Privy Council Appeal No. 39 of 1913.

Arthur Allen and others - - - *Appellants,*

v.

John C. Hyatt and others - - - *Respondents.*

FROM

THE COURT OF APPEAL FOR ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND APRIL 1914.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD DUNEDIN.
LORD SHAW.
LORD MOULTON.
LORD PARKER OF WADDINGTON.

[*Delivered by* THE LORD CHANCELLOR.]

The appellants were the directors of a Company called the Lakeside Canning Company, Limited. The capital of the Company was $750,000 in shares, each of $250. Such shares were issued to the extent of $30,500, and in the year 1909 and for a short time in 1910 these shares were held to the extent of $10,000 by the seven appellants, and to the extent of $20,500 by the twenty-two respondents and certain other persons not parties to these proceedings. In January 1907 a dividend of 15 per cent. had been paid, but no further dividend had since been declared.

In November 1909 negotiations took place between the appellants as directors and one Grant, who was endeavouring to amalgamate the canning companies of Ontario. His purpose was to acquire the shares and undertaking of the

Lakeside Company. After negotiation, during which the consideration asked by the appellants was increased, a transfer was finally agreed on at the following price :—

	Dollars.
Cash for factory and plant -	33,750.00
Cash for raw materials -	8,406.44
Allotment of Preferred Stock in Dominion Canners, Limited - - -	11,250.00
Allotment of Common Stock in ditto - - -	15,000.00
Total in cash -	42,156.44
Total in shares -	26,250.00

The Dominion Canners, Limited, was the amalgamating company which Grant was forming. The transaction was carried through early in March 1910.

In the interval the appellant directors took various steps which have given rise to this litigation. On the representation that it was necessary for the directors to secure the consent of the majority of the shareholders in order to effect the amalgamation, and before the price had been settled they approached individual shareholders, including the respondents, and induced them to give to the appellants options to purchase their shares at the par value of $250 with interest at 7 per cent. for the periods during which no dividend had been paid. About 18th February 1910 they exercised these options and paid the shareholders concerned $22,883.75. The shareholders endorsed their share certificates in blank and handed them to the appellants. The result of the transaction was that the appellants made what was apparently a handsome profit, measured by the difference between what they paid the other shareholders, and what they received from the Dominion Company,

subject only to deduction of the debts of the Lakeside Company which they had undertaken to the former Company to pay, but which do not appear to have been large.

The action was brought by the respondents for a declaration that the appellants were trustees for the shareholders of the Lakeside Canning Company of the profits derived from the Dominion Company, and for an account and consequential relief. Mr. Justice Sutherland tried the case and, after hearing evidence, found the facts substantially as follows:—that general and similar representations were made by the appellants to each of the respondents, to the effect that the former as directors wanted the options from the shareholders in order to deal on behalf of all the shareholders with the representatives of the Dominion Company; that the appellants expected to realise the par value of the shares, and the 7 per cent. interest and that all the shareholders including themselves were to share *pro rata* in the amount realised; that the appellants did not inform the other shareholders that they were buying their shares on their own account, and that they had entered into a secret arrangement by which they kept concealed from the other shareholders, the information which it was their duty, as directors to disclose, and that the appellants were thereby guilty of fraud. Objections were taken on behalf of the appellants at the trial to the form of the proceedings. It was said that the directors were trustees, if at all, for the Lakeside Company, and that the latter ought to have been a party either as plaintiff or defendant, and that in its absence the respondents were not entitled to sue on behalf of themselves, and the other shareholders. There appears to have been some doubt as to whether the Company had or had not been

