1967 WILFRED M. POSLUNS (*Plaintiff*) ..... APPELLANT;

*Oct. 16, 17
1968

AND

Mar. 13 THE TORONTO STOCK EXCHANGE (*Defendant*) ..... RESPONDENT;

AND

GEORGE GARDINER (*Defendant*).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law—Investigation by Board of Governors of Stock Exchange concerning certain option transactions by member company—Representative of company fined and Board's approval of appellant's association with company withdrawn—Whether Board in taking action against appellant exercised its jurisdiction legally and in accordance with rules of natural justice.

The Board of Governors of the Toronto Stock Exchange was informed that a member company was acting for both sides in certain option transactions and as a result four directors of the company, including the appellant, were interviewed by some members of the Board. In consequence of these discussions the Board decided to hold a meeting to investigate and consider the question of whether or not the member of the Exchange for the company was guilty of any offence under the by-laws or rulings of the Exchange. A notice was issued that an inquiry would be held to determine, *inter alia,* whether the member company, while acting as agent for a customer on one side of the transactions in question, had acted on the other side for a company in which the appellant had a one-sixth personal interest.

On the day before the meeting was to take place the appellant consulted the member firm's counsel as to whether he should have his own

*PRESENT: Abbott, Judson, Ritchie, Hall and Spence JJ.

counsel at the hearing. He was advised that the hearing was to be with reference to the company and that his position was not particularly different from that of the other directors. The appellant was present at the hearing and was given an opportunity to explain his role in the matter. The Board found that the company was guilty and the maximum fine was imposed. The Board then went on to deal independently and additionally with the appellant and after some discussion it was resolved to terminate all prior consents given to the appellant as a director, officer and shareholder of the company.

On the day following the hearing, representations were made to the Board that there should be a rehearing with respect to the appellant's personal position. The Board having acceded to this request a rehearing was held at which a statement was read reviewing what had transpired at the original hearing in so far as it related to the appellant. Appellant's counsel was asked whether he wished to call any additional evidence and replied that there was no dispute about the evidence but only as to the interpretation to be placed upon it. Appellant's counsel then made full representations to the Board, following which the Board considered the matter and concluded that appellant's conduct was such to warrant the withdrawal of the Board's approval of his association with the member company, but they agreed to give him ten days in which to resign and withheld official publication of the resolution passed against him until that period had expired. The appellant, however, declined to resign and a letter was accordingly forwarded from the Board to the company giving formal notice of the resolution. The appellant was subsequently removed as a director and was discharged from his association with the firm.

An action brought by the appellant against the Exchange for substantial damages and for a declaration that the Board of Governors of the Exchange had acted illegally and contrary to the rules of natural justice in terminating all prior consents given by it for the appellant to act as a director, officer, shareholder or employee of the member company was dismissed by the trial judge and an appeal from his judgment was dismissed by the Court of Appeal. The appellant then appealed to this Court.

Held: The appeal should be dismissed.

The Court found that neither the good faith nor the mode of procedure of the Board had been successfully impugned. The appellant had been fully informed of what was alleged against him and was given an opportunity to present his version and explanation of the allegations. *Russell v. Russell* (1880), 14 Ch. D. 471; *Board of Education v. Rice*, [1911] A.C. 179, applied; *Ridge v. Baldwin*, [1964] A.C. 40, distinguished; *Weinberger v. Inglis*, [1919] A.C. 606, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Gale J. (now C.J.O.). Appeal dismissed.

W. B. Williston, Q.C., and *R. B. Tuer*, for the plaintiff, appellant.

[1] [1966] 1 O.R. 285, 53 D.L.R. (2d) 193.

