Privy Council Appeal No. 52 of 1926.

The British America Nickel Corporation, Limited, and others - - *Appellants*

v.

M. J. O'Brien, Limited - - - - - - - - - - *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 18TH JANUARY, 1927.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
LORD WRENBURY.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal against a judgment of the Court of Appeal of Ontario, affirming the judgment of Kelly, J., by which it was found in favour of the minority of a class of secured debenture-holders of the appellant Corporation that the minority were not bound by resolutions passed by the majority of the class of such debenture-holders. The latter had purported to exercise a power conferred on such a majority by the terms of a trust deed. The resolutions in question sought to modify the rights of the debenture-holders as an entire class.

Before their Lordships proceed to consider the somewhat involved circumstances in which the question arises, it will be convenient that they should refer to the principle to be applied in weighing the outcome of these circumstances.

To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the Company may render such a power

expedient, even in the interests of the class of debenture-holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by section 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the Articles of Association. There is, however, this restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities. It is that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share. The distinction does not arise in this case, and it is not necessary to express an opinion as to its ground. What does arise is the question as to whether there is such a restriction on the right to vote of a creditor or member of an analogous class on whom is conferred a power to vote for the alteration of the title of a minority of the class to which he himself belongs.

It was decided by the Judicial Committee in 1887, in *North-West Transportation Company* v. *Beatty* (12 A.C., 589) that where a contract, fair in its terms and within the powers of a company, had been entered into by the directors with one of their own number, as a vendor to them, and was therefore voidable, it could not be assailed. The reason was that it had been ratified by the shareholders at a general meeting. At this meeting the ratification was actually obtained by the aid of the votes of the vendor director himself and his nominees, which produced a majority of shareholders' votes at that general meeting. The vendor in exercising his votes had thus a direct personal interest. It was held that the affirmance of the voidable contract, being matter only of internal policy, was binding on the Company, and further that every shareholder, including the vendor, had a right to vote on such a question, notwithstanding that he might have a personal interest in the subject matter in conflict with the interest of the Company itself. As its constitution enabled the vendor individually to acquire shares freely, he was entitled to the votes these carried and to qualify a majority at the meeting. Having regard to the constitution of the Company this could not be said to be oppressive so as to invalidate the voting. There the question arose, not as regarded a class of creditors, but of shareholders.

In *Burland* v. *Earle* (1902 A.C., 83) the question before the Judicial Committee was whether it was *ultra vires* for a Company

to carry its profits to reserve instead of dividing them, and to invest them in a manner which, although not *ultra vires*, was objectionable. It was also a question with shareholders only. A minority of shareholders sued the others, the company itself not being a plaintiff, to compel the company and its directors to distribute accumulated profits, and also to compel the appellant Burland to hand over certain funds invested in his sole name. It was held that the question, being in no way one of *ultra vires* action, was one of internal management only, and that any action that could be taken required that the Company itself should be plaintiff. It would have been otherwise had the acts complained of been of an *ultra vires* or actually fraudulent character, as had been explained by James and Mellish, L.JJ., in *Menier* v. *Hooper's Telegraph Works* (9 Ch. 350), where the majority of the shareholders had improperly appropriated to themselves property which belonged to all the shareholders equally. It was laid down in *Burland* v. *Earle* that a shareholder is not debarred from using his voting power as a shareholder to carry a resolution by the circumstance of his having a particular interest in the subject matter of the vote, following in this the decision in *The North-West Transportation Company* v. *Beatty* (*ubi supra*).

It has been suggested that the decision in these two cases on the last point is difficult to reconcile with the restriction already referred to, where the power is conferred, not on shareholders generally, but on a special class, say, of debenture-holders, where a majority, in exercising a power to modify the rights of a minority, must exercise that power in the interests of the class as a whole. This is a principle which goes beyond that applied in *Menier* v. *Hooper's Telegraph Works* inasmuch as it does not depend on misappropriation or fraud being proved. But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly.

