ROBERT HENRY GALE, TERMINAL GRAIN COMPANY LIMITED, JOHN RUSSELL SMITH AND WILLIAM FARQUHAR GURD (DEFENDANTS)... } APPELLANTS;

AND

DAI THOMAS (PLAINTIFF)..... RESPONDENT.

1926
*May 4, 5.
1927
*Jan. 4.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Agency—Contract—Claim for commission—General or special employment—Promise to pay commission on moneys raised for certain project, in consideration of letters of introduction—Project arrived at different from that originally contemplated—Companies—Payment of dividend without regard to claim for commission against company—Liability of directors—Debt "existing" or "thereafter contracted"—Companies Act, R.S.C., 1906, c. 79, s. 82.

G., president of defendant company, was authorized on its behalf to negotiate and conclude arrangements for raising $1,000,000 or such other sum as might be found necessary for the erection and equipment by the company of an elevator, etc. It was contemplated he should go to England for the purpose. He discussed the matter with plaintiff and, before going to England, gave plaintiff a letter from the company in which he said "Relative to the project of building grain elevators, etc., in Vancouver, concerning which we have had several discussions * * *. I shall be pleased to take advantage of the letters of introduction which you have given me to the following persons and concerns [which were here set out]. In the event of my being successful in raising the money required for my project, from or through any of these concerns, I * * * agree on behalf of [defendant company] to protect you to the extent of 2% commission on the amount of money so raised, said commission to be paid

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

to you as and when the money is received." G. did not present the letters of introduction but, through a cable sent at plaintiff's instance, he was met in England by an official of one of the concerns mentioned in the letter, who introduced him to an official of S., with whom eventually an agreement was made by which S. should loan the money required up to $2,500,000, to erect an elevator on an enlarged site, but the elevator and site were to be the property of a new company, 70% of the shares of which were to become the property of S. who should elect a majority of the board of directors. Plaintiff claimed commission, but the defendants alleged that the project ultimately arrived at and carried out between G. and S. was so entirely different (particularly, among other things, as to the holding of control) from the project originally contemplated that it did not come within the terms of the commission agreement. There was conflicting evidence of what G. had told plaintiff was his project when the agreement for commission was made.

Held, reversing judgment of the Court of Appeal of British Columbia (36 B.C. Rep. 512), Idington and Duff JJ. dissenting, that plaintiff could not recover; the agreement for commission constituted a special employment, and its restricted character precluded him from claiming commission in respect to an advance for the carrying out of the project ultimately arrived at, which was essentially different from that contemplated when plaintiff was engaged.

In arranging for the carrying out of the project arrived at, steps were taken for the transfer of defendant company's assets to a new company in consideration of all the capital shares of the new company, and provision was made for distribution of said shares by way of dividend to the shareholders of defendant company. The agreement with S. was not consummated until after the payment of this dividend. Plaintiff sought to hold the directors of defendant company liable, under s. 82 of the *Companies Act,* R.S.C., 1906, c. 79, for having paid this dividend without providing for payment of his claim for commission. Idington and Duff JJ., dissenting, who held defendant company liable to plaintiff, held also that the directors were liable; that plaintiff's claim, if not strictly a debt "existing" at the time the dividend was paid, was a debt "thereafter contracted" within the meaning of s. 82.

APPEAL by defendants from the judgment of the Court of Appeal of British Columbia (1) which (M. A. Macdonald J.A. dissenting), dismissed an appeal by defendants, and allowed a cross-appeal by plaintiff, from a judgment of Gregory J. (2) in an action to recover commission.

In 1923 the defendant The Terminal Grain Company Limited, a Dominion company, having corporate powers enabling it, *inter alia,* to construct and work elevators and mills, had its head office in Vancouver, the defendant Gale being president of it, and the defendants Smith and Gurd,

(1) 36 B.C. Rep. 512 [1926] 1 W.W.R. 569.

(2) (1925) 36 B.C. Rep. 512.

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with Gale, directors. The company held a lease of a property on the Vancouver waterfront from the Vancouver Harbour Commissioners, reserving a yearly rental of $4,400, and by that instrument, among other provisions, it was stipulated that the demised premises should be used solely for the purposes of a grain elevator and feed and flour mill, and that an elevator and mill constructed according to plans approved by the Harbour Commissioners, and costing not less than $500,000, should be begun within six months and completed within two years from the date of the lease, which was 19th July, 1923.

