Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chapman and another v. *The Great Central Freehold Mines, Limited, and others, from the Supreme Court of Victoria; delivered the 28th November* 1905.

Present at the Hearing:

LORD MACNAGHTEN.
LORD ROBERTSON.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Robertson.*]

By the Judgment appealed against, the Supreme Court of the State of Victoria has given decree in favour of the Respondent John Brandon, for 3,333*l.* 6*s.* 8*d.* against the Appellants, with costs. In so doing, the Supreme Court amended the Judgment of the Chief Justice, who had given the same decree, not to the Respondent Brandon, but to the Respondent The Great Central Freehold Mines, Limited. This variance, as will be seen in the sequel, is of minor importance.

The action was brought to recover the sum for which decree has been given as the unpaid balance of 5,000 1*l.* shares in what, for shortness will be called the Great Central Company, 1,666*l.* 13*s.* 4*d.* having been already paid. The writ was issued on 3rd November 1902; and the amended Statement of Claim is dated 15th September 1903. The bargain sought to be enforced was one of sale of 20,000 shares in The Great Central Company;

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and in the letters founded on the sellers were represented, so far as signatures to the letters are concerned, by John Brandon and the buyers by F. P. Brett. The amended Statement of Defence of the present Appellants was delivered on 22nd September 1903. They admitted that Brett acted for them and one John Moffat (who is not sued and need not be further considered). They stated several grounds of defence, of which two only need now be mentioned, viz., (1) that the agreement alleged was an agreement to issue shares at a discount and to reduce the capital of the Great Central Company and therefore illegal; and (2) that the Appellants were induced to enter into the agreement by misrepresentation and concealment of material facts.

The action came on for trial before Chief Justice Madden on 15th September 1903, and the trial lasted six days. The Chief Justice refused to admit evidence of misrepresentation, and gave Judgment for the Great Central Company, holding the contract to be valid. The Appellants took the case to the review of the Supreme Court, with the result already stated, Mr. Justice a'Beckett differing from his two colleagues on the ground that evidence of misrepresentation was wrongly excluded. The Appellants before their Lordships have invited attention to two main questions, viz., (1) was not the agreement sued on an agreement by the Great Central Company to issue shares at a discount, and therefore illegal? and (2) was not evidence of misrepresentation wrongly excluded? (Related to the former of these there arises the question whether the proper Plaintiff is not the Great Central Company).

The case, as exhibited by the Record, is somewhat complicated; but a correct understanding of the controversy is aided by seeing what (among all the numerous communications in the

case) is the agreement sued on. The Statement of Claim says that the agreement was made by "certain letters," and in the particulars the "certain letters" are specified as Exhibits P to V inclusive. These letters, no doubt, relate back to other letters and to a former agreement, and the relations of the various parties have got to be understood; but they contain the bargain, and this will be found to be of crucial importance. A few words may first be said explaining the circumstances.

The Great Central Company was a mining company, with limited liability (and it may conveniently be noted that it was not disputed that under the law of the Colony such a company's powers of issuing its shares were subject to the same limitations as prevent an English limited company from issuing its shares at a discount). The Company was registered on 2nd July 1900. It was got up for the purpose of working a mining property situated at South Mount Hope, which it acquired from the Respondents, the Intercolonial Mines Purchase Option and Development Company, no Liability (to be called for shortness the Intercolonial Company.) The latter Company was the parent Company, and so completely was the Great Central Company the creation of the other, and so entirely were the directors and officers common to both, that in the initial stages it is difficult to distinguish between the acts of individuals in the one capacity and in the other. One cardinal fact stands out distinctly enough; the price of the property as between the two Companies was 300,000 fully paid-up shares in the Great Central Company. At the date of the bargain now sued on, those shares belonged to the Intercolonial Company.

