LOUIS F. ROTHSCHILD AND CO. (PLAINTIFFS) .... APPELLANTS;

1950

*Feb. 15
*Mar. 28

AND

ALFRED R. DUFFIELD (DEFENDANT)...RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Mandate—Brokers—Authorized by client to buy and sell shares for him—Indemnification of broker for unforeseeable losses incurred during execution of mandate—Whether settlement made prior to delivery of shares is final—Art. 1701, 1713, 1725 C.C.

Appellants as brokers purchased for respondent 750 shares on the New York Stock Exchange. When in a position to deliver them, they were instructed by respondent to sell 250 of the shares and to apply the proceeds toward the purchase price of the 750. This sale was done, and, at the request of respondent, the remaining 500 shares were delivered to him and the account was then determined and paid before the 250 shares were delivered to and paid for by the buyer of the same on the New York Stock Exchange. A modification of the exchange rate of the dollar taking place after determination of the account and before such delivery and payment resulted in a loss for appellants which they seeked to recover from respondent. The action was maintained in the Superior Court but dismissed in the Court of Appeal.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Estey, Locke and Fauteux JJ.

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Held: The contract between the parties being clearly in the nature of a mandate, appellants therefore are entitled to recover the loss incurred during the execution of the mandate as the result of unforeseeable changes in the exchange rate, since a mandatary should not be impoverished by the due execution of his mandate.

Held: As the mandate could only come to an end after delivery and payment were made on the sale of the 250 shares, the settlement made prior to that time could not be more than provisional.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the decision of the Superior Court maintaining an action to recover losses incurred by a broker in the execution of transactions for a client.

Roger Cordeau for the appellants.

Hazen Hansard, K.C., for the respondent.

The judgment of the Court was delivered by

FAUTEUX, J.:—The essential facts of this case are not disputed and are substantially stated as follows by the Trial Judge:—

On the 1st of July 1946, the Respondent, who describes himself as an investment dealer, decided to purchase shares of the International Paper Company, a company whose stock is listed on both the Montreal and the New York Stock Exchanges. It being "Dominion Day", the Montreal Stock Exchange was closed. The Respondent was aware that under the Regulations of the Foreign Exchange Control Board, he could not purchase shares in New York without United States currency. He had also seen a notice in the Montreal *Daily Star* in which the Appellants advertised that they could provide facilities for the purchase of American stocks under said Regulations. Thereupon, the Respondent called on one MacKinnon, co-manager of the Appellants' Montreal office, and placed an order for the purchase of 500 shares of International Paper Company and later, on the same day, another order to purchase 250 more shares of the said stock. As a result, on the 1st of July 1946, the Appellants purchased 750 shares of International Paper Company common stock on the New York Stock Exchange in their own name, but for the benefit of the Respondent. According to Rule 109 of the New York Stock Exchange,

(1) Q.R. [1949] K.B. 312.

in force on the 1st of July 1946, the delivery of the shares would be made "on the second full business day following the day of the contract." That would be the 3rd of July, 1946. The Respondent having instructed MacKinnon to deliver these shares to the Canadian Bank of Commerce, L. J. Swinburne, the Security clerk in the Appellant's employ, telephoned the bank on the 3rd of July 1946 and was told that no instructions had been received to take delivery of the securities for the Respondent. On the same day, 3rd of July 1946, the Respondent telephoned MacKinnon stating that he had decided to take up only 500 shares and instructed him to sell the remaining 250 shares and to credit the proceeds thereon on account of the purchase price of the 750 shares. Accordingly, 250 shares were sold that date for the sum of $11,572.54 in United States currency. On the same 3rd of July 1946, the Respondent and William Goldburn, the Appellant's office manager, had a conversation over the telephone; and the 250 shares having been sold, the Respondent says he was desirous of closing the transaction on that date. They together, over the telephone, checked the figures. Purchase price of the 750 shares, including the brokers' commission and the premium of United States currency amounted to $39,966.28, of which the Appellants' manager gave the Respondent credit for $12,729.79, being the proceeds of the sale of the said 250 shares in Canadian currency, leaving a net balance due by the Respondent of $27,236.49 which the Respondent paid and took delivery for the 500 shares. But, on the 3rd of July, 1946, when that alleged settlement was made, the Appellants had not yet been paid for the said 250 shares by the purchaser on the New York Stock Exchange. The 3rd of July 1946 was a Wednesday, and it is admitted that on Thursday, the 4th of July, being a United States holiday, the New York Stock Exchange was closed. Friday, the 5th of July, was then the first "full business day following the day of the contract" which was related to the sale of the 250 shares. Saturday, 6th of July, and Sunday, the 7th of July, the New York Stock Exchange was also closed. So that, according to the Rules of the New York Stock Exchange, Monday, the 8th of July, 1946, was the first day on which the purchaser of the 250 shares could be compelled to take delivery and pay the price of the same.

