to raise the issue in a broader and, in their Lordships' opinion, a just and sound form. That question would be: "Could a man making a proposal for insurance fairly read the question as applying only to a single previous claim?" Their Lordships, as stated, are clearly of opinion that such a limitation would result, not in the disclosure which was truly required, but in a failure to reveal essential elements important to be known.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Rev Broken Hill Proprietary Co Ltd v Warnock (1922) 30 CLR 362

[HIGH COURT OF AUSTRALIA.]

IN RE THE AUSTRALIAN METAL COMPANY LIMITED.

Trading with the Enemy—Enemy company—Winding up business in Australia—Controller—Application to High Court to determine questions—Jurisdiction of High Court—Questions as to claims arising out of contract—Discretion—Right of company to be heard—Questions of fact—Trading with the Enemy Act 1914-1916 (*No.* 9 *of* 1914—*No.* 20 *of* 1916), *sec.* 9H.

Under sec. 9H of the *Trading with the Enemy Act* 1914-1916 the Minister for Trade and Customs can confer on the Controller such powers as are exercisable by a liquidator in a voluntary winding up of a company, including power to apply, with the consent of the Minister, to the High Court to determine any question arising in the carrying out of the order for winding up.

The Controller of company A, with the consent of the Minister, applied to the Court to determine (1) the right of company B to payment by company A on a certain basis for the spelter contents of certain concentrates delivered in the first half of 1914, (2) the right of company B to payment by company A on a certain basis for the spelter contents of certain other concentrates delivered in the whole year 1914, (3) the right of company C to payment by company A on a certain basis for the lead contents of certain other concentrates delivered during 1914; and to determine (4) what procedure should be followed for trying a claim made by the Sydney Corporation against company A for defects in a machine sold by the company to the corporation.

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The Court, in the exercise of its discretion, and assuming that it had jurisdiction to determine the questions, refused to determine questions 1, 2 and 3 except in proceedings in which company A could be heard as well as companies B and C.

Held, also, that question 4 could not be answered until the Controller investigated the facts and presented to the Court his conclusions.

The power to apply to the Court to answer questions conferred by sec. 9H is no greater than that conferred on a voluntary liquidator; and in a voluntary winding up the Court is not to determine a question unless satisfied that the determination will be just and beneficial.

But, *quære*, has the Court jurisdiction to determine questions which arose before the winding up between company A in carrying on its business and several parties claiming independently and adversely to the company?

In re Zoedone Co. [*No.* 1], 53 L.J. Ch., 405; *In re Bridge*; *Franks* v. *Worth*, 56 L.J. Ch., 779; *In re Continental C. and G. Rubber Co. Proprietary Ltd.*, 27 C.L.R., 194; *In re Dieckmann*, (1918) 1 Ch., 331, discussed.

MOTION.

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. should be wound up; he appointed Samuel James Warnock 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. for £15,327 and by the City of Sydney Council for £7,027.

The Controller now, with the consent of the Minister, moved to have certain questions determined by the High Court, which, as amended at the hearing, 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 other material facts are stated in the judgment hereunder.

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

Latham, for the Broken Hill Proprietary Co. and the Sydney Municipal Council.

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Owen Dixon, for the Broken Hill South Silver Mining Co.

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[During argument reference was made to *In re Continental C. and G. Rubber Co. Proprietary Ltd.* (1); *In re Pilling*; *Ex parte Salaman* (2); *In re Zoedone Co.* [*No.* 1] (3); *In re Direction der Disconto-Gesellschaft*; *In re Anglo-Austrian Bank* (4); *In re Dieckmann* (5); *In re Francke & Rasch* (6); *Palmer's Company Law*, 10th ed., p. 612; *In re Hagelberg Aktien-Gesellschaft* (7); *In re Kastner & Co.*; *Auto-Piano Co.* v. *Kastner & Co.* (8); *Palmer's Company Precedents*, 11th ed., Part II., pp. 851, 862, 886; *In re Cheque Bank Ltd.* (9).]

Cur. adv. vult.

June 23.

HIGGINS J. read the following judgment:—This is a motion by the Controller of the Australian Metal Co. Ltd. for the determination of four questions. The Company is registered in England; but, as it appeared to be carried on for the benefit of certain German companies, an order was made by the Minister for Trade and Customs on 7th December 1917, as under sec. 9H of our *Trading with the Enemy Act* 1914-1916, for the winding up (not of the Company) but of the business carried on by the Company in Australia; and by the same order Mr. Warnock was appointed as Controller and was given certain of the powers appropriate (in England, at all events) to a voluntary liquidator. One of the powers was to bring or defend actions on behalf of the Company; another was "subject to the provisions of the said Act to pay the debts and discharge the liabilities of the Company"; another was, with the consent of the Minister to apply to the High Court to determine any question arising in the carrying out of this order.

