

1,1934

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No. 25 of 1933.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

BETWEEN

ISAAC WILLIAM CANNON SOLLOWAY (a Defendant) *Appellant*

AND

W. T. JOHNSON, TRUSTEE OF THE ESTATE OF THEO.
FRONTIER AND COMPANY LIMITED IN BANK-
RUPTCY (Plaintiff) - - - - - *Respondent.*

CASE FOR APPELLANT.

1. This is an appeal by the Appellant, Isaac William Cannon Solloway, from a Judgment of the Court of Appeal for British Columbia, dated the 4th day of October, 1932, whereby the Judgment of the Honourable Mr. Justice Fisher, pronounced the 15th day of February 1932, in favour of the Respondent against all the Defendants except the Defendant Solloway Mills (B.C.) Limited, namely the Appellant, Harvey Mills and Solloway Mills and Company, Limited, for the sum of \$118,086.44, was confirmed.

RECORD.
p. 361W.
p. 361O.

10 2. The Respondent (Plaintiff) sued as Trustee in Bankruptcy of the Estate of Theo. Frontier & Company Limited, a brokerage company which carried on business at Kamloops, British Columbia where there is no stock exchange. They bought and sold shares both for clients and for their own account through the Defendant Solloway Mills & Company Limited. The course of the transactions ran over a period of about eighteen months.

pp. 5, 28,
148.

3. The action was primarily one of fraud against the Defendant Solloway Mills & Company Limited, the Respondent (Plaintiff) seeking a declaration that shares ordered to be purchased by Theo. Frontier & Company Limited were never purchased, and for a return of moneys. The action as against the Appellant Solloway and the Defendant Mills was for

p. 6, ll. 26-
34.
p. 2 *et seq.*,
p. 33, ll. 6-10.

RECORD. damages as directors and officers of the Defendant Solloway Mills & Company Limited in directing or having knowledge of the alleged fraud of the Defendant Solloway Mills & Company Limited.

p. 361K, l. 37 to
p. 361L, l. 17.
p. 361M, l. 40 to
p. 361N, l. 24.

4. The trial Judgment awarded the Respondent a declaration that he was entitled to return of all moneys paid by Theo. Frontier & Company Limited to the Defendant Solloway Mills & Company, Limited, as margin together with interest, amounting in all to the sum of \$118,086.44, and awarded the Respondent the said sum of \$118,086.44 as damages against the Appellant and the defendant Mills.

p. 361O.

5. No allegations were made or evidence given against the Defendant Solloway Mills (B.C.) Limited, or was any Judgment given against it, and hereinafter when reference is made to the Defendant Company it means Solloway Mills & Company Limited only. 10

p. 2, ll. 6-19;
p. 102, ll. 13-16.

6. The Defendant Company was a large brokerage company having its head office in Toronto, Ontario, with some forty odd branches throughout Canada and other parts of the world. One of such branches was located in Vancouver, British Columbia. The Appellant Solloway was the President of the Defendant Company.

p. 3, ll. 16-26;
p. 28, ll. 22-36;
p. 31, ll. 1-3.

7. The Respondent (Plaintiff) alleged a system by which the Defendant Company never bought and sold a share for any clients. He alleged that every transaction on behalf of clients was fictitious,—that in colloquial terms the Defendant Company operated a “ bucket shop.” 20

p. 28, l. 3 to p. 30,
l. 23; p. 31,
ll. 3-6.

8. The Respondent contended that at all material times the Defendant Company had sold “ short ” and was “ short ” shares traded in by the Respondent ! That the Defendant Company from time to time employed agent brokers in effecting sales and purchases of shares on the Vancouver Stock Exchange, and purchased through and sold to such agent brokers shares which were dealt in, so that the transactions were fictitious and fraudulent. Also that the Defendant Company carried on a system of selling or purchasing shares direct from itself to the client, while reporting the transactions to clients as having been made on the floor of the Exchange. 30

Ex. 40,
p. 523.

9. It was agreed between Theo. Frontier & Company Limited and the Defendant Company that the order or orders for the purchase or sale of shares by the Defendant Company for Frontier & Company Limited would be subject to all the rules, by-laws and customs existing on the Exchange where the order or orders were executed.