At a meeting of the directors held on 10th August, 1923, it was resolved

that the president be authorized to enter into negotiations and conclude arrangements on such terms as he shall consider reasonable, for the raising of the sum of $1,000,000 or such other sum as may be found to be necessary for the erection and equipment of the elevator proposed to be erected by the company, and also for a feed mill and for working capital; and that such moneys may be raised in one or more ways and in one or more sums, and at different times, and either by the sale of debentures, secured in such manner and payable on such terms as he may deem it expedient to concede, or by the sale of preferred shares with any rights and restrictions he may deem it advisable to grant, or by the sale of common stock or by any two or more of such methods; and in pursuing such negotiations to enter into such engagements and or financial obligations on behalf of the company as he may find to be necessary or expedient; and for the attainment of said object to proceed to England or elsewhere at the company's expense.

According to the plans of the directors, Gale was to proceed, and did proceed, to England to attempt to raise the money there. Before leaving Vancouver, he discussed the subject of his visit to England with the plaintiff. As a result, Gale, on behalf of The Terminal Grain Company Limited, wrote to plaintiff, on August 30, 1923, the following letter embodying the agreement which is the basis of the plaintiff's action:

Relative to the project of building grain elevators, etc., in Vancouver, concerning which we have had several discussions, I beg to advise that I shall be pleased to take advantage of the letters of introduction which you have given me to the following persons and concerns:

[Here are set out the persons or concerns referred to.]

In the event of my being successful in raising the money required for my project, from or through any of these concerns, I shall be pleased and do hereby agree on behalf of the Terminal Grain Company Limited, to protect you to the extent of two (2%) per cent. commission on the amount of money so raised, said commission to be paid to you as and when the money is received. * * *

Gale proceeded to England. He did not present the letters of introduction given him by the plaintiff, but through a cable sent, at the plaintiff's request, from Vancouver by an official (who had just arrived at Vancouver) of the Canadian British Corporation (one of the concerns mentioned in Gale's letter to plaintiff aforesaid), Gale was met in England by another official of the Canadian British Corporation, who subsequently introduced him to Sir William Nicholls, of Spillers Milling and Associated Industries Ltd. (Hereinafter referred to as the "Spillers"). Eventually an agreement was arrived at between Gale and the Spillers by which the Spillers should loan the money required, up to $2,500,000, to erect an elevator on an enlarged site, including the land leased to The Terminal Grain Co., Ltd., by the Harbour Commissioners, but the elevator and site were to be the property of a new company, The Vancouver Terminal Grain Co., Ltd., and 70% of the shares of the new company were to become the property of the Spillers, who should elect the majority of the membership of the board of directors.

On 8th February, 1924, the old company, The Terminal Grain Co. Ltd., and the new company, The Vancouver Terminal Grain Co. Ltd., entered into an agreement by which the old company agreed to transfer all its assets to the new company in consideration of the allotment to the old company or its nominees of all the capital shares of the new company. On the same date a resolution was passed at a meeting of the directors of The Terminal Grain Co. Ltd., and also at a general meeting of the company, providing for the payment of a dividend by distribution among the shareholders of The Terminal Grain Co. Ltd., of the said shares. Later, on consummation of the agreement with the Spillers, arrangement was made for the transfer of 70% of the shares to the Spillers, according to the understanding on which the Spillers entered into the project as above mentioned.

The main questions in dispute were:

(1) Was the plaintiff entitled to commission from the defendant The Terminal Grain Co. Ltd.? This would appear to depend on whether or not it could be said that the arrangement ultimately arrived at between Gale and

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the Spillers came within the scope of Gale's "project" as referred to in his letter to plaintiff of 30th August, 1923. There was also involved the question of whether the agreement sued upon constituted a general or special employment of the plaintiff.

(2) If the plaintiff was entitled to commission, on what basis should it be calculated?

(3) If the plaintiff was entitled to commission, had he a claim against the defendants the directors of The Terminal Grain Co. Ltd., under s. 82 of the *Companies Act,* R.S.C., 1906, c. 79, upon the ground that they had declared and paid a dividend to the shareholders, which exhausted the capital of the company, without making provision for payment of his claim for commission?

