

UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

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In the Privy Council.

No. 37 of 1897.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN—J. T. JOHNSTON and THE TORONTO TYPE
FOUNDRY COMPANY, LIMITED, who sue on
their own behalf, as well as on behalf of all other
consumers of gas furnished by the Defendants in the
City of Toronto (Plaintiffs) - - - - - Appellants.

10

AND

THE CONSUMERS' GAS COMPANY OF TORONTO
(Defendants) - - - - - Respondents.

Case for the above-named Appellants.

1. This is an Appeal from an Order of the Court of Appeal for Ontario,
made on the 30th of June, 1896, allowing an Appeal from a Judgment for the
Appellants pronounced on the 9th of September, 1895, by the Honourable
Thomas Ferguson, one of the Justices of the High Court of Justice for Ontario
in this Action, which was brought to compel the Respondents to refund the
amount of certain alleged overcharges for gas supplied by them, and to fulfil
20 certain statutory obligations.

2. The facts out of which this Case arises are not in dispute, and are shortly
as follows:—

3. The Respondents hereinafter sometimes called "the Co." are a corporation
constituted by an Act of the Parliament of Canada, 11 Vict., cap. 14, for the
manufacture and supply of gas in the City of Toronto.

4. By various subsequent Acts, additional rights and powers were given to
the Respondents, and finally by the Statute, 50 Vic., chapter 85 (hereinafter called

“ the said Act ”) sec. 1, they were empowered (inter alia) to increase their Capital Stock up to \$2,000,000, divided into shares of \$50 each, and it was by sec. 4 of the said Act provided that all shares issued in pursuance of the said Act should be sold in manner therein prescribed, and that all surplus over the par value of the shares, realised by the sale thereof, should be added to the Rest or Reserve Fund of the Co., until the same should be equal to one-half of the then paid-up Capital of the Co., and it was thereby declared to be the true intent and meaning that the Co. might at all times maintain a Rest or Reserve Fund equal to, but not exceeding one-half of its then paid-up Capital, and which Fund might be invested in certain securities enumerated therein. 10

5. It was by the said Act, section 6, further provided that there should be created and maintained by the Co. another fund, to be called the “ Plant and Buildings Renewal Fund ” to which should be placed each year the sum of 5 per cent. on the value at which the plant and buildings in use by the Co. stood in its books at the end of its then fiscal year and that all usual and ordinary renewals and repairs should be charged against this fund.

6. By section 7 of the said Act it was further provided that any surplus of net profit from any source whatever, including premiums on sales of stock after the Rest or Reserve Fund should have been established and maintained as aforesaid, remaining at the close of any fiscal year of the Co., after payment of certain fees (not exceeding the amount therein mentioned) and payment of a dividend of 10 per cent. per annum on the paid-up Capital Stock of the Co. and the establishment and maintenance of the “ Reserve Fund ” and providing for said “ Plant and Buildings Reserve Fund ” should be carried to a special account called “ The Special Surplus Account ” and that whenever the amount of such surplus was equal to 5 cents per 1,000 cubic feet on the quantity of gas sold during the preceding year, the price of gas should be reduced, for the then current year, at least 5 cents per thousand cubic feet, to all consumers. 20

7. Prior to the passing of the said Act, the Co. had accumulated out of profits a fund of \$394,310,27, part of which was standing to the credit of “ Profit and Loss,” and the remainder to the credit of the “ Contingent Account,” as of October 1st, 1886. 30

8. The Company from time to time, made various sales of shares issued in pursuance of the said Act, amounting in all at par value to \$700,000. Up to October 1st, 1893, they received premiums on said sales amounting to \$455,482,26. Subsequently during the financial year commencing October 1st, 1893, they received further premiums amounting to \$83,642,45, making in all \$538,521,71. There still remains \$300,000 stock unissued.

9. After the passing of the said Act, the Company opened an account in their books called the “ Reserve Fund Account,” to the credit of which there stood, on the 1st October, 1893, a sum of \$742,758,13. 40

10. The Co. had invested in plant in actual use, on the 30th September, 1887, the sum of \$1,145,543,30, and on that day the sum of 5 per cent. thereon, was credited to an account called the "Plant and Buildings Renewal Fund Account."

