1928

*May 14, 15.
*June 12.

IN THE MATTER OF

THE NORTHERN LIFE ASSURANCE COMPANY OF CANADA (CLIENT)... } APPELLANT;

AND IN THE MATTER OF

MESSRS McMASTER, MONTGOMERY, FLEURY & CO., GENTLEMEN, SOLICITORS OF THE SUPREME COURT OF ONTARIO (SOLICITORS)..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

*Solicitor—Company—Solicitor retained to act for company and directors in litigation—Company's liability to solicitor for costs.*

The appellant company was a party to certain actions, and, in each case, by resolution of the directors, M. was retained as its solicitor, and also as solicitor for the individual directors where they were made

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

co-defendants. The actions were settled. The company disputed its liability for payment, in large part, of the solicitor's bill, on the ground that the litigation was merely a contest between opposing bodies of shareholders, in which the company, as such, had no interest, that the company should have adopted a neutral attitude and merely submitted its rights to the court, and that the retainers in the terms in which they were given were consequently *ultra vires* and of no effect, and that, even if the solicitor was justified in taking up for the company the burden of the litigation, the bills of costs showed that the services rendered in the negotiations leading to settlement were for the benefit of individual directors whose shares, as a result thereof, were sold or transferred, and not for the benefit of the company or under its instructions.

*Held:* The company was liable. As, in the litigation in which the costs were incurred, certain resolutions of the directors and issues of shares by the company, which must now, on the record, be taken as valid and regular, were impeached, the costs of defending the company and directors in respect thereof should be borne by the company. As corporate acts of the company were impeached, it could not be said that the solicitor should have held merely a watching brief for it. As to the services rendered in negotiations for settlement, the company had a vital interest in having the litigation speedily terminated, and, on the evidence, it was impossible to hold that they were rendered on behalf of any person other than the company; the test to be applied, in the circumstances, to determine on whose behalf the solicitor was acting, was not "could he have rendered the services without instructions from some one other than the company?", but rather "were the services reasonably necessary to procure a settlement of the litigation in which the company was involved?"

While it is a well established rule that directors may not use the company's funds in payment of their own costs, although such costs would not have been incurred if they had not been directors (5 Hals., p. 227), yet it is equally well established that directors acting as such within such of the company's powers as are confided to them, and without gross negligence, cannot be called upon to pay out of their own funds the costs of defending resolutions passed by them in the interests of the company, simply because a plaintiff has chosen to make them individually co-defendants (*Breay* v. *Royal British Nurses' Assn.*, [1897] 2 Ch. 272).

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment of Grant J. (2) which dismissed an appeal by the present appellant from the report of the Taxing Officer at Toronto made upon the taxation of certain bills of costs rendered by the respondents to the appellant. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

(1) (1927) 33 Ont. W.N. 175. (2) (1927) 33 Ont. W.N. 32.

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NORTHERN LIFE ASSUR. CO. OF CANADA v. MCMASTER.

*H. H. Davis* and *H. E. Manning* for the appellant.

*R. S. Robertson K.C.* for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal from a judgment of the Second Divisional Court (Ont.), dismissing an appeal from an order made by Mr. Justice Grant, confirming a report of the taxing officer in reference to the taxation of certain solicitor and client bills of costs. In his report the taxing officer says:

> The bills are for services rendered by the Solicitors in connection with certain actions in which the Northern Life Assurance Company and its directors were joined as defendants and the evidence shows the Solicitors were retained in these actions to represent the company and certain of the directors, their retainers in each case being in accordance with a resolution passed at a Directors' meeting.
>
> The contention is now advanced by those opposing the bill that the litigation in question was merely a contest between two opposing bodies of shareholders in which the Company as such had no interest, that in these circumstances the Company should have adopted a neutral attitude and contented itself with submitting its right to the Court and the retainers in the terms in which they were given were consequently *ultra vires* and of no effect. If this contention is correct it follows that practically all the solicitor and client charges made against the Company in the bills must be disallowed.

After considering the matter from the point of view of the solicitor, the company, and the directors, the taxing officer rejected the contention of the company, holding that, as the validity of the allotments of certain shares of its stock was involved, the interest of the company in the litigation was a most substantial one. This ruling was approved by Mr. Justice Grant on appeal to him, and by the Divisional Court.

Before us the company urged the contention it had advanced before the taxing officer, and submitted the further argument that, even if the solicitor was justified in taking up for the company the burden of the litigation, the bills of costs rendered, particularly the general bill, shew that the services rendered by the solicitor in the negotiations which led up to the final settlement were rendered for the benefit of the individual directors whose shares, as a result thereof, were sold and transferred, and not for the benefit of the company or under its instructions.