On behalf of the plaintiff it was contended that the contract with him was one which contemplated payment of a commission in the event of variations being made in the proposal of The Terminal Grain Co. Ltd., and the variations that were made in the deal consummated were within the scope of the original proposition, so that the promise to pay commission included a promise to pay commission in the deal as actually consummated.

On behalf of the defendants it was contended that the project referred to in Gale's letter to plaintiff of 30th August, 1923, was changed entirely, and, indeed, abandoned altogether, and a new one substituted, involving, among other things, an entirely different arrangement than that originally contemplated as to the holding of control.

The resolution of 10th August, 1923, above quoted, had not been shown to the plaintiff. The parol evidence as to what Gale told the plaintiff was his project, was conflicting.

The trial judge, Gregory J., held the plaintiff entitled to commission, the formal judgment limiting the commission to 2% on $1,000,000. He also held the defendant directors jointly and severally liable to the plaintiff for the amount of said commission, under s. 82 of the *Companies Act,* R.S.C., 1906, c. 79.

The court of appeal affirmed the judgment of Gregory J. in holding plaintiff entitled to commission, and the defendant directors liable under s. 82 of the *Companies Act;* but (allowing a cross-appeal by plaintiff) it varied his

judgment by striking out the proviso limiting the commission recoverable to 2% on $1,000,000. Martin J.A. dissented on the question of the directors' liability. M. A. Macdonald J.A, dissenting, held that the plaintiff was not entitled to any commission, as the project actually carried out was so different from the one originally contemplated that it did not come within the terms of Gale's letter to the plaintiff of 30th August, 1923. Having reached this conclusion, he found it unnecessary to deal with the point of law in respect to the alleged liability of the directors. His reasons were substantially adopted by the majority of the court in the judgments now reported.

E. P. Davis K.C. and *E. F. Newcombe* for the appellants.

C. W. Craig K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Newcombe and Rinfret JJ.) was delivered by

ANGLIN C.J.C.—Substantially for the reasons stated by Mr. Justice M. A. Macdonald in his dissenting judgment in the Court of Appeal, I would allow this appeal and dismiss the plaintiff's action.

The agreement sued upon constituted a special employment of the respondent. The contract eventually made was for the carrying out of a project essentially different from that contemplated when the respondent was engaged. Whatever might have been the case had the respondent's employment been general, its restricted character, in my opinion, precludes his right to claim commission in respect of an advance of moneys for the carrying out of a project entirely outside the contemplation of the parties at the time the respondent was so employed.

IDINGTON J. (dissenting).—I agree in the main with the reasoning of each of the four judges in their several judgments in the court below upon which was founded the judgment from which appeal is taken herein.

I entirely agree with the judgment of my brother Duff, and hence with his conclusion that this appeal should be dismissed with costs.

I was for a time during the argument and later, inclined to agree with the decision of the learned trial judge, but

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the result of the full consideration I have given the case renders it impossible for me to agree with his judgment in limiting the commission to 2% on $1,000,000. The documents upon which the respondent's claim rests seem expressly to contemplate obtaining money to a greater extent than the $1,000,000, and, as put by the Chief Justice in the court below, it seems to be all or nothing.

The respondent, being either a sensible man desiring to avoid further litigation or, failing that, feeling that he might reasonably be satisfied, under all the circumstances of the case, with $20,000, offered to abandon his cross-appeal if the present appellants abandoned their appeal.

This mid-way that the respondent was willing to go has been treated with contempt, and hitherto, has been supported by only one judge, who can find no cause of action.

The excellent factum of counsel for the respondent has produced an array of authorities, and such an analysis of the evidence and dealing with the various views taken by the judges in the courts below, presents a case that adds much to what my brother Duff has considered, but the essential features thereof are fully presented by him and in such a way as renders it unnecessary for me to resort to the many other features put forward in said factum.

DUFF J. (dissenting).—In 1923 the appellant, The Terminal Grain Company, Limited, a Dominion company (having corporate powers enabling it, *inter alia*, to construct and work elevators and mills), had its head office in Vancouver, the appellant Gale being president of it, and the appellants Smith and Gurd, with Gale, directors. The company held a lease of a property on the Vancouver water front from the Vancouver Harbour Commissioners, reserving an annual rental of four thousand dollars odd, and by that instrument, among other provisions, it was stipulated that the demised premises should be used solely for the purposes of a grain elevator and feed and flour mill, and that an elevator and mill, constructed according to plans approved by the Harbour Commissioners, and costing not less than $500,000, should be begun within six months, and completed within two years from its date, which was the 19th of July, 1923.

