PRIVY COUNCIL

W.C. Macdonald, Registered

Vs.

Fred Latimer

Privy Council Appeal No. 102 of 1927
(Viscount Sumner, Lords Shaw and Atkin JJ.)

12.06.1928

JUDGMENT

LORD ATKIN J.

1. This litigation arises from a series of transactions which their Lordships think are rightly stigmatized as frauds perpetrated by one Deaconupon farmers who were growers of tobacco in Essex County in Ontario in the year 1919. Deaconwas at the time, the factory manager of a limited company, the Foster Tobacco Co. Ltd., which carried on business as tobacco manufacturers in Leamington. The Foster Company was in 1919 doing little if any business. In June 1919, Deaconwas appointed by the Dominion Company of Montreal their tobacco buyer for the County of Essex or elsewhere in Ontario for one year on a commission of half cent, per pound. Deaconwas not to act as tobacco buyer for any other person except the Foster Co. Ltd., without the Dominion Company's written consent. It was alleged by the Foster Company that Deacon, being sent to Montreal to obtain this contract for the company, wrongfully obtained it for himself. Apparently this dispute was disposed of by Deaconagreeing to share with the company or with Mr. Brown, the President of the company, the commission earned under the contract.

2. The Dominion Tobacco Company was a firm the partners in which were the Messrs, Goldstein, Deacon's authority to buy for the Dominion Company was advertised, but he received from the company instructions not to buy more than 300,000 to 350,000 lbs. Burley tobacco and 75,000 lbs. Virginia tobacco. This limitation was not made public. The buying season began in October. Deaconin fact, bought about 150,000 lbs. of Virginia tobacco and about 1,100,000 lbs. of Burley tobacco. of the Burley tobacco he bought about 800,000 lbs. in the name of the

Dominion Company, and about 300,000 lbs. in the name of the Foster Co. Ltd., telling the sellers in the latter case that though he was using Foster Company's forms he was in fact buying for the Dominion Company. All the Virgina tobacco he appears to have bought in the name of the Dominion Company. The Dominion Company were handed contracts for the 75,000 lbs. of Virginia tobacco and 300,000 lbs. of Burley. They took delivery and those quantities disappear from the dispute. The question arises as to the balances. Eventually Deacon, about January 1920, told the farmers that as to the balance of Burley he had been buying, not for the Dominion Company, but on the instructions of one George Jasperson, who had, authorised him to buy the tobacco for account of the Macdonald Tobacco Co., Ltd. The Macdonald Company is a wealthy corporation who are manufacturers of tobacco. They had been buyers of tobacco on a small scale in Essex County in 1918, and in 1919 had bought largely up to 4,000,000 lbs. through Jasperson, a large buyer in the district. Jasperson had employed a staff of about 16 buyer to buy for the Macdonald Company, the purchases being made in the name of the Macdonald Company and on the Macdonald Company's forms. Both the Macdonald Company and Jasperson repudiate any responsibility for the purchases Jasperson denies that he ever authorises Deaconto make any purchases for him though he acknowledges that he took over the balance of Virginia tobacco which he says Deaconoffered him. The Macdonal Company say they gave no authority to Jasperson, express or implied, to buy an tobacco for them except that which was bought on their forms, of which the have taken delivery. The Dominion Company in December 1923, made an authorised assignment under the Bankrupted Act to trustees. The present appeal to the Board is aconsolidated appeal in two actions.

3. The action *Latimer v. Foster Co. Lt., George Jasperson and W. C. Macdona* Registered was an action brought by to farmers from whom Deaconbought on Foster Company's forms. The plaintiffs claim damages for non-acceptance of the tobacco against the Macdonald Company, alternatively against Jasperson, and alternatively against the Foster Company. In the further alternative they claim damages for fram against Jasperson and the Macdonald Company. The action, *Plumb v. Macdonald Co., and George Jasperson*, is an antion in which those of the plaintiffs was are farmers are those from whom Deaconbought on the Dominion Company's forms. These plaintiffs claim damages for not-acceptance against the Macdonald Company and alternatively against Jasperson. The plaintiffs, the authorised trustees of the property of the Dominion Company and their assignors, Messrs. Goldstein, claim an indemnity from the Macdonald Company and alternatively from Jasperson against all liability incurred by them under the contracts taken in the name of the Dominion Company.

