IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY) No. 61 of 1934

ON APPEAL from the Supreme Court of New South Wales in its Equitable Jurisdiction.

IN THE MATTER of THE COMPANIES ACT

AND IN THE MATTER of FEDERAL BUILDING ASSURANCE COMPANY LIMITED

AND IN THE MATTER of FRANCIS JAMES BENTON

AND ON APPEAL

BETWEEN

FRANCIS JAMES BENTON

Appellant

- and -

ALEXANDER EWAN CAMPBELL and

FEDERAL BUILDING ASSURANCE COMPANY LIMITED (In Liquidation)

Respondents

BEFORE THEIR HONORS THE ACTING CHIEF JUSTICE AND MR. JUSTICE STARKE, MR. JUSTICE DIXON, MR. JUSTICE EVATT AND MR. JUSTICE McTIERNAN

Tuesday the Second day of April in the year of our Lord One thousand nine hundred and thirty five.

WHEREAS in pursuance of directions given by the Honourable Sir John Musgrave Harvey Knt. Chief Judge in Equity of the Supreme Court of New South Wales on the Twenty sixth day of April One thousand nine hundred and thirty three the objections of the abovenamed Appellant to his inclusion in the list of contributories of the abovenamed Respondent Federal Building Assurance Company Limited (in liquidation) as the holder of seven thousand four hundred and forty three (7,443) Cumulative Preference shares came on to be heard before Mr. Harry André Henry as

Acting Master in Equity of the said Supreme Court on the Third Fourth Eighth Ninth Tenth Fifteenth Twenty ninth and Thirtieth days of August One thousand nine hundred and thirty three AND WHEREAS on the said Thirtieth day of August One thousand nine hundred and thirty three it was ordered by the said Acting Master in Equity that the matter should stand for judgment AND WHEREAS the matter standing for judgment accordingly on the Twelfth day of February One thousand nine hundred and thirty four the said Acting Master did adjudge that the Appellant was properly placed on the said list by the abovenamed Respondent Alexander Ewan Campbell the Official Liquidator of the abovenamed Respondent Company for the number of shares placed opposite the Appellant's name in such list and did order that the Appellant should pay the said Respondent Liquidator's costs as between party and party as in the judgment of the said Acting Master mentioned AND WHEREAS by his certificate dated the Twenty first day of May One thousand nine hundred and thirty four the Master in Equity of the said Supreme Court certified (inter alia) that the Appellant had been included in the said list of contributories as a contributory of the said Respondent Company in respect of (inter alia) the said seven thousand four hundred and forty three (7,443) shares AND WHEREAS on the Eighteenth day of June One thousand nine hundred and thirty four the Appellant filed a summons to the Honourable Sir John Musgrave Harvey Knt. the Chief Judge in Equity of the said Supreme Court to vary the said certificate by reducing the number of shares set opposite the name of the Appellant in the First Schedule to the said certificate (Serial Number 13) from Seven thousand four hundred and forty three (7,443) to Three thousand six hundred and five (3,605) and by altering the date of the inclusion in the said list of the Appellant as a contributory in respect of Three thousand six hundred and five (3,605) shares from the Twelfth day of February One thousand nine hundred and thirty four to the Fourteenth day of March One thousand nine hun-