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A. S. Pattillo, Q.C., and *J. F. Howard, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario dismissing an appeal from the judgment rendered at trial by Mr. Justice Gale (as he then was) whereby he dismissed the action which the appellant had brought against the Toronto Stock Exchange (hereinafter called the "Exchange") for substantial damages and for a declaration that the Board of Governors of the Exchange had acted illegally and contrary to the rules of natural justice in terminating all prior consents given by it for the appellant to act as a director, officer, shareholder or employee of R. A. Daly and Company Limited (hereafter called the "Daly Company") a member corporation of the Exchange which was represented thereon by one of its directors, R. A. Daly, Jr. The result of the order which is challenged in these proceedings was that the appellant was removed as a director of the Daly Company and was discharged from his association with that firm where he had been an active partner and where the trial judge found that he had been engaged as a "customers' man" for the solicitation of commission business in securities listed on the Exchange.

The background of this case has been carefully and accurately described in the very full judgment of the learned trial judge which is reported in 46 D.L.R. (2d) at pp. 210 to 347 and which was confirmed by the Court of Appeal[1] so that I do not find it necessary to do more than present a summary of the circumstances which provided the immediate cause for the Board of Governors of the Exchange acting as they did.

When the appellant became associated with the Daly Company in the year 1960, he had already become interested in the somewhat specialized field of dealing in the buying and selling of options on shares and he had acquired a one-sixth interest in a partnership under the name of Lido Investments which engaged in that business. During 1960 one of the appellant's clients, a Mr. Lynch who was a Peter-

[1] [1966] 1 O.R. 285, 53 D.L.R. (2d) 193.

borough druggist, sold 570 options through the Daly Company acting as his agent and the Daly Company in turn purchased 313 of these options in its capacity as agent for Lido and in the same capacity sold most of these in New York at a price higher than the price received by Lynch. The Daly Company charged Lynch a commission of 5.5 per cent on the options sold to Lido and charged Lido 1.1 per cent on their purchase, but no commission charge was made to Lido on any of the sales made in New York. The appellant, as one of the owners of Lido, shared in the substantial profit which was made by that partnership through these transactions, and through his association with the Daly Company he also participated in the profits made on the other side of the transactions both through commissions and as a shareholder of that company.

Early in February 1961, it came to the attention of the Exchange that the Daly Company was acting for both sides in the Lynch-Lido option transactions and this was reported to the Board of Governors of the Exchange as a result of which four of the directors of the Daly Company, including the appellant, were interviewed by some members of the Board on February 15 when the appellant was questioned about the operations of Lido and his interest in it, and there was a discussion about the Daly Company's position in relation to the transactions. In consequence of these discussions the Board decided to hold a meeting on February 28 to investigate and consider the question of whether or not R. A. Daly, Jr., as a member of the Exchange and director of the Daly Company, was guilty of any offence under the by-laws or rules of the Exchange. Pursuant to the provisions of its by-laws, the Board of Governors issued a notice on February 22 addressed to R. A. Daly, Jr., as an individual member of the Exchange and to the President of the Daly Company. In this notice the purpose of the meeting to be held on February 28 was stated to be:

> ...in connection with transactions in 'put and call' options conducted between January 1st, 1960, and January 31st, 1961, with its customer John T. Lynch by R. A. Daly & Co. Limited (herein referred to as 'Daly'), a member corporation of which you are a shareholder and director, and through which you, as a member of the Toronto Stock Exchange, carry on business, and for the acts and omissions of the directors, officers and employees of which you as a member, are responsible:

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The first of the acts of omission into which the inquiry was to be held was specified in the notice in the following terms:

> (a) whether Daly, while acting as agent for the said Lynch on one side of such transactions, acted on the other side in such transactions, or some of them, for or with a company or partnership known as Lido Investments, in which Wilfred M. Posluns, a director of Daly, on his own admission, had a one-sixth personal interest.

As I have said, the appellant, as a director of the Daly Company, had been interviewed by members of the Board of Governors and discussed the subject-matter of the first act of omission and his role concerning it. On being advised of the notice for the February 28 meeting he postponed his holiday plans so as to be present there and on the day before it was to take place, he and his solicitor consulted Mr. Stapells, counsel for Daly and Company, as to whether he should have his own counsel at the hearing. It is true that Mr. Stapells advised him and his solicitor that the hearing was to be with reference to the Daly Company and that he did not think the appellant's position to be particularly different from that of the other directors, but in light of all the circumstances, it must I think, be accepted that he knew that his conduct was to be the subject of an inquiry which was to be held for the purpose of determining whether or not his firm should be penalized by the Exchange. I do not, however, think that the appellant was alerted to the fact that he might be personally penalized at the same meeting.