Now the Intercolonial Company having started the Great Central Company, resolved

to get itself wound up; and the bargain now sued on is, in one of its aspects, an incident in this winding up, while it is at the same time an incident in the issue of the Great Central shares, the Respondent Brandon having in that transaction acted with the authority of both Companies. The bargain came about in this way: In issuing its shares, the Great Central got Mr. Brett (already mentioned) to undertake to dispose of 5,000 shares of the new Company. The stock does not seem to have gone off very easily, but Mr. Brett got the Appellants to allow him to agree, as he did in October 1900, to give 5,000*l.* in instalments, provided they got not merely the 5,000 shares but 2,500 more, and an indemnity against loss from the Intercolonial Company. It would rather appear that in this original agreement the 2,500 shares were to come, as well as the indemnity, from the Intercolonial Company. If this were not so, and if they were to come from the Great Central Company itself, the legality of the transaction could not be supported; but the sequel of events renders this a speculative question. For, shortly after this agreement, viz., in December 1900, Mr. Brett noticed that the Intercolonial Company were going into liquidation and told Mr. Brandon that this could not be done "until the indemnity given to me is disposed of"; and, on liquidation being resolved on, Mr. Brett held his ground, refused to allow the funds to be divided, and on 25th March 1901 wrote that, unless the conditions undertaken by the Intercolonial Company were fulfilled, he was not bound to carry out his purchase of the shares, and that the only question was "carry out" the contract "or cancel it." It is in view of this definite challenge that Exhibit P was written by Mr. Brandon, which is the first of the series of letters founded on by the Respondents in their

Particulars. When these letters are read in this light, their import is unambiguous. Unable to "carry out" the original bargain, Mr. Brandon suggests that instead of the 2,500 extra shares, and the indemnity, Mr. Brett should take 15,000 shares in addition to the 5,000, which, as before, were to be issued. The ultimate expression of the agreement is in Exhibit U, and the post-script reminds the reader of the party interested to remove the difficulty.

"The Intercolonial, &c., Company (in Liquidation),
"47, Queen Street, Melbourne.
"29th April 1901.

"John Brandon,
"Manager.
"F. P. Brett, Esq.,
"120, William Street,
"Melbourne.

"Dear Sir,

"I have to acknowledge receipt of your favours of the "18th and 27th instant, and now beg to accept your offer "on the terms set out therein, viz., one third cash on the "expiration of the present option, one-third in three months "after and one-third six months after, which would make the "payments due on the following dates:—

"1,666*l.* 13*s.* 4*d.* on the 1st August 1901.
"1,666*l.* 13*s.* 4*d.* on the 1st November 1901.
"1,666*l.* 13*s.* 4*d.* on the 1st February 1902.

"and on receipt of the final payment fully paid scrip for "20,000 (twenty thousand) shares in the Great Central "Freehold Mines, Limited, will be handed to you.

"I shall be obliged if you will confirm this by return.

"Yours very truly,
"JOHN BRANDON,
"Liquidator.

"P.S.—I am now proceeding to distribute the assets of "the Intercolonial Mines Purchase Company amongst those "interested.

"J. B."

By the conclusion of this agreement the original contract was superseded, or, to use Mr. Brett's phrase, "cancelled," for the one came in place of the other. The new contract was so far carried out by payment being made to the Great Central of the first instalment; but, before the second instalment came to be

due, the Appellants found that the mine was less valuable than they had supposed and refused to make further payments.

On the question of whether the agreement was an agreement to issue shares at a discount, the position of the Respondents is that so far as 5,000 shares were concerned they were to be issued by the Great Central at par in return for 5,000*l.*, per the instalments; and that the 15,000 shares which form the excess consideration were to come not from the hitherto unissued shares of the Great Central Company, but from the fully paid-up shares which belonged to the Intercolonial Company, having come to them as the price of the property. That this is so is hardly disputed and is at least clear, the intention having been to give the Appellants the extra 15,000 shares out of a block of 30,100 shares, which had been set aside out of the 300,000 fully paid-up shares assigned to the Intercolonial Company as the price of the property.