4. The actions were tried before Meredith, C. J., of C. P., in December 1924. He disbelieved Deacon's story that he had been authorised by Jasperson to enter into contracts in question, and dismissed both actions with costs. On appeal the Appellate Division found that Deacon's story was true. The result, in their opinion, was that in the action on the Dominion contracts, *Plumb v. Macdonald Co.,* the plaintiffs failed against the Macdonald Company on the ground that Jasperson must be taken to have acted without authority in instructing Deaconto buy in the name of the Dominion Company; they, therefore, dismissed the appeal against the Macdonald Company, but allowed it against Jasperson, giving judgment against him for the farmer plaintiff's for damages for non-acceptance. On the other hand, in the action on the *Foster contracts, Latimer v. Macdonald Co.*, they found no lack of authority in Jasperson to authorise Deaconto buy in the name of the, Foster Company. They therefore gave judgment for the plaintiffs against the Macdonald Company for damages for non-acceptance and dismissed the appeal against Jasperson.

5. In the action on the Dominion contracts the Appellate Division felt themselves able to give further relief, finding themselves on the decision of the Courts of Ontario, and this Board in the case of *Peterson v. Dominion Co., Jasperson and Macdonald Co.* That was an action brought by one of the farmers who had sold on a Dominion contract. The action was framed against all the defendants in the alternative on the contract for damages for non-acceptance, and the Dominion Company on a so-called third party claim though against a co-defendant claimed damages from Jasperson by way of indemnity against all liabilities on the contract. The trial Judge had accepted Deacon's story; he gave judgment for the plaintiff against the Dominion Company and for Jasperson and the Macdonald Company on the contract; but he gave judgment for the Dominion Company against Jasperson on the third party notice on the ground that Jasperson had tortiously procured Deaconto commit a breach of his contract with the Dominion Company. This judgment was upheld by the Appellate Division, and Jasperson alone appealed from the judgment against him to this Board, who advised the dismissal of the appeal. In the present case the Appellate Division, relying upon the former decision as creating an estoppel by record as between the Dominion Company and Jasperson made a declaration that the trustees of the Dominion Company were entitled to an indemnity from Jasperson against all liability on the contracts mentioned in the pleadings taken in the name of the Dominion. Company, being all the contracts other than those of which the Dominion Company themselves took delivery.

6. If their Lordships took the view of the, facts adopted by the Appellate Division they would yet find themselves unable to give this relief to the trustees of the Dominion Company. The liability of Jasperson under this head of claim is in tort and depends upon the Dominion Company establishing that they had suffered damage in fact. No liability in the present action was sought to, be established by the plaintiffs against the Dominion Company, who, by their trustees, were co-plaintiffs of the sellers and were not defendants. The judgment of the Appellate Division gives judgment for the farmers on the contracts against Jasperson as being the actual principal, and their Lordships cannot accept the view that when the actual principal, is made directly liable on the contract he can also be held liable to indemnify an ostensible principal as though the latter were in fact the party by whom the contract had to be fulfilled. Counsel for the Dominion Company perceiving the difficulty supported the decision as a proper result if Jasperson escaped liability to the farmer plaintiffs on the facts, relying on the doctrine of *res judicata* as between them selves and Jasperson. In their Lordships' opinion, however, the failure in the present action to establish any liability of the Dominion Company to the plaintiffs is sufficient to dispose of the claim in tort.

