Privy Council Appeal No. 62 of 1915.

A. B. Cook - - - - - - *Appellant,*

v.

George S. Deeks and others - - - *Respondents.*

FROM

THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD FEBRUARY 1916.

Present at the Hearing.

THE LORD CHANCELLOR. LORD PARKER OF WADDINGTON.
VISCOUNT HALDANE. LORD SUMNER.

[*Delivered by* THE LORD CHANCELLOR.]

The appellant in this case is the plaintiff in a suit brought against the respondents, under circumstances to which full reference is necessary; his rights depend entirely upon the fact that he is, and has, throughout the whole history of these proceedings, been, a shareholder in the Toronto Construction Company, Limited, one of the defendants in the suit. Between himself and the defendants G. S. Deeks, G. M. Deeks, and T. R. Hinds, there have been at sundry times various business arrangements and relationships outside their association in the Toronto Construction Company; but, except for the purpose of explaining what may have

caused the conduct to which these proceedings are due, it is unnecessary to refer at length to these relationships.

The Respondent, the Toronto Construction Company, was formed some time in 1905; the date of its incorporation is nowhere exactly stated, nor is it material. It appears that at the date of its incorporation all the parties were in business in various parts of the Dominion of Canada and the United States of America as contractors. The two defendants—G. S. Deeks and G. M. Deeks—were in partnership, and had just completed for the Canadian Pacific Railway Company a subway under the track of the Canadian Pacific Railway at Winnipeg. In 1905 the Canadian Pacific Railway were asking for tenders for the construction of a line from Bolton to Parry Sound, known as the Toronto Sudbury Line, and the tenders of G. S. Deeks made, as it would appear, on behalf of the firm of Deeks and Deeks, were accepted by the company. Before tendering, arrangements had been made by Messrs. Deeks with a firm of Winters, Parsons, and Boomer that they should take an interest in the contract to the extent of one-half if G. S. Deeks were successful in obtaining it. Mr. Winters, however, had assumed certain obligations which rendered him unwilling to accept his full share of responsibility, and the plaintiff and the defendant, Hinds, were accordingly introduced by him to Mr. Deeks, in order to supplement his obligation, with the result that all the parties agreed to share in the contract in the following proportions: G. S. Deeks and G. M. Deeks to take three-eighths; the plaintiff and the defendant Hinds to take three-eighths; and Winters, Parsons and Boomer one-quarter. In order to

place these relationships upon a fixed foundation, and the better to define their interests, the Toronto Construction Company was formed, and its share capital distributed in the proportions mentioned, the Company taking over and carrying out the work under the contract.

In 1906 Messrs. Winter and Boomer withdrew from the company, and the stock that they held was divided equally among the remaining parties, so that the plaintiff and each of the three defendants—George S. Deeks, George M. Deeks, and T. R. Hinds—held one-fourth of the entire capital of the company, with the exception of four shares held by Mrs. Deeks (the wife of George S. Deeks), whose introduction as a shareholder was necessary in order to provide the total number of five. These interests have remained unchanged down to the present time.

The board of directors was comprised of Messrs. Deeks, Hinds, and the plaintiff, and, in addition, George S. Deeks was appointed president of the company, the plaintiff was general manager, and Hinds was secretary and treasurer, though their Lordships do not think that the description of these offices affords an accurate description of the duties assumed and discharged by the various parties. The company appears to have carried out the work of laying the Toronto Sudbury Line to the entire satisfaction of the Canadian Pacific Railway, and they continued to tender, and were fortunate in obtaining a considerable number of other contracts of great value from the Canadian Pacific Railway. Apart, however, from this work, they undertook no other contracts. As has been already stated, during part of the time of the operations of the company, the plaintiff and the three defendants

were associated together in various other enterprises of a similar nature in Montana and in the West, but no contracts were taken in the east excepting by the Toronto Construction Company.

In 1907 disagreement appears to have arisen between the parties, and the different firms which had been constructed between them, and were all partnerships at will, were dissolved, and the parties refused to enter into any further voluntary arrangements between themselves.

