

6/1915

JUDGMENTSTARKE J.

This Court on the 16th March 1915 made an order, pursuant to the Trading with the Enemy Act 1914 Sec 8, appointing Horace Bately Allard Controller of the business of the firm of Alexander and Company, such control to continue "until the end of the present state of war or until further order of the Court". By the same order it was provided that the powers to be exercised by the Controller should be subject to certain conditions which included the following: that the moneys of the firm be deposited in a bank to the joint credit of the Controller and Bernhardt Hesselein so far as the moneys were in Sydney, ~~and in the names of the Controller and Louis Frank so far as the moneys were in Sydney,~~ and in the names of the Controller and Louis Frank so far as the moneys were in Melbourne, and that all securities of the firm be in the joint control of the Controller and such one of Bernhardt Hesselein and Louis Frank as should be resident in the place where the security existed. The order also provided that certain moneys withdrawn from the firm and paid or invested ^{to or} for the benefit of the wife and daughter of Louis Frank, and securities for the time being representing the same, should be placed in the same control as the moneys and securities of the firm.

The firm of Alexander and Company consisted of three partners: Edouard Alexander, who resided in Germany and was a German national; Louis Frank, who was also a German national, but had resided in Australia for thirty years and married an Australian subject of the King. ^{Frank had} ~~children and maintained~~ ^{children and maintained} her and maintaining the family home in Australia, and Bernhardt Hesselein, the third partner, ~~was~~ ^{he} was born in Germany but had resided in Australia for some twenty eight years; ^{he} also had married an Australian subject of the King and the family home ^{maintained} ~~was maintained~~ in Australia. Hesselein however had obtained a Certificate of Naturalisation under the Naturalisation Act 1903.

Louis Frank died in Melbourne in 1920, leaving a widow ^{Kathleen Frank} and several children. By his will he appointed the National Trustees Executors and Agency Company of Australasia Ltd. his executor, and the Company duly proved the will. The outbreak of war between England and Germany dissolved the partnership of Alexander and Company and apparently Bernhardt Hesselein with the consent of Louis Frank, proceeded to wind up the business. But, as

already indicated, an application was made to this Court under the Trading with the Enemy Act 1914 for the appointment of a Controller of the firm of Alexander and Co., with the result that it made the order of the 16th March 1915, above referred to.

Under that order, considerable sums of money, securities, and investments came into the possession custody or control of the Controller jointly with Bernhardt Hesselain or Louis Frank. The control was imposed only "until the end of the present state of war or until further order of the Court". "The present state of war", according to the Trading with the Enemy Act 1914 Sec 2, was the period from the 4th August 1914 until such time as the Governor General should issue a proclamation to the effect that the war between His Majesty the King and the German Emperor and between His Majesty the King and the Emperor of Austria King of Hungary, had ceased. Proclamations have been issued declaring that the 10th January 1920 shall be deemed the date of the termination of the war with Germany, and the 16th July 1920 the date of the termination of the war with Austria (See the Commonwealth Gazette 24th for the 8th March 1920 and the 26th August 1920). The control imposed under the order of the 16th March 1915 has therefore ceased, but the Controller and others require some order of this Court, for their protection before handing over the moneys securities and investments come to their hands possession or custody under the order of the 16th March 1915. Consequently the Controller moved the Court, on notice to the parties interested, for the following orders and directions and the determination of the following questions:

1. That the business of the said firm be ordered to be wound up.
2. That all sums and other property resulting from the realisation of assets of the said business or otherwise representing ~~the~~ assets of the said business and now under the control of the said Controller be distributed by the said Controller.
3. That the persons entitled to the said sums and other property and the respective amounts and shares payable to such persons in such distribution be ascertained and determined by this Court.
4. That in the event of any share of the said sums and other property being so ascertained and determined to be payable to Edouard ~~other~~ property and Alexander or to the Public Trustee, the following question may be determined, viz:-
Whether the said Kathleen Frank is entitled to be paid for the last mentioned share the amount of £100 referred to in Paragraph 18 of the Affidavit of Horace Bately Allard to be filed herein, and if so whether without interest or with interest, simple or compound, and at what rate.
5. That in the event of any share of the said sums and other property being so ascertained and determined to be payable to the

legal personal representatives of Louis Frank deceased, the following questions be determined, viz:-