The distinction, which may prove a fine one, is well illustrated in the carefully worded judgment of Parker, J., in *Goodfellow* v. *Nelson Line* (1912, 2 Ch. 324). It was there held that while the power conferred by a trust deed on a majority of debenture-holders to bind a minority must be exercised *bona fide*, and while the Court has power to prevent some sorts at least of unfairness or oppression, a debenture-holder may, subject to this, vote in accordance with his individual interests, though these may be peculiar to himself and not shared by the other members of the class. It was true that a secret bargain to secure his vote by

special treatment might be treated as bribery, but where the scheme to be voted upon itself provides, as it did in that case, openly for special treatment of a debenture-holder with a special interest, he may vote, inasmuch as the other members of the class had themselves known from the first of the scheme. Their Lordships think that Parker, J., accurately applied in his judgment the law on this point.

Their Lordships now turn to the facts in the appeal before them. The appellant Nickel Corporation was constituted under the law of the Dominion of Canada. The Corporation was the owner of valuable mining properties in the Province of Ontario and of plant there and elsewhere. In 1913 the appellant Corporation had bought from M. J. O'Brien, now represented by the respondent Company, and from one John R. Booth, mining properties, and had given them, as part of the purchase price, bonds secured on these properties amounting to approximately $3,000,000 On a reorganisation, to be presently referred to, these bonds were exchanged for bonds secured under a trust deed. The Nickel Corporation had an authorised capital of $20,000,000, divided into 200,000 ordinary shares of $100 each. Before the reorganisation the Corporation had issued debenture stock to the amount of $10,000,000, secured by floating charges. The appellant Trust Company was the trustee of a deed which constituted the floating security, and is also trustee of the securities in question in this appeal.

By contract of 10th March, 1916, the British Government had agreed to purchase the Nickel Corporation's output of nickel up to a large amount for a period of ten years. On 15th March, 1916, the Nickel Corporation, being desirous of reorganising its finances and of putting them on a more satisfactory footing, executed a mortgage deed of trust in favour of the second appellant as trustee, to enable them to issue bonds. These bonds were issued at 6 per cent. interest, in two series, A and B, of $3,000,000 each, specially secured on assets of the Nickel Corporation, and ranking *pari passu*, with a difference only in the period for redemption. The bonds were held substantially as follows :—

	$
J. R. Booth, A Bonds	2,184,000
(Mr. Booth had held bonds in the older form, which were now paid off.)	
J. F. Booth, A Bonds	147,000
Frances D. Anderson, A Bonds ..	38,000
C. A. Masten, A Bonds	6,000
M. J. O'Brien, Ltd., A Bonds	625,000
	$3,000,000
The British Government, B Bonds ..	3,000,000
	$6,000,000

The British Government had, as already stated, bought the output of nickel by the appellant Corporation, and it appears to have been desirous to strengthen the position of the Corporation by aiding it to raise a loan.

The trust deed of 15th March, 1916, provided power to a majority of the bondholders, consisting of not less than three-fourths in value, to sanction a reconstruction of the Corporation, to enter into a scheme for selling its assets, to sanction any modification of the rights of the bondholders against the Corporation or its property, either under the trust deed or otherwise, to accept other securities of the Corporation in lieu of the bonds, or to consent to an issue of securities constituting a prior charge, together with other powers.

The effect of the war was to disorganise the markets of the appellant Corporation, so that it was mainly by the aid of purchases of its stock by a Norwegian nickel group, and by the co-operation of the British Government, that the appellant Corporation carried on its business between 1916 to 1919. The Norwegian group purchased both debenture stock and ordinary stock in large amounts. As the Corporation was indebted to its bankers in the end of 1920, at a meeting of the First Mortgage Bondholders authority was given for the creation of a prior lien bond for $500,000 having priority over the First Mortgage Bonds, and this was issued to the bank.

In February, 1921, the Nickel Corporation made default in payment of the half-year's interest due to the respondent on the First Mortgage Bonds. A scheme for reconstruction was prepared on behalf of the Corporation and was laid before a meeting of the First Mortgage Bondholders on 31st March, 1921. The object of this scheme was to compel the holders of the First Mortgage Bonds to exchange them for an amount of new "A" Income Bonds equal to the principal of the former bonds. The Corporation was also to be at liberty to issue $6,000,000 of First Income Bonds at 10 per cent. interest and at 20 per cent. premium, to be a first charge on the property of the Corporation. Provision was made for the issue of the "A" Income Bonds already referred to to rank subsequently to the First Income Bonds. The bank and the Norwegian creditors were, by means of these issues, to have their claims reduced. The Corporation was also to be enabled to issue "B" Income Bonds to the amount of $12,500,000, ranking *pari passu* as to principal with the "A" Income Bonds. There was also given power by extraordinary resolution to sanction the exchange of the "A" Income Bonds into other securities, and the British Government was to be relieved of its obligation to purchase nickel.

