

James Joseph Gray - - - - - Appellant

v.

New Augarita Porcupine Mines Limited - - - - Respondent

FROM

THE COURT OF APPEAL FOR ONTARIO

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 24TH MARCH, 1952

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*Present at the Hearing:*

VISCOUNT SIMON  
LORD PORTER  
LORD OAKSEY  
LORD RADCLIFFE  
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* LORD RADCLIFFE]

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This is an appeal from a judgment of the Court of Appeal for Ontario dated 3rd March, 1950, awarding damages for fraud against the appellant and directing an enquiry under a number of heads for the purpose of ascertaining those damages. The judgment of the Court of Appeal was itself made by way of variation of a judgment of McFarland J. dated 15th October, 1949, and given in the Supreme Court of Ontario, by which he had held the appellant accountable to the respondent in respect of dealings between them and had ordered the return to the respondent of several blocks of shares or their equivalent value.

The bare outline of the facts out of which the case arises is as follows. Much of it has already been recited in the Court of Appeal's judgment. The respondent, New Augarita Porcupine Mines Ltd. (hereinafter called "the Company") was founded in May, 1936, as a mining company with a capital divided into 3,000,000 shares of one dollar each and with power to issue all but five of its shares at a discount of 99 per cent. From the month of October, 1936, until the month of March, 1941, the Company was entirely in the hands of the appellant Gray, who was Vice-President and Chairman of the Board: its only other acting director during this period was a Mr. Bourne (now dead) who was an accountant employed in the law office conducted by Gray. Another employee, a typist, Miss Lord, was elected a director in October, 1936, but she can have maintained no more than a shadowy connection with the Company, for she is not recorded as having attended a Board Meeting between that date and the month of November, 1941. The Company had no establishment of its own, its affairs being conducted from Gray's own office. Except for the share register, which was in the hands of the Premier Trust Company as Registrar and Transfer Agent, the Company can hardly be said to have had any books or records of its own. If it ever had an auditor, no auditing was done. No meeting of shareholders was held between the month of May, 1936, and the month of July, 1943.

During the years when the Company was thus at the mercy of Gray he entered into a number of purported transactions between it and himself. Since the By-Laws required a Board of five directors, of whom three should form a quorum, and precluded a director from voting on any contract or arrangement in which he was interested, it is obvious that these transactions, which had no other warrant than the authority of Gray and Bourne, were incapable of constituting a valid commitment between Gray and the Company, whatever rights they might create in innocent third parties whose innocence entitled them to remain ignorant of the invalidity of the Company's proceedings. Thus Gray appointed himself the Company's Solicitor as from December, 1936. He issued to himself or to his nominee Bourne very large blocks of the Company's shares as fully paid up, taking them at a discount of 80 per cent. He committed the Company to purchasing from him various mining claims in consideration of fully paid shares and sums of cash, the amounts being determined by himself and Bourne. He treated himself as having sold to the Company for cash holdings of speculative shares in other mining ventures in which he was interested, although, as he conducted in the Company's name a voluminous account with a firm of brokers on the Toronto Stock Exchange in which many share dealings are recorded, it is not possible to deduce from the evidence with any certainty what exactly was the Company's ostensible title to these holdings. More will have to be said about them later. This is by no means an exhaustive list of transactions with the Company in which Gray had implicated himself: but it is necessary to add to them his frequent drawings upon the Company's bank account for his own purposes. For he does not seem to have felt any need to distinguish between the Company's property and his own, nor, perhaps logically, did he take any steps to see that accounts or records were kept which would at least make it possible to measure the extent of his misappropriations.