dred and thirty two AND WHEREAS the said summons came on to be heard before the Honourable Kenneth Whistler Street a Judge of the said Supreme Court sitting in Equity on the Twenty fourth Twenty fifth and Twenty ninth days of October last AND WHEREAS on the said Twenty ninth day of October last His Honor did order that the said summons should stand for judgment AND WHEREAS the said summons standing for judgment accordingly on the Second day of November last His Honor the said the Honourable Kenneth Whistler Street did order that the said summons be and the same was thereby dismissed and did further order that the Appellant should pay the Respondents' taxed costs as in the said order mentioned AND WHEREAS on the Twenty first day of November last the Appellant filed a notice of appeal to this Court against the whole of the order of the said the Honourable Kenneth Whistler Street and the said appeal coming on to be heard before this Court this day WHEREUPON AND UPON READING the certified copy of documents transmitted by the Master in Equity of the said Supreme Court to the New South Wales Registry of this Court AND UPON HEARING what was alleged by Mr. Flannery of King's Counsel and Mr. Stuckey of Counsel for the Appellant and by Mr. Street and Mr. Smith of Counsel for the Respondents THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed AND that the said order of the Honourable Kenneth Whistler Street be and the same is hereby discharged and the said certificate of the said Master in Equity be and the same is hereby varied by reducing the number of shares in the abovenamed Respondent Company (in liquidation) set opposite the name of the Appellant in the First Schedule thereto (Serial Number 13) from Seven thousand four hundred and forty three (7,443) to Three thousand six hundred and five (3,605) AND by altering the date of the inclusion in the said list of the Appellant as a contributory in respect of the said Three thousand six hundred and five (3,605) shares from the Twelfth day of February One thousand nine hundred and thirty four to the Fourteenth day of March One thousand nine hundred and thirty two AND that the said summons be dismissed out of

the said Supreme Court with costs AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the Appellant of and incidental to this appeal and to the proper officer of the said Supreme Court to tax and certify the costs of the Appellant in the said Supreme Court and in the office of the Master in Equity and that the costs of the Appellant when so taxed and certified be paid by the Respondent Alexander Ewan Campbell out of the assets of the Respondent Company to the Appellant or to his Solicitors Messrs. H. Hamilton Moore & Co. within fourteen days after service upon the Respondent the said Alexander Ewan Campbell of an office copy of the certificate or certificates of taxation AND THIS COURT DOTH FURTHER ORDER that the sum of Fifty pounds (£50) paid into the said Supreme Court by the Appellant by way of security for the costs of this appeal together with interest accrued thereon (if any) be paid out of Court to the Appellant or to his said Solicitors.

BY THE COURT.

F. D. Moore
District Registrar

SUPREME COURT OF AUSTRALIA
DISTRICT REGISTRY

Reasons for judgment

2 April 1935

IN THE HIGH COURT OF AUSTRALIA No. 61 1934

Original

ON APPEAL from the Supreme Court of New South Wales in its Equitable Jurisdiction.

IN THE MATTER of the Companies Act

AND IN THE MATTER of Federal Building Assurance Company Limited

AND IN THE MATTER of Francis James Benton.

AND ON APPEAL.

BETWEEN FRANCIS JAMES BENTON (Appellant)

And

ALEXANDER EWAN CAMPBELL AND FEDERAL BUILDING ASSURANCE COMPANY LIMITED (In Liquidation) (Respondents).

Tuesday, 2nd. April 1935.

JUDGMENT OF THE HIGH COURT OF AUSTRALIA'

HIS HONOUR, THE ACTING CHIEF JUSTICE.

In my opinion the Liquidator has not sustained the onus imposed on him of showing a concluded contract to take shares.

If the case be tested by the illustration of an action or suit for specific performance by the Assurance Company against the Appellant, Benton, of a contract to take shares I think that the Company would not succeed. Whatever the rights may be between the two Companies - the Assurance Company and the Loan Company - with regard to the issue of shares, I cannot find evidence of a concluded contract which can be enforced against the appellant and I think the Appeal should be allowed and the Order of the Judge discharged.

ORDER. Appeal allowed - Order of Street J. discharged - certificate of the ~~Acting~~ Master varied.

Costs in this Court and in the Court below and in the office of the Acting Master to be paid by the liquidator out of the Assets.

BENTON v CAMPBELL AND FEDERAL BUILDING ASSURANCE COMPANY LTD (In liquidation)

ORAL JUDGMENT DIXON J.

In my opinion the appeal should be allowed.

