[HIGH COURT OF AUSTRALIA.]

ARDLETHAN OPTIONS LIMITED . . APPELLANTS; DEFENDANTS,

AND

EASDOWN . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 17, 18, 19, 20.

Isaacs, Gavan Duffy and Powers JJ.

*Company—Agent—Secret profits—Profits received on behalf of another—Recovery by company—Shares—Non-delivery of scrip by company—Measure of damages.*

E. had on behalf of himself and C. acquired from B., the owner of a mining lease, an option to purchase it for £2,500 on the terms that, on the sale of the lease to a company which E. intended to promote, B. would pay to E. two-thirds of the difference between that sum and £1,400—one-third for E. and one-third for C. E. and others subsequently promoted a company which purchased the lease and paid to B. the £2,500 of which B. paid to E. the two-thirds of £1,100 as agreed. E. had not paid to C. his share of that sum. E. brought an action against the company, in which the company by counter-claim sought to recover from E. certain moneys on the ground that E. as agent of the company had received them as secret commission on certain sales to the company of certain mining leases, including the sale by B. of the lease in question, and, alternatively, on the ground that E. as one of the promoters of the company had received the moneys as secret profits on the sales by them to the company of the leases. A decree was made, by consent, containing a declaration that E. was a trustee for the company of (*inter alia*) all money received from B. by way of commission or in respect of any profit received or made by E. on the sale by B. of the option or on the exercise of it.

*Held*, that the declaration was limited to the claim against E. as agent of the company and that the company was not entitled under it to recover the one-third of £1,100 received by E. on behalf of C.

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In an action by a shareholder against a company for wrongfully refusing to deliver scrip for shares allotted to him he is not entitled to damages in respect of non-delivery before his name has been entered in the register of members of the company.

In such an action where the shareholder had sold shares and in consequence of the non-delivery of the scrip for his shares purchased other shares at not more than the market price to satisfy his contracts of sale,

*Held*, by *Isaacs* and *Powers* JJ. (*Gavan Duffy* J. dissenting), that such sales should not be taken into account in assessing the damages for non-delivery.

By the articles of association of a company it was provided that every member should be entitled without payment to one certificate for shares held by him.

*Held*, that the company was only bound to give such certificate on demand by a member therefor.

Observations on the duty of an injured party to mitigate his loss.

Decision of the Supreme Court of New South Wales (*Simpson* C.J. in Eq.) affirmed with a variation.

APPEAL from the Supreme Court of New South Wales.

A suit in the Supreme Court was brought by William Charles Easdown against Ardlethan Options Ltd., a company incorporated in New South Wales on 9th May 1913, by which the plaintiff sought a declaration that the defendant Company held sixty shares in the Company as trustee for the plaintiff, an order that the defendant should forthwith deliver to the plaintiff share certificates or scrip for such shares, a reference to the Master in Equity to ascertain the loss and damage sustained by the plaintiff by reason of the Company having refused and neglected to deliver the share certificates or scrip of such shares to the plaintiff, and an order that the Company should pay to the plaintiff the amount of such loss and damage when so ascertained.

The Company set up a counterclaim in which they alleged that the plaintiff obtained on behalf of the defendant Company options to purchase certain mining leases from the several owners thereof or from the owners of the options; that the Company on the advice of the plaintiff purchased the mining leases or the options from the several owners thereof; and that

the plaintiff received from those owners secret commissions on such sales. The Company alleged alternatively that the plaintiff was a promoter of the Company, and with others sold to the Company for a certain sum certain options of purchase of mining leases some of which the Company exercised; and that the plaintiff received, in addition to his share of the price paid by the Company for the options, a portion of the sum paid by the Company for the purchase of the mining leases without disclosing to the Company that he was making a profit from the sale of such mining leases. The Company claimed a declaration that the plaintiff was a trustee for them of the sums received by him as secret commission or, alternatively, of the sums received by him as secret profit, an account of the moneys so received, and payment of the amount found due.

