63, 1936

In the Privy Council.

No. 12 of 1936.

CANADIAN LAW LIBRARY

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

IN THE MATTER of THE COMPANIES ACT; and
IN THE MATTER of PIONEER GOLD MINES LIMITED (In Liquidation)

BETWEEN

VERNON LLOYD-OWEN ... ... (*Petitioner*) *Appellant,*

AND

ALFRED E. BULL, J. DUFF-STUART, R. B. BOUCHER, F. J. NICHOLSON and HELEN A. WALLBRIDGE and D. S. WALLBRIDGE, executors and trustees of the estate of ADAM H. WALLBRIDGE deceased (*Respondents*) *Respondents,*

AND

JOHN S. SALTER, Liquidator of PIONEER GOLD MINES LIMITED (In Liquidation) ... (*Petitioner*) *Respondent.*

CASE FOR THE APPELLANT.

1. This is an appeal by special leave from a judgment of the Court of Appeal for British Columbia dated the 17th July, 1935, affirming an order of the Supreme Court of British Columbia dated the 28th March, 1935, whereby Mr. Justice Murphy dismissed a Petition of the Appellant and the Respondent John S. Salter as liquidator of Pioneer Gold Mines Limited (in Liquidation), hereinafter called "the Company," for an Order directing or granting leave for legal proceedings in the name of the Company. Record. p. 18. p. 10, l. 35. pp. 3-6.

2. The Appellant is the owner and registered holder of 10,580 shares in the capital stock of the Company. p. 4, l. 1.

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Record.
pp. 3-6.
pp. 6-7.

3. By a Petition dated the 13th March, 1935, and verified by the Appellant's affidavit sworn the same day, the Appellant and the Respondent John S. Salter as liquidator of the Company, hereinafter called " the liquidator," asked for the directions of the Supreme Court in relation to the course to be followed by the liquidator. The liquidator submitted himself to the directions and orders of the Court, and beyond joining in the Petition and appearing by Counsel at the hearing thereof took no active steps in the case. In the Petition the Appellant also asked for an Order that the liquidator be directed to take action in the Company's name against the Respondents (other than the liquidator) or some of them for the recovery of property and assets of the Company or for other relief. Alternatively the Appellant asked for leave to bring an action in the Company's name for the same purpose.

p. 5, l. 10.
p. 5, l. 7.
p. 5, l. 12.
p. 5, l. 39.

The application was made under section 218 of the Companies Act (being the Statutes of British Columbia, 1929, chapter 11) which reads as follows :—

> " 218. Where a company is being wound up, the liquidator and any member of the company may apply to the Court to determine any question arising in the winding up, and the Court may make such Order on the application as the Court thinks just."

p. 4, l. 11 to p. 5, l. 2.

4. The Petition was presented to enable proceedings to be taken in the Company's name in respect of matters which had been the subject of a former action by one Andrew Ferguson (personally and in a representative capacity) against all the Respondents. This former action in the Supreme Court of British Columbia and an appeal therein were dismissed and Ferguson then exercised his right of appeal (the appeal being numbered 18 of 1934) to His Majesty in Council. The judgment of the Lords of the Judicial Committee of the Privy Council in the appeal was delivered by Lord Blanesburgh on the 1st day of February, 1935.

5. The Record in the Ferguson appeal, extracts from the shorthand notes of the argument on the appeal, and the judgment therein form part of the Record in this appeal but, by direction of the Judicial Committee, given on the hearing of the Petition for special leave to appeal, they are not printed as part of the Record. For convenience of marginal reference the Record in the Ferguson appeal is referred to in this Case as an Appendix.

p. 7, l. 22.
p. 7, ll. 32-39.

6. The Petition came on for hearing on the 14th March, 1935, and Mr. Justice Murphy then took the unusual course of adjourning the hearing until the Petition, the Affidavit in support thereof, and Notice of the hearing had been served on the Respondents other than the liquidator.

p. 10, l. 36.
p. 8.
p. 10.