11. Of the said Reserve Fund of \$742,758,13, there was on the 1st of October, 1893, a sum of \$221,967,37, invested in municipal debentures, which was one of the investments authorised by the said Act. The amount invested in the said debentures was on the 1st of October, 1894, \$129,246,53. The entire residue of the said fund had been previously expended in the acquisition or
10. construction of land, buildings and plant.

12. Between the years 1887 and 1893, a very large increase took place in the Company's plant, which was not necessary for the purpose of its business during that period but was made in view of an anticipated increase in the demand for gas. The additional plant thus acquired, was paid for partly out of the Reserve Fund, and partly out of the premiums on the sale of shares.

13. The Co. did not in the year 1890 or 1891, carry to the credit of the "Plant and Buildings Renewal Fund Account," 5 per cent. on the plant and buildings in use, but merely the sums which after the appropriations were at the balance of profits for these respective years. In the former year the deficiency in
20 the amount so credited was \$23,186,75, and in the latter \$30,692,65.

14. The Appellant J. T. Johnston has been a large consumer of gas since 1887, and has paid large sums of money to the Respondents therefor. The Appellants The Toronto Type Foundry Company, Limited, purchased his business. He is the largest stockholder in that Company. He has always been primarily liable to the Respondents for the gas consumed in the business of The Toronto Type Foundry Company, Limited.

15. The Appellant J. T. Johnston issued his writ of summons in this action on the 22nd of February, 1894, on behalf of himself and all other consumers of gas furnished by the Respondents in the City of Toronto. Pursuant
30 to an Order made in the said action, the Appellants The Toronto Type Foundry Company, Limited, were afterwards added as parties Plaintiffs. The Appellant J. T. Johnston had, previous to the issue of the writ, on behalf of himself and all other such consumers, called on the Respondents by writing to fulfil their statutory duties, and had received a reply that they had done so.

16. The Appellants delivered their Statement of Claim on the 21st of March, 1894, charging that the Respondents, in fraud of the Appellants and contrary to the provisions of the said Act, instead of forming and investing the Reserve Fund, as thereby directed, used the same for other purposes, and invested it in plant and material, and instead of forming and creating a plant and building
40 renewal fund neglected and refused to do so, and used the monies received by

them from premiums and profits for their own uses and other purposes than those directed by the said Act. The Appellants thereby alleged that by reason of the aforesaid misappropriation, the Respondents had lost the interest which otherwise would have been received from the investment of the reserve fund, and which should have been applied in the reduction in the price of gas to the Appellants, and that by reason thereof the Appellants had been compelled to pay large sums of gas rents in excess of what was justly due.

17. The Appellants, by their said Statement of Claim, claimed a reference to take an account of the surplus in the Respondents' hands at the passing of the said Act, and of their receipts, disbursements and profits, since mandatory orders directing the Respondents to comply with the provisions of the said Act, a declaration that the Respondents were trustees for the Appellants of all sums received and misapplied, which should have been allowed to them in reduction of the price of gas, an account of such sums, with rests, an Order restraining any further misapplication of the Company's funds, and other appropriate relief. 10

18. The Respondents delivered their Statement of Defence on the 5th April, 1894, disputing the construction sought to be put by the Appellants on the said Act, and denying that there was any obligation on them to invest in the securities mentioned in it, or that they had ever acquired a Reserve Fund amounting to one-half their paid-up Capital, or that their surplus of net profits had ever amounted to such a sum as would impose on them the duty of reducing the price of gas under the provisions of the said Act, and alleging that they had, from time to time, voluntarily reduced the price of gas more than would have been incumbent upon them if they had acted on the principle contended for by the Appellants. 20

19. The Respondents also delivered a Demurrer on the 5th of April, 1894, alleging as grounds that the Statement of Claim shewed no cause of action, that the Appellants had no *locus standi* to bring the action, and that they did not represent and could not sue on behalf of the public, or that portion of the public interested in the matters in question. 30

20. A Joinder of issue was delivered on the 7th of April, 1894, and by an Order made on the 17th of April, 1894, the Demurrer was directed to stand adjourned till the trial of the action.

21. A Special Case was agreed upon, and filed on the 28th of May, 1896. The following 10 questions were thereby submitted to the Court, viz. :—

- (1) Had the Appellants a right to maintain the action ?
- (2) Were the Respondents bound to include in the Reserve Fund the moneys so standing to the credit of "Profit and Loss" and of the "Contingent Account," and all the moneys received from premiums on the sale of Stock until the Reserve Fund amounted to 50 per cent. of the paid-up Capital ? 40

(3) Was it *ultra vires* to invest any part of the Reserve Fund in plant or buildings, or in the Company's business generally?