Now, as to two of the questions the Broken Hill Proprietary Co. is interested, as to the third question the Broken Hill South Silver Mining Co. is interested, as to the fourth question the Sydney Municipal Council is interested. The Broken Hill companies' claims

(1) 27 C.L.R., 194.
(2) (1906) 2 K.B., 644.
(3) 53 L.J. Ch., 465.
(4) 35 T.L.R., 736.
(5) (1918) 1 Ch., 331.
(6) (1918) 1 Ch., 470.
(7) (1916) 2 Ch., 503.
(8) (1917) 1 Ch., 390.
(9) (1901) W.N., 14.

for concentrates delivered were £128,778 and £15,341 respectively, but on different grounds; the Sydney Council claimed £13,500 as for defects in a turbo-alternator sold by the Australian Metal Co. to the Council. Unless the Act justifies such an extraordinary procedure for determining questions, unless the Act allows what are practically three independent actions of three independent claimants to be tried on this motion, the proceeding is ridiculous. It involves the keeping of three sets of counsel before the Court as to matters in which two sets throughout the proceedings have no concern; and if there were 300 claimants concerned it might involve 300 sets of counsel present during the whole proceedings. I know of no power enabling the Controller to get all his contests with claimants against the assets tested on one motion.

The motion is said to be made under the order of the Minister enabling the Controller to apply to this Court "to determine any question arising in the carrying out of this order" of 7th December 1917. Under sec. 9H (3) the Minister can confer on the Controller 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" (of the Minister): and one of the powers of the liquidator in an English winding up is to apply to the Court "to determine any question arising in the winding up"; but the Court is not to accede to the application unless "satisfied that the determination of the question will be just and beneficial" (*Companies Consolidation Act* 1908, sec. 193). The draughtsman of the Commonwealth Act seems to have overlooked the fact that there is no winding up or liquidation under the Commonwealth law, and that the powers of a voluntary liquidator under the laws of one State may differ from the powers under the laws of another State. But, assuming that we can look to the English Act for the powers of a voluntary liquidator, nothing is said in the Commonwealth *Trading with the Enemy Act* as to parties to the application; and *primâ facie* the Controller should apply *ex parte* or (possibly) bring before the Court such parties as the Court directs him to bring or approves of his bringing. The power to make the application was obviously conferred in order that the Controller shall have guidance in his

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proceedings; and I very much doubt whether the Court, under the order of the Minister coupled with sec. 9H (3), has jurisdiction to determine a question which arose between the Company in carrying on its business and parties claiming adversely to the Company, so as to bind those parties. If, as in this case, the claims of these claimants are not due to winding up, or to the order for winding up, but are based on breach of contract on the part of the Company irrespective of the order, the proper course would be for each of the claimant companies to bring its action against the Australian Metal Co. if it cannot get payment. There is nothing in sec. 9H or in the Act, as I understand the Act, to prevent a creditor from bringing an action for the determination of his rights; although under sec. 9H (8) he cannot enforce his rights by petition for liquidation, execution, &c., without the consent of the Minister. This is not an application by the Controller for guidance as to his duty in meeting the very complex claims of the two companies; it is an application for the final determination, as between these Broken Hill companies severally and the Australian Metal Co., of their rights under the several contracts. The questions are, as amended: —[The questions above set out were then read by his Honor].

The point was expressly decided by *Bacon* V.C. in *In re Zoedone Co.* [*No.* 1] (1). It was there held that the power conferred on a voluntary liquidator by sec. 138 of the *Companies Act* 1862 applied to matters in the winding up—not matters arising "extra and beyond the winding up"; so that the power did not apply to a claim of a purchaser from the company to set aside the sale. In the analogous case of bankruptcy, *Bigham* J. (now Lord *Mersey*) refused to express on the application of a trustee any opinion as to the propriety of a proposed compromise (*In re Pilling*; *Ex parte Salamon* (2)); but this case may not be precisely in point. The decisions on originating summonses, however, are very closely in point. Under Order LV., r. 3 (*g*), the executors of a will may take out a summons for "the determination of any question arising in the administration of the estate or trust"; and it has been held that the Court cannot determine a question arising between the estate and a person claiming adversely to the estate (*In re Bridge*; *Franks* v. *Worth* (3); *In re*

(1) 53 L.J. Ch., 465.
(2) (1906) 2 K.B., 644.
(3) 56 L.J. Ch., 779.