7. The adjourned hearing took place on the 28th March, 1935. Mr. Justice Murphy then heard counsel not only for the Petitioners but for the Respondents and received in evidence affidavits of the Respondent Alfred E. Bull and of the liquidator's solicitor which set out among other things the amount of costs incurred by the Respondents in the Ferguson action

and the fact that the liquidator had no assets of the Company in his hands. The affidavit of the Respondent Alfred E. Bull exhibited extracts of the shorthand note of the argument before the Judicial Committee in the Ferguson appeal. Record. p. 8, l. 31.

8. Mr. Justice Murphy considered the judgment of the Judicial Committee in the Ferguson appeal, these affidavits and the exhibits thereto, and ordered that no action be taken by the liquidator, that leave to bring action in the Company's name be refused to the Appellant, that the Petition be dismissed and that the Appellant pay to the Respondents other than the liquidator their costs of and incidental to the Petition. No reasons for Mr. Justice Murphy's Order appear in the Record. p. 11, ll. 12-15. pp. 10-11.

9. It is necessary at this stage briefly to indicate what matters were the subject of the Ferguson appeal in so far as they would be gone into again in the action which is now proposed in the name of the Company. The Pioneer Gold Mine, situate in British Columbia, was acquired by the Company in the year 1915. The purchase consideration was 750,000 fully-paid shares in the Company, of which Ferguson and his brother received 269,999 each, one Williams, their solicitor, 195,000, his wife 15,000, and two partners of his, Walsh and McKim, one each. By 1920 the Company had got into difficulties and Wallbridge, a mine broker, formed a syndicate of six persons, namely the Respondents Bull, Boucher, Duff-Stuart and Nicholson, himself and McKim, to take an interest in the property. In January, 1921, Wallbridge on behalf of the syndicate acquired from the two Fergusons and Williams 51 per cent. of the issued shares in the Company; he, Bull and Duff-Stuart became Directors of the Company; and the full management of the Company was from that time on assumed by those members of the syndicate, the only other Director at the material dates being Walsh, who became one of the executors of Williams when the latter died in September, 1921. Williams at his death was holding the shares of both the Fergusons as security for monies owing by them to him, and Walsh thus became a nominal holder of both the Williams and the Ferguson shares. Judgment, p. 4, l. 15. Appendix, p. 364, ll. 14-32; p. 70, ll. 22-29. Appendix, p. 366. Appendix, p. 367, l. 7. Appendix, p. 373, ll. 31-35.

10. In the summer of 1923 the Board instructed Mr. David Sloan, a mining engineer of experience and repute, to report on the mine. He made a very complete and highly favourable report, subject to the provision of further finance. This was not forthcoming and the mine was temporarily closed down. However, in July, 1924, Mr. Sloan agreed to accept a working bond upon the property with an option of purchase for $100,000, Mr. Sloan taking (with other participants) responsibility for finding one-half of the sum immediately required, which he estimated at $16,000, and arranging with Wallbridge (with whom all his actual negotiations took place and who, as he thought " had the thing all in his hands "), that the other half was to be found elsewhere. The responsibility for this other half was, in fact, undertaken by the syndicate on the terms that a corresponding half of the property and any profits therefrom was to be ceded to them by Mr. Sloan. The working bond was in Mr. Sloan's name alone but the interests of the Appendix, pp. 435-442. Appendix, p. 55, l. 16. Appendix, p. 56, l. 7; p. 314, l. 10. Appendix, p. 307, l. 20. Appendix, p. 247, ll. 28-39.

Record. Appendix, p. 469, l. 7. syndicate were evidenced by a declaration of trust under his hand in favour of the six members of the syndicate by name.

