No. 68 of 1931

McDonald

v

Horlac Air Line Ltd
& Raymond Parer

Reasons for Judgment

Rich J.
Starke J.
Dixon J.
McTiernan J.
} Jointly

Delivered at Sydney
on 5/7/1932.

M c D O N A L D

v

MORLAE AIR LINE LIMITED AND RAYMOND PARER

JUDGMENT

RICH J.
STARKE J.
DIXON J.
McTIERNAN J.

Mc DONALD

v

MORLAE AIR LINE LIMITED AND RAYMOND PARER

This is an appeal by a petitioning creditor from an order of the Central Court of Papua made by Gore J. dismissing a petition for the compulsory winding up of the respondent Company. The appeal is brought under section 43 of the Papua Act 1905-1924 and under the Appeal Ordinance of 1909. The appeal was not argued by Counsel but the parties submitted their contentions in writing pursuant to section 9 of the Ordinance.

It appears that in October 1928 the appellant and the

respondent Parer formed a partnership for the purpose of conducting an air service in and from Papua and the Mandated Territory of New Guinea. On 2nd July 1929 the respondent Company was incorporated under the Companies Ordinance 1912-1926 of Papua. It took over the business and assets of the partnership and the greater part of its share capital was issued to the partners. The appellant came to hold 3,301 fully paid shares of £1.0.0. each and the respondent Parer 3,000. The only other substantial shareholder had only 500 shares. Between the beginning of March and the end of July 1930 the appellant provided sums of money amounting to a little over £90.0.0. for labour and material used at the aerodrome at Port Moresby and for certain hotel expenses.

of the respondent Parer. According to the claim made by the appellant in the present proceedings, the sums so provided were lent to or paid to the use of the respondent Company and constitute a debt owing by it to him. The respondents denied that the Company was indebted to the appellant in these sums or in a further sum of £40.0.0 said to be the unpaid balance of principal and interest upon an advance made by him on 11th May 1929 before the formation of the Company which the appellant seems, nevertheless, to have claimed as a debt due by the Company, perhaps setting up some suggested novation. Gore J., however, was " quite satisfied a debt subsisted " and the case on appeal states, among the facts which on the hearing were

admitted or proved, that prior to 27th February 1931 the Company had incurred a debt with the appellant, which presumably means a debt sufficent to support a winding up petition. On that date the appellant and the respondent Parer brought to a conclusion some negotiations which had been proceeding between them for the acquisition by Parer of the appellant's interest in the concern. They agreed that Parer should pay the appellant a total sum of £350 by two cheques of £150 each with exchange added, and a promissory note of £50. The parties now dispute what exactly it was the appellant agreed to surrender for this sum. The respondents contend that the agreement was that the appellant should transfer to Parer his shares and should make over to him or give up all claims upon the Company and they rely

upon it as an answer to the petition. It is not clear whether the respondents contend that the appellant made an oral equitable assignment to Parer of the debts owing to him by the Company, or that there was an accord and satisfaction, Parer being regarded for this purpose as contracting on behalf of the Company. But ~~w~~ either of these legal interpretations of the facts alleged by the respondents would defeat the petitioner.

The appellant, on the other hand, denies that the agreement related to anything but his shares and contends that the debt of the Company remains due and owing to him. Each of the parties gave oral evidence of the agreement but they were in conflict as to what had

been said. The version of the respondent Parer ascribed very general and somewhat vague expressions to the appellant, but we think that, if this version had been accepted in preference to the appellant's as a correct account of the transaction, an inference might have been drawn that the parties intended that all claims against the Company should be made over or given up by the appellant. But the learned Judge did not form or at any rate express a conclusion upon the veracity or correctness of the rival versions of the transaction deposed to by the witnesses. He resolved the conflict between the parties by interpreting a document which was made out at a bank to which they resorted immediately upon arriving at an agreement. This document was addressed to the Manager of the Bank and was as follows:-

27th February 1931

" I hand you herwith my cheques in your favour, bearing to day's date
" as under:-

£151/10/- drawn on Bank of Australasia, Sydney

£151/10/- drawn on Bank of New South Wales, Salamoa.

.... also Prpmissory Note £50, payable 2 months from date, in favour
" of P.J.McDonald, payable at the Bank of New South Wales, Salamoa.

" On clearance of the cheques mentioned, please pay Mr P.J.McDonald
" the proceeds viz:-£300 in exchange for scrip from him duly endorsed
" in my favour representing 3301 (Three thousand three hundred and
" one) fully paid up £1 shares in Morlae Airline Ltd., and also hand
" him the Promissory Note referred to.

" When such dealing has been completed and you have duly received
" the scrip mentioned, please forward same to your Salomoa Branch for
" delivery to me ; and in your acting as above you and your Bank are
" free from all responsibility.

" I hereby agree to hold you and your Bank indemnified against all
" loss, actions and claims arising therefrom.

" Yours faithfully

" (Signed) Ray Parer

" I agree to the above dealing and undertake to execute transfers of
" the scrip mentioned when the £300 is paid to my account in the Bank
" of New South Wales, Port Moresby and the Promissory Note held by the
" Bank on my account.

(Signed) P.J.McDonald. "

"

In his judgment the learned Judge described this document as the deciding factor of the matter and said :- " I have given a great " deal of consideration to this letter and from it it appears to me " that the sum of £300 was for the purchase of 330I shares petitioners " interest in the Company. For what then was the £50 p.n. given ? " I can come to no other conclusion that it represented the debt and " that the whole sum of £350 was in payment of the shares and in " satisfaction of the debt."

After a full consideration of the matter we find ourselves

unable to concur with His Honour in thinking that the document provides a solution to the question at issue. We think that all the expressions it employs are as consistent with the view that the whole £350 was paid for the shares or that the shares were the only subject of the transaction as with the view that £50 was allocated to the claims of the appellant otherwise than as shareholder or that both the shares and other interests or claims of the appellant were included in the dealing.

We think that, as the learned Judge based his decision upon a meaning of the document which we do not consider it possesses, his determination of the issues of fact cannot be supported.

For these reasons we are of opinion that the order

appealed from must be set aside and the matter remitted to the Central Court of Papua to be further dealt with according to law. This will enable the Court to reconsider the matter and give a decision upon the whole of the evidence adduced in the case, oral and written. The parties, if they are wise, will not incur the costs of any further hearing but will submit the matter to the decision of Gore J. on the materials as they now stand.

Costs of appeal to abide the result of the proceedings