1931
*Oct. 8, 9.
*Dec. 22.

R. K. CLAY AND A. K. CLAY (PLAINTIFFS) ..... APPELLANTS;

AND

S. P. POWELL & COMPANY, LIMITED, AND SYDNEY P. POWELL (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Company—Agreement to buy shares in company—Question whether agreement was for treasury shares or could be satisfied by transfer of shares held by individual shareholder—Claims against stock broker for damages for alleged failure to perform agreement as to short sales and for alleged delay in carrying out instructions to transfer accounts.

An agreement for the sale of treasury shares of a company is not satisfied by the transfer to the purchaser of an individual shareholder's personal stock (*International Casualty Co.* v. *Thompson*, 48 Can. S.C.R. 167).

It was *held* that, on the evidence, the agreement by plaintiff, in question, to purchase shares was an agreement to purchase treasury shares of the defendant company and not shares in that company held by the individual defendant, and that plaintiff was entitled to return of the sum taken from his funds in the company's hands to pay for transfer of personal stock from the individual defendant (*Smith* v. *Hughes*, L.R. 6 Q.B. 597, held not applicable).

The judgment of the Court of Appeal for British Columbia, 44 B.C. Rep. 124, was reversed on the above point, but was affirmed in its disallowance of two other claims against defendant company (viz., for loss sustained because of alleged failure to perform an agreement with regard to short sales of certain mining shares, and for damages for alleged delay in carrying out instructions to transfer plaintiffs' accounts to another stock broker).

APPEAL by the plaintiffs from the judgment of the Court of Appeal for British Columbia.(1)

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) 44 B.C. Rep. 124; [1931] 2 W.W.R. 325; [1931] 3 D.L.R. 538.

The action was brought upon three claims: (1) The plaintiff R. K. Clay claimed damages from the defendant company for loss sustained by reason of an alleged failure to perform an agreement with regard to short sales of certain mining shares. (2) The plaintiffs jointly claimed from the defendant company damages for alleged delay in carrying out instructions to transfer their accounts to another stock broker. (3) The plaintiff R. K. Clay claimed from the defendant company and the defendant Powell the return of the sum of $2,000 and interest in connection with the sale to plaintiff of twenty shares of the defendant company's stock.

The trial judge, D. A. McDonald J., allowed claims no. 1 and no. 2, and disallowed claim no. 3.

The Court of Appeal (1) disallowed all the said claims.

At the hearing of the present appeal, as mentioned in the judgment now reported, this Court held against claim no. 1. By its judgment now reported it held against claim no. 2 for the reasons stated by M. A. Macdonald, J.A., in the Court of Appeal (2); but held in favour of the plaintiff (appellant) as to claim no. 3, thus reversing the judgment of the Court of Appeal and of the trial judge on this claim, which is the only one dealt with at length in the present judgment. The material facts in connection with it are sufficiently stated in the judgment now reported.

J. A. MacInnes for the appellants.

J. A. Ritchie, K.C., and *E. F. Newcombe, K.C.*, for the respondents.

ANGLIN, C.J.C.—I would allow this appeal with regard to the $2,000 taken by defendants for shares supplied by Powell; otherwise, I would dismiss the appeal. In view of the disposition I make of it, I would allow no costs.

The judgment of Rinfret, Lamont, Smith and Cannon JJ. was delivered by

RINFRET J.—The appellant R. K. Clay is an author residing in Vancouver, B.C., and the appellant A. K. Clay is his wife.

(1) 44 B.C. Rep. 124; [1931] 2 W.W.R. 325; [1931] 3 D.L.R. 538.

(2) 44 B.C. Rep. 124, at 129 *et seq.*; [1931] 2 W.W.R. 325, at 327 *et seq.*; [1931] 3 D.L.R. 538, at 540 *et seq.*

1931

CLAY v. POWELL & CO. LTD.

Rinfret J.

The respondent company carries on a general business of stock brokers in Vancouver. The respondent Sydney P. Powell is a stock broker and also a shareholder and director in the respondent S. P. Powell & Company, Limited.

The appellants' action against the respondents was based on three separate transactions. It comprised:

1. A claim for loss sustained by reason of an alleged failure to perform an agreement with regard to short sales of certain mining shares.

2. A claim for damages arising out of the respondents' delay in carrying out instructions to transfer the appellants' accounts to another stock broker.

3. A claim for the return of $2,000 in connection with the sale of twenty shares of the respondent company's stock to the appellant R. K. Clay.

The trial judge allowed claim no. 1, but the Court of Appeal reversed his judgment and dismissed the action in regard to it. In this Court, after hearing argument by counsel for the appellants and without calling on counsel for the respondents, we were all satisfied that the claim failed. Announcement to that effect was made from the Bench by our Lord the Chief Justice.

