STANLEY JOHN CROCKER AND CROQUIP LTD. (*Defendants*) ... } APPELLANTS;

AND

LIBBIE CLEO TORNROOS AND ALFRED HALL TORNROOS (*Plaintiffs*) ..... } RESPONDENTS.

1956
*Dec. 3, 4, 5, 6
1957
Jan. 22

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Trusts and trustees—Alteration of terms of trust by Court—Limits on jurisdiction—"Salvage" rule—Whether trustee guilty of breach of trust.*

The shares in a British Columbia company were owned equally by C, D and T. According to the articles of association of the company, any shareholder who wished to sell or transfer his shares was required to give written notice to the directors who would thereupon give the other shareholders a first opportunity to purchase. T died in 1936, leaving a will whereby he appointed his wife, D and C as his executors and trustees and devised and bequeathed to them the residue of his estate on trust for conversion and investment in trustee investments. The trustees were given a power to postpone conversion and a specific power to hold the shares in the private company. Three months later D died and his widow became entitled to his shares. She did not wish to retain the shares and they were bought by C in 1945. In this action, the trustees of T's estate (C having retired and been replaced in 1948) alleged that as to one-half of the shares bought by him C had been guilty of a breach of trust, although they disclaimed any charge of fraud.

*Held,* there had been no breach of trust and the action must be dismissed.

It was clear that under T's will the estate would not have been entitled, without an order of the Court, to buy the shares, which were purely speculative and not a trustee investment. The Court would have had no jurisdiction to authorize such a purchase under the "salvage" rule, since it could not have been contended that the offer of D's shares

*PRESENT: Kerwin C.J. and Kellock, Locke, Cartwright and Nolan JJ.

1957

CROCKER *et al.* v. TORNROOS *et al.*

presented a situation which might "reasonably be supposed to be one not foreseen or anticipated" by T or one where his trustees were "embarrassed by the emergency". *In re New,* [1901] 2 Ch. 534 at 544, quoted and applied.

T's estate had nothing either to sell or to assign and C in buying the shares as he did was doing no more than exercise a contractual right vested in him under the articles of association of the company. The fact that the estate could not be a buyer was not due to anything for which C, by reason of any act or default on his part as trustee, was responsible.

APPEAL by the defendants from the judgment of the Court of Appeal for British Columbia (1), reversing a judgment of Whittaker J. Appeal allowed.

*Alfred Bull, Q.C.,* and *C. C. I. Merritt,* for the defendant Crocker, appellant.

*Jacob S. Ziegel,* for the defendant Croquip Ltd., appellant.

*Hon. J. W. deB. Farris, Q.C., A. D. Poole* and *Kenneth Farris,* for the plaintiffs, respondents.

The judgment of the Court was delivered by

KELLOCK J.:—This litigation relates to certain shares in the British Columbia Equipment Company Ltd., incorporated in January 1931 under the laws of British Columbia, in which the deceased Gunnar Tornroos, one Dietrich and the appellant Crocker held an equal number of shares. All three were active in the business of the company.

The articles of association which, by virtue of s. 37 of the *Companies Act,* R.S.B.C. 1948, c. 58, have the force of a contract binding both the members and the company, require any shareholder desiring to sell or transfer his shares to give written notice to the directors, specifying the fair value of the shares, and constituting the board his agent for sale to any member or members of the company who might desire to purchase at the price so fixed or at a price to be agreed upon or settled by arbitration.

The board is thereupon required to notify the other shareholders of the notice and invite them to state within 10 days whether they desire to purchase any and, if so, how many of such shares. The board is required to apportion the shares so offered among the shareholders desiring to purchase *pro rata* according to the number of shares already held by them respectively. If only one shareholder desires

(1) 3 D.L.R. (2d) 9.

to purchase, he is entitled to purchase the whole. It is only shares not taken up by the other shareholders which may be sold to non-shareholders, but at a price not less than that at which they have already been offered to the shareholders.

