Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the North Sydney Investment and Tramway Company, Limited (in Liquidation) v. Higgins and others, from the Supreme Court of New South Wales; delivered 25th February 1899.

Present:
LORD MORRIS.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

This is an appeal by the Official Liquidator of the North Sydney Investment and Tramway Company Limited (now in Liquidation) from an Order of the Supreme Court of New South Wales in Equity made on the 8th November 1895 dismissing an application by the Liquidator by way of summons that a call of 66*l.* 13*s.* 4*d.* be made on the contributories of the Company. The real question involved is whether certain shares in the Company held by and registered in the names of the Respondents respectively had or had not been paid for in cash within the meaning of Section 57 of the Companies Act of the Colony which is substantially in the same terms as Section 25 of the Imperial Companies Act 1867.

The facts on which the answer to this question depends are somewhat complicated but are not in dispute.

By contracts made in March and April 1888 one Charles Arthur Moresby Billyard contracted for the purchase of a tract of land in North

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Sydney. The aggregate purchase money was 134,000*l.* and of this amount it was agreed that 35,000*l.* should be satisfied by partly paid up shares of a Company to be formed to work and acquire the property. Billyard's object was to sell the property to such a Company at an enhanced price and his ideas as to the profit obtainable seem to have grown from time to time as matters proceeded.

Shortly afterwards a prospectus was issued of a Syndicate which has been called in the argument Syndicate No. 1. It is entitled "Syndicate "prospectus of the North Sydney Investment "Company Limited Capital 300,000*l.* in 60 "shares of 5,000*l.* each payable one-third in cash "one-third months" (the words "in three" are accidentally omitted) "interest six per cent. "added. The balance is not likely to be required. "Two and a half per cent. upon the subscribed "capital will be charged to cover all preliminary "expenses in connection with the Syndicate. "Provisional Directors C. A. M. Billyard J. W. "Cliff Alick Osborne." The prospectus then states that the Syndicate is formed for the purpose of acquiring the lands described being those comprised in Billyard's Contracts and after stating the character and advantages of the property and other details not material for the present purpose concludes thus:—"The terms of purchase are as "follows:—Total purchase money 300,000*l.* "payable one-third in cash one-third by pro- "missory note at three months with six per "per cent. added balance can remain for three "years at the lowest bank rate of interest if "required and the owner will join in the con- "veyance of any portion sold. Immediately "the full number of shares has been subscribed "it is proposed to place the property in the "English market and it is thought that with the "names associated and the soundness of the

"undertaking there will be no difficulty what-"ever in disposing of the property at a sum "decidedly not less than half a million."

This Syndicate was not registered as a joint stock company with limited liability. The whole of the shares were subscribed by various persons including Higgins and Hogan two o the Respondents who paid in cash one-third of the amount of three shares and gave promissory notes for another third with six per cent. interest added. The receipt given to the Respondent Higgins is headed "North Sydney Invest-"ment Company Limited" and the sum of "1,666*l.* 13*s.* 4*d.* is thereby stated to have been "paid as a deposit on one share in the above "Company" *i.e.* in the Company to be registered with limited liability. The promoter determined to change the name of the intended Company and to increase the nominal capital and the amount of the purchase money. Accordingly he shortly afterwards issued another prospectus of what has been called Syndicate No. 2. This document is in the following terms: "Syndicate "prospectus of the North Sydney Investment "and Tramway Company Limited to be registered "under the Companies Statute 1871 Capital "500,000*l.* in 100 shares of 5,000*l.* each one-third "payable in cash one-third in three months interest "six per cent. added the balance is not likely "to be required. Two and a half per cent. upon "the subscribed capital will be charged to cover "all preliminary expenses in connection with "the Syndicate." The names of the provisional directors and description and particulars of the property and the terms of purchase (substituting 500,000*l.* for 300,000*l.*) are then set forth as in the former prospectus. It then states: "The "contract with the vendors and the Memorandum "and Articles of Association may be inspected at "the office of the solicitor to the Company." Attached to the second prospectus was a form of

receipt. The form filled up and given to the Respondent Allcock was as follows :

"Received the sum of ten thousand pounds
" being first and second payments (latter with
" interest deducted) for three shares in within
" Syndicate as per prospectus. This receipt to
" be returned upon receipt of share certificate
" in limited Company from Jas. Service and
" Company (signed) J. Woolf solicitor for the
" Melbourne portion of the Syndicate and (by
" his request) for the vendor."

No doubt the arrangements for obtaining the share capital of the Company were not made so carefully or skilfully with a view to the exigencies of the law as they might have been But on a careful consideration of the language of these documents their Lordships come to the conclusion that both prospectuses were and were intended to be an invitation to subscribe for shares in a joint stock company then about to be registered with limited liability the Memorandum and Articles of Association of which were offered for inspection in the second prospectus with a view to the purchase by that Company of the property in question and that consequently the money paid by the subscribers on the terms of the prospectuses was intended to be applied in payment up of shares in the Company when formed and further that the promoter who issued the prospectuses and received the money of the subscribers was bound so to apply the amounts paid by them and to procure share certificates to be issued to the several subscribers in exchange for the receipts held by them. The subscribers on the first prospectus might have raised and (as will presently appear) did raise questions as to their position under the second prospectus but (as will also appear) they accepted the position of shareholders in the Company and for valuable consideration waived any such questions.

