

25, 1934

In the Privy Council.

No. 110 of 1933.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

BETWEEN

G. A. P. BRICKENDEN - - - - - *Appellant,*

AND

THE LONDON LOAN AND SAVINGS COMPANY OF
CANADA, THE HURON AND ERIE MORTGAGE
CORPORATION, THE CANADA TRUST COMPANY
AND LONDON LOAN ASSETS LIMITED - - *Respondents.*

CASE FOR THE RESPONDENTS.

1. This is an appeal by the Appellant from the judgment of the Supreme Court of Canada bearing date the 29th day of March, 1933, reversing a judgment dated 1st March, 1932, of the Court of Appeal for Ontario and restoring the judgment of the Trial Judge, the Honourable Mr. Justice Raney, who gave judgment in favour of the Respondents on the 11th day of October, 1930.

RECORD.
pp. 206, 268.
pp. 209, 222.
pp. 195, 202.

2. The action as originally constituted was brought by Walter H. Biggs and his wife, Eva Viola Biggs, against the London Loan and Savings Company and the Consolidated Trusts Corporation seeking redemption of
10 certain properties in the City of London, Ontario, on payment of the principal moneys actually advanced without interest, on the contention that the mortgage transactions 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. The question raised in this appeal arises solely under the counterclaim.

3. The Appellant Brickenden is a solicitor practising at London, Ontario, under the name G. A. P. Brickenden & Co. He has been general

CASE FOR RESPONDENTS.

- RECORD. solicitor for The London Loan and Savings Company, herein referred to as the "Loan Company," since 1920. He is the son-in-law of George C. McCormick, President of the Company.
- p. 275. **4.** Prior to November 1924 the Loan Company loaned to W. H. Biggs
p. 285. the sum of \$18,000 secured by a first mortgage on property known as
116 Elmwood Avenue in the City of London and it loaned to his wife,
Eva Viola Biggs, the sum of \$12,000 on property known as 315-317-319
Ridout Street South in the City of London. It held as collateral security
p. 280. for the loan on 116 Elmwood Avenue a third mortgage for \$3,000 on
114 Elmwood Avenue, the two prior mortgages being held by one Edwin 10
Barrell. These loans were in the nature of building loans; that is to say,
the moneys were to be advanced as the building progressed.
- p. 66, l. 1. **5.** Applications were subsequently made to the Loan Company for
p. 290, l. 25. additional advances on the same properties but the applications were
p. 296, l. 27. refused.
- pp. 297, 299. **6.** Biggs afterwards obtained three loans from the Appellant for
pp. 301, 303. \$5,000, \$2,000 and \$1,200 secured by mortgages dated 13th July, 1923,
pp. 305, 307. 24th August, 1923, and 13th January, 1924. The mortgages were made
to G. A. P. Brickenden in trust but Brickenden says there was no reason
p. 130, l. 1. for using the words "in trust" as the loans were made by him. The 20
mortgages bore interest at 8 per cent. payable monthly and the Appellant
p. 128, l. 42. received in addition to his legal fees a bonus with each loan. He received
p. 130, l. 42. \$1,000 on the loan of \$5,000 and \$300 on the loan of \$1,200. The amount
p. 130, l. 45. received on the loan of \$2,000 is not shown.
- p. 200, l. 44. **7.** The lands covered by the Appellant's mortgages were insufficient
security for prior charges.
- p. 132, l. 40. **8.** The Appellant says that Biggs applied to him for a further advance
p. 320, l. 7. but his moneys being all invested, he saw Mr. Kent, Manager of the Loan
p. 326, l. 12. Company, and on 11th November, 1924, an application on behalf of Mr.
and Mrs. Biggs for a loan of about \$13,500 was placed before the directors 30
of the Loan Company. It was laid over at that meeting but was accepted
on the 17th of November. The application was unsigned and undated. It
p. 325. stated that the advance was to be applied in payment of arrears on the
Company's mortgages, sundry accounts amounting to \$7,500 and the
Appellant's mortgage of \$5,000 which would mature about March 1925.
- p. 133, l. 15. **9.** The mortgage for \$13,500 was prepared by the Appellant as solicitor
for the Loan Company. It omits one of the properties covered by the
Appellant's mortgages. It is dated 8th ~~January~~ ^{NOVEMBER}, 1924, and was registered
on 12th November, 1924. The moneys secured by it (except \$5,000 which 40
was withheld by the Loan Company to satisfy the Appellant's mortgage for
that amount) were disbursed on or about 15th November before the loan
was authorized by the directors. The Appellant gave the usual solicitor's
certificate as to title, but like the application, it contained no reference to
the mortgages for \$2,000 and \$1,200.

10 **10.** The Appellant received out of the advance the sum of \$1,993.83 to cover the balance due on his mortgages for \$2,000 and \$1,200. These mortgages were discharged by certificates which were dated 11th November and were registered on 12th November, 1924, at the time the mortgage for \$13,500 was registered. Later, the mortgage for \$5,000 was paid and the Appellant gave a certificate of discharge dated 22nd January, 1925, which was registered on 5th January, 1928. The Appellant gave instructions that all cheques issued by Biggs on his savings account with the Loan Company were to be marked "O.K." by him. A note of these instructions
 10 was entered on the account and they were carried out. He commenced initialling cheques on November 8th, 1924, when the cheque to him for \$1,993.83 was issued. For his services in acting for Biggs and obtaining the loan, he was paid \$500 by Biggs.