The appellant was present at the hearing of February 28 at which a statement was read reciting the facts known to the Board concerning the transactions in question and he was given an opportunity to explain his association with Lido. After considering the matter amongst themselves, the members of the Board called in the representatives of the Daly Company and announced that they were unanimously of the opinion that the Company was guilty of six of the seven acts of omission preferred against it, including the first. After representations had been made on the company's behalf with respect to penalty, the matter was again considered and it was decided to impose the maximum fine of $5,000 on R. A. Daly, Jr.

There then occurred what the trial judge referred to as "an unfortunate error" because the Board, instead of accepting the fact that it had completed the inquiry with respect

to the Daly Company upon which it had properly embarked, went on to deal independently and additionally with the appellant.

This new issue was introduced when the chairman said something to the effect "What about the directors of Daly individually?" and another governor then referred to Mr. Posluns as being the one who had caused all the trouble. After relatively little discussion, it was unanimously resolved that all prior consents given to the appellant as a director, officer and shareholder of the Daly Company be terminated forthwith and it was the general understanding that his association with the Daly firm was to be severed in all respects.

Although the president of the Daly Company was informed of the resolution withdrawing the appellant's approvals, no action was at that time taken by the Board to put the terms of the resolution into effect and on the following day representations were made to the Board that there should be a rehearing with respect to Posluns' personal position. The Board acceded to this request and a rehearing was set for March 2 on which date the same members of the Board were present who had conducted the February 28 meeting and a statement was read reviewing what had transpired at the meeting in so far as it related to the appellant. The appellant was represented at this meeting by counsel who was asked whether he wished to call any additional evidence and replied that there was no dispute about the evidence but only as to the interpretation to be placed upon it. The appellant's counsel then made full representations to the Board and concluded with a plea in mitigation urging that the publication of the resolution withdrawing the approvals would do irreparable damage to the appellant and his family. There being no dispute as to the facts, the members of the Board adjourned to consider the matter in light of the interpretation placed on them by the appellant's counsel and in light of the submissions which he had made concerning the penalty to be imposed; in the result they concluded that the appellant's conduct was such as to warrant the withdrawal of the Board's approvals of his association with the Daly Company, but they agreed that the resolution directing that withdrawal passed at the meeting of February 28 would not be acted upon or published if the appellant resigned

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by March 10. The appellant, however, decided not to tender his resignation and a letter was accordingly forwarded from the Board to the Daly Company giving formal notice of the resolution.

For the reasons stated by the learned trial judge and the Court of Appeal, I am satisfied that under the by-laws of the Exchange the Board of Governors had jurisdiction to take the action which they did against the appellant, but the question raised by this appeal is whether they exercised that jurisdiction legally and in accordance with the rules of natural justice.

I do not find it necessary to review the considerable number of cases which discuss the meaning and effect to be given to the rules of natural justice because the trial judge has dealt extensively with all the leading authorities in that regard and it would be redundant for me to retrace the ground which has been so thoroughly covered.

It does, however, appear to me to be desirable to mention the case of *Russell v. Russell*[2], in which Sir George Jessel M.R. made the following comment on the earlier case of *Wood v. Wood*[3]:

> . . . it contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than judges who have judicial functions to perform, . . . The passage I mean is this, referring to a committee:
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> > They are bound, in the exercise of their functions, by the rule expressed in the maxim *audi alteram partem*, that no man should be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

This language was quoted with approval by the Privy Council in *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montréal*[4].

Although the case of *Board of Education v. Rice*[5] has been referred to in the Courts below, I think it desirable to reiterate what was there said by Lord Loreburn at p. 182 where, speaking of the duty of the Board of Education in considering a complaint against a local education authority, he said:

> In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law.

