63, 1936

No. 12 of 1936.

In the Privy Council.

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*

AND

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

RESPONDENT'S CASE.

Case for the Respondents

OTHER THAN THE LIQUIDATOR.

RECORD.

PART I.

1. This is an Appeal by Special Leave from a judgment of the Court of Appeal of British Columbia dated 17th July 1935 dismissing an appeal from an interlocutory judgment of Mr. Justice Murphy dated 28th March 1935.

pp. 10–11. 2. By such order the learned judge, in the exercise of the discretion given to him by the British Columbia Companies Act, s. 218, refused to allow the Appellant to bring an action in the name the Pioneer Gold Mines Limited (In Liquidation) raising substantially if not precisely questions which had been decided in favour of the Respondents in the Supreme Court of British Columbia and in the Court of Appeal of British Columbia in other proceedings, although upon an appeal to His Majesty in Council in those proceedings (Ferguson *v.* Wallbridge and Others, No. 18 of 1934) the action was found to have been incompetent and the appeal was dismissed on that ground, though the Board explicitly marked their displeasure at the Appellant's persistence in unfounded charges of fraud by ordering him to pay costs.

3. The present Appellant was, as hereinafter appears, exceedingly active though never nominally a party, in the first action, the costs of which were very great and remain unpaid.

4. In the present appeal the primary question is whether in refusing to allow these matters to be litigated again and upon the same evidence, for there is no suggestion that fresh evidence can be adduced, the learned judge erred in law the exercise of the discretion conferred upon him.

p. 4, l. 40. p. 5, l. 5. 5. It is most material here to state that the petition before the trial judge asked leave to prosecute an action " with respect to the matters complained of in the action aforesaid " (Ferguson *v.* Wallbridge and Others) and that the affidavit of the Appellant in support relies on the Appellant's case in Wallbridge *v.* Ferguson and Others, thus raising again the very allegations of actual fraud for the persistence in which the Appellant was severely penalised by the Board in the former appeal.

p. 6, l. 39. p. 7, l. 5.

6. The Respondents further submit that, on the material evidence being available, but two of the Respondents' material witnesses being dead, the Board should upon this appeal decide whether the decisions of the British Columbia Courts upon the former action were right; for obviously if they were right the proposed action must be futile, and should not be allowed.

7. The Petition was launched in the Supreme Court (Mr. Justice Murphy) and asked leave to institute legal proceedings against the Respondents—other than the Respondent Salter who was liquidator of the Pioneer Gold Mines Limited and does not now appear : S. 218 of the Companies Act Stat. B.C. 1929 Ch. 11 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."

8. By letters dated 26th February 1935 and 28th February 1935 the Appellant made a formal demand upon the Liquidator to take proceedings " for the enforcement of the rights of the minority shareholders of the said Company arising out of the acquisition of the company's property by members of the Wallbridge Syndicate." (The Respondents.) pp. 29–30.

9. The Liquidator declined to bring the action, but consented to and did join with the Appellant in a Petition of the Supreme Court of British Columbia " for directions in relation to the course to be followed by the Liquidator in the premises." This Petition was supported by the affidavit of the Appellant. p. 4, l. 36. p. 5, l. 10. p. 6.

10. The Petition coming before Mr. Justice Murphy in Chambers in accordance with Section 248 of the Companies Act 1929, which provides that such application shall be made " to a judge in Chambers by Petition." The learned Judge adjourned the hearing and directed that notice be given to the proposed Defendants (the Respondents), who had already been defendants in the previous suit for the same cause of action and relative to the same subject-matter. This action will be herein subsequently discussed. p. 7.

11. The Respondents appeared by counsel to oppose the Petition and filed an affidavit of A. E. Bull, together with two exhibits thereto— Exhibit A. Extracts from the Hearing on the Appeal before the Privy Council in Ferguson *v.* Wallbridge et al and Exhibit B. the Record in that Appeal. pp. 8 and 9. p. 30.

12. After hearing argument at length Mr. Justice Murphy in the exercise of his discretion dismissed the Petition. pp. 10 and 11.

13. The Appellants appealed to the Court of Appeal by the Appellant, but the liquidator refused to join. The Appeal was dismissed, Mr. Justice McPhillips dissenting and the Court subsequently refused leave to appeal. p. 18. pp. 19–22.

14. Following this outline and in order to appreciate the issues on this appeal it is necessary to give a brief history of the case of Ferguson *v.* Wallbridge et al and its relation to the present proposed action by the Appellant Owen.

15. History Ferguson *v.* Wallbridge et al.

(1) This action was brought in the Supreme Court of British Columbia on 1st June 1932, by one Andrew Ferguson suing on behalf of himself and all other minority shareholders of the Pioneer Gold Mines Limited (in liquidation). The Company

had been dissolved but by an order obtained on 11th July 1933 the dissolution was declared void and the Company was " revived " until 20th May 1936.

p. 4, ll. 5–10.

Ferguson Record.

(2) The nature of the action and the facts leading up to it are fully set out in the Respondents' case upon appeal in that action, it suffices here to say that the gravest charges of actual fraud and conspiracy were brought against the Respondents.

Ferguson Record, p. 87.

(3) In brief, the Pioneer Gold Mines Limited, acquired a gold mine in the Bridge River District in 1911. The shareholders were Adolphus Williams, Ferguson and his brother. Ferguson and his brother were experienced miners. Ferguson managed the mine.

Ferguson Record, p. 88.

(4) The Company operated the mine till 1919 and by that time was in debt to about $35,000.00, with no funds available. Attempts to sell it for a price around $90,000.00 failed and by February 1920 the mine was closed down.

Ferguson Record, p. 90.

(5) In the fall of 1920 the vendors interested one Wallbridge. Wallbridge is now deceased and his executor is one of the Respondents. Wallbridge got together a group—the present Respondents—as a syndicate and they purchased 51 per cent. of the Company. It was represented to them that the tailings from the old workings would produce enough money to carry on the necessary development work and generally provide working capital for the company. These expectations were not realised and generally the venture proved a failure.

Ferguson Record, p. 97, ll. 23–35.

(6) Ferguson remained on the Board of Directors until 1922, when he left for the United States and did not return till 1931.

Ferguson Record, p. 492, Exhibit 93.

(7) The Fergusons transferred all their shares, save one qualifying share each, to the Royal Bank of Canada and to the Williams Estate as security for indebtedness. These shares at all material times were in the name of the Bank and the Williams Estate, and by them were voted at the various meetings of the Company.

Ferguson Record,
p. 396.
pp. 244–245.
pp. 386–389.
pp. 393, 396.
p. 397.
p. 413.
pp. 429–435.
p. 442.
p. 443.
pp. 453, 458.
pp. 461, 469.
Ferguson Record,
p. 245, l. 10.
p. 435.

(8) Ferguson was as anxious as anyone to effect a sale. The price asked was around $100,000.00 ; from 1922 to 1924 very many attempts were made to sell the mine, but without success. The affairs all the time were becoming more desperate. The mine was not operated after 1922. In June 1923 the directors engaged a Mining Engineer David Sloan, to investigate the mine and report. He made a report which was favourable, but stated that at least

$25,000 should be spent before any attempt was made at milling, and recommended the expenditure of at least $50,000·00 on the property.