A decree was made, by consent, by which it was declared that the Company held the sixty shares as trustee for the plaintiff, ordered that the Company should forthwith deliver to the plaintiff share certificates or scrip for such shares, and ordered a reference to the Master in Equity to ascertain the amount of the loss or damage sustained by the plaintiff by reason of the refusal and neglect of the Company to deliver the share certificates or scrip. The decree then proceeded: "And this Court doth further declare that the plaintiff is a trustee for the defendant Company of and in respect of all moneys and other property received by the plaintiff on or after the first day of February 1913 from the persons mentioned in par. 2 of the counterclaim" (the persons from whom the plaintiff acquired the options of purchase which were afterwards exercised by the Company) "or from any of them by way of commission or in respect of any profit received or made by the plaintiff on the sale by such persons or any of them of the options in the counterclaim mentioned . . . . or on the exercise of the said options or any of them." It was then ordered that it be referred to the Master to take an account of all moneys and other property received by the plaintiff as aforesaid and that the plaintiff should pay to the Company such moneys and the value of such property.

On the reference the Master disallowed a surcharge by the Company of a sum of £366 13s. 4d. alleged by them to have

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been paid by one R. W. Bonnar to the plaintiff. He also found that the amount of loss and damage sustained by the plaintiff in respect of the non-delivery of share certificates or scrip was £600.

On an application by the defendant Company to vary or rescind the Master's certificate, *Simpson* C.J. in Eq. refused to vary or rescind it.

From that decision the defendant Company now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

*Loxton* K.C. and *R. K. Manning*, for the appellants. As to the sum of £366 13s. 4d. which the respondent alleges was received by him on behalf of Dr. Crowe, the actual physical receipt was by the respondent, and he cannot protect himself by setting up a receipt on behalf of Dr. Crowe either as his agent or his partner. A principal cannot retain a profit made by the fraud of his agent: *Refuge Assurance Co. Ltd.* v. *Kettlewell* (1). The debt to the Company arose from the corrupt act of the respondent (*Lister & Co.* v. *Stubbs* (2)), and the act is equally corrupt whether the respondent received the money on his own behalf or on that of another. The money cannot with propriety be said to have been paid for the purpose of being handed to Dr. Crowe: *Snowdon* v. *Davis* (3); *Smith* v. *Sleap* (4); *Sharland* v. *Mildon* (5); *Ex parte Edwards*; *In re Chapman* (6). The measure of the debt is the benefit received. The benefit was the £733 6s. 8d., because Dr. Crowe cannot recover the money from the respondent by any legal process.

[ISAACS J. referred to *Powell & Thomas* v. *Evan Jones & Co.* (7).]

There was a joint and several liability on the part of the respondent to repay the money to the Company: *Erlanger* v. *New Sombrero Phosphate Co.* (8). The respondent is liable as a

(1) (1908) 1 K.B., 545; (1909) A.C., 243.
(2) 45 Ch. D., 1, at p. 12.
(3) 1 Taunt., 359.
(4) 12 M. & W., 585, at p. 588.
(5) 5 Ha., 469.
(6) 13 Q.B.D., 747, at p. 752.
(7) (1905) 1 K.B. 11, at p. 21.
(8) 5 Ch. D., 73, at pp. 104, 117; 3 App. Cas., 1218, at p. 1243.

promoter to repay the money. Dr. Crowe was, on the evidence, also a promoter. [They also referred to *Mayor &c. of Salford* v. *Lever* (1); *Grant* v. *Gold Exploration and Development Syndicate Ltd.* (2.]

[ISAACS J. referred to *Hay's Case* (3).]

As to the claim for damages in respect of non-delivery of scrip, the respondent is not entitled to recover more than £8 each in respect of the twenty-five shares which he bought to carry out his contract. As to the three shares he borrowed from Crosby there was no damage. As to the balance of the shares no damages should be awarded on the basis of the price of the shares before the formal allotment of the shares, which was on 24th June 1913, or after the decree. [They also referred to *Hooper* v. *Herts* (4).]