Royle; *Royle* v. *Hayes* (1); and see *In re Carlyon*; *Carlyon* v. *Carlyon* (2); *In re Davies*; *Davies* v. *Davies* (3); *In re Bowes*; *Cradock* v. *Witham* (4)). But I have been referred to the decision of the Full High Court in *In re Continental C. and G. Rubber Co. Proprietary Ltd.* (5), in which the Court decided on a summons issued by a Controller under sec. 9H as to the validity of a contract made by an enemy company, as to the right of the other party to the contract to prove in the winding up of the company, &c. The objection to the jurisdiction was not argued or mentioned; but the very fact that the point was ignored makes me pause before dismissing this application as to the Broken Hill companies. I find also that in *In re Dieckmann* (6) *Younger* J. decided upon the corresponding English *Trading with the Enemy Act*, a question as between the Controller and a lessor of premises leased to an enemy subject, as to the liability of the assets to future rent, &c. The learned Judge decided the point as it was frequently arising; but only because the lessor submitted to this jurisdiction, appeared to the summons and concurred with the Controller in asking that the question be settled. In the present case the Broken Hill companies, in answer to my question, consent to submit to the jurisdiction similarly. I am therefore constrained to examine the questions more in detail.

Briefly, the Broken Hill Proprietary Co. claims for concentrates delivered in 1914. The price was to be the average market price for spelter as per *London Public Ledger* (a newspaper of long standing), for the six months July to December 1914 as to some, and for 1914 as to others. The Metal Exchange in London closed on 30th July 1914, and there were no official quotations till 16th November 1914; but the Committee of the Exchange kept an unofficial record of prices realized on outside sales, fixing the average price for each month; and these average prices actually appeared in the *Ledger*. The prices rose beyond all expectation. Questions 1 and 2 mean, substantially: Are those prices recorded in the *Ledger* binding on the Australian Metal Co.; if not, what prices should be paid? I have no

(1) 43 Ch. D., 18.
(2) 56 L.J. Ch., 219.
(3) 38 Ch. D., 210.
(4) 38 Sol. J., 81.
(5) 27 C.L.R., 194.
(6) (1918) 1 Ch., 331.

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material on which to decide what should be the prices if the *Ledger* prices do not bind; and on this application on mere affidavits I should not be asked to decide mere questions of fact. But even as to the construction and effect of the agreement I could not, under the abnormal circumstances, justly give a decision without hearing the Australian Metal Co. The Controller, admittedly, has no interest in the result—he compares himself to a stakeholder. It turns out, from certain affidavits which were put in in response to my inquiries, that the official receiver in England of the Australian Metal Co. opposes the claims and seeks to be heard on them. The official receiver and the representatives of the German Metallgesellschaft and of other firms concerned in the Australian Metal Co. have met in London and asked the Controller here for an adjournment of these proceedings so that one Wallach—formerly the attorney under power in Melbourne of the Australian Metal Co.—may come to Melbourne and assist in contesting the claims. But Wallach, before leaving Australia, entered into a bond not to engage in any business whereby benefit could accrue to German subjects without the consent of the Attorney-General of Australia. The Commonwealth Offices in London have cabled to the Attorney-General for his consent for the purpose of these claims, but the consent has been refused. Under the circumstances, it is only just that the amount of liability to the Broken Hill companies should not be determined except in proceedings in which the Australian Metal Co. can be heard, and if that company be sued it may have the opportunity of bringing in the other companies as third parties liable to indemnify. The amount claimed is £128,778 7s.

The answer to question 3 turns on the effect of the contract (said to be varied by correspondence) between the Broken Hill South Silver Mining Co. and the Australian Metal Co. The "return charges" for freight, &c., as provided in the contract, seem to be fixed at £4 10s. per ton; but the actual charges owing to the difficulties in carriage due to the War were about £11. It appears from a letter of 9th September 1914 that Wallach, the Melbourne attorney of the Australian Metal Co., proposed that as the Metal Exchange in London was closed "final payment should take place on the prices which will be actually realized for the metal produced

from this ore," and that this proposal was "now under consideration," with an addendum guaranteeing to the Broken Hill South Silver Mining Co. a minimum price of lead of £14 per ton. To this letter a reply was sent by the solicitors for the Broken Hill South Silver Mining Co., acknowledging a preliminary payment of part of the price, and adding: "This payment is accepted on 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 in the lead contents thereof." Apart from any difficulty as to varying a deed by such letters, it is by no means clear that the parties were *ad idem* as to the variation, or that they had agreed to any variation, or that the variation did not involve a change as to the fixed sum for return charges. Moreover, I have not before me the complete letters—only extracts; and there may be other letters. By a letter dated 29th January 1917 addressed to the English Controller of the Company, the secretary of the Australian Metal Co. in London emphatically repudiated the calculations put forward by the Company's Melbourne office, and insisted on a deduction of the full £11 per ton. The secretary said: "We shall certainly fight against any settlement made with the Broken Hill South based upon the calculations as put forward by our Melbourne office." In my opinion the Australian Metal Co. ought to have an opportunity to put its case in its own way. The amount claimed is £15,341. If there is jurisdiction in the Court to decide such matters on such an application as the present, both sides shall be heard, not one; the Australian Metal Co. should be heard as well as the Broken Hill companies.

