

1940
*Mar. 7, 8.
*May 21.

WILLIAM L. CHRISTIE, I. HUNTLY
CHRISTIE, KATHERINE CHRISTIE
AND EMMA L. CHRISTIE, SUING ON
BEHALF OF THEMSELVES AND ALL OTHER
SHAREHOLDERS OF ERWIK ESTATES LIM-
ITED OF RECORD IN THE YEAR 1932 OTHER
THAN THE DEFENDANT GEORGE EDWARDS
(PLAINTIFFS) } APPELLANTS;

AND

GEORGE EDWARDS (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Company wound up voluntarily—Resolution approving of reservation of sum for taxation, legal charges and other expenses to be used as liquidator with advice of certain persons might determine—Subsequent suit by shareholders for an accounting in respect of said sum reserved—Nature and form of the action—Right to relief—Companies Act, R.S.O. 1927, c. 218, ss. 229, 201.

The shareholders of a company incorporated by letters patent under the Ontario *Companies Act* resolved at a special general meeting on May 2, 1932, that the company be wound up voluntarily under the provisions of Part XIV of the *Companies Act*, R.S.O. 1927, c. 218, and that defendant be appointed liquidator. On December 6, 1932, at a special general meeting of the shareholders, at which all were represented, defendant presented a statement showing the assets

*PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau J.J.

which had come into his hands as liquidator and other statements showing distribution among shareholders and accounting for receipts and disbursements; it was explained, among other things, "that there has been reserved for taxation, legal charges, and other expenses the sum of \$25,000 to be used as the liquidator with the advice of [two named persons] may determine." By resolution the liquidator's report was adopted and the plan of distribution approved. On December 10, 1932, the liquidator's return as to such meeting was filed in the Provincial Secretary's office as required by s. 229 of said Act, which provides that "on the expiration of three months from the date of the filing the corporation shall *ipso facto* be dissolved."

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The said sum of \$25,000 consisted of bonds of the face value of \$25,000. These bonds or proceeds thereof when received in 1933 by the liquidator from the company's custodian were of the value of \$28,037.21. The liquidator paid thereout certain sums on account of taxation, legal and other expenses.

Plaintiffs, shareholders in the company, in 1935 demanded distribution of said sum of \$25,000, and later, suing on behalf of themselves and all other shareholders of the company of record in the year 1932 other than defendant, brought action against the liquidator. The claim endorsed on the writ was for an accounting of said sum of \$25,000, and payment thereof and of interest, less the amount, if any, that might be found to be due and owing to defendant for his fees and disbursements as liquidator; and to recover possession of books, documents, etc., of the company. In their pleadings the plaintiffs claimed a declaration that the company had not been fully wound up or dissolved, an order that the winding-up proceedings be continued under the court's supervision and that another liquidator be appointed in place of defendant, an accounting and payment of the amount with interest "that may be found to be due to [the company] or to the shareholders thereof," possession of books, documents, etc.

Held: (1) As against the plaintiffs, in the absence of fraud, the company was fully wound up and dissolved at the expiration of three months from the date of said filing of defendant's return with the Provincial Secretary.

(2) The minutes of said meeting of December 6, 1932, as to reservation of the sum of \$25,000 could not be taken as an arrangement whereby defendant was to retain the moneys for himself in settlement of all matters, including protection against his liability for prospective claims for taxes, legal charges and expenses.

(3) (Reversing on this point the judgment of the Court of Appeal for Ontario, [1940] O.R. 28.) The relief of an accounting could be given to plaintiffs in the action as framed (even without calling in aid R. 183, Ontario Rules of Practice). Though plaintiffs sought a declaration (which could not be made) that the company had not been fully wound up or dissolved, yet their claim for an accounting was not subsidiary or consequential upon any declaration that might be so made. Sec. 201 (a) of said Act (providing that, upon a voluntary winding up, the property of the corporation shall, subject to satisfaction of its liabilities, and unless otherwise provided by its by-laws, be distributed rateably amongst the shareholders) referred to.

