1965

*April 29, 30
June 24

BANK OF MONTREAL (*Defendant*) ..... APPELLANT;

AND

GRANT BLOOMER (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Banks and banking—Purchaser turning over bank draft to third party to effect payment for shares—Proceeds of draft credited to account of holding company to cover latter's cheque to payee—Bank not liable for conversion.

The plaintiff B and certain other persons connected with N Ltd. became interested in the acquisition of shares in that company, which were owned by a group living in the United States, which controlled 410 out of the 1,000 issued common shares of the company. An arrangement made by Y, the president of the company, involved the sale by one L of a total of 54 shares, and the acquisition of a like number by B. The latter, on March 29, 1962, purchased a draft for $13,500 (U.S.) from the defendant bank in Vancouver and turned it over to Y to effect payment to L.

Unknown to B was the fact that the shares controlled by L in the company were not registered in his own name. The 410 shares of the company controlled by the American group were registered in the name of a holding company, S, incorporated in British Columbia. To avoid a loss on exchange, the procedure which was followed was to have S issue its cheque to L in the amount of $15,000 (U.S.), which L duly cashed. When the S cheque was returned to the bank in Vancouver there was delivered to the bank the bank draft to L, which was applied to cover the payment made by S.

The secretary of the company, by May 9, 1962, had in his possession all the documents necessary to register B as the owner of the 54 shares which he was purchasing from L. However, no share certificate was issued to B at that time and it was not until July 30 that his solicitors were advised that B was recorded on the register of transfers and that share certificates were available for delivery. In the meantime B had repudiated the purchase of shares on the ground that the shares had not been delivered. The company went into liquidation in August 1962.

In an action for damages for conversion of the draft, the trial judge held that there had been such conversion. The Court of Appeal in dismissing an appeal from the trial judgment took the position that B was not obliged to accept company shares from S because his contract with L was for the purchase of shares owned by L.

Held: The appeal should be allowed.

If a contract specifically stipulated for delivery of a specified article, or in a specified manner, a party to it was entitled to insist upon performance in the agreed manner. Here, however, there was no written contract, and no evidence that, in his negotiations with L, B stipulated for the purchase of shares which must have been registered in L's own name.

B knew that Y had negotiated the purchase for B and others from the American group of a block of company shares, and that the draft

*Present: Cartwright, Abbott, Martland, Hall and Spence JJ.

was turned over to Y to pay for those shares which B was to acquire. The draft, while it did not reach L directly, was used to effect that payment. The bank could not be guilty of conversion merely because B was not aware of the actual procedure by means of which the deal was to be finally effected.

Bowes v. Shand (1877), 2 App. Cas 455, distinguished.

APPEAL from a judgment of the Court of Appeal for British Columbia, affirming a judgment of Munroe J. in an action for conversion of a negotiable instrument. Appeal allowed.

F. H. Bonnel, Q.C., and *D. A. Freeman*, for the defendant, appellant.

H. E. Hutcheon, for the plaintiff, respondent.

The judgment of the court was delivered by

MARTLAND J.:—This is an appeal from the Court of Appeal for British Columbia, which affirmed the judgment at trial in an action in which the respondent, Bloomer, was plaintiff and the appellant bank the defendant. Bloomer obtained a judgment for $14,183.44, plus interest and costs, in respect of a claim for conversion by the bank of a bank draft purchased by him from the bank, in the amount of $13,500 U.S. funds, payable to one James C. Lewis and drawn on the United California Bank.

On April 17, 1961, Bloomer became an employee of Nutri-Bio of Canada Ltd. (hereinafter called "the company"), in Vancouver. The company, which was a private company incorporated under the *Canadian Companies Act*, and an affiliated company in the United States of America, Nutri-Bio Corporation, were engaged in the distribution and sale of dietary supplements. In February 1962, Bloomer became the vice-president of the company in charge of distributor relations. The president of the company was Charles W. Young, and he and Bloomer had their offices in the premises of the company in Vancouver.

Bloomer and certain other persons connected with the company became interested in the acquisition of shares in the company, which were owned by a group living in the United States, which controlled 410 out of the 1,000 issued common shares of the company. They were interested in

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acquiring the shares because of the likelihood of the company being converted into a public company and making a public issue of its shares.

Bloomer had had some discussion with James C. Lewis, of Los Angeles, regarding the acquisition of some shares from him, in December of 1961. Early in 1962, Young had discussions with Lewis, in Los Angeles, regarding Bloomer acquiring some of Lewis's shares.