(4) Was it *ultra vires* to invest any part of the premiums received on the sale of stock in the erection of buildings until the Reserve Fund was equal to a half of the paid-up Capital?

(5) Did the Respondents establish, maintain, invest and use the Reserve Fund in accordance with the said Act?

(6) If not, in what respect had they failed to do so?

10 (7) Had the "Plant and Buildings Renewal Fund" ever been created or maintained, within the meaning of the Act?

(8) Was it *ultra vires* after providing for all usual and ordinary repairs and renewals, to invest or use the surplus of the "Plant and Buildings Renewal Fund" in the general business of the Respondents, or was the fund to be kept separate from the other monies of the Respondents uninvested?

(9) If the usual and ordinary repairs and renewals did not amount to the 5 per cent. mentioned in the Act, should the full 5 per cent. be carried to the credit of the "Plant and Buildings Renewal Fund," or only sufficient to cover the usual and ordinary repairs?

20 (10) Had the Respondents the right to write off from profits sums for depreciation in plant, in addition to keeping the plant and buildings in repair by means of this fund?

22. The said Special Case was heard before the Honourable Mr. Justice Ferguson on the 30th and 31st of May, 1895. Judgment was delivered on the 9th of September, 1895, answering the said questions as follows, viz. :—

The 1st, 2nd, 3rd, 4th and 8th, in the affirmative.

The 7th and 10th, in the negative.

30 To the 5th, that the Respondents did not, save as stated in the Special Case, invest and use the Reserve Fund in accordance with the Act, but that it was not compulsory upon them to invest same in any of the securities mentioned therein.

To the 6th, that in so far as an answer to it did not already appear, the Court were not properly called on to answer it.

To the 9th, that the Respondents had the right to add the full 5 per cent. to the "Plant and Buildings Renewal Fund."

23. Formal Judgment was signed on the 16th of December, 1895, embodying the said answers declaring the Appellants entitled to an account, and directing a reference accordingly.

40 24. The Respondents appealed from this Judgment to the Court of Appeal for Ontario, and the Appellants, on the 5th of December, 1895, appealed against

that portion of the said Judgment wherein it was held, in answer to the 5th question, that it was not compulsory to invest the Reserve Fund in any of the securities mentioned in the said Act.

25. The said Appeal was heard on the 21st, 22nd and 23rd of January, 1896, before Osler and MacLennan, *J.J.A.*, & Rose, *J.*

26. Judgment was delivered in the said Appeal on the 30th of June, 1896, allowing the Appeal of the Respondents herein, with costs, and directing Judgment to be entered therein, dismissing this action with costs.

27. MacLennan, *J.A.*, in delivering Judgment, said "An examination of the Acts relating to the Company, prior to 1887, does not disclose any obligation to supply gas to any particular person, and with one exception the Co. was as free in the conduct of its business, and the disposition of its property, as any other corporation or individual. That exception was a restriction upon the power of paying dividends, which was limited to 10 per cent. per annum on its paid-up Capital Subject to the restriction the Co. was perfectly free. It could supply gas to one person and refuse to supply it to another. It could sell at one price to one customer and stipulate for a different price from another, and in every case might make the best bargain it could, just as any other vendor of any other commodity could do Until the Act of 1887, therefore, the Co. could charge whatever they pleased for their gas." 10 20

28. The Appellants submit that the above quoted statement is erroneous in point of law, inasmuch as where a corporation obtains valuable privileges for the professed purpose of conferring a benefit on the public, the law imposes on them a duty to give the public the advantage of that benefit, and apart from everything else the Preamble to the Act 11, Vic. c. 14, by which the Respondents were incorporated, shows that the objects the legislation had in view, and the advantages to the public which formed the consideration for the privileges granted to the Respondents were, among others, to secure to the inhabitants of Toronto a supply of gas, greater in quantity, better in quality, and cheaper in price than had been theretofore available. The Respondents, therefore, it is submitted were bound to supply gas at a reasonable rate to every inhabitant of Toronto who required and was prepared to pay for it, so far, at least, as their mains extended. 30

