

103, 1930

No. 103 of 1930

In the Privy Council.

APPELLANTS CASE

ON APPEAL

FROM THE SUPREME COURT OF ONTARIO.
(Appellate Division).

BETWEEN—

THE STEEL COMPANY OF CANADA LIMITED and JAMES T. ROGERS and GEORGE C. COPPLEY on behalf of themselves and all other holders of Preference Stock of the Defendant The Steel Company of Canada.

(Defendants) *Appellants*

— AND —

THOMAS RAMSAY and FRANCIS A. MAGEE suing on behalf of themselves and all other holders of Ordinary Stock of The Steel Company of Canada Limited.

(Plaintiffs) *Respondents*.

APPELLANTS' CASE.

RECORD.

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1. This is an appeal from a judgment of the First Divisional Court of the Supreme Court of Ontario dated 17th March 1930, dismissing an appeal from a judgment of Hon. Mr. Justice Orde dated 23rd August 1929. The question involved is as to whether the Company should be restrained from paying dividends in excess of seven per cent. per annum on its Preference Shares until the total dividends paid on the Ordinary Stock since the incorporation of the Company equal as to the rate thereof the dividends theretofore paid on the Preference Stock.

p. 77.

p. 53.

p. 79.
p. 29, l. 2.
p. 36, l. 42.
p. 12, l. 2.

p. 37, l. 7.

p. 29, l. 31.

p. 12, l. 11.

2. The Appellant Company, originally called the "Canadian Steel Corporation Limited" was incorporated by Letters Patent dated 8th June, 1910, under the authority of The Companies Act, (R.S.C. 1906, Cap. 79). It acquired the businesses of several other companies and paid therefor by issuing to the Shareholders in the amalgamating companies 64,963 fully paid Preference Shares and 115,000 fully paid Ordinary Shares, with the result that every original Shareholder in the Appellant Company became the holder of both classes of stock, his shares being represented by certificates in the form hereafter referred to. Every subsequent Shareholder received a certificate in similar form. No additional shares of either class of stock have been allotted or issued.

3. The Companies Act contained the following provisions as to the creation of preferences and priorities in favour of Preference Stock :—

"8. The application shall be in accordance with form A in the schedule "to this Act and may ask to have embodied in the letters patent then "applied for, any provision which could under this Part be contained in any "by-law of the Company or of the directors approved by a vote of share- "holders, which provision so embodied shall not, unless power is given "therefor in the letters patent, be subject to repeal or alteration by any "by-law. 20

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"47. The directors of the Company may make by-laws for creating "and issuing any part of the Capital Stock as Preference Stock, giving the "same such preference and priority, as respects dividends and in any other "respect, over Ordinary Stock as is by such by-laws declared.

"(2) Such by-laws may provide that the holders of shares of such "Preference Stock shall have the right to select a certain stated proportion "of the board of directors or may give them such other control over the "affairs of the Company as is considered expedient. 30

"48. No such by-law shall have any force or effect whatever until "after it has been sanctioned by a vote of three-fourths of the shareholders. "present in person or by proxy at a general meeting of the Company duly "called for considering the same and representing two-thirds of the stock "of the Company, or until the same shall be unanimously sanctioned in "writing by the shareholders of the Company.

"49. Holders of shares of such Preference Stock shall be shareholders "within the meaning of this part, and shall in all respects possess the rights "and be subject to the liabilities of shareholders within the meaning of this "Part: Provided that in respect of dividends, and in any other respect 40

“declared by by-law as authorized by this Part, they shall, as against the
 “Ordinary Shareholders, be entitled to the preferences and rights given by
 “such by-law.”

4. The Letters Patent contained the following provisions as to the Capital Stock:— p. 83, l. 23.

“The Capital Stock of the said Company shall be Twenty-five Million
 “Dollars divided into Two hundred and fifty thousand shares of One Hundred
 “Dollars each, subject to the increase of such Capital Stock under the
 “provisions of the said Act, of which Two hundred and fifty thousand shares,
 10 “One hundred thousand shares of One Hundred Dollars each, that is to say,
 “Ten Million Dollars, be created and issued as Preference Stock and the
 “same when so issued shall have preference and priority as follows:—

“(a) In case of liquidation, dissolution or winding up of the Company,
 “the holders of such shares shall be entitled to repayment in preference
 “to Ordinary Shareholders of the amount of the par value of said shares
 “and any arrears of dividends thereon and also the net profits of the
 “Company which it shall from time to time be determined to distribute
 “are to be applicable first to the payment of a fixed cumulative prefer-
 “ential dividend at the rate of seven per centum per annum on the
 “capital paid up on the said Preference Shares and the holders of such
 20 “shares shall participate rateably with the holders of the issued Ordinary
 “Shares in the distribution of net profits after the holders of the
 “Ordinary Shares shall have received dividends equal to those paid on
 “the Preferred Shares;

“(b) No dividends shall be paid on the Ordinary Shares until
 “after the Company shall have created and have to the credit of a
 “reserve fund a sum equal to at least one year’s dividend on the then
 “issued Preference Shares.”