Subsequently, in 1909 the Canadian Pacific Railway Company invited tenders for an important contract, known as Seaboard Number 2, a contract which involved the continuation of a line which had been already laid by the Toronto Construction Company. This contract was tendered for by the company, in competition with others, in the usual way. Their tender did not appear to be the lowest. In consideration, however, of the company having previously constructed the line known as Seaboard Number 1, the company was given the contract at the lowest price. The date of that contract was May 14th, 1910. Seaboard Number 3 was again taken up on behalf of the Toronto Construction Company, and apparently the negotiations for it were entirely conducted by Mr. Hinds, or at any rate by Mr. Hinds and Mr. Deeks; while finally a contract known as the Guelf Junction and Hamilton Branch was also taken on the 29th of April 1911, Mr. Leonard acting for the Canadian Pacific Railway, and either G. S. or G. M. Deeks acting on behalf of the company. As this contract was nearing completion, the defendant Hinds gave the manager of the Toronto Construction Company —H. F. McLean—instructions to get the work

through as quickly as possible, as other work was coming up. The statement upon this matter is important, and it had better be given in the actual words, taken from the evidence of Mr. McLean :—

"Q.—Was the work on the Seaboard line handled in "any respect in any exceptional way, was there anything "out of the ordinary in the way that work was handled? "A.—What is that?

"Was there anything out of the ordinary in the way "the work on the Seaboard line No. 2 and 3 was han- "dled? A.—I do not know that it was.

"Q.—Was it proceeded with at the ordinary rate of "expedition? A.—No, I think we made better progress "on that line than I had on the other line.

"Q.—What was the reason for that progress? A.—We hurried the work through.

"Q.—You hurried the work through? A.—Yes.

"Q.—Why did you do that? A.—Why did we do it?

"Q.—Why did you personally? A.—I always rush "our work as fast as we possibly can.

"Q.—Did you get any instructions as regards the Sea- "board line, any special instructions? A.—Yes, I had "special instructions regarding the line.

"Q.—Who did you receive these from? A.—I think "it was from Mr. Hinds. I am quite sure it was Mr. Hinds "and I do not remember any conversation with Mr. Decks "over it.

"Q.—Tell me what Mr. Hinds said about rushing the "Seaboard? A.—He said there was other work coming "up. The Company was going to do it, if we rushed "this through and got it through that fall, our opportunity "would be better to get this other work.

"Q.—Did he say what other work? A.—Yes, he "referred to a contract the C.P.R. was proposing to run "on the South Shore—I do not know what the name of "the contract was. It is the line they were proposing to "run on the South Shore——

"Q.—The South Shore of what? A.—I think they "called it the South Shore line. It was down near Lake "Ontario somewhere.

"Q.—We have referred in these proceedings continually "to a South Shore line—I think the line is sometimes "referred to as the Campbellford, Lake Erie & Western—is "that the one? A.—That is the one I have referred to.

"Q.—There are a great many South Shores, and I "wanted to make sure. And it was on these instructions "of Mr. Hinds you acted in reference to the work? "A.—I acted on these instructions.

"Q.—And did you keep the work up later in the fall? "A.—Yes, we tried our best to finish it, so we worked "away until December.

"Q.—For the same reasons? A.—Yes, on some of it, "and some of it we worked in the winter.

"Q.—Was that unusual? A.—Not for the class of "work we were doing there—it would be unusual for the "class of work—ballasting and track laying in December."

The South Shore contract is the one which has given rise to the present dispute, and it is of the utmost importance to follow closely the circumstances under which it was obtained. The representative of the Canadian Pacific Railway Company was a Mr. Leonard, and it was he who arranged some, though it is impossible to say how many, of the contracts effected with the Toronto Construction Company on behalf of the railway company. His negotiations were always carried out either with Mr. Deeks or with Mr. Hinds. He never discussed any details with any other person, and he never saw the plaintiff in the office, though he sometimes saw him on the line.