added as a party and the learned Judge inclined to think that, possibly because the Dominion Company had by the time of the litigation acquired all the shares, it was not represented so as to enable him to deal effectively with the matters in question. He, however, seems to have considered that as it had been made out to his satisfaction, that the appellants were, on the footing that the transaction could not then be set aside but must be treated as adopted by the respondents and the other shareholders, trustees of what they had received, the objection was not serious. He offered, if the respondents preferred it, to retain the record, and after any further trial that was necessary to put it into proper form, but expressed his willingness to give judgment as it then stood to the effect already indicated. The respondents elected to accept the second alternative. The appellants appealed to the Divisional Court, which affirmed the judgment. But as the learned Judges who heard the appeal considered that the action was really one in which a group of individual shareholders had joined together, but were suing individually on separate causes of action, they amended his judgment by confining it to the plaintiffs on the record, and directing that the account taken should deal with the amount which each individual plaintiff was entitled to receive. From the judgment in this form the appellants appealed to the Court of Appeal for Ontario. This Court took the same view as the Divisional Court, and dismissed the appeal. They concurred in the findings of fact by the trial Judge just as the Divisional Court had done. They held that although under other circumstances it might be that the fiduciary duty of the directors was a duty to the Company and not to individual shareholders, yet under circumstances such as those of the case

before them, the directors became the agents in the transaction of the shareholders, when they took the options from them. They thought that the addition of the Lakeside Company as a party, if made, had been irregularly made, having regard to the real character of the action as one brought by a group of individual plaintiffs with what were substantially similar causes of action, and they struck out the name of the Company from the record in affirming the judgment.

Arguments have been addressed to their Lordships both on the question of procedure and on the substantial issue whether the appellants were properly found to have put themselves in the circumstances of this case in a fiduciary relation to the respondents. On the latter point their Lordships do not think it necessary to say more, so far as the questions of fact are concerned, than that, having heard the arguments and considered the evidence, they see no ground for not accepting the concurrent findings of the three Courts which have already decided this issue. They agree with the learned Judges of the Court of Appeal of Ontario in thinking that under the circumstances of the case the respondents were entitled to treat the appellants as trustees for them, and, subject to the question of procedure, to ask for the relief they obtained.

The appellants appear to have been under the impression that the directors of a Company are entitled under all circumstances to act as though they owed no duty to individual shareholders. No doubt the duty of the directors is primarily one to the Company itself. It may be that in circumstances such as those of *Percival* v. *Wright* (1902, 2 Ch. 421), which was relied on in the argument, they can deal at arm's length with a shareholder. But the facts as found in the present case are widely different from those in

Percival v. *Wright*, and their Lordships think that the directors must here be taken to have held themselves out to the individual shareholders as acting for them on the same footing as they were acting for the Company itself, that is as agents.

The question of procedure has, however, been strenuously argued, and their Lordships will deal with the points raised under this head. There is no doubt that on the Statement of Claim the action was originally brought as a class action by the plaintiffs on behalf of themselves and all the other shareholders. In the absence of the Company itself, which does not appear to have been properly made a party, the claim was demurrable. Moreover it appears on the face of the Statement of Claim that the shares of the plaintiffs had been transferred to the Dominion Company, so that, in the absence of a claim to set this transfer aside, a claim which could not have been successfully made in the absence of that Company, the relief sought was demurrable on this ground also. The appellants therefore argued that as the proper plaintiff was the Company and as the respondents had parted with their shares, the action must fail. It appears, however, that throughout the proceedings in the three Courts below the action was treated by these Courts, which had power to amend the pleadings if they thought it necessary, as one for a declaration that the appellants became, under the circumstances proved by the evidence, the agents of the respondents in dealing as they did with their shares, and that on this footing judgment was given in a form which afforded the relief to which the respondents were held entitled. In other words the action was treated as one in which the respondents had sued individually as co-plaintiffs, joining in asserting their causes of action. Their

Lordships see no reason for holding that any substantial injustice has been done by the Courts below in proceeding on this footing. The rule of procedure in Ontario does not, in their Lordships' opinion, preclude the Court from amending or treating as amended the pleadings so as to enable relief to be given as though claimed in this fashion. It has been argued for the appellants that because of the original form of the pleadings and the joinder in one proceeding of separate causes of action injustice may have happened by the improper admission of evidence. Their Lordships are, however, unable to find that such a result was brought about, and they think that under the circumstances the procedure adopted in the Courts below was admissible.

They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

ARTHUR ALLEN AND OTHERS

v.

JOHN C. HYATT AND OTHERS.

DELIVERED BY
THE LORD CHANCELLOR.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1914.