Privy Council Appeal No. 48 of 1922.

Geoffrey Teignmouth Clarkson and another - - - *Appellants*

v.

E. C. Davies and others - - - - - - *Respondents*

Geoffrey Teignmouth Clarkson and others - - - - *Appellants*

v.

E. C. Davies and others - - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD OCTOBER, 1922.

Present at the Hearing:

VISCOUNT CAVE.
LORD PHILLIMORE.
LORD JUSTICE CLERK.
MR. JUSTICE DUFF.

The transactions which gave occasion for the two actions in which these appeals have been taken originated and were completed in 1902. The two actions were raised one on the 6th August, 1919, and the other on the 15th March, 1920, after an interval of seventeen or eighteen years subsequent to the occurrence of the cause of action.

In 1902 it was arranged that the Provincial Building and Loan Association (hereinafter called the Provincial Association) should sell its assets and undertaking to the Dominion Permanent Loan Company (hereinafter called the Dominion Company). The Provincial Association (the vendor Company) had been incorporated in 1891, and the Dominion Company (the purchasing Company) had been incorporated in 1890. The terms of the arrangement were set out in an agreement between the Provincial Association and the Dominion Company dated the 2nd April,

1902. It was declared that the agreement was not to "be deemed to be an agreement for the union merger or amalgamation" of the two companies, but an agreement for the purchase and acquisition by the Dominion Company of the assets and undertaking of the Provincial Association.

As and for the consideration for the said sale, the Dominion Company were to allot and issue to the shareholders of the Provincial Association permanent stock of the Dominion Company at par, fully paid up and non-assessable, for an amount exactly equal to the net value of the assets of the Provincial Association, as the same should be valued and ascertained as after mentioned in the said agreement, less the amount of debts, liabilities and obligations of the Provincial Association.

The completion of the sale and purchase was defined to be the assent to the said agreement by the Lieutenant-Governor in Council. This assent was duly given on the 25th June, 1902.

The said agreement was contingent upon the same being ratified and confirmed by the shareholders of each of the said Companies, and the same was duly ratified and confirmed by the shareholders of the said Companies on the 18th June, 1902.

The valuation of the Provincial Association's assets was to be made by two valuers, who were not to fix a lump sum, but were to value "each and every such assets," all such values being deemed to be the cash market value of each of such assets as at the date of valuation.

By the said agreement it was further provided that the Provincial Association should pay $5,000 in full of its share of the costs of carrying out the agreement to completion, which was to be deducted from the purchase price, and the Dominion Company was to pay all such costs over and above the said $5,000.

The said purchase was carried out in terms of the said agreement of the 2nd April, 1902. That is to say that, so far as was disclosed to either of the said Companies or the shareholders thereof, the whole terms of the said purchase and sale were contained in the said agreement of the 2nd April, 1902, which agreement was duly carried out.

It was, however, about the same time arranged between the defendants, the directors of the Provincial Association, and Mr. Holland, the managing director of the Dominion Company, that a further payment of $30,000 beyond anything provided for or disclosed in the said agreement of the 2nd April, 1902, should be made out of the funds of the Dominion Company to the said directors of the Provincial Association. This payment of $30,000 was made by Mr. Holland, managing director of the Dominion Company, to Mr. Davies, managing director of the Provincial Association, who primarily retained $18,000 thereof to himself, and distributed the remainder of $12,000 among the other defendants, his co-directors of the Provincial Association, in varying sums, as had been arranged among themselves. Out of the said $18,000, Mr. Davies paid $1,000 to the auditor of the

Provincial Association. The said payment and distribution were made in July and August, 1902.

No disclosure as to this $30,000 was made by the defendants or any of them to the Provincial Association or the shareholders thereof, except, as after mentioned, to Miss Hancock. On the contrary, all the defendants combined to prevent it from becoming known, and they appropriated the whole $30,000 to themselves. Nothing was included in the valuation of the assets of the Provincial Association for or in respect of the said $30,000, or any claim in respect thereof, the defendants' concealment as to this being for a time entirely successful.

