IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

OLLERENSHAW, A.C.J.
THURSDAY,
17TH JULY, 1969.

BETWEEN HAMAC HOLDINGS LIMITED (In Liquidation) Plaintiff

AND SANGARA (HOLDINGS) LIMITED Defendant

JUDGMENT.

69,
ne 11, 12, 13,
, 17, 18, 19,
, 23, July 17.
. MORESBY.
erenshaw, A.C.J.

The plaintiff is a holding company incorporated in this Territory on the 8th October, 1956, as a company limited by shares.

On the 1st April, 1960, an Order was made by this Court that it and all but one of its subsidiary companies be wound up compulsorily.

Liquidators were appointed and they produced Balance Sheets and Accounts for each of the companies covering the period during which they functioned, which have been used extensively in these proceedings.

On the 5th October, 1961, final, or what have been called "formal", Orders were made in this Court staying the winding-up of the plaintiff and its subsidiaries to allow a Scheme of Arrangement or Compromise to come into operation. On the 30th September, 1960, a company, Papua New Guinea Development Corporation Limited, had been incorporated for the purpose of rescuing the plaintiff from its difficult financial situation in the event of its liquidation being stayed. The name of this company appears frequently in the evidence but I do not see that I am much concerned directly with it.

On the 28th September, 1961, the plaintiff was still in liquidation and it had no directors. Nevertheless on that day what was described as, and what I am prepared to assume was, a valid extraordinary general meeting of shareholders was held which purported to appoint four persons to be directors of the plaintiff company none of whom held any shares in such company.

I would have liked to quote the provisions of the plaintiff's constitution which are relevant to this action in one place but I think that it is convenient here to cite its Article 74 which prescribes the qualification for a director:

"74. The qualification of a Director shall be the holding of not less than two thousand (2000) shares in the Company. Directors shall hold their requisite share qualification at time of appointment or election."

To return to the facts: none of the four persons purported to be appointed directors had the share qualification prescribed by Article 74 and I can say no more than that they did not become directors as a result of the proceedings at the meeting of the 28th September, 1961. Since his name, so frequently uttered during the hearing, cannot escape this judgment I may introduce one, Stephenson Fox, as one of the four persons purported, as above, to have been appointed as directors of the plaintiff. It also seems that he was at this time the acting, if not the full, secretary of the plaintiff: he was present at the meeting in this capacity and as representing what I take to be a shareholding company.

It would appear that some apprehension was felt about the purported appointment of directors because on the 16th October, 1961, what was described as a "Meeting of Directors" was held at which the required qualification shares purportedly were issued to three of the four persons whom I have mentioned as having been appointed, on the face of it, as directors. There were two persons present at this "Meeting of Directors" - a sufficient number for a quorum. One of them was one of the four purportedly appointed as aforesaid and the other was an employee of the purportedly appointed director Fox, appointed by him as his "Alternate Director" and also representing him in his capacity of secretary to the plaintiff. This meeting and its action in allotting shares was a hollow farce. The persons who purported to meet as directors were not directors and the allotment of qualification shares to the three persons supposed to have been appointed previously as directors was invalid as was also the allotment of a single share each to three of the employees of Fox, whose position thus far I need not describe again. I should add that none of the four persons purported to have been appointed directors at the meeting of shareholders on the 28th September, 1961, had at that time the necessary qualification shares, the holding of which was a condition precedent to their valid appointment. In spite of the meetings of the 28th September and 16th October, 1961, the plaintiff had no directors and that position obtained at relevant times, a position which must have been known to Stephenson Fox.

It did have considerable liabilities and it had assets, some valuable and the others worthless or almost so. It is, therefore, not surprising that at a meeting of the persons acting as directors of the plaintiff held on the 10th March, 1962, this resolution was recorded:

> "POLICY: In view of the fact that the only two assets making a profit are the Goroka and Cecil Hotels the Board RESOLVED that their policy should be to dispose of all assets except these two Hotels."

Notwithstanding the exception of the plaintiff's hotel interests from this policy of disposal it is impossible upon the evidence to avoid the conclusion that a plan was devised to strip the plaintiff of these valuable interests and pass them to the defendant, a company that at the time was in financial difficulties and was only too willing to obtain such interests for its assistance generally and particularly in a contemplated appeal for further capital.

