Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The New Zealand Loan and Mercantile Agency Company, Limited, v. Reid, from the Court of Appeal of New Zealand; delivered the 25th May 1905.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD ROBERTSON.
LORD LINDLEY.
SIR FORD NORTH.

[*Delivered by The Lord Chancellor.*]

This is an Appeal from the Court of Appeal of New Zealand which affirmed the Judgment of Mr. Justice Edwards. That Judgment declared that two memoranda of agreement dated respectively the 15th August 1901 and the 7th September 1901 set out in the Statement of Claim were obtained by the fraud of the Defendant (the Appellant) Company, and ordered them to be set aside, and further declared that the conveyances and transfers of the Plaintiff's (the Respondent's) securities were obtained by fraud, and ordered the consequential relief appropriate to such findings and declarations.

The Statement of Claim puts forward two distinct grounds upon which the agreement, or rather the two agreements, in question ought to be set aside:—one, that it was procured by a fraudulent conspiracy between the authorized agent or agents of the Defendant Company and a person who was authorized by the Plaintiff to

represent him in the negotiations for the contract; and secondly, that the person so alleged to have been authorized by the Plaintiff to negotiate for him was therefore his agent, and stood by agreement with him in the ordinary fiduciary relation which exists between agent and principal, but that he betrayed his trust and allowed his principal's interest to be sacrificed contrary to the duty thus existing towards him.

In either view of the right to relief the argument put forward in the Judgments below with the most prominence is the supposed unconscientious and unfair nature of the bargain thus arrived at, and inasmuch as it would be impossible to judge of the strength of this argument until the circumstances of the parties and the exigencies of the occasion when the bargain was made are understood, it will be necessary to consider what those circumstances and the exigencies created by them were before entering into the question of the fairness of the bargain.

It will not, however, be necessary to recite the whole of the evidence which the learned Judges below have gone through with such minute and extraordinary diligence.

A person named Mitchell was, in the year 1899, carrying on the business of an export butcher with freezing works attached, and had borrowed money from the Bank of New Zealand for the purposes of his business. In the course of that year some differences arose between the Bank, who did not like the state of Mitchell's account, and Mitchell, who was not satisfied with the manner in which his business was being managed in London through the agency of the Bank. Mitchell applied to the Manager of the Appellant Company's Branch at Wanganui, Mr. Stevenson, who agreed to take over the account of Mitchell, which already amounted

to from 8,000*l.* to 10,000*l.*, but required as a condition that the Plaintiff should, to the extent of 8,000*l.*, guarantee the payment of any debt Mitchell might incur with the Bank. Mitchell was already indebted to Reid, and Reid held certain securities against that indebtedness, the amount and value of which will be dealt with hereafter.

In consideration of this pecuniary assistance the Defendant Company was to have the disposal of Mitchell's export from New Zealand, and whatever profit that agency might involve.

But neither Reid nor the Defendant Company was disposed to trust absolutely to Mitchell, and a Mr. Ernest Deuchar Johnson was appointed with specific duties to discharge, which are fortunately in writing, since the whole controversy before their Lordships turns upon the nature of his duties and the mode in which they were discharged. His appointment is in a letter dated Wanganui, 10th October 1899:—

"E. D. Johnson, Esq., Christchurch.

"Dear Sir,

"This serves to place on record the result of our "conference with you, Mr. Reid, and Mr. John Stevenson in "Wanganui last week. You are to have a three years' "engagement at a salary of 300*l.* per annum, payable monthly. "If the net proceeds of the business admit, after providing "for all working expenses, interest, and a fair amount for de- "preciation, we are agreeable that you should receive a slight "bonus in addition to the salary above-named; the amount "of the bonus to be agreed upon by Mr. Stevenson. Your "duties will be to attend to all the book-keeping and clerical "work, keeping a systematic account of all profit and loss, and "to report to Mr. Reid or to Mr. Stevenson regularly the "result of the firm's operations. You are to confer and "advise with us in all the details of the working, including "the price paid for the purchase of stock, and generally to act "with our Mr. Thomas Mitchell in the general working of "all the departments of the firm's business. Should there be "any difference of opinion between you and myself, I agree "that such points be referred to Mr. John Stevenson, whose "decision will be final.

"Yours faithfully,

"THOS. MITCHELL,

"for Mitchell & Co."