On the 14th February, 1903, Mr. A. B. Cunningham, a shareholder in the Provincial Association, issued a writ of summons which, as amended, was addressed to the Dominion Company, the Provincial Association and the five directors thereof, in which the plaintiff's claim was to set aside the said agreement of the 2nd April, 1902, approved on the 18th June, 1902, as being illegal and fraudulent. The Dominion Company, the Provincial Association, and the directors of the Provincial Association, other than Mr. Davies, entered appearance in the said action.

The statement of claim for Cunningham, the plaintiff in the said action, was based on an averment of an illegal and fraudulent and secret agreement between the Dominion Company and the managing director of the Provincial Association, by which the former agreed to pay a substantial sum of money to the latter in order to facilitate the carrying out of the said agreement of the 2nd April, 1902.

In their statements of defence to the said action the Provincial Association and the Dominion Company pleaded *inter alia* that the Provincial Association had ceased to exist as a corporate body, and was an extinct corporation. After sundry proceedings in the said action, the same was settled on terms including a money payment by certain of the defendants to the plaintiff, and the action was of consent dismissed on the 18th September, 1903, by an order of the Local Master. In the course of the said proceedings it appeared that one of the grounds on which the said action was based was the said transaction relating to the payment of the said $30,000, the facts relating to which seem to have been in most material respects disclosed by the proceedings in the said action.

Thereafter, on the 28th September, 1904, another writ of summons was issued by Samuel Salton as plaintiff against the Dominion Company, the Provincial Association, the said directors of the latter Association, and certain directors of the Dominion Company, claiming *inter alia* that the Dominion Company and the said directors of the Provincial Association should pay the said $30,000 to the Provincial Association.

Another and similar action appears at or about the same time to have been raised or threatened by some person called Hunter against the same defendants.

Salton's action was a class action in which he sued on his own behalf and on behalf of all shareholders of the Provincial Association. These actions were also compromised and settled in or about September, 1905, by certain payments made by or on behalf of certain of the defendants therein.

Thereafter nothing further was done in the matter till the two actions were raised in which the present appeals to this Board were taken.

On the 15th March, 1920, the Trial Judge ordered that these two actions should be consolidated, but the Supreme Court, on the 19th April, 1920, set aside this order. Thereafter the two actions proceeded before the same Trial Judge, the evidence in the first action being accepted as evidence also in the second, the trial of the second action being held immediately after the trial of the first action, and both actions were disposed of by the Trial Judge (Lennox J.) on the 9th October, 1920, when he dismissed the first action as against the defendants other than the defendant Davies. As to Davies, no appearance having been entered for him, default judgment was pronounced on the 3rd January, 1920, for damages to be assessed. In the second action the Trial Judge ordered and adjudged that the plaintiffs do recover from the defendants $57,319·85.

In the Appellate Division both actions were heard and disposed of together on the 14th June, 1921. The appeal in the first action was dismissed with costs, and in the second action the Appellate Division allowed the appeal and set aside the said judgment of the Trial Judge.

The present appeals have been taken to this Board against these judgments of the Supreme Court.

It will be necessary to consider and deal with the two actions separately. But the following observations are applicable to both actions.

As to the merits or substance of the $30,000 transaction, the Trial Judge expressed himself thus: "The consideration stated in the Deed of Transfer was not the full or true consideration for the sale and transfer of the assets and rights of the Association and its shareholders. There was an additional consideration of $30,000 secretly bargained for and obtained by these five directors. Knowledge of the true consideration was intentionally and studiously concealed from the shareholders of the Association, and the approval of the shareholders other than these five accredited agents—and the sanction of the Attorney-General of the Province were obtained by the false and fraudulent representation of these directors as to the nature and character of the transaction. The directors were thereby enabled to obtain, and did secretly obtain and appropriate to themselves, $30,000, the property of the shareholders of the Association. There is no shadow of doubt about the facts, and the facts establish a plain vulgar case of false representation, followed by misappropriation. It was not merely a failure to disclose the truth: the defendants

were careful to prevent the shareholders from knowing the terms upon which the transaction was actually being carried out."