(9) Then followed effort after effort to raise capital or sell the mine. These might be summarised :—

(A) Sloan was approached. He agreed to take an interest if $30,000 could be raised. The shareholders formed a pool of shares to raise capital, a prospectus was issued and attempts were made by Wallbridge to sell the shares, but he was unable to sell a share or raise a dollar.

Ferguson Record, pp. 245, 445–447.

Ferguson Record, p. 245, l. 35.

(B) October 1923.—Proposal that Sloan should form a Syndicate and buy for $100,000. Respondents to contribute $25,000 owed by Company to them. This failed.

Ferguson Record, p. 458, Exhibit 141.

Ferguson Record, p. 246.

(C) December 1923.—Option to one Copp for $112,000 net. This failed.

Ferguson Record, p. 461, Exhibit 55.

(D) April 1924.—Option to R. R. Land for $90,000 net payable by December 1925. $1,000 spent in pumping out mine for inspection. This failed; proposal to constitute 2 cents per share. Syndicate agreed—but nobody else. This failed.

Ferguson Record, p. 246, l. 26.

Ferguson Record, p. 466.

Ferguson Record, pp. 247, 472, 277, l. 30, p. 269.

The position was now desperate. The treasury was empty, the mine was certain to flood again, and the Respondents had advanced $40,000 to the Company and were liable on a guarantee to the bank for monies advanced.

Ferguson Record, p. 230, l. 15.

(10) As a last resort the mine was offered in July 1924 to David Sloan for $100,000.00. He refused but made a counter-proposal to take an option or working bond on the property for $100,000.00 net, on the condition that the Respondents would join him for a 50 per cent. interest, put up half the money required for working, estimated at $16,000 and assume half the responsibility. Sloan was to have the bond in his own name and was to have sole charge of operations. The Respondents reluctantly agreed to this; for three years the directors had unsuccessfully tried to sell to outsiders, Sloan's offer seemed to be the last chance, and the only way to try to get something out of the fast flooding property. The directors met 16th July 1924 and gave the option to Sloan. This option was for $100,000.00. It required that $16,000.00 should be put up for development work. The payment of purchase price was to be completed by 1st August 1929. The purchaser was to take over at a valuation all supplies and materials at the mine and was to keep the mine insured for $20,000.00. The purchaser had to do a specified amount of

Ferguson Record, p. 247. p. 469. p. 248. p. 11, l. 8. p. 270, l. 20. p. 247, l. 34. p. 248. p. 250, l. 23.

Ferguson Record, p. 55, l. 13 to p. 59, l. 24.

development work each year and 15 per cent. of the proceeds of the ore sold was to be paid the vendors as rent, or, if the option was exercised, to be applied towards the purchase price. Attempts were made to get the other local shareholders to join in the new option, but they refused. It will be noted that the terms were more favourable to the company than the "Land" option referred to above.

Ferguson Record, pp. 203, 284, 186.

Ferguson Record, p. 468.

(11) All the directors were present at the Directors' Meeting when the option was given on 16th July 1924. They were General Duff-Stuart, A. E. Bull, W. W. Walsh and A. H. Wallbridge. All but Walsh were members of the syndicate. Walsh represented, as Executor, the Williams Estate and in that capacity all the shares of the Fergusons except one and except the shares held by the Royal Bank. Full disclosure of the directors' interests as members of the syndicate was made at the meeting. Walsh, who held over three-fourths of the shares of the minority was particularly well pleased to get the sale through, and moved its adoption, which was unanimous.

Ferguson Record, pp. 248–249.

Ferguson Record, p. 204, l. 10, p. 468, ll. 38–44.

(12) This meeting was the beginning of the difficulty. There were four directors present, all except Walsh were members of the syndicate having the agreement with Sloan. Under Article 102 of the company a director could contract with the company provided there was full disclosure, but he could not vote, or, if he did vote, his vote was not to be counted. A quorum was two. There was full disclosure at the meeting but as Walsh was the only disinterested director there was no quorum so that, if this was a disqualifying contract the resolution and the Sloan's option were both void. There is no suggestion that this was appreciated by Walsh or the other directors at the time. If anyone was to blame it would be Walsh, as his firm were the Solicitors for the company.

Ferguson Record, pp. 361–362.

Ferguson Record, p. 361, l. 28.

(13) The Sloan option and his back agreement to the syndicate appears in the Ferguson Record at pages 55 and 469 respectively.

'erguson Record, . 307, l. 23, . 43 to end.

(14) Sloan at once proceeded to the mine and began operations.

'erguson Record, . 475. . 471.

(15) On 22nd August 1924 at an extraordinary general meeting of the company it was resolved that the company be wound up voluntarily. Mr. John S. Salter for years the company's auditor was appointed liquidator. The resolution was confirmed by a second extraordinary general meeting 9th September 1924. The Fergusons received notices of these meetings but ignored them. Ferguson was advised by Walsh that he could attend and vote his own shares. If he had done so his vote could have defeated the resolution. Lloyd-Owen apparently showed no interest and attended no meetings, although duly served with notices.

'erguson Record, . 107.

'erguson Record, xs. 91 and 92. . 486 *et seq.* . 253.

(16) In virtue of the Companies Act R.S.B.C. 1924, Chapter 38, Section 219, all the powers of the directors had ceased from the date of the liquidation resolution of 22nd August, 1924.

(17) On the 13th day of November 1924 the Liquidator gave notice of an extraordinary general meeting of the company for the 5th day of December 1924 for the following purposes :— Ferguson Record, pp. 488, 489, 490.

" (1) Of confirming the action of the Board of Directors " of the company in granting a working bond containing an " option to purchase all the mineral claims, buildings, plant, " machinery, equipment, materials and supplies belonging to " the company dated 16th July 1924, to one David Sloan " representing himself for one-half interest and the following " shareholders of the company for one-half interest :— " R. B. Boucher, F. J. Nicholson, H. C. N. McKin, A. E. Bull, " A. H. Wallbridge and J. Duff Stuart, of whom the last three " mentioned are directors of the company ;

" (2) Of considering, and if thought fit, confirming or " sanctioning the action of the meeting of the Creditors of the " Company, held the 22nd day of October, A.D. 1924, in " accepting a tender of $45,000.00 for all the mineral claims, " assets and property of the above company, subject to but with " the benefit of the said working bond, said tender being made " by R. B. Boucher on behalf of the before mentioned six share- " holders, who are also creditors of the company to the extent " of $39,590.18.

" (3) Of considering, dealing with or acting upon any other " offer or offers for said assets that may be submitted to the " meeting or authorising the Liquidator to sell said assets for " such sum and on such terms as the meeting may determine."

(18) At this meeting of the company, 5th December 1924, over 97 per cent. of the shareholders of the company were present. The Ferguson shares were represented and voted by Walsh as executor for Williams Estate and Seaman for the Royal Bank. Ferguson Record, p. 483.

