CARTWRIGHT & CRICKMORE, LTD. (DEFENDANT) ..... } APPELLANT;

AND

IAN S. MACINNES (PLAINTIFF) ..... RESPONDENT.

1931
*Feb. 3.
*April 28.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Stock broker—Agency—Conversion—Delivery of shares to broker to sell at certain price—Agreement to return same certificate—Sale at lower price—Right of customer—Custom and usage—Tender by broker of another certificate.

The respondent, a customer of a broker, delivered to the latter a certificate for 500 shares of a mining company registered in his name with instructions to sell the shares at not less than a certain price and, if

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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not so sold, to return to him the same certificate. The broker, having received from another customer 1,000 shares of the same company represented by two certificates of 500 shares each, sold 1,000 shares for the account of the latter and, in making delivery, used one of the certificates belonging to him and the certificate belonging to the respondent. When the respondent demanded his certificate the broker tendered him another certificate of the same company for the same number of shares in accordance with the custom of the stock exchanges. The respondent refused to accept it and sued for conversion.

Held, affirming the judgment of the Court of Appeal (43 B.C. Rep. 265), that the respondent was entitled to judgment; custom and usage of the stock brokerage business cannot override the obligations of an actual contract between the parties contrary to that custom and usage.

APPEAL, by special leave granted by the Court of Appeal for British Columbia, from the judgment of that court (1) reversing the judgment of the trial judge, Ruggles C.C.J., and maintaining the respondent's action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

W. B. Farris K.C. for the appellant.

Geo. F. Henderson K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—The respondent, who is a clerk residing in the city of Vancouver, brought this action against the appellant, a firm of stock brokers having its place of business in the same city. The plaint was that, on the 23rd of July, 1929, the respondent delivered certificate no. 951 for 500 shares in the capital stock of the Silver Cup (Hazelton) Mining Company, Limited (non-personal liability) for sale by the appellant at a price not less than 30 cents per share; that the appellant had sold the shares and had failed to account to the respondent therefor; that, in the alternative, the appellant had converted the shares to its own use; wherefore the respondent claimed damages for the alleged detention of his funds or for failure to carry out his instructions, an accounting and costs.

The facts proven were that the respondent owned 500 shares of the Silver Cup Mining Company and held the certificate for those shares. One Christie, an agent for the

(1) (1930) 43 B.C. Rep. 265; [1931] 1 W.W.R. 81.

appellant, called on the respondent and advised him to buy some Weymarne Oil Stock. The respondent yielded to the suggestion upon the following conditions which, as we find them to be the very crux of this case, had better be stated in the precise words of the evidence:

Q. When you gave Christie this order to buy Weymarne, how was he to handle it?—A. He agreed to sell my Silver Cup stock for 30 cents or better and buy Weymarne. If this was not done he was to return the certificate to me.

The COURT: Q. What is that, the last?—A. He was to sell my Silver Cup stock for 30 cents or better, and with the proceeds buy Weymarne. If it was not sold, he was to return my own certificate to me.

The COURT: That is a different thing. That is not varying it.

Mr. GROSSMAN: Yes, that simply means an option to buy the Weymarne, and unless the Silver Cup is sold he is not to buy Weymarne.

The COURT: You say, notwithstanding any agreement to the contrary, they could have bought this Weymarne and made this man pay for it?

Mr. GROSSMAN: Yes, and we say we bought it for him and notified him we bought it for him.

Mr. MACINNES: Q. Did you ever receive any notice?—A. I never received any notice from Cartwright & Crickmore with regard to that stock.

The COURT: I will allow that question.

Mr. MACINNES: Q. If the Silver Cup stock were not sold, what was Christie to do with that certificate?—A. He was to return my own certificate to me.

Q. And what became of the buying order for Weymarne?—A. It was immediately cancelled.

it * * *
(i.e., the order to buy Weymarne)
was only given to them on the condition that when it
(i.e., the Silver Cup stock)
was sold, they were to buy 100 Weymarne.

It is common ground that the Silver Cup shares never reached 30 cents on the market; also that the Weymarne stock was not purchased and the order for same was eventually cancelled.

The respondent requested the return of his certificate several times. At first, he only saw a young clerk in the office of the appellant and was told that the certificate could not be located, but that he should "come in to-morrow." Later, he was informed that the Silver Cup stock was held as collateral for the Weymarne purchasing order. The respondent says, on that occasion, Christie happened to be present in the office, and, upon being told what was the matter, immediately stated that "there was a mistake right there."

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Finally, the respondent wrote to the appellant for the return of his stock certificate. He was tendered another certificate (296) for the same number of shares. He refused it and returned it to the appellant. At the trial, when asked why he did so, he replied as follows:

A. I wrote this letter so that Christie would produce my own certificate.

Q. Christie had told you he was not holding it as collateral?—A. Well, why didn't he give it to me back? They would not give it to me back.

Q. That is the only explanation you can give me?—A. Yes, Christie was the man I had practically all my dealings with.

Q. And you actually did receive a certificate for 500 shares, another certificate, of course?—A. I received another certificate, but not my own.

Q. Was it identically the same as the certificate you handed in?—A. No, not to me.

Q. Why?—A. Because it was not mine.

Q. That is the only reason it was not worth that much to you, is that it?—A. It was not my own certificate.

Q. It was a certificate in blank endorsed in blank?—A. Yes.

What had taken place, as the respondent eventually found out, was this:

On July 23, 1929, the appellant had received the respondent's certificate for 500 shares of the Silver Cup Mining Company. The certificate shewed that the respondent was the registered holder of the shares and that they were transferable only on the books of the company by endorsement herein and surrender of this certificate.

