[HIGH COURT OF AUSTRALIA.]

CLIFTON AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

MOUNT MORGAN LIMITED AND OTHERS . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 8, 9, 13.

Starke, Dixon, and Evatt JJ.

Companies—Meetings—Proxies—Proxy holder—Voting.

It is not essential to the casting of a vote at a meeting of a company by a proxy on behalf of his principal that the proxy should expressly state that he votes for and on behalf of the principal. Where shareholders holding proxies vote without expressly so stating, the question whether they are voting on their own behalf only, or on behalf of their principals as well as themselves, is one of intention to be gathered from the ballot paper and the circumstances surrounding the poll and the voting.

Held, on the facts, that shareholders holding proxies who had voted without expressly stating that they voted on behalf of their principals had exercised the votes both of their principals and themselves.

Spurr v. *Albert Mining Co.*, (1874) (2 Pugsley) 15 New Brunswick R. 260, distinguished.

Decision of the Supreme Court of New South Wales (*Williams* A.J.): *Clifton* v. *Mount Morgan Ltd.* [*No.* 2], (1940) 40 S.R. (N.S.W.) 336; 57 W.N. (N.S.W.) 110, affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit brought in the equitable jurisdiction of the Supreme Court of New South Wales by Daniel Vincent Clifton and Rex Cullen-Ward against Mount Morgan Ltd., Eric Byron Moore, Eric Jack Morgan, and others to have it determined that the two

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plaintiffs and not the defendants Moore and Morgan were elected as directors at the annual general meeting of the defendant company which was held on 30th October 1939 was dismissed: *Clifton* v. *Mount Morgan Ltd.* [No. 2] (1). See also *Clifton* v. *Mount Morgan Ltd.* [No. 1] (2).

The plaintiff appealed to the High Court from the decision dismissing the suit.

The before-mentioned meeting was summoned by a notice in writing which stated that part of the business was to elect two directors and gave the names of Clifton, Cullen-Ward, Moore, Morgan and one Eric Campbell as candidates for the two vacancies. The notice contained a form of proxy by which a shareholder who would not be able to attend the meeting personally but wished to vote could appoint another shareholder to vote for him at the meeting. There were present at the meeting 56 shareholders in person, representing 121,820 shares, while 1,828 shareholders, representing 1,435,844 shares were present by proxies. After a vote by a show of hands had been taken a poll was demanded. The chairman then proceeded to take the poll. Before the ballot papers were distributed he made the following statement:—"If any shareholders present have given proxies and do not intend to alter their votes, I would suggest that they refrain from filling in a ballot paper as this procedure will assist the scrutineers. If, however, some of you have given proxies and desire to vote, you can do so as your proxy will be automatically cancelled." This statement was repeated at a slightly later stage, so that all shareholders who were attending to the business of the meeting should have heard it on one or both occasions. The number of ballot papers placed in the ballot box was thirty. Two of these were informal, so that the number of effective papers was twenty-eight. Of the shareholders present who had given proxies twenty did not vote. Thirteen shareholders present who had given proxies did vote thereby automatically cancelling their proxies. One of the latter shareholders was the chairman. The ballot papers contained on their front the names of the candidates with a direction to strike out the names of those for

(1) (1940) 40 S.R. (N.S.W.) 336; 57 W.N. (N.S.W.) 110.

(2) (1940) 40 S.R. (N.S.W.) 31; 57 W.N. (N.S.W.) 35.

whom the shareholder did not wish to vote and a space for the name of the shareholder in block letters and for his signature. The back of the ballot paper contained the following words: "Votes in own right," "votes by proxy" and "total votes." Some shareholders called as witnesses said that they did not notice any writing on the back of the ballot paper. Another said he did not notice anything on the back until he folded it. Two others evidently did not notice the writing. No witness said he had noticed the back of the ballot paper, but it was plain that the chairman must have been aware of the writing because he had approved of the form of the ballot paper. The chairman did not refer to the back of the ballot paper, and nothing was said about it by anyone at the meeting. Immediately after the ballot had closed the scrutineers commenced to count the votes. In order to do this an audited list of shareholders and the number of votes to which each of them was entitled and also an audited list of the proxies which had been received had been prepared. Clifton, Cullen-Ward and another shareholder in addition to signing their names on their respective ballot papers added the words: "For self and all proxies in my favour." The other eight shareholders who held proxies merely signed their names. During the counting of the votes a shareholder took objection that the only votes that could be counted as having been validly cast by the shareholders who had only signed their names were their own personal votes as they had not indicated their intention to vote on behalf of the shareholders for whom they held proxies. On the following morning the scrutineers certified the result of the poll to the chairman to be as follows: Campbell 5,548 votes; Clifton 48,697 votes; Cullen-Ward 43,279 votes; Moore 50,070 votes; and Morgan 49,986 votes. One of the scrutineers —the shareholder who had taken the above-mentioned objection— signed the certificate subject to the following objection: "I subscribe to this report subject to the validity of certain votes purported to have been cast by proxies but not specifically so stated and it is without prejudice to the rights of candidates Clifton and Cullen-Ward in that regard." The chairman overruled the objection, signed the statement, and announced that Moore and Morgan had

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been elected. He inserted an entry in the minute book of the company which he signed to the same effect.

