

68, 1937

No. 134 of 1936.

In the Privy Council.

ON APPEAL  
FROM THE COURT OF APPEAL FOR ONTARIO.

UNIVERSITY OF LONDON  
W.C.1.  
5 - NOV 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

15077

BETWEEN—

E. B. M. COMPANY LIMITED (Plaintiff)

*Appellant*

— AND —

THE DOMINION BANK (Defendant)

*Respondent.*

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CASE FOR THE RESPONDENT.

RECORD.

1. This is an appeal from the unanimous judgment of the Court of Appeal for Ontario (Latchford C.J., Riddell, Masten, Fisher and Davis J.J.A.), dated 29th June, 1934, dismissing an appeal from the judgment of Mr. Justice Kelly at the trial.

29 June 1934

p. 167.

p. 153.

2. The question raised by the appeal is whether the Appellant is entitled to recover from the Respondent the amount realized on the sale of certain Dominion of Canada Victory Loan Bonds belonging to the Appellant which were assigned to the Respondent by the Appellant and by Harry Low, Marco Leon and Charles Burns as security for the indebtedness of Low, Leon and Burns subject to a prior claim of the Dominion Government for the amount of any taxes that might be found due by the Appellant in litigation then pending.

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16/11/1934

3. The assignment was executed by the Company under its corporate seal by its proper officers, the President and Secretary, and by Low, Leon and Burns under seal. It recited in accordance with the fact that the individual assignors owned all the Company's capital stock. One share stood in the name of Mrs. Low, and another

p. 227 l. 10.

p. 229 l. 40.

p. 265 l. 20.

p. 266.

RESPONDENT'S CASE

4/11/34

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p. 149 l. 40.  
p. 151 l. 28.

in the name of Mrs. Leon to make up five shareholders, as required by The Dominion Companies Act, R.S.C. 1927, cap. 27. An attempt made at the trial to establish that there were other shareholders failed.

p. 53 l. 32.  
p. 87 l. 18.

4. Low, Leon and Burns were partners in the business of exporting intoxicating liquor to the United States at the time importation of liquor for beverage purposes into that country was illegal. They acquired the shares of the Appellant Company in 1923 and thereafter exported beer from the Company's brewery at London along with spirituous liquors acquired elsewhere.

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p. 219.

5. The Appellant Company was incorporated under the name Carling Export Brewing & Malting Company Limited by Letters Patent dated May 8th, 1922, issued under The Dominion Companies Act, now R.S.C. (1927) cap. 27, to carry on the business of brewers and maltsters; to acquire and deal in lands; to erect buildings; to enter into partnership or into any arrangement for sharing of profits, joint adventure or otherwise with any person carrying on or engaged in any business or transaction which the Company might carry on or which might directly or indirectly benefit the Company; to lend money to, guarantee the contracts of, or otherwise assist any such person; and to do all such other things as are incidental or conducive to the attainment of its corporate objects or any of them. It also possessed as incidental and ancillary to the powers set out in its Letters Patent all the powers conferred by Section 32 of The Dominion Companies Act.

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p. 83 l. 27.

6. The operations in beer and spirituous liquors were all under the control of the partners. They were transported to and sold in the United States through the same channels. The receipts from sales were paid to persons in charge of the various docks on the Canadian side from which export by small boats took place and the proceeds were later deposited in various bank accounts at Windsor in the name of the Company or of Low, Leon and Burns collectively or individually as the partners directed.

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pp. 84, 85.  
p. 175 l. 45.

7. The partners paid out of the Windsor accounts into an account kept in the Company's name at London amounts computed at prices fixed by them for the beer, accounted to their representatives in the United States for one-half the profit realized on American sales and retained the balance in various accounts. They financed the Company's operations, gave to the Respondent as its banker a continuing joint and several guarantee of the Company's liability, first for \$50,000 each and later for \$100,000 each and they postponed any claims they might have against the Company to the Respondent's claim.

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pp. 88; 89.  
pp. 235; 238.

pp. 241; 242.

8. In June 1927 the Appellant Company's undertaking and assets (except accounts receivable and cash) were sold free of liabilities to a new Company named Carling Breweries Limited, the consideration being an amount in cash and 60,000 shares of the new Company's capital stock. The sale was authorized by a bye-law passed by the Directors and the approval of shareholders was given by a notation at the end of the by-law reading "unanimous (sic) approved by all shareholders the 10th day of June 1927" and signed by Low, Leon and Burns.

pp. 231 to 233.