*Leverrier* K.C. (with him *R. H. Long Innes*), for the respondent, was not called upon as to the £366 13s. 4d. The true date of the allotment of the shares was when the directors assented to the issue of the shares to the respondent, which was prior to the formal allotment. The respondent is entitled to damages on the basis of the highest price the shares realized after that time. [He referred to *Archer* v. *Williams* (5); *Michael* v. *Hart & Co.* (6).] The damages were properly assessed as at the date of the assessment: *Consolidated Equity Rules of* 1902, rule VI.; *Daniel's Chancery Practice*, 7th ed., vol. I., p. 632; *Hole* v. *Chard Union* (7).

[ISAACS J. referred to *Burdett* v. *Standard Exploration Co.* (8); *Wilkinson* v. *Anglo-Californian Gold Mining Co.* (9).]

The fact that the respondent had other transactions in shares does not affect his right to recover in respect of the non-delivery of the particular shares in question.

*Loxton* K.C., in reply, referred to *Wertheim* v. *Chicoutimi Pulp Co.* (10).

*Cur. adv. vult.*

(1) (1891) 1 Q.B., 168.
(2) (1900) 1 Q.B., 233.
(3) L.R. 10 Ch., 593.
(4) (1906) 1 Ch., 549.
(5) 2 Car. & K., 26.
(6) (1901) 2 K.B., 867; (1902) 1 K.B., 482.
(7) (1894) 1 Ch., 293.
(8) 16 T.L.R., 112.
(9) 18 Q.B., 728, at p. 736.
(10) (1911) A.C., 301.

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ISAACS J. read the following judgment:—Two questions arise on this appeal.

The first is whether, in addition to one sum of £366 13s. 4d. awarded to the appellant Company against the respondent Easdown, it is entitled to another sum of like amount.

Before referring to the portion of the decree under which this question arises, the relevant facts may be stated.

Before the incorporation of the Company a man named Bonnar had acquired an option of purchase of eighteen acres of mining land for £1,400. Easdown, a mining engineer, and one of the promoters of the future corporation, desired that this land should be acquired by the Company when it came into existence. He negotiated with Bonnar, and having to some extent ascertained the terms, he arranged with Dr. Crowe to purchase the option rights. A document was signed on 14th February 1913, whereby Bonnar agreed to sell to Easdown the option rights for £2,500, the deposit being £250. But before this was finally agreed to, Bonnar knew that Crowe as well as Easdown was to be concerned in the purchase from him, and it must be accepted as a fact that Easdown entered into the agreement on behalf of himself and Crowe in equal shares. The beneficial interest of these two consisted in this: that Bonnar had promised to give Easdown two-thirds of the £1,100—the difference between £1,400, which he was himself to pay for the land, and the £2,500 that the proposed Company was to pay. One-third, namely, £366 13s 4d., he was to keep for himself; the other two-thirds, £733 6s. 8d., he was to hand over to Easdown. But it is the fact—and the deciding fact on this branch of the case—that the £733 6s. 8d. was to be handed over by Bonnar to Easdown, not wholly for himself, but half for himself and the remaining half for Crowe. Crowe had contributed one-third of the deposit, and was to get one-third of the profit. Easdown, in the eventual settlement of accounts, got into his hands the whole £733 6s. 8d., and up to the present has not paid anything over to Crowe.

The Company being sued in respect of some shares, which form the subject of the second branch of the case, counterclaimed against Easdown—Crowe not being a party—to have him declared a trustee of the £733 6s. 8d. for them. The counterclaim set out

two alternative cases. One was that Bonnar alone was the vendor to the Company, and that Easdown—who after the Company was incorporated became its mining engineer and confidential adviser—abused that confidence by secretly accepting commission or profit from the vendor, and at the same time persuading the Company to purchase. The alternative case was that Easdown and others, having formed a syndicate, were themselves the real vendors to the Company, and surreptitiously made a profit.