The management of Messrs. Deeks and Hinds of the affairs of the construction company was eminently satisfactory; but so far as railway construction was concerned, the whole of their reputation for the efficient conduct of their business had been gained by them while acting as directors of the Toronto Construction Company.

In 1911, and probably at an earlier date, the three defendants had settled that they would no longer continue business relationships with the plaintiff. It is unnecessary to seek the cause of the quarrel, or to determine

whether they had good reason for the opinion that they had formed. There was nothing to compel them to work with or for the plaintiff, and it is impossible to see that they were bound to continue their relationship with him by any legal or moral consideration. They were, however, involved with him in different reciprocal duties, by reason of their relationship in connection with the Toronto Construction Company, and if they desired freedom to act, without regard to the restrictions that those relationships imposed, it was necessary that they should terminate their position as directors and shareholders in the company, and place it in dissolution. This they could easily have accomplished owing to the fact that they held three-fourths of the share capital. It is suggested that they might also have resolved at a general meeting of the company that the company should no longer continue the work. This would have been all but equivalent to a resolution of voluntary liquidation; but even this step was not taken. While still retaining their position as directors, while still actually acting as managers of the company, and with their duties to the company of which the plaintiff was a shareholder entirely unchanged, they proceeded to negotiate with Mr. Leonard for the new Shore Line contract, in reality on their own behalf, but in exactly the same manner as they had always acted for the company, and doubtless with their claims enforced by the expeditious manner in which they, while acting for the company, had caused the last contract to be carried through.

The negotiations for this contract were opened by a telephone message sent through to Mr. Hinds at the Toronto Construction Company's office. Upon receipt of that message

certain units of price were prepared in the company's office; and, the prices being ultimately fixed, the defendant Hinds was informed by Mr. Leonard that, although the prices had been agreed to, the contract would not be then immediately let, as it was necessary that there should be an appropriation of the necessary cash made to authorise the contract by the Canadian Pacific Railway Company.

During the whole of this discussion, up till the time when these prices were fixed, it does not appear that at any moment the representatives of the Canadian Pacific Railway Company were told that this contract was in any way different from the others that had been negotiated in the same manner on behalf of the Toronto Construction Company; although it was plain that Mr. Leonard had been told by Mr. Deeks, when he was engaged on the Georgian Bay and Seaboard line, that when it was finished Messrs. Deeks and Hinds intended to go on their own account and leave Mr. Cook. But, after all the necessary preliminaries of the contract had been concluded, Mr. Hinds made to Mr. Leonard this statement: "Remem-" ber, if we get this contract it is to be Deeks " and I, and not the Toronto Construction " Company."

On March 12th, 1912, the Canadian Pacific Railway Company made the necessary appropriation for the contract, and this was communicated to Mr. Deeks by Mr. Ramsay, who said that they might proceed with the contract at once. As from this moment, although the formal contract was not signed until the 1st April, the defendants became certain of their position, and knew that they had obtained the contract for themselves. They then for the first time informed the plaintiff of what had happened.

He protested without result, and the defendant —the Dominion Construction Company—was formed by the three defendants, G. S. Deeks, G. M. Deeks, and T. R. Hinds, to carry out the work. The contract was accordingly taken over by this company, by whom the work was carried out and the profits made.

On the 20th March 1912, there was a meeting of directors of the Toronto Construction Company, at which the three defendants were present; and they resolved that a fresh meeting of the shareholders be held to consider the question of the voluntary liquidation of the company.

Ultimately, after sundry meetings which are really not material, on the 26th of April 1913 resolutions were passed owing to the voting power of the defendants, G. S. Deeks, G. M. Deeks, and T. R. Hinds, approving the sale of part of the plant of the company to the Dominion Construction Company, and a declaration was made that the company had no interest in the Shore Line contract, and that the directors were authorised to defend this action, which had in the meantime been instituted.

Two questions of law arise out of this long history of fact.

The first is whether, apart altogether from the subsequent resolutions, the company would have been at liberty to claim from the three defendants the benefit of the contract which they had obtained from the Canadian Pacific Railway Company.