10 9. At a meeting of Directors held 31st January, 1928, attended by Low, Leon and Burns, who were referred to in the minutes as "all the Directors", a resolution was passed that each Director be paid a salary of \$10,000 a year as and from 10th June, 1927, for "services in connection with the administration of the affairs of the Company". Apart from this resolution and one passed on 11th October, 1923, when the partners acquired control, fixing the salary of each partner as an officer of the Company at \$4,000 a year, no by-law or resolution was at any time passed by either directors or shareholders authorizing any payment to be made to any of the partners by way of distribution of profits or otherwise.

p. 233 l. 25.

p. 229 l. 40.

10. The Appellant's liabilities other than the disputed claim of the Government and a balance due the Respondent were discharged out of the cash received and a balance of \$1,200,000 or over was credited to an account in the name of the Appellant at London. From this account \$415,000 was withdrawn for the purchase of the Dominion of Canada Bonds in question which were deposited on 26th October, 1927, with the Respondent, to secure any amount ultimately found to be due the Crown and the balance of upwards of \$800,000 was withdrawn and used in whole or in part in the purchase in the names of the partners of valuable real estate in Montreal on which through a Company they were promoting called Dominion Square Corporation a large building was to be erected.

p. 59 l. 6.

p. 114 l. 36.

pp. 91; 92; 93.

p. 244.

p. 113 ll. 1 12

11. The Respondent in July 1928 advanced to the partners \$1,500,000 to enable mortgages on the Montreal property to be discharged. The loan was repayable as to \$500,000 by 21st December, 1928, and the balance by 21st June, 1929. The Respondent received as security for the loan the 60,000 shares of Carling Breweries stock above referred to and \$1,000,000 preferred stock; 50,000 shares common stock; and \$1,326,500 unsecured debentures of Dominion Square Corporation. The Carling Breweries shares were hypothecated by the Appellant and the partners. The Dominion Square securities were hypothecated by the partners.

p. 192.

p. 37 l. 5.  
pp. 201; 203.

**12.** The loan of \$1,500,000 was not paid at maturity; \$1,200,000 that had been advanced by the partners largely out of cash withdrawn from the Appellant's funds was still outstanding, and there was difficulty in arranging permanent financing for the Dominion Square Corporation. The Respondent in these circumstances was asked not to insist on immediate payment of its advance and to obtain further time, additional security was provided on 12th July, 1929. The partners then executed mortgages on equities in real estate in Toronto and Windsor and the Appellant and the partners executed the assignment of the Dominion of Canada bonds. This additional security was given at a conference in Toronto on 12th July, 1929, attended by all the partners and the Appellant's solicitor. 10

p. 58 ll. 14-29.

pp. 247; 257.  
pp. 265; 266.

p. 143 l. 3.  
p. 111 l. 34.

p. 234.

**13.** At a meeting of Directors held 20th May, 1931, the partners and Mrs. Leon being present, it was resolved "in view of the "Judgment rendered by the Privy Council (1931 A.C. 435) in the case "of His Majesty the King v. Carling Export Brewing and Malting "Company Limited" that the President and Secretary take the opinion of Counsel regarding this Company's right to recover the proceeds of the deposited bonds. On 3rd June, 1931, the Appellant's solicitors directed the Respondent to pay the Government's claim as adjusted and demanded that the balance of money be returned to the Appellant. This was the first intimation received by the Respondent that the assignment of 12th July, 1929, was questioned. 20

p. 214 l. 5.

p. 58 l. 30.  
p. 59 l. 5.

p. 188 l. 20.

**14.** The deposited bonds were by direction of the Appellant sold prior to the final judgment in the litigation with the Crown and the moneys were deposited to the credit of a special account. On June 30th, 1931, the Respondent applied the amount then standing to the credit of the account to the following items:—

p. 243.  
p. 25 l. 31.

|  |        |                            |
|--|--------|----------------------------|
| (1) Amount due by Appellant to the Crown               | ...    | \$88,073.17                |
| (2) Amount due by Appellant to Respondent              | ...    | 8,807.98 30                |
| (3) Credited on indebtedness of partners to Respondent | ... .. | 323,156.69                 |
| <b>Total</b>   |        | <u><u>\$420,037.84</u></u> |

p. 168 (2) l. 1.

**15.** After crediting item three, there was still due the Respondent on 26th February, 1935, when accounts were taken by the Master \$933,234.10 by the partners jointly, \$17,902.62 by Low and \$111,357.38 by Leon.

p. 149 l. 40.  
p. 151 l. 30.