A contract purporting to bear date the 26th March 1888 was made between one John William Cliff described as the vendor and certain persons described as "trustees for the Company herein-"after mentioned" whereby after reciting that a Company with limited liability was about to be formed having for its objects amongst other things the purchase of the lands in the Schedule (being those purchased by Billyard) under the name of the "North Sydney Investment and "Tramway Company Limited" it was agreed that the vendors should sell and the Company should purchase the lands in question for 512,500*l.* to be paid as follows viz. 171,100*l.* in cash on the signing of the agreement a further sum of 171,000*l.* at three months from the date of this agreement with interest at 6 per cent. per annum and the remaining sum of 170,500*l.* to remain on security of the property with interest at the same rate. Cliff (who was named as one of the provisional directors in both prospectuses) was admittedly the nominee and agent of Billyard the vendor and promoter. The addition of 12,500*l.* to the purchase money obviously represents the 2½ per cent. charged for the expenses of the Syndicate. Mr. Cozens Hardy contended that the contract was not executed until after the date which it purports to bear. This may very likely be so but in the view which their Lordships take the point is immaterial.

On the 5th May 1888 the North Sydney Investment and Tramway Company Limited was registered with the object (amongst other things) of adopting and carrying into effect the contract dated the 26th of March 1888 and with a capital of 1,000,000*l.* divided into 200 shares of 5,000*l.* each.

The first meeting of the Directors of the Company was held on the 22nd of May 1888.

The Secretary placed before the meeting a document signed by Cliff which is of the greatest importance. This document is in the following terms:—

"North Sydney Investment and Tramway "Company Limited I John William Cliff the "vendor in Contract dated the 26th day of "March 1888 hereby acknowledge to have re- "ceived from each of the following shareholders "in this Company the respective sums of" ( ) "amounting in all to 333,333*l*. 6*s*. 8*d*." Then follows a schedule of the subscribers to the Syndicate (including the present Respondents) in alphabetical order with denoting numbers against their several names of their shares amounting in all to 100 shares and showing the number of shares subscribed for by each of them.

The minutes of the Director's meeting record that "The Secretary reported the present position "of the Company and exhibited the vendors' "receipt to the shareholders for the sum of "3,333*l*. 6*s*. 8*d*. per share making in all a pay- "ment of 333,333*l*. 6*s*. 8*d*. which was accepted by "the Board and initialled by the Chairman." The contract of the 26th March 1888 was then "adopted and confirmed." Two directors and the Secretary were directed to sign "the share "certificates" and an appointment was made for their so doing on the following day also for the affixing of the Company's seal thereto. And the Secretary was directed before issuing the share certificates to obtain from each shareholder his Syndicate receipt and also to obtain his signature to the Articles of Association. But no allotment was made by the directors in express terms of any shares in the Company.

The Secretary proceeded to act on these resolutions. All the Respondents received in exchange for their Syndicate receipts certificates

of the corresponding shares in the Company which were certified as paid up to the amount of 3,333*l*. 6*s*. 8*d*. per share. And the names of the Respondents were severally entered in the register as holders of their shares (described as allotted on the 22nd May) with that amount paid. The acceptance by the Respondents of the shares removes any difficulty as to Cliff's authority to apply for shares in their names or in consequence of the increase of the nominal capital to 1,000,000*l*. or as to the directors' authority to allot them. Their Lordships are disposed to think that Cliff had an implied authority to apply for shares in the names of the subscribers but it is not necessary to decide the point.

In October 1888 each of the shares of 5,000*l*. was subdivided into 50 shares of 100*l*. each with 66*l*. 13*s*. 4*d*. per share paid thereon. Calls to the amount of 16*l*. and 17*l*. 6*s*. 8*d*. have been paid before and since the liquidation and the demand of the liquidator is therefore for the sum originally credited on the shares which he contends has not been paid in cash as required by the Statute.

The learned Judge in the Court below has on these facts decided in favour of the Respondents holding 1st that by the directors adopting and confirming the contract of the 26th of March the Company made it their own contract 2nd that the acceptance by the Company of Cliff's receipt amounted to an acknowledgment that the money had been paid to the Company in cash 3rd that there was on the 22nd May a present debt due to the Company and also a present debt due by the Company which could be set off one against the other in such a way as to support a plea of payment in law. For the reasons presently stated their Lordships do not differ from

the conclusion of the learned Judge although they cannot assent to the grounds of his Judgment. Their Lordships do not think that the adoption and confirmation by directors of a contract made before the formation of the Company by persons purporting to act on behalf of the Company creates any contractual relation whatever between the Company and the other party to the contract or imposes any obligation whatever on the Company towards that party They think that the proposition maintained by the learned Judge is opposed both to principle and authority and that the judgment in the case of *In re* Johannesburg Hotel Company (1891) 1 Ch. D. 119 referred to by the learned Judge is to the contrary effect. Nor can their Lordships hold that the acceptance by the directors of Cliff's receipt was an acknowledgment of payment in cash and even if it were the question under the Statute is whether cash has been paid not whether a receipt has been given or payment has been acknowledged.