And the second, which only arises if the first be answered in the affirmative, whether in such event the majority of the shareholders of the company constituted by the three defendants could ratify and approve of what

was done, and thereby release all claim against the directors.

It is the latter question to which the Appellate Division of the Supreme Court of Ontario have given most consideration, but the former needs to be carefully examined in order to ascertain the circumstances upon which the latter question depends.

It cannot be properly answered by considering the abstract relationship of directors and companies; the real matter for determination is what, in the special circumstances of this case, was the relationship that existed between Messrs. Deeks and Hinds and the company that they controlled.

Now, it appears plain that the entire management of the company, so far as obtaining and executing contracts in the east was concerned, was in their hands, and, indeed, it was in part this fact which was one of the causes of their disagreement with the plaintiff. The way they used this position is perfectly plain. They accelerated the work on the expiring contract of the company in order to stand well with the Canadian Pacific Railway when the next contract should be offered, and, although Mr. McLean was told that the acceleration was to enable the company to get the new contract, yet they never allowed the company to have any chances whatever of acquiring the benefit, and avoided letting their co-director have any knowledge of the matter. Their Lordships think that the statement of the Trial Judge upon this point is well founded when he said that "it is hard "to resist the inference that Mr. Hinds was "careful to avoid anything which would "waken Mr. Cook from his fancied security," and again, that "the sole and only object on

" the part of the defendants was to get rid " of a business associate whom they deemed, " and I think rightly deemed, unsatisfactory " from a business standpoint." In other words, they intentionally concealed all circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their own favour, and there was no longer any real chance that there could be any interference with their plans. This means that while entrusted with the conduct of the affairs of the company they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect.

It is quite impossible to enter into the speculations which form part of the examination of Mr. Leonard and Mr. Ramsey on behalf of the Canadian Pacific Railway. What might have happened if the railway company from the first considered Mr. Cook as a possible competitor, or considered the position of the Toronto Construction Company apart from Messrs. Deeks and Hinds, is a matter too conjectural to be brought into consideration. Their Lordships think that the Appellate Division of the Supreme Court of Ontario may have been misled in the attempts that they made to see whether this particular duty of the defendants had been the subject of previous judicial decision. Their Lordships see no reason to differ from the opinion which the Appellate Division extracted from careful consideration of the authorities, except so far as they were led by these conclusions to regard the transaction as a question of policy and a matter that lay entirely within the directors' individual discretion. But this reservation is important, for

throughout the whole of the judgments, both of the learned Judge who tried this case and of the Appellate Division, there is underlying rather the question as to whether the transaction was not one which, by virtue of their preponderating influence in the company, the defendants would be able ultimately to put right, than the real question of whether it was one into which, consistently with their duty, they were at liberty to enter.

It is quite right to point out the importance of avoiding the establishment of rules as to directors' duties which would impose upon them burdens so heavy and responsibilities so great that men of good position would hesitate to accept the office. But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent.

Their Lordships think that, in the circumstances, the defendants, T. R. Hinds and G. S. and G. M. Deeks, were guilty of a distinct breach of duty in the course they took to secure the contract, and that they cannot retain the benefit of such contract for themselves, but must be regarded as holding it on behalf of the company.

There remains the more difficult consideration of whether this position can be made regular by resolutions of the company controlled by the votes of these three defendants. The Supreme Court have given this matter the most careful consideration, but their Lordships are unable to agree with the conclusion which they reached.

In their Lordships' opinion the Supreme Court has insufficiently recognised the distinction between two classes of case, and has applied the principles applicable to the case of a director selling to his company property which was in equity as well as at law his own, and which he could dispose of as he thought fit, to the case of a director dealing with property which, though his own at law, in equity belonged to his company. The cases of the *North West Transportation Company* v. *Beatty* (12 A.C. 589) and *Burland* v. *Earle* (1902, A.C., 83), both belonged to the former class. In each, directors had sold to the company property in which the company had no interest at law or in equity. If the company claimed any interest by reason of the transaction, it could only be by affirming the sale, in which case such sale, though initially voidable, would be validated by subsequent ratification. If the company refused to affirm the sale the transaction would be set aside, and the parties restored to their former position, the directors getting the property and the company receiving back the purchase price. There would be no middle course. The company could not insist on retaining the property while paying less than the price agreed. This would be for the Court to make a new contract between the parties. It would be quite another thing if the director had originally acquired the property which he sold to his company under circumstances which made it in equity the property of the company. The distinction to which their Lordships have drawn attention is expressly recognised by Lord Davey in *Burland* v. *Earle*, and is the foundation of the judgment in *North West Transportation Company* v. *Beatty*, and is clearly