Claim no. 2 was allowed by the trial judge and disallowed by the Court of Appeal. For the reasons stated by Mr. Justice M. A. Macdonald, with whom the majority of the other Judges of Appeal concurred, we think this claim also fails.

It remains to consider claim no. 3. This claim was disallowed by the trial judge, and his judgment was affirmed on appeal.

It is set out as follows in the statement of claim:

In or about the month of August, 1929, the Plaintiff, R. K. Clay, was solicited by the Defendant, S. P. Powell, to purchase 20 shares of the Treasury stock of the Defendant Company, at the par value of $100 each, and the said Plaintiff, believing that he was purchasing Treasury shares of the said Company, at a later date agreed to purchase 20 Treasury shares of the Defendant Company, at the par value of $100 each, namely, $2,000.

The Defendant Company never allotted or issued or caused to be allotted or issued to the said Plaintiff any of its Treasury shares, but at a date unknown to the Plaintiff and known to both Defendants, the Defendant, Sydney P. Powell, purported to transfer to the Plaintiff 20 shares in the Defendant Company which had already been allotted to and was then owned by the Defendant, S. P. Powell, and the Defendant Company thereupon debited the Plaintiff's account with the said sum of $2,000, and

at a date unknown to the Plaintiff but known to both the Defendants, purported to transfer the said sum to the Defendant, S. P. Powell, and the said S. P. Powell thereupon converted the said moneys to his own use.

On the 14th day of May, 1930, the said Plaintiff ascertained that the 20 shares of stock so purported to have been issued to him were not Treasury stock of the Defendant Company but were 20 shares of the issued capital of the said Company owned by S. P. Powell, and the Plaintiff thereupon repudiated the said transaction and demanded from the Defendants a return of the said sum of $2,000, but the Defendants and each of them has neglected and refused to refund the said moneys to the Plaintiff.

The defence was that:

R. K. Clay himself requested the said Defendants to sell him 20 shares of S. P. Powell & Co. Limited stock which the said Defendant agreed to do and that there was no offer or subscription at any time made by the said Plaintiff for unissued shares of S. P. Powell & Co., Limited, and the said Plaintiff well knew that he was purchasing shares the property of the Defendant Powell. The transfer of the said shares from the Defendant Powell to the said Plaintiff was made by one Ley, then an officer of the Defendant Company and the agent of the said Plaintiff, to buy and sell shares at his discretion.

The parties went to trial and we have to examine how far their respective contentions were borne out by the evidence adduced. It is preferable that we should do so by quoting from the testimony itself.

The following is taken from the evidence of Robert K. Clay:

Q. Were you ever approached at any time to buy any stocks in S. P. Powell & Company Limited?—A. I was.

Q. When and where was that?—A. About August, 1929, in a restaurant called the Bon Ton at lunch.

Q. You were approached by whom?—A. Mr. Powell.

Q. Any other person?—A. No, Mr. Ley was present.

Q. Mr. Ley was present, and what was your conversation with Mr. Powell regarding the stocks in S. P. Powell & Company Limited?—A. To the effect that I had surplus funds in my account and that it would be a good investment for me to put a certain amount of money in the company.

Q. Yes, was the price of the stock discussed?—A. No, I understand it was par—the par value was $100.

Q. And what was your answer to Mr. Powell?—A. That I would think it over.

Q. When did you next have any conversation with him?—A. The next transaction was after Mr. Powell had gone away.

Q. Yes?—A. And I spoke to Mr. Ley—

Q. No, just before you start on Mr. Ley, what was Mr. Ley's position with S. P. Powell & Company Limited?—A. Well, he was a partner, so far as I know.

The COURT: He was not a partner in the limited company?—A. Well, he was associated with him as a partner.

1931

CLAY v. POWELL & CO. LTD.

Rinfret J.

Mr. ARNOLD: Is my friend prepared to admit that he was at that time a director?

Mr. BULL: Yes.

The COURT: What?

Mr. ARNOLD: My friend admits that he was a director in the company.

Q. Well, what was your conversation with Mr. Ley regarding this stock?—A. I told him I was ready to take out stock in the company—

Mr. BULL: Of course any conversations with Ley—well, admissions by Ley at that time might be evidence against the company, would not be evidence against Powell as an individual defendant.

The COURT: I will keep that in mind.

Mr. ARNOLD: Q. Yes?—A. And he said that it would be necessary for him to see Mr. Tupper.