(19) The resolution ratifying the Sloan option was moved by Twiss, a minority shareholder. It was seconded by Seaman of the Royal Bank and carried unanimously. Ferguson Record, p. 483.

(20) The motion accepting the offer of the syndicate to purchase the assets of the company on the terms therein set out was moved by Walsh and seconded by Seaman. This too was carried unanimously.

Ferguson Record, p. 60.

(21) On 21st January 1925 the Liquidator, pursuant to the resolution of 5th December 1924, entered into an agreement as vendor under seal with the syndicate as purchasers, which provided inter alia :—

> " The vendor hereby agrees to sell to the purchasers and the purchasers hereby agree to purchase from the vendor all the mineral claims, assets and property of the vendor subject to but with the benefit of that certain working bond containing an option to purchase all mineral claims, buildings, plant, machinery, equipment, materials and supplies belonging to the vendor dated July 16th 1924, given by the vendor to one David Sloan."

(22) Sloan carried out the terms of his working bond in due course and conveyances were executed by the Liquidator. The property was conveyed to a new company, Pioneer Gold Mines of B. C. Limited and the old company was wound up. The mine after some vicissitudes has proved a success and is now a valuable property.

Ferguson Record, p. 2 *et seq.*

(23) After the success of the mine had been established Ferguson arrived back from the United States in 1932. In June 1932 he issued a Writ against the syndicate making most outrageous allegations of fraud against the syndicate. He charged them with conspiring together to mismanage the mine so as to acquire his interests ; with conspiring to cause the Williams Estate to commence foreclosure proceedings ; and with fraudulently conspiring to give an agreement to David Sloan. Allegations were made attacking the ratification of 5th December 1924 on the ground of non-disclosure and fraud. Anyone reading this Statement of Claim and following the outcome, can only conclude that the action was launched with a motive inspired not by a knowledge of facts justifying the allegations, but inspired by a cupidity arising from the richness of the mine.

p. 8.

(24) In these proceedings the Appellant Lloyd-Owen was an interested participant. His activities were in marked contrast with his disregard of what was going on when the mine was in distress. He did not however venture into the witness box.

Ferguson Record, pp. 324, 325, 326-329.

(25) The action was tried before Chief Justice Morrison and a strong Judgment was given by him finding against the Plaintiff, on all points and an appeal to the Court of Appeal was dismissed Mr. Justice McPhillips dissenting.

(26) An appeal was then taken to the Privy Council, but some of the more improbable charges of fraud were before this

abandoned, but many serious charges of fraud were still pressed. These charges of fraud were severely dealt with by their Lordships of the Judicial Committee during the hearing, and by Lord Blanesburgh in the Judgment. p. 30. p. 27.

(27) In addition, however, both by the pleadings and the trend of the action, all the issues which are now proposed to be raised were involved, and were disposed of adversely to Ferguson in the British Columbia Courts.

(28) Throughout these proceedings Lloyd-Owen, the present Appellant, also a minority shareholder, was closely identified with Ferguson and was in that action, it is suggested, an alter ego of Ferguson, as Ferguson is of Lloyd-Owen in the present action. The reasons for changing the nominal plaintiff are obvious. The costs, amounting to many thousands of dollars, have not been paid, and the learned Trial Judge had unpleasant things to say about Ferguson. p. 8.

(29) When the Ferguson action was heard in the Privy Council, Mr. Wilfrid Greene, K.C., as he then was, who was Counsel for two of the Respondents, opened at the conclusion of the Case for the Appellant Ferguson. He raised the point, then taken for the first time, that once the company was in liquidation a minority shareholder had no status to bring such an action.

(30) When Mr. Greene was about to proceed on the merits of the Respondents' case, he was stopped, and effect was given to his first submission.

(31) The Judgment (delivered by Lord Blanesburgh) went into the issues at some length to determine what was the actual case being presented by the Appellant in his pleadings and in his argument. In the result it was found that, although the issues were somewhat camouflaged in the pleadings, the action was clearly one brought by a minority shareholder on behalf of himself and other minority shareholders for the benefit of the company, and it was held that the action being after liquidation, the minority were no longer at the mercy of the majority and consequently an action in this form would not lie. The judgment in examining the allegations and arguments put forward by the Appellant was careful to declare that no decision was being given on any of these questions as the Respondents had not been heard. p. 27.

(32) It was pointed out by Lord Blanesburgh that the proper procedure after liquidation would be to request the Liquidator to bring the action in the name of the company. If the Liquidator

acting at the behest of the majority refused when requested to take the action in the name of the company it was open to any contributory to apply to the Court.

(33) Following this Judgment the minority shareholders or some of them acting through the same Solicitor and Counsel, made Lloyd-Owen the spearhead of the attack instead of Ferguson and made the demand upon the Liquidator which has resulted in this appeal.

PART II.

GROUNDS UPON WHICH THE APPELLANT'S RIGHTS ARE BASED.

1. It is contended by the Appellant that he is entitled to his day in Court and that as the previous action was in the end adjudged to be abortive he should now be allowed to bring another action as a matter of course, he having given adequate security to protect the Liquidator and the Company, though not the Respondents, and limiting his action to those matters not finally dealt with by the Judicial Committee in the Ferguson action.

2. In considering this proposition, it is necessary to understand the real relation of the two actions one to the other and the unusual circumstances which apply.

3. As already stated many issues raised in the Ferguson action have been eliminated, but the Petition as presented to the Judge and the Affidavit in support clearly showed that many allegations of active fraud and conspiracy dismissed by the Courts in British Columbia and severely dealt with in the Judgments of the Privy Council, were to be revived.

4. These issues were narrowed down, however, in the Petition for Special Leave to Appeal and by the submission of Counsel at the hearing of the application so that it clearly appears that the proposed action with respect to which the learned trial judge is said to have wrongly exercised his discretion is not the action which the Appellant says now the Judge should have allowed. In alleging a wrong exercise of discretion, the Appellant in fact put forward a case upon which discretion was never exercised.

5. The present allegations are set forth in the Petition as follows :—

Paragraph 19 : " That after the delivery of this Judgment your Petitioner investigated the allegations made and sought legal advice from eminent counsel in Toronto and is advised

that the Company has a good cause of action in the circumstances set out in the Judgment on the ground of the Directors' fraud and breach of trust."

6. Again in paragraph 23 :—

"Your Petitioner has no desire to make nor any intention of making any 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 *v.* Lord Ashburton reported in 1914 A.C. page 932, was often described as fraud or constructive fraud although not giving rise to an action for deceit."

7. Before the Judicial Committee when the Petition for Special Leave was heard Counsel for the Appellant further and precisely limited the issues to the following :—

(1) Was full disclosure made at the ratifying meeting 5th December of the successful operations of the mine during the second half of 1924 ?

(2) The resolutions of ratification were not extraordinary resolutions.

(3) Could the majority shareholders validate a gift of the Company's property to the directors at the expense of the minority, the company not being a going concern at the time ?