After the trial had proceeded some time a decree was made, by consent, both on the claim and the counterclaim. The claim will be dealt with hereafter. On the counterclaim, the first alternative was taken as the basis of the consent decree, and that basis cannot now be reconsidered. The declaration pertinent to this point is in these terms:—"And this Court doth further declare that the plaintiff is a trustee of the defendant Company of and in respect of all moneys and other property received by the plaintiff on or after the first day of February 1913 from the persons mentioned in par. 2 of the counterclaim, or from any of them by way of commission or in respect of any profit received or made by the plaintiff on the sale by such persons or any of them of the options in the counterclaim hereunder mentioned." The persons referred to as mentioned in par. 2 of the counterclaim are Bonnar and others in a similar position who sold various mining options to the Company.

The question therefore resolves itself into this: Was the second sum of £366 13s. 4d. received by Easdown within the meaning of that declaration?

It is clear from the evidence that he received that sum, not for himself, but to hand over to Crowe; and in no sense can he be said to have received it to his own use. It is not that as between him and Bonnar the arrangement was that Easdown, and he only, was to be entitled to the whole £733 6s. 8d., leaving Crowe's title to rest on a separate and independent agreement between Crowe and Easdown only. But Crowe's right to one £366 13s. 4d. from Bonnar is founded on precisely the same agreement or arrangement as creates Easdown's right to receive for himself a like sum.

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Now, the claim upon which the Company succeeded in getting a declaration is based on the fraud of Easdown, not as promoter, but as servant. He broke his fiduciary obligation of honesty towards his employer by accepting what in law is a bribe from the vendor for persuading the employer to enter into the bargain.

Money or money's-worth received in that way, is received not in trust for, but to the use of, the employer. The fraudulent servant or agent, in such a case, is not a trustee of the property, but a debtor in respect of the money or the money's-worth he has received. The full extent of the benefit he surreptitiously receives, he owes to his employer as an equitable debt, because the mere receipt of the benefit in such circumstances is a fraud on his employer, and he cannot be allowed to retain it if the employer claims it. This is the result of many cases such as *McKay's Case* (1), *Lister & Co.* v. *Stubbs* (2), *Mayor &c. of Salford* v. *Lever* (3), *Gold Exploration Case* (4) and *Hovenden* v. *Millhoff* (5), all cases in the Court of Appeal. But this species of fraud, faithlessness to an employer, is necessarily confined to the employee himself, and its consequences are limited to the benefit he receives. He may be guilty, as Lord *Esher* points out in *Mayor &c. of Salford* v. *Lever* (6), of another fraud, namely, conspiracy with the person bestowing the benefit to defraud the employer. For this fraud other consequences are provided, quite independently of the remedy against the servant for his personal faithlessness.

But there is another kind of fiduciary relation, that of promoter, which the appellant here endeavoured to call in aid. It is exemplified by such cases as the *New Sombrero Case* (7) and *Gluckstein* v. *Barnes* (8). There, by a breach of the fiduciary obligation which promoters owe to the company they call into existence, they may, in conjunction, induce the company to part with its own money upon some contract to purchase. If they do, each and every one of the wrongdoers may be made to restore to the company what was originally its property, of

(1) 2 Ch. D., 1, at p. 5.
(2) 45 Ch. D., 1.
(3) (1891) 1 Q.B., 168.
(4) (1900) 1 Q.B., 233.
(5) 83 L.T., 41.
(6) (1891) 1 Q.B., 168, at p. 176.
(7) 5 Ch. D., 73; 3 A.C., 1218.
(8) (1900) A.C., 240.

which it has by the combined fraud of the culpable promoters been deprived.

But that is wholly different in principle from the case here. The second lot of £366 13s. 4d. was not, on the case presented, the Company's property, the Company was not deprived of it. The money belonged to Bonnar, and he could have kept it, and if he had kept it, the Company could not, upon the case made, have set up any claim to it. Consequently, Bonnar could validly give it to Crowe, who owed no allegiance to the Company as a servant, or, so far as is established, as promoter either.

The appellants' argument therefore fails. It is not to be understood, however, that any suggestion is made either that an action would or would not lie against Bonnar or Crowe. Neither of them is made a party here, or charged with liability—the only case determined is that Easdown failed in his duty as servant of the Company.

The second question raised by this appeal is as to the amount of loss and damage sustained by the plaintiff by reason of the Company's refusal to issue share certificates or scrip for sixty shares, and also for refusing to register transfers of twenty-five of those sixty shares.