At a meeting of the directors held on the 10th of August, of that year, the president was authorized to take steps and conclude arrangements "for raising the sum of one million dollars or such other sum as may be found necessary" for the erection and equipment of the proposed elevator and feed mill, and "for working capital." By the terms of the resolution by which this authority was conferred, the president was empowered to raise this money

> in one or more ways and in one or more sums, and at different times, and either by the sale of debentures * * * or by the sale of preferred shares * * * or by the sale of common stock, or by any two or more of such methods and * * * to enter into such engagements or financial obligations on behalf of the company as he may find to be necessary or expedient.

According to the plans of the directors, Gale was to proceed, and did proceed, to England to attempt to raise this money there.

Before leaving Vancouver, Gale discussed the subject of his visit to England with the respondent and, the respondent having delivered to Gale certain letters of introduction, an agreement was entered into between them, Gale speaking in the name of The Terminal Grain Company, by which the respondent was to receive a commission of two per cent. on moneys raised "from or through" any of the concerns to whom these letters of introduction were directed. This agreement is embodied in a letter addressed to the respondent and signed by The Terminal Grain Company, and is the basis of the respondent's action.

The primary issue for determination is whether or not the conditions have been fulfilled upon which the respondent's right to commission must rest, according to the terms of this letter.

Gale did, in fact, procure an arrangement with the Spillers Milling and Associated Industries, Limited (whom I shall designate as the Spillers), of which Sir William Nicholls was managing director, one of a group of concerns to which Spillers & Baker, one of the firms mentioned in the letter of the 30th of August, belonged; Gale having been introduced to Sir William Nicholls by Mr. White, of the Canadian British Corporation, Limited, another concern mentioned in that letter, at the instance of the respondent. The learned trial judge finds as a fact, and this finding is accepted by the Court of Appeal, that Gale was introduced

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to the Spillers through the Canadian British Corporation, and that his introduction to the Canadian British Corporation was the "direct and immediate result of the plaintiff's act supplementing his letter of introduction to them." This finding is adequately supported by the evidence, and we need not stop to discuss it. By the arrangement with the Spillers, a sufficient sum, up to two and a half million dollars, was to be provided for the building of a grain elevator at Vancouver, on an enlarged site, including the land leased to The Terminal Grain Company by the Harbour Commissioners. But by the scheme as ultimately settled, the elevator and the site were to be the property of a new company, The Vancouver Grain Company, and seventy per cent. of the shares of the new company were to become the property of the Spillers. The proposition upon which the claim of the respondent rests is that this sum, which the Spillers on these terms agreed to advance, answers the description in the letter of the 30th of August as being "money raised" for The Terminal Grain Company's "project," and that, this money having been procured through the Spillers, to whom Gale was introduced by the Canadian British Corporation, one of the concerns mentioned in the letter, the company cannot deny that it has been "successful" in raising the money "required" for its "project" in a manner contemplated by the letter. In the courts below and in this court, the debate turned chiefly upon the point, which is really the crux of the dispute, whether moneys procured for the purpose outlined, and by the means and on the terms outlined, can fairly be said to be "the money required for" The Terminal Grain Company's "project," within the meaning of the letter.

On behalf of the appellants it is said that at the time when this letter was written the plan of the directors of The Terminal Grain Company was to raise money by way of loan, with or without a bonus of shares, but that an essential element of the plan as they conceived it, and as Gale described it to the respondent, was that the relation between the company and the persons furnishing the money should in substance be that of borrowers and lenders merely, and that the voting control and the actual management of the company should remain in the hands of

Gale and Smith; and that the scheme ultimately adopted, under external pressure, involved departures in respect of these essentials so great as to give it the character of an entirely new "project"—a "project" of a type not contemplated by the agreement between the parties.

On behalf of the respondent it is said that this condition, of retaining the control and the management in the hands of the existing directors, was never imparted to the respondent, and that in truth it never was regarded as of the essence of the directors' plans, and that Gale, while desiring to retain control, never regarded that as more than a desideratum.

