

John A. Allen and others - - - - - Appellants
v.
F. O'Hearn and Company - - - - - Respondents

FROM

THE SUPREME COURT OF ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 29TH OCTOBER, 1936.

Present at the Hearing :

LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.
LORD ALNESS.
SIR LYMAN POORE DUFF.

[*Delivered by* LORD ATKIN.]

This is an appeal from the Court of Appeal of Ontario, who reversed a decision of Kingstone J. in favour of the plaintiffs and dismissed the action with costs. The original plaintiffs were L. S. Clarke and J. A. Allen his trustee in bankruptcy. During the proceedings Mr. Clarke died and his executors were added as parties. The defendants are brokers in Toronto and have a seat on the Standard Stock and Mining Exchange in Toronto and upon other exchanges. Mr. Clarke was a civil engineer and engaged in a prosperous lumbering business in Ontario. About 1931 he was induced by a Mr. Bayne to embark in a brokerage business at North Bay which had just closed down, in which Mr. Bayne had been concerned. He started the business and opened two branches, one at North Bay managed by Mr. Bayne, and another at Sudbury. He was introduced by Mr. Bayne to the defendant firm and his brokerage business in stocks and shares was conducted through the defendants, a firm of good standing and experience. Mr. Clarke's country clients gave orders to Mr. Clarke for the purchase and sale of shares. Mr. Clarke would give the necessary instructions to the defendants in his own name, not disclosing the name of his client. The defendants would render a brokers contract note to Clarke, and he would render a similar note in his name to his client. Most of the transactions were on margin : and there were terms in the contract notes regulating the rights of the parties and the power of the respective brokers to

realise the shares bought and the securities held as margin in case the margin became insufficient. These terms were an important part of the original case for both plaintiffs and defendants, but in their Lordships view are now irrelevant. Business proceeded on normal lines for some months until in September 1932 Bayne acting in conjunction with one Barkell began a series of transactions in a company called Peninsular Petroleum, Ltd., (Pen. Petes) out of which arose the trouble which brought Mr. Clarke to ruin. A series of orders were given to the defendants for the purchase of large numbers of these shares. They were low-priced shares which under the rules of the relevant stock exchange could not be dealt with on margin. Eventually Clarke found himself unable to find the cash for the purchases then open: nor could he find the client for whom the purchases should have been made. Apart from these purchases the account as between Clarke and his clients and Clarke and the defendants was apparently in order with sufficient margin. The defendants purporting to act under powers given them by the contract between them and Clarke proceeded to sell shares bought and held as security on the general account which mainly consisted of shares bought on behalf of Clarke's clients, and in this way indemnified themselves against the loss on Pen. Petes. Clarke went into bankruptcy, making an assignment for the benefit of his creditors on 28th February 1933, of which the other plaintiff is trustee. The present action was commenced by writ dated 27th September 1933. The amended statement of claim was delivered 24th January 1934. It is unnecessary to discuss the various forms of relief claimed in this document, for this case has to be decided upon the relief given by the learned judge at the trial which the plaintiffs, the appellants before this Board, contended was the relief they were entitled to and of which they asked no variation. The learned judge came to the conclusion that the defendants were not entitled to make the sales complained of and by his formal judgment dated 1st December 1934 made the following declarations and orders:—

“2.—This Court doth declare that the Defendants held the securities in the account of the plaintiff L. S. Clarke and sold by the defendants on or after the 7th day of February, 1933, in trust for the plaintiff L. S. Clarke as Trustee or the plaintiff J. A. Allen as Trustee, for the clients and customers of the plaintiff L. S. Clarke, and that the defendants had no right to charge the said securities with the purchase price of 300,000 shares of Peninsular Petroleum stock referred to in the plaintiffs' Statement of Claim herein, and the plaintiffs as joint trustees for these customers and clients are entitled to damages for the wrongful sale and disposal of the securities belonging to the said customers and clients and sold by the defendants on or after the 7th day of February, 1933, and doth adjudge the same accordingly.

3.—This Court doth order and adjudge that this cause be referred to the Local Master at North Bay to determine the amount of damages, if any, that the defendants ought to pay for the said wrongful sale and disposal of the same and who are the customers and clients so entitled and the amount due to each of such clients and customers for damages accordingly.

4.—This Court doth further direct that the defendants do pay to the plaintiffs the amount when so ascertained, and that the same constitute a special Trust Fund to be distributed among the parties entitled as the customers and clients of L. S. Clarke for whom the said securities were sold and doth adjudge the same accordingly."

Their Lordships are of opinion that this judgment cannot stand. So far as the rights of the parties depend upon contract either Clarke's customers were undisclosed principals of Clarke in relation to the defendants and had the contractual rights of such principals or they were not. If they were they had the right of suit for breaches of contract, or alternatively until they exercised their rights Clarke could sue: but these are ordinary legal rights. The supposed agent's rights would be to recover the damage suffered by him on the footing that he had been principal. He has no claim against the other party in the capacity of trustee: and though there have been countless actions in which an agent for undisclosed principals has sued in his own name, there appears to be no precedent for such an agent suing as trustee for his principals. What happens to the proceeds of a successful claim by such an agent is another matter. By virtue of his fiduciary relation to his principals he may have to account to them for what he receives: but this is not the concern of the other party.

If the case is looked at as a wrongful dealing with property apart from privity of contract the result is the same. As far as the shares agreed to be bought are concerned if there is nothing due from the undisclosed principal either he or the agent must sue. No question of trusteeship arises. As far as the shares deposited as margin are concerned the agent is in the position of mortgagee with a right to submortgage: a mortgagee is not a trustee: and if the shares are improperly dealt with by the submortgagee, the mortgagee can sue in his own right, or the mortgagor may under proper conditions sue to protect his property: but the mortgagee cannot sue as trustee for the mortgagor for he is not trustee. In the case in question either Clarke's rights passed to the trustee: or Clarke's customers alone could sue. Neither Clarke nor the trustee could sue as trustee for the customers: and clearly they were not joint trustees as they have been declared to be by the judgment. It appears therefore to their Lordships that the judgment was properly set aside by the Court of Appeal, and as no other relief was asked for by the plaintiffs the action was properly dismissed. The decision of the Court of Appeal appears to have been based principally on consideration of the question whether the customers could be considered as undisclosed principals

of Clarke so as to affect the defendants' dealings with the shares in question. On this matter their Lordships have not thought it necessary to express an opinion: and the opinions of the learned members of the Court of Appeal upon this question and on the construction of the contractual documents must not be treated as forming any part of the grounds of the present decision. Fisher J.A. in addition to other grounds clearly indicated the view that has been maintained in the foregoing reasons. Their Lordships are of opinion that this appeal fails and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

In the Privy Council.

JOHN A. ALLEN AND OTHERS

v.

F. O'HEARN AND COMPANY

DELIVERED BY LORD ATKIN.

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