As to the latter, the plaintiff was compelled to purchase outside shares at £8 each to satisfy his contracts. But he purchased at not above a fair price, indeed it is admitted he purchased at £2 a share less than the then market price, and if he parted with £8 for every share he purchased he sustained no actual loss, because he retained for every sum of £8 so expended another share which was worth at least £8, and actually £10, and which he otherwise must have parted with. Then as to three shares borrowed from Crosby, he is not shown to have lost anything by that: they were also represented by three which he retained the value of, which was the same. It comes back to the loss on the sixty shares.

Then as to the refusal of certificates for these sixty shares. It is important to inquire how the duty to deliver certificates arises. The *Companies Act* of New South Wales, Act No. 40 of 1899, provides, by sec. 18, that a person who has agreed to become a member of the Company, and whose name is entered on

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the register of members, is a member. Now, as soon as a person is a member, he is entitled to all the benefits of the share he holds in the undertaking and becomes a party to the social contract constituted by the articles of association. By sec. 238 a certificate under the seal of the Company specifying any shares held by a member is *primâ facie* evidence of his title to the shares specified. But the right of the member in the present Company to get a certificate is given by article 11 which provides that "every member shall be entitled without payment to one certificate under the common seal of the Company specifying the shares held by him and the amount paid up thereon." It is clear that until registration the plaintiff could not require a certificate —for until then he was not a member.

One question, however, that acquired prominence in the argument is whether the Company was in default for failing within a reasonable time after registration to deliver to him a certificate without any demand on his part. It would be a most unreasonable construction of the article to hold that to be its meaning. A member may not need a certificate. He may be content to be on the register and remain a shareholder. But as *Cockburn* C.J. says in *In re Bahia and San Francisco Railway Co.* (1):—"This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value." Consequently, most people desire to have these certificates, but, if so, they must ask for them. It would be impracticable—almost impossible—otherwise to comply with the article. The Company would have to follow every shareholder, and at its peril see that he got the certificate personally. When he transferred a share, a new certificate must be similarly forwarded, because he is only entitled to one certificate; if a call is paid, a fresh certificate would have to be similarly given, and if without compliance a period should pass, asserted to be unreasonably long, the Company would be exposed to unknown liability.

Not only is the suggested construction unreasonable, but it is

(1) L.R. 3 Q.B., 584, at p. 594.

not warranted by the words of the article. Article 11 does not say "upon allotment" or "upon registration"; on the contrary, it operates from time to time, and possibly years after registration, and after the holding has varied by transfer or the amount paid up has varied.

Demand is therefore necessary, and by a person who is a member, but, as the article provides, no payment is necessary. This condition as to demand is only satisfied by the telegram of 3rd July, because registration took place on 24th June, and the refusal was the reply of 4th July.

Now, what is the true measure of damages? Taking the case of *Williams* v. *The Peel River Land Co.* (1) as laying down the correct principle, the question is what would a prudent man in the position of the plaintiff have done with regard to selling the shares?

Until the refusal of 4th July, it cannot be said that any abstention by the plaintiff from selling his shares was caused by the Company's refusal to issue certificates. Therefore, if we take 4th July as the first date upon which damage could be said to have possibly occurred, it is not ungenerous to the plaintiff.

Then, in what quantities and over what period would the sales have been distributed? It cannot be assumed, in the absence of evidence, that he would and could have sold the whole of his shares at the very moment when the price was highest. What evidence there is as to probability is against it. When the price was much higher, he did not do so. His later sales in July were in parcels of two, three, ten, and ten, respectively, but on what dates he does not say, except that transfers for twenty-three were lodged by 10th July, and by the 14th two more were sold, and that the time for delivery for all was up by the 14th, when refusal was definitely adhered to.

The prices remained fairly steady up to the end of 16th July, and may be roughly taken to be £10 for that period. On the 18th the price went down to £8 and under, and has since declined. Take it in plaintiff's favour that his sales of the sixty shares would have been completed by the 16th at £10 a share. Then

(1) 55 L.T., 689.