As usual, it bore on the *verso*, a form of transfer which the respondent had signed in blank.

On August 5, 1929, the appellant received from another customer 1,000 shares of Silver Cup represented by two certificates of 500 shares each. On August 14, they sold the 1,000 shares of Silver Cup for the account of the other customer; but, in making delivery of the shares in fulfilment of that sale, they used one of the certificates belonging to the other customer and the certificate belonging to the respondent.

That mode of dealing with the respondent's securities, the appellant did not attempt to excuse on the ground of mistake. On the contrary, they asserted their right to use the certificate as they did in the ordinary course of their business and in accordance with what they claimed to be the custom of the Exchange.

We are thus brought to the discussion of the appellant's defence which, in the dispute note, was expressed in the following way:

9. * * * the defendant says that the plaintiff deposited the said shares with the defendant subject to the rules, by-laws and customs of the Vancouver Stock Exchange, and subject to the general practice, customs and usage of the stock brokerage business.

10. It is the custom and usage recognized by the Vancouver Stock Exchange, and in general use amongst all stock brokers, that delivery of the identical certificate deposited is not required, but that a tender or delivery of a certificate covering an identical number of shares is good and sufficient tender or delivery.

In the appellant's factum, this defence is elaborated by a quotation from the judgment of the Supreme Court of the United States in *Gorman* v. *Littlefield* (1), where Mr. Justice Day, in course of delivering the opinion of the court, referred to *Richardson* v. *Shaw* (2), and speaking of the decision in that case said:

This court therefore had to consider the legal relation of customer and broker, in buying and holding shares of stock, and it was held that the certificates of stock were not the property itself, but merely the evidence of it, and that a certificate for the same number of shares represented precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; that the return of a different certificate or the substitution of one certificate for another made no material change in the property right of the customer; that such shares were unlike distinct articles of personal property, differing in kind or value, as a horse, wagon or harness, and that stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another.

And the appellant's counsel strongly urged before us that the above was a correct exposition of the law upon the subject, that it governed the case, and that the respondent was bound by the customs and usage of the Vancouver Stock Exchange.

We think it may be stated as settled law that a man who gives authority to a stock broker to do business for him on a Stock Exchange should, in the absence of evidence to the contrary, be taken to have employed the broker on the terms of the Stock Exchange. (*Forget* v. *Baxter*) (3). But it is, after all, a question of fact whether the contract was or was not entered into with reference to the customs and usage referred to (*Clarke* v. *Bailie*) (4). Custom and

(1) (1913) 229 U.S. 19.
(2) (1908) 209 U.S. 365.
(3) [1900] A.C. 467.
(4) (1910) 45 Can. S.C.R. 50, at 68.

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usage cannot override a special contract. In the present case, the respondent testified to the fact that there was a special contract whereby the identical certificate should be returned to him, in case the shares were not sold at the named price. The statement was made clearly and repeated several times in the course of the respondent's testimony. It remained uncontradicted. Christie, with whom the contract was made, was not offered as a witness, although it is not explained that he was not available. The stipulation may be unusual, but it is not unreasonable. The intention may have been to prevent the certificate from losing its identity by being mixed with all the other stocks in the brokers' safety deposit box, or it may have been to avoid precisely what is shown to have happened in the premises.

Ruggles C.C.J., who tried the case in the County Court of Vancouver, dismissed the action. But we do not think it should be assumed from his judgment (which he delivered without giving reasons) that he disbelieved the respondent or that he found against him on the fact whether the special stipulation was made or not. The judgment can be explained upon other grounds; and, besides, we have the statement of counsel for the appellant that the point was not argued before the trial court.

The point, however, was raised before the Court of Appeal, and the learned Chief Justice of that court found that

> the arrangement between the plaintiff (respondent) and Christie was that the certificate should not be parted with unless the shares were sold at the named price but should be kept and re-dilevered to the (respondent).

In our opinion, on the facts proved, the correctness of that finding cannot be disputed. It being so, we see no escape from the consequence that the special arrangement must be given effect to.

We think the evidence sufficiently shows the existence, among brokers in Vancouver, of a general practice and of a well understood usage, such as was alleged by the appellant in their dispute note, if we add to it the proviso that the broker should always have on hand or under immediate control a sufficient number of shares to take care of his obligations towards all his clients. As a rule, the proper inference would be that transactions and dealings between broker and customer, in respect to stocks negotiated on the

Vancouver Stock Exchange, are impliedly affected by the incidents of the practice and usage referred to. But there can be no recognized custom in opposition to an actual contract, and the special agreement of the parties must prevail.

What we have just said is sufficient to dispose of the appeal. The Court of Appeal awarded damages and, under the particular circumstances of the case, the question whether, on account of the technical breach, any loss was inflicted upon the respondent, was one of not inconsiderable nicety. In view of the terms of the order granting special leave to appeal, there would be no object in our expressing an opinion upon that or upon any other point, except so far as we have already stated.

The appeal is therefore dismissed. The question of costs was already provided for in the order granting leave.

Appeal dismissed.

Solicitors for the appellant: *Farris, Farris, Stultz & Sloan.*
Solicitor for the respondent: *C. S. Arnold.*