No such attenuated case was ever presented to the trial judge.

8. But it is respectfully submitted that all the facts relating to these issues are fully available in the Ferguson action ; and these issues may be determined by your Lordships in reviewing that case :

(1) See Statement of Claim Record Ferguson *v.* Wallbridge paragraphs 16 and 18 at page 6.

(2) Finding of the learned trial judge Ferguson Record pp. 328 last line, to page 329, 4 lines.

(3) Outline by Lord Blanesburgh of issues raised in Ferguson Appeal.

"The resolutions so passed were, as was natural, strongly relied on by the Respondents in the Courts below as one answer to the claim made against them. It is convenient, therefore, at this point to summarize the contentions of the Appellant

with reference to this meeting. It is with his contentions that, at the moment, their Lordships are alone concerned. His view, as their Lordships understand it, is that the true position at the time of the meeting was as follows :

" (1) If the Sloan working bond was to become binding on the company it had to be ratified.

" (2) If the syndicate, including the directors, sought to retain for themselves the benefit of the Sloan declaration of trust which on ratification of the bond, they held as trustees for the company or the contributories generally, they could, if at all, only do so on the fullest disclosure of the position and of all then material facts in relation to the mine which were calculated to influence the minds of the contributories.

" None of these last conditions were, it is said, complied with. There was no reference to the declaration of trust at all. The statement that under the bond Mr. Sloan ' represented himself for one half interest and the members of the syndicate for another half ' not in fact true, suggested, if it did not say, that the interests of Mr. Sloan and the syndicate stood or fell together, and that the company could not have the benefit of the one without renouncing all interest in the other. The actual situation, again, was, so it is said, travestied in Mr. Wallbridge's statement, giving as it did no hint of the mine's progress under Mr. Sloan ; of the gold extracted since he began work ; or of the fact that since September it had been self-supporting. It was incredible that Mr. Wallbridge, in constant touch with the mine, was not fully informed on all these matters. Such are the Appellant's views."

9. In the Canadian Courts the Appellant and his associates have had their day in Court to the full in Ferguson's case. The question of the Plaintiff's competence was not there raised. All the judgments were against the Appellant except the dissenting Judgment of McPhillips J.A.

10. It has been suggested that the learned Judges of the Court of Appeal had made findings of constructive fraud giving support to the present submissions of the Appellant. It is submitted this is incorrect.

Ferguson Record, pp. 324–329.

(1) The learned trial judge Chief Justice Morrison found against them on all issues ;

Ferguson Record, p. 336, top.

(2) Chief Justice Macdonald of the Court of Appeal found a technical breach of trust in the action of the directors at the meeting of 16th July, 1924, but was satisfied there was no conscious fraud.

This Judgment is of no help to the Appellant relative to the alleged concealment at the company's meeting of 5th December, 1924.

(3) Mr. Justice Martin found there would have been constructive fraud by the action of the directors at the 16th July meeting if it had not been for the provisions of the Articles of Association of the Company. See Article 102, pages 361–2 of the Ferguson Record. He found that full disclosure was made at the directors' meeting and that there was due ratification and confirmation by the company at the December meeting. Ferguson Record, pp. 336–338.

(4) Mr. Justice M. A. Macdonald based his judgment on the findings of the learned trial Judge. He said in part :— Ferguson Record, p. 345 *et seq.*

> " It is difficult after ratification to assert that the thing approved and, at the time regarded as fair by the minority, was in fact fraudulent. The truth is that the minority shareholders, if the company could not effect a sale to third parties—and its efforts in that direction failed—were willing to retire and to permit the Respondents to join in a deal with Sloan, acquire the property ; pay the debts of the old company and $20,000.00 additional. It seemed to them desirable to affirm at that stage ; they cannot now repudiate because future events disclosed that it would have been more profitable to dissent. It would be regarded as a fair arrangement had not later developments revealed values rich enough to excite cupidity. The viewpoint, as entertained by all shareholders when the bond was given and continuing up to the time it was known that a rich mine had been developed, is important in deciding whether or not the steps taken by respondents were fraudulent, unjust or oppressive. It may be observed too that the resolution of December 5th, 1924, ratifying the bond and declaration of trust was moved and seconded by minority shareholders and supported by 95 per cent. of the shares represented. Mr. Twiss and other minority shareholders present were capable of appreciating the situation." Ferguson Record, p. 352, l. 30, to p. 353, l. 4.

(5) Mr. Justice McPhillips in his dissenting judgment gave a pronouncement which was interpreted as and appeared to be a finding of actual fraud. His Lordship in the appeal in the present action to the Court of Appeal from the Judgment of Mr. Justice Murphy has devoted some time in explaining that his judgment on the Ferguson appeal was directed only to constructive fraud. Appeal Book, pp. 15–16.

11. These judgments in the Court of Appeal give no comfort to the Appellant, but they do show that the questions now being raised were before

the Canadian Courts, and by them decided and they afford ample ground for the decision of Mr. Justice Murphy that the Respondents should not be again " vexed."

12. It is true that owing to the lack of competence in Ferguson there has not been a determination on the merits by your Lordships' Board.

13. It is submitted that a new trial is not necessary for this purpose, but that your Lordships should decide them now for the following reasons:—

(1) The material before your Lordships on this appeal shows that the Appellant has no evidence to offer in a new trial, other than that given in Ferguson's case.

(1A) All the parties and all the evidence are before your Lordships.

(2) On the application for Special Leave it was suggested by Appellant's Counsel that on a second trial further information might be extracted from the Respondents in Interrogatories. The learned Counsel overlooked that in British Columbia there is a more effective method of interrogating parties before action than by written interrogatories—namely, Examination for Discovery—and that all the Respondents were examined for discovery and they were all witnesses at the Ferguson trial and were fully cross-examined.

(3) Special attention is called to the Appellant's affidavit which was the only material supporting the Petition to Mr. Justice Murphy, particularly paragraph 4, Record, pages 6 and 7.

(4) It is submitted that the situation is essentially different from the ordinary one. In the ordinary case the shareholder or contributory applies to the Liquidator to bring an action submitting only his own side of the case. On this ex parte evidence he asks for action to be taken. If he is refused he then petitions the learned Judge in liquidation submitting the same material.

(5) Here, however, is the unusual. The minority shareholder applied first to the Liquidator and then to the Judge in liquidation. By his affidavit he stated that all the facts in his possession have already been proved in a previous action and can be fully substantiated by evidence in any new action. He also informed the Court in effect in his Petition that the other action was decided against him at the trial and in the Court of Appeal and that the appeal to the Privy Council was abortive.

p. 6, l. 23, to p. 7, l. 5.

p. 3 *et seq.*

(6) The learned Judge thereupon required the Petition to be adjourned and the Respondents served.

p. 8 *et seq.*

(7) The Respondents appeared and by the affidavit of Mr. Bull made the Record in Ferguson's Case an exhibit, thus putting before his Lordship the actual material which the Petitioner had referred to generally both in his Petition and affidavit.

