of maintenance by the Company of the turbo-alternator should be extended and be subject to the terms of the contract of 19th March 1913 for a further period to expire six months from the date of the certificate of the City Electrical Engineer that the repairs had been satisfactorily completed ?

(1) (1922) 30 C.L.R. 362.

H. C. OF A. 1926.

SYDNEY MUNICIPAL COUNCIL v. AUSTRALIAN METAL CO. LTD.

(4) Did the Company replace the broken parts of the turbo-alternator as aforesaid ?

(5) Was the turbo-alternator, with its broken parts replaced, capable at all material times to produce electricity at the rate of steam consumption set out in the contract of 19th March 1913 ?

(6) Did the Company maintain the turbine part of the turbo-alternator in accordance with the terms of the contract of 19th March 1913 for the extended period or at all ?

(7) Was the failure, if any, of the Company to carry out any obligation in respect of the said turbo-alternator due to the failure by the Council to fulfil its obligation towards the Company ?

(8) If the Company committed any breach or breaches of the aforesaid contract of 19th March 1913 or of that contract as altered or amended, did the Council waive its rights or any of them as regards the conditions so broken ?

(9) Is the Council entitled to claim any and what amount of damages in respect of the foregoing matters ?

(10) Is the Company entitled to payment of the contract price provided by the contract of 19th March 1913 or by that contract as subsequently amended or altered, and to a return of cash deposited as a security for the due performance of such contract ?

The issues were tried before *Starke*, J., who, on 18th September 1925, made certain findings upon them.

From the decision of *Starke* J. the Council appealed to the Full Court of the High Court, and the Company gave notice of cross-appeal.

In view of the decision of the Full Court the findings of *Starke* J. and his reasons for them are immaterial to this report. The other material facts are stated in the judgments hereunder.

Brissenden K.C. (with him *A. L. Campbell*), for the appellant.

Ham and *C. Gavan Duffy*, for the respondent, were not heard.

Cur. adv. vult.

The following written judgments were delivered:—

KNOX C.J. AND ISAACS J. During the argument on this appeal certain facts and legal contentions were relied on which were not brought under the notice of the learned trial Justice, *Starke* J. Those facts and contentions have the effect of disturbing, and to a great extent altering, the basis upon which *Starke* J. was invited by the parties to proceed, and upon which he accordingly did proceed, to determine the issues as formulated by the order of 10th May 1923. A reconsideration of the rights and obligations of the parties therefore becomes necessary, without considering in any way the accuracy of the conclusions arrived at by the learned primary Justice on the basis adopted by the parties at the trial. The newly advanced facts are of such a nature that in the circumstances they cannot be ignored even at the present stage.

The relevant circumstances are briefly stated:—On 19th March 1913 the Company contracted to supply and erect for the Council a turbo-alternator with apparatus complete on terms specified. The plant was installed in March 1914. In June 1914 the turbine was wrecked, owing, as found by the learned Justice, to the brittle nature of the material of certain parts. For present purposes it must be taken that a breach of contract had taken place on the part of the Company. Communications between the parties eventuated in a supplementary agreement constituted by letters in November and December 1914 and January 1915, whereby the Company undertook to replace the defective parts with new rotor-wheels and other internal parts of the same manufacture, and the Council undertook not to claim damages for the break-down that had taken place. The replacement was effected in April 1915. Within a fortnight a wheel was found to be buckled. It was burnt off as the best means for keeping the machine going. But its loss reduced the capacity of the machinery, and the Council ran the apparatus at a greater working cost than would have been required if the mishap had not occurred. Ultimately, about September 1917, the Council replaced the turbine with a Westinghouse turbine. For present purposes we must again assume the second break-down to have arisen through a breach by the Company of its contract of March 1913 supplemented by the agreement of January 1915. The trial was conducted by both sides

H. C. OF A. 1926.

SYDNEY MUNICIPAL COUNCIL v. AUSTRALIAN METAL CO. LTD.

Knox C.J. Isaacs J.

