25, 1934

No. 11 of 1933.

CASE FOR APPELLANT.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

G. A. P. BRICKENDEN (Defendant by Counterclaim) - *Appellant*

AND

THE LONDON LOAN AND SAVINGS COMPANY OF CANADA, THE HURON AND ERIE MORTGAGE CORPORATION, THE CANADA TRUST COMPANY and THE LONDON LOAN ASSETS LIMITED (Plaintiffs by Counterclaim) - - - - - *Respondents*

Case for the Appellant.

1. This is an Appeal by Special Leave from a Judgment of the Supreme Court of Canada which on the 29th March 1933 allowed an Appeal from a unanimous Judgment of the Appellate Division of the Supreme Court of Ontario dated the 1st March 1932 allowing an Appeal by the Appellant from the Judgment of the Trial Judge (Raney J.) dated 11th October 1930 in favour of all the Respondents.

2. The principal points raised in this Appeal are

(*a*) whether the Appellant who is a Solicitor has been guilty of certain acts of grave misconduct

(*b*) whether the onus of proof is upon the Plaintiff or the Defendant in an action brought by a client against his Solicitor claiming damages for an alleged loss, alleged to have arisen out of a transaction between the Plaintiff and a third party, owing to an alleged breach of fiduciary duty on the part of the Defendant towards the Plaintiff

RECORD.

(*c*) whether a right of action arising out of an alleged breach of a fiduciary duty is capable of assignment

(*d*) whether at the time the Counterclaim mentioned in paragraph 20 hereof was instituted, The Respondent The London Loan and Savings Company of Canada existed for the purpose of bringing or had any power to bring the said Counterclaim

3. The principal business of the Respondent The London Loan and Savings Company (hereinafter referred to as The Respondent Loan Company) was to advance money on the security of mortgages upon real estate. At all material times the Respondent Loan Company's Directors were all experienced in the said business and the Respondent Loan Company employed its own Valuer one Gorwill and a Manager one Kent, whose work it was to advise the said Directors upon such applications for loans as might be made to the Respondent Loan Company. At all material times The Appellant was Solicitor to the Respondent Loan Company.

p. 275. Ex. 1 R. p. 285. Ex. 2 R. p. 280. Ex. 3 R.

4. In the autumn of 1922 one Walter Herbert Biggs obtained from the Respondent Loan Company a loan of $18,000 secured by a Mortgage on certain property situate at 116, Elmwood Avenue, in the City of London in the Province of Ontario one Eva Vera Biggs (his wife) joining to bar her dower : shortly thereafter the said Biggs gave as a collateral security to the Respondent Loan Company a Mortgage for $3,000 on certain property situate at 114, Elmwood Avenue as aforesaid which said property was already subject to two Mortgages for $6,000 and $1,000 respectively in favour of one Edwin Barrell. In the following year the said Eva Vera Biggs obtained a loan of $12,000 from the Respondent Loan Company secured by a Mortgage on her property situate at 315, 317, and 319 Ridout Street in the City of London aforesaid.

pp. 125, 134, 135.

5. In the case of each of the loans in paragraph 4 hereof mentioned the Respondent Loan Company obtained from the Mortgagor a bonus in respect of the advance and the Appellant acted as Solicitor for both parties and also received a commission and fees from the Mortgagor to the knowledge of the Respondent Loan Company.

pp. 290, 296. Ex. D.

6. In the Spring of 1923 the said Walter Herbert Biggs applied for a loan to the Respondent Loan Company. The application was not granted.

pp. 69, 129, 297. Ex. 10 R. p. 298. Ex. 13 R.

7. In July 1923 the Appellant personally advanced $5,000 to the said Biggs on the security of a Mortgage from the said Biggs and a collateral Mortgage from the said Eva Vera Biggs each for $5,000 on the said properties (already mortgaged to the Respondent Loan Company as set out in paragraph 4 hereof) and upon the further security of another collateral Mortgage from the

said Biggs on certain property situate at 309, 311, and 313 Ridout Street aforesaid. In August 1923 the Appellant advanced $2,000 to the said Biggs and in January 1924 $1,200 to the said Biggs; each of the said loans were secured by Mortgages on the said properties referred to in this paragraph. The said Biggs paid a bonus to the Appellant in respect of each of the three loans mentioned in this paragraph. In or about November 1924 the said Biggs applied to the Appellant for a further advance of $13,500. At the said date the Appellant's money was all invested and accordingly he informed the said Biggs that he had no money available for the proposed loan.

pp. 130, 301. Ex. 11 R. p. 303. Ex. 14 R. pp. 305, 306. Ex. 15 R. p. 132.