It is not clear to me who were or was the master minds or mind behind this scheme but it is clear that the executive was Stephenson Fox, who remained a "director" of the plaintiff until his resignation on the 4th October, 1962.

On the 24th April, 1962, a "Meeting of Directors" of the plaintiff was held at which there were present the one of the originally appointed four unqualified directors to whom no shares were purported to have been allotted at the meeting of the 16th October but who held a proxy from one to whom the necessary qualification shares had been so allotted and Stephenson Fox as a "director" and as secretary of the plaintiff.

In the records of this meeting of "Directors" of the 24th April, 1962, there is the first intimation in evidence of what is to come:

> "MOROBE HOTELS LTD: Mr. Fox reported that there had been discussions with Sangara (Holdings) Ltd. Board, as a result of which an offer is expected for the whole of Hamac Holdings Ltd. and Papua & New Guinea Development Corporation Ltd.'s interest in shares and credit in Morobe Hotels Ltd. This offer will also include Territory Finance Co. Ltd.'s interest in Morobe Hotels Ltd."

At this stage Stephenson Fox, who had been active in the affairs of the defendant company for some years, was a shareholder in the defendant, its secretary and an alternate director, who frequently had chaired meetings of the directors of the defendant.

In the minutes of a meeting of the directors of the defendant held on the 28th April, 1962, at which Fox was present as an alternate director and secretary a record appears under the subtitle "MOROBE HOTELS LTD." that:

> "The Secretaries reported that Hamac Holdings Ltd. had offered to sell 345,823 fully paid 5/- shares in Morobe Hotels Ltd. which fully owns the Hotel Cecil through

its subsidiary Coffee Products Ltd. and the Goroka and Wau Hotels. According to the offer the consideration for the sale was to be:- ....."
(There follows the terms proposed for the sale.)

One sees that on the 24th April, 1962, Fox was reporting to the plaintiff that an offer was expected from the defendant for its interest in Morobe Hotels Limited and four days later Fox reported to the defendant that an offer had been made by the plaintiff to sell this interest to the defendant.

Although no meeting of the plaintiff's "directors" or shareholders took place between the 24th April, 1962, and the 1st May, 1962, a Deed that had been prepared by a solicitor upon the instructions of Fox acting for both the plaintiff and the defendant, was entered into on the latter day providing for the sale by the plaintiff to the defendant of the whole of the plaintiff's shares in the capital of Morobe Hotels Limited.

Subsequently the plaintiff and its subsidiaries were ordered by this Court to be wound up compulsorily.

In this action, which is brought at the instigation of the plaintiff's official liquidator, the plaintiff asks for a declaration that this Deed of the 1st May, 1962, is void and of no effect and for consequential declarations and orders. One of these declarations is that a subsequent "Deed" dated the 31st May, 1962, between the plaintiff and the defendant, to which I mention in passing the affixing of the plaintiff's seal was attested by Stephenson Fox, who also signed it on behalf of the defendant, also be declared void and of no effect. This "Deed" dated the 31st May, 1962, relates to the Deed of the 1st May, 1962, and I propose to say no more about it than that if the Deed of the 1st May is a nullity it falls with it. More could be said of it.

The plaintiff says that the Deed of the 1st May, 1962, is void for three independant reasons any one of which is sufficient to render it a nullity: firstly, that the plaintiff had no directors who could authorise its execution; secondly, that the purported directors did not authorise its execution by the affixing of its seal and thirdly, that the subject matter of the sale provided for by the Deed, namely its shares in Morobe Hotels Limited, comprised the plaintiff's main undertaking, which could only be sold, pursuant to its Article of Association No. 102(a), subject to ratification by the shareholders in general meeting.

I do not understand it to be disputed by counsel for the defendant that the plaintiff did not have any regularly appointed

directors or that such purported directors as it had did not authorise the execution of the disputed Deed. He relies, I think, upon Article No. 100 and also the relevant section of the Companies Ordinance 1912 (amended) in the common form providing:

"100. All acts done by any meeting of the Directors or by a Committee of Directors or by any person acting as Director shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such Director or person acting as aforesaid or that they or any of them were disqualified be as valid as if every such person had been duly appointed and was qualified to be a director."