It is indeed one of the features of this case that, despite the researches made by the respondent's counsel, only a few of the relevant facts can be stated in anything but general terms. For instance it is far from clear how many of the Company's shares Gray did procure to be allotted to himself or his nominees. The trial judge treated him as liable to the Company for 252,850 shares or their value, apart from another block of 7,700 shares which is involved in a separate issue. The minute of a Board meeting on 17th November, 1941, speaks of 216,550 as having been allotted in this way by that date. During the hearing of the appeal the respondent's counsel produced an analysis of the evidence which showed Gray as having taken from the Company and disposed of a total of 358,519 of its shares. Their Lordships are content to accept this figure as the best that can be arrived at on the available information, but it is not necessary to make any conclusive finding on the matter at this stage. Similarly, it is quite certain that Gray disposed of the shares he took on a very large scale: but it is not possible to say precisely how many he sold or what prices he realised on the various sales. It does appear that in July, 1939, he sold a block of 500 at 26 cents per share, that 28½ cents was the average market price of the Company's shares on the Toronto Stock Exchange during the period November, 1939, to November, 1941, when many of Gray's operations were carried out, and that between December, 1940, and January, 1941, a firm of brokers bought 100,000 shares from Gray at prices ranging from 27 to 36 cents per share. These facts are quite sufficient to establish that over a long period he was making very large profits at the expense of the Company by obtaining shares with Bourne's connivance at a fixed discount of 80 per cent. and then retailing them to his own advantage at much higher prices. When examined on discovery Gray made no secret that he regarded this as being the effective arrangement:—"I was to get the stock at a price and I was to pay the expenses and I was to get the difference . . . Bourne and I arranged that for the Company." The "expenses" seem to have been represented in the main by a "mail order campaign" which he conducted for the purpose of enlarging upon the Company's prospects. At more than one point of his

examination he invoked these expenses as having eliminated any net profit from his dealings: but as he never at any time made any analysis of the expenses or indeed appears to have seen any record of them it would strain the credulity of any Court too far to allow this pessimistic impression to outweigh the ascertained fact that he did realise much higher prices for the shares than he ever gave for them.

In 1941 certain changes in the Board began to take place. The facts concerning them share the haze that obscures most of the Company's history up to this date. At a meeting held on 17th March, 1941, Gray and Bourne purported to elect two new Directors, Tovell and Buchanan, to fill existing vacancies. Since the By-laws required that Directors should be shareholders of the Company and neither of them was, according to Gray, a shareholder at that date, their election could not have been validly made: but both of them are recorded as having attended a meeting on 29th October, 1941. On 17th November Gray, Bourne and Miss Lord (now Mrs. Bauman) held a meeting, at which, after numerous decisions of no possible validity, they elected Buchanan and Tovell to the Board of Directors. Buchanan was by that time a holder of 1,000 shares and therefore qualified: Tovell, to whom 500 shares had been transferred but who was not yet then registered in respect of them, was a shareholder in the sense that he was a member of a firm, Wilson, Gregory, Liphardt & Co., who were registered as shareholders under that name. On 19th November Gray, Bourne and Mrs. Bauman met again. Mrs. Bauman proceeded to affix her signature to the records of all (except one) Directors' meetings held since October, 1936, to show that she "approved of and consented to everything done at those meetings." Even this comprehensive, though belated, endorsement was incapable of adding anything to the validity of such proceedings. Opportunity was also taken to correct the minutes of previous meetings by eliminating from the records of "Directors present" the name of Napier Weir, a gentleman who had at no time been either a Director or a shareholder of the Company but who had made occasional appearances in Gray's law office. No explanation was forthcoming why these appearances had led Gray and Bourne to mistake him for a colleague on the Board. If he existed at all, a "man of medium height and medium build, . . . not a very big man," he disappears as completely from the case as his name disappeared from the Minute Book of Directors' meetings. Bourne and Mrs. Bauman then resigned and, Tovell and Buchanan taking their seats, a vacancy was filled by the election of Seguin. He again was not then registered in respect of an individual holding, but was a member of a firm, Barrett, Seguin & Co. who were registered under that name. The only further changes in the Board that need to be mentioned are that at a Board meeting on the 9th December, 1941, a fifth Director, Bouck, was elected. Thus at that date, the crucial one for the purposes of this action, there were in office, ostensibly at any rate, five directors, Gray, Tovell, Buchanan, Seguin and Bouck.