By his will, dated January 9, 1936, the testator, who died on April 29, 1940, appointed his wife, the respondent Libbie Tornroos, the said Dietrich and the appellant Crocker his executors and trustees, and devised and bequeathed to them the residue of his estate upon trust for conversion and investment in trustee investments. The widow is entitled to the income during her life or until remarriage, with remainder to the testator's children. In the event of the widow remarrying, however, she shares equally in the corpus with the children. The will contains a power of postponement of conversion of any part or parts of the estate and a specific power to hold the shares in British Columbia Equipment Company Ltd. for such period as the trustees should deem in the best interests of the estate, even should this involve their remaining unconverted at the period of distribution.

The death of Tornroos was followed three months later by that of Dietrich, whose widow became entitled to the shares previously belonging to her husband. These shares she ultimately sold to the appellant Crocker in April 1945, and it is the latter's purchase which is the subject-matter of these proceedings, which were instituted in September 1953 by the respondents, the then trustees, the appellant Crocker having retired from the trust in 1948, been discharged and succeeded as trustee by the respondent Alfred Hall Tornroos.

In the statement of claim the respondents allege that the appellant Crocker "failed to exercise the right of pre-emption which enured to the benefit of the [Tornroos] Estate, and, in breach of trust, bought all of the shares so offered for sale for himself and retained them or alternatively transferred them or caused them to be transferred to" the appellant Croquip Ltd. The respondents' claim for relief is confined to one-half of the Dietrich shares so acquired by Crocker, as well as the proceeds of any shares redeemed, and dividends. The respondents do not charge fraud on the part of either appellant and, in fact, disclaim any such charge.

1957

CROCKER *et al.* *v.* TORNROOS *et al.*

Kellock J.

Before entering into the purchase, the appellant Crocker and the respondent Libbie Tornroos had each been advised by their respective solicitors that under the terms of the Tornroos will, it was not open to the estate to acquire any part of the Dietrich shares. In my opinion this advice was sound.

In these circumstances, the learned trial judge absolved the appellant Crocker from any breach of trust as well as from any abuse of his fiduciary position. Consequently he dismissed the action. This judgment was, however, reversed on appeal, Bird J.A. dissenting (1), but it was directed that the respondent Libbie Tornroos should receive no beneficial interest in such shares. The majority were of opinion, in the first place, that as the estate was entitled under the company's articles to buy from Dietrich, a duty rested upon the appellant Crocker as trustee to apply to the Court for leave to purchase one-half of the Dietrich shares and that there was jurisdiction in the Court to have authorized such a purchase on the principle of salvage. Davey J.A., who delivered the judgment of himself and O'Halloran J.A., entertained "no doubt that it [the application] could have been supported plausibly as a salvage operation designed to avert depreciation in the value of the estate's principal asset from the unforeseen sale of the Dietrich shares" (2). This depreciation he considered would flow from the fact of control of the company being acquired by one shareholder.

The learned judge was also of opinion that it was the duty of Crocker to endeavour to persuade Mrs. Dietrich not to sell her shares, or, failing this, to have endeavoured to have the trustees make an "agreement with Crocker for him to pay the estate to surrender its rights or allow them to lapse, so that he could get control" or to bring about some agreement with him "to protect the estate against an oppressive exercise of control, such as guaranteeing representation on the board of directors, limitation of executives' salaries and like matters" (3). Davey J.A. also considered that in any event before purchasing himself, Crocker ought to have applied to the Court for directions, and for "leave to allow the estate's rights of pre-emption to lapse if no

(1) 3 D.L.R. (2d) 9.

(2) 3 D.L.R. (2d) at p. 24.

(3) *Ibid.*, at p. 24.

other course was open, and for leave to exercise the rights which would accrue to him personally by that lapse" (1).

It is, of course, well settled that a trustee may not place himself in a situation where his interest and his duty conflict. The question which arises at the threshold of this litigation is, therefore, whether the appellant Crocker, as trustee of the Tornroos estate, had any duty toward the estate in connection with the purchase of any part of the Dietrich shares.