5. Prior to the sub-division of the Company’s shares here- p. 29, l. 35.
 30 after referred to, all stock certificates issued by the Company were
 in the following form and were received and accepted by all Share-
 holders without objection as evidencing the rights of Shareholders
 in the Company:—

“The Preference Shares carry a fixed cumulative preference dividend p. 84, l. 21.
 “payable out of the profits of the Company applicable to dividends at the
 “rate of seven per centum (7%) per annum on the capital paid up thereon.
 “They rank both as to dividends and assets in priority to all Ordinary
 “Shares. If, after providing for the payment in any year of the dividend
 “on the Preference Shares and any balance due for cumulative dividends for
 “preceding years, there remain any surplus net profits, any and all such as
 40 “are not in the opinion of the directors required for the purposes of the
 “Company will be applicable to dividends on the Ordinary Shares for such

“year to the extent of but not exceeding seven per centum (7%) on the capital paid up thereon when and as from time to time the same may be declared by the directors. The remainder of any such surplus net profits shall then be applicable to the payment of further dividends equally per share upon both the Preference Shares and the Ordinary Shares but no dividends shall be paid on the Ordinary Shares until after the Company shall have created and have to the credit of a reserve fund a sum equal to at least one year’s dividend on the then issued Preference Shares, the whole as provided in the Letters Patent incorporating the Company.”

p. 143. **6.** The Company declared and paid dividends on the Preferred Stock at the rate of 7 per cent. per annum from and after its incorporation in 1910, a deficiency of $3\frac{1}{2}$ per cent. in 1914 being made good by an extra $3\frac{1}{2}$ per cent. in 1916. 10

p. 143. **7.** The Company first declared a dividend on its Ordinary Stock in 1916 when it paid 4 per cent. The rate was increased to 6 per cent. for 1917 and 1918 and to 7 per cent. for each year from 1919 to 1927, inclusive.

p. 143. **8.** The total amount paid in dividends on Ordinary Shares greatly exceeds the total amount paid on Preference Shares.

p. 132. **9.** By supplementary letters patent issued on 16th November, 1928, the 100,000 Preference Shares and the 150,000 Ordinary Shares, all of the par value of \$100 each were converted into 400,000 Preference Shares of the par value of \$25 each and 600,000 Ordinary Shares without nominal or par value, reserving to each class of shares all rights attaching to the shares of the par value of \$100 as originally created. 20

p. 135. **10.** For each of the first three quarterly periods of 1928 dividends of $1\frac{3}{4}$ per cent. were declared on both Preferred Shares and Ordinary Shares. On 19th December 1928, a dividend of 50 Cents per share and an additional dividend of $18\frac{3}{4}$ cents per share were declared on both Preferred and Ordinary Shares, payable 1st February, 1929, to shareholders of record on 19th January, 1929, the intention being to place each class of stock on a dividend basis of 8 per cent. 30

p. 1. **11.** On 28th December, 1928, the Respondents Ramsay and Magee on behalf of themselves and other holders of Ordinary Shares brought this action against the Appellant Company claiming that the dividends on the Ordinary Stock were “cumulative” and that arrears of dividends aggregating approximately $43\frac{1}{2}$ per cent. must be paid on the Ordinary Shares before the holders of Preferred Shares participated in dividends in excess of 7 per cent. per annum. 40

p. 3, l. 25.
p. 3, l. 31.
p. 4, l. 15. They further alleged that the stock certificates theretofore issued

were ambiguous and might erroneously and without authority be construed to imply that dividends on the Ordinary Stock were non-cumulative.

12. The Respondents alleged that the calling of the meeting of shareholders to ratify the by-law sub-dividing the shares for the first time put them on enquiry as to what were the legal rights of the holders of Preference and Ordinary Shares and that on obtaining copies of the Letters Patent they ascertained that the dividends on the Ordinary Stock were "cumulative". They claimed an injunction restraining the Appellant Company from paying any dividend on its Preference Stock in excess of 7 per cent. per annum until such time as it had declared and paid dividends upon the Ordinary Stock equal per share in amount to the dividends previously paid on its Preference Stock; an injunction restraining the issue of stock certificates incorrectly stating the rights of both classes of stock; and a declaration as to the rights of both the holders of Preference and Ordinary Shares with respect to dividends.