Appendix, p. 468, l. 38. **11.** The grant of the working bond was resolved upon at a meeting of the Board on 16th July, 1924, at which the three Directors who were members of the syndicate and Walsh were present. No disclosure of interest was recorded, but in any event, the quorum for the Board being two and the Appendix, p. 362, ll. 8-15. syndicate Directors being disqualified under the Articles from voting, the Resolution was incapable of binding the Company as a valid disposition of its property, and left the members of the syndicate accountable to the Company in respect of any profits in fact derived from this transaction.

Judgment, p. 9, l. 18. **12.** In the judgment of the Judicial Committee the grievance alleged by Ferguson is stated to be that the benefits resulting from the trust declaration

> " instead of being held for all the shareholders of the Company including the Respondents, have been wrongfully diverted by the syndicate to themselves."

The Appellant respectfully submits that the grievance was well founded.

Judgment, p. 9, l. 27. **13.** The effect of granting the working bond on the prospects of the mine is thus set out in the judgment :—

> " On receiving his bond Mr. Sloan at once started vigorous operations at the mine. His progress was, in fact, both rapid and immediate. The syndicate's moiety of the $16,000 was to be provided in equal instalments of $2,000 on or before the first day of August, September, October and November, 1924. The instalments for August and September were called for. Thereafter no further payments were required by Mr. Sloan. The mine had so soon become self-supporting, and the gold obtained more than enough to pay for all the development work which under his bond Mr. Sloan was required to carry out. By the 5th December, 1924, there had been deposited in the Government Assay Office bullion in bricks from the mine of the total value of $15,532.36. The brick, deposited, as it happened, on the 5th December, was alone of the value of $6,412. The syndicate's participation has in the result cost them nothing, their $4,000 having been long ago reimbursed."

Appendix, p. 475, ll. 17-21. Appendix, p. 474, ll. 30-42. **14.** The syndicate thereupon proceeded to put the Company into voluntary liquidation, which was resolved upon in September, 1924. Besides holding the majority of the shares they were in substance its only creditor.

Appendix, p. 480. **15.** On the 13th November, 1924, the liquidator summoned for the 5th December, 1924, a meeting of contributories to consider resolutions (1) confirming the Board resolution of 16th July, 1924, the working bond being referred to as granted to Sloan " representing " as to one-half the members of the syndicate, and (2) accepting a tender made on behalf of the

syndicate for all the remaining assets of the Company, subject to confirmation of the working bond. The only information circulated with the notices convening this meeting was a letter addressed to the shareholders by Wallbridge as " Manager and Secretary," containing a very discouraging history of the attempts to develop the mine and explaining that the syndicate had made their arrangement with Sloan to endeavour to save their advances and investments. Record. Appendix, p. 481, l. 24.

16. At the meeting a resolution relating to a revised tender was substituted for the second resolution. The resolutions were, in fact, passed unanimously, and the assets (in effect the 100,000 dollars which might become payable under the working bond), subsequently assigned to the syndicate. No disclosure of the declaration of trust was made nor was any information given to the meeting as to the recent operations at the mine. The majority of the votes was held by the syndicate. Moreover the first Resolution was, the Appellant submits, of such a nature that no majority of members of the Company could pass it, the Company being in liquidation. The Appellant submits that in the circumstances the Board Resolution of 16th July, 1924, notwithstanding these Resolutions of December, 1924, remained as invalid as before. Appendix, pp. 483-484. Appendix, p. 60, l. 37.

17. Eventually, on 21st January, 1925, five members of the syndicate, representing the creditors of the Company, accepted the revised tender of 70,000 dollars for its remaining assets made on behalf of the syndicate and the assignment was recorded in an agreement dated 21st January, 1925, between the liquidator and the syndicate, under which, except for a sum of $3,369, the syndicate were only liable to pay the $70,000 in as far as they received equivalent amounts under the working bond. In 1928 a new Company, the Pioneer Gold Mines of British Columbia Limited, was incorporated, to which Sloan and the syndicate transferred the Pioneer Mine, the syndicate receiving 800,000 shares in the new Company as their quantum of the purchase consideration. Appendix, p. 484, l. 18. Appendix, p. 61, l. 29; p. 62, ll. 3-14. Appendix, p. 509, l. 30.

