

Privy Council Appeal No. 127 of 1915.

Sir Rodolphe Forget - - - - - *Appellant,*

v.

The Cement Products Company of Canada
(Limited) - - - - - *Respondents,*

AND

The Canadian Bank of Commerce - - - *Mise en Cause,*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC
(APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 30TH MAY, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
EARL LOREBURN.
LORD SHAW.
SIR ARTHUR CHANNELL.

[*Delivered by* THE LORD CHANCELLOR.]

THE facts upon which this case depends are to be found in the circumstances attending the formation of the respondent company and the issue of part of its preference capital. The letters patent, incorporating the company, the articles and memorandum of association, and the preliminary documents leading up to its incorporation, were not put in evidence at the trial, and neither the appellant nor any person having first-hand information of the material circumstances was called as a witness—an omission which, in their Lordships' opinion, has greatly embarrassed all the Courts by whom this case has been considered.

It appears that the company was incorporated in the early days of January 1912 for the purpose of acquiring from a Mr. Slade certain property in the Island of Orleans, and, from a syndicate composed of Mr. Slade and three other people, certain patents and machinery. The capital of the company was fixed at 5,000 7 per cent. cumulative preference shares of 100 dollars each, and 5,000 common shares of the same nominal value; of these latter shares, 1,500 were allotted to Mr. Slade as a consideration for the transfer of his property and 2,000 to the syndicate for theirs. In order to obtain the necessary working

capital, the company determined to issue 200,000 dollars of its preference shares, and accordingly they prepared and placed before the public a prospectus dated the 15th January, 1912. The terms of this prospectus are unusual and difficult to construe. It states in a prominent form that it relates to the issue of the 200,000 dollars 7 per cent. preference shares, it sets out the amount of the capital stock of the company, and the classes of shares into which it is divided, the rights which the preferred shares will enjoy and the date from which their dividends will commence.

There then follows an important paragraph in these terms :—

“The preferred shares will be sold at par with a bonus of 50 per cent. par value, of common shares, and they will carry the same voting rights as the common shares. Preferred shares with the bonus of common shares will be delivered to subscribers on payment of subscriptions in full. The balance of the preferred shares (300,000 dollars par value) will remain in the treasury of the company for future requirements, together with 150,000 dollars par value of common shares, available for 50 per cent. bonus with the issue of the preferred shares remaining in the treasury, if deemed advisable.”

A table is set out showing when the “subscriptions” for the shares will be payable, and, finally, it is provided that application for shares should be made upon the form accompanying the prospectus and sent to Edward Slade and Co., accompanied by a remittance of the amount of the deposit. The form referred to is in the following words :—

APPLICATION FORM.

Cement Products Company of Canada (Limited).

Issue of 200,000 dollars par value of 7 per cent. cumulative preferred shares, consisting of 2,000 shares of 100 dollars each.

Offered at 100 dollars per share, with a bonus of 50 per cent. in common shares.

We, the undersigned, severally subscribe for and agree to purchase from Edward Slade and Co. and to pay for the same under the terms of the prospectus of the company, dated the 15th January, 1912, the number of 7 per cent. cumulative preferred shares in the capital stock of the Cement Products Company of Canada (Limited) to the par value of the amounts set opposite our respective names.

(N.B.—Make all remittances payable at par of exchange in Quebec to the order of the Canadian Bank of Commerce.)

Name of Subscribers.	Address.	Par Value of Shares subscribed.	Date.	Witness.

The appellant signed one of these forms for shares of the value of 10,000 dollars, and his signature was witnessed by Mr. Slade. His application appears to have been placed before the company as early as the 16th February, 1912, for, at a meeting of the directors of that date, there is an entry to the effect that the stock book was then opened and certain subscriptions made, of which the appellant's is one. It is for the calls made against the appellant upon these shares that the company has brought the action which has given rise to this appeal.

The real defence raised at the hearing was that the whole transaction took place between the appellant and a Mr. Slade (referred to in the prospectus under his trade name of Edward Slade and Co.), who was the duly authorised agent of the company, and that all he did, in connection with obtaining the subscription, was the action of the plaintiffs. Upon this hypothesis the appellant sought to bind the company by a letter signed by Slade and addressed to himself, dated the 4th March, 1912, which is in the following terms :—

“ Dear Sir Rodolphe,

“ As promised, I am writing you in regard to your subscription to the Cement Products Company (Limited).

“ It is understood that you will not be obliged to take up this stock, and that I am at liberty to resell the 100 shares for which you have applied. Personally I am very anxious to have you keep it, as there is no question but that the company is going to be a huge success, and I would like to have you enrolled among the shareholders.

“ No calls will be made on you in connection with your subscription, and when you get back from Europe I will see that your subscription is taken off your hands if you might decide that you do not care to keep it yourself.

“ With my regards and best wishes, I remain,

“ Yours very truly,

“ EDWARD SLADE.”

By virtue of this arrangement the appellant alleges that he took the shares on the terms that he should not be under any obligation to the company for their payment.

Upon the hearing of this appeal, however, this defence was scarcely urged. The appellant here has sought to resist liability on the ground that the prospectus and the application form which he signed together constituted a contract to buy the shares from Mr. Slade as vendor, that there was never any privity of contract between himself and the company, and that consequently, whatever might be the position between himself and Slade, the company has no right to maintain the suit. These defences are inconsistent and alternative, and in their Lordships' opinion neither can prevail. The true position of the parties could undoubtedly have been made more plain, if either the defendant or Slade had been called as witnesses. They, and they only, could have given the necessary evidence to show what were the circumstances out of which the contract

in question arose. But sufficient is shown from the facts and documents that were disclosed to enable a clear and comprehensive view of the action to be formed.