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APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Roach J. (2)) dismissed the action, without prejudice to any further proceedings that the plaintiffs might be advised to take. The material facts of the case and the questions in issue are sufficiently stated in the reasons for judgment in this Court now reported, and are also discussed in the reasons for judgment in the Courts below. The appeal to this Court was allowed but the relief granted in this Court differed in form from that granted by the trial judge, and is set out at the conclusion of the reasons for judgment of Kerwin J.

G. W. Mason K.C. and *C. B. Henderson K.C.* for the appellants.

D. L. McCarthy K.C. and *A. W. R. Sinclair K.C.* for the respondent.

The judgment of the Chief Justice and Kerwin, Hudson and Taschereau JJ. was delivered by

KERWIN J.—In this action the plaintiffs appeal from the judgment of the Court of Appeal for Ontario (1), which allowed an appeal by the defendant from the judgment of the trial judge (2). The plaintiffs are William L. Christie, I. Huntly Christie, Katharine Christie and Emma L. Christie, suing on behalf of themselves and all other shareholders of Erwik Estates Limited of record in the year 1932, other than the defendant George Edwards, and the said George Edwards is the sole defendant. The issues involved may be appreciated after a statement of certain events and a reference to the pleadings.

By letters patent under the Ontario *Companies Act*, a company was incorporated, the name of which was subsequently changed to Erwik Estates Limited. The principal shareholder, Robert J. Christie, by his will, appointed as executors National Trust Company Limited, Charles E. Edmonds, and the defendant George Edwards. At all relevant times the shareholders of the Company and the number of shares held by them, respectively, were:

(1) [1940] O.R. 28; [1939]
4 D.L.R. 139.

(2) [1939] O.R. 48; [1939]
1 D.L.R. 158.

Executors of Robert J. Christie, deceased, 3,498 shares; the plaintiff, William L. Christie, 300 shares; the plaintiff, I. Huntly Christie, 300 shares; the plaintiff, Katharine Christie, 300 shares; the plaintiff, Emma L. Christie, 600 shares; the said Charles E. Edmonds, 1 share; the defendant, 1 share; making a total of 5,000 shares, being the total authorized and issued capital stock of the Company.

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On May 2, 1932, there was held a special general meeting of the shareholders, at which it was resolved that the Company be wound up voluntarily under the provisions of Part XIV of the Ontario *Companies Act*, R.S.O. 1927, chapter 218, and that the defendant be appointed liquidator. On December 6, 1932, at a special general meeting of the shareholders, at which all were represented, the defendant presented a statement showing the assets which had come into his hands as liquidator and other statements showing the distribution, as of April 30, 1932, of those assets among the shareholders, and accounting for the receipts and disbursements since that date to the end of November. The minutes of this meeting conclude:

It was explained that the distribution of the assets had been effected partly in cash and partly in specie, as shown by the separate accounts prepared for each shareholder; and that to the extent that the distribution had been made in specie due account had been taken of accrued interest; and that to ensure a fair and equitable distribution regard was had to both the cost price, and also the market price of each security as determined by independent and competent opinion; and that there has been reserved for taxation, legal charges, and other expenses the sum of \$25,000 to be used as the Liquidator with the advice of Messrs. Laughton and Edmonds may determine.

The Liquidator produced the bank statements for inspection as required by statute.

After discussion it was upon motion duly seconded,

Resolved, that the report of the Liquidator be adopted, and the plan of distribution approved.

The motion was adopted without dissent.

The meeting then adjourned.

The Messrs. Laughton and Edmonds referred to are respectively the Assistant Estates Manager of National Trust Company, Limited, one of the executors of Robert J. Christie, and Charles E. Edmonds, also an executor and the holder of one share in the Company.