explained in the case of *Jacobus Marler Estates, Limited* v. *Marler and Another*, a case which has not hitherto appeared in any of the well-known reports. (*See* Note at the end of this judgment.)

If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company, and ought to have been dealt with as an asset of the company. Even supposing it be not *ultra vires* of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North West Transportation Company* v. *Beatty* and *Burland* v. *Earle* have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves.

Such use of voting power has never been sanctioned by the courts, and, indeed, was expressly disapproved in the case of *Menier* v. *Hooper's Telegraph Company* (9 Ch. App., 350).

If their Lordships took the view that, in the circumstances of this case, the directors had exercised a discretion or decided on a matter of policy (the view which appears to

have been entertained by the Supreme Court) different results would ensue, but this is not a conclusion which their Lordships are able to accept. It follows that the defendants must account to the Toronto Company for the profits which they have made out of the transaction. Their Lordships will therefore humbly advise His Majesty that the judgments of Middleton, J., and of the Appellate Division be set aside, and that the case be referred back to the High Court Division of the Supreme Court of Ontario for the purpose of taking such account. There must not be included in such account any claim in respect of the plant purchased from the Toronto Company; their Lordships are satisfied by the evidence that this was bought at the fair market price. Their Lordships have throughout referred to the claim as one against the defendants, G. S. Deeks, G. M. Deeks, and T. R. Hinds. But it was not, and it could not be, disputed that the Dominion Construction Company acquired the rights of these defendants with full knowledge of all the facts, and the account must be directed in form as an account in favour of the Toronto Company against all the other defendants. The respondents must pay the costs of the appellant here and in the Courts below, and the costs of taking the account will be dealt with in the Supreme Court. Although the account is in favour of the Toronto Company, the plaintiff must have the conduct of the proceedings.

NOTE.

The following is the judgment of Lord Parker of Waddington, delivered in the House of Lords on the 14th April 1913, in the unreported case of *Jacobus Marler*

Estates, Limited v. *Marler and another*, which is referred to on page 14 of the above judgment :—

My Lords, it is no doubt well settled that in equity an agent cannot, without the consent of his principal, given with full knowledge of the material facts and under circumstances which rebut any presumption of undue influence, retain any profit acquired by him in transactions within the scope of the agency. The principal can always in such a case treat the profit as acquired on his own behalf, and insist on its being accounted for to him. For the same reason an agent, whose duty it is to acquire property on behalf of his principal, cannot, without the like consent, acquire it on his own behalf and subsequently resell it to his principal at an enhanced price. In such a case the principal can treat the property as originally acquired for him and the resale as nugatory, and may, therefore, recover from the agent the money paid on such resale less the original price and the expenses incurred by the agent in acquiring the property. This, however, only applies where the relationship of principal and agent existed at the time when the agent acquired the property. If it did not then exist the property acquired was, at the outset, the agent's own property for all purposes, and the subsequent constitution of the relationship of principal and agent cannot deprive him of property already his own. (*Re Cape Breton Company* (26 Ch.D., 221 and 29 Ch.D., 795), *Ladywell Mining Company* v. *Brookes* (35 Ch.D., 400), and *Burland* v. *Earle* (1902, Ap. C., 83). There is another principle of equity which ought to be distinguished from, but is sometimes confused with, that to which I have already referred. Equity treats all transactions between an agent and his principal in matters in which it is the agent's duty to advise his principal, as voidable unless and until the principal, with full knowledge of the material facts and under circumstances which rebut any presumption of undue influence, ratify and confirm the same. In such cases the interest of the agent is in conflict with his duty, and there can be no real bargain at all. It must be remembered, however, that if the transaction be one of sale by the agent to the principal, the latter must, in order to avoid it, be able to restore the agent to his original position. If he has resold the property, or cannot restore it to the agent in its original condition, the right to avoid the transaction will, as a general rule, have been lost. But, even so, it does not follow that the principal is without remedy. He