Later on, the same learned Judge, in his opinion, says : " The directors conspired together to wrongfully and secretly divert and appropriate to themselves, and did in fact and in law, and in breach of their duty as agents of the Association, wrongfully appropriate the entire cash consideration paid by the Dominion Permanent for the transfer spoken of, to wit, the sum of $30,000."

In giving the reasons for the judgment of the Appellate Division, Meredith C. J., in dealing with the payment, receipt and apportionment of the said $30,000, says : " Davies and the other of these gentlemen (*i.e.* the said five directors of the Provincial Association) lost their offices as a result of the sale ; it was reasonable for them to ask and to receive compensation for the loss of their positions, and it was on this basis that the money they received from Davies was paid to them. I venture to think that the usual course in such a transaction as was entered into is to compensate officers who are deprived of their positions as the result of it, and, in my view, the amounts allowed as compensation in this case were reasonable."

Later on, he adds : " It is difficult, if not impossible, for me to imagine that the shareholders did not know that it would be necessary to provide this compensation."

In the proceedings before this Board neither of the learned counsel, who represented the respondents, seriously challenged the views as above expressed by the Trial Judge, or supported the grounds above quoted from the opinion of the learned Chief Justice. In so acting, this Board think counsel exercised a wise discretion. On this point of controversy, without accepting it as textually in all respects accurate, they think the opinion of the Trial Judge was in substance sound.

Their Lordships cannot assent to the views given expression to on this part of the case by the learned Chief Justice. A necessary basis, in the opinion of this Board, for a payment of compensation such as he describes is that there should be a full and complete disclosure to the parties interested of all the main facts (*Kaye* v. *Croydon Tramways Company*, 1898, 1 Ch. 358). Here there was not only no attempt to make such a disclosure, but there was, on the contrary, a concealment of the facts.

Coming now to a consideration of the two actions separately, the first action was brought by the liquidator of the Dominion Company and Miss Hancock, suing on behalf of herself and all other shareholders of the Provincial Association, and the only defendants are the four surviving directors of that Association and the executors of the deceased director. The Provincial Association was not a party to the action.

Dealing, in the first place, with the position of Mr. Clarkson, the liquidator of the Dominion Company, the statement of claim is far from clear. All that is said about Mr. Clarkson is that he is liquidator of the Dominion Company. It is further said (paragraph 3) that the Dominion Company agreed to purchase the

assets of the Provincial Association, and to pay, as they did subsequently pay, to the defendants $30,000 as a bribe for approving of the said purchase as directors of the Provincial Association. By paragraph 4 of the said statement of claim, it is said that the $30,000 was paid by the Dominion Company as a bribe to the said directors of the Provincial Association, and was wrongfully accepted by the said directors as a bribe, and in breach of their fiduciary relations to the Provincial Association. By paragraph 5 of the said statement of claim, it is said that the fact of the payment of the said bribe was concealed by the directors of the Dominion Company and of the Provincial Association " from its shareholders" until, in the course of the liquidation of the Dominion Company in 1918, the facts were ascertained by the liquidator.

The plaintiffs' claim is for a decree against the defendants jointly and severally for $30,000, with interest from the 2nd April, 1902.

The whole of the payments making up the $30,000 paid by the Dominion Company appears to have been duly entered in the books of that Company (Clarkson, p. 60, line 20), and they were all made subsequent to June, 1902. The valuation of the assets of the Provincial Association was, as has been already pointed out, not to be made as a lump valuation, but the said assets were to be separately valued, item by item. Nothing was included in the assets of the Provincial Association, transferred or acquired by the Dominion Company in respect of the said $30,000, or of any claim in respect thereof, nor was any valuation made in respect thereof, and it is proved that all the assets of the Provincial Association were transferred to the Dominion Company, as the agreement contemplated (Clarkson, p. 62, line 37). The Trial Judge was of opinion that representatives of the Dominion Company " joined in the conspiracy," as he considered it as to the said $30,000 and the payment thereof. This does not seem to have been established, or even suggested against them, with the possible exception of Mr. Holland, and even as to him it does not appear that there is any satisfactory evidence to this effect.

If the Provincial Association ever had a claim for, or in respect of, the said $30,000, it never made it good, or even advanced it before the present proceedings, and no such claim was ever transferred to or vested in the liquidator of the Dominion Company.

