Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hardoon v. *Belilios, from the Supreme Court of Hong Kong; delivered 8th December* 1900.

Present at the Hearing:

LORD HOBHOUSE.
LORD ROBERTSON.
LORD LINDLEY.
SIR FRANCIS JEUNE.
SIR FORD NORTH.

[*Delivered by Lord Lindley.*]

The question raised by this Appeal is whether the Plaintiff who is the registered holder of some shares in a Banking Company which is being wound up is entitled to be indemnified by the Defendant who is the beneficial owner of such shares against calls made upon them in the winding up of the Company. The Courts of Hong Kong have decided against the Plaintiff upon the evidence adduced by him; and have entered judgment of non-suit. The Defendant adduced no evidence; it did not become necessary for him to do so. The Chief Justice who first heard the case decided that the Defendant was the sole beneficial owner of the shares but that the Plaintiff had failed to prove any contract by the Defendant to indemnify him either express or implied. On appeal the Chief Justice and Mr. Justice Wise considered that although the Defendant had become the sole beneficial owner of the shares the relation of trustee and cestui que trust had not been created between the Plaintiff and the Defendant and that the Defendant had

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not become liable to indemnify the Plaintiff. Against these decisions the Plaintiff has appealed to this Board.

The facts of the case so far as they are material are shortly as follows :—

The Bank in question was formed and registered with limited liability under the Companies' Act 1862. Its capital was divided into shares which were not fully paid up when it went into liquidation which it did in December 1894. Calls have been made on the contributories of whom the Plaintiff is one. He is a contributory in respect of fifty 10*l*. shares. He has been sued by the liquidator for the calls made on him in respect of those shares and judgment has been given against him for 402*l*. 12*s*. 11*d*. which he seeks to recover from the Defendant.

The 50 shares in question were placed in the Plaintiff's name in April 1891 by his then employers Benjamin and Kelly who were share-brokers. The Plaintiff never had any beneficial interest in them ; but he was registered as their holder on the 3rd April 1891. A provisional certificate of his ownership was made out and he signed a blank transfer of them and those two documents were held by Benjamin and Kelly who paid the application and allotment money and first call. This certificate and transfer afterwards came into the hands of one Coxon who acted on behalf of a syndicate formed to speculate in shares in another company. The Defendant financed this syndicate and the provisional certificate and blank transfer of the 50 shares in question were with other securities pledged by Coxon with the Defendant as security for his advances. In October 1891 the Plaintiff's provisional certificate was exchanged for an ordinary certificate which the Defendant has ever since held. In March 1892 dividends were paid on those shares and the Defendant as holder of these 50 shares demanded these dividends from the

Plaintiff and received them from him. The operations of the syndicate resulted in considerable loss. Their accounts with the Defendant were closed and in October 1892 the Defendant became the absolute owner of the shares. This at least is the conclusion arrived at by both Courts in Hong Kong from the entries in the Defendant's books and there are no grounds on which this Board can come to any different conclusion.

In November 1893 a call of 1*l.* per share was made payable by four instalments of 5*s.* each. The first three of these instalments payable in November 1893, February and April 1894 were at the Plaintiff's request paid by the Defendant to the Plaintiff and by him to the Bank. The Defendant said he was not liable to pay them; and in his books he debited the Plaintiff with those payments but there is no evidence that the Plaintiff was informed of this. The fact that the Defendant did not at this time debit Coxon with these calls seems to their Lordships very strong evidence that at this time Coxon's interest in these shares was at an end and they belonged absolutely to the Defendant.

On the 10th April 1894 the Plaintiff wrote to the Defendant asking that the shares might be transferred out of the Plaintiff's name but the Defendant declined to get this done, and the Plaintiff said no more about it until June 1894 when the fourth instalment of 5*s.* in respect of the call of 1*l.* became due. The Plaintiff then asked the Defendant to pay this instalment and he did so but debited the Plaintiff with the amount as before. Shortly afterwards the Plaintiff's solicitors wrote to the Defendant and asked him to have the shares transferred out of the Plaintiff's name. But the Defendant declined, saying that the shares were lodged with him by Coxon who was absent from the Colony.

Further correspondence took place after calls had been made by the liquidator on the Plaintiff as already stated but the Defendant refused to indemnify the Plaintiff and this action was commenced.