The extent of Johnson's authority and the nature of the duties he had to discharge are sufficiently indicated, and the language employed is not susceptible of any ambiguity. It is worth while to observe that not one of the learned Judges in New Zealand appears to suggest that in respect of any of the duties thus specifically described Johnson acted otherwise than strictly according to the tenor of his employment. The Chief Justice (who dissented from the Judgment appealed from) says: "Euphemisti-"cally he was called a book-keeper, or adviser; "really he was a person placed in possession to "control the business on behalf of the two "largest creditors," the Defendant Company and the Plaintiff. If the word "adviser" is restricted to the conduct of the business, *i.e.* the trade carried on, their Lordships see no objection to the description.

Mr. Justice Williams says, speaking of Johnson:—"He had to report the results of the "business to Reid and to Stevenson on behalf of "the Company. In what he was by the letter "employed to do he was acting both for the "Company and Reid. When Johnson was "engaged and for long afterwards there was "no conflict of interest between Reid and the "Company."

If, as the learned Judge says, "Johnson "obtained Reid's full confidence," and "in "all matters connected with the business Reid "looked to Johnson for advice," it could only have been as a friend. Indeed, as the learned Judge himself says, "looking at the situation "of the parties, it was only natural that this "should be so. This relation between Reid "and Johnson was not created by the letter "of the 10th of October 1899. It arose out "of the situation created by that letter "and from the subsequent circumstances.

" Johnson's relation to the Company was defined " by the letter, and remained unaltered, but his " relation to Reid became that of confidential " friend and adviser in matters relating to the " business." Again one has to understand what is meant by adviser. If it means no more than a friend, there is no objection to the term; but if more than that is meant, there is, in their Lordships' opinion, no evidence to justify the statement.

Mr. Justice Denniston appears to adopt the view of Mr. Justice Williams that what he calls " fiduciary relations " were in some way established between Reid and Johnson, without giving any reasons in regard to the proofs tendered upon the subject, but he sums up his argument by the statement that Johnson's conduct fell short of the conduct required of a person who " had undertaken to act as guide " and adviser " to Reid.

Mr. Justice Cooper says that Johnson was Reid's agent, and " permitted Reid to remain " under the belief that throughout he, Johnson, " was negotiating with the Company in (Reid's) " interests, whereas he was indirectly negotiating " mainly in the Company's interests."

Mr. Justice Chapman, referring to the position occupied by Johnson and the view taken by Mr. Justice Edwards in the Court of First Instance, says: " His Honour explicitly finds " that Johnson was the agent of (Reid), and " that while in this position he was employed by " the Company to bring about the transaction " complained of. This is debateable matter, but " there are certain facts which are quite clear. " Whether justified in assuming that position or " not, Mr. Johnson undoubtedly entered into " relations with both parties. His position " which I have attempted to explain was known " to both parties." The phrase " entered into

"relations with both parties" requires exposition. If it means more than that Johnson in common with Mitchell, Reid, and Stevenson expressed opinions on, and discussed, the best mode of extricating all parties from what was felt to be commercially a perilous position, their Lordships are unable to agree with the learned Judge. In truth, none of the learned Judges, except Mr. Justice Edwards, are quite logical in their conclusions. While deciding in the Plaintiff's favour for setting aside the agreements, they point to facts which, if they mean anything, mean that Johnson and Stevenson were conspirators, and although they repudiate this conclusion, they decide in favour of the Plaintiff on the ground of some not very clearly defined equity which, while not going so far as actually to determine that Johnson was Reid's agent (though some of the learned Judges use that phrase), assumes that these undefined fiduciary relations throw upon Johnson the necessity of proving that he did not sacrifice "his principal's" interest in the course of the negotiations. Their Lordships are unable to agree that any such agency existed, or that any fiduciary relation was undertaken. It may be that in the course of the business in which they were all engaged, Reid preferred Johnson, and talked to him more readily and freely than to the others, but there is not, in their Lordships' opinion, the least evidence to show that Johnson ever agreed to take upon himself the character of Reid's agent. None of the cases referred to are, therefore, in point. But for this view—which their Lordships are unable to accept—that Johnson was in some such employment by Reid as has been assumed, the majority of the Judges of the Court of Appeal, if not all of them, would have come to an opposite conclusion from that at which they did in fact arrive.