This reinforcement of the Board could not have been wholly unconnected with the attention that the Ontario Securities Commission had begun to pay to the manner in which the Company's affairs were being conducted. About the 17th November Gray was interviewed by an official of the Commission and shortly afterwards Bourne placed in the hands of the Commission such of the Company's books and documents, including the Minute Book, as may then have existed. It seems clear that a report was in course of being prepared. On the 28th November a separate investigation was started by Bouck, a lawyer by profession and not then a director of the Company. His commission to make this investigation came from a Mr. Bishop, who was interested in the Company's shares, but he worked with the approval and to some extent with the assistance of Seguin, Buchanan and Tovell. His work included a study of the Minute Book, some cancelled cheques and certain unidentified records, and the sight of a statement that had been prepared by the

Securities Commission. He also had an interview with two officials of the Commission from whom he obtained some, again unidentified, figures. From this material Bouck drew up a document which he "thought was fairly representing the position of the company at that time." This document (Exhibit 14) was shown by him to and discussed with Gray on the 4th and 8th December or on one of those days, at any rate before the Directors' meeting that took place on the 9th. Exhibit 14 was the basis of the arrangement that was come to at that meeting and both it and a shorter version (Exhibit 8) were then before the Board. One was styled an "approximately correct statement of the affairs of the Company," the other "Financial Statement." Their purpose was to clear up the obscure question, what was the Company's true financial position: but this question really depended on the answer to another, hardly less obscure, what was the state of account between itself and Gray.

In the result the statement showed Gray as owing the Company \$18,765.29, subject to certain assumptions. The crucial assumption was that he ought to be charged with approximately 20 cents for every share that had been issued for cash. Starting with this charge against him, which made up a figure of \$97,745.20, there were then set off against it what were described as "payments properly made," in other words payments which had been made or were to be treated as having been made out of the Company's funds and to which no exception was to be taken. They included two sums which were not really payments at all, a sum of \$15,000 allowed to Gray for "services, rents, office expense, to date" and a sum of \$10,200 in respect of "Preston stock on hand." This sum was in fact equivalent to about twice the amount of money that had been paid for the stock and represented more nearly its then market value. A second important assumption was that the Company was not going to accept any responsibility for the acquisition of certain blocks of shares in which Gray was interested and which he had purported to sell to it or to cause it to buy. These shares, 56,300 shares of Bear Exploration and Radium Ltd., 25,000 shares of Giant Yellowknife Gold Mines Ltd. and 2,500 shares of Hugh Pam Porcupine Mines Ltd., as well as 7,700 shares of the Company itself, were to be transferred to Gray, but as a consequence the "payments properly made" in the account with him were not to include any sums that might have been paid out of the Company's funds or on its behalf towards the making of these acquisitions.

Thus the Company's financial statement was drawn up on the basis that Gray had been treasurer of all that the Company had received in cash for its shares, assuming the issue price to be 20 cents per share, and he could receive credit only for such sums (apart from the two special items just mentioned) as had been properly spent on the Company's behalf. That is an intelligible conception, even if it was not consistently applied; but by itself it does not explain why Gray should only be charged with 20 cents per share when his allotments to himself had realised for him, apparently, a much larger average figure per share. The explanation is not easily extracted from such evidence as is available. Apart from Gray only two of the Directors gave evidence, Bouck and Tovell. According to Tovell, who evidently knew much less than Bouck as to what the real basis of the calculation was, the \$97,745 represented monies that Gray had paid into the Company's treasury against the 500,681 shares in all which had been issued for cash during the preceding years. But in fact Gray had not taken, by himself or by nominees, anything like all these 500,681 shares nor does it seem possible to suppose that he had paid up even the 20 cents per share that he and Bourne had decided to regard as the issue price to him. Bouck's explanation was quite different. The 20 cents, he said, were not related to Gray's ostensible price of issue: they represented more nearly an estimation of the value of the shares as at 9th December, 1941. "I think Mr. Bishop was prepared to take down some treasury stock as soon as the Company was in a position to sell, at 20 cents a share, and I figured that was