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Meanwhile, in the evening of Friday, 5th July 1946, the Canadian currency had been brought to a parity with the United States currency. As a result of this change in the value of the two currencies, $11,572.54 United States currency did no longer amount to $12,729.79, but was then worth only 10% less, that is a difference of $1,157.25 which the Appellants seek to recover from the Respondent.

The Respondent urged three points. He first says that the original purchase by the Appellants in their own name, of the 750 shares and the subsequent sale by the Appellants of 250 of them were all part and parcel of one single modified transaction by which the Respondent bought from the Appellants as principals, 500 shares of the stock in question and the Respondent being entitled to assume, as he did, that the Appellants were acting as principals throughout, that the operations conducted by them on the New York Stock Exchange were for their own account and that it was up to them to protect themselves in respect of the exchange premium. The Respondent further urges that the settlement reached between the parties on the 3rd of July was final and intended to be so by both parties. And, finally, the Respondent contends that if the Appellants were acting as his mandataries in disposing of the 250 shares, they failed to execute their mandate with the reasonable skill and care of a prudent administrator by not protecting the mandator in respect of the exchange premium.

These submissions were not accepted by the Trial Judge who maintained the action of the Appellants for $1,155.43, being the amount claimed through error by the Appellants instead of $1,157.25.

This judgment of the Trial Court was reversed in Appeal (1) by a majority judgment now before us for review.

The judgment appealed from contains only two reasons. One held by one of the Judges of the majority is formulated as follows:—

> The agreement of July 3rd, 1946, was final and complete as between the parties and the loss suffered consequently must be borne by Respondents.

(1) Q.R. [1949] K.B. 312.

(The Appellants herein.)

The second reason formulated by the two other Judges of the majority reads:—

That there existed facilities whereby the loss of the premium could have been avoided and that since Respondents—

(The Appellants herein)—

must be presumed to have had knowledge of these facilities, their failure without reason to make use of them prior to the close of business on July 5th amounts to a negligence of sufficient gravity to engage their responsibility for the loss thereby incurred.

The whole transaction, purchase as well as sale of these shares, were made by the Appellants in performance of the Respondent's instructions which they had accepted, and was carried on in the ordinary course of the business in which they were engaged. The contract between the parties is clearly of the nature of a mandate (1701, C.C.). That the Appellants have, by reason of the Foreign Exchange Control Board Regulations, acted as principals with respect to the party from whom they purchased the 750 shares on the New York Stock Exchange, does not change the nature of their contractual relations with the Respondent.

At the relevant time, Rule 109 of the Rules of the Board of the New York Stock Exchange made a distinction between a "cash transaction" and a "transaction in the regular way." In the case of the former, the delivery date was the very day of the contract whereas, in the case of the latter, it was the second full business day following the date of the contract. Furthermore, and under the same rule, a transaction was presumed to be a "transaction in the regular way" unless otherwise specified. The Appellants who were brokers, and known as such by the Respondent, were by the same mandate given authority to do, what they were asked to do, in the ordinary course of the business they followed. Such authority is inferred by law (1706, C.C.). And if need be, reference may be had to the fact that the Respondent, describing himself as an investment dealer, and who, it was admitted before us, was equally associated with another brokers' firm, cannot and did not disclaim knowledge of such ordinary course in which the business committed by him to the Appellants was to be carried on, and by his failure to otherwise specify, he accepted the same. The Judicial Committee held in *Forget* v. *Baxter* (1) that:—

(1) [1900] A.C. 467.

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When one employs a broker to do business on a Stock Exchange he should, in the absence of anything to shew the contrary, be taken to have employed the broker on the terms of the Stock Exchange.