Though it is true that Johnson gave advice and expressed opinions in matters of interest to all the parties, their Lordships are unable to see that there is any evidence to justify the statement throughout the opinions given by all the learned Judges except the Chief Justice, that there was any employment by Reid which established what they call "fiduciary relations." It does not seem to have occurred to any of the learned Judges that before Johnson could be fixed with the character of agent for Reid, his own consent to act in such a character should be proved. That he should be consulted by all was, in the circumstances, very natural, but that he should be invested with the character of negotiator or adviser to any one of them seems to their Lordships not only not to be proved, but to be disproved. That Reid liked Johnson best and found him the most friendly and considerate may be true, but if instead of using the somewhat vague phrase "fiduciary relation" one had asked before the dispute what was the nature of the relation between Reid and Johnson, it does not seem probable that either Reid or Johnson would have described it otherwise than as that of friends, and their Lordships are unable to see that any relation is established between them other than that which compels any man to be honest in the advice given by him when appealed to for advice by one towards whom he has no recognized duty. Of course the finding by Mr. Justice Edwards that there was a fraudulent conspiracy between Stevenson and Johnson raises a question which, if determined adversely to Johnson and the Company, gets rid of all difficulty, but in this finding, if their Lordships rightly understand the judgments, Mr. Justice Edwards stands alone. One learned Judge describes the charges made in the Statement of Claim raising that question as reckless, and none of them, in terms, at all events, base

their finding upon the notion of a fraudulent conspiracy between Stevenson, as representing the Company, and Johnson, as representing Reid. It is only just to Mr. Johnson and Mr. Stevenson, as well as respectful to the learned Judges who certainly have spared no labour in their desire to arrive at a right conclusion, to revert to the nature of the circumstances and the agreement which, it is suggested, in its own nature was so unjust as itself to prove the impropriety of any one advising its conclusion.

Of course, if, apart from any "fiduciary relations," Johnson had, in collusion with the Company, consciously given bad advice, and such as was intended to profit his Company at the expense of the friend whom he was advising, their Lordships would agree with Mr. Justice Edwards.

Their Lordships are very much disposed to adopt the reasoning of Mr. Justice Denniston, who, but for the argument as to the nature of Johnson's employment which (as their Lordships have already pointed out) is, in their view, unsound, would have decided in favour of the Defendants.

Indeed, that learned Judge has adduced a very powerful argument upon the subject of his difference with Mr. Justice Edwards.

He pointed out that, when on the 30th of July Johnson's investigation of the books disclosed that the result of the year's operations had been a loss of 7,500*l.*, this result was "regarded by all as disastrous." The situation was this. Mitchell was indebted to the Company to the extent of about 20,000*l.*, but they held Reid's guarantee for 8,000*l.* (an item with which Johnson had nothing whatever to do). Mitchell owed Reid 24,440*l.* Reid, however, held securities on the greater part of the works and fixed machinery, and certain lands and other property. But what has not apparently been

sufficiently considered as a matter of business is how complete a disaster the stopping of the works and the preventing of the disposal of Mitchell's business as a going concern would have been. The difficulty had partly to be looked at in reference to the somewhat complex arrangement of the Company's business. There was a general manager in New Zealand; there was a Board of Directors in London to be considered; and it is plain, upon the evidence, that both Stevenson and Johnson were very much afraid that the Board in London would order the account to be closed and bring about what Stevenson, Johnson, and Reid all regarded as destructive of any hope of saving the situation. This part of the question is so ably and clearly dealt with by Mr. Justice Denniston that their Lordships are not disposed to deal with it otherwise than in the learned Judge's own language. Speaking of Johnson and Stevenson, he says:—

"They had, however, not only to convince the general "manager and the London Board of the advisability of keeping "the business going, but to suggest means of doing so. In the "first instance they took up the idea of the Company carrying "on the business in co-operation with Reid and with this "object formulated the scheme set out in Stevenson's letter of "30th July. That provided for Johnson taking over the "whole liabilities and assets and transferring Reid's securities "to the Company, which would on its part undertake to find "the further capital necessary to carry on the business. As "this suggestion was not assented to by either Reid or the "Company, it is not necessary to discuss it. I may, however, "say that while it indicates Johnson's sanguine view of the "capabilities of the business, it does not seem to me to be so "unreasonable as has been contended. If there was an honest "belief in a surplus of 15,000*l.*, or even something much below "that, the keeping the business going by the Company and "the releasing Reid from his immediate liability of 8,000*l.* "might be a not unfair ground for offering the transfer "of securities as an inducement to the Board to continue the "account.