(8) His Lordship was then in a position of singular advantage as compared with the ordinary case. He had before him all the evidence for the plaintiff clarified by cross-examination. He had before him all the evidence for the defendants also tested by cross-examination. He had all the documents in possession of either side. He had the findings of the Chief Justice of his Court, who had heard the evidence. He had the judgments of the Court of Appeal, and he had the benefit of the discussion before your Lordships.

(9) To say that his Lordship should have shut his eyes and ears to all this information, and have insisted on proceeding blindly on the minimum of facts offered him by the Appellant is to deny to the Court the material known by him to be available and necessary so that he may intelligently and with full understanding make in the words of the Statute " such order on the application as the Court thinks just."

(10) The Board is now asked to over-rule the discretion exercised by Mr. Justice Murphy.

(11) It is respectfully submitted that, in so doing, the evidence in Ferguson's Case should be reviewed and a decision should be given whether the Judges below in that case were wrong in the result.

(12) If, as a result that case was rightly decided, then the discretion of the learned trial Judge was rightly exercised and should not be over-ridden merely to give this Appellant a chance to try his luck on the same case over again.

PART III.

It is submitted that in the result the Judgments of the Canadian Courts in Ferguson's Case were right and that therefore, as the learned Trial Judge in effect found, the Appellant should not be given the opportunity to harass the Respondents by another trial. This submission is based on the following reasons :—

FIRST.—Consideration of the Directors' meeting 16th July, 1924 :—

1. There was not a valid quorum at this meeting. But there was full disclosure and if a quorum the directors were fully protected by Article 102 of the Company's Articles. See Ferguson Record, p. 362.

2. Your Lordships have already decided that this meeting was void and the Sloan agreement was also void.

3. As the back agreement was based on Sloan's agreement with the company, it would follow that this agreement too was of no effect.

4. From this it follows that there was nothing coming to the directors which could be claimed by the company.

5. Sloan was in possession because of a mutual mistake. By this, however, the company was not injured, but, on the contrary. If he had not begun work the mine would to-day be only a hole in the ground filled with water. Neither the directors nor Sloan received any benefit from his activities under the void agreement prior to ratification.

SECOND.—Consideration of the events between 16th July and 5th December, 1924 :—

1. In August, 1924, the company was put into voluntary liquidation under the provisions of the Companies Act. R.S.B.C., 1924, Ch. 38, Section 216.

2. At this time it was considered either (1) That Sloan would carry out his option—in which case there was nothing more for the company to do ; or (2) that the property would come back on the company's hands—In which event the outlook was hopeless. In any case it was within the statutory rights of the majority shareholders to utilise the statutory provisions to put the company into liquidation. See Cook *v.* Deeks (1916) 1 A.C. 554 ; (1916) 85 L.J.P.C. 161.

3. In Ferguson's case it was charged that the company was put into liquidation as part of the fraudulent conspiracy alleged against the Syndicate. No such charge can now be made.

4. Once the company was in liquidation the directors ceased to function as such, and the affairs of the company were exercised solely by the Liquidator : See Companies Act R.S.B.C. 1924, Chap. 38, Sections 219 (*c*) ; 225 ; 205. The directors were functus officii and their duties were completely taken over by the Liquidator.

5. There has been some suggestion that the Liquidator did not take his duties seriously, and acted only in a perfunctory way.

6. It is submitted that no such suggestion can arise here :—

Ferguson Record, p. 382, l. 16, to l. 20.

(1) The Liquidator had been for some years the company's auditor and had been seconded for that position in 1921 by Ferguson.

(2) It has never been charged that he acted fraudulently or in conspiracy with the Syndicate.

(3) It is not suggested in the present proceedings that he ever acted negligently. He is not being sued but, on the contrary, has been asked to bring the present proposed action.

(4) If it be that his actions were at times perfunctory it is only that he regarded the proceedings as routine, believing all the parties to be honest and knowing that practically all the shareholders (over 97 per cent. of them) were in complete agreement in what was being done—The others taking no interest.

(5) The failures of the Liquidator cannot impose a trust obligation on the ex-directors short of fraud and collusion.

7. From these considerations it follows that from the general meeting in August to the meeting of 5th December the company was in law directed and controlled by the Liquidator and the directors so-called were no longer acting as such. During this period they were liable for any acts of actual fraud, but not for any constructive fraud as directors.

8. It was the Liquidator who called the meeting of 5th December. His authority for so doing is Section 227 of the then Companies Act R.S.B.C. 1924, Ch. 38. Ferguson Record, p. 480.

THIRD—Meeting of the Company 5th December 1924.

The Respondents make two submissions in relation to this meeting.

A: There was in fact no concealment.

B: That neither at this meeting, nor in the notices calling the meeting, were the Syndicate under any obligation to make disclosure. That the legal consequences of non-disclosure have been misconceived.

A: There was no concealment.

1. Throughout in this case, and in the Ferguson case, there have been many extravagant and incorrect statements made about the progress at the mine and the knowledge which the members of the Syndicate had.

2. Attention is called to the Judgment of Lord Blanesburgh, where he recalls what the Appellant had asserted in this connection:

"On receiving his bond Mr. Sloan at once started vigorous operations at the mine. His progress was, in fact, Appeal Book, p. 168, l. 13 to l. 29.

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. This the Appellant points out."

Petition, p. 4.

3. In the Petition for Special Leave it is asserted : " No disclosure of the Declaration of Trust was made, nor was any information given to the meeting as to the recent successful operations at the mine."

Ferguson Record, p. 480, l. 24, to p. 481, l. 22.

Ferguson Record, p. 297, l. 20 to l. 26.

4. As to the Declaration of Trust, this, it is submitted is only a quibble. The notice of the meeting clearly indicated that in some form the syndicate had a half interest. At the meeting the Sloan option was read in full. This document showed that the syndicate did not appear therein. Their interests must have been by some independent document. It was not concealed, it was simply taken for granted. If anyone had called for its production it would have been forthcoming. As to the 3 per cent. or less of the shareholders not present at the meeting, is it to be contended that their rights have been so denied by the form of this notice as to justify this stale claim ?

5. As to the allegations about the concealment of the progress of the mine, much has been asserted, but nothing was ever proved. It is essential that now for the first time the facts as contained in the evidence should be presented.

6. Facts about concealment and the assertions that by December the mine had proved itself and was self-supporting. This allegation involves two distinct questions :—

A : That the operations had established that the mine had proved itself.

B : The suggestion that enough gold was being taken out to make financing assured.

A: That the operations had proved the mine. This requires an understanding of the workings of the mine and the character of the work being done.

(1) It is to be remembered that this mine had been operated as far back as 1911. Ferguson Record. p. 87 at bottom.

(2) Sloan went up to begin operations on 19th July. At this time there was a shaft down to the third level about 300 feet. All the gold which had been already taken out was from these levels. This appears from the plan Exhibit 163, Ferguson Case. Ferguson Record. p. 307, l. 23. l. 43 to end. Ferguson Record, p. 320, l. 12 to l. 31.