I accept the learned Judge's views as to the manner in which the minute of 28th.July and the minute of 5th.August were made up. It appears to me that the facts of the case probably were these. An application was made to the Loan Company by the appellant for 5,540 shares in a form which I should think would authorize the Loan Company to nominate him to the Liquidating Company as an allottee of the shares.

On 28th July,the Secretary of the Liquidating Company had made up a total of the shares to be allotted. Possibly, although it is a matter of conjecture,he had lists made up by the constituent companies of persons to whom they were to be allotted and also of the amounts to be paid up. A resolution was then, I think,passed allotting shares in a block to the full amount specified by the agreement or resulting from the agreement. After that had been done,and I think before there had been a schedule made up of the shares which each individual was to take and of the amounts to which the shares were to be considered paid up,the Secretary of the Company and the appellant,Benton, probably had a conversation,the result of which was that he agreed that his application should be reduced to 1,702 fully paid up shares,together with certain shares which are not the subject of this appeal.

Then I think the minute of 5th.August was written recording what took place on 5th August, and in that minute the minutes of the previous meeting were confirmed,incomplete as they were.

The directors on 5th.August recorded that Roche,Hogue, Kirkness and Benton had agreed to surrender the balance of the cumulative shares allotted to them,but not yet paid for,but

agreed to take cumulative preference shares for the amounts paid by them to date. That appears to me to suggest that they considered that they had a right to shares for the larger amount- in the case of this particular appellant,5,540 - and that each had reduced them to lower amounts - in this case to 1,702. It does not appear to me to show that they considered actual allotments had been made to them,but merely that they had a right which they could surrender. Whether the shares had been allotted to them in the technical sense or not is a matter with which they probably did not concern themselves very much at that stage.

After 5th August - possibly some time after - lists were, I believe,made up and added to the minutes of 28th July. They state that in respect of the appellant 1,702 shares only had been allotted.

Substantially I agree up to this point with the decision of the learned Judge and the reasons he gave,except that I am disposed to put the arrangement between the two dates - 28th July and 5th August 1927. That being so,if there had been an allotment on 28th July,the intended arrangement recorded in the minute of 5th August would not be valid in point of law and would not bring about a surrender of any of the shares allotted, but would leave the appellant,Benton,liable to remain on the list of contributories in respect of the full number. The real question in this case appears to me to be whether in the state of circumstances I have described there is satisfactory evidence of an allotment made to him individually on 28th July 1927. In my opinion there is no satisfactory evidence of such an allotment.

The minute which,prior to its alteration,showed the full number of shares calculated under the agreement, was expressed in terms which describe an allotment made not to the appellant, Benton, but to the Loan Company. Such an allotment would be consistent with the agreement and would be made with a view to the Loan Company afterwards transferring the ~~xxxxx~~ shares to the appellant,Benton. I think it is at least consistent with/the all facts that this was the then intention and that afterwards it was found more convenient to make up lists of persons to whom shares were allotted directly and to enter them in the share

register as the allottees.

In the second place,whilst one may conjecture that all parties were agreed precisely as to the amount of shares which each member of the two constituent Companies was to receive and the amount to be deemed paid up upon them , knowing,as we all do,how very irregularly and informally business men conduct such transactions and what little attention they pay to legal requirements which distinguish one mode of acquiring shares from another, I do not think that one is warranted in coming to the conclusion that on 28th July the directors did any formal act with the express intention of vesting shares in the appellant as an individual. It is more probable that they thought it sufficient to pass a resolution allotting the shares as a whole and left it to the Secretary to draw up typewritten sheets to express correctly the steps formally necessary. They were concerned with the desirability of an immediate allotment of shares perhaps and were not very greatly concerned at the moment as to precisely to whom they were to be allotted and how far as paid up shares.

For these reasons I think there is not sufficient material to find upon that date - 28th July - an acceptance of an offer to become a shareholder. Accordingly the transaction effectually made the appellant a shareholder in respect of 1,702 shares only, and the amount of these shares was fully paid up.

For these reasons I think the appeal should be allowed.