CAPE BRETON COLD STORAGE COMPANY, LIMITED (DEFENDANT)..... APPELLANT;

AND

G. A. R. ROWLINGS (PLAINTIFF).....RESPONDENT.

1929
*May 1, 2.
*May 27.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, EN BANC

Solicitor—Company—Director of company acting as its solicitor—Claim for payment for legal services—Whether a "trustee" within s. 56 of the Trustee Act, R.S.N.S., 1923, c. 212.

Plaintiff, who was a director and vice-president of defendant company, acted as its solicitor (although not formally appointed as such) in a great number of matters, and was consulted, and his advice sought, by his co-directors and the officers of the company. His co-directors were aware of his so acting, and he was paid substantial amounts on account of the legal services rendered from time to time. He sued on an account for legal services rendered.

Held, reversing judgment of the Supreme Court of Nova Scotia *en banc* ([1929] 2 D.L.R. 519), that he could not recover; his position as director of the company incapacitated him from engaging as its solicitor, on principles of law laid down in *Aberdeen Ry. Co.* v. *Blaikie, Bros.*, 1 MacQueen, 461, at p. 471; *North-West Transportation Co.* v. *Beatty*, 12 App. Cas., 589, at p. 593; *Broughton* v. *Broughton*, 5 De G. M. & G., 160, at p. 164. He was not a "trustee" within the meaning of the enabling s. 56 of the Nova Scotia *Trustee Act*, R.S.N.S., 1923, c. 212. *In re Lands Allotment Co.*, [1894] 1 ch. 616, distinguished.

APPEAL by the defendant, a company incorporated in 1922 under the provisions of *The Nova Scotia Companies Act* (1921, c. 19; now R.S. N. S., 1923, c. 174), from the

(1) (1889) 16 Can. S.C.R. 387.
(2) (1894) 24 Can. S.C.R. 59, at p. 61.
(3) (1904) 34 Can S.C.R. 285.
(4) (1916) 53 Can. S.C.R. 353, at p. 369.

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

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judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing its appeal from the judgment of Carroll J. (1) confirming and varying (by increasing the amount allowed) the decision or report of His Honour Walter Crowe, Co. C. J. (1), as special referee appointed under order of Jenks J., in an action by the plaintiff claiming payment for legal services rendered by him to the defendant.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed, with costs in this court and in the court below, and the action dismissed with costs.

C. B. Smith K.C. and *R. S. McLellan K.C.* for the appellant.

T. R. Robertson K.C. for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—I have examined this case with some anxiety, hoping to find that the law has made provision whereby the plaintiff may be compensated for his services, but I have reluctantly come to the conclusion that his case breaks down irretrievably upon the main point.

The material facts are stated in a compact and orderly fashion by the learned County Court Judge, who was the Referee in the case. I quote the following passage from his report:

> The salient facts, as I find them, and as to which I think there is no serious dispute, briefly are that the defendant company was incorporated in 1922 under the Nova Scotia Companies Act, chap. 174 R.S. The plaintiff, who is a Barrister and Solicitor of this Court of many years' standing, and a King's Counsel, took the necesasry steps to incorporate the Company, of which he was one of the promoters and provisional directors, and he was paid for that service. At a later stage in the Company's history the plaintiff became a Director and its Vice-president, and I find that during the period covered by the accounts referred to he was a Director and Vice-president of defendant company. I find that no formal appointment of plaintiff as the Solicitor of the Company was made, certainly no express resolution to that effect was ever passed by the Board of Directors, or if it was no evidence was offered about it. I find, however, and of this there can be no doubt, that plaintiff did act as the Company's Solicitor in a great number of matters, that he was freely consulted and his advice sought by his co-directors and the officers of the company, and of his so acting his fellow directors were well aware.

(1) [1929] 2 D.L.R. 519.

Indeed he was paid substantial amounts on account of the legal services he had rendered or was rendering to the company from time to time.