It appears from the evidence as it stands that the Defendant became in October 1892 the sole beneficial owner of these shares the legal title to which was vested in the Plaintiff. Assuming this to be established their Lordships are at a loss to understand what more was required to create the relation of trustee and cestui que trust between the Plaintiff and the Defendant. The facts that they never stood in the relation of vendor and purchaser, that there was no contract between them, that the Defendant never requested the Plaintiff to become his trustee are quite immaterial. All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in the Plaintiff and the equitable title in the Defendant. This might be proved in many ways. The mode of proof is quite immaterial. Being proved, no matter how, the relation of trustee and cestui que trust was thereby established.

No one can be made the beneficial owner of shares against his will. Any attempt to make him so can be defeated by disclaimer. But the moment the Defendant accepted the beneficial ownership of these shares he became the Plaintiff's cestui que trust and the Plaintiff had no option in the maiter.

The next step is to consider on what principle an absolute beneficial owner of trust property can throw upon his trustee the burdens incidental to its ownership. The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burdens unless he can show some good

reason why his trustee should bear them himself. The obligation is equitable and not legal and the legal decisions negativing it unless there is some contract or custom imposing the obligation are wholly irrelevant and beside the mark. Even where trust property is settled on tenants for life and children the right of their trustee to be indemnified out of the whole trust estate against any liabilities arising out of any part of it is clear and indisputable; although if that which was once one large trust estate has been converted by the trustees into several smaller distinct trust estates the liabilities incidental to one of them cannot be thrown on the beneficial owners of the others. This was decided in *Fraser* v. *Murdoch* L. R. 6 A. C. 855 which was referred to in argument. But where the only cestui que trust is a person *sui juris* the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further and imposes upon the cestui que trust a personal obligation enforceable in equity to indemnify his trustee. This is no new principle but is as old as trusts themselves.

In *Balsh* v. *Hyham* 2 P. W. 453 the trustee sought indemnity in equity not against a liability incidental to the ownership of the trust property but against a liability incurred by him by borrowing money at the request and for the benefit of his cestui que trust. The Court decided that the Plaintiff was entitled in equity to the relief which he sought on the broad ground "that a cestui que "trust ought to save his trustee harmless as to all "damages relating to the trust." This language (although open to criticism if applied to cestuis que trustent who are not *sui juris* and also sole beneficial owners) shows plainly enough that it was taken for granted as well settled that speaking generally absolute beneficial owners of property

must in equity bear the burdens incidental to its ownership and not throw such burdens on their trustees.

The short report of *Balsh* v. *Hyham* as given in 2 Eq. Ca. Ab. 741 fol. 8 shows that this general rule was well recognised and that the decision was only an illustration of its application to the facts then before the Court.

It is impossible to read the judgment of Vice-Chancellor Wigram in *Phené* v. *Gillan* 5 Ha. 1 without coming to the conclusion that he also regarded the general rule as well established.

The principle acted upon in *Balsh* v. *Hyham* was reconsidered and most strikingly illustrated in the well-known case of the *German Mining Company Ex parte Chippendale* 4 De G. Mc and G. p. 19 where the shareholders of a mining company were held liable personally to indemnify the directors against payments made by them in discharge of debts contracted by them but which payments created no legal obligation on the company enforceable at law and could not be recovered by the directors from the company by any action at common law. The shareholders in vain contended in that case that the directors had only a right to indemnity out of the assets of the company. *See* page 54.

Where as in *Balsh* v. *Hyham* a trustee seeks indemnity in respect of transactions in which he need not have engaged and which were not within the scope of his trust he must prove that his cestui que trust either authorised or ratified such transactions. But if he has incurred liability within the scope of his trust and for the benefit of his cestui que trust *Ex parte Chippendale* shows that nothing more is required.

When a trustee seeks indemnity from his cestui que trust against liabilities arising from the mere fact of ownership there is neither principle nor authority for saying that the trustee need prove any request from his cestui

que trust to incur such liability. In the case supposed the trust involves such liabilities and the trustee whilst he remains such cannot get rid of them. He is subject to them as legal owner; but in equity they fall on the equitable owner unless there are good reasons why they should not.

As regards shares this right of a trustee to be indemnified by his cestui que trust against calls has been repeatedly recognised and enforced on the principles applicable to the equitable ownership of property, and without reference to the principles applicable to contracts or specific performance or any other legal or equitable doctrine. Nothing can be plainer or sounder than the language of Vice Chancellor James in *Castellam* v. *Hobson* L.R. 10 Eq. 47; and of *Chitty, J.* in *Loring* v. *Davis* 32 Ch. D. 634. *James* v. *Way* L.R. 6 Ho. Lo. 328 proceeded on the same principle. Other cases to the same effect might be cited but it is unnecessary to refer to them. No case has been found, nor as their Lordships believe can be found, which is opposed to these authorities.