may be able to recover damages from the agent for negligence in the performance of his duties. Thus, if the agent's duty is to advise the principal as to the purchases of stocks or shares having a market value, and he sells to his principal stocks or shares of his own at prices in excess of their market value, he may be liable in damages for the excess of the prices received over the market value. It is a different matter if the property sold by the agent to the principal is a specific property having no market value, for the court will not fix a new price between the parties. In such a case the measure of damages will be the principal's loss in the whole transaction. If he has suffered no such loss there can be no damages.

The equities above referred to as governing the relationship between principal and agent apply also to other fiduciary relationships, and in particular to that which exists between a company promoter and the company which results from the promotion, and its shareholders.

The facts of this particular case are comparatively simple. Sidney Marler and Jack Jacobus acquired the leasehold property in question on the 14th March 1904, as a joint adventure. On the 13th June 1905, after many disputes, they came to an agreement as to the terms on which they would endeavour to dispose of it. These terms involved the promotion of a company, and the sale of the property to such company at an improved rental, and subject to an obligation to erect certain buildings and to sub-demise part of the property, with the buildings thereon, to Jack Jacobus, at a rent of 1,500*l.* per annum. Sidney Marler, who was an estate agent, having already done a considerable amount of work on behalf of the joint adventurers in trying to dispose of the property, it was further provided that he, or his firm, should receive from Jack Jacobus, as remuneration for such work, a commission of 1,000*l.*

It is reasonably clear, and indeed was in effect admitted by counsel for the appellant company, that neither on the 14th March 1904, nor on the 13th June 1905, was either Sidney Marler or Jack Jacobus in any fiduciary relationship toward the appellant company, or any one whom the appellant company represents. It follows, therefore, that the appellant company can have no equity to treat the property itself or the 1,000*l.* payable to Sidney Marler, or his firm, as property or profit acquired on its own behalf. It appears, however, that, after the 13th June 1905, and

pursuant to the terms agreed on that day, Messrs. Jacobus and Marler entered into the agreement of the 16th June 1905 for the sale of the property to one Phillips, as trustee for the intended company, and that the appellant company was thereafter promoted and registered; Sidney Marler, Seymour Hicks (who was interested in the property through Sidney Marler), and Alfred Beyfus being the first directors. On the 29th June 1905, at a directors' meeting, it was resolved that the agreement with Phillips should be adopted by the company, and that an agreement adopting the same and endorsed thereon should be sealed with the company's seal. Obviously this resolution was not passed by any independent board, and was not binding on the company, and the agreement sealed pursuant thereto was voidable at the option of the appellant company. But the appellant company does not desire to avoid this agreement, even if it be in a position to restore the property to the vendors. Its remedy, if any, must therefore be in damages against Sidney Marler or Seymour Hicks for negligently allowing it to purchase the property on the terms specified. Such damages cannot be measured by the 1,000*l.* commission payable to Sidney Marler or his firm. They can only be measured by the loss resulting to the appellant company from the whole transaction. It is not even alleged, much less proved, that there has been any such resulting loss. The allegation is that, by reason of the negligence of Sidney Marler, the terms on which the appellant company acquired the property were not so beneficial as Sidney Marler might with reasonable care have obtained for the appellant company. In other words, the appellant company is asking the court to fix a proper price between vendor and purchaser, and estimate the damage with reference to such price. This the court cannot do. I concur, therefore, in the opinion that the appeal fails.

In the Privy Council.

A. B. COOK

v.

GEORGE S. DEEKS AND OTHERS.

DELIVERED BY
THE LORD CHANCELLOR.

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

1916.