on the footing that the actual happenings were to be judicially dealt with on the ordinary basis of legality. On this basis the Council relied on the agreement of January 1915, and conceded the Council's waiver of any right to rely on the absence of the Engineer's certificate as stipulated in the original contract as a condition precedent to payment of the balance. On this basis also the Company conceded the binding character of the later agreement and relied (*inter alia*) on the conduct of the Council in not rejecting the turbine as an acceptance reducing a condition to a warranty. For some time the argument before us proceeded on this basis. But at one point Dr. *Brissenden* brought under notice a proclamation of the Governor-General of 7th July 1915 and a gazetted declaration of the Attorney-General of the Commonwealth dated 16th July 1915 and gazetted 22nd July 1915. No objection was raised to the reception of those facts; and in any case their nature is such that, even apart from sec. 31 of the *Acts Interpretation Act* 1901, they are of such public notoriety that judicial notice must be taken of them. Dr. *Brissenden* urged, and with unanswerable truth, that the conjoint legal consequence of the proclamation and declaration, having regard to sub-sec. 2 of sec. 2 of the *Trading with the Enemy Act* (No. 9 of 1914), was that no "transaction" with the Company after 16th or 22nd July 1915 could be regarded as lawful. Therefore, urged learned counsel, after that date no conduct of the Council could be relied on by the Company as constituting a waiver or relinquishment of rights. This position at once raised two questions: First, whether conduct, if otherwise amounting to waiver, was a "transaction" within the meaning of the *Trading with the Enemy Act*; second, whether the conjoint effect of the proclamation and declaration was not also to attract the operation of the Commonwealth Act No. 11 of 1915, the *Enemy Contracts Annulment Act*, in relation to the contracts between the parties. The conjoint effect of the proclamation and declaration being to make any transaction with the Company "trading with the enemy," it necessarily follows that the Company was "an enemy" within the meaning of the proclamation, and therefore par. (*a*) of sec. 2 of the *Enemy Contracts Annulment Act* is satisfied, and the Company was as from 16th July 1915 an "enemy subject" within the meaning of that Act.

Further, though no issue was at the trial directed to whether the Company came within par. (*b*) of sec. 2 of that Act, the facts in evidence were so strong to show that it did as to leave no doubt in the mind that it would be hopeless to deny it. In addition, Dr. *Brissenden*, with complete frankness, admitted he could offer no evidence to the contrary, and indeed would not contest it.

There is no doubt, therefore, that the Company was, at and from the date mentioned, at all material times an "enemy subject" within the meaning of the Act.

As to the construction of the statute, that is settled by *In re Continental C. and G. Rubber Co. Pty. Ltd.* (1).

The result is that the arrangement constituted by the communications in November and December 1914 and January 1915 cannot be regarded as a valid contract, and must be eliminated so far as it purported to affect the rights and obligations of the parties otherwise existing. As to the contract of 19th March 1913, sub-sec. 5 of sec. 3 of the Act applies. The basis on which the findings proceeded being thus radically modified, the consequential concession that the Council did not rely on the absence of a written certificate of the Engineer must be released.

The result is that the issues, or such of them as are unaffected in form, have to undergo re-examination. Nos. 1 and 2 are so unaffected. No 3 may be treated as eliminated. No. 4 should be read without the words "as aforesaid." No. 5 stands unaltered. No. 6 should be read without the words following "1913"; and is thus practically included in No. 2. No. 7 stands unaltered. No. 8 stands, except that the words "or of that contract as altered or amended" should be considered as eliminated. No. 9 stands unaltered. No. 10 stands, except that the words "or by that contract as subsequently amended or altered" should be considered as eliminated. The evidence already given should be taken as given on the retrial, either side being at liberty to adduce further evidence. The parties having consented, the issues remitted for rehearing are to be deemed issues in a cause pursuant to Order XXXII., rr. 9, 10 and 11, so that the judgment may at the trial be directed to be entered upon the whole matter as in the ordinary course of judicial

(1) (1919) 27 C.L.R. 194.

H. C. OF A. 1926.

SYDNEY MUNICIPAL COUNCIL v. AUSTRALIAN METAL CO. LTD.

Higgins J.

procedure. The costs of the first hearing and of this appeal ought to be regarded as costs in the cause; the whole of such costs to be in the discretion of the Court on the retrial. The retrial will take place before a Full Court.

HIGGINS J. I can see no course open to us but to declare that the contracts of 19th March 1913 and of November 1914-January 1915 are null and void, although certain rights and obligations under the earlier contract are preserved in the terms of sec. 3 (5) of the *Enemy Contracts Annulment Act* 1915. However rash the legislation may have been, it must be obeyed. The point as to the effect of the legislation was not raised before *Starke* J.; and if the result could possibly be cured by evidence, this Court on appeal would assume the contracts to be valid, as was assumed below. But the result cannot be cured by any evidence. It is not contended that there is anything to qualify or contradict the effect of the legislation. There has not been even a declaration by the Attorney-General, such as appeared like a *deus ex machina* to aid the Broken Hill Pty. Co. Ltd. after the summons was dismissed, and after the appeal began in this very case (1). The pattern of the mosaic here seems to be made complete by the *Trading with the Enemy Act* 1914-1916, sec. 2 (2) (*b*)—23rd October 1914; *Enemy Contracts Annulment Act* 1915, sec. 2 (*a*) and (*b*), sec. 3 (1) (*a*), sec. 3 (5) and (6)—24th May 1915; proclamation of Governor-General—7th July 1915; declaration of Attorney-General—gazetted 22nd July 1915.

I concur in the order proposed; but solely on the ground of the order which the Full Court made already in this case on 11th May 1922. But for that order I should have thought that there is no power to direct issues under the Comptroller's summons.

Issues amended and remitted for rehearing. Costs of first hearing and of appeal to be costs in the cause.

Solicitor for the appellant, *T. W. K. Waldron.*

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

B.L.

(1) (1922) 30 C.L.R. 362.