Q. Yes?—A. And as a result of his interview with Mr. Tupper, he wrote me a letter.

* * *

Q. Now, what were the contents of that letter?—A. They were to the effect that Mr. Ley had seen Mr. Tupper and that it was impossible for the stock to be issued until the return of Mr. Powell.

Q. I see. Did you see Mr. Powell at all after that?—A. When he returned.

Q. Do you remember when that was?—A. Well, he returned about January—sometime about January.

Q. Of 1930?—A. 1930.

Q. Did you have any conversation with Mr. Powell regarding the stock?—A. No.

Q. What was the next that you heard about this stock?—A. Well, the next that I heard about it was the transfer of Lot 8—on February 8th, of $2,000. I received a debit note for $2,000.

* * *

Q. Now, at any of the conversations between you and Mr. Powell, had you ever heard—had you ever been told or did you hear anything said by Mr. Powell that you were buying S. P. Powell's personal stock? —A. No.

Statements to the same effect were made by Clay throughout his testimony.

This evidence of Clay should be read in the light of what Ley testifies to. We have seen that, at the time, Ley was a director of the S. P. Powell & Company, Limited; or, to put it more exactly, a partner in that company—a private company really controlled by Powell. Before approaching Clay with the object of inducing him to buy the shares in question, Powell had discussed matters with Ley, and Ley gives the following account of their conversation:

Mr. ARNOLD: Q.What was your conversation with Mr. Powell?—A. The conversation was that we hadn't at that time sufficient money as working capital. We required more money for working capital. It was suggested by Mr. Powell to me that we should approach one or two of the more well-to-do of our clients with a view to asking them to take stock in the company.

Q. Now, what stock were they going to take in the company?—A. Well, obviously treasury stock.

Q. Treasury stock; and as a result of that conversation with Mr. Powell did you have a conversation with Mr. Clay?—A. We did, jointly.

Q. Whereabouts was that?—A. At the Bon Ton at a lunch.

Q. And what was the conversation?—A. It was suggested to Mr. Clay that the purchase of stock in the Company—S. P. Powell & Company Limited would be a good investment for him.

Mr. BULL: Q. What is that again?—A. For some of his surplus funds.

Q. I didn't hear the answer?—A. It was suggested to Mr. Clay that an investment in the stock of S. P. Powell & Company Limited would prove a good investment for some of his surplus funds.

Mr. ARNOLD: Q. Yes, when Mr. Clay was approached what did he say?—A. He said he would consider it.

Q. When next did you have any conversation about it?—A. I think not until about three months later.

Q. Where was Mr. Powell then?—A. Mr. Powell was on his way around the world on a pleasure trip.

Q. And you had a conversation with Mr. Clay, did you?—A. Yes.

Q. What was the conversation you had with Mr. Clay?—A. It was one of the routine conversations, I think, which took place in regard to his operations in general, and at the same time I informed him that the company was doing quite reasonably well, and asked him if he was still considering the question of taking stock in the company. I said I considered it would be a good investment for somebody and he said that he thought he would take it.

Q. That he would—— A. In fact he definitely decided to take it then.

We have thus the whole story of the transaction from the lips of Clay himself, and his story is corroborated by Ley.

Powell contradicts Clay, but, as to that, the trial judge said:

Speaking generally, I think Clay told the truth. I may be mistaken, but I have to size up the witnesses as best I can as I see them. Where Clay's evidence is in conflict with any other witness, I accept his. I think he spoke candidly, and he did not try to colour his evidence where he might have done so very much to his own assistance.

Now, accepting Clay's evidence as the learned trial judge did, we think the logical consequence is that he is entitled to succeed in respect of this part of his action.

Powell's proposition to Clay was that he should "put a certain amount of money in the company." The ordinary meaning that those words would convey to Clay was that he should buy the company's treasury stock. In no other way could he put money in the company, and certainly not by purchasing Powell's personal stock. That that was Clay's understanding of the transaction was held by the trial judge. That that was also what Powell had in mind when he made the proposition is, in our view, established

1931

CLAY v. POWELL & CO. LTD.

Rinfret J.

beyond doubt by the fact that Powell's object, as disclosed by Ley, was to secure more money for the company as "working capital"—an object quite impossible of being secured by simply selling his own stock. That view is strengthened by the fact that Powell never at any time mentioned his personal stock, which, on account of the usual interpretation of the words he used, would have been well nigh, if not entirely, necessary in order to give them the meaning he now contends for. If he wished Clay to understand he was offering his own stock, the only way was to tell him.

The view is further supported by the terms of the letter above referred to and written by Ley after his interview with Tupper. Clay was told in that letter "that it was impossible for the stock to be *issued* until the return of Mr. Powell"—an expression applicable only to treasury stock.