Question 4—as to the claim of the Sydney Municipal Council for an alleged breach by the Australian Metal Co. of an admitted contract for the sale to the Council of a turbo-alternator—is not open to the same objections as questions 1, 2 and 3. The Court is merely asked to say what procedure should be followed for deciding the questions of law and fact; and this question, on its face, seems to be fairly within the words of the Act and of the Minister's order,

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giving power to the Controller to apply to the Court "to determine any question arising in the carrying out of the order." But the answer to the question must depend on the facts; and I am not informed of the facts. If the Controller has satisfied himself that there was no breach of the contract, he should reject the claim; if there was a breach, but the claim for £7,207 (the claim as filed is for £13,500) is in his opinion excessive, the Controller should probably try to get a compromise. If there is only a difficulty as to the construction of the contract, an arrangement might be made for agreed damages on the alternative constructions, leaving the construction of the contract to the Court on a case stated. But as things stand I cannot say what procedure should be followed until the Controller investigates the facts and presents his conclusions to the Court (*cf. In re Pilling*; *Ex parte Salaman* (1)). There is no power conferred on this Court by the order of the Minister, or by any Act so far as I can find, to adjudicate on debts and claims, or to settle a list of creditors. Those who drafted the Act seemed to have copied the provisions of the English Act under the idea that this High Court has the same powers as to liquidation of companies as the High Court of Judicature in England; but the idea is wrong. Ordinary company law is for the Courts of the States. There is no sufficient basis of fact put before me to enable me to give a categorical answer to question 4.

So far, therefore, as it lies in my discretion to refuse to answer any given question, I refuse to answer each of these questions. Any answer would probably do more harm than good. The power to apply to this Court to determine questions which is conferred by the order of the Minister is no greater than the power conferred on a voluntary liquidator (sec. 9H (3)); and a voluntary liquidator has no right to insist that the Court shall answer his questions. Under sec. 138 of the English *Companies Act* 1862 and under sec. 193 of the *Companies Consolidation Act* of 1908, the Court can refuse to answer. It is to answer only "if satisfied that the determination of the question . . . will be just and beneficial." The Australian Metal Co. ought to be heard, as it wants to be heard; and the Court ought not to be asked what procedure should be followed

(1) (1906) 2 K.B., 644.

until the Controller states to the Court the results of his investigation of the facts, with or without the aid of experts. The parties prefer that the application should be dismissed rather than have it adjourned for service of the notice of motion on the Australian Metal Co.

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I dismiss the application.

Application dismissed.

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

Solicitors for the Broken Hill Proprietary Co., *Moule, Hamilton & Kiddle.*

Solicitors for the Broken Hill South Silver Mining Co., *Blake & Riggall.*

Solicitors for the Sydney Municipal Council, *Lynch, McDonald & Elliott.*

B. L.

Appl. *R v Turner; Ex parte Marine Board of Hobart* (1927) 39 CLR 411

Cons *Harrington v Lowe* (1996) 70 ALJR 495

Dist *Kuligowski v Metrobus* (2004) 208 ALR 1

[HIGH COURT OF AUSTRALIA.]

THE NEWCASTLE AND HUNTER RIVER STEAMSHIP COMPANY LIMITED AND OTHERS . . . . . PLAINTIFFS;

AGAINST

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH AND ANOTHER . DEFENDANTS.

H. C. OF A. 1921. SYDNEY, July 25, 26, 27; Aug. 8. Knox C.J., Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Navigation and Shipping—Extent of power of Commonwealth Parliament—Ships engaged solely in intra-State trade and commerce—Validity of Federal legislation—Severability—Valid and invalid provisions included in one expression—Manning and accommodation—Navigation Act 1912-1920 (*No.* 4 *of* 1913—*No.* 1 *of* 1921), *secs.* 2 (2), 7, 14, 43, 44, 135, 136, 288, 293, *Schedules* I. *and* II.—*Navigation* (*Manning and Accommodation*) *Regulations* 1921 (*Statutory Rules* 1921, *No.* 84)—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), 98.

The effect of sec. 51 (I.) and sec. 98 of the Constitution is to endow the Parliament, not with a substantive power to deal with navigation and shipping