(3) Sloan had two distinct operations on his hand :—

(A) To take out what gold still remained in the stopes and around the pillars on the third levels ;

(B) To sink a shaft below the third level to open up the vein at a lower depth. It was this problem of sinking the shaft below the third level which had been the goal of the previous operators, but they had never been able to undertake this work. Before the syndicate had bought in 1920 the Fergusons had " gutted " the old workings, but there was still some gold left in them. Everybody knew this, but its removal proved nothing. The whole venture required going deeper. Ferguson in his letters had predicted " There was rich ore at great depth." Ferguson Record, p. 123, l. 38, p. 166, l. 19, p. 167, l. 6, p. 392, ll. 11–15, p. 118, l. 36. Ferguson Record, p. 396, ll. 1–13.

(4) As a result Sloan did two things :—

(A) He started his own crew getting the gold around the pillars, etc., on the third level. This gold was not taken from the new findings and amounted to no new discovery.

See Stevenson's letter : Ferguson Record, p. 476.
Copp's evidence ,, ,, p. 150.
Davidson's ,, ,, ,, p. 123 (top).
See also Exhibit No. 163, p. 320, l. 12.

He took out by December $15,500, although he lost money in doing so. He was operating over five months and there was no significance whatever in his getting this much gold from these old workings. The record shows amounts taken in previous years by Fergusons.

1916 taken out $26,000.
1917 ,, ,, 34,000.
1918 ,, ,, 34,000.
1919 ,, ,, 40,000.

Ferguson Record, p. 70.

They were never able to operate in the winter months, so that these takings were made in not more than 9 months in any year.

(B) He let a contract to sink a shaft some 400 feet to contractors who started work at once. About the middle of November Sloan was in Vancouver for the last time till just before Christmas. At this time the contractors were sinking the shaft. It was running in the foot-wall of the vein.

Ferguson Record, p. 308, p. 309 to l. 26.

(5) When Sloan returned to the mine they were down 140 feet. They then cross-cut at this level and after going 18 to 20 feet they struck the vein which was running down at a slightly different angle from the shaft. The ore apparently was showing about the same as at the third level.

Ferguson Record, p. 215, ll. 30–32, p. 254, l. 41 to end, p. 255, ll. 1–10, 19–27, p. 260, l. 7, p. 121, l. 35, p. 290, ll. 10–14, p. 292, ll. 20–31, p. 297, ll. 12–17, p. 304, ll. 24–28, p. 305, ll. 1–17, p. 306, ll. 24–31.

(6) The evidence is conclusive that no one of the Syndicate knew anything about this and is also conclusive that it was nothing but the ordinary progress of the work. If the vein was there as expected, it justified continuation of development If it had ceased the mine was not worth proceeding. The assertion that the continuation of this vein for 140 feet made or proved the mine in any sense is an absurd statement.

Ferguson Record, p. 316, l. 18.

p. 255, l. 40 to end.

(7) All the gold in this discovery was taken out the next year and it gave a profit of only $9,000.00.

B : The suggestion that enough gold was taken out to finance the undertaking is not true.

(1) Prior to 5th December Sloan had sent down two blocks of gold :

Ferguson Record, p. 68.

19th September	$2,700.00
4th November	6,300.00
	$9,000.00

Fifteen per cent. of this went to the Liquidator. This gold was not taken from new findings.

(2) The facts about these two bricks were mentioned at meeting :

Bull	p. 303
cf. Twiss	p. 184

(3) A third brick was brought down on 5th December by Bebe—an associate of Sloan. This brick was afterwards assayed to be valued at $6,400.00. This too was taken from the old workings.

(4) Nobody knew anything about this brick till after the meeting. Ferguson Record, p. 254, l. 41, to end. p. 259, ll. 32–38.

(5) The fact that there was no failure to disclose any known fact at the meeting, because they knew nothing, was admitted repeatedly by Mr. MacInnes, Counsel for Ferguson before your Lordships' Board, both as to the sinking of the shaft and the last brick of gold. p. 278, l. 30, to end. p. 292, l. 32, to end. p. 304 and p. 305, to l. 17.

See Appeal Book in the present case.

(A) At page 65 Mr. MacInnes was reading from the evidence of Bull :—

"Lord Blanesburgh : Do you accept that answer as the result of the evidence as a whole that this information you are referring to was only known to them after the meeting ? Appeal Book, p. 65, l. 13 to l. 30.

"Mr. MacInnes : That is what they say.

"Lord Blanesburgh : I am asking you if you accept it ?

"Mr. MacInnes : I have to, my Lord, because there is nothing to show to the contrary. '(Q.) Now what did you discover from Sloan when he did come down ? etc.' (reading to the words, line 45) 'so that this wonderful discovery of ore that he talks about 200,000 dollars does not amount to much.'

"Then, my Lords, there is the evidence of Dr. Boucher, General Stuart, and Mr. Bebe, all going to the same effect, that is, that the defendants did not have information about what Sloan was doing at the mine."

(B) "Lord Thankerton : Are you still maintaining that you have proved your allegation on page 6 of the Record, at line 30, about concealment at this meeting ? I understood you to say you were accepting this evidence or had accepted it ? Appeal Book, p. 67, l. 28, to p. 69 l. 11.

"Mr. MacInnes : I am simply showing your Lordships now apart from any suggestion against these defendants, that as a matter of fact there were certain conditions existing at the time the notice was sent for these meetings which were material for the shareholders to know, and that they were not known to the shareholders.

"Lord Thankerton : What are they ? All the evidence you are reading is negativing concealment.

What do you say was concealed? While the fact that the mine shaft had been sunk and that they had tapped the vein lower down was apparently not known at that date. That is what this evidence says, and you say you have to accept that evidence. What beyond that do you still say was concealed.

"Mr. MacInnes: I say the fact that the shaft was being sunk and that work was being carried on was known to everybody.

"Lord Thankerton: Sinking the shaft does not mean that the mine has become valuable.

"Mr. MacInnes: Not necessarily, my Lord. If your Lordships will allow me to develop this——

"Lord Thankerton: All right. You still say you have something?

"Mr. MacInnes: General Stuart at page 297, lines 14 to 17, says practically the same thing. My submission is that the defendants knew that the shaft was being sunk and that it was part of the development operations being carried on, and that would be a very material thing for the shareholders to know when they came on the 5th December to determine whether or not they were going to confirm the working bond and option. They did know as a matter of fact that the shaft was being sunk to an extent.

"Lord Blanesburgh: Who is 'they'?

"Mr. MacInnes: The defendants, my Lord, the witnesses whose evidence I have just read did know that work was being done, but they were ignorant of the extent to which it had been carried out at the time of the meeting. There was this about it: if they did not know of the extent to which it was carried out they could have found out, because their manager to whom they had entrusted the work was in charge of the operations, and it was their knowledge through his knowledge of the facts."

Appeal Book, p. 72, l. 29, to p. 73, l. 15.