More particularly he relies upon the principle of The Royal British Bank v. Turquand (1) and the stronger case of Mahony v. East Halford Mining Co. (2) to the effect that, notwithstanding that a company's Articles of Association are a public document, of the contents of which anyone dealing with the company is deemed to have notice, in certain circumstances an outsider is entitled to assume that all internal regulations of the company have been complied with.

Counsel for the defendant did dispute that the plaintiff's interest in Morobe Hotels Limited was its main undertaking and in any event here again he relied upon the principle of Turquand's Case (1) and maintained that the defendant was entitled to assume that the sale of these assets had been ratified by the plaintiff's shareholders in general meeting.

I am told by both counsel that the phrase "main undertaking" in Article No. 102(a) has not received any judicial interpretation: they agree that whether or not the plaintiff's interest in Morobe Hotels Limited was its main undertaking at the date of the sale to the defendant is a question of fact. I agree that I am not concerned to define the phrase and heed the warnings against an attempt to make an exclusive definition. I regard the phrase in the light of the fact that the plaintiff was a holding company and that its assets consisted of shares in some eight separate subsidiary companies.

Considerable evidence has been given about the value and so on of the plaintiff's interest in these subsidiary companies. I do not propose to analyse it: it is all one way. I find, without hesitation, that the plaintiff's interest in its subsidiary companies other than Morobe Hotels Limited was negligible or worthless.

Morobe Hotels Limited owned and controlled and, lifting the veil of incorporation, (see, e.g. Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies per Lord Reid (3)), the plaintiff owned and controlled

(1) 6 El. & Bl. 327; 119 E.R. 886.
(2) (1875) L.R. 7 H.L. 869.
(3) (1955) 1 W.L.R. 352 at p. 367.

three valuable hotels. They were valuable properties with considerable potential. At the relevant time two of them, namely the Hotel Goroka and the Hotel Cecil were making considerable profits. It is true that the Hotel Wau had suffered a loss at the relevant time but it was a valuable property and at the time it was the opinion of the present Valuer-General, who gave evidence, that under proper management it, too, could return profits.

I find, without hesitation, that the plaintiff's main undertaking at the relevant date was its interest in Morobe Hotels Limited, the whole of which was purported to be disposed of to the defendant.

I must now come to what I see as the crux of the matter.

I find that at the relevant time the defendant left its acquisition in the plaintiff's interest in Morobe Hotels Limited to Stephenson Fox as its agent, Stephenson Fox whose interest in and knowledge of the plaintiff's affairs was entirely complete for my purposes. The cases relied upon by counsel for the defendant, such as In re Hampshire Land Company (4), as to companies having a common officer are beside the point. I find that Stephenson Fox must have known, that he knew of the disability of the alleged directors of the plaintiff. and I find that good faith certainly was absent. I say disability of the directors having in mind the distinction between such disability and the facts upon which it depended: See, for instance: The Peoples Prudential Assurance Co. Ltd. v. The Australian Federal Life And General Assurance Co. Ltd. (5).

I find too that he must have known, that he did know, that the plaintiff's interest in Morobe Hotels Limited that he was acquiring for the defendant was the plaintiff's main undertaking and finally that he must have known, that he did know, that its sale or disposal had not been ratified by the plaintiff's shareholders in general meeting or in any way at all.

I cannot see that the defendant can rely upon the principle of Turquand's Case (6) because the defendant must be taken to have known, because its agent knew, that the "internal regulations" of the plaintiff had not been complied with in the sale. In effect it is saying now that I shut my eyes to everything, I left it to my agent, Stephenson Fox, an agent for whose services it was deeply grateful as is evidenced by the following statement in its Directors' Report presented at its Ninth Annual General Meeting held on the 25th June, 1962: "On your behalf, the Board desires to express its sincere appreciation to our Secretary, Mr. S. Fox of E. A. James & Co., for his sterling effort to bring about diversification and further consolidation of the affairs of this Company."