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allow, as the Master did, and as both sides admit is just, a deduction of 10s. per share for vendors' shares, the balance is £9 10s. per share, saleable value. But from that must also be deducted, in order to ascertain the damage actually sustained, the value of the shares at the time when the plaintiff could have got the certificates.

The decree gave him the right *instanter*, and the decree is dated 23rd February 1914. At that date, at all events, a prudent man really desiring to sell would have entertained no doubt that he could obtain the certificates on application, and would not have been deterred from selling by the fear of not being able to produce the certificates when required. In point of fact the plaintiff did not hesitate to sell the twenty-five shares without then having the certificates, and the purchasers were not deterred from purchasing. Why suppose the position less secure after the Court's decree in his favour? So that whether the Company was technically bound or not to seek him out and place the certificates in his hand—a conclusion by no means to be taken as correct—still he was bound, as every person claiming damages is bound, to do all things reasonable to mitigate his loss.

After the decree was pronounced, and still more after it was drawn up, the plaintiff could have had no shadow of doubt as to the willingness of the Company to give him a certificate whenever requested.

From a practical standpoint it would have been the most reasonable course to adopt for him to go to the Company's office, if he had any desire or intention to sell, and to ask for the certificates. Of course he would have got them. To stand by and allow his shares to dwindle to nothing without making any effort to save loss was most unbusinesslike and unreasonable. These considerations have a double effect. First, they are most material in affecting the mind of the jury, so to speak, as to whether from the time of the decree the plaintiff really wanted to sell or would have sold even if he had the certificates. If he would not, then his damage stops at the date of the decree.

Next, assuming, without deciding, that the view is correct

that the damage resulting from the refusal must be calculated down to the moment of assessment, the answer is that, looking at all the circumstances, the plaintiff was acting unreasonably in not selling as soon as the decree was made, and asking for the certificate, which he must have known would not be refused; and, consequently, if he has lost from that date, the loss is attributable to himself and not to the Company.

Stopping, then, on 23rd February, what were the shares worth on that date? Their value at that time does not appear. The nearest we can get is on 21st March and 25th March 1914, when they were selling at £2. It is not unfavourable to the plaintiff to take that date—a month after the decree,—and if we deduct that value from the selling value obtainable previously, the result is a net loss of £7 10s. per share, which totals £450 instead of £600, arrived at by the Master, and to that amount of £450 the damages should be reduced.

GAVAN DUFFY J. read the following judgment:—I concur in the judgment which has just been delivered, except that I think that, in estimating the loss and damage suffered by the plaintiff, we should take into account the refusal of the defendant Company to register the transfer to various purchasers of twenty-five shares belonging to him. Because of such refusal the plaintiff had to buy twenty-three other shares for which he paid £8 each, or £184. Had his own twenty-five shares been available for transfer he would have transferred them and the purchase of these other shares would have been unnecessary. After their purchase he remained owner of the twenty-five shares and entitled to demand a certificate in respect of them from the defendant Company, but he had spent £184. Shares were then worth more than £8 each, and had he obtained immediate delivery from the defendant Company he would have suffered no loss, but the Company refused a certificate and persisted in declining to recognize the plaintiff's right to deal with these shares until they had greatly fallen in value, and his ultimate loss was the difference between £184 and their value at the time when he became entitled to delivery of them under the decree. With respect to the balance of thirty-five shares I think the method of assessment

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adopted by my brother *Isaacs* is correct, and I concur with him in thinking that £450 is a reasonable estimate of the total loss and damage sustained by the plaintiff.

POWERS J. I agree with the judgment delivered by my brother *Isaacs*, for the reasons given by him for it.

*Order* (1) *that the order of the Supreme Court of* 10*th September* 1914 *be varied by reducing the sum of* £600 *for damages to* £450; (2) *that all sums recovered by one party against the other, whether by way of debt, damages or costs, be mutually set off and the balance be paid to the party entitled thereto*; *and* (3) *that this appeal be otherwise dismissed without costs.*

Solicitors, for the appellants, *Lobban & Lobban.*
Solicitor, for the respondent, *Percy C. Law.*

B. L.