the proper price to charge Gray for these shares which had been taken out of the treasury". If Gray was to be charged at all with the monies which the Company had received or ought to have received on the issue of its shares during the preceding five years, there was no good reason for fixing the charge on the basis of the price obtainable at the time of settlement. But then neither Bouck nor Tovell knew at the time that Gray had been selling the shares which he had taken at prices showing a substantial difference in his favour. Bouck had no reason to know and did not enquire: Tovell could have known something about it because of the option which his firm had taken up during the preceding December/January. But each stated explicitly in his evidence that he did not know of this important circumstance on the 9th December.

The Board meeting of the 9th December is recorded in the Company's minutes. It was attended by all the Directors, and the first business was the election of Bouck. The result of the meeting was that, after discussion, an agreement was come to on the lines of Bouck's recommendations as put forward in his memorandum (Exhibit 14). Gray was to pay the Company the \$18,765.29 shown as due, the payment to be secured by depositing for sale 93,816 of its shares: he was to take back the Bear stock, the Giant stock, the Hugh Pam stock and the 7,700 shares previously mentioned: the shares deposited were to be taken "in full settlement of the liabilities" of Gray to the Company: Gray was to release the Company from all claims to date. Gray is recorded as having declared his interest "in all matters in which he was interested" and refrained from voting.

The crucial question in the case is to determine what is the validity and what are the consequences of this agreement arrived at in this way. But before doing so their Lordships ought to notice a point that was argued before them to the effect that two of the Directors, Seguin and Tovell, were not qualified to be elected Directors at the date when their ostensible election was made (ignoring for this purpose the abortive election of 17th March), and that therefore there was not on the 9th December any quorum competent to bind the Company to any agreement. Reliance was placed upon the statutory requirements as to Directors' qualification which were contained in Section 87 (1) of the Companies Act then ruling (R.S. Ontario 1937, c. 251). The appellant's counsel answered this point by maintaining that each of them, Seguin and Tovell, was at the date of his election a member of a firm then registered as shareholders in the Company's books and was as such "a shareholder absolutely in his own right" within the meaning of Section 87 (1) and so as to satisfy its requirements. Their Lordships do not propose to decide this point. It is not noticed in the judgment of the Trial Judge and the Court of Appeal only noticed it in order to put it aside, being content to assume that the Board was properly constituted, since they regarded Gray as liable in any event. Their Lordships also regard him as unable to escape liability and they will therefore make the same assumption. To hold that these Directors were not qualified would make it necessary to consider two further points which have not been dealt with in the Courts below: one, the effect of By-Law 62 which gives validity to the acts of de facto Directors despite a subsequent discovery of invalidity in their appointment, a provision which, though commonly found in the Articles of Association of companies in the United Kingdom, was, it was argued, ultra vires this Company having regard to the Companies Act and to its constitution; the other, the effect of a resolution passed at a general meeting of shareholders on 28th July, 1943, ratifying the acts of the then Board of Directors as evidenced by the Minutes and records of the Company. The determination of these points involves matters of general importance to the law governing the administration of limited companies, although the Ontario statute itself has since been changed and now requires no more than that a Director should be "a shareholder of the company" (R.S. Ontario 1950, c. 59, s. 87 (1)). Their Lordships will however observe in passing that it is by no means to be assumed that the well-known English decisions that one of two joint holders of shares has

a holding of those shares (*Dunster's case* [1894] 3, Ch. 473) and that a registered shareholder who is in fact a trustee is nevertheless a "registered member in his own right" (*Pulbrook v. Richmond Consolidated Mining Co.*, 9 Ch. D. 610) and other decisions that have followed and elaborated upon them offer any direct guidance as to the construction of such a provision as that contained in the Ontario statute which was in force at the relevant date. This is a view that has already been suggested in Canada (see for instance *Ritchie v. Vermillion Mining* 4 Ont. L.R. 588 at 597), and in so far as the particular point may still have practical importance in Ontario or elsewhere it would need very careful consideration.