8. Thereafter the said Biggs and Eva Vera Biggs made a written application to the Respondent Loan Company for an advance of $13,500 on the security of the properties already mortgaged (1) to the Respondent Loan Company (2) to the Appellant as aforesaid. This said application showed clearly upon its face that the said properties were held by the said Biggs subject to other Mortgages, some of them to the Respondent Loan Company itself, one to the Respondent The Huron and Erie Mortgage Corporation, and one of $5,000 to the Appellant. The said application further set out the purposes for which the said Biggs required the said loan, namely (1) to pay the arrears of interest on the Mortgages referred to in paragraph 4 hereof (which were Mortgages to the Respondent Loan Company) (2) to pay sundry accounts owing by the said Biggs amounting to $7,500 and (3) to pay off the aforesaid Mortgage for $5,000 held by the Appellant.

p. 66. p. 325. Ex. 5 R.

9. The said application was considered at two Meetings of the Respondent Company's Board of Directors held respectively on the 11th November 1924 and the 17th November 1924. The said application was laid over at the first meeting and allowed at the second meeting as hereinafter set out. The said application was read aloud at the said Board Meetings and after considering the valuations placed by the Respondent Loan Company's Valuer upon the properties mentioned in the said application it was resolved to grant the said application and to charge interest at the rate of 8 per cent. per annum upon the loan of $13,500, and a bonus of $1,000 in respect of the said loan, since it was considered by the Board (as was the fact) that the value of the property to be mortgaged offered adequate security for the loan. The said resolution was duly entered in the Minutes of the said Meeting of the 17th November 1924, and endorsed upon the said application form by the President of the Respondent Loan Company. The Appellant was not present at either of the aforesaid Meetings.

pp. 320, 326. Ex. D. pp. 122, 144, 146. pp. 144, 145.

10. As to the properties mentioned in paragraph 9 hereof it appears from the books of the Respondent Loan Company that the Respondent Loan Company's Valuer the said Gorwill in November 1922 valued 116, Elmwood Avenue at $31,800 and that in January 1923 the said Gorwill valued Nos. 315, 317 and 319 Ridout Street aforesaid at $14,500 and that on the 8th November 1924 the said Gorwill confirmed his said valuations in respect

pp. 328, 329, 330. Ex. Q. of these two properties and that on the 6th October 1925 the said Gorwill valued all the properties covered by the said Mortgage for $13,500 (including both the said properties mentioned in this paragraph) at a total of $81,500 with the existing encumbrances of $60,210 (including the said Mortgage of $13,500) showing a surplus or equity in the said properties of $21,290.

p. 133. 11. The Appellant acted as Solicitor for the said Biggs in connection with the said Mortgage for $13,500 and also, in his capacity of general Solicitor to the Respondent Loan Company, did the legal work in connection with the said Mortgage on behalf of the Respondent Loan Company. The Appellant gave a Certificate of Title to the Respondent Loan Company dated the 12th November 1924 in respect of the said Mortgage. This Certificate which was endorsed by the Respondent Loan Company's manager set out clearly the existing encumbrances against the property to be mortgaged including the Appellant's said Mortgage for $5,000.

pp. 320, 321. Ex. 5 R.

12. The two Mortgages for $2,000 and $1,200 to the Appellant, referred to in paragraph 7 hereof had by the commencement of November 1924 been reduced to $800 and $600 respectively. The said Biggs gave the Appellant a cheque dated the 8th November 1924 for an amount which included the said balance due under the said Mortgages; the discharges in respect of the said Mortgages were dated the 11th November 1924 and duly registered on the 12th November 1924 although the said cheque had not been paid by the said date.

p. 317. Ex. 24 R.

pp. 379, 380, 381. Ex. A.

13. Neither the said application nor the said certificate of title disclosed the said Mortgages for $2,000 and $1,200; the said Mortgages were duly discharged on the date of the said certificate and five days before the said application was granted as aforesaid, and accordingly were not at the date of the said certificate or at the date when the said application was granted, existing encumbrances upon the property to be mortgaged as security for the said loan of $13,500.

p. 72.