13. The action was tried by Honourable Mr. Justice Orde who decided in favour of the Respondents. The learned judge says that the conclusion he reached differed from that entertained by him during the trial. His final opinion was that the provision in the charter for participation in the net profits, was a broad general declaration as to the respective rights of the preferred shareholders in all the net profits after making provision for the cumulative preferred dividends. If the construction urged by the Appellants was right, the learned judge thought it gave the directors power to distribute profits in a manner that would benefit the preferred shareholders enormously. In his opinion the language of the stock certificates could not be considered.

14. The Appellants appealed to the First Divisional Court of the Supreme Court of Ontario, which dismissed the appeal by a majority judgment. Mulock, C.J.O., Magee and Middleton, J.J.A. were in favour of dismissing the appeal but Hodgins and Grant, J.J.A. would have allowed it.

Mulock, C.J.O. thought the words in the letters patent were free from ambiguity and that their meaning was perfectly plain. In his opinion the holders of Ordinary Shares are entitled to be paid dividends equal in amount to all those paid to the holders of Preferred Shares before the latter become entitled to participate further. The share certificates did not, in his view, correctly declare the rights of the holders of Preference Shares and he agreed with the trial judge that the rights of the shareholders are not thereby affected.

p. 58, l. 9.

Magee, J.A. agreed.

p. 65.

Middleton, J.A. was of opinion that the Preference Stock is entitled to no other preference than a cumulative dividend of 7 per cent. per annum and that in all else there is to be equality and that as to dividends there is to be the equality claimed by the Respondents. He agreed that the stock certificates could not be considered.

p. 58.

Hodgins, J.A. (dissenting) thought the direction as to equality in favour of the Ordinary Shareholders has reference to the per annum payment and is to be applied from time to time, and as and 10 when profits are being distributed. He recognised the difficulty created if the language is not confined to the action of the directors at one time and in relation to one sum of profits then to be distributed. The meaning that commended itself to him was equality in the per annum rate. He did not think the Ordinary Shareholders could go back to previous periods and claim a present right to a sum equal to any cumulative charge of the Preference Shareholders as determined from year to year. In his opinion the ambiguity in the words "equal dividends" made it proper to consider the language of the share certificates but he did not base his judgment 20 on the share certificates. Apart altogether from such certificates, his opinion was that the true construction of the letters patent limits the Ordinary Shareholders to dividends equal but only in the per annum rate of 7 per cent. to those payable to the Preference Shareholders.

p. 66.

Grant, J.A. (also dissenting) reached the conclusion that to attach a cumulative right to Ordinary Shares requires clear language and that to allow the Respondents' claim would, in the result, make the common shares cumulative as to dividends. The provisions of the Companies Act as they stood in 1910 seemed to him to be 30 against rather than in favour of the Respondents' contention. The only shares which by statute could be given any special rights or privileges were Preference Shares. Holders of shares cannot compel the Company or the directors to declare or pay to them any part of the profits as dividends and in the opinion of the learned judge it is only as and when the directors "determine to distribute" profits and only with respect to such portion of them as they determine to distribute that the rights of the shareholders become operative. It is only with respect to such profits that equality was required. As he was not convinced that he was entitled in the circumstances to 40 consider the form of stock certificate, he preferred not to express any opinion as to its effect.

The Appellants submit that their appeal should be allowed for the following, amongst other,

REASONS.

1. Because on the true construction of the Letters Patent the Preference Shareholders are entitled to participate with the common shareholders in the dividends paid in any year in excess of seven per cent.
2. Because the equality provided for in the Letters Patent means equality in the profits distributed in a particular year.
3. Because the share certificate may be looked at and support the contention of the Preference Shareholders.
4. Because the common shareholders are not entitled to any cumulative rights with regard to dividends.
5. Because the Respondents are estopped from making the claim now asserted.
6. Because the dividends that have been paid on the common shares are greater in amount than those paid on the Preference Shares.
7. Because the judgments of Hodgins, J. A. and Grant, J. A. are right.

W. N. TILLEY.

C. F. H. CARSON.

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LIMITED and JAMES T. ROGERS and
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Limited (Defendants) *Appellants***

— AND —

**THOMAS RAMSAY and FRANCIS A. MAGEE
suing on behalf of themselves and all other
holders of Ordinary Stock of the Steel Company
of Canada Limited (Plaintiffs) *Respondents.***

APPELLANTS' CASE.

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