How then does the agreement of 9th December stand in law? A variety of answers has been returned to this question. To Gray, of course, it is a valid and binding compromise of all claims then outstanding and is a bar to any action that seeks to reopen them. That has been his argument throughout. To Mr. Justice McFarland, on the other hand, who tried the case, it did not "in fact or in law constitute a final settlement of the claims" of the Company against Gray. Consistently with this finding the learned judge directed extensive accounts of all transactions between them from May 1936 to January 1942, ordered the return of the Bear, Giant and Hugh Pam shares or their value, and awarded other relief. Since no reasons were given by the judge for his finding it is a matter of speculation what precise conclusion it was intended to express. From the wording used it seems to be an acceptance of the plea contained in paragraph 26 of the Statement of Claim to the effect that no final release at all was involved in the transactions of the 9th December and that claims were still open. But this reading of the matter was rejected by the Court of Appeal. They came to the conclusion that a settlement had indeed been come to, and a settlement which, having regard to what had happened since, could not now be rescinded: but they were of opinion that the Company was entitled to recover damages from Gray "by reason of his fraud", and they varied the Order of the Court below by directing a most extensive enquiry as to damages under a number of different heads, the total result of which might well be to make Gray liable to much the same extent as if the settlement, which they held to be incapable of rescission, had in fact been rescinded.

None of these three different solutions commends itself to their Lordships without qualification. They think that the transaction of 9th December was intended by both sides to be and did in fact constitute a settlement of outstanding claims. It is true that, so far as the Minutes go, it is not recorded as having been the subject of any motion that was proposed or carried: but the record does make it quite clear that a release of Gray, subject to the conditions then imposed, was what was intended and the oral evidence of Bouck and Tovell leaves no other construction possible. Nor can the agreement be rescinded now. Even if it were to be regarded as voidable on account of fraud or non-disclosure, *restitutio in integrum* is impossible, as the Court of Appeal have held. To take one element alone, Gray handed over a very large block of the Company's shares to be realised for the purpose of providing the \$18,765 that he was to pay, and that transaction cannot now be undone, for they have been sold and the monies realised. But, if the settlement agreement must stand, it is difficult to see out of what fraud there arise the damages which have been awarded by the Court of Appeal. Fraud is a comprehensive word that covers much wrong-doing. It is easy to say that Gray was guilty of fraud in his dealings with the Company over a long period. So he was, in the sense that he committed incessant breaches of his fiduciary obligations, that he used the Company's funds and shares to his own advantage, that he did not keep the records that he should have and resorted to the most doubtful expedients to try to embellish the few records that he did keep. But his obligations to the Company in respect of all this are wiped out if the settlement stands. Was Gray then guilty of fraud or deceit in putting forward or at any rate being party to the settlement itself? It is this

aspect of fraud that the Court of Appeal seem to have had in mind, and the argument before their Lordships turned principally upon this point. They have come to the conclusion that the evidence does not support a finding against Gray on this head.

There are two main considerations that rebut the claim. One is that Gray did not make any representations that can be founded upon as having induced the settlement. There may be matter of complaint in what he failed to say, having regard to his special position, but there is nothing to complain of in what he did say or in any half-truth that he might have concocted. For in effect he said nothing. The document that became Exhibit 14 was not prepared or instigated by him, nor did the crucial figure of 20 cents per share appear in it through any suggestion of his. The document was brought into existence by Bouck before he ever saw Gray and Bouck was the author of the proposal to charge Gray at the rate of 20 cents. It is true that he had been through his memorandum with Gray before it was put before the Board Meeting on the 9th December: but Gray's contribution to the discussion was to object that he ought to be allowed larger credits than he was being given. Nothing is attributed to him by way of comment on the 20 cent charge. Bouck was not in any sense an agent or emissary of Gray in carrying this document before the meeting: he was not even relying on the validity of anything that he found in the Minute Book. There were, as he said, "a great many of the minutes that I didn't consider binding on the company". Again, "I don't recall accepting anything other than I had verification for".