RECORD.

p. 380, l. 36.

p. 381, l. 5.

p. 385, l. 10.

p. 381, l. 30.

p. 403, l. 24.

p. 317, l. 25.

p. 193, l. 10.

20 **11.** The Appellant did not disclose to the directors that he was acting for Biggs in obtaining the loan; that he had three mortgages on the property which were insufficiently secured and carried exceedingly high interest returns on the amounts actually advanced; and that he had a great personal interest in securing repayment of his advances. Nor is there any evidence that the directors had such knowledge. The directors who
 20 gave evidence disclaimed such knowledge. The Appellant called no evidence at the trial.

p. 140, l. 32.

p. 141, l. 35.

p. 142, l. 10.

p. 147, l. 40.

p. 149, l. 20.

30 **12.** On the 3rd day of July, 1929, the Loan Company entered into an agreement with the Respondent, The Huron and Erie Mortgage Corporation, herein referred to as the "Mortgage Corporation," the purpose of the agreement being to provide for the liquidation of the Loan Company. By the agreement the Mortgage Corporation agreed to take over the assets and undertaking of the Loan Company and assume its liabilities. Sufficient assets were to be retained by the Mortgage Corporation to provide for the liabilities of the Loan Company, and the surplus assets (which included
 30 the mortgage in question) enumerated in a schedule to the agreement were transferred to the Respondent London Loan Assets Limited, a Company incorporated to take over and administer the assets.

p. 355, l. 20.

40 **13.** The Mortgage Corporation agreed to loan and did loan to London Loan Assets Limited the sum of \$720,000.00 or \$35.00 per share on the 20,000 issued and paid up shares of the Loan Company, and this loan was to be repaid from the liquidation of the assets referred to in the schedule. The Mortgage Corporation received the entire capital stock of London Loan Assets Limited amounting to 20,000 shares of no par value, and these shares were transferred to the Loan Company for distribution amongst its
 40 shareholders. Trustees appointed by the shareholders received the shares and gave to each shareholder in the Loan Company one share of the capital stock in the new Company for each share of stock held in the Loan Company upon the transfer to the Trustees of the stock held in the Loan Company. The result was that the shareholders of the Loan Company transferred their shares in the Loan Company to the three Trustees to be held in trust,

- RECORD. and in return received share for share of stock in London Loan Assets Limited, and in addition received in cash \$35.00 a share out of the loan of \$720,000.00 which was secured on the surplus assets referred to in the schedule. Provision was also made in the agreement for the continuance of the Loan Company as a corporation for all the purposes of the agreement and it is still a subsisting corporation.
- pp. 195, 202. **14.** The Honourable Mr. Justice Raney who tried the action found that when the mortgage for \$13,500 was taken, there was no equity in the properties over the first mortgages and not sufficient to provide for them under a forced sale and that the Appellant as solicitor for the Loan Company did not make disclosure of his mortgages or his interest and that his interest and duty being in conflict, he failed to perform his duty to the Company and was responsible for any resulting loss. 10
- pp. 209, 222. **15.** The Honourable Mr. Justice Grant who delivered the judgment of the Court of Appeal disagreed with these findings of fact and held that in any case there was no proof of damage that could be recovered. He was of opinion that the Company must be taken to have received under the agreement of 3rd July, 1929, the full face value of its mortgages.
- pp. 260, 267. **16.** The Supreme Court of Canada agreed with the findings made by the Trial Judge and restored his judgment but varied it by directing that \$1,000 paid on the loan as bonus should not be allowed when computing the amount due on the mortgage and that interest should be allowed at 5 per cent. and not at 8 per cent., the mortgage rate. 20
- p. 268. **17.** The Respondents submit that the judgment of the Supreme Court of Canada was right and should be affirmed for the following among other

REASONS

1. Because the Appellant was solicitor for and in a fiduciary relationship to the Loan Company and failed to discharge his duty to the Company.
2. Because the Appellant was personally interested in the proposed loan and failed to make proper disclosure. 30
3. Because the transaction was brought about by the Appellant and was in his interest and against the interests of the Company.
4. Because the Appellant took active steps to deceive the Company as to the full extent of his interest.
5. Because the Appellant failed to show that the transaction was entered into by the Company with full and adequate information.

6. Because the Appellant became liable in damages at the time the wrongful acts were committed.
7. Because the effect of the agreement of 3rd July, 1929, and what was done under it did not amount to realization of the securities and all rights of action were preserved by force of the agreement and the Loan and Trust Corporation Act.
8. Because the judgments of the Trial Judge and the Supreme Court of Canada were right and should be affirmed.

W. N. TILLEY.

G. T. WALSH.

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CASE FOR THE RESPONDENTS.

LAWRENCE JONES & CO.,
Lloyds Building,
Leadenhall Street, London, E.C.3.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C. 4.