(C) "Lord Russell: Let me see what you say in your Pleadings about that. That 'the Defendants concealed and induced the Directors to conceal from the meeting the discoveries of ore which had been made.' Do you say that now? That is the question.

"Mr. MacInnes: I say that the evidence falls short of the instructions which are set out in these Pleadings.

"Lord Russell: That is no answer to the question. Do you allege it before us?

"Mr. MacInnes: No, my Lord, I cannot.

"Lord Russell: Then you do not?

"Mr. MacInnes: No, I do not.

"Lord Blanesburgh: Then you are not abandoning it by any ruling of ours. I want to keep quite clear of complexity in this matter. At the moment I have no knowledge of the evidence. I accept your statement that the evidence does not enable you to maintain that charge now."

(D) "Lord Thankerton: There are four facts with regard to non-disclosure in the pleadings so far. First of all, that the shaft had been sunk to a certain level with the result that they found a vein. The answer on the evidence is that they did not know that until after Christmas. I understand you accept that, and therefore, that disappears. Is not that right? Appeal Book, p. 75, l. 4, to l. 29.

"Mr. MacInnes: No, my Lord. I think your Lordship is taking me wrongly there—simply the fact that they did not know the extent to which that shaft had gone.

"Lord Thankerton: If they did not know the extent to which it had gone, they would not know he had reached the vein, would they? Is that involved in it, or not?

"Mr. MacInnes: No, my Lord, because they did not know that he was sinking a shaft for the purpose of getting to the vein.

"Lord Thankerton: Have you any evidence to show that they knew more than they say they knew about the sinking of the shaft?

"Mr. MacInnes: No, my Lord.

"Lord Thankerton: And about tapping the vein at the lower level?

"Mr. MacInnes: No, my Lord, I think the evidence which I have read covers that."

(6) The evidence of all the witnesses establishes first, that the facts known at the mine had no significance, and, second, that there were no facts known by the Syndicate on December 5th, other than those which were disclosed.

(A) Sloan, Ferguson's case pp. 307 to 309.

(B) Bull „ „ p. 207,
p. 254, l. 40.
p. 271.
pp. 278–9.

(C) Dr. Boucher „ „ pp. 289, l. 19–290, l.24.

(D) General Duff-Stuart pp. 297–8.

(7) See Findings Morrison, C.J., pp. 328–9 Ferguson Case.

(8) There are several collateral facts which indicate that no one placed any particular value on the mine, or the contract, after the ratification.

Ferguson Record, p. 261, l. 10 to l. 27.

(A) McKim, one of the syndicate, sold his shares—a twelfth interest—in 1925 for $7500.00, or at the rate of $90,000.00 for the whole mine. He did this after consultation with Mr. Bull, and Bull did not buy them.

Ferguson Record, p. 289, l. 40. p. 294, l. 28. p. 297, l. 40.

(B) Copp, the former manager of the mine, sold his shares in January 1925 for 1 cent a share. If the Sloan option was taken up these shares were worth 2.66 cents a share. Two of the Syndicate had a chance to buy them and refused. The third bought them and thought he "was easy."

Ferguson Record, pp. 271–280.

(C) As late as 1926 the vein "petered out" and Sloan wanted to quit.

Ferguson Record, p. 261, l. 28, to end. p. 262, ll. 1–21.

(D) It is to be noted that this mine was 50 miles from a railroad up in the mountains, with only an inadequate telephone service. Sloan was not in the habit of giving out any information.

Ferguson Record, p. 260, l. 8. p. 271, l. 44, to end. p. 292, l. 40.

(9) Fact that the Syndicate had only put up one-half of the $8,000.00 which they were required to put up, was of no importance because :—

(A) They had obligated themselves at the Bank for further moneys required.

Dr. Boucher —p. 211 Ferguson Record.
Bull —p. 270 „ „

(B) There was an operating loss in 1924 of $2,500.00.

Bull p. 255 Ferguson Record.

(C) This takes no consideration of their capital expenditures for machinery and shaft, etc.

Sloan pp. 309 and 315 Ferguson Record.

B. The Syndicate were under no obligation to make disclosure :—

1. That the Syndicate did make disclosure of their interest appears from the notices and Wallbridge's letter. See pages 480 to 484 Ferguson record.

2. If this notice inaccurately defines their interest, though how it could be further disclosed in a notice is not shown, it is immaterial :—

(1) As mere shareholders it was not necessary that their interest should be disclosed at all. The meeting was not ratifying a voidable contract. It was dealing with a contract which was void, and so to be considered de novo.

(2) If there was any inaccuracy it was in overstating their interest. No one could be misled by the statement.

3. So far as concerns the progress being made at the Mine, it is submitted that the directors no longer functioning as such were under no obligation to make any disclosure. They were under no greater obligation than Sloan. In any case they could not disclose what they did not know.

4. When the meeting convened the Syndicate were entitled to vote as independently as any other shareholders.

See North-Western Transportation Co. *v.* Beatty (1887) L.R. 12 App. Case 589 ; (1887) 56 L.J.P.C. 102.

5. Assuming—(which of course is disproved)—that the Syndicate had had any information as to the progress which Sloan was making at the mine, what obligation was there to disclose it, either in the notice, or at the meeting ? The shareholders knew in fact that Sloan was working and that he was at least making satisfactory progress, or it would not be necessary to ratify the agreement. He must be sufficiently encouraged to consider it worth while to proceed, or he would abandon the enterprise. Knowing this much, surely the burden was on them to ask just what

this progress was, and what the prospects were. Knowing that work was progressing and that Sloan was meeting with enough success to justify him continuing, how can those present at the meeting complain about non-disclosure when they never even enquired ?

6. Furthermore, the company at all material times was represented by the Liquidator. He knew what gold was being taken out of the mine, because under the contract 15 per cent. of all gold taken out was paid to the Liquidator.

See Bull's evidence p. 254 bottom page (Ferguson record) also Salter's evidence p. 193 l. 36 (Ferguson record).

7. The company's meeting of 5th December was called by the Liquidator under the provisions of Section 227 of the Companies Act, Ch. 38 Revised Statutes B.C. 1924.

" 227. Where a company is being wound up voluntarily the liquidator may summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extra-ordinary resolution or for any other purposes he may think fit."

8. It is submitted that at this meeting the duty of ascertaining the facts and informing the meeting rested on the liquidator. In the absence of fraudulent collusion the ex-directors incurred no responsibility because of his actions, or failure to act.

9. It is submitted that at no time did the Respondents as directors hold the " back agreement " from Sloan in trust for the company for the following reasons :

10. There is no principle of equity which supports the claim that this back agreement was ever the property of the company.

11. At the meeting on 16th July there was full disclosure. If there had been a valid quorum present not only would Sloan's agreement have been valid, but the back agreement would have been the property of the syndicate, because of the disclosure and Article 102 of the Company's articles.

Ferguson Record, pp. 361–362.

12. When does the company's right to the back agreement begin and upon what principle is the right based ?

13. The directors, including Walsh, made a mistake at the July meeting, but it did not involve a breach of trust, it only resulted in a no quorum meeting and an invalid agreement.