Secondly, the evidence leaves it quite undetermined how much of the Company's previous history was or was not known to the other Directors. Yet, if that point is not cleared up, it is quite impossible to come to any satisfactory conclusion as to what they were relying upon when they made the settlement with Gray. The main cause of this obscurity was the decision of the trial judge to uphold an objection by counsel for the Company and to refuse to allow Bouck to give evidence as to what information he, Seguin, Buchanan and Tovell had received from the Ontario Securities Commission when they visited the officials of that Department on the 2nd December. This evidence must have been not merely relevant but also important on the issue of fraud or deceit, for it is impossible to predicate of a person that he has been misled by some statement unless there is the means of establishing how much he knew at the time that the statement was made. The evidence was objected to on the ground that it would be hearsay. So it would be, regarded as proof of the facts that were the subject of the information. But that was not the purpose for which it was tendered: it was tendered as evidence of the state of mind of the persons to whom the information was given. As such it was clearly admissible, and it was wrongly rejected.

Therefore Gray cannot be held liable in damages for fraud or deceit. But, in their Lordships' view, this conclusion does not avail to exempt him from all liability. It is necessary to examine his position as a Director contracting with his company. Their Lordships were invited to consider also his position as the Company's solicitor. But it would serve no useful purpose to follow out the implications of this as well. He never had any valid retainer from the Company, since he and Bourne could not give one: and, whatever else is obscure, it at least seems clear that none of them, Buchanan, Tovell, Seguin and Bouck, was looking to him as the Company's solicitor on 9th December or was under any form of that influence which sometimes grows up between a solicitor and his client. In those circumstances it is as director, not as solicitor, that he should be charged.

It is beyond dispute that there are certain special obligations upon a director who places himself in the position of contracting with his Company. The general principle is that such a contract is not binding on the company, for a director is not entitled to place himself in a position

in which his interest is in conflict with his duty. The company, it has been said, has a right to the services of its directors as an entire board. Even if the contract is not avoided, whether because the company elects to affirm it or because circumstances have rendered it incapable of rescission, the director remains accountable to the company for any profit that he may have realised by the deal. Subject to any statutory requirements that cannot be dispensed with, it is open to companies to make such provisions as they please for the purpose of modifying the incidence of this general principle. By-Laws 54 and 55 of the Company's By-Laws are designed to achieve just such a modification: s. 94 of the Companies Act (R.S. Ontario 1937, c. 251) supplied the statutory requirements to which the By-Laws were subjected. In the result Gray as a director was not precluded from entering into contracts or arrangements with the Company, but he was not permitted to vote upon a Board resolution dealing with such a contract or arrangement and he could only retain for himself any profit arising from the transaction if at the meeting which passed the resolution he had disclosed to his colleagues "the nature of his interest".

Gray did not vote at the meeting of 9th December: but did he make a disclosure of the nature of his interest? If he did not he remains liable to the Company for any profit which accrued to him from the settlement. It is said that, having regard to the form of the pleadings, it is not open to the Company to rely on a claim of this kind. But their Lordships are not prepared to entertain this objection. It is true that the case has been rested hitherto upon allegations of fraud in the sense of positive deceit or misrepresentation and the Statement of Claim is primarily drawn so as to set up such a case. But enough is said in it to show that special reliance is intended to be placed upon Gray's obligations as a director and upon his breaches of fiduciary duty. That is enough for the present purpose. Their Lordships think that they are bound to treat a claim based on "equitable fraud" as open on these pleadings, just as the House of Lords in *Nocton v. Ashburton* [1914] A.C. 932 treated a similar claim as open upon pleadings that were primarily based upon allegations of fraud at common law. What matters is that a defendant should have had adequate warning by the pleadings as to the issues of fact that are to be raised against him, and no one can read the Statement of Claim in this case without seeing that Gray received full warning that it would be material to establish what was or was not disclosed at the time when the settlement was made.