The learned trial judge has found, on these disputed points, in favour of the respondent, and four out of five of the learned judges who sat in the Court of Appeal have concurred in these findings. These concurrent findings, it goes without saying, the appellants cannot succeed in reversing, without establishing—proving, that is to say, to a demonstration—some specific error or errors vitiating the grounds upon which the findings proceed.

Two considerations militate gravely against the appellants' attack on the conclusions of the courts below. The first arises out of the terms of the resolution already quoted. On the face of it, the resolution makes provision for the possible modification of plans, both as to the amount to be raised and as to the manner of raising it, of a radical character, with a view, one cannot doubt, to coping with the vicissitudes of the negotiations and satisfying the ultimate requirements of the London market. Admittedly, at an early stage, before the Spillers had been interviewed at all, the amount had been increased by Gale, on his own authority, from one million to two millions. In view of the character of the alternatives provided for in the resolution, it seems difficult to say that the resolution itself does not contemplate the abandonment of control by the existing shareholders as a possibility at least. One of the methods specified for raising the money required is by a sale of common stock, and by that alone. In other words, the resolution contemplated the possibility of acquiring the money needed from persons who should not become lenders at all, but virtually co-owners. It is indeed difficult to

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suppose that experienced men of affairs could have thought of seeking to procure capital on such a scale upon such terms without looking forward to the abandonment of control as a likely, if not, indeed, an inevitable condition of success.

The other consideration arises out of the findings of the learned trial judge as to credibility. He accepts the evidence of White as that of a truthful witness; and White received the impression from Gale, for whom he prepared the statement presented to Spillers, and whose confidence he seems to have fully enjoyed, that Gale, while very much averse to parting with so large a share of the property as the Spillers demanded, was not so keenly concerned as to the voting control, which White thought he would not have been unwilling to see vested in a voting trust. Again, the testimony of Gale and that of the respondent came into conflict on more than one point, and on these points the learned trial judge was not satisfied with Gale's testimony. These views of the trial judge were, as already mentioned, concurred in by the Court of Appeal; and in such circumstances it is not the office of this court to inquire what its own view might have been, had it heard the testimony. Criticism of no little force was directed by counsel for the appellants against the views of the learned trial judge as to the testimony of White and as to the testimony of Gale, but, to cite once again the phrase of Lord Haldane in *Nocton* v. *Lord Ashburton* (1), it would be little less than "a rash proceeding" on part of this court to set aside or disregard these findings, which primarily rest on the basis of the learned judge's views as to credibility—views, moreover, confirmed and fortified, to adopt the suggestion of Mr. Justice Martin, by inferences fairly deducible from the documentary evidence.

Loss of control was the point chiefly emphasized by Mr. Davis, but the appellants also rely upon the circumstance that, according to the plan ultimately adopted, the proprietorship of the elevator was vested in an entirely new company. As regards this circumstance, the view taken by the courts below seems to be the right one, namely, that

(1) [1914] A.C. 932, at p. 945.

this was a matter of machinery rather than something affecting the substance of The Terminal Company's "project."

There remains the question of the personal liability of the directors. The obligation arising out of the letter of the 30th of August was, it is contended on behalf of the appellants, neither a debt "existing" at the time of the declaration and payment of the dividend, nor a debt "thereafter contracted," and consequently the directors of The Terminal Company do not fall under the liability created by s. 82 of the Dominion *Companies Act*. Let it be conceded that, strictly, there was no existing debt. Does the obligation in favour of the respondent, which became exigible after the pertinent date, fall within the scope of the later phrase, "debts thereafter contracted"? The obligation took its rise from the letter of the 30th of August. It was a conditional obligation in the sense that the respondent was to become entitled to certain payments upon the fulfilment of certain conditions. The conditional contract was completely constituted as an executory contract before the declaration of the dividend, but the right to payment, conditional in its inception, became absolute—ripened into a "debt"—on the performance of the conditions. This debt was a contractual obligation resulting from the performance by the respondent of the conditions of the executory contract. It does not seem to be an abuse of language to describe such a contractual obligation as "contracted" at the time when it came into existence as a debt, through the performance of the conditions of the contract in which it originated.

The appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Davis, Pugh, Davis, Hossie, Ralston & Lett.*

Solicitor for the respondent: *Clarence Darling.*