The discussions culminated in a meeting held at the offices of the company in March 1962, which is described in the following extract from the evidence of W.R.D. Underhill, the solicitor and secretary of the company:

> Subsequently in 1962 I was advised by Mr. Young in Mr. Bloomer's presence that Mr. Young was engaging in negotiations with certain members of the American group, among them, Lewis, for the sale of shares in Nutri-Bio of Canada Ltd., to a number of Canadian officers of the company, including Bloomer, Strong and Granholme. These negotiations had gone on for some period of time and at the end of March, I was at the office, company offices for business purposes and present at a meeting, at which meeting there was also present Mr. Bloomer, Mr. Young and I believe Mr. Granholme, and I was informed at that meeting that a sale had been negotiated of shares to Bloomer, Strong and Granholme. I was informed of the price and I was informed that Mr. Bloomer's draft in payment for the shares was on Mr. Young's desk. The meeting took place in Young's office. I was asked to attend to the details of effecting the share transfer.

The arrangement made by Young involved the sale by Lewis of a total of 54 shares, and the acquisition of a like number by Bloomer. The draft referred to is the one which is in issue, which Bloomer purchased from the bank on March 29, 1962. After purchasing it, Bloomer had handed it to Young's secretary, saying: "Here is the draft for Mr. Lewis."

As previously noted, Young was conducting the negotiations for the share purchases, including Bloomer's, and in evidence Bloomer stated that Young negotiated the price of the shares and the actual sale of the shares with Lewis on Bloomer's behalf. He was also asked the following question and gave the following answer:

> Q. Now, would it be correct to say, Mr. Bloomer, that you left the question of the acquisition of these shares and the payment of the money entirely in the hands of Chuck Young and Mr. Underhill?
>
> A. In as much as the money to be sent to James C. Lewis when I acquired the shares, yes.

Unknown to Bloomer, but known to Underhill, as secretary of the company, was the fact that the shares controlled by Lewis in the company were not registered in his own name. The 410 shares of the company controlled by the American group were registered in the name of a holding company, Saturn Enterprises Ltd., incorporated in British Columbia. All of the shares in Saturn were registered in the name of another holding company, Mars Holdings Limited, also incorporated in British Columbia, whose shares were owned by the American group in the same proportions as the respective share holdings they had had in the company prior to their transfer to Saturn. These holding companies had been created at the suggestion of Underhill in order to meet certain tax problems in the United States. In the result, however, each of the shareholders of Mars could exercise control over, and could dispose of those shares in the company, now registered in the name of Saturn, which, previously, he had owned in his own name. The procedure followed by a beneficial owner in effecting a sale of shares held on his behalf in the company was to have Saturn effect the sale to the purchaser, the proceeds then being applied by Saturn in the purchase, from the beneficial owner, of a proportionate number of the shares held by him in Mars.

The draft which Bloomer had delivered to Young's secretary to effect payment for the shares to be obtained from Lewis was made payable to Lewis, and not to Saturn, of whose existence Bloomer was not aware. Underhill learned from the bank that if the draft were to be cancelled there would be a loss on exchange. The procedure which was followed was to have Saturn issue its cheque to Lewis in the amount of $15,000 (U.S.), which Lewis duly cashed. When the Saturn cheque was returned to the bank in Vancouver there was delivered to the bank the bank draft to Lewis, which was applied to cover the payment made by Saturn. On April 4 both documents came into the hands of the associate manager of the foreign exchange department of the bank at its main office in Vancouver, and the above procedure was followed. He was not aware that the bank draft had initially been purchased by Bloomer, and assumed that it belonged to Saturn. He marked the draft "Proceeds refunded to Purchaser", and Saturn obtained the credit for it. This occurred on April 4, 1962.

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Prior to that time, Underhill had communicated with Butler, a lawyer in the United States, who acted for Nutri-Bio Corporation (the American company) and who also represented most of the American group who controlled shares in the company, including Lewis, and arranged for the delivery to Butler of Saturn's share certificate for 410 shares in the company, and for payment to those persons who controlled them for those shares which were being sold. The certificate was forwarded to Underhill on April 17, and in the meantime Underhill prepared the directors' resolution approving the transfers from Saturn to the various purchasers. The signed resolution was in Underhill's possession on May 8 or 9. Underhill says he signed this and gave instructions to file it in the minute book and to have the share register noted accordingly.

No share certificate was issued to Bloomer at that time, and in the latter part of June Bloomer inquired about it. Underhill told him the certificates were not prepared, but that he would do so as soon as he could, but that he was pressed with other business, particularly company business.

On June 29 Bloomer was discharged from the service of the company. A few days later he learned that the proceeds of the draft had been received by Saturn.

On July 17 Bloomer wired Lewis to advise that he was repudiating the purchase of shares from him on the ground that the shares had not been delivered and on other grounds, which were not stated. This was confirmed by a letter from Bloomer's solicitors.

On July 30 Underhill wrote to Bloomer's solicitors, advising that Bloomer was recorded on the register of transfers and that the share certificates were available for delivery.

In August 1962, the company made a proposal under the *Bankruptcy Act* and then went into liquidation under the *Winding Up Act*.