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[2] (1880), 14 Ch. D. 471.
[3] (1874), L.R. 9 Ex. 190.
[4] [1909] A.C. 535.
[5] [1911] A.C. 179.

It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either *they must act in good faith* and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial.

The italics are my own.

In light of the findings of the Courts below, I do not think that the good faith of the Board of Governors is open to question, but under the authorities they were also required, before taking any final action against the appellant, to inform him of what was alleged against him and to give him an opportunity to present his version and explanation of any such allegations.

The position as I interpret it, is that the appellant was fully informed at and before the meeting of February 28 that the Board of Governors disapproved of his conduct in relation to the Lynch-Lido-Daly transactions and he was given an opportunity to present and did present his explanation of that conduct at that meeting but, although he must have realized at that time that he was personally open to censure by the Board, he was not alerted to the fact that his own case was to be dealt with at the February meeting. It is now contended on behalf of the appellant that the February hearing was a nullity so far as he was concerned and that the second hearing of March 2 was in the nature of an appeal and did not afford him the new hearing to which he was entitled. The key submission made in the factum filed on behalf of the appellant is phrased as follows:

2. It is submitted that the Appellant could not have had a fair hearing on March 2nd by reason of the state of mind of the Governors on that occasion in:

(a) Failing to understand and accept the fact that the proceedings on February 28th had no legality and that they must consider the matter afresh;

(b) By their failure to exercise their proper function as members of a tribunal determining the propriety of the Appellant's conduct for the first time rather than as members of an appellate board prepared to be convinced that their earlier decision was wrong.

Counsel on behalf of the appellant relied in great measure on the decision of Lord Reid in the case of *Ridge v. Baldwin*[6], and particularly on the passage at p. 79 in which

[6] [1964] A.C. 40.

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he commented on the two meetings held in that case by the "watch committee" to consider the question of the dismissal of the Chief Constable of the Borough of Brighton. The passage in question reads as follows:

> Next comes the question whether the respondents' failure to follow the rules of natural justice on March 7 was made good by the meeting on March 18. I do not doubt that if an officer or body realizes that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid. An example is *De Verteuil v. Knaggs,* [1918] A.C. 557. But here the appellant's solicitor was not fully informed of the charges against the appellant and the watch committee did not annul the decision which they had already published and proceed to make a new decision. In my judgment, what was done on that day was a very inadequate substitute for a full rehearing. Even so, three members of the committee changed their minds, and it is impossible to say what the decision of the committee would have been if there had been a full hearing after disclosure to the appellant of the whole case against him. I agree with those of your Lordships who hold that this meeting of March 18 cannot affect the result of this appeal.

Counsel for the appellant sought to apply this language directly to the circumstances of the present case and it therefore becomes necessary to examine the facts in *Ridge v. Baldwin* so as to fully understand Lord Reid's reference to the two meetings. In that case the Chief Constable of Brighton was dismissed from office by a resolution of the watch committee passed at a meeting of which he had no notice and at which he was given no opportunity to be heard in his own defence. Following his dismissal, the chief constable's solicitor asked to be allowed to appear before the watch committee saying that he wished to be informed about the case against his client so that he could deal with it and furthermore, he submitted that the best way of dealing with the situation would be to allow his client to resign and take his pension.

The distinction between the two cases is, in my view, clearly apparent from a description of the initial meeting at which the chief constable was dismissed as contained in the judgment of Lord Morris at p. 113:

> The watch committee were under a statutory obligation (see Police Act, 1919, s. 4(1)) to comply with the regulations made under the Act. They dismissed the appellant after finding that he had been negligent in the discharge of his duty. That was a finding of guilt of the offence of neglecting or omitting diligently to attend to or to carry out his duty. Yet they had preferred no charge against the appellant and gave him no notice. They gave him no opportunity to defend himself or to be heard. Though their good faith is in no way impugned, they completely disregarded the regulations and did not begin to comply with them.