14. Monies were duly advanced on Mortgage to the said Biggs by the Respondent Loan Company pursuant to the Resolution mentioned in paragraph 9 hereof and such monies were applied as follows :—

The Respondent Loan Company retained

p. 401. Ex 28 R.

(1) $1,600 to cover arrears of interest due on the Mortgages mentioned in paragraph 4 hereof.

p. 315. Ex. 22 R.

(2) $1,000 as a bonus, and

p. 324. Ex. 25 R.

p. 324. Ex. 23 R.

(3) $5,000 to pay off the Appellant's said Mortgage for $5,000.

p. 316. Ex. 23 R (2).

p. 327. Ex. 23 R (3).

p. 328. Ex. 23 R (4).

p. 317. Ex. 23 R (5). & (6).

p. 316. Ex. 23 R (6).

The balance of $5,900 was used to settle sundry accounts due by the said Biggs. One of these accounts was for $1,993·33 on a cheque given to the Appellant in satisfaction of (1) the balance due under the said two Mortgages for $2,000 and $1,200 respectively and (2) the sum of $500 due to the Appellant by the said Biggs for fees and commission.

15. It was admitted at the Trial in the evidence adduced by the Respondent Loan Company's Directors and not contradicted by any other evidence, that if the fact had been known to the Respondent Loan Company that the Appellant was being paid the aforesaid fees and commission by the said Biggs and that one of the sundry accounts referred to in the said application was the Appellant's account for $1,993·33 constituted as aforesaid, such fact would not in any way have influenced the Respondent Loan Company nor prevented nor deterred the Respondent Loan Company from advancing $13,500 as aforesaid. pp. 150, 165, 166.

16. By an Agreement dated the 3rd July 1929 and made pursuant to the power conferred by R.S.O. 1927 Chapter 223 S. 55 the Respondent Loan Company sold and transferred all its assets (including the said Mortgage for $13,500) and all rights of action connected with the said assets which were capable of assignment to the Respondent The Huron and Erie Mortgage Corporation a registered Corporation and the Respondent Loan Company received in payment thereof $720,000 in cash and 20,000 shares in the Respondent London Loan Assets Limited and the said Mortgage became vested in the Respondent The Huron and Erie Mortgage Corporation and all rights thereunder passed to the said Corporation. p. 355. Ex. G.

17. All the provisions of the said Statute in respect of such sale as aforesaid were duly complied with, and on the 29th August 1929, the Lieutenant-Governor in Council duly gave his assent to the said sale pursuant to section 60 of the said Statute, and accordingly the Respondent Loan Company was dissolved as from the date of the said assent except in so far as was necessary to give full effect to the said Agreement, by virtue of section 63 s.s. 5 of the said Statute. pp. 81, 82.

18. The Respondent Loan Company received the full face value of the said Mortgage upon the aforesaid sale and transfer. Further by the said Agreement the Respondent The Huron and Erie Mortgage Corporation sold and transferred to the Respondent London Loan Assets Limited certain of the assets acquired from the Respondent Loan Company including the said Mortgage for $13,500.

19. An action was brought by the said Walter Herbert Biggs and Eva Vera Biggs against the Respondent Loan Company and the Respondent Consolidated Trust Corporation seeking redemption of certain properties in

the City of London, aforesaid (including all the properties aforesaid) on payment of the principal monies actually advanced without interest on the contention that certain mortgage transactions in respect of the said properties came within the provisions of The Interest Act of Canada. This claim of the original Plaintiffs was dismissed by the Trial Judge and no Appeal was taken therefrom.

20. The Respondent Loan Company and the Respondent Consolidated Trust Corporation by a Counterclaim in the said action dated the 14th November 1929 to which the rest of the Respondents were made Plaintiffs
p. 13. and to which the Appellant was made a Defendant (*a*) claimed from the said Biggs and the said Eva Vera Biggs the amounts which might be owing on their several Mortgages and (*b*) recited the effect of the said Agreement of the said 3rd July 1929 and alleged that the said Mortgage for $13,500 was obtained from the Respondent Loan Company through the conspiracy of the Appellant with one McCormick or through the fraud of the Appellant or through a breach of duty or trust by the Appellant arising out of his fiduciary relationship with the Respondent Loan Company, and the Respondents counterclaimed against the Appellant declarations to the above effect, and damages in respect of the loss which they alleged they had suffered by reason of the alleged fraud or conspiracy or breach of trust or other wrong doing on the part of the Appellant.