10. The witnesses for the Respondent admitted :

p. 315, ll. 19-22;
p. 101, ll. 30-33;
p. 110, ll. 19-46.

(a) That the employment of agent brokers was legitimate and was recognized by the rules of the Stock Exchange, which provided for the allowance of a special commission for agent brokers. 40

p. 312, l. 27
to 313, l. 13.

(b) That a broker could legitimately in accordance with the rules of the Stock Exchange sell shares short ;

(c) That the Stock Exchange clearing house worked on a nett balance of shares bought and sold and that therefore Certificates for shares bought could not be earmarked as having been received from the Exchange in respect of individual purchases; RECORD. p. 99, ll. 9-28.

(d) That the Head Office of the Defendant Company was in Toronto, Ontario, and the Company had altogether forty odd branch offices, of which Vancouver was one. p. 102, ll. 12-20.

(e) That in order to establish whether or not the Defendant Company was short in any particular stock it would be necessary to ascertain—

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(1) The number of shares owed by the Defendant Company in all its branches to all clients wherever located;

(2) The number of shares held by the Defendant Company in all its branches; p. 114, l. 47 to 115, l. 13.

(3) The number of shares loaned by the Defendant Company to brokers on call; p. 114, l. 47 to 115, l. 13.

(4) The number of shares in the clearing house of the various stock exchanges on which the Defendant Company was trading; p. 114, l. 47 to 115, l. 13.

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(5) The number of shares in transit between the various offices of the Defendant Company; p. 114, l. 47 to 115, l. 13.

(6) The number of shares in transfer offices of companies, whose shares were being traded in; p. 114, l. 47 to 115, l. 13.

(7) The number of shares on call by the Defendant Company from the treasury of the company whose shares were being traded in; p. 114, l. 47 to 115, l. 13.

(8) The number of shares hypothecated to banks and for other loans obtained by the Defendant Company under the terms of the contract between the Respondent and Defendant Company and similar contracts. Ex. 40, p. 523.

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(f) That the Stock Exchange rules and practice permitted brokers to sell and trade short in shares for their own account this may be done by borrowing shares equal to the amount sold short and that the Defendant Company had from time to time borrowed stock from other brokers to trade in; pp. 310, 312, 313. p. 310, ll. 15-25; p. 312, l. 28 to p. 313, l. 13.

(g) The system or practice of the Defendant Company was to execute all orders for the sale or purchase of shares over the Stock Exchange. p. 109, ll. 33-47; p. 110, ll. 8-18; p. 314, ll. 12-43.

11. No evidence was adduced by the Respondent to show that the Defendant Company as a whole or in regard to clients was short a single share. The only evidence given in this connection was general evidence as to a short position in the Vancouver branch office, and a general reference to the Calgary Branch office. No evidence was given that even the Vancouver office of the Defendant Company had not borrowed every share it was short, in accordance with the rules and practice of the Vancouver Stock Exchange.

RECORD.

12. The Respondent did not attempt to prove that any transaction of the thousands between Theo. Frontier & Co. Limited and the Defendant Company had not been carried out. It relied entirely on the alleged system that no shares had been bought or sold by the Defendant Company for any of its clients, although it was admitted by Respondent's witnesses that the Defendant Company at all times had on hand in the Vancouver branch alone from 35% to 50% of the total shares bought through it on margin and that the Defendant Company had at all times shares in transit between the head office of the Company and its branches. In attempted proof of such alleged system the Respondent put in records (wrongly admitted in evidence it is submitted) which purported to show the trading of the defendant company on some fifteen days only during the two years in question: as to which the learned trial Judge observed that they showed that on some days the defendant company did buy and sell sufficient shares to "take care of" all orders sent in including the Respondent's orders. 10

p. 135, ll. 15-27.
p. 102, ll. 21-23.
p. 361G, ll. 15-20.

p. 298, l. 39-
p. 301, l. 38;
p. 303, l. 39-
p. 309, l. 20.