We must decide, therefore, that what Powell proposed to Clay was the purchase of the company's treasury stock. And as, according to the evidence, no other proposition was ever made to Clay, it follows that what Clay accepted later was the proposition to buy treasury stock and not Powell's personal stock.

As a result, the matter stood in this way:

Clay had surplus funds in the hands of S. P. Powell & Company, Limited. For those funds the company has to account to Clay. They can only do so by showing that they used the funds in accordance with his instructions. They were authorized to debit his account of $2,000 for the purchase of the company's treasury stock. They never got authority to use the money otherwise. They are not properly accounting for it by showing that with that money they purchased Powell's personal stock.

It may be added that no stock of any kind, either treasury stock or Powell's own stock, was ever allotted, issued or transferred to Clay. The latter never received any certificate of any kind. When the accounts were given over by the respondents to Ley & Co. on the 15th of May, 1930, statements were delivered shewing the state of Clay's accounts. These statements purported to indicate the final settlement. Yet, neither of them shewed that any of the respondent company's stock was held for the credit of R. K. Clay.

The learned trial judge based his judgment on the authority of *Smith* v. *Hughes* (1), and we are referred by counsel for the respondents to a passage of the judgment of Blackburn J. in that case, where he said (2):

> I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality.

We do not think the case applies. In the present instance, it is not a question of quality, it is a question of identity. In *Smith* v. *Hughes* (1), the plaintiff offered to sell oats to the defendant and exhibited a sample. The defendant took the sample and, on the following day, wrote to say that he would take the oats. The defendant afterwards refused the oats on the ground that they were new, and he thought he was buying old oats. Nothing, however, was said at the time the sample was shewn as to the oats being old, but the price was very high for new oats. And the case went on the principle that there is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake not induced by the act of the vendor.

Be that as it may, with due deference, we find no similarity between the two cases. It is sufficient to say that in *Smith* v. *Hughes* (1), the purchaser had got the specific article he bought, in the present case the purchaser did not. An offer duly accepted to sell treasury shares of a company is not satisfied by the transfer to the purchaser of an individual shareholder's personal stock (*International Casualty Co.* v. *Thompson* (3)).

The appellant R. K. Clay is entitled to the return of the sum taken out of his funds in the hands of the respondent company to pay for S. P. Powell's personal stock in the company. But he has already received $50, supposed to represent dividend earned by the stock. The company had no authority to issue the dividend cheque to Clay, for he never was registered as a shareholder. He accepted it then, because he understood the transaction to have been carried out as agreed and that treasury stock had been issued to him. As soon as he ascertained what really took place, he tendered back the $50 at once, through Messrs.

(1) (1871) L.R. 6 Q.B. 597. (2) *ibid.*, at 606-607.
(3) (1913) 48 Can. S.C.R. 167.

1931
CLAY
v.
POWELL
& CO.
LTD.
Rinfret J.

MacInnes & Arnold, his solicitors, who signed and sent a cheque for that sum to the order of S. P. Powell & Co., Limited. The cheque was not cashed. It was produced in court by the company and marked as exhibit in the record. In view of the result, the company should get that money back. The most convenient way is to deduct it from the sum of $2,000, leaving a balance of $1,950 owing to R. K. Clay, together with interest thereon from the date when the money was debited to him in the books of the company. As a consequence, the cheque of MacInnes & Arnold should be cancelled and ordered returned to them.

The appeal should be allowed accordingly and judgment entered as stated in favour of the appellant R. K. Clay against both respondents. The respondent Powell got the money and must be condemned to repay it jointly with the company. The judgment entails cancellation of whatever transfer may have been made by Powell to R. K. Clay of any shares in the respondent S. P. Powell & Company, Limited, and also the rectification, if any be required, of the share register.

On the whole, the appeal is dismissed in respect of any claim with which the appellant A. K. Clay is concerned, and the appellant R. K. Clay succeeds only upon one of the three claims involved in the appeal and in which he was interested. In view of the disposition so made, we would allow no costs of the appeal to this court. Following the method of division adopted by the trial judge with regard to the costs of the action, the appellant R. K. Clay should have judgment for one-third of those costs in the court of first instance.

As for the costs in the Court of Appeal: The effect of our judgment is to confirm the decision of the Court of Appeal on the main appeal brought to that court. The adjudication as to costs on the main appeal before that court should not therefore be disturbed. But the appellant R. K. Clay now succeeds on what was the subject of his cross-appeal to the Court of Appeal, and the present respondents must pay the costs of that cross-appeal.

Appeal allowed in part.

Solicitors for the appellants: *MacInnes & Arnold.*
Solicitor for the respondents: *Stuart H. Gilmour.*