14. When the company ratified the Sloan option the rights under the back agreement were revived, but on what principle does this give them to the company ?

15. All the cases clearly indicate that a director is only bound to account to his company for a profit which " belongs to the company." There is no doctrine that a director cannot make a profit out of a transaction with his company. The company can always repudiate a contract made by directors on the ground that it has not had the benefit of the disinterested action of its directors, but it cannot approbate and claim from the directors their profit, unless it was a profit which was the property of the company at the time it was acquired. Moreover, how could a contract of this kind which a company could never have entered into, " belong " to the company.

16. It is submitted that the question of remedies has been misconceived and there has been confusion of thought in not distinguishing between cases involving the failure of directors to disclose their interest in a contract and cases where at a general meeting there is non-disclosure not of interests but of material facts as to the merits of the contract about to be ratified.

17. First : It is not now open to charge fraudulent misrepresentation as a basis of an action of deceit. That was fully disposed of by Your Lordships in the Ferguson action. See Appeal Book pages 178, l. 18 and p. 181, l. 25.

18. Second : There is no proposal to rescind the Sloan Agreement because of misrepresentation, innocent or otherwise.

19. The only complaint is that those who had been directors committed a breach of trust in not disclosing their information (assuming they had any).

20. It is submitted that short of non-disclosure amounting to fraudulent misrepresentation, there was then no more duty on the Respondents than on any other members of the company who might also have had an interest with Sloan.

21. These directors did not possess their interest because they had been directors but because they were the only ones who had been willing to take the chance. The others were offered the same opportunity and would have been welcomed as participants in the risk.

22. It is submitted that the "back agreement" was not an agreement belonging to the company, because when it was made the company was in distress and incapable of making such a contract or incurring its obligations.

23. The following cases are referred to :— 10

Cook *v.* Deeks
(1916) 1 A.C. 554.

Marler *v.* Marler
85 L.J. P.C. 167.

North Western Transportation Company *v.* Beatty
12 A.C. 589.

Mesner *v.* Hoopers Telegraph
(1874) 9 Ch. App. 350.

Re Cape Breton
26 Ch. D. 221. 20
29 Ch. D. 795.

In re Ambrose Lake Tin & Copper Mining Company
14 Ch. D. 390.

Hirsche *v.* Sims
(1894) A.C. 660.

Fourth : The Liquidator sold all the assets of the Company to the Creditors (The Syndicate) and evidenced this by an agreement under seal dated 21st January, 1925.

Ferguson Record, p. 60.

1. It follows from this that the now proposed action must be futile because any assets recovered in such action would in 30 virtue of this agreement belong to the Respondents.

2. This question was raised by their Lordships of the Privy Council during the argument in the Ferguson case and its force is best indicated by their Lordships' language, which is quoted in part as follows :—

Appeal Book, p. 53, ll. 18–27.

"Lord Thankerton : You are not attacking the Sloan transaction. That is not what I was referring to a moment ago. You are saying that any profits the Syndicate got by means of that transaction must be accounted for by the Company. But in the Liquidation this asset was sold on a tender received 40 in answer to an advertisement. I understood you to say in

answer to Lord Blanesburgh a moment ago, that you are not attacking the conveyance of the asset to the purchaser for the 70,000 dollars.

" Lord Blanesburgh : I think Lord Thankerton, if I may be allowed to say so in his presence, is putting a very awkward point to you. You are endeavouring to obtain, as being the property of the Company, the interest of these directors under Sloan, and his option. You say that belongs to the Company and ought to be accounted for to the Company. Lord Thankerton says : Let that be so, but what has happened ? The shareholders at this meeting on the 5th December, have sanctioned the sale of every asset that the Company had, subject only to the Sloan agreement, and they have that for the profit which has been paid by the Syndicate. What has it, in fact, got under that contract in relation to the property of the Company ? Amongst other assets they get this interest under Sloan which they take for themselves, but which belonged to the Company and which will then come to the Company under this contract, as well as its assets, which have been recovered by your exertions in this suit. Appeal Book, p. 54, ll. 7–25.

" Lord Russell : Why is it not effectively sold to the Syndicate under the agreement of the 21st January 1925 ? That, of course, is a sale by the Liquidator ? Appeal Book, p. 90, l. 26.

" Lord Russell : That is the whole point ; the point of trusteeship does not arise under the 21st January 1925, because that is an act of the liquidator. I follow your point ; if the meeting was invalid then there was no ratification by the Company of the act of the directors in the previous July, and therefore the only title would depend upon the act of the directors, and that being an invalid act the directors must account, because they made a gift to themselves ; but those considerations do not apply to the 21st January 1925." Appeal Book, p. 92, l. 28–p. 93, l. 5.

3. The powers of the Liquidator are found in the Companies Act, Revised Statutes British Columbia 1924 Ch. 38. They are in part as follows :—

" Section 225 (1) The Liquidator may without the sanction of the Court exercise all powers by this act given to the liquidator in a winding up by the Court."

" Section 205 (1).—The liquidator in a winding up by the Court shall have power :—

" (B) To carry on the business of the company so far as may be necessary for the beneficial winding up thereof.

"(2) The liquidator in a winding up by the Court shall have power :—

"(A) To sell the real and personal property and things in action of the company by public auction or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels.

"(B) To do all acts and to execute in the name and on behalf of the Company all deeds, receipts and other documents, and for that purpose to use when necessary the company's seal." 10

The Respondents therefore submit that this Appeal should be dismissed for the following, amongst other

REASONS.

(1) BECAUSE the learned Trial Judge properly exercised his discretion.

(2) BECAUSE every issue sought to be raised in the proposed action has been decided in the Respondents' favour in the Supreme Court and in the Court of Appeal of British Columbia and rightly so decided.

(3) BECAUSE the Appellant seeks to revive charges of actual fraud found to have been unfounded in the prior action by the Chief Justice of British Columbia, the Court of Appeal of British Columbia and the Judicial Committee of the Privy Council. 20

(4) BECAUSE the claims sought to be put forward are "stale" claims.

(5) BECAUSE the Appellant should not after 11 years and after the death of two of the Respondents' principal witnesses be allowed to re-litigate these claims.

(6) BECAUSE the Appellant participated in the prior action and sustained and supported it. 30

(7) BECAUSE the proceedings proposed are vexatious and must fail.

(8) BECAUSE all the material put before the learned Trial Judge was material proper for him to consider.

(9) BECAUSE there is no evidence that the learned Trial Judge improperly exercised his discretion.

(10) BECAUSE the discretion exercised and exercisable by the Statute was that of the learned Trial Judge.

(11) BECAUSE the decisions of the learned Trial Judge and of the Court of Appeal of British Columbia were right.

J. W. DE B. FARRIS.

WILFRID BARTON.

No. 12 of 1936.

In the Privy Council.

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*

AND

JOHN S. SALTER, Liquidator of Pioneer Gold Mines Limited (in Liquidation) (Petitioner) - - *Respondent.*

Case for the Respondents

Other than the Liquidator.

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