Slade was, as has been stated, entitled to 150,000 dollars of the common stock of the company, but he had no rights whatever over the preference shares. He was, however, entitled to a commission which, in a minute of the company of the 7th June, 1912, is stated to be a commission on stock (which clearly means the preferred shares) "sold." Now the only means by which a company sells its unissued capital to purchasers is by acceptance of applications from them to become shareholders, and, in the absence of evidence showing that Slade had agreed himself to take up the issue of the shares in question and to sell them on his own behalf, this is the only meaning that can be attributed to the phrase. But with this interpretation the meaning of the prospectus becomes plain. The phrase that the preferred shares will be sold at par then means that they will be issued at par to the person who subscribed, and the form of application which states that the signatory subscribed for and agreed to purchase from Edward Slade and Co., must mean that he will subscribe for shares in the company, and that Edward Slade and Co. are the intermediaries through whom the transaction is carried out. The words "subscribe for" and "purchase from" Edward Slade and Co. would, if each word were given its true and ordinary meaning, result in a plain contradiction. Shares cannot at once be subscribed for in a company and bought from a third party, and if the transaction had been one by which Slade was selling shares to which he was entitled, the prospectus inviting intending purchasers to buy would not have been the prospectus of the company, but a prospectus of Slade and Co.

Their Lordships think that the appellant was right in his first contention that the application really was made to the company, and that he could only escape from the obligations, which he then offered to undertake, by establishing that, as part of the agreement, there was an arrangement made by the company's agent by which his obligation should be dissolved.

For this he is bound to rely upon the letter of the 4th March. This in form is no part of the original bargain, its terms are equally consistent with its being a record of some subsequent arrangement, and its date strongly confirms this view. But even if it were contemporaneous, it cannot be regarded as anything but a collateral agreement—an agreement which, if made with the agent of the company, was one which bears evidence upon its face that the agent had not, and never could have, possessed legal authority to make it. That a man should subscribe for shares in a company on the terms of a prospectus, which arranges for payment in full by certain instalments at certain dates, and at the same time agree that no call should be made upon him, and that he should not be

obliged to take up the stock, is a contract that is little short of a fraud upon the creditors and shareholders of the company.

In truth, however, the document of the 4th March is, in their Lordships' view, nothing but a personal arrangement between Slade and the appellant, and as their Lordships understand that it is the subject of proceedings now pending between these parties, it is undesirable to express any further opinion upon its legality and effect.

There is a further point upon the prospectus, upon which much emphasis has been placed by the appellant, which deserves attention. The offer to subscribe for shares was, by virtue of the prospectus, made conditional upon the subscriber receiving a bonus of 50 per cent. par value of the common shares. This, if it related to an issue of common shares by the company, would be clearly *ultra vires* and bad; but, in fact, by an arrangement with Mr. Slade, it was perfectly possible to carry this agreement out. He held 150,000 dollars of the common stock issued as fully paid in return for property sold. These were more than sufficient to satisfy the obligation to provide 100,000 dollars of such stock, the total amount involved in connection with the issue of the 200,000 dollars preferred shares. That it was out of these shares, or out of the 200,000 dollars allotted to the syndicate, that the 50 per cent. bonus was to come, is made clear by the statement that 150,000 dollars of the common shares would remain in the treasury of the company for future requirements, this being the balance after the issue of the 150,000 to Slade and 200,000 to the syndicate. It is true that the prospectus states that these remaining shares would be available for a further 50 per cent. bonus if it was determined to issue the balance of the preference shares. But this is no more than a statement of intention on the part of the company to do something which, in the then position of the company, they would be unable to carry out, and there is no contract that such shares would be issued or that such bonus would be paid.

The result, therefore, in their Lordships' opinion, is that the documents constitute a valid application on the part of the appellant to take 10,000 dollars of preferred shares in the company. This offer was accepted on the 16th February, and the fact of its acceptance was sufficiently called to the attention of the appellant by the letter of the 24th December, 1912, when he was asked for payment of the total subscription that was then due. To this letter he appears to have sent no answer to the company. On the 2nd January, 1913, an endorsement on the application form is made in the words "Transferred to Cement Produce Company of Canada." This endorsement cannot on any hypothesis affect the rights of the parties: if the application were an application to the company for shares, it would have no meaning except as a record of when it had been delivered to the company, and in this respect the date is wrong, as the company had clearly received notice of it before the

16th February, 1912. If, on the other hand, it were an offer to buy shares from Slade, to transfer it to the company, could not enable them to sue.

On the 11th January, 1913, a further request for payment was made. To this the appellant replied on the 13th of the same month, requesting the company to apply to Mr. Slade, and stating that he had written to him on the 26th December ; and on the same date he again wrote to Mr. Slade calling his attention to the effect of the letter of the 4th March, which, the appellant urged, had exonerated him from obligation to pay.

Nothing further of importance transpired until these proceedings were brought, but their Lordships think that the correspondence confirms the view that they have expressed as to the nature of the transaction, and shows that the real defence upon which the appellant sought to rely was, in fact, a personal arrangement between himself and Mr. Slade, and that there was no infirmity or ambiguity in the contract between the appellant and the company.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.



In the Privy Council.

SIR RODOLPHE FORGET

v.

THE CEMENT PRODUCTS COMPANY
OF CANADA (LIMITED)

AND

THE CANADIAN BANK OF
COMMERCE.

DELIVERED BY THE LORD
CHANCELLOR.