The inaccuracy of Cliff's document and the irregularity of the directors' proceedings are patent. Cliff had not received the money of the subscribers as vendor to the Company but he or his principal Billyard (the promoter) had received it on the terms of the prospectus *i.e.* (as their Lordships have already said) for the purpose of the subscribers becoming shareholders of a Company which should acquire the property and obtaining for the shareholders share certificates in exchange for their syndicate receipts. Nor could Cliff retain the subscribers' money in part payment of the purchase money payable by the Company (if they should purchase) because it was not the Company's money and would not become so until the shares were allotted and the money paid or properly credited to the Company

in payment up of the shares. Looking at the facts by the light of the previous documents and dealings and the relation of the parties to each other their Lordships think that Cliff's document was in substance and effect an application for and on behalf of the persons named in the schedule for shares and that the directors acted upon and accepted that application by putting the names of those persons on the register and giving them notice they had done so which superseded the necessity for any formal allotment. Their Lordships also think that Cliff's document was an acknowledgment that he had received 333,333*l*. 6*s*. 8*d*. from the subscribers appropriated to the payment up of their shares in the Company but he was wrong in stating that he had received that sum as vendor or in claiming to retain it as part of his purchase money as against the Company who had not at that time entered into any contract with him or his principal Billyard. Their Lordships do not think that in these circumstances Cliff's acknowledgment of having received the 333,333*l*. 6*s*. 8*d*. amounted to payment in cash to the Company and consequently the directors were wrong in crediting the shareholders with the payment of that amount on their shares as on the 22nd May. But their doing so was evidence of the amount to be paid on the shares on allotment.

However on the 29th of September 1888 the property was conveyed to the Company by four documents of that date. The purchase money of 51[illegible]500*l*. was paid and discharged by the appropriation and retainer of 333,333*l*. 6*s*. 8*d*. in Cliff's hands and two mortgages dated the 1st October 1888 and the 22nd October 1888 made by the Company to Billyard and Cliff for 149,166*l*. 13*s*. 4*d*. and 30,000*l*. making together 179,166*l*. 13*s*. 4*d*. The two sums of 333,333*l*. 6*s*. 8*d*.

and 179,166*l*. 13*s*. 4*d*. make together 512,500*l*. In other words the Company gave credit to Cliff and his principal Billyard for the 333,333*l*. 6*s*. 8*d*. in Cliff's or Billyard's hands specifically appropriated to the payment up of the subscribers' shares in the Company and got credit for that amount of the purchase money. Their Lordships think that this transaction was a payment in cash on the subscribers' shares on that date which would satisfy the statute in accordance with the decisions of the English Courts in Spargo's Case L. R. 8 Ch. 407 and Ferrao's Case L. R. 9 Ch. 355 and the decision of this Board in *Larocque* v. *Beauchemin* 1897 A. C. 358. There was a sum payable by Cliff to the Company for the specific purpose of paying up the shares and there was a like sum payable to the vendor for purchase money and it was not necessary that the parties should go through the form of handing the money over and receiving it back or giving cross cheques. It is sufficient if the shareholders can show that their shares are paid up to the extent of the money in Cliff's hands although the payment was not made at the time or in the manner erroneously imputed by the directors.

One other point which was made by Counsel should be mentioned. It appears that in the year 1889 certain of the subscribers on the terms of the prospectus of Syndicate No. 1 including the Respondents Higgins and Hogan claimed to participate in the enhanced price obtained by Billyard above 300,000*l*. This claim was compromised by the payment of a sum of money and the transfer of certain shares in the Company by Billyard to the objecting shareholders. A release was executed in which the members of the Syndicate in some respects treated themselves as vendors to the Company. Mr. Cozens Hardy argued that this document was evidence of the true position of the parties and that they

were precluded by it from saying that the moneys paid by them were paid as a deposit on the shares in the Company to be registered. The release however was certainly not an estoppel as between the Respondents parties to it and the Liquidator and their Lordships do not think that they are precluded by the form of the release from showing the terms upon which they really paid their money as appearing from the the receipts given and the other documents. The compromise was subsequent to the completion of the purchase and the payment up of the shares and was in truth *res inter alios acta*.

Their Lordships will therefore humbly advise Her Majesty that the Appeal be dismissed. The Appellants must pay the costs of it but there will be only one set of costs between all the Respondents.