It was further provided by the scheme that a committee of four persons (one appointed by the First Mortgage Bondholders other than the British Government; one by the Debenture Stockholders; one by the bank, the Canadian Bank of Commerce, and

a certain Dr. Eyde, representing the Norwegian interests ; and one by the British Government) should have power to modify the scheme without confirmation by extraordinary resolution of the bondholders.

Mr. John R. Booth's vote was necessary in order to gain the required majority of bondholders, and it was secured by a promise to give him $2,000,000 of the ordinary stock of the Nickel Corporation. This stock was at the time of little value, but it was evident that if the price of nickel rose it might become of value. The promise to Mr. Booth was made some months before the new scheme was submitted to the bondholders.

The respondents protested against the adoption of the scheme, but it was carried by the prescribed majority at the meeting of 31st March, 1921. The respondents then applied for an interim injunction, but the Court allowed the resolutions to be carried into effect, on the terms that if at the trial of the action it should be found that they ought not to have been carried into effect, the appellant Trust Company should pay to the respondents the amount of these bonds with interest.

At the trial in the Supreme Court of Ontario, Kelly, J., held that what was really done was that the majority at the meeting did not act in the *bona fide* exercise of the rights which the majority might exercise, but in consideration of what would benefit the Nickel Corporation and the personal interests of those whose votes were to be secured. The vote had been influenced by special negotiations in advance of the meeting. He also thought that it was outside the powers of the majority to confer on a Committee, not necessarily representing the interests of the First Mortgage Bondholders, powers which belonged to these bondholders alone, and to authorise the substitution for their security of something which was not a satisfactory security. He therefore gave judgment for the respondents, the plaintiffs.

There was an appeal to the Court of Appeal, where Ferguson, J.A., delivered the judgment. He agreed with Kelly, J., in holding that the votes neither of Mr. Booth nor of the British Government would have been given for the scheme had they been influenced only by what was most in the interest of the bondholders. Both of these may, he thought, have acted honestly if mistakenly. But what really moved them was not a legitimate consideration of the improvement of their security, but that they felt that a refusal to approve the scheme would result in serious loss to other persons who had lent to or invested in the Corporation. They wished to give these persons a chance, even if a risk to the bondholders had to be taken in doing it. This the Court of Appeal held to have been improper. On that ground they affirmed the judgment of Kelly, J., and they affirmed it also on the ground that there was no power in the majority of the bondholders to delegate their power of binding the minority.

Their Lordships are of opinion that judgment was rightly given for the respondents in this appeal. In the first place, it is

plain, even from his own letters, that before Mr. J. R. Booth would agree to the scheme of 1921 his vote had to be secured by the promise of $2,000,000 ordinary stock of the Nickel Corporation. No doubt he was entitled in giving his vote to consider his own interests. But as that vote had come to him as a member of a class he was bound to exercise it with the interests of the class itself kept in view as dominant. It may be that, as Ferguson, J.A., thought, he and those with whom he was negotiating considered the scheme the best way out of the difficulties with which the Corporation was beset. But they had something else to consider in the first place. Their duty was to look to the difficulties of the bondholders as a class, and not to give any one of these bondholders a special personal advantage, not forming part of the scheme to be voted for, in order to induce him to assent. On this ground by itself their Lordships are of opinion that the resolutions cannot stand. They think, in the second place, that the appointment of a Committee of four persons, with power to modify in a very extensive fashion the security of the mortgage bondholders, was *ultra vires*. As has been pointed out the appointment of the majority of this Committee was not entrusted to the mortgage bondholders themselves. They might have acted together by a proper majority, but, neither in form nor in substance, was any power given to that majority to delegate. It was only under the provisions of the deed of mortgage and trust of 15th March, 1916, that the scheme of 31st May, 1921, could be made, and the former contained no provision authorising it. Other points referred to in the judgments were raised in criticism of the scheme, but it is not necessary for their Lordships to enter on them.

For the reasons given they will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

THE BRITISH AMERICA NICKEL CORPORATION, LIMITED, AND OTHERS

v.

M. J. O'BRIEN, LIMITED.

DELIVERED BY VISCOUNT HALDANE.

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