Much argument was addressed to the Board as to the $30,000 transaction being *ultra vires*. No such ground of action is explicitly founded on in the statement of claim. The transaction may have been unauthorised by the Provincial Association or the Dominion Company, but it cannot be said to have been *ultra vires*. If the facts had been disclosed to the shareholders of either Company they would have been quite entitled to approve of the payment, and if they had so done, this Board is of opinion that the payment could not have been challenged.

The true ground of challenge is not that the transaction was *ultra vires*, but that it was unauthorised. A company cannot adopt or effectively approve of what is *ultra vires*, but it can adopt and approve of what is merely unauthorised.

But, further, in the opinion of this Board, any claim by the Dominion Company, or the liquidator thereof, to recover the said $30,000, if competent at all, could only be based on constructive trust (*Taylor* v. *Davies*, 1920, A.C. 636), and is therefore now barred by the Statute of Limitations.

No doubt in the statement of claim it is said that the $30,000 was paid and received as a bribe, which might give rise to an equitable debt (*Metropolitan Bank* v. *Heiron*, 5, Ex. Div. 319). But the foundation of the claim here is constructive trust affecting money which never was reduced into possession as the property of the Provincial Association.

The effect of the Statute of Limitations on a claim arising under a constructive trust was considered in the case of *Taylor* v. *Davies* (*supra*), and it was there laid down that there is a distinction between a trust which arises before the occurrence of the transaction impeached and cases which arise only by reason of that transaction.

The result is that in any event this action, so far as it proceeds at the instance of the liquidator of the Dominion Company must fail.

So far as Miss Hancock is concerned, she only claims in and through the Provincial Association; that Association is not made a party to the action; and moreover Miss Hancock is proved to have been acquainted with the facts from the first, and her claim is therefore statute barred.

As regards the second action, the plaintiffs here are (1) the liquidator of the Dominion Company; (2) the Dominion Company on behalf of itself and all other shareholders of the Provisional Association, and (3) John R. Young, suing on behalf of himself and all other shareholders of the Provincial Association, and all shareholders of that Association prior to the 29th June, 1902, who transferred their shares in the said Association pursuant to the agreement of the 29th June, 1902.

The Dominion Company is not and never was a shareholder of the Provincial Association, and that Association is not made a party to this action any more than it was to the first action.

As the Dominion Company is not and never was a shareholder of the Provincial Association, it cannot maintain this action as a shareholder's action, neither can the liquidator of the Dominion Company, whose claim can only be in right of the Company.

With regard to Mr. Young, who claims in two representative capacities, he is not a shareholder in the Provincial Association, his shares having been surrendered. Neither can he claim in his other representative capacity, because the directors of the Association whom he is suing were the agents of the Association and not of the shareholders, and there was no privity between the shareholders as such and the directors. The fiduciary relation of the directors was to the Association.

It is for this reason that no action of this sort can be brought by shareholders without making the Company party. When this claim is supposed to have arisen, the Provincial Association was either already defunct, or still in existence. If defunct, it could make no claim and pass no claim. If in existence then, it is in existence now, and should have been brought before the Court.

Moreover, for the reasons given in the earlier part of this judgment, any claim by any and all of the plaintiffs would now be barred by the Statute of Limitations.

It was suggested before their Lordships that the claim might be treated as one for damages for concealed fraud, but to this there are two answers. The action is not so framed, and a representative action by one of several defrauded persons on behalf of himself and all others will not lie.

A point was taken on behalf of the defendants based upon the fact that judgment had been already obtained against one of them, Davies, they contending that the doctrine in the case of *Kendall* v. *Hamilton* (4 A.C. 504) would preclude further recovery against them. This argument did not commend itself to the Court of Appeal in Canada, and their Lordships think it was rightly discarded. There are probably other answers to it, but it is enough to say that the liability of the several defendants in this case, if any, was not a mere joint liability, but was joint and several.

The other grounds of defence are, however, in their Lordships' opinion, amply sufficient, and on these grounds, which cover both actions, they will humbly recommend His Majesty that both appeals should be dismissed with costs.

In the Privy Council.

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