On January 18, 1963, Bloomer issued a writ against the bank claiming damages for conversion of the bank draft, on the basis that the bank had wrongfully converted the proceeds of his draft.

The learned trial judge held that there had been a conversion by the bank of Bloomer's draft. He relied upon the statements of the law made in Paget's Law of Banking, 6th ed., p. 303:

A conversion is a wrongful interference with goods, as by taking, using or destroying them, inconsistent with the owner's right of possession. To constitute this injury, there must be some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it.

Intention is no element in conversion.

"Any person who, however innocently, obtains possession of goods the property of another who has been fraudulently deprived of the possession of them, and disposes of them, whether for his own benefit or that of another person, is guilty of a conversion."

He also cited from Salmond on Torts, 13th ed., p. 262:

A conversion is an act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it. Two elements are combined in such interference: (1) a dealing with the chattel in a manner inconsistent with the right of the person entitled to it, and (2) an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with such right.

He rejected the defence that Young and Underhill had authority to deal with the draft in the way they did, and also the defence that the bank's disposition of the draft had not caused damage to Bloomer.

The Court of Appeal took the position that Bloomer was not obliged to accept company shares from Saturn because his contract with Lewis was for the purchase of shares owned by Lewis. On this point reference was made to *Bowes v. Shand*[1], per Lord Cairns L. C. at p. 463:

My Lords, if that is the natural meaning of the words, it does not appear to me to be a question for your Lordships, or for any Court, to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance, and that alone might be a sufficient answer.

* * *

My Lords, I must submit to your Lordships that if it be admitted, as the Lord Justice is willing to admit, that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers without any real cause would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled.

[1] (1877), 2 App. Cas. 455.

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In the same case Lord Hatherley said at p. 474:

> Now under these circumstances, and with the plain meaning of the contract lying, as it appears to me, on its surface, we are not entitled to speculate on the reasons and motives which have induced those who are engaged in this particular trade, those who have this "usual run," as the witness describes it, of contracts before them from time to time, and who must have pondered upon the matter, to frame their contracts in the manner which pleases them best.

There is no doubt that if a contract specifically stipulates for delivery of a specified article, or in a specified manner, a party to it is entitled to insist upon performance in the agreed manner. In the *Bowes* case there was a written contract for the sale of rice to be shipped in specified months, and the purchaser was held to be entitled to insist upon shipment in that period.

There is no written contract here, and no evidence that, in his negotiations with Lewis, Bloomer stipulated for the purchase of shares which must have been registered in Lewis' own name. The negotiations with Lewis were conducted by Young, who was not Lewis' agent. In his own evidence, in chief, Bloomer was asked: "What were you to get out of the transaction?" and his reply was: "I was to get 54 shares of Nutri-Bio of Canada Ltd. from James C. Lewis transferable to my name." I am satisfied, on reading all the evidence, that this accurately describes the deal between Bloomer and Lewis. The evidence, previously reviewed, shows that Lewis was personally in control of that number of shares in the company through the two holding companies. I am satisfied that, in so far as Lewis was concerned, the contract between him and Bloomer was performed. The secretary of the company had in his possession, by May 9, all the documents necessary to register Bloomer as the owner of the 54 shares which he was purchasing from Lewis. Any delays thereafter in effecting the registration and issuing a share certificate to Bloomer were the responsiblity of the company secretary, and not of Lewis.

In the light of this, I do not see how it can be said that the bank could be made liable for the conversion of Bloomer's draft. That draft was acquired by Bloomer in order to effect payment to Lewis for the shares which Bloomer was purchasing from him. Bloomer, in his evidence, previously cited, said that inasmuch as the money to be sent to Lewis when he acquired the shares was concerned, the payment

was left in the hands of Young and Underhill. The draft was used as the means whereby Lewis received payment for those shares. It is true that it did not reach Lewis directly, but it was used by Young and Underhill to effect that payment. Adopting the statement in Paget's Law of Banking, previously cited, I do not see how it can be said that the act of the bank, in crediting it to Saturn's account to cover Saturn's cheque to Lewis, was an act which repudiated Bloomer's right or an exercise of dominion inconsistent with it. The essential facts are that Bloomer knew that Young had negotiated the purchase for Bloomer and others from the American group of a block of company shares, and that the draft was turned over to Young to pay for those shares which Bloomer was to acquire. When the draft was used for that purpose I cannot see how the bank is guilty of conversion merely because Bloomer was not aware of the actual procedure by means of thich the deal was to be finally effected.

In my opinion the appeal should be allowed and the respondent's action should be dismissed. The bank is entitled to its costs here and in the Courts below.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Freeman, Freeman, Silvers & Koffman, Vancouver.

Solicitors for the plaintiff, respondent: Shakespeare & Hutcheon, Vancouver.