S/1

1581

IN THE SUPREME COURT

OF THE TERRITORY OF PAPUA AND NEW GUINEA

BETWEEN

RICHARD MURRAY CROOKE and
LEONARD FRANCIS McEACHERN Plaintiffs

-and-

ROBERT KEITH YORSTON, LANCE MURRAY JOHNSON and HAMAC HOLDINGS LIMITED Defendants.

REASONS

The action is based on the assertion that the appointments of messrs. Yorston and Johnson as directors was invalid. In the course of argument however it appeared that the same grounds of invalidity might apply to Mr. Crooke also. Since his appointment was first in point of time, it is probably most convenient to consider first the validity of Mr.Crooke's appointment.

At the Directors meeting on 19.5.59 Mr. Crooke was appointed director and according to the minutes the secretary reported that Mr.Crooke held the necessary qualifying shares. The shares had been applied for in March, paid for in April, and the certificate issued bears date the 18th May 1959. The Application and Allotment Register, Exhibit B- (Fol.20 entry 41) and also the Share Register (Fol.1 & 67) show the entries as having been made on 19th May. Mr.Sargent the Company's secretary, now says that according to the usual practice the Share Certificate was prepared in anticipation of the meeting being held on 18th May but was in fact sealed and signed with

the Certificates for Applications Nos. 25-40, after the appointment of the directors, and in the order of business shown in the Minutes, not as shown in the Agenda. Meetings, formal and otherwise, were held over several days and there is room for doubt as to when or by whom various steps were taken, eg. Applications 25-32 appear to have been approved by Mr.Sefton and Nos.33-41 by Messrs.Mackechnie and Cosh. (Exhibit B).

Only two of the persons present were called to give their recollection of the order of events. I think it most likely that the minutes give the correct order. The agenda is tentative and leaves blank spaces evidently to be filled in at the meeting according to the practice adopted by Mr. Sargent in taking notes for subsequent preparation of the Minutes. I prefer Mr.Sargent's account of what happened, but in any event I think that I must conclude that Mr.Crooke's name was not on the Register when he was appointed.

The qualification for a Director is "the holding" of 2000 shares to be held "at time of appointment or election".(Art.74). The article does not say that the holder's name must be on the Register at the time but, at least in the case of a transfer, it is too late to distinguish between a "holder" of shares and a member duly registered as such. (Spencer v Kennedy 1926 Ch.125.). The articles use the words holder and member interchangeably in several places (eg. Art.60), and the ordinary meaning of "held" is referable to a person registered as a shareholder, so that there is no need to add the word "registered" except perhaps to eliminate possible reference to share warrants in favour of bearer. (In re ALA MYNAAD Indian G.M.C.21 Ch.D.849) (See also Companies Ordinance 1912-54,Papua,Secs.7(a), 20,21.)

In spite of Mr.Cullinan's persuasive argument that the reason for insisting on actual registration in case of transferred shares does not apply in case of originally allotted shares, I think that to draw a distinction now between a holder of shares and a registered holder for the purposes of Article 74 is to read too much subtlety into the language of the Article, which, like other articles dealing with members, is expressed in terms of common and established usage. It is not a question whether a transferee can be distinguished from an allottee, for clearly he can. The question is whether such a distinction is to be implied or inferred in the wording of Article 74 so as to assist the Plaintiffs, and I think it cannot.

I hold therefore that Mr.Crooke was not validly appointed as a director at the meeting held in May 1959, but that the participants acted in good faith and on the Secretary's assurance, and that they must be taken to have been unaware of the defect.

This involves consideration of Section 250(4) of the Companies Ordinance. Section 67 of the Queensland Companies Act 1863 throws a good deal of light on this Section, and shows that both sub-sections (3) and (4) as they now appear were governed by the opening words "Until the contrary is proved". In its original form the section would not validate Mr.Crooke's appointment now that the contrary appears. It was fairly common practice in Papua, when long sections of Queensland Acts were adopted, to subdivide them into shorter numbered paragraphs, and I must assume that the legislature intended the provisions to apply in their altered form. I think that in its own terms Sub-section (4) only applies to latent defects, and is not a licence to ignore invalidity when the defect is discovered; but while the defect is latent I think that

acts performed by directors are valid and that for the purpose of validating those acts, but for no other purpose, the directors are deemed to have been validly appointed. The clause makes those acts valid, but does not make the defective appointment valid. It preserves the effect of the defect, and leaves the director as he was except that he is deemed to be validly appointed for the purpose indicated.

Thus I think that the omission of the opening words of the sub-section makes only this difference, that Mr.Crooke's actions as a director are validated until the defect is discovered, but not until it is proved that the defect existed.

On my reading of Section 250(4) I think that it follows that Mr.Crooke cannot now be a director, nor can he be deemed to be one for any purpose, now that the defect is discovered. Even if Mr.Crooke were to be regarded as a director at any stage, I cannot accept the argument that he continued in office as a retiring director under Articles 76 and 78. The provisions of Article 85 as to notice were not complied with. These requirements are abrogated by Article 76 in the special case of a retiring director. There is a clear scheme for retirement and re-election specified and the persons comprised in the scheme must have been approved by a majority of shareholders at a general meeting. The special power in Article 80 to fill a casual vacancy or appoint an additional director is vested in the Directors subject to safeguards, perhaps the main one being that he is to hold office only until the next general meeting. He may be "re-elected" but the absence of the express abrogation of the requirements of notice such as applies to a retiring director under Article 76 strengthens the impression that the power of the directors is special and

limited and that their appointee is not in the same position as a retiring director previously appointed by the Company. There is of course much sound reason for this, and it is no mere accident.

A retiring director remains in office until the close of the meeting (Article 75), although his office is spoken of as vacated (Art.77), and if re-elected his service becomes continuous. Article 78 carries on the same notion of continuity in case no successor is appointed at the "directors' director", appointed under Article 80 vacates his office when the meeting commences, and his service is discontinuous if he is again elected. I think the distinction is very clear and I can see no grounds for applying Article 78 to a director appointed under Article 80 even if his appointment is valid.

The Plaintiffs' only title to sue in this action is based on Mr.Crooke's directorship. Mr. McEachern resigned in June 1959. A shareholder would not be entitled to the relief claimed in this action as against the Company. In my opinion therefore the action fails.

It is not necessary for me to determine the validity of the appointments of Messrs. Yorston and Johnson as directors, but I will express my opinion as to their position. Their appointment was by the Company in general meeting, the validity of the convening of which would be saved by Section 250(4). Nevertheless they were not qualified when first appointed, and since they were appointed under Article 80 they were not retiring directors when re-elected. Section 250(4) does not appear to save the failure to give notice of intention under Article 85, and I think that Messrs. Yorston and Johnson are in the same position as Mr.Crooke.

This leaves Mr.Sefton as the sole director when he appointed new directors on 11th January 1960. Since then there have been further changes and I think that no purpose would be served in going beyond the 11th January.

ORDER: Action dismissed with costs.