

*Reasons for the Report of the Lords of the
Judicial Committee of the Privy Council
on the Appeal of The National Trust
Company, Limited, v. Louis E. Whicher,
from the Court of Appeal for Ontario ;
delivered the 21st February 1912.*

PRESENT AT THE HEARING :

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD ATKINSON.

LORD ROBSON.

[DELIVERED BY LORD ROBSON.]

This action was brought by the Respondent as a bondholder in the Dominion Copper Company, a corporation constituted under the laws of British Columbia, against the Appellants who are a trust company and were trustees for the bondholders of the Copper Company under a mortgage deed of the 1st June 1905. The Respondent claimed that the Appellants had committed a breach of trust, and further, or alternatively, had committed a breach of contract in refusing to purchase from him certain of his bonds in the Copper Company which he had offered to them for sale in response to an advertisement inviting tenders of bonds under the terms of the mortgage deed.

Shortly stated, the Respondent contends that the Appellants were bound to expend a certain fund in purchasing bonds at the lowest price, and that his bonds were offered at a price lower than that accepted from the successful tenderer.

The Appellants, on the other hand, contend that the Respondent's offer was for a comparatively small quantity of bonds, and, if accepted, would have put it out of the power of the Appellants to purchase the much larger quantity offered by the successful tenderer at a price which admittedly enabled the trustees to expend the whole fund at their disposal so as to procure a larger number of bonds at a lower average price than they could have done if they had accepted the offer of the Respondent.

It is admitted that the Appellants acted in perfect good faith and in the exercise of an honest judgment as to what appeared to them to be within their powers and in the interest of the bondholders as a whole.

The mortgage deed provided that a fund for the purchase or retirement of bonds should be constituted by means of a stipulated appropriation year by year from the surplus profits of the Copper Company.

By Article 2 Section 12 it is directed that—

“The moneys so paid to the trustee shall be applied to the retirement of bonds of the Company issued hereunder and secured hereby, and for that purpose only, to be obtained as follows” (omitting immaterial parts):—“The trustee shall annually or oftener by a notice published in a newspaper in general circulation in the cities of New York and Toronto call for offerings of the bonds issued under and secured hereby, to be made within some period prescribed in the said notice, and from the bonds offered to it shall purchase those bonds which are offered to it at the lowest price, not, however, exceeding par value of said bonds and the then accrued interest for each such bond.”

The section goes on to prescribe that if sufficient bonds are not offered to exhaust the said fund at less than par, then and in that event—

“The trustee shall by a notice in manner therein directed give notice that certain bonds to be drawn by lot are called for the purpose of investing therein the moneys paid to the trustee by the Mortgagor Company.”

On the 2nd May 1907 the Mortgagor Company handed to the Appellants the sum of \$170,000 to be applied in the redemption of bonds according to the terms of the mortgage, and the Appellants thereupon published the following advertisement:—

“ The Dominion Copper Company, Limited.
“ First Mortgage 6 per cent. Gold Bonds.

“ The Dominion Copper Company, Limited, in accordance
“ with the requirements of its mortgage, dated the 1st
“ June 1905, securing the above issue, has paid out of its
“ earnings the sum of one hundred and seventy thousand
“ dollars (\$170,000) to the National Trust Company,
“ Limited, trustee under the mortgage, to be applied in
“ the redemption of bonds as provided by the mortgage.
“ Offerings of the bonds for sale as of 1st June 1907,
“ exclusive of interest coupon maturing on that date, stating
“ the amount offered and price for delivery at the office of
“ the undersigned, at Toronto, Ontario, will be received by
“ the undersigned up to and inclusive of 25th May 1907.

“ National Trust Company, Limited.”

The Respondent answered the said advertisement and duly offered \$10,000 bonds at \$82 per bond of \$100.