21. That the Appellant by his Defence to the said Counterclaim delivered on the 28th November 1929 denied that he had been guilty of the
p. 24. alleged or any fraud or conspiracy or breach of trust or any wrongful doing as alleged or at all, and denied that the Respondents or any of them had suffered the alleged or any loss or damage as alleged or at all.

22. The said Counterclaim was tried before Raney J. without a jury in the City of London aforesaid on the 7th, 8th and 9th March 1930 and no evidence was adduced by or on behalf of the Appellant.

23. On the 11th October 1930 Raney J. gave Judgment for all the Respondents against the Appellant for whatever balance there might be
p. 202. owing on the said Mortgage for $13,500 according to the terms of the said Mortgages allowing credit for payments that had been made by the Mortgagor. The learned Judge further directed that upon payment by the Appellant of such sums the said Mortgage should be assigned to him, alternatively at the discretion of the Respondents there might be a sale under the direction of the Master of the properties covered by the said Mortgage subject to other encumbrances, and that in the event of this course being adopted Judgment should be entered against the Appellant for the deficiency and that the Appellant should pay the costs of the action.

24. The Trial Judge did not find fraud or conspiracy against the Appellant; he held however that on the claim for breach of a fiduciary duty, the onus of proof was upon the Appellant and based his Judgment upon a finding of fact that the Appellant wrongfully failed to disclose to the Respondent Loan Company either his said Mortgage for $2,000 or his said Mortgage for $1,200 or his said Mortgage for $5,000 or that the Mortgage for $13,500 was not a first mortgage, and that in acting as Solicitor to the Respondent Loan Company in connection with the said Mortgage for $13,500 his interest conflicted with his duty. The learned Judge held that "under these circumstances he (meaning the Appellant) is responsible for whatever loss the Company may suffer." p. 209.

25. The learned Judge in giving Judgment in favour of all the said Respondents observed that "the right of action is in one or more of these Plaintiffs by Counterclaim (meaning the Respondents). It is not necessary that I should differentiate. They may work out their rights themselves."

26. On the 17th October 1930 the Appellant duly gave Notice of Appeal from the said Judgment and the Appeal duly came on for hearing in the Appellate Division of the Supreme Court of Ontario before Mulock C.J.A., Grant J.A., and Riddell J.A. and on the 1st March 1932 the said Court in a Judgment delivered by Grant J.A. unanimously allowed the said Appeal without costs on the grounds that :— p. 205. p. 222.

(1) There was no evidence that the Appellant committed any breach of duty or trust by non-disclosure or otherwise.

(2) There was no evidence that the Respondent Loan Company was induced to make or influenced in making the said loan of $13,500 by any act or omission of the Appellant.

(3) There was no evidence that the Respondent Loan Company did not receive the full face value on the said Mortgage for $13,500 upon the sale and transfer referred to in paragraph 16 hereof and accordingly the Respondent Loan Company suffered no loss upon the said Mortgage.

(4) The action was premature since no attempt was made before action to realise the Mortgage security nor had the property covered thereby been sold.

(5) As the said Mortgage had been duly transferred from the Respondent Loan Company to the Respondent The Huron and Erie Mortgage Corporation in and by virtue of the Agreement referred to in paragraph 16 hereof, at the time

when the Counterclaim was delivered, the Respondent Loan Company had no right title interest to or in respect of the said Mortgage and had suffered no loss in respect thereof.

(6) In reality no more than $10,900 was advanced by the Respondent Loan Company to the said Biggs in respect of the said Mortgage for $13,500, since of the purported loan of $13,500 the Respondent Loan Company retained more than $1,600 in payment of arrears and interest due under the Mortgages mentioned in paragraph 4 hereof, and $1,000 as a bonus for making the said loan. 10

27. The Respondents Appealed from the said Judgment of the Appellate Division of the Supreme Court of Ontario to the Supreme Court of Canada and the said Appeal duly came on for hearing on the 29th and 30th November and the 1st December 1932 before Rinfret, Lamont, Smith, Cannon, and Crockett J.J.