The position thus attained is summed up in the judgment as follows :—

" In the end, as put by the Appellant, the syndicate, out of the property of the Company in which at the commencement of the liquidation they held 51 per cent. of the issued capital, secured, as a result of their dealings with the Company's property made valid, if at all, only in the liquidation :— Judgment, p. 13, l. 23.

" (1) As creditors, the amount of the Company's debt to them with interest at the rate of 8 per cent. per annum ;

" (2) $10,200 in respect of their shares in the Company ;

" (3) $30,000 profit on the agreement of the 21st January, 1925 ;

Record.

"(4) 800,000 shares in the new Company with, at the time of the trial, a quoted market price, already stated.

"The minority shareholders, on the other hand—holding 49 per cent. of the Company's capital—were 'frozen out.' They received in respect of their entire interest $9,800 only. That is the way in which the Appellant states the position."

The market price mentioned was $6.50 a share, at the time of the trial, on a rising market, giving a value of over 5,000,000 dollars.

18. The appeal in the Ferguson case was dismissed solely on the technical objection that the action must be in the Company's name and in examining the objection the judgment proceeds :—

Judgment, p. 3, l. 21.

"And the answer to the question whether the objection is well taken depends first of all upon the answer to another, viz., are the claims of the Appellant at all events as now formulated properly described as claims competent only to the Company ? And that answer is neither short nor simple for two reasons—the first, that the Appellant's case as presented to the Board has been much less comprehensive than that set forth in his writ and statement of claim ; and the second, that quite clearly he has all through sought so to frame his claims that they need not properly, or at all events need not necessarily be so described. If they are necessarily only corporate claims the Appellant has been at pains to avoid saying so. Indeed, his purpose throughout the litigation certainly in words has been not so much to vindicate as against the Respondents any rights of the Company as to voice the wrongs of its minority shareholders, 'frozen out' by the Respondents—a majority overbearing and abusing, as he alleges their powers as such."

Finally the claim in the Ferguson case was rested throughout on the existence of a fraudulent conspiracy on the part of the Syndicate to dispossess the minority shareholders of the mine. Allegations of fraud of this nature were held by the Judicial Committee not to have been established by the evidence, and the present Appellant has no intention of repeating such charges.

pp. 12-13.

19. The Appellant appealed to the Court of Appeal for British Columbia (Justices Martin, McPhillips, Macdonald and McQuarrie) from the Order of Mr. Justice Murphy dismissing his Petition. The Court of Appeal heard Counsel for the Appellant and for the Respondents other than the liquidator on the 14th, 17th, 18th and 19th June, 1935, and on the 17th July, 1935, dismissed the appeal with costs, Mr. Justice McPhillips dissenting.

p. 18, l. 5.

p. 18.

20. Mr. Justice Martin and Mr. Justice McQuarrie did not give formal reasons for their Judgment.

21. In his reasons for judgment Mr. Justice McPhillips held that Mr. Justice Murphy was wholly wrong in making the order he did. Mr. Justice McPhillips had thought Ferguson entitled to succeed in the Ferguson case, and the Judicial Committee had not disposed of the appeal on its merits at all. The Judgment defined the rights of shareholders where directors failed properly to discharge their fiduciary duty and the right to have monies derived from the disposition of property brought into the treasury of the Company. It was unthinkable to construe the judgment as determining that the shareholders are without possibility of relief. The Appellant had adopted the proper procedure and it was incumbent on Mr. Justice Murphy to make the desired order. The contention that the Ferguson appeal was decisive of the Appellant's claim was untenable. The charges of conspiracy and fraud dealt with in the judgment were wholly unessential for success in a properly constituted action, for the action was one for breach of a fiduciary duty. The judgment in no way constitutes a bar but in fact supports and authorises the relief for which the Appellant asks, and justice requires that the relief be granted and the liquidator should be directed to vindicate the Company's rights.