(a) Whether Kathleen Frank widow of the said Louis Frank deceased, is entitled to be paid from the said share the two respective amounts of £1000 and £250 referred to in Paragraph 19 of the Affidavit of Horace Bately Allard to be filed herein, and if so, whether without interest or with interest, simple or compound, and at what rate.

(b) Whether the said Kathleen Frank is entitled to be paid from the said share the amounts of £300 and £350 referred to in Paragraph 20 of the Affidavit of Horace Bately Allard to be filed herein, and if so whether without interest or with interest, simple or compound, and at what rate.

(c) Whether Freida Fenn (née Frank) daughter of the said Kathleen Frank and of the said Louis Frank deceased is entitled to be paid from the said share the amount of £600 referred to in Paragraph 22 of the Affidavit of Horace Bately Allard to be filed herein, and if so whether without interest or with interest, simple or compound, and at what rate.

6. That the said Horace Bately Allard may be discharged from the position occupied by him of Controller of the said Firm and vested with general powers of a receiver of the said firm.

7. That the said Horace Bately Allard may be authorized to retain out of the said sums and other property the costs and expenses properly incurred by him in the course of the winding up of the Company said Firm.

8. That the costs of this application after taxation by the proper officer of the Court may be retained by the said Horace Bately Allard out of the said sums and other property.

In my opinion the motion is misconceived. Jurisdiction is not conferred on this Court to wind up the business of the firm or to distribute its assets. Nor is jurisdiction conferred upon it to determine the rights of the partners inter se to the assets of the firm or the rights of the wife and daughter of Louis Frank as against the partners or the executor of Louis Frank to the moneys and securities paid to or invested for their benefit and brought under the Control Order. The provisions of Sec 9 h and ⁹ P of the Trading with the Enemy Act 1914-1916 are inapplicable to the present case, and Sec 8 does not enable the Court to determine any question arising in the carrying out of the control order, as does Sec 9H in respect of an order made by the Minister for Trade and Customs requiring a business to be wound up. But the Court, I think, has inherent power to give directions to persons who have the possession custody or control of property under an order of the Court, for the return of that property now that the control has ended. Prima facie it seems to me that the property should be returned to the possession from which it was obtained.

But as to the Firm of Alexander and Co further complications

have arisen. On the 25th June 1919 the Minister for Trade and Customs, purporting to act under Sec 9 (I) of the Trading with the Enemy Act 1914-1916, vested in the Public Trustee all property real and personal (including all rights whether legal or equitable in, or arising out of, property real or personal) belonging to or held or managed for and on behalf of Edouard Alexander, being an enemy subject, and likewise the right to transfer such property. And Sec 9 D of the Act directs the Public Trustee to hold the property vested in him under the Act until the termination of the war, and to thereafter deal with the same in such manner as the Governor General directs. Doubtless the share of the Edouard Alexander in the partnership assets would be dealt with in accordance with the Economic Clauses of the Treaty of Peace (See Treaty of Peace Act 1919 and the Regulations made thereunder 1920 No 25). The share of Louis Frank in the partnership assets has not however been vested in the Public Trustee, and ^{on} the 7th October 1920 the Governor General, acting pursuant to Regulation 20 of the Treaty of Peace Regulations, released the share of Louis Frank in the assets of the partnership business from the charge created on that property under the Treaty of Peace, the Treaty of Peace Act 1919, and the Regulations of 1920. Both the Public Trustee and Frank's executors have no doubt a right as against the other partner Hesslein to have the share of Edouard Alexander and the deceased Frank ascertained and paid, but I apprehend that Hesslein would, until a Court intervenes, have the right and duty to wind up the partnership affairs.

