Privy Council Appeal No. 103 *of* 1930.

The Steel Company of Canada, Limited, and others - - *Appellants*

v.

Thomas Ramsay and another - - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1930.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.

[*Delivered by* VISCOUNT DUNEDIN.]

The Steel Company of Canada are a company incorporated by letters patent under the Companies Act of Canada. The capital of the company consisted of 250,000 shares, of which, to quote textually the letters patent—

> " Two hundred and fifty thousand shares, one hundred thousand shares of one hundred dollars each, that is to say, ten million dollars, be created and issued as preference stock and the same when so issued shall have preference and priority as follows :—
>
> " (*a*) In case of liquidation, dissolution or winding up of the company, the holders of such shares shall be entitled to repayment in preference to ordinary shareholders of the amount of the par value of the said shares and any arrears of dividends thereon, and also the net profits of the company which it shall from time to time be determined to distribute are to be applicable first to the payment of a fixed cumulative preferential dividend at the rate of seven per cent. per annum on the capital paid up on the said preference shares, and the holders of such shares shall participate rateably with the holders of the issued ordinary shares in the distribution of net profits after the holders of the ordinary shares shall have received dividends equal to those paid on the preferred shares ;
>
> " (*b*) No dividends shall be paid on the ordinary shares until after the company shall have created and have to the credit of a reserve fund a sum equal at least to one year's dividend on the then issued preference shares."

The shares were afterwards by supplementary letters patent subdivided into smaller amounts, but it was provided that the rights of the shares *inter se* should remain as before.

The company started in 1910. Up to 1912 it distributed dividends at the rate of 7 per cent. on the preferred shares, but declared no dividend on the ordinary. In 1914 the preference dividend fell to $3\frac{1}{2}$ per cent., but in 1915 it was again 7 per cent., the ordinary shares still receiving nothing. In 1916 the preferred received $10\frac{1}{2}$ per cent., which made up the deficiency in 1914, and the ordinary received 7 per cent. From that time up to 1927 inclusive both preferred and ordinary received 7 per cent.

In 1928 there were surplus profits available after paying 7 per cent. to each class of shareholder, and the directors proposed to pay 8 per cent. to each class. The ordinary shareholders then raised the question which is involved in this action. The action is at their instance against the company and the directors, and asks for an injunction against the directors paying anything more than 7 per cent. to the preferred shareholders until the ordinary shareholders shall have received dividends which will give them on their shares during the whole life of the Company the same percentage, viz., 7 per cent., as the preferred shareholders have received.

The question all turns on the proper interpretation of the words " dividends equal to those paid on the preferred shares." Do they mean as set forth above, or do they mean the sum paid to the preferred shareholders in that actual distribution, viz., 7 per cent. ? The share certificates issued did not exactly echo the words used in the letters patent, but it is unnecessary to set forth their terms, as it is beyond controversy that the rights of the parties depend on the terms of the letters patent. A certificate which professed to give other rights would be simply *ultra vires* of the directors who issued it.

The learned Trial Judge decided in favour of the contention of the ordinary shareholders, and on appeal his judgment was affirmed by a majority of the Court of Appeal. Appeal has now been taken to His Majesty in Council.

Their Lordships are of opinion that the decision of the Trial Judge affirmed by the Court of Appeal was right. The considerations which lead them to that conclusion are as follows :—

The article (*a*) is only dealing with the rights of preferred shares. The right to declare a dividend does not rest on this article, but on a bye-law duly passed in terms of the Companies Act. Now the declaration of a dividend need not be only once a year. It may be at any time the directors choose, and there may be several declarations (as, indeed, was done) in the course of one year. Accordingly the preferential dividend is directed to be not " at 7 per cent. per annum" but " at the rate of 7 per cent. per annum." The rate to be applied only speaks when there are profits which the directors determine to distribute, and that distribution is one operation complete in itself. There is only one dividend, whether paid to the preferred shareholder or

to the ordinary shareholder. When therefore to describe the dividends paid to the preferred shareholders, equality of payment to which is made the condition precedent to further participation on the part of the preferred shareholders, the expression used is " those dividends " in the plural, that shows that more than the single dividend of the moment is referred to ; and it is only after the condition is fulfilled that equality of participation is secured to the preferred shareholder. This equality of participation is an additional privilege. Ordinarily speaking, when a preferred shareholder receives his preferred dividend he can ask no more. *Will* v. *United Lankat Plantations* [1914], A.C. 11. The fulfilment of the condition alone opens the door for a further participation in profits. The moment that it is realised that " those dividends paid " refer to dividends other than the dividend immediately being dealt with, it is obvious that the whole history of the past is opened.

There is another consideration which strongly points the same way. The rule as laid down is obviously meant to act as a fixed rule on all occasions when distribution occurs, and it would be natural that it should act in a uniform manner as between the respective classes of shareholders. It will do so if the judgment appealed against is right. But if the opposite conclusion were reached, if " dividends paid on the preferred shares " were the dividend paid at that distribution, then the ratio of participation as between the two classes of shareholders in the whole profits distributed will vary according to the action of the directors. Suppose that in a year when there were profits sufficient to warrant a distribution of 7 per cent. to each class the directors thought it more prudent to declare no dividend on the ordinary (and they could not be forced to declare it), and that next year the flourishing state of affairs continued, and the directors decided to divide all their profits, the preferred shareholders would get beside their 7 per cent. for the year, half of the money which would have gone to the ordinary shareholders if there had been a distribution the year before. For be it observed that the directors could not give the ordinary shareholders 14 per cent. ; for, on the assumption that the argument of the appellants prevails, as soon as the ordinary shareholders had got 7 per cent., the participation of the preferred shareholders on anything left over became obligatory.

The learned Judges in the minority in the Court of Appeal were impressed with the idea that the Trial Judge's judgment gave the ordinary shareholders a cumulative dividend. It does no such thing. Arithmetically it may be the case that the amount eventually received by the ordinary shareholders may be the same as if they had had a cumulative dividend. But equally it may not be so. And in any view they are not getting what they do get as a cumulative dividend ; they are getting it because they are entitled to have the condition fulfilled before the preferred shareholders can call for participation.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

THE STEEL COMPANY OF CANADA, LIMITED,
AND OTHERS

v.

THOMAS RAMSAY AND ANOTHER.

DELIVERED BY VISCOUNT DUNEDIN

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1930.