It is common ground, as already pointed out, that the trustees were debarred by the direction of the testator himself from investing any of the funds of the estate in these shares. To have done so would have been a breach of trust on the part of the trustees, and Davey J.A. agrees that this is so. Leaving aside any question as to whether or not the estate could have financed the purchase or whether such an investment would have been considered suitable at the time owing to its undoubted speculative character, in my opinion the authorities are clear that in the circumstances of this case, there is no foundation for a contention that the Court, if it had been applied to, had jurisdiction to authorize the purchase on the basis of "salvage".

Before referring to the salvage rule itself, it will be useful to refer to one or two instances held to be outside its scope. In *In re Montagu; Derbishire v. Montagu* (2), the Court of Appeal dismissed an appeal by the trustees of a settlement from a decision of Kekewich J. refusing an application for an order authorizing them to raise money out of the settled estate for the purpose of pulling down and rebuilding houses on the property. The following from the judgment of Lopes L.J., at p. 11, contains the gist of the judgment:

> I have no doubt that what is proposed is beneficial, and would increase both the income and the capital value of the property. The question is whether the Court has jurisdiction to sanction it. There is no provision in the settlement which would authorize the works in question, nor do they fall within any of the improvements sanctioned by the Settled Land Acts. It is urged that the Court, having control over trust property, can sanction them, as it would be vastly for the benefit of the persons interested that it should do so. That is not enough. If the buildings were falling down it would be a case of *actual salvage* and would stand differently. Even in cases of repairs the Court has been very careful in the exercise of its jurisdiction. In the case of *In re Jackson* (1882), 21 Ch.D.,

(1) 3 D.L.R. (2d) at p. 25.
(2) [1897] 2 Ch. 8.

1957

CROCKER *et al.* v. TORNROOS *et al.*

Kellock J.

786, 789, Kay J., in dealing with a case of repairs, said: "I think that this jurisdiction should be jealously exercised, and only in cases which amount to actual salvage." The present cannot be said to be a case of actual salvage, and the learned judge was right in refusing to exercise a jurisdiction which he in fact did not possess.

(The italics are mine.)

In *In re Morrison; Morrison v. Morrison* (1), it was held that the Court had no jurisdiction to sanction an agreement under which executors or trustees proposed to concur in converting into a limited company a business in which their testator had been a partner, and under which the testator's share would be exchanged for shares and debentures which the executors and trustees were not authorized by the will to hold. Buckley J. referred to the previous decision of North J. in *Re Crawshay; Dennis v. Crawshay* (2), on somewhat similar facts and expressed himself as follows at p. 707:

> In my opinion there does not reside in this Court any power to authorize trustees to take, on the ground that it is beneficial, an investment which the testator has not authorized.

The rule was authoritatively expressed by Romer L.J. in *In re New; In re Leavers; In re Morley* (3), as follows:

> As a rule, the Court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorized by its terms. The cases of *In re Crawshay,* decided by North J., and *In re Morrison,* decided by Buckley J., are instances where the Court was asked to sanction steps to be taken by trustees which it thought unjustifiable, and which it declared it had no jurisdiction to authorize. But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. *In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen* and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to.

(The italics are mine.)

(1) [1901] 1 Ch. 701.
(2) (1888), 60 L.T. 357.
(3) [1901] 2 Ch. 534 at 544.

The facts existing in the above case afford a useful contrast to situations of the character existing in the other cases to which I have referred. In the *New* case the Court gave its sanction to the concurrence of trustees in a scheme for the reconstruction of a prosperous limited company, shares in which had become vested in the trustees, it being proposed that all the shareholders in the existing company should exchange their shares for more realizable shares and debentures in the proposed new or reconstructed company, but the Court required that the evidence before it should be supplemented with respect to the importance of further capital being provided by the proposed reconstruction and the difficulties that would arise if the trustees should be obliged to stand aloof and take no part in it. The proposed plan of reconstruction had been put forward because of "the constantly increasing dividends earned by the company and the large outlays which it had been necessary to make from time to time out of profits in developing the [company's] collieries". Counsel for the trustees pointed out that if they did not assent to the scheme, they would "be at the mercy of the other shareholders, who could still wind up the company, and under s. 161 of the Companies Act, 1862, could buy the trustees out".