On December 9, 1932, the defendant notified the Provincial Secretary for Ontario of the meeting of December 6, reported that the affairs of the Company had been fully

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wound up and returned the original letters patent and the supplementary letters patent by which the name of the incorporated Company had been changed. This report was filed in the Provincial Secretary's office on December 10. These steps were taken under section 229 of the *Companies Act*, which reads as follows:

229. (1) Where the affairs of the corporation have been fully wound up, the liquidator shall make up an account showing the manner in which the winding up has been conducted, and the property of the corporation disposed of, and thereupon shall call a general meeting of the shareholders or members of the corporation for the purpose of having the account laid before them and hearing any explanation that may be given by the liquidator, and the meeting shall be called in the manner provided by the by-laws for calling general meetings.

(2) The liquidator shall make a return to the Provincial Secretary of such meeting having been held, and of the date at which the same was held, and the return shall be filed in the office of the Provincial Secretary; and on the expiration of three months from the date of the filing the corporation shall *ipso facto* be dissolved.

In July, 1935, the then solicitors for the plaintiffs, on three occasions, wrote the defendant asking for the distribution of the twenty-five thousand dollars fund referred to in the minutes of the meeting of December 6, 1932, but no reply was sent to these communications. A motion was launched by the plaintiffs in the Supreme Court of Ontario for an order under section 222 of the Act. This motion was dismissed by the Chief Justice of the High Court, before whom it was argued, but without prejudice to any claim the applicants might have otherwise.

The present action was then instituted and in view of the manner in which it presented itself to the trial judge and to the members of the Court of Appeal, it appears desirable to state what is claimed. The endorsement on the writ of summons reads:

The Plaintiffs' claim is for an accounting of the sum of \$25,000 which was reserved for the liquidator's expenses at the time of the voluntary winding up of Erwik Estates Limited and which sum together with interest thereon is unlawfully in the possession of the Defendant and for payment to the Plaintiffs of the said amount of money and accrued interest thereon to date of judgment herein less the amount, if any, that may be found to be due and owing to the Defendant for his fees and disbursements as liquidator of Erwik Estates Limited.

And the Plaintiffs' further claim is to recover possession of all books, documents and other writings of Erwik Estates Limited, and its predecessor Christie Brown & Co. Limited.

The statement of claim, after setting forth a number of the details already mentioned and referring specifically to the fund of twenty-five thousand dollars, contains the following allegation in paragraph 16:

16. The sum of \$25,000 referred to in paragraph 15 consisted of Province of Ontario bonds of the face value of \$25,000 bearing interest at 5½ per cent. and maturing on February 1, 1947.

Paragraph 17 and part of paragraph 21 are as follows:

17. The said bonds and/or the proceeds thereof have subsequently come into the control and possession of the Defendant Edwards and the Defendant Edwards has refused at all times to give to the Plaintiffs any account of his dealings with the same other than his suggestion that he is entitled to the same as his fee as liquidator.

21. The Plaintiffs were unaware that the Defendant had personally secured possession of the \$25,000 bonds aforesaid or the proceeds thereof until June, 1935, whereupon the Plaintiff I. Huntley Christie consulted his solicitor who made three written demands upon the Defendant Edwards under date of July 9, July 20 and July 31, 1935, for an accounting of the said money but did not receive any reply. * * *

The statement of claim concludes:

The Plaintiffs therefore claim on behalf of themselves and all other shareholders of Erwik Estates Limited other than the Defendant:

(a) A declaration that Erwik Estates Limited has not been fully wound up or dissolved.

(b) An order that the winding-up proceedings be continued under the supervision of this Honourable Court and/or the Defendant be removed as liquidator of Erwik Estates Limited, and that this Honourable Court doth appoint another liquidator in his place and stead.

(c) An accounting from the Defendant of the said bonds of \$25,000 and for payment of the amount with interest at 5 per cent. that may be found to be due to Erwik Estates Limited or to the shareholders thereof.