29. MacLennan, *J. A.*, in the course of his Judgment, after referring to the provisions of the Act of 1887, proceeds "The Company can still choose its consumers, and is still under no obligation to sell to any particular person, unless it chooses to do so. The Act has not made it compulsory to sell gas to everyone, nor is anyone compelled to buy from them. It follows that the consumers who are mentioned in the Act are those persons to whom the Company thinks fit to sell, and who are willing to agree to buy from them. In other words, the consumers relation to the Company is still one of contract, and there is nothing to prevent the latter from terminating any particular contract, just as they could before the 40

“ Act. What then is the effect of this provision of the Act for a reduction of price? I think it is no more than this, that in every case in which the Company chooses to continue to supply gas to a person who had been a consumer in the previous year, this provision of the Statute as to a reduction of price must be read into the contract.”

30. The Appellants submit for the reasons given in paragraph 26, that the Respondents are bound to continue to supply gas *de anno in annum* to every consumer of gas in Toronto already supplied by them who continues to require and is prepared to pay for it, and that all such persons are entitled, as of right, to the statutory reduction in the price of gas.

31. The same learned Judge further says :—“The Plaintiffs’ cause of action appears to be that, having regard to the Statute, they have paid more than they ought to have paid for the gas which they have received from the Defendants for a number of years past, and they seek to recover back what they have overpaid. The action to recover back money paid, is a very familiar one. It is the old common law money count of ‘money had and received,’ and I think, notwithstanding its great length, that is the only cause of action alleged in the Statement of Claim. If the Plaintiffs are entitled to recover back any part of the money which they have paid to the Defendants for gas, they have a cause of action, if not, they have none. Unless they have paid money under circumstances which entitle them to recover it back, their action ought to be dismissed, and they have no concern with the way the Defendants have kept their accounts, or the application they have made of their premiums and earnings. If the Plaintiffs have had the benefit of a reduction in the price of gas, that is all they are entitled to, and if they have not yet the moment they receive it, they are entitled to nothing further; they have no longer any interest in the accounts. They have then no more right to question the Company’s conduct of its business, or its manner of keeping its accounts, than any stranger.”

32. The Appellants submit that this last extract from the learned Judge’s Judgment contains an erroneous statement of the law applicable to the case. They submit that they are not only entitled to the statutory reduction in the price of gas whenever the statutory conditions, upon the happening of which such reduction becomes obligatory on the Co. have been fulfilled, but that they are also entitled to have the Co’s. fund invested and applied in the manner prescribed by the Statute, in order that those conditions may be fulfilled, and to have the accounts of the Co. kept in manner prescribed by the Statute, in order that the fulfilment of those conditions may from time to time, be manifested to the auditors authorised pursuant to the 9th section of the Statute, to examine the Company’s books, and that a record may be preserved in case it should become necessary at any time to determine whether the Co. were charging more than the statutory price. The Appellants submit that the provisions of the Act relating to the investment and application of the Co’s. fund, and the mode of keeping its accounts were intended for the benefit and protection of the Appellants and all other

consumers of gas supplied by the Respondents in Toronto, and that a violation by the Respondents of any of those provisions constitute a wrong for which the Appellants are entitled to maintain this action, irrespective of any actual pecuniary damage presently sustained.

33. The learned Judge also proceeds as follows :—“ In fact, no overpayment “ is proved or admitted either in the Statement of Defence or in the Special Case. “ I am of opinion that both upon the Demurrer and the Special “ Case the Plaintiffs fail, and that they have not made out a case for the recovery “ of the alleged overpayment. Not being entitled to recover the overpayment, it “ follows that they are not entitled to the accounts and enquiries and mandatory 10 “ orders claimed in their Pleading, or the other relief directed by the Judgment.” Rose, J., concurs in this view.

34. The Appellants submit for the reasons already given, that whether they are entitled to recover anything as overpayment or not, they are entitled to the accounts, inquiries and mandatory orders claimed in their Pleading, and the other relief directed by the Judgment, and they submit further that they are entitled to an account for the additional reason that the mere fact that the Respondents do not admit that the Appellants are entitled to any balance does not prevent the Court from directing an account, as the jurisdiction to direct an account does not depend on such an admission being made, or on the fact 20 being previously proved, but on whether the circumstances are such that a Court of Equity will direct an account.