13. The only evidence given against the Appellant Solloway was certain minutes of the directors' meetings of the Defendant Company showing that the Appellant Solloway was the President of the Defendant Company and the largest shareholder (this being at all times admitted) and the evidence of one Willins, a former officer of the Defendant Company, who stated he had on two or three occasions had discussions with the Appellant Solloway in reference to the business of the Company. 20

p. 154, l. 10-
p. 155, l. 12;
p. 181, ll. 12-45;
p. 167, l. 37-
p. 170, l. 4.

14. Frontier & Company Limited had been carrying on a general stock brokerage business in Kamloops, where there was no Stock Exchange, and had held themselves out to be the correspondents of the Defendant Company. Clients of Frontier & Company Limited would place orders to purchase or sell shares of a certain class or kind and these orders were in turn forwarded by wire or letter to the branch office of the Defendant Company at Vancouver, together with orders of Frontier & Company Limited as this company also carried on a trading business of its own speculating in shares. The orders forwarded to the Defendant Company did not indicate whether they were for the trading account of Frontier & Company Limited, or for its clients. They were all carried by the Defendant Company in a single account in the name of Frontier & Company Limited. The funds of the clients of Frontier & Company Limited and its own funds were stated to be so intermingled in that company's books it was impossible to segregate them. 30

p. 176, l. 1-
p. 177, l. 5.

15. The Defendant Company in confirming sales or purchases to Frontier & Company Limited added or deducted from the price, as the case might be, the regular brokerage commission, and in turn Frontier & Company Limited in confirming to its clients added or deducted the commission as charged by the Defendant Company. The Defendant Company remitted to Frontier & Company Limited from time to time one half of the commission so charged. 40

p. 173, ll. 2-30.

16. During the period of dealings between Frontier & Company Limited and the Defendant Company, which extended from May 1st, 1928, to the middle of September, 1929, thousands of sale and purchase orders

were given by Frontier & Company Limited to the Defendant Company on behalf of itself and its clients. These sale and purchase orders included both transactions on margin and outright purchases of Stocks. The outright purchases were made by the Defendant Company and the shares so acquired were delivered by the Defendant Company to Frontier & Company Limited and in turn delivered by it to its clients. In no instance of any outright purchases were shares not delivered.

RECORD.
p. 177, ll. 35
-46.

17. Frontier & Company Limited in dealing with the Defendant Company for its clients acted solely, the Appellant submits, in the capacity of intermediary between its clients and the Defendant Company. No evidence was offered by the Respondent to show that any client was dissatisfied with any transaction, or had authorized the Plaintiff to institute action for rescission or otherwise on his behalf, or even that any claim had been put in by any client in the Bankruptcy of Theo. Frontier & Company Limited.

pp. 167-169.

18. The Respondent called no official of Frontier & Company Limited or other witness to prove that any of the transactions between Frontier & Company Limited and the Defendant Company were not according to the arrangement between the parties and apart from certain preliminary letters, there was before the Court no evidence of the terms ultimately agreed. No witness on behalf of Frontier & Company alleged that the company had been deceived.

19. The Defendants called no evidence.

20. At the trial the Defendants urged :

(a) That under the Bankruptcy Act, Revised Statutes of Canada 1927, Chapter 11, Section 43, Subsection (c) an action could only be maintained by a trustee in bankruptcy in respect of the property of the debtor. By Section 23 of the Act property of the debtor is defined to mean "that property which is divisible among creditors of the debtor." It does not include trust property. The moneys claimed for in this action were in whole or in part trust funds received by Theo. Frontier & Company Limited for its clients. If in part they were so intermingled with the funds of Frontier & Company Limited that they could not be segregated, and so became the property of the clients, these funds were not divisible among the creditors of Frontier & Company Limited and no right existed in the Trustee in Bankruptcy to bring this action. *In re R. P. Clark & Company (Vancouver) Limited*, 3 W.W.R. 1931, p. 79.

p. 158, ll. 16
-20.

(b) That the Defendant Company should not be ordered to produce its books and documents on the trial, as such books and documents tended to criminate the Defendant Company and consequently there was no power in the Court to order the production thereof. The learned Trial Judge over-ruled the objection and ordered the production of the books and document.

p. 44, l. 18-46-
p. 45, l. 4.