There were four actions in all. They arose out of an attempt on part of certain shareholders to obtain control

of the company. In two of these the company, and the directors individually, were defendants; in the third the company and one Roadhouse, while in the fourth the company was plaintiff. In each case by a resolution of the board of directors Mr. McMaster was retained on behalf of the company and also on behalf of the individual directors, in the actions in which they were co-defendants.

In the first action—McKnight v. Purdom et al—the plaintiff sought, *inter alia,* to set aside the confirmation to T. H. Purdom by the board of directors of an allotment of 2,219 shares in the company's capital stock, and to set aside an allotment and issue to S. C. Tweed of 830 shares of the company's treasury stock, on the following grounds:

1. That the 2,219 shares standing in the name of T. H. Purdom in the books of the company, and on which he had voted for years, did not belong to him but were shares originally subscribed for by others, but which had been surrendered to the company and which, after being surrendered, Purdom caused to be entered in the books as shares belonging to himself, and

2. That the allotment and issue of 830 shares to S. C. Tweed was simply a sham and was carried out as part of a previously arranged scheme to enable the Purdom interests to keep control of the company.

It is, no doubt, a well established rule that directors may not use the funds of the company in payment of their own costs, although such costs would not have been incurred if they had not been directors. Halsbury's Laws of England, vol. 5, p. 227. It is, however, equally well established that directors acting as such within such of the powers of the company as are confided to them, and without gross negligence, cannot be called upon to pay out of their own private purses the costs of defending resolutions passed by them in the interests of the company, simply because a plaintiff has chosen to make the directors individually co-defendants. *Breay* v. *Royal British Nurses' Association* (1).

By a final settlement it was agreed by all parties to the various actions that the allotment of these shares as and how they were allotted should be held to be valid and bind-

(1) [1897] 2 Ch. 272.

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Lamont J.

ing; and that a consent judgment to that effect should be entered. It was also agreed that consent judgments should be entered in the other actions. The parties, therefore, by the settlement and judgments have made it impossible for the court to say that the resolutions of the directors of September 13 and September 20, 1923, which, in the first action, the plaintiff McKnight sought to set aside, were invalid or even irregular. We must take it, therefore, that these resolutions were properly passed by the directors, and the issue of the shares valid corporate acts of the company.

The costs incurred in defending the company against attacks in respect of valid corporate acts, and the directors in respect of resolutions regularly passed authorizing the same, should, in our opinion, be borne by the company. As the corporate acts of the company were impeached in the litigation, we cannot see any solid foundation for the contention that the solicitor should have held merely a watching brief for the company.

Then can it fairly be said that the services rendered by the solicitor in carrying on negotiations for the purpose of arriving at a basis on which the litigation could be terminated, were services rendered for individual directors or shareholders and not for the company?

The evidence shews that, very shortly after being retained, Mr. McMaster clearly perceived that if the litigation was protracted it might, and probably would, have serious consequences to the business of the company through creating a widespread suspicion as to the validity of the company's acts and the integrity of its directors, as such. The success of a life insurance company depends, to a great extent, upon its ability to secure insurance. Anything which casts suspicion upon the regularity of the acts of the company or indicates that its directors are manipulating its shares for their individual benefit, rather than for the benefit of the company, is bound, in our opinion, to adversely affect the company's prestige. The company, therefore, had, as was frankly admitted by its counsel, a vital interest in having the litigation brought to a speedy termination. In its factum the company admits that it was being seriously affected by the litigation. No one has suggested any way other than that taken by Mr. McMaster by which a settlement could have been brought about.

Neither has anyone questioned the advisability, in the company's interest, of having the settlement take place, rather than a continuation of the litigation. The position taken by the company is not that the settlement was not beneficial to it, but that it was primarily beneficial to the shareholders whose shares were sold and transferred as a result of the negotiations, namely, the shares of the Purdom family and the shares controlled by the Honourable Manning Doherty and Mr. Tweed.

In his evidence Mr. McMaster testified that anything he did for T. H. Purdom or on his behalf, including the sale of his shares to Doherty and Tweed, was paid for by Purdom. He further testified that he had no retainer to act for Doherty or Tweed and that he did not advise them. This evidence being in no way impeached, it seems to us impossible to hold that the services for which the solicitor has charged were rendered on behalf of any person other than the company.

In his argument Mr. Manning suggested that the following as a proper test to determine on whose behalf the solicitor was acting:

"Could Mr. McMaster have rendered the services set out in the general bill without instructions from some one other than the company?"

In our opinion this is not the test to be applied. We think, in the circumstances of this case, the test should rather be this:

"Were the services rendered reasonably necessary to procure a settlement of the litigation in which the company was involved?"

We are of opinion that they were.

The appeal should, therefore, be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Long & Daly.*

Solicitors for the respondents: *Donald, Mason, White & Foulds.*