The Referee found for the plaintiff upon items of the accounts filed, amounting to $1,876.48, and Carroll J., upon motion before him to adopt or vary the report, increased the amount found by the addition of some further items; confirmed the report in other respects, and directed judgment to be entered for $2,730.48 (corrected by the judgment of the Supreme Court *en banc* to $2,630). There was an appeal and a cross-appeal to the Supreme Court of Nova Scotia, sitting *en banc,* and both appeal and cross-appeal were dismissed (subject to the variation aforesaid); Jenks J. dissenting. He would have allowed the appeal.

The appellant company relies upon the principle enunciated by Lord Cranworth, L.C., in *Aberdeen Railway Co.* v. *Blakie Brothers* (1) that

> a corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

This doctrine is affirmed by the Judicial Committee of the Privy Council in *North-West Transportation Company* v. *Beatty* (2), where Sir Richard Baggallay, pronouncing the judgment, says:

> Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of the company.
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> On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director.

The rule is, indeed, so well established and familiar as to require no citation of authority. It is applied in the case

(1) (1853) 1 MacQueen, 461, at p. 471.
(2) (1887) 12 App. Cas., 589, at p. 593.

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of a solicitor-trustee in relation to his profit-costs, as in *Broughton* v. *Broughton* (1). So far there seems to be no dispute.

But the respondent objects that the appellant is not entitled to raise that contention; that it is not set up in his pleadings. I think, however, that the pertinent facts are sufficiently stated by paragraphs 3 and 4 of the defence, wherein the existing relation between the parties is in fact alleged; moreover, no effect was given to the objection by the court *en banc,* where, presumably, the adequacy of the pleadings was considered in the light of the local practice, if the question were raised in that court; and therefore I think we must proceed upon the view that if, according to the law, the claim cannot be enforced, there is sufficient in the defence to enable the court to decide in conformity.

The respondent's principal answer, and that to which the majority of the court *en banc* gave effect, rests upon s. 56 of the Nova Scotia *Trustee Act.* R.S. N.S., 1923, c. 212, whereby it is enacted that:

> 56. Where there are more executors, administrators, trustees or guardians than one, any one of such executors, administrators, trustees or guardians who is also a solicitor may with the consent of his co-executors, co-administrators, co-trustees or co-guardians, charge for professional services rendered by him in relation to the estate in the same manner as if he were not such executor, administrator, trustee, or guardian: Provided, however, that no such charge shall be made for any service which an executor, administrator, trustee or guardian ought to render without the intervention of a solicitor.

This was the chief topic discussed at the hearing, and my view, which I have reached upon very careful consideration, is that the legislature has not, by this provision, manifested an intention to include the directors of a company, as such, within the class of trustees to which the enactment is meant to apply. The collocation of the words, "executors, administrators, trustees or guardians", as descriptive of the persons for whose benefit the dispensation is made, coupled with the limitation of the professional services, which are the subject-matter of the clause, to those rendered "in relation to the estate", make it to my mind extremely unlikely that a solicitor, if not a trustee otherwise than because he is a director of a company, is within the purview of the section. The reading of the text is not only inapt to draw attention to the

(1) (1855) 5 De G. M. & G., 160, at p. 164.

ordinary case of a director, but it seems, upon my interpretation, more likely to stifle any suggestion that a mere director is intended to share in the benefit of the provision. And, however the case may stand as to a director, who has in hand money or property of the company, and who is thus, in a qualified sense, a trustee, whether within the application of s. 56 or not, the respondent here is no more than an agent who is endeavouring, without any enabling clause, to justify the transaction in question, and to recover reward for his services by reason of instructions emanating from himself and his co-directors. This is not a case of dual capacity, such as that to which James, L. J., referred in *Smith* v. *Anderson* (1), when he observes that

> the same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional, and casual circumstance.

On the other hand, the respondent's disqualification arises only by reason of his quality as agent of the company; as is said by Lord Selborne, L.C., in *Great Eastern Railway Co.* v. *Turner* (2)

> The directors are the mere trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company.