The relevant transaction being a "transaction in the regular way", the delivery date of the 250 shares sold by the Respondent through the Appellants, on the New York Stock Exchange, on the 3rd of July 1946, was, in the circumstances and for the reasons indicated above, on the 8th of July, 1946. It is then only on or from that date that the purchaser of these shares in New York could be compelled to take delivery and make payment, and only on or from that date that the mandate committed to the Appellants by the Respondent could, after and subject to the proper fulfilment or liquidation of the purchaser's obligations, come to an end. In the meantime, all the obligations contracted by the Appellants for the Respondent, within the mandate, were the latter's obligations.

However, five days previous to that date, the Respondent wanted to take delivery of the 500 shares and at his request, for his accommodation, and without any obligation on their part and, evidently, with no intention of jeopardizing any of their rights, the Appellants indicated to him in a telephone conversation, the then position of the account, delivered the 500 shares on payment of the assumed amount of the balance. On the occasion, there was no reference as to what remained to be done to perfect the execution of the mandate. Further contractual obligations, related to both parties and to the very essence of the mandate, were still outstanding. In point of fact, it is established that the delivery and the payment of the 250 shares took place in New York on the 8th of July, 1946; this being the normal course of business implicitly agreed upon by the Respondent.

That the mandatary must not enrich himself beyond the consideration agreed and must not be impoverished by the due execution of the mandate is a general and fundamental principle (1713, 1725, C.C.). As pointed out by one of the learned Judges of the minority, if one is to accept the alleged settlement as final, the two results indicated above would have obtained: the first one, had the value of Canadian currency been decreased instead of being increased, and the second one, had the purchaser of the 250 shares failed to take delivery or make payment. There is no evidence that the parties ever intended to deviate from these paramount principles nor can such intention be inferred from the circumstances in which the Appellants were called by the Respondent to accommodate him. On the contrary, the latter, well aware that the perfection of the execution of the mandate was not yet achieved and was still conditioned by the subsequent delivery and payment of the shares, made no reference to this fact and said nothing to nullify or minimize the relevant obligations of the parties hereto. To say that this settlement was anything more than provisional, I am, with deference, unable to do.

As to the alleged negligence of the Appellants to protect the exchange position, I think it is manifest from the circumstances in this case that neither of the parties, the mandator, or the mandatary, directed their mind to the matter, on the occasion. The Respondent's witness, E. A. Robson, in charge of the Foreign Exchange Control Department of the Royal Bank of Canada,—authorized dealers under the Regulations and, besides, the very bankers of the Appellants,—admits that "the change was not foreseen by anyone"..., "that it came as quite a surprise"..., "that the Appellants could not have foreseen it." That there were facilities to protect the exchange position is established. The record also shows that the procedure devised to that end and indicated in a circular letter proven to have been addressed several months previously, to the banks,—but not to brokers,—was not recommended or resorted to in practise. Once being appraised of the change and of its nature, it becomes easy for the Respondent to think of protection and, thus, formulate the above argument. Speculation is not necessary to envisage how the Respondent's contention would have been formulated had the value of Canadian currency been decreased, instead of being increased, and had the Appellants frozen the exchange position by any method, without being so instructed by the Respondent. And it cannot be stated that such authority "to protect" could be inferred from the circumstances of the provisional settlement. There was no law, and no custom, or instructions proved to suggest the existence of an obligation for the Appellants to "protect the exchange

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position." (*Barthelmes* v. *Bickell and others* (1)). The fact that the Appellants advertised that they were providing "facilities for the purchase of American stocks" has no relevancy to the point in issue.

Under the circumstances of this case, I am of the opinion that this appeal should be maintained, that the judgment of the Court of the King's Bench (Appeal side) rendered on the 28th of February, 1949, should be reversed and that the judgment of the Superior Court, rendered on June 18, 1947, condemning the Respondent to pay to the Appellants the sum of $1,155.43 with interest from the 8th of July, 1946, and costs be restored; with costs here and in the Court below.

Appeal allowed with costs.

Solicitors for the Appellants: *Heward, Holden, Hutchison, Cliff, Meredith & Ballantyne.*

Solicitors for the Respondent: *Montgomery, McMichael, Common, Howard, Forsyth & Ker.*