The plaintiffs challenged the chairman's declaration. They claimed that he should have upheld the objection and disallowed the votes of the eight proxy holders. It was admitted that if the objection had been valid the correct totals would have been as follows :—Cullen-Ward 40,886 votes ; Clifton 40,856 votes ; Moore 2,496 votes ; Morgan 2,412 votes ; and Campbell 100 votes.

Mason K.C. (with him *Miller*), for the appellants. The demand for a poll had no significance whatsoever. The general rule of law is that a person acting on behalf of another must indicate that he is so doing (*Palmer's Company Precedents*, 15th ed. (1938), vol. I, p. 808 ; 13th ed. (1927), p. 843). In the case of a ballot paper not indorsed to the effect that the vote was cast in respect of the proxies also, the effective vote is only that of the voter in his personal capacity. There is not any conflict between *Foerster* v. *Newlands* (*West Griqualand*) *Diamond Mines* (*Ltd.*) (1) and *Spurr* v. *Albert Mining Co.* (2). In the latter case, upon facts which are indistinguishable from the facts in this case, the court held that it is necessary for a voter to indicate that his vote is exercised in respect of proxies also : See also *Palmer's Shareholders', Directors' and Voluntary Liquidators' Legal Companion*, 34th ed. (1936), p. 82. A person present at a meeting as a proxy as well as in his own right must indicate that he is there in the dual capacity if he intends to act in both capacities (*Ex parte Evans* ; *In re Baum* (3)). The omission by the particular voter to indicate that he exercised his vote in his own right and also in respect of the proxies was not cured by the chairman's remarks nor by anything else which occurred at or in connection with the meeting.

Maughan K.C. (with him *Harper*), for the respondents. The proxy holders properly exercised the right properly conferred upon them. In exercising that right they did all that was required of them whether under the common law (*Buckley* on *The Companies Acts*,

(1) (1902) 18 T.L.R. 497.
(2) (1874) (2 Pugsley) 15 New Brunswick R. 260.
(3) (1880) 13 Ch. D. 424, at pp. 428, 429.

11th ed. (1930), p. 715), or under the statute, or under the contract which the shareholders of the company have made one with another. The right to vote by proxy is purely a social right. There is nothing in the articles which makes it obligatory or even suggests that a proxy holder must indicate his intention to vote on behalf of the giver of the proxy. The convention governing the meeting was that the proxy holders voted in their dual capacity. The evidence supports the finding that the shareholders present at the meeting were parties to an arrangement by which it was understood that if a person held a proxy and did vote he voted as a proxy in addition to his personal vote.

Mason K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered :— Aug. 13.

STARKE J. The appellants in this appeal claim that they and not the respondents Moore and Morgan were elected as directors of the Mount Morgan Ltd. at an annual meeting held on 30th October 1939.

The articles of association of the company provided that every question to be decided by any general meeting should be decided by a simple majority on a show of hands by the members personally present unless immediately on the declaration of the result of the show of hands a poll was demanded in the manner prescribed. The articles also provided that any person entitled to vote might from time to time appoint any person entitled to vote as his proxy at any poll. A form of proxy was given in the articles. The voting power of every member entitled to vote whether present in person or by proxy was also regulated by the articles.

The question depends upon the allowance of certain votes upon a poll demanded at the meeting and cast by certain shareholders who held proxies for other shareholders. Ballot papers setting forth the names of the candidates were issued to the shareholders. Three of the shareholders who held proxies signed the ballot paper, " For self and all proxies in my favour." Eight shareholders who held proxies merely signed the ballot paper with their names. Objection was taken during the counting of the poll that the only votes that

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could be validly counted on these latter ballot papers were the individual votes of the shareholders who signed the ballot paper and not the votes of any shareholders for whom they held proxies. The chairman of the meeting disallowed the objection. The result of this decision was that Moore and Morgan were declared elected and the appellants consequently defeated by small majorities.

Now it was contended that a shareholder or other person claiming to vote as proxy for another should unequivocally and explicitly vote for and on behalf of his principal. But I would rather say that the question is one of intention to be gathered from the ballot paper and the circumstances surrounding the poll and the voting. Some intention to act for his principal as well as for himself should appear. *Ex post facto* declarations that a proxy has acted for his principal as well as for himself would be inadmissible. But to mark a ballot paper, "For self and all proxies in my favour," would evince a clear intention to act for his principal as well as for himself (*Foerster* v. *Newlands* (*West Griqualand*) *Diamond Mines* (*Ltd.*) (1)). A ballot paper bearing merely the signature of a shareholder is equivocal, but in conjunction with the surrounding circumstances in the present case it is a legitimate inference that the intention of the shareholders who so signed their ballot papers was to poll full strength ; that is, to act for their principals as well as for themselves.

