JOSEPH WALTER McFARLAND, OFFICIAL LIQUIDATOR OF D. E. BROWN, HOPE & MACAULAY LIMITED (PLAINTIFF) ..... APPELLANT;

AND

LONDON & LANCASHIRE GUARANTEE & ACCIDENT COMPANY OF CANADA (DEFENDANT) ..... RESPONDENT.

1927
*Feb. 3.
*April 20.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Guarantee—Company—Bond guaranteeing true accounting by liquidator of company—Default by liquidator—Dispute as to extent of guarantor's liability—Moneys received by liquidator as personal agent of a secured creditor of the company under power of attorney given to facilitate realization of securities—Claim against guarantor for interest.

Defendant by its bond guaranteed the true accounting by L. for what he "shall receive or become liable to pay as official liquidator" of a company "at such periods and in such manner as the Judge shall appoint, and pay the same as the Judge hath by the said orders directed, or shall hereafter direct." Auditors reported a shortage in L.'s accounts, and plaintiff, who had succeeded L. as liquidator, was, by order, given leave to proceed against L. under s. 123 of the *Winding-up Act* (R.S.C. 1906, c. 144), and subsequently an order was made declaring L. guilty of misfeasance and breach of trust in relation to the company, and directing him to pay to plaintiff the amount of the alleged shortage. Defendant, in paying under its bond, refused to pay part of the shortage on the ground that such part did not come within its bond, and plaintiff sued therefor.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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Held, affirming judgment of the Court of Appeal for British Columbia (37 B.C. Rep. 373), that defendant was not liable; on the evidence, the moneys in question were received by L. as the personal agent of one O., a secured creditor of the company, when acting under a power of attorney from O., authorizing L. to deal with O.'s securities, and given to facilitate the realization thereof; the moneys never belonged to, and were never accountable for by, the company of which L. was liquidator, and could not properly have been made the subject of a misfeasance order under said s. 123; while some of the moneys in question appeared to have passed into L.'s account kept by him as liquidator, payment thereof into that account was without authority and L. would have been, and was, within his rights as against the company in withdrawing them and placing them to his own personal credit; the condition of the bond had no application to the moneys in question.

A claim by plaintiff for interest was disallowed, in view of the terms of the condition of the bond, and the absence of any order for payment of interest.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1) which, reversing the judgment of Hunter C.J.B.C., held that the defendant was not liable under its guarantee bond in respect of the moneys in question. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

E. Lafleur K.C. for the appellant.

W. N. Tilley K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—The company, of which the appellant is now official liquidator, was ordered to be wound up in June, 1916; the defendant Lockwood was appointed official liquidator in August of that year, and the guarantee bond, upon which the action was brought, was executed on the 25th of that month.

At the date of the winding up, one Ormrod was a secured creditor in $30,000 odd, that sum being due to him in respect of a loan made to the company by him in December, 1912. All the usual steps were taken in the winding up proceedings. No claim was made by Ormrod, and in two reports made by the district registrar of the court respecting claims of creditors, it was stated that there was no

(1) 37 B.C. Rep. 373; [1926] 3 W.W.R. 290.

creditor holding security. In March, 1918, Ormrod executed a power of attorney, appointing Lockwood, described not as official liquidator, but simply as " of 739 Hastings Street West, in the city of Vancouver, in the province of British Columbia, Broker," as his attorney, authorizing him to deal with the Ormrod securities as he might see fit; to execute all necessary conveyances; and to give receipts and discharges for all or any the sum or sums of money "which shall come into his hands, in virtue of the powers herein contained."

Lockwood received no authority from the court to accept this power of attorney, and it is quite clear that it was given to him on the suggestion of Ormrod's Vancouver agents for the purpose of facilitating the realization of Ormrod's securities. Lockwood proceeded to realize these securities by acquiring titles to properties affected by them, and to dispose of the properties. The details of these proceedings are immaterial, although it may be observed that a considerable part of the proceeds of each security was paid by Lockwood direct to Ormrod's agents, Richards & Company, apparently without any authority from the court. Lockwood's accounts having been investigated by auditors, a shortage was reported of $18,329.02, and on the 26th of May, 1923, an order was made, giving the appellant liberty to prosecute proceedings against Lockwood, under s. 123 of the *Winding-Up Act;* and on the 12th of June, 1923, an order was made declaring Lockwood guilty of misfeasance and breach of trust in relation to the company, and directing him to pay that sum to the appellant, together with the expenses of audit and costs. In July, 1923, the respondent company paid to the appellant the sum of $8,217.75, being the difference between the total misappropriation reported by the auditors and the moneys included therein which were alleged to belong to Ormrod. The present action was brought at the instance of Ormrod, who agreed to indemnify the appellant against the costs of the action. At the trial, the appellant's claim was sustained, but this judgment was reversed by the Court of Appeal except as to certain items not material to be considered, Macdonald C.J.A., dissenting. The bond, upon which the action is brought, is upon the condition that " the said

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Herbert Lockwood * * * shall truly account for what [he] shall receive or become liable to pay as Official Liquidator * * * at such periods and in such manner as the Judge shall appoint, and pay the same as the Judge hath by the said orders directed, or shall hereafter direct." And the question is whether the moneys sued for were received by Lockwood as official liquidator, or are moneys which he became liable to pay as official liquidator.

The evidence seems to establish clearly that these moneys were received by Lockwood as the personal agent of Ormrod, when acting under the power of attorney above mentioned. They never were at any time the moneys of the company, and never could properly have been made the subject of a misfeasance order under s. 123 of the *Winding-Up Act*. The order of the 12th of June, 1923, appears to have been, as regards these moneys, an order made without jurisdiction.

It is contended on behalf of the respondent company that the condition of the bond above quoted applies only to moneys which are the moneys of the company within the meaning of s. 123. It does not appear to be necessary to decide whether or not that is the true construction of the bond. It seems sufficiently clear that the condition is limited in its application at least to moneys which are the moneys of the company or moneys in respect of which the company is by law accountable to others. Some of the moneys in question, it is true, seem to have passed into Lockwood's account kept by him as official liquidator, but the payment of these moneys into that account was a payment wholly without authority, and he would have been, and was, quite within his rights as against the company in withdrawing them, and placing them to his own personal credit. It is difficult to see upon what principle the company could be charged with responsibility in respect of such moneys. Such being the case, it appears to me that the language of the condition has no application to the facts.

A point was argued by Mr. Lafleur with some elaboration, to the effect that on a true view of the accounts, the shortage in respect of the company's moneys (that is to

say, moneys which were admittedly such), after allowing for the sum paid by the respondent company, was sufficient to justify the judgment. The point was very fully considered on the argument, and a further examination of the record leaves no doubt in my mind that there is no sufficient ground for doubting the accuracy of the auditor's report.

A further question is raised as regards interest. As respects that question, the answer of the respondent company seems conclusive. The condition provides for the payment of moneys received and for moneys he is "liable to pay * * * at such periods and in such manner as the judge shall appoint." There has been no order in respect of the payment of interest, and that claim, in consequence, must also be disallowed.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Walsh, McKim, Housser & Molson.*

Solicitors for the respondent: *Pattulo & Tobin.*