**16.** Leon, who lived in Montreal, was the only partner who gave evidence at the trial. He endeavoured to establish that the

Company had shareholders other than the partners, but the trial Judge refused to accept his testimony. Burns, the President, who was in charge at the head office in London, and Low, the Vice-President and Managing Director, who was in charge at Windsor, were in Court but were not called. Leon stated that when the assignment of 12th July, 1929, was given, the Respondent was threatening to put the Company and the partners into receivership and to sell the 60,000 Carling Breweries shares which it held as collateral. The Appellant was, therefore, greatly interested in obtaining delay to enable Dominion Square Corporation to arrange its financing. Besides its interest in the 60,000 Carling Breweries shares which were of substantial value until June 1930, when the Canadian Government stopped the export of liquor to the United States, large sums withdrawn from its funds without any formal authority had found their way into the Dominion Square venture. In addition, the Appellant desired to carry to a conclusion its litigation with the Crown in which it would require financial assistance from the Respondent, which assistance it received. In the circumstances, it was a matter for the Appellant to decide under the guidance of Mr. Springsteen, its Solicitor, who was present at the conference, whether or not it would furnish additional security.

17. Hon. Mr. Justice Kelly, who tried the action, held that Low, Leon and Burns were the owners of all the outstanding capital stock of the Appellant; that they treated its business as their own; that the agreement of July 1929 was within the powers of the Appellant and that it had been properly executed and was binding. He accordingly declared that the Respondent was entitled to apply the proceeds of the bonds less the amount paid to the Crown in or towards the payment and satisfaction of the indebtedness of the Appellant and the other Defendants by counterclaim, and he directed a reference to ascertain the amount due to the Respondent and reserved costs and further directions until after the report upon the reference.

18. The Court of Appeal dismissed the appeal with costs. Riddell, J.A., was of opinion that a perusal of the evidence made it quite clear that the Appellant was a sham or cloak; that its business must be regarded as the business of Low, Leon and Burns; that the agreement in question was properly executed; and that the appeal must be dismissed with costs.

40 Masten, J.A., held that the business of Low, Leon and Burns and the Appellant was a coadventure which still continued when the agreement in question was executed, that the agreement was

p. 94 l. 40.

p. 82 l. 25.

p. 75, ll. 3; 40.

p. 183 l. 30.

p. 97 l. 40.

p. 107 l. 38.

p. 58 l. 40.

p. 59 l. 1.

p. 146.

p. 155.

p. 156.

delivered as part of the winding up of the coadventure and was within the powers of the Appellant. He held further that in executing the agreement in question Low, Leon and Burns did not commit any breach of trust and that the appeal should be dismissed with costs. In his opinion the Appellant was not a sham or cloak for Low, Leon and Burns.

p. 163. Latchford, C.J.A., and Fisher, J.A., concurred with Masten, J.A.

p. 163. Davis, J.A., held that the Appellant did not attempt to discharge the onus on it to dislodge the agreement in question; that the wide powers of the Appellant enabled it to make the agreement; that the Respondent in the circumstances of this case was entitled to rely on the representations that Low, Leon and Burns were all the directors and shareholders of the Appellant; that the Appellant failed to discharge the onus of proving the transaction was of no advantage or benefit to the Appellant but solely for the personal advantage of Low, Leon and Burns, and that the appeal should be dismissed with costs. 10

p. 168 (1). 19. On May 14th, 1935, the Master of the Supreme Court of Ontario having made his report pursuant to the judgment delivered by Mr. Justice Kelly on January 4th, 1934, Mr. Justice Kelly delivered a further judgment dismissing the action with costs. 20

The Respondent submits that the appeal should be dismissed for the following

### REASONS.

1. Because the assignment of 12th July, 1929, was executed under the Appellant's corporate seal by its proper officers and is binding on it;
2. Because the assignment was within the powers of the Appellant under its charter and The Dominion Companies Act; 30
3. Because the assignment was accepted in good faith and without notice or knowledge of any defect;
4. Because the assignment was in the interest of the Appellant;
5. Because the Appellant was a party to a joint adventure with Low, Leon and Burns;
6. Because the Appellant was entitled to render financial assistance to Low, Leon and Burns;

7. Because the Appellant having sold its undertaking and assets and having paid or provided for all its liabilities was entitled under Section 30 of The Dominion Companies Act to distribute its assets amongst its shareholders and it appropriated the bonds and proceeds thereof to Low, Leon and Burns;
8. Because the Respondent acted on the assignment and the Appellant having stood by for two years and taken benefits under it is estopped from repudiating it.
- 10 9. Because the assignment was authorised by all the shareholders;
10. Because the Respondent was entitled to rely and did rely on the statement as to stock ownership recited in the assignment;
11. Because the judgments of the trial Judge and the Court of Appeal are right for the reasons assigned.

W. N. TILLEY.

J. L. WILSON.

**In the Privy Council.**

**ON APPEAL**

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**E. B. M. COMPANY LIMITED**

**(Plaintiff) *Appellant***

— AND —

**THE DOMINION BANK**

**(Defendant) *Respondent*.**

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**CASE FOR THE RESPONDENT.**

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LAWRENCE JONES & Co.,  
Lloyds Building, E.C.3.