35. MacLennan, J.A., stated that he thought it unnecessary to decide the question whether the Plaintiffs could properly sue on behalf of all other consumers, but expressed the opinion that they could not, on the ground that their only cause of action was overpayment, that it was not alleged that any of the other consumers had overpaid, that every consumer had a separate contract, that each consumer had, if anything, a separate cause of action, and apart from his right to a reduction of price, had no right to interfere in the internal affairs of the Company, and that the relief sought in this action, being merely the recovery of a 30 sum of money with which other consumers had nothing to do, the authorities showed that they could not all join in one action, and if so, it followed that no one could sue on behalf of the others as well as himself. His Lordship compared the case to that of *Smurthwaite v. Hannay* (1893) 2 Q.B. 412, (1894) A.C. 494, and referred also to *Sadler v. The Great W. R. Co.* (1895) 2 Q.B. 688, affirmed in D.P.W.N., 1896, p. 57, and then reported 12 T.L.R. 394, and since reported 65 L.J. Q.B. 462, 74 L.T. 561, 44 W.R. 50.

36. The Appellants submit that the view expressed by the learned Judge on the right of the Plaintiffs to sue on behalf of themselves and other consumers is erroneous, for the reason that it is based upon the false assumption that the Appellants' 40 only cause of action is overpayment. They further submit that the authorities referred to by the learned Judge have no application, inasmuch as they were decisions upon Rule 123 of the English Rules of 1883, corresponding to Ontario

Consolidated Rule 300, while this action is framed upon Ontario Consolidated Rule 315, corresponding to Rule 131 of the English Rules. Moreover if the Demurrer was well taken, the Appellants should have had leave to annul by striking out the reference to the other consumers of gas.

37. Osler, *J.A.*, having read the Judgment of MacLennan, *J.A.*, agreed in the conclusion at which he had arrived.

38. The Appellants humbly submit that the said Judgment of the 30th June, 1896, ought to be reversed, and that the Judgment of the High Court of Justice, Ontario, should be restored, save so far as same declares in answer to the
 10 5th question submitted by the Special Case, that it was not compulsory on the Respondents to invest the Rest or Reserve Fund in any of the securities mentioned in the Act, which part of said Judgment of the said High Court the Appellants humbly submit should be reversed, and the Appellants' Appeal therefrom allowed, for the following, among other,

REASONS :

1. Because the Appellants, and all other consumers of gas furnished by the Respondents in the City of Toronto, are within the meaning of Ontario Consolidated Rule 315, "numerous persons having the same interest in one cause or matter," and therefore the Appellants are entitled to sue for themselves and all the others of the said consumers of gas.
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2. Because irrespective of the rule mentioned in the 1st reason the Appellants are, according to the principles and practice acted on in Courts of Equity entitled to sue on behalf of themselves and all other such consumers.
3. Because, even if the Appellants are not entitled to sue on behalf of the others of said consumers of gas, they are entitled to sue on their own behalf, and the action on that assumption should not be dismissed, but should be allowed to proceed, and for that purpose all necessary amendments in the Pleadings and proceedings made.
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4. Because the Respondents, having been incorporated, and having obtained certain exclusive and exceptional privileges, for the purpose of enabling them to supply, and in consideration of their supplying gas to such consumers of gas in Toronto as required, and were prepared to pay a reasonable price for same, were bound to do so, and could not refuse the burden imposed by their Acts of Parliament, once they had accepted the advantages thereby conferred on them.
5. Because the obligations imposed by Statute on the Respondents with regard to the investment and application of their funds, and the keeping of their accounts, were so imposed for the benefit and
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protection of all consumers of gas furnished by the Respondents in the City of Toronto, and therefore the Appellants, either on their own behalf, or on behalf of themselves and all other such consumers, are entitled to maintain an action to compel the Respondents to comply with those obligations, whether or not the non-compliance therewith has resulted in present pecuniary loss to the Appellants, or such other consumers or any of them.

6. Because the effect of the 11 Vic., c. 14, and the 50 Vic., c. 85., is to give all such consumers an interest in the profits made by the Respondents, and, therefore, the Appellants, either on behalf of 10 themselves, or on behalf of themselves and such other consumers, are entitled to maintain this action for an account, notwithstanding that the Respondents have not admitted, and notwithstanding that it has not been proved, that the Appellants and such other consumers or any of them have made any overpayment for the gas supplied to them or any of them.

R. B. HALDANE.

ARTHUR HOUSTON.

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CASE FOR THE APPELLANTS.

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