The following is a convenient summary of all the tenders at prices below par:—

Rate.	Par value.	Offered at.
	\$	\$
Under 80 - -	39,400.00	30,937.75
80-86 inclusive - -	102,600.00	84,804.95
86.8 (Untermeyer) - -	195,700.00	170,000.00
Over 86.8 - -	25,600.00	24,043.00
	<u>363,300.00</u>	<u>309,785.70</u>

It will be observed that Mr. Untermeyer offered bonds to the nominal value of \$195,700 at the price of 86.8, which was just enough to exhaust the fund. The Appellants naturally treated this as an indivisible offer and, wishing to buy all the bonds (including the Plaintiff's) which were offered at lower prices, they asked Mr. Untermeyer whether, if they did so, he

would be willing to offer sufficient bonds at 86.8 to exhaust the balance of the fund.

After correspondence and interviews, with which it is not necessary to deal in detail, it was ultimately agreed that the Appellants might buy bonds amounting to \$39,400 at rates less than 80, if he, Mr. Untermeyer, would offer bonds of the nominal value of \$160,600 for the balance of the sinking fund. By this means the Appellants succeeded in obtaining bonds amounting to \$200,000 for the money at their disposal, whereas if they had accepted all the offers (including the Plaintiff's) below 86, and Untermeyer had withdrawn his offer, as he would have done if the terms ultimately arranged had not been agreed to, they would only have got bonds below par amounting to \$142,000, and would have been obliged to expend the balance of the fund in purchases at par.

The Plaintiff's offer was therefore declined. A great fall in the price of copper afterwards took place by which the Copper Company lost heavily, and it is now in liquidation.

At the trial Mr. Justice Riddell decided in favour of the Appellants, and further held that even if they were wrong in refusing the Plaintiff's offer, they had acted honestly and carefully, so that they were entitled to be excused both under the Provincial Trustee Act and the provisions in that behalf of the trust deed itself. This decision was reversed by a majority of three Judges to two in the Court of Appeal for Ontario, and judgment was entered for the Plaintiff for \$700, with costs.

Their Lordships are of opinion that the Appellants properly fulfilled the obligation cast upon them by Article 2 Section 12 of the trust deed. There can be no doubt as to the object of that section. It was intended by all the parties to the deed that the Appellants should obtain as

many bonds as possible with the money placed at their disposal, and they were accordingly directed to select, from the bonds tendered, those which were cheapest.

As Mr. Justice Riddell pointed out, on a strictly literal construction of the words of the clause, the obligation of the Appellants to purchase "those bonds which are offered to it at the lowest price" does not expressly extend beyond the particular lot which is offered at a price lower than any other lot to buy, leaving the trustees without any directions as to how they were to select from the other bonds, but no one has suggested such a construction except for the purpose of dismissing it as wholly unreasonable when tested by the object of the clause. The Court must, if possible, construe the clause so as to give effect to the plain intent of the parties. In buying bonds the Appellants had to consider number as well as price. Indeed a low price was only important because it facilitated the acquisition of a large number. Under these circumstances, "the lowest price" meant the price which was lowest as applied to the whole block purchased. If the Appellants had purchased the small lot of bonds offered by the Plaintiffs at 32, and had been unable, in consequence of that purchase, to complete the bargain with Untermeyer, the price given for the whole block of bonds purchased would certainly not have been the lowest price at which an equal number of bonds could have been purchased under the agreement with Untermeyer, and by the acceptance of his offer.

In this view of the case, it is unnecessary to consider the points raised as to contract or trust, or the further question which would arise if an obligation on either of these grounds could be shown to exist between these parties, viz.—how far a trustee or agent can be made liable for an

honest and reasonable misinterpretation of ambiguously worded instructions; for in neither alternative did the Appellants commit any breach.

Their Lordships have therefore humbly advised His Majesty that this Appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment of Mr. Justice Riddell restored, with costs in both Courts.

The Respondent will pay the costs of the Appeal.

In the Privy Council.

THE NATIONAL TRUST COMPANY,
LIMITED,

v.

LOUIS E. WHICHER.

DELIVERED BY LORD ROBSON.

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