(d) For payment or refund to Erwik Estates Limited or to the shareholders thereof of the sum of \$950 being the proportionate part of the monies received by the Defendant in 1932 from Erwik Estates Limited as mentioned in paragraph Number 10 for the period subsequent to the 30th day of April, 1932.

(e) To recover possession of all books, documents and other papers of Erwik Estates Limited and Christie, Brown & Company Limited.

(f) Their costs of this action.

(g) Such further or other relief as to this Honourable Court may seem meet and proper.

By his statement of defence, the defendant admits paragraph 16 of the statement of claim, and paragraph 9 of his own pleading is as follows:

9. The Defendant alleges that between the 18th day of March, 1933, and the 31st day of July, 1933, he received from National Trust Company Limited, which had been the custodian of the securities of the

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Company, the said bonds and proceeds thereof amounting to the sum of \$28,037.21, and with the knowledge and advice of Messrs. Laughton and Edmonds previously obtained, he paid out on account of taxation, legal and other expenses, the sum of \$5,799.63.

At the trial, certain extracts from the defendant's examination for discovery were put in evidence, from which it appears that the defendant treated the matter as if the shareholders had no interest in the disposition of the fund. It also appears that while the defendant stated he had paid out \$5,799.63 (the sum mentioned in paragraph 9 of his statement of defence), \$1,275 of that amount had been paid to National Trust Company Limited as an annual fee for the year 1932 for the safe keeping of securities comprising the assets of the Company; that upon the Trust Company discovering that Erwik Estates Limited was really not operating as from about May 1 of that year, it returned to the defendant \$850 as being the proportion of the fee which it considered it had not earned. It further appears that included in the \$5,799.63 was the annual fee for 1932 (\$1,500) to the defendant as one of the executors of the R. J. Christie Estate,—the practice apparently having been for the executors, as the holders of the great majority of the shares of Erwik Estates Limited, to transact a great part of the Company's affairs. None of the parties to the action testified.

The trial judge took the view that it was a condition precedent to the operation of section 229 of the Act that the affairs of the Company should have been fully wound up, and that in view of the reservation of the twenty-five thousand dollars fund, this had not happened. The judgment declared that the Company had not been fully wound up or dissolved, removed the defendant as liquidator and directed a reference to the Master to appoint a new liquidator and to take an account as between the defendant and the new liquidator. The Court of Appeal were of the opinion that as against the plaintiffs, in the absence of fraud, the Company was fully wound up and dissolved at the expiration of three months from the date of the filing of the defendant's report with the Provincial Secretary. With that view I agree and, as pointed out in the reasons for judgment of McTague J.A. (Gillanders

J.A. agreeing and Riddell J.A. agreeing in the result), the same conclusion had been reached in the Court of Appeal in England in two cases, *In Re Pinto Silver Mining Company* (1) and *In Re London and Caledonian Marine Insurance Company* (2).

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At the end of his reasons for judgment, Mr. Justice McTague states:

While it is the view of the Court that the defendant should be made to account, we feel we cannot give this relief in the action as framed. If we are right in our views then there is no such company as Erwik Estates Limited, no shareholders thereof, and the liquidator as such is *functus officio*. While technical justice is to be avoided where possible, we do not think that the application of Rule 183 can go so far as to justify us reconstituting the whole action, particularly when it is a matter of conjecture as to how far the defendant would be prejudiced by such action at this stage of the proceedings.

Upon this branch of the case I feel constrained to differ from the Court of Appeal. It is true there is now no such company as Erwik Estates Limited and there can, therefore, be no shareholders, but this action is brought by several people who were shareholders and who sue on behalf of themselves and all others, except the defendant, who were shareholders of record in the year 1932. Section 201 of the Act provides in part:

Upon a voluntary winding up:

(a) the property of the corporation shall be applied in satisfaction of all its liabilities *pari passu*, and, subject thereto, shall, unless it is otherwise provided by the by-laws of the corporation, be distributed rateably amongst the shareholders or members according to their rights and interests in the corporation;

From the outset the plaintiffs demanded an accounting—by the three letters of the solicitors to the defendant, by the endorsement on the writ of summons, and by the statement of claim. It is true that they also sought a declaration that Erwik Estates Limited had not been fully wound up or dissolved but the claim for an accounting was not subsidiary or consequential upon any declaration that might be so made.