A director who wishes to keep for himself the benefit arising from some deal with his Company has to establish that he has satisfied all necessary conditions. The onus is upon him. But it seems fairly plain that in this case Gray made no such disclosure as was required. He came to the meeting under very heavy liabilities towards the Company: he had been making large profits out of his transactions in the shares that he had allotted to himself, he had been making liberal use of the Company's funds for his own purposes. He left the meeting with all those liabilities extinguished for a secured payment of \$18,765, a sum which charged him with the equivalent of no more than his ostensible issue price for the shares and which ignored altogether the benefits that he may have obtained from the use of the Company's funds. It was imperative that he should reveal to his colleagues before they voted the fact that to settle with him on the basis of 20 cents per share was to release him from liability at a price that was singularly favourable to himself. The nature of his interest in the agreement proposed consisted of just this fact that he stood to gain so much by the transaction: and only he at the time had the means of knowing how much. There is no precise formula that will determine the extent of detail that is called for when a director declares his interest or the nature of his interest. Rightly understood, the two things mean the same. The amount of detail required must depend in each case upon the nature of the contract or arrangement proposed and the context in which it arises. It can rarely be enough for a director to say "I must remind you that I am interested" and to leave it at that, unless there is some special provision in a company's articles



that makes such a general warning sufficient. His declaration must make his colleagues "fully informed of the real state of things" (see *Imperial Mercantile Credit Association v. Coleman*, L.R. 6 H.L. 189 per Lord Chelmsford at 201). If it is material to their judgment that they should know not merely that he has an interest, but what it is and how far it goes, then he must see to it that they are informed (see Lord Cairns in the same case at p. 205). Tried by any test of this sort Gray's action falls short of what was required. It is true that the Minutes contain a formal record that he declared his interest, but his own evidence on discovery and the evidence of Bouck and Tovell at the trial show that he never made any attempt to tell the other directors what relation the 20 cents per share bore to his real liabilities to the Company. Gray's attitude was quite explicit: he did not think that there was any necessity for him to make any disclosure. He could not remember that he had said anything at the meeting. He regarded the settlement proposals as having been laid down by the others and himself as having done "pretty well what I was told". "I wasn't on the company's side in that settlement. I was J. J. Gray in that settlement". The evidence of Bouck, who was called by the Company, and of Tovell, who was called by Gray, is to the same effect: nothing was said by Gray that would have helped to enlighten them as to the real nature of his liabilities to the Company.

It is said that it would have made no difference if he had told them. They had decided on the basis of settlement that they were going to impose upon him, they did not think that they could get any more out of him, and their main concern for the Company was to recover for it some cash that would keep it running and to achieve an agreement that would regularise its disordered affairs. There may be an element of truth in all this, but in fact it constitutes an irrelevant speculation. If a trustee has placed himself in a position in which his interest conflicts with his duty and has not discharged himself from responsibility to account for the profits that his interest has secured for him, it is neither here nor there to speculate whether, if he had done his duty, he would not have been left in possession of the same amount of profit. It has often been said that a trustee who is accountable is not the less accountable if he shows that the transaction impugned is both reasonable and fair (*Parker v. McKenna* L.R. 10 Ch. App. 96. *Costa Rica Railway v. Forwood* [1901] 1 Ch. 746), and the principle is the same. It follows that Gray must be held liable to account for all profit that he made by the settlement which he obtained in the manner that has been described. Speaking in general terms, this means the difference between what may have been his real debt at the date of the settlement and the \$18,765 for which the directors released the Company's claims.