The principle was recognised by Mr. Justice Fry in *Hughes Hallett* v. *The Indian Mammoth Gold Mines Company* L.R. 22 Ch. D. 561 although he there held that the application for indemnity was premature.

It is true that the facts of this case are not in all respects like those in the cases above alluded to. But although the facts are different the result of them is the same; *i.e.*, the facts were such that the relation of trustee and cestui que trust was created. In this case the Defendant did not create the trust on which the Plaintiff originally held the shares. The Defendant had nothing to do with procuring their registration in the Plaintiff's name as trustee for Benjamin and Kelly and their assigns. This

feature of the case was strongly relied upon by the Defendant's Counsel as distinguishing it from those above mentioned and reliance was placed on what Lord Blackburn said in *Fraser* v. *Murdoch* L.R. 6 A.C. about makers of trusts (*see* p. 872) and trusts to carry on business with particular funds (*see* p. 875). But their Lordships can find nothing in Lord Blackburn's judgment which is inconsistent with the principles which in their Lordships' opinion govern this case. The fact that the Defendant did not create the trust on which the Plaintiff held the shares when they were first placed in his name affords the Defendant no defence to this action. Although the Defendant did not create the trust he accepted a transfer of the beneficial ownership in the shares first as mortgagee and afterwards as sole beneficial owner with full knowledge of the fact that they were registered in the Plaintiff's name as trustee for their original purchasers and their assigns whoever they might be. By this acceptance the Defendant became the Plaintiff's cestui que trust ; and the Plaintiff could not prevent it or effectually dispute his trusteeship for the Defendant. By this acceptance the Defendant created the trust for himself. Having done so the Defendant as the beneficial owner of the shares demanded from the Plaintiff and obtained dividends declared in respect of them. The Defendant also paid calls made upon them although he attempted to protect himself from any admission of liability by entering these payments in his books as made on behalf of the Plaintiff. Lastly when asked by the Plaintiff to procure a transfer of the shares out of the Plaintiff's name the Defendant refused to do so and thereby compelled the Plaintiff to continue to hold them as his trustee. It is idle after this to rely on the fact that the Defendant did not create the trust in the first instance; and idle to talk of renunciation or disclaimer of

these shares by the Defendant. He cannot now get rid of the trust for himself which he created by becoming beneficial owner of the shares and which trust he has recognised since as subsisting.

It is quite unnecessary to consider in this case the difficulties which would arise if these shares were held by the Plaintiff on trust for tenants for life or for infants or upon special trusts limiting the right to indemnity. In those cases there is no beneficiary who can be justly expected or required personally to indemnify the trustee against the whole of the burdens incident to his legal ownership; and the trustee accepts the trust knowing that under such circumstances and in the absence of special contract, his right to indemnity cannot extend beyond the trust estate, *i.e.*, beyond the respective interests of his cestuis que trustent. In this case their Lordships have only to deal with a person *sui juris* beneficially entitled to shares which he cannot disclaim. The obligation of such a person to indemnify his trustee against calls upon them appears to their Lordships indisputable in a Court of Equity unless of course there is some contract or other circumstance which excludes such obligation. Here there is none. Whether the Plaintiff in this case could sue Benjamin and Kelly on any promise by them to indemnify him need not be discussed. Such a right if it exists in no way affects the obligation of the Defendant as the Plaintiff's cestui que trust. But it is obvious that any payment to the Plaintiff by Benjamin and Kelly or by the Defendant in respect of the calls would reduce the amount which the Plaintiff could recover from the Defendant or from them as the case might be.

For these reasons their Lordships will advise Her Majesty to allow the Appeal and to reverse the judgments appealed from with costs;

and the Defendant will pay the costs of this Appeal.

Owing to the judgment appealed from being a judgment of non-suit only, their Lordships are unable to advise Her Majesty to order judgment to be entered for the Plaintiff with costs. The Defendant is entitled to a new trial at the risk of costs. But how in the face of his own books and conduct he can reasonably hope for ultimate success their Lordships are at a loss to conceive. If however he insists on his strict rights he is entitled to have the action remitted to Hong Kong for retrial; and their Lordships will humbly so advise Her Majesty.