The defendant's contention is that the sum of twenty-five thousand dollars referred to in the minutes of the meeting of December 6, 1932, was handed over to him and

(1) (1878) L.R. 8 Ch. 273.

(2) (1879) L.R. 11 Ch. 140.

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that the shareholders have no concern with the disposition of the fund. In his statement of defence he alleged that before the date of that meeting he informed the plaintiffs William L. Christie and I. Huntly Christie of his opinion that, if the Company were wound up, its assets distributed among the shareholders, and the Company dissolved, all prospective claims for taxes and for all legal fees and expenses in connection with the winding up, distribution of assets, and dissolution of the Company could be settled for the sum of twenty-five thousand dollars, and that on that basis the plaintiffs William L. Christie and I. Huntly Christie approved of such winding up, distribution and dissolution, and agreed to recommend the same to the plaintiffs Katharine Christie and Emma L. Christie. No proof was made, or attempted to be made, of this allegation. It is further to be remarked that to establish the fund, the defendant retained or secured control of 5½ per cent. bonds of the Province of Ontario maturing February 1, 1947, which, because of the premium at which they were sold (and possibly because of some accrued interest), produced the sum of \$28,037.21. The minutes of the meeting of December 6, 1932, which the defendant sets up as an agreement between himself and the shareholders, whereby he might retain "the sum of twenty-five thousand dollars" cannot be taken to mean what he suggests; and certainly it could not be taken to include bonds which realized the sum mentioned.

Even without calling in aid the provisions of Rule 183 of the Ontario Rules of Practice, I do not find any difficulty in granting to the plaintiffs in this action the accounting relief which they claim. The defendant secured the bonds or the proceeds thereof and, on his own admission, still has those proceeds, less certain disbursements. The plaintiffs are the only persons beneficially entitled to the estate of Robert J. Christie and, in any event, sue on behalf of themselves and all other shareholders of record in 1932. If the proper construction of the minutes of the meeting of December 6, 1932, be as I have indicated, it would be strange indeed, in view of the

provisions of section 201 of the Act, if this action as framed is not sufficient to call upon the defendant, under the circumstances, to account.

The appeal should be allowed but in lieu of the judgment directed to be entered by the trial judge, there should be judgment directing a reference to the Master of the Supreme Court of Ontario to take an account of the \$25,000 in bonds received by the defendant (or the proceeds thereof) and to determine what sums have been properly expended by the defendant out of the said bonds, or the proceeds of the same, and to determine the balance of the said bonds and the proceeds of the same unexpended by the defendant, and interest on so much thereof as has remained or should have remained in the hands of the defendant from time to time. In determining such balance, the Master shall not have regard to any claim which the defendant may put forward for remuneration as liquidator (see clause (c) of section 201 of the Act). Any sum found to be due from the defendant is to be paid into the Supreme Court of Ontario to the credit of this cause, subject to the further order of the Court. The plaintiffs are entitled to their costs throughout. The costs of the reference are reserved to be disposed of by a Judge of the Supreme Court of Ontario after the Master shall have made his report.

RINFRET J.—The appeal should be allowed and there should be judgment directing a reference to the Master of the Supreme Court of Ontario to take an account of the \$25,000, as stated in my brother Kerwin's reasons. The plaintiffs are entitled to their costs throughout, the costs of the reference to be disposed of by a Judge of the Supreme Court of Ontario, after the Master shall have made his report.

Appeal allowed with costs.

Solicitor for the appellants: *C. B. Henderson.*

Solicitors for the respondent: *Armstrong & Sinclair.*

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