There were three separate trust estates involved and it was directed that where the trustees were not by the terms of the trust authorized to invest in the shares or debentures of such a company as the proposed new company, they must undertake to apply to the Court for leave to retain them. The shares and debentures of the new company when received by the trustees in pursuance of the authorization of the Court, would, of course, be considered on the same footing as if they had been original assets. If their retention was not authorized by the terms of the trust instruments the trustees would be under obligation to dispose of them.

The rule as laid down in *New's Case* was followed in *In re Tollemache* (1), where that decision was described as "the high-water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts". The rule so laid down received the approval of the House of Lords in *Chapman et al. v. Chapman et al.* (2).

(1) [1903] 1 Ch. 955. (2) [1954] A.C. 429, [1954] 1 All E.R. 798.

1957

CROCKER *et al.* *v.* TORNROOS *et al.*

Kellock J.

The jurisdiction of the Court on the ground of salvage being as above defined, it is impossible to contend in the case at bar that the offer of the Dietrich shares presented a situation which, in the language of Romer L.J., might "reasonably be supposed to be one not foreseen or anticipated" by the testator, or one where his trustees were "embarrassed by the emergency".

In drawing his will, the testator clearly had present to his mind his shareholding in the company in question, as he specifically mentions these shares. He must equally be taken to have been well aware of the provisions of the articles of the company, of which he was one of the founders, and that in the event of the death of either Dietrich or Crocker occurring while his own estate was undergoing administration, the shares of either might be offered for sale, in which event his trustees would be entitled to buy. In settling the terms of his will and giving directions to his trustees, it is plain he did not desire that his estate should exercise the right to purchase but was content that his own shares should continue as a minority holding in a company controlled by the one or other of his former business associates, in whom he had such confidence that he desired they should be his trustees. This being so, the case is entirely outside the rule in *New's Case*. Accordingly, there was no duty resting upon the appellant Crocker as suggested by the majority in the Court of Appeal.

It may be pointed out, also, that had any duty as trustee rested upon Crocker with respect to the Dietrich shares on the footing that the estate had something to sell or assign, it would have involved him in a purchase from an estate of which he was trustee, if he had brought about an agreement "to pay the estate to surrender its rights or to allow them to lapse so that he could get control", as the majority in the Court below considered he ought to have endeavoured to do.

In truth, however, the estate had nothing either to sell or to assign, and Crocker, in purchasing the shares as he did, was exercising nothing but a contractual right vested in himself personally under the articles of association to buy all the shares offered where there was no other competing shareholder. The respondents admit that the appellant was entitled to buy one-half of the Dietrich shares but it is

plain that he was entitled to buy all of those shares when no other shareholder appeared in the market. The fact that the Tornroos estate could not be a buyer was not due to anything for which the appellant Crocker, by reason of any act or default of his, as trustee, was responsible. Crocker, accordingly, had a right to buy upon the footing of the articles or if, as was contended, the time for acceptance of the Dietrich offer had gone by, then just as any other member of the public.

While certain further grounds of defence were put forward on behalf of the appellant company, some of which, at least, would appear to present objections of a somewhat formidable nature to the judgment of the majority in the Court below, it is not now necessary, in view of the conclusion to which I have come as above, to consider them.

I would allow the appeal and restore the judgment of the learned trial judge with costs in this Court and in the Court of Appeal.

*Appeal allowed and trial judgment restored, with costs throughout.*

*Solicitors for the defendant Crocker, appellant: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.*

*Solicitors for the defendant Croquip Ltd., appellant: Guild, Yule, Lane & Collier, Vancouver.*

*Solicitors for the plaintiffs, respondents: Farris, Stultz, Bull & Farris, Vancouver.*