28. The Supreme Court of Canada delivered Judgment on the 29th March 1933 and allowed the said Appeal and, by a majority (Rinfret, Lamont and Smith J.J.) restored the Judgment of Raney J. subject to the variation that there should be a reference back to the Master for re-calculation of the amount payable by the Appellant and that such calculation should be upon 20 the basis that $1,000 should be deducted from the amount due under the said Mortgage for $13,500, and that interest should be calculated at the rate of 5 per cent. instead of 8 per cent. and that the Appellant should pay the costs of both Appeals. The Supreme Court of Canada held that the whole onus of proof lay upon the Appellant.

29. Cannon and Crockett J.J. although concurring in allowing the Appeal, did not agree with the other learned members of the said Court as to the remedy available to the Respondents and held that the Respondents were entitled only to $6,993·33 (being the amount which the Appellant was alleged to have received out of the proceeds of the said loan) together with 30 interest at the statutory rate from the 12th November 1924 until Judgment, and found further that, upon the Appellant paying the said sum and interest he should be subrogated to that extent to the right of the Respondent Loan Company or its assignees under the said Mortgage for $13,500.

30. The Appellant in the premises respectfully submits that the Judgment of the Supreme Court of Canada and of the Trial Judge ought to be reversed and the Counterclaim against him dismissed with costs for the following and other

REASONS.

(1) BECAUSE the reasons given by the Appellate Division of the Supreme Court of Ontario and set out in paragraph 26 are right.

(2) BECAUSE the Appellant did not commit any breach of duty or trust.

(3) BECAUSE the onus was upon the Respondents to prove a breach of duty or trust, and that the alleged breach of duty or trust caused the Respondent Loan Company to make the said loan of $13,500 on the security of the said Mortgage and because not only was there no evidence of this fact but the uncontradicted evidence was that even if there had been the alleged breach of duty or trust by the Appellant and the Respondent Loan Company had known of the same, such knowledge would not have deterred, or prevented the Respondent Loan Company from making, or influenced the Loan Company in making the said loan.

(4) BECAUSE the Supreme Court of Canada erred in law in that they gave Judgment on the basis that, as the Appellant had committed a breach of duty or trust whilst acting as Solicitor for the Respondent Loan Company in the matter of the said Mortgage for $13,500 and as the Respondent Loan Company had suffered a loss upon the said mortgage, therefore in law, the Appellant was liable for the said loss, whether or not the Respondent Loan Company was induced or in any way influenced by the said breach of duty or trust to make the said loan,

(5) BECAUSE the right of action, if any, which the Respondent Loan Company had against the Appellant was not assignable, and accordingly none of the Respondents save the Respondent Loan Company, could have any right of action against the Appellant, since it was not alleged or proved that he ever owed any of the other Respondents any duty or was ever in any fiduciary relationship to any of the other Respondents. Further and alternatively because there was no evidence at the trial that the Appellant before the commencement of the action ever received or was sent a Written Notice of any assignment of any of the alleged rights relied on herein by the Respondents.

(6) BECAUSE the onus of proof lay on the Respondents to show that the Respondent Loan Company suffered a loss upon the said Mortgage for $13,500 and they did not discharge such onus.

(7) BECAUSE since the Counterclaim mentioned in paragraph 20 hereof was not constituted to give nor could it give full or any effect to the Agreement mentioned in paragraph 16 hereof, and since the Respondent Loan Company was dissolved in July 1929 except in so far as was necessary to give full effect to the said Agreement (as set out in paragraph 17 hereof) the Respondent Loan Company did not exist for the purpose of bringing and had no power to bring the said Counterclaim.

ALFRED B. MORINE.

CYRIL SALMON.

No. 110 of 1933.

In the Privy Council.

ON APPEAL

From the Supreme Court of Canada

BETWEEN

G. A. P. BRICKENDEN (Defendant by Counter-claim) - - *Appellant*

AND

THE LONDON LOAN AND SAVINGS COMPANY OF CANADA, THE HURON AND ERIE MORTGAGE CORPORATION, THE CANADA TRUST COMPANY and THE LONDON LOAN ASSETS LIMITED (Plaintiffs by Counterclaim). *Respondents*

Case for the Appellant.

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