The meeting of March 18 to which reference is made in Lord Reid's judgment is briefly described by Lord Hodson at p. 129 of the same report where he made the following comment on the reception given to the appellant's solicitor at that meeting:

> On March 18 Mr. Bosley was given not only a full but a courteous hearing by the watch committee but received no indication of the nature of the charges which his client had to answer, notwithstanding his repeated statements that he did not know what they were. It is plain, therefore, that if there were a failure on March 7 to give justice to the appellant this was not cured on March 18 when the watch committee confirmed their previous decision. At this hearing it was made plain by Mr. Bosley that his client was not seeking reinstatement but only his pension rights of which he had been deprived by his dismissal. This position is maintained by the appellant through his counsel before your Lordships.

I am in sympathy with the observations made by Lord Hodson later in his reasons for judgment at p. 133 where he said:

> It may be that I must retreat to that last refuge of one confronted with as difficult a problem as this, namely, that each case depends on its own facts, and that here the deprivation of a pension without a hearing is on the face of it a denial of justice which cannot be justified on the language of the section under consideration.

From the above recital of the facts it will be apparent that the circumstances in *Ridge v. Baldwin* were quite different from those in the present case. In *Ridge v. Baldwin* the appellant was never told of the case which he had to meet, whereas Mr. Posluns knew what was complained of in his conduct some days before the first hearing. In *Ridge v. Baldwin* the appellant was given no opportunity to be heard at either meeting, whereas Posluns gave evidence and had a full opportunity to explain himself at the first hearing and declined, through his counsel, to add anything at the second hearing to the evidence which had already been taken. In *Ridge v. Baldwin* the plea made by the chief constable's solicitor at the second hearing that his client should be permitted to resign was of no avail, whereas after listening to the submissions of Posluns' solicitor at the March 2 hearing, the Board of Governors gave him ten days in which to resign and withheld official publication of the resolution passed against him until that period had expired and Posluns had declined to resign.

In my opinion, the contention that the proceedings at the meeting of March 2 were in the nature of an appeal

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from the decision of February 28 rather than a rehearing, leaves out of account the fact that the Board gave the appellant's solicitor full opportunity to call any evidence he pleased at the second hearing and that it was he and not the Board who made the election to abide by the evidence taken in February. He then reviewed all the circumstances afresh and advanced at every turn the construction of the facts which was most favourable to his client. In the result, although the Board of Governors did not change their ruling, they offered to withdraw it altogether if the appellant would resign. In my view also it is inconsistent to speak of the March 2 hearing as an appeal when the disputed resolution was not formally published until March 10.

The learned trial judge expressed the view that it was "an unfortunate error" for the Board of Governors to have proceeded against the appellant personally at the first hearing. I do not find it necessary to express an opinion as to this because, in any event, the circumstances are governed by the general proposition stated in the paragraph above quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin* where he said:

> I do not doubt that if an officer or body realizes that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid. An example is *De Verteuil v. Knaggs,* [1918] A.C. 557.

The case of *Weinberger v. Inglis*[7] was one in which the committee of the London Stock Exchange had refused re-election to a German member and their decision was challenged as having been reached without regard to the rules of natural justice. It appears to me that the language used by Lord Birkenhead in that case is directly applicable to the present appeal. He there said, at p. 617:

> The Committee formed their opinion. It is conceded that they formed it honestly. They formed it in my opinion upon grounds which were made known to the appellant and which he had a chance of answering. The short answer, therefore, to the appellant's case is that the Committee did not deem him eligible to be a member of the Stock Exchange, and that neither their good faith nor their mode of procedure has been successfully impugned.

I think that the Board of Governors in the present case is in the same position and I find, to use Lord Birkenhead's

[7] [1919] A.C. 606.

language, "that neither their good faith nor their mode of procedure has been successfully impugned".

For all these reasons, as well as for those contained in the reasons for judgment of the learned trial judge and the majority of the Court of Appeal, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Goodman & Goodman, Toronto.

Solicitors for the defendant, respondent: Blake, Cassels & Graydon, Toronto.