"The suggestion of co-operation having failed, the next "idea was that the Company should take the responsibility. "This would involve paying off or arranging with Reid. But "it could hardly be supposed that the eloquence of Stevenson, "the officer responsible for the loss, would convert the Board,

"unless some substantial inducement was offered. That "inducement could only be some concession or sacrifice by "Reid. The crude proposal to pay Reid in full would hardly "tempt the Board to take the risk of the business proving "profitable in the future. It is obvious, as I have said, that "Reid looked on the value of his securities, in the event of "winding up, as very doubtful, and upon the alternative of "having to risk further capital of his own as an idea which "was causing him sleepless nights and might at his age "have serious consequences. It is alleged in the state- "ment of claim that these opinions and that condition of "mind were purposely induced by misrepresentations on "the part of Johnson. For that I do not see any "evidence—certainly not such cogent evidence as would "alone justify a finding of fraud. It was therefore, in my "opinion, a reasonable thing that Reid should, in order to "relieve himself from risk and worry, accept from the Com- "pany a composition on Mitchell's debts. As the result of "conferences between Johnson and Stevenson the agreement "of August was signed by Reid. By it he offered to the "Company for twenty-one days the option of purchasing "Mitchell's liability to him, with the securities covering it, for "8,000*l.*, the Company releasing his guarantee to it for 8,000*l.* "It amounted to accepting a composition of 13*s.* 4*d.* in the £ "on the whole debt. That this was, under the circumstances, "necessarily an improvident arrangement (assuming such proof "to be material in these proceedings) does not seem to me "proved. In September, Mr. MacPherson, the general "manager, was willing, though not desirous, to give up the "same option in favour of the alternative scheme of that date, "with which alternative scheme Mr. Reid, at the trial of "this action, expressed himself as still satisfied. Owing "to the necessary difficulties of exchanging full information "and ideas with the London Board this option expired "without action by the Company, and on the 7th of Sep- "tember the agreement was signed . . . which it is the object "of this suit to avoid."

It is not necessary to consider whether the suggested arrangement was the best that could be devised, or whether it was a wise one or not. Upon the hypothesis upon which their Lordships are regarding it, the only question is, was it honestly recommended and not part of a conspiracy between Stevenson and Johnson? It is not denied that, so far from undertaking to be Reid's confidential agent and adviser, Johnson recommended him to consult his own sons, men of from 35 to 40 years of age. It is a somewhat ludicrous contradiction in the argument that

Reid is alternately represented as an old man who had suffered at some time from sunstroke and could not apply his mind to business for any time longer than twenty minutes, and as so self-willed and self-confident that he treated his two sons as little children.

From the examination and cross-examination of Reid their Lordships are unable to discern any such weakness of mind as is more than once mentioned by the learned Judges below, and they think that the suggestion savours somewhat of rhetorical exaggeration. But the importance of Johnson's evidence in this respect is not, as stated in the Court of Appeal, that it relieves him of the obligations cast upon him by his fiduciary relations, but that it supplies the plainest proof that he never took upon himself any such relations at all. There was no concealment by Johnson of his connection with the Company, and with the exception of the one incident as to the suppression by Johnson of the mention of the general manager's willingness to waive the option, there does not seem a particle of evidence to show that Johnson did not faithfully and honestly do his duty in giving every information in his power. Again, their Lordships would quote Mr. Justice Denniston in relation to that incident, and adopt his reasoning.

"On that point I retain the opinion I expressed at the argu-
"ment. Reid had signed provisionally and had next day
"telegraphed from Wanganui cancelling his signature. Mr.
"MacPherson was then in direct communication with Johnson
"in Wellington. Mr. MacPherson was naturally anxious to
"have the thing settled. It occurred to him the option might
"be the difficulty. He then said that if it were an absolute
"stumbling block, as he was anxious to come to some arrange-
"ment, he would waive it, if it were absolutely necessary, but
"not otherwise, as they were anxious to have two strings to
"their bow. He said he certainly did not intend that this
"should be repeated to Mr. Reid if his objection was not the in-
"clusion of the option. In these circumstances I think Johnson
"would not have been justified in stating to Reid Mr.

"MacPherson's provisional alternative unless and until the "contingency, on which alone it was to be given, had arisen— "that is, that it was shown that Reid's objection was the "existence of the option. Had he gone to Reid and, without "ascertaining whether this was his objection, informed him "that MacPherson was prepared to abandon the option as "the price of his signature, he would have defeated the "object of MacPherson's communication to him. The con- "cession was offered, not if this objection to the execution was "subsequently made, but if it then existed."

Their Lordships think it only just to Mr. Johnson and Mr. Stevenson to say that they see no reason whatever to suppose that there was anything dishonest or improper in their actions in any part of the transactions in question.

In the result their Lordships agree with the Judgment of the Chief Justice, and they will humbly advise His Majesty that the Judgments of the Court of Appeal and of the Supreme Court should be reversed, and the Action dismissed with costs in both Courts. The Respondent will pay the costs of this Appeal.