It remains to consider what ought to be done about the blocks of Bear, Giant, and Hugh Pam shares (which may be conveniently referred to as "the released shares") handed back to him under the settlement. Both the Trial Court and the Court of Appeal have given judgments that charge Gray with these shares or their value (subject to certain limits). The Court of Appeal has also charged him with the 7,700 shares of the Company that were returned at the same time, but counsel for the Company intimated during the course of the appeal that he did not wish to press this claim. But, if the settlement agreement must be treated as a valid agreement in the sense that it cannot now be avoided, it follows that the decision that was then taken to disavow the Company's title to the released shares must be treated as an effective decision. They were not then thought to have any considerable value, whatever heights some of them may have climbed to since, and the decision meant no more than that Gray was debited with anything that he might have made the Company spend on their acquisition. This debit stands in any account that is taken between these two parties.

It does not seem possible, while retaining this debit, to treat Gray, who is to be regarded as the true owner of the released shares for all purposes, as accountable for any profit arising from the decision to return them to him and not to keep them for the Company. Assuming that he sold them or some of them in later years at a price much greater than the Company gave for them or than their current value in December, 1941, that was not a profit arising from the transaction itself. The only permissible basis for ascertaining such a profit would be to take the value of the released shares as at the settlement date and to measure it against the amount of money, charged to Gray, which the Company spent in buying the shares. And, as to that, all that can be said is that, even if the evidence was available and some profit could be shown, it is not open to treat Gray as accountable for making profit out of property in which, *ex hypothesi*, the Company has never had an interest.

The case remains an unsatisfactory one, even at its conclusion. The various accounts and enquiries that at successive stages of the proceedings have represented the only form of relief that can be awarded against Gray require, if they are to be rendered properly, the production of information and records which are very unlikely now to be forthcoming. To answer them at all large assumptions may have to be made, and inferences may have to be drawn from computed rather than from actual figures. Nothing in the evidence suggests, for instance, that it will ever be possible to ascertain with precision what was the profit which Gray realised from his dealings in the shares of the Company taken from it by himself or by Bourne on his behalf. The cause of that lies with him. He was entirely in the wrong in what he did: it was his default in his statutory duty to keep proper records and accounts that is the main source of the present obscurity. It will not be for him to complain if upon slender material assumptions are made and inferences drawn, adverse to himself, when the fact that it is necessary to speculate at all is caused by his own breach of duty. But, for all that, the Company itself cannot escape responsibility for some share in the difficulties. It was very late in taking action to dispute the settlement and some of the facts which ought to be known, if justice is to be done, may well have become obscured by nothing more than the lapse of time itself. Moreover, from the first, an undue proportion of the Company's case has been occupied by elaborating the details of Gray's general misconduct in his relations with the Company, a misconduct for which there is nothing to be said except that it is irrelevant unless it aids to the establishment of a subsisting liability. Their Lordships feel that they are bound to show some reflection of these facts in the order that they make as to the costs of the present appeal.

For these reasons their Lordships will humbly advise Her Majesty that the Order of the Court of Appeal for Ontario of 3rd March, 1950, should be varied except so far as it deals with the costs of the action and the costs of the appeal before it, and that in lieu of the account of damages and judgment therefor directed by the said Order there should be substituted an Order to the following effect:—(1) a Declaration that the defendant Gray is liable to account to the plaintiff Company for the profit that he realised by the settlement agreement made on the 9th December, 1941; (2) an inquiry to ascertain what was the total of the sums for which defendant was accountable to the plaintiff at that date, the defendant being charged for the purposes of this inquiry with (a) all such profits as he had made by selling shares of the plaintiff issued to him without valid authority, (b) all monies belonging to the plaintiff drawn by him and utilised for his own purposes together with interest on such monies or the profit realised by their use as the plaintiff may elect, and (c) all other monies which may have been owing by him to the plaintiff at that date; and (3) judgment for the plaintiff for the amount (if any) by which the total of the sums so ascertained exceeds the sum of \$18,765.29 already paid by the defendant. Each party must bear his own costs of this appeal.



In the Privy Council

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JAMES JOSEPH GRAY

v.

NEW AUGARITA PORCUPINE MINES  
LIMITED

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DELIVERED BY LORD RADCLIFFE

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