Record. pp. 14-17. p. 15, l. 4. p. 15, l. 6. p. 15, l. 13. p. 15, ll. 14-19. p. 15, ll. 19-36. p. 15, ll. 37-47. p. 16, ll. 1-5. p. 16, ll. 5-41. p. 16, ll. 42-45. p. 16, l. 47. p. 17, l. 14.

22. In his reasons for judgment Mr. Justice Macdonald stated that the question was whether in the interests of justice the order sought should be made. Mr. Justice Murphy in his discretion refused an order. The Court of Appeal had full knowledge of the case from earlier contact with the case, and he could not read the judgment in the Ferguson appeal as intimating that leave to bring a new action should be given. Leave should only be given if, with fraud in all its phases eliminated, an action would have a reasonable chance of success. The proposed action could not, in his judgment, possibly succeed.

p. 17, l. 18. p. 17, l. 22. p. 17, ll. 23-27. p. 17, ll. 30-33.

23. The Appellant respectfully submits that the judgment in the Ferguson appeal was rightly interpreted by Mr. Justice McPhillips and that on the facts proved in the Ferguson case the Supreme Court of British Columbia should not have dismissed the Petition but should have given leave for proceedings in the Company's name.

24. The Appellant has no desire to make nor any intention of making indiscriminate charges of fraud or any charges of fraud except so far as he is advised that they are amply borne out by the evidence; but he humbly submits that the judgment of the Judicial Committee did not indicate any opinion that the facts would not warrant charges of breach of fiduciary relationship which, as pointed out by Lord Haldane in *Nocton* against *Lord Ashburton* reported in 1914 Appeal Cases, page 932, was often described as fraud or constructive fraud although not giving rise to an action for deceit. In this connection it is worthy of recall that when the Ferguson case was before the Court of Appeal of British Columbia three of the four judges (Macdonald C.J., Martin and McPhillips JJ.A.) held that the Directors who were members of the syndicate had been guilty of a breach of trust or constructive fraud in acquiring an interest in the working bond,

Appendix, p. 335, l. 32; p. 337, l. 17; p. 339, ll. 29-40.

although Macdonald C.J. was of opinion that Ferguson could not take advantage of it if he confirmed the working bond, while Martin J.A. held that the Directors' interest had been validated by the general meeting of the Company held on the 5th December, 1924.

25. The Appellant submits that the judgment of the Court of Appeal for British Columbia was wrong and should be reversed for the following amongst other

REASONS.

1. Because the facts proved in the Ferguson case establish a breach of fiduciary duty to the Company entitling the Company to a remedy, and no subsequent transactions were ever effective to cure that breach.

2. Because the facts show a *prima facie* cause of action in the Company which should be investigated on issues properly defined in an action.

3. Because Mr. Justice Murphy and the Court of Appeal heard the Respondents other than the liquidator (being or including the Defendants in the proposed action) and considered evidence submitted by them.

4. Because Mr. Justice Murphy and the majority of the Court of Appeal misconstrued the judgment of the Judicial Committee in the Ferguson case, particularly in holding that the judgment showed that no charge of fraud actual or constructive made by the Company could succeed.

5. Because Mr. Justice Murphy and the majority of the Court of Appeal assumed that the evidence in the Record in the Ferguson case was the only evidence available to the Company in the action proposed to be brought.

6. Because Mr. Justice Murphy and the majority of the Court of Appeal determined before trial issues of law and fact which could only be properly determined in an action by the Company.

7. Because the discretion of the Court is a judicial discretion and was exercised on wrong principles.

8. For the reasons given by Mr. Justice McPhillips.

CYRIL RADCLIFFE.

FRANK GAHAN.

In the Privy Council.

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CASE FOR THE APPELLANT.

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