7. Similarly in any view of the facts their Lordships are unable to find any evidence upon which, the Macdonald Company could be made liable upon the contracts in question. It was rightly held by the Appellate Division that the Macdonald Company were not liable upon the contracts made in the name of the Dominion Company on the ground that Jasperson had no authority to bind them by making contracts in the name of a company in breach of that company's contract with its agent Deacon. It seems to have been overlooked that for Deaconto make contracts in the name of the Foster Company, though not in fact for that company, was equally a breach of his contract with the Dominion Company, and that Jasperson equally had no authority to employ him for the purpose. In fact the whole circumstances of Jasperson's actions, as stated by Deacon, appear to be fraudulent and quite outside the scope of any authority given by the Macdonald Company. Express authority is negatived by two concurrent findings with which their Lordships agree. Their Lordships would therefore, in any case, have to advise that the appeal of the Macdonald Company be allowed with costs.

8. Their Lordships, however, are of opinion that there is not sufficient reason for interfering with the findings of the trial Judge on the question of fact. There was a direct conflict of evidence between Deaconand Jasperson on the issue as to Deacon's authority to buy for Jasperson and Jasperson's denial was supported by affirmative evidence of statements made by Deaconat material times which, if believed, appear to

be inconsistent with the truth of Deacon's evidence. Such evidence was given by the witnesses Copeland and Goodeve. On the other hand, evidence was given of circumstances such as visits to Jasperson's house, and a statement by Jasperson as to Deacon's possible profits out of the transaction which tend to support Deacon's story. The trial Judge has accepted Jasperson and his witnesses as truthful witnesses. Moreover, the trial Judge has very reasonably taken into account the fact that Deacon, upon whose evidence the plaintiffs must base their case, was, on his own admission, a party to a series of transactions in which he was deceiving the farmers and betraying the confidence of his employers, the Dominion Company. By every code of evidence the testimony of a professed accomplice requires to be carefully scrutinised with anxiou search for possible corroboration. There is no documentary evidence that clearly affirms the one view or contradicts the other, indeed, the documents so far as they were examined at the trial throw little light on the matter. It might appear improbable that Deaconshould enter into these transactions unless he could rely on some financial supporter; on the other hand, it would appear improbable that Jasperson would, as Deaconaverred, have sent him into the market to buy in competition with his own organized body of buyers. There is no sufficient balance of improbability to displace the trial Judge's finding as to the truth of the oral evidence. The case resolves itself into a simple example of a charge of commercial misconduct based almost entirely on the evidence of a professed accomplice which the trial Judge, after hearing the accused and his witnesses, has found to be disproved. It must require very cogent proof of mistake by the trial Judge to displace his findings in such a case as that. No one doubts that, where an appeal on facts lies it is within the jurisdiction of an appellate Court to reverse a finding of fact; but it is well-established that such a course is only to be adopted upon very clear proof of error where the case depends upon the credibility of witnesses whom the trial Judge has seen and believed.

9. It is unfortunate no doubt that in the former trial another tribunal came to a different conclusion on the question of fact. That conclusion was accepted on appeal, and their Lordships note that Hodgins, J. A., in that case thought that the appellate Court could not but accept that view :

> "as the testimony of these parties is entirely opposed the one to the other, and no appraisement of its value can properly be made except under the conditions and with the advantages possessed by a trial Judge."

10. Their Lordships agree with this and are of opinion that the same principle applied to the findings in this case should have led to the dismissal of the appeal. An appellate

tribunal in such circumstances has not to decide which of two convicting decisions is right, but has to apply well-established principles to the particular case immediately under appeal. In the present case the witnesses were examined and cross-examined afresh, and further and different evidence was given on both sides by different witnesses. Their Lordships do not find it necessary to review in detail the various circumstances which tend to support or displace the case for the plaintiffs. After careful consideration of all the facts they are unable to find any sufficient ground for interfering with the findings of the trial Judge. They will therefore humbly advise. His Majesty that the appeal of both appellants be allowed with costs against the respective plaintiffs here and below, and the judgments of Meredith, C. J., be restored.

Appeal allowed.