The company, with the notice of the general meeting, issued proxy forms to shareholders and a large number were lodged in the company's office, checked, and tabulated ; some proxies were from shareholders in England. At the meeting itself a show of hands was taken, but a poll was demanded, which contemplated the use of proxies or, as the learned primary judge said, an appeal to a larger body of shareholders than those actually present. The qualifications of the rival candidates for election as directors was the subject of some discussion and it is plain that the election of directors was the subject of a keen contest. Further, the chairman of the meeting referred to the subject of proxy voting. "Members," he said, "will be handed a ballot paper with the names of all candidates and you are asked to strike out those for whom you do not wish to vote. That is, three names will be struck out and the

(1) (1902) 18 T.L.R. 497.

remaining two will represent your choice. . . . If any shareholders have given proxies and do not intend to alter their votes I would suggest that they refrain from filling in a ballot paper as this procedure will assist the scrutineers. If however some of you have given proxies and desire to vote you can do so as your proxy will be automatically cancelled." In this setting it is a reasonable conclusion and one open to the learned trial judge that the shareholders who merely signed the ballot papers with their names intended to and did vote for their principals as well as for themselves. Otherwise they disfranchised their principals, whether intentionally or ignorantly, which is not a conclusion that should be lightly adopted when another, more reasonable and businesslike, is suggested and made more probable by the surrounding circumstances. The case of *Spurr* v. *Albert Mining Co.* (1) was much relied upon during the argument. But, when the reasons stated (2) are examined, it will be found that the decision is based upon the special facts of the case and does not propound a rigid rule of law as suggested by the appellants, namely, that a person claiming to vote must clearly and distinctly put forward such claim and unequivocally and explicitly vote in the name and on the behalf and as the representative of the shareholders whose proxies he holds. Both *Evans' Case* (3) and *Foerster's Case* (4) are opposed to so rigid a rule.

In my opinion the learned trial judge was right in dismissing the appellants' suit and this appeal should also be dismissed.

Dixon J. I agree.

The articles of association provided for voting by proxy and entrusted the chairman with the duty of directing in what manner the poll should be taken. If he had made a full statement to the meeting explaining how proxy votes would be ascertained, this litigation might not have been persisted in, but I have no doubt that the reason why he thought it unnecessary to do so was because every one present knew that the poll was demanded so that the proxies should be used and because no reasonable man who read the face of the ballot paper and listened to what the chairman in fact said could fail to understand that, as it stood, the

(1) (1874) (2 Pugsley) 15 New Brunswick R. 260.
(2) (1874) (2 Pugsley) 15 New Brunswick R., at pp. 279, 280.
(3) (1880) 13 Ch.D. 424.
(4) (1902) 18 T.L.R. 497.

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ballot paper was intended to operate as an indiscriminate exercise of the voter's entire voting strength, both as a shareholder and as a proxy. I feel sure that this was the conventional basis on which the poll proceeded, and I think that there is neither need nor room for the application of any presumption as to the significance of ambiguous acts done by a person bearing two capacities. I entirely agree with the reasons which *Williams* A.J. gave for dismissing the suit.

EVATT J. Mr. *Mason* has put the case for the appellant with admirable clearness and candour; but I am of opinion that the reasoning of *Williams* A. J. admits of no satisfactory answer, and that his judgment should be affirmed. The precise question is whether, in the particular circumstances and the particular setting, the ballot cast by a shareholder who was entitled to vote not only on his own account, but on account of other shareholders for whom he was proxy, should be reckoned as having been cast in respect of those shares for whom he was proxy, as well as his own. In my opinion, the inference in favour of the finding that the ballot was to be conducted in such a way as to exert the maximum effective voting power of each person marking a paper, is irresistible. The facts are carefully set forth in the judgment under appeal; and nothing is to be gained by repeating them here.

Perhaps some reference should be made to the case of *Spurr* v. *Albert Mining Co.* (1) upon which the appellant strongly relied. In my opinion, that case cannot be regarded as laying down any broad doctrine which controls the method by which proxy votes must be recorded. The circumstances there proved to exist were exceptional, indeed unique. The shareholder who claimed to have exercised proxy votes had disputed the legality of the meeting of shareholders, and, for that purpose, had carefully kept his proxies in reserve, the documents of proxy having been previously laid in a vault, access to which seemed to be a very slow and cumbersome process. It was only at a comparatively late stage of the meeting, during scenes of considerable disorder, that the shareholder in question seemed desirous of recanting in order that he

(1) (1874) (2 Pugsley) 15 New Brunswick R. 260.

might elect his own group of directors. Upon the production of the proxies, he exclaimed :—" We can now outvote everything. You can do nothing, we have over 3,000 proxies " ; and, about the same time, some other person exclaimed : " I move that everything heretofore done be rescinded." In these peculiar circumstances, it is not surprising that the court considered that the shareholder who had blown hot, but afterwards wished to blow cold, should " clearly," " distinctly," " unequivocally " and " explicitly " state that, contrary to his first intention, he was going to use the proxies for the purpose of electing the directors. This requirement is to be regarded rather as invoked by common sense and fair play than as a rigid general rule of law. Such a general rule is, in my opinion, non-existent.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Campbell, Campbell & Campbell.*
Solicitors for the respondents, *Minter, Simpson & Co.*

J. B.