In the events which have happened, it seems to me that the proper direction would be that the Controller and other persons in possession of the property of the firm of Alexander and Co pursuant to the control orders, should pay and deliver it over to the only living partner now within the jurisdiction, namely Bernhardt Hesslein, and leave to the Public Trustee and Frank's executors to enforce their rights to their respective shares in the partnership assets by the ordinary legal processes. But Hesslein's ~~executors~~ very reasonably consents to an order that the partnership property should be paid and delivered over to him and the Public Trustee jointly,

A question has arisen whether this order should be made without requiring the Controller to pass his accounts. All the parties who appeared before me apparently consent to this course, but I am not

pared to adopt it. The public interests require, in my opinion, that there should be on record a proper account of the collection, administration, investment and disposal of assets under the order of the Court. Moreover, it is not unimportant that Edward Alexander should have an opportunity, if he ever so desires, of ascertaining what his share in the partnership amounted to and how far it has been dealt with. This may be of moment to him, possibly in connection with claims for indemnity against his own Government, or, again, for the purpose of challenging the right of the Public Trustee to receive the share.

The moneys paid to or invested for the benefit of the widow and daughter of Louis Frank which came to the possession or custody of the Controller and Louis Frank under the control order must be restored to the possession from which they came, namely that of Mrs Kathleen Frank and of Mrs Freida Fenn. It is necessary to direct the National Trustees Executors and Agency Company of Australasia Ltd, the executor of Frank, to join in the restoration. Some of the moneys were deposited or some of the investments made in the joint names of the Controller and Frank under the control order. Consequently, if the Court is to restore the parties, so far as possible, to the position in which they were before that order was made, the executor of Frank must concur in acts necessary to effect that restoration.

It must be understood that the Court gives no judgment as to the rights of the parties in these moneys and securities. The rights of the partners must be worked out if necessary before ^{some competent} ~~an appropriate~~ tribunal and in other proceedings. And if Frank's estate is entitled to the money etc ordered to be paid and delivered over to Mrs Frank and Mrs Fenn, then the executor must establish its rights by the ordinary ~~proper~~ process of law.

A declaration is added to the order which will, I hope, make the position clear, and free other tribunals from any embarrassment in adjudicating upon the rights of the parties and others ^{to} ~~and upon~~ the moneys and securities dealt with in the order.

Mrs Kathleen Frank has communicated with me by letter. I could not act upon this letter, and have not done so. I direct it to be placed with the file of papers in the registry, and to be shewn to such of the parties as may desire to inspect it. It may possibly be useful to the

executor of Louis Frank.

One other matter I think it right to mention. Louis Frank died during the year 1920. The control order ceased to operate after July 1920. But though Frank and his wife were apparently entitled to considerable property, subject to that order, the property was never ^{handed over to them} ~~realized~~, and Mrs Frank and her ^{three} children have, it seems, since her husband's death, been near the point of starvation. Necessary as was the control from the public point of view, still the hardship ~~suffered~~ by Mrs Frank and her family were quite unnecessary. The lack of consideration for their interests reflects but little credit upon those responsible for the administration of the control order.

I have provided in the present order that the Controller pass his accounts within one month or such further time as the District Registrar allows. But I recommend to the District Registrar that he insists upon expedition in the passing of these accounts, and I direct him to report to me if any unnecessary delay takes place.

Further, I trust that Hesselein and the Public Trustee will release the shares of Hesselein and Frank respectively in the partnership ~~asset~~ assets and also the moneys etc payable to Mrs Frank and Mrs Fenn, at the earliest possible moment. And ^{possibly} ~~hope~~ that some arrangement can be made amongst the parties which will soon release some income for Mrs Frank and her children.

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