But then the Appellants say that the arrangement by which their 30,100 shares were set aside was made on 29th May 1900, before the registration of the Great Central, and that it shows that in the inception of the Great Central, this part of the 300,000, ostensibly the price of the property, did not represent value but a fund for discounting the sales of the rest of the shares. The letter setting out the agreement is as follows:—

"47, Queen Street, Melbourne.

"To the Directors of the Intercolonial Mines.

"Purchase Option and Development Company N.L.

"Dear Sirs,

"In futherance of the agreement made at a meeting of "the shareholders in the above Company held the twenty-ninth "day of May 1900 we hereby authorise you to dispose of the "30,100 shares in the Great Central Freehold Mines, Limited, "(which will remain in your hands after distributing 10,100 "shares for each full share in the Intercolonial Mines Purchase "Option and Development Company and providing for the

"shares to be given to the underwriters) for the purpose of "assisting in the sale of the shares of the Great Central "Freehold Mines, Limited, not already disposed of or in "furthering the interests of that Company.

"Yours truly,

"E. Neale Wigg.
"Thos. Rollason.
"John Brandon (by his "attorney Thomas "Rollason).
"J. T. Lempriere.
"Alec. Campbell.
"Alfred Mellor.
"Edward Miller.
"John A. Patterson.
"Harvey Patterson.
"D. E. McBryde (by "his attorney W. "McNichol).
"T. King.
"A. T. Brown."

Upon this argument of the Appellants it is to be observed that it is indirect and complicated. The case put is not that in the transaction with the Appellants the issuing Company gave more than 20s. worth for the £, but that the transfer of additional shares by the parent Company invalidates the transaction with the issuing Company because the original price of the property was inflated for this purpose. Their Lordships have no occasion to negative the validity of such a case if clearly made out. But in the present instance the dealing with the 30,100 shares does not occur as part of the original fixing of the number of fully paid-up shares to be given as the price of the property. It is a dealing by the shareholders of the Intercolonial Company of what was (in conception) already their own to deal with as they chose within the purposes of a company like theirs. There is, again, no evidence at all that the figure 300,000 was fixed in view of any other element than the value of the property or that the property was in truth estimated at a different and smaller figure. Accordingly their Lordships are unable to accede to the Appellants' argument on this branch of the case. They hold that the new bargain (the bargain sued on) was simply that in return for the stipulated payments Brandon was to find 20,000 shares. It is known where he was to get them, the 5,000 coming from the unissued

shares and the 15,000 from the Intercolonial Company's fully paid-up shares. Unless it were the law that no third party can with the knowledge of the issuing company, give additional shares in consideration for a purchaser paying the issuing Company at par, the case as established in evidence fails the Appellants. It is obvious that the principle which is illustrated by the case of *The Ooregum Gold Mining Company* v. *Roper* (1892 A. C. 125) only applies where the issuing company gives away more shares than it gets the value of.

In the view of the facts thus taken by their Lordships, both the other points taken by the Appellants must also fail. The bargain being a bargain with Brandon and not with the Great Central, it is impossible to treat the Great Central as holding out the prospectus to the Appellants, and the case is within the rule of *Peek* v. *Gurney*. (L. R. 6 H. L. 377.) Their Lordships are also disposed to think that the prospectus does not, even in the passages singled out for attack, purport to do more than summarise Mr. Brown's report. This is the more readily to be accepted as the Appellants disclaimed all imputations on the honesty of the Directors issuing the prospectus.

Their Lordships agree with the Supreme Court in holding Mr. Brandon to be the proper Plaintiff. The fact is that he was not contracting simply as the agent of the Great Central Company, although the authority of the Great Central Company, as well as the Intercolonial Company, put him in a position to fulfil his contract. And the general law of *Thomson* v. *Davenport* (9 B. & C. 78, Smith's Leading Cases, 11th ed., Vol. II., p. 379) presents no difficulty in the way of such an action.

Their Lordships will humbly advise His Majesty that the Appeal ought to be dismissed. The Appellants will pay the costs of the Appeal.