(4) (1896) 2 Ch. 743.
(5) (1935) 35 S.R. (N.S.W.) 253 at p. 268.
(6) 6 El. & Bl. 327; 119 E.R. 886.

I should mention, perhaps, that the shares, the subject of the purported sale, were transferred into the name of the defendant by two "forged transfers" (I adopt with approval the description of plaintiff's counsel) and a Statutory Declaration by a director of the defendant, which were accepted by Stephenson Fox, who by this time had become secretary of Morobe Hotels Limited. It may have been that the forged transfers were prepared by him or under his direction. All I wish to say about these transfers and Declaration is that they could add nothing to the invalid transaction in relation to the shares in question.

Counsel for the defendant has not pursued some of the other defences raised in the Statement of Defence, e.g., estoppel, but he has urged that if I do make declarations and orders in favour of the plaintiff I should make orders upon certain conditions with respect to some consideration that he says, in effect, the plaintiff received. There is no counter claim and as I see the position these are matters for the defendant to prove in the liquidation of the plaintiff.

I deeply regret that in the condition in which I find myself I am unable to do justice to the length of the case and the devotion of counsel to it. However, I think that, in all the circumstances, I should deliver this judgment and make my declarations and orders without further consideration. I have given the best consideration that in the circumstances I have been able to give to all that counsel urged upon me.

I make the following declarations and orders as asked for by the plaintiff upon notice to the defendant:

I ORDER AND DECLARE

1. THAT the deed of sale of 1st May, 1962 between Hamac Holdings Limited and Sangara (Holdings) Limited for the sale by Hamac Holdings Limited of 345,823 fully paid five shilling shares in the capital of Morobe Hotels Limited to Sangara (Holdings) Limited is void and of no effect.
2. THAT the Agreement of 31st May, 1962 between Hamac Holdings Limited and Sangara (Holdings) Limited relating to the aforesaid sale of shares in the capital of Morobe Hotels Limited is void and of no effect.
3. THAT the undated transfer of 254,307 shares in the capital of Morobe Hotels Limited appearing on the back of Share Certificate No. 26 dated 5th August, 1957 is void and of no effect.
4. THAT the undated transfer of 80,000 shares in the capital of Morobe Hotels Limited appearing on the back of Share Certificate No. 37 dated 29th August, 1957 is void and of no effect.
5. THAT the defendant holds and at all times held the whole of the issued shares in the capital of Morobe Hotels Limited in trust for the plaintiff.

AND I FURTHER ORDER

THAT within twenty-one days of the date of service upon it of a copy of this order the defendant deliver up to the plaintiff all the share certificates relating to the shares in the capital of Morobe Hotels Limited held by it in trust for the plaintiff together with properly executed transfers to the plaintiff in respect thereof.

AND I FURTHER DECLARE

THAT the defendant is liable to account to the plaintiff for the amount of any dividend received by it directly or indirectly upon the shares in Morobe Hotels Limited held in trust by it for the plaintiff or upon the shares in Coffee Products Limited owned by Morobe Hotels Limited at 1st May, 1962 or upon the shares in Hotel Cecil Limited owned by Coffee Products Limited at 1st May, 1962.

AND I FURTHER ORDER

THAT within twenty-eight days of the date of service upon it of a copy of this order the defendant render to the plaintiff an account of all moneys received by it by way of dividend or otherwise from Morobe Hotels Limited, Coffee Products Limited and Hotel Cecil Limited from and including 1st May, 1962.

AND I FURTHER ORDER

THAT either party be at liberty to apply on fourteen days' notice to the other party.

AND I FURTHER ORDER

THAT the defendant pay the plaintiff's costs.

AND I hereby certify for Senior Counsel from Australia.

AND I FURTHER ORDER that all proceedings under this judgment be stayed for a period of forty days AND THAT the exhibits remain in Court until further Order or until a consent to their being handed out signed by the solicitors for both parties is filed in the Registry.

Solicitor for the plaintiff : P. J. Clay, Acting Crown Solicitor.

Solicitor for the defendant : Francis & Francis.