- RECORD.
p. 361A to
p. 361N.
p. 361W.
21. The learned Trial Judge was of the opinion the Plaintiff had established its case as against all of the Defendants and was permitted under the Bankruptcy Act to bring the action.
- p. 361S.
22. The Appellant and the other defendants except Solloway Mills (B.C.) Ltd. appealed to the Court of Appeal of British Columbia which by order dated October 4th 1932 dismissed their said Appeal.
- p. 361T.
23. By his reasons for Judgment the Honourable the Chief Justice of British Columbia was of the opinion that the fact that some of the transactions were for cash and some on margin was not a factor in the case. The learned Chief Justice thought it was incumbent on all of the Defendants to show the Defendant Company had bought as they were instructed, thus imposing the onus of proof upon the Defendants.
- p. 361U.
24. The Honourable Mr. Justice Martin was of opinion the learned trial Judge had reached the right conclusions.
- p. 361V.
25. The Honourable Mr. Justice McPhillips was of opinion the Defendants had failed to adhere to the practice of the Stock Exchange and the recognized rules binding on all brokers, but did not state in what respect the defendants had so failed.
26. The Honourable Mr. Justice Macdonald agreed that the Judgment of the trial Judge should stand as it affected the Defendant Company, but thought that the Respondent had failed to satisfy the burden of establishing the liability of the directors for misfeasance and that the appeal should be allowed as to the present Appellant Solloway and the Defendant Mills.
27. The Appellant humbly submits that the Judgment of the Supreme Court and of the Court of Appeal of British Columbia are wrong and should be reversed and that this appeal should be allowed and that Judgment should be entered for the Appellant for the following among other—

REASONS.

- (1) Because the Respondent did not establish a system of "bucketing" and did not establish such system in respect of the orders of Theo. Frontier & Company Limited.
- (2) Because the Respondent did not prove the Defendant Company failed at any time properly to execute any orders given by Theo. Frontier & Company Limited to the Defendant Company according to the tenor of such orders: and because no proof was adduced of the terms upon which orders were given.
- (3) Because the Respondent did not prove the Defendant Company was at any time "short" in shares of stock being dealt in by Frontier & Company Limited, either for itself or for its clients, or that the Defendant company was unable at any moment, if liable so to do, to deliver shares purchased by the Defendant Company.

- (4) Because if the Defendant Company was at any time material to the action "short" in shares traded in by Frontier & Company Limited, the Respondent failed to prove that the shortage was in violation of the rules and practice of the Stock Exchange; or was in shares carried on the account of Frontier & Co. Limited.
- 10 (5) Because each order by Frontier & Company Limited and its acceptance by the Defendant Company constituted a separate Contract and because the onus upon the Respondent to prove that each such contract was not performed in accordance with the terms thereof was not satisfied and because by the judgments appealed from the onus of disproof was wrongly cast upon the defendants in the action including the Appellant.
- (6) Because if the Defendant Company was guilty of any improper conduct to the damage of Frontier & Company Limited the Respondent failed to prove that the Appellant was a party to this conduct, or conspired with the Defendant Company in respect thereto, or had knowledge thereof.
- 20 (7) Because *bonâ fide* transactions extending over eighteen months made by the Defendant Company for Frontier & Company Limited should not be set aside on the ground even if proved that isolated transactions reported by the Defendant Company to Frontier & Company Limited as *bonâ fide*, were, in fact, not *bonâ fide*.
- (8) Because it was not proved that the Respondent suffered damage by any act of the Appellant Solloway.
- (9) Because the Court had no power to order the Defendant Company to produce its books and documents on the trial of the action.
- 30 (10) Because no right existed in the Trustee in Bankruptcy to bring this action.

W. B. FARRIS.

WILFRID BARTON.

In the Privy Council.

No. 25 of 1933.

*On Appeal from the Court of Appeal of
British Columbia.*

BETWEEN

ISAAC WILLIAM CANNON SOLLOWAY (A
DEFENDANT) - - - - *Appellant*

AND

W. T. JOHNSON TRUSTEE OF THE ESTATE OF
THEO. FRONTIER AND COMPANY LIMITED IN
BANKRUPTCY (PLAINTIFF) - *Respondent.*

CASE FOR APPELLANT.

GARD LYELL & CO.,

47, Gresham Street, E.C.2,

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