The majority of the court below appears to have reached a different view upon the authority of *In re Lands Allotment Company* (3). In that case, the company was being wound up, and it was said that the directors had engaged in a transaction which was *ultra vires* of the company. What they had done, in effect, was this: One Hobbs was indebted to the company to the extent of £35,000, and a company called the Building Securities Company was formed to purchase his business and to take over his assets and liabilities. It thus became the duty of the Building Securities Company, as between it and Hobbs, to pay off that sum of £35,000, and it did so by purporting to sell its shares to that amount to the Lands Allotment Company which sent the Securities Company its cheque for the sum, upon the understanding that the cheque should be immediately returned. Hobbs' debt was thus repaid in a manner which is described as a farce. In point of fact, it was a

(1) (1879) 15 Ch. D., 247, at pp. 275-276.

(2) (1872) 8 Ch. App., 149, at p. 152.

(3) [1894] 1 Ch., 616.

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mere paper transaction; the cheque was handed back on the following day, and, as stated by Lindley, L. J.,

> the real substance of that transaction, when you see through the cloak which is thrown around it, is that the Lands Allotment Company took £35,000 worth of shares in the Building Securities Company in satisfaction of Hobbs' debt. That was what was really done.

Lindley, L. J., considered the case upon the assumption that the transaction was *ultra vires,* and therefore that the directors were liable to make good the money; and the question was whether they were protected by the *Statute of Limitations* relating to trustees, c. 59, s. 8, of 1888; it was held in the affirmative, and upon the view, if I correctly interpret the meaning, that the directors had committed a breach of trust; that directors, although not, properly speaking, trustees, have always been considered as trustees of money which comes to their hands, or is actually under their control, and liable to make good that which they have misapplied, upon the same footing as if they were trustees; that s. 8 of the *Trustee Act,* 1888, applies to trustees, and includes

> a trustee whose trust arises by construction or implication of law as well as an express trustee;

and that directors are considered as express trustees of money which they have control of, or, if not, that they are certainly trustees by construction or implication of law, within the definition of the Act. Kay, L. J., makes the matter very clear at pages 638 and 639, where he says:

> Then comes the question, what was the position of the directors who made an improper and *ultra vires* investment of that kind? Now, case after case has decided that directors of trading companies are not for all purposes trustees or in the position of trustees, or *quasi* trustees, or to be treated as trustees in every sense; but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust.
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> It is said, by way of argument, "Why did not the definition clause expressly include directors?" But it would have been quite wrong to have included directors, because directors are not always trustees. As directors they are not trustees at all. They are only trustees *quâ* the particular property which is put into their hands or under their control, and which they have applied in a manner which is beyond the powers of the company. I conceive that *quâ* such fund they are constructive trustees, or trustees by implication of law, and they come exactly within the words of this definition in the Act, and therefore the 8th section of the Act, which applies to all persons who come within this definition of trustees, does apply to exonerate these directors from that misapplication of funds for which otherwise, I assume, they would have been liable.

The case of the *Lands Allotment Company* (1), upon this point, may therefore be taken as a mere example or illustration of the principle affirmed by Jessel, M.R., when he said in *In re Wincham Shipbuilding, Boiler, and Salt Co.; Poole, Jackson and Whyte's case* (2):

> It has always been held that the directors are trustees for the shareholders, that is, for the company. They are the managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company, for their own benefit, they are liable to make good the breach of trust to their *cestuis que trust* like any other trustees.

The directors had misused their powers. They were charged with the resulting liability, and, the proceeding not being within the statutory exception, they were naturally held entitled to the protection of the statute.

Upon this review of the *Lands Allotment* case (1), I do not think it affords the respondent any assistance. His case is entirely different. He is seeking to recover from the appellant company, for services rendered under a contract, which, by the general principles of the law, is incapable of being enforced, and the company resists the demand, relying upon the director's incapacity. The respondent has no money or property of the company in his hands; he is not subject to any action for breach of trust; rather, it seems, he is endeavouring to persuade the court to sanction a breach of trust.

For these reasons I do not think that the respondent can be regarded as a trustee for the purposes of s. 56 of the Nova Scotia *Trustee Act*.

It follows that the appeal must be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *R. S. McLellan.*

Solicitor for the respondent: *M. A. Patterson.*

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(1) [1894] 1 Ch. 616.

(2) (1878) 9 Ch. D., 322, at p. 328.