

LOTHAIR WILLIAM GEBHARD } CLAIMANT;
BLUCHER }

1926
March 15.

AND

THE CUSTODIANRESPONDENT.

*Consolidated Orders respecting Trading with the Enemy, 1916—Custodian
—Dividends—Rate of conversion in U.S. Funds—Interest*

B., a natural born British subject, was owner of shares in the Canadian Pacific Railway Company, which were registered in the name of the National Bank fur Deutschland, through whom he received his dividends, down to the outbreak of war in 1914. In 1919, these shares with dividends accrued and to accrue, were duly declared vested in the Custodian, but were never paid in to him. At the close of the war, B. applied to the Canadian Pacific Railway Company for payment of his dividends, which forwarded to the Custodian the necessary evidence to obtain release of same, and on the 11th May, 1921, the Custodian released both shares and dividends, relieving the Canadian Pacific Railway Company from the inhibition to pay. On the 3rd March, 1924, the Canadian Pacific Railway Company paid B. the dividends declared during the war, which were payable in U.S. funds, at the then rate of exchange. The rate was then materially lower than when the dividends were declared and B. claims that payment should have been made on the basis of the value of the American dollar on the 1st June, 1921.

Held: that the rate for conversion of these dividends is the rate ruling on the date when each dividend became due, and should have been paid to the Custodian, and not the 1st June, 1921 or the 3rd March, 1924.

2. That the claimant is further entitled to interest from the 1st June, 1921, by way of damages for wrongful withholding of money due.

CLAIM arising out of the World War in respect of trading relations with the enemy.

Ottawa, February 5, 1926.

Case now heard before the Honourable Mr. Justice Audette.

E. Bristol for claimant.

Geo. Wilkie, K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now this 15th day of March, 1926, delivered judgment.

This is a case arising out of the World War in respect of trading relations with the enemy.

Resulting from such of the allegations of the statement of claim as are admitted both by the statement in defence and the admission filed on the 4th February, 1926, it appears that the claimant, notwithstanding his German

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name, is a natural born British subject, residing in Guernsey, one of the Channel Islands, and that at various times between 1909 and June, 1914, he acquired by purchase 420 shares of common stock of the C.P.R. company, which were and remained registered in the name of the National bank fur Deutschland and that he received through the said bank the quarterly dividends paid in respect of these shares down to the outbreak of the war in 1914.

These shares, with all dividends accrued thereon since the 4th of August, 1914, or thereafter to accrue, were on the 23rd day of April, 1919, declared vested in the Custodian by an order of the Superior Court of the District of Montreal. (See section 28 of the Consolidated Orders respecting Trading with the Enemy, 1916.)

Notwithstanding this vesting order, and notwithstanding secs. 24 and 36 of the Consolidated Orders, 1916, respecting Trading with the Enemy, which provide that such dividends, etc., shall be paid to the Custodian and held by him until the termination of the war, and notwithstanding repeated demands to that effect made by the Custodian, the C.P.R. Co. unlawfully refused to obey and never complied with the law and these demands—retaining these dividends in its own possession, having thus the use and forbearance of these moneys.

At the close of the war, in July, 1920, the claimant applied in writing to the C.P.R.—supported by affidavit—as disclosed by the evidence on discovery filed as exhibit No. 1—to have, among other things, payment of his dividends, and the Vice-President of the C.P.R. forwarded to the Custodian the necessary evidence to obtain the release of the same.

Pursuant to such application *in writing* made to the C.P.R. by the claimant and by the C.P.R. to the Custodian, on the 11th May, 1921, the Custodian executed a release of both the shares and the accrued dividends relieving the C.P.R. from the inhibition to pay.

Notwithstanding this, the dividends on the shares in question—duly declared and paid to other shareholders—from the 1st October, 1914, to the 1st October, 1917—were not paid by the C.P.R. to the claimant until the 24th March, 1924,—and at the rate of exchange in United States

funds prevailing at that date when the rate had materially gone down. Hence the present controversy.

These dividends were payable in the United States, that is in United States funds, and the present shareholder claims the value of the same at the current rate of exchange on the 1st June, 1921, in United States funds, correspondent to and equivalent in Canadian currency. That is, an amount in Canadian currency as would, at that date (1st June, 1921), have been produced by the American dollar.

The release by the Custodian bears date the 11th May, 1921.

The relative position of the parties: the claimant, the C.P.R. and the Custodian, is clearly defined in the pleadings and admitted by the parties.

Now the question to be decided in the present case is at what rate of exchange these dividends should be paid. The exchange has greatly varied between 1914 and the date of payment by the C.P.R., which was on the 3rd March, 1924.

After careful consideration, I have come to the conclusion that the rate for conversion must be the rate ruling on the date when each dividend became due or payable to the Custodian—and not either the 1st of June, 1921, or the 3rd March, 1924. That is at the date of the breach or default, a sum in Canadian currency as would at that date have been produced by the American currency. *Barry v. Van den Hurk* (1); *Di Ferdinando v. Simon Smits & Co.* (2).

In other words there should be no discrimination as between the shareholders of the company. The C.P.R. was bound in law to pay these dividends to the Custodian as they from time to time became due and payable to its shareholders. (See secs. 24 and 27 of the Orders, 1916). Their unlawful conduct, their default in not complying with the law cannot change the relative position of the parties and cannot prejudice the rights of the claimant. A right in their favour cannot arise out of their wrong. Had the C.P.R. paid, as requested by the Custodian, they would have been relieved from all liability in that respect and the Custodian would, at the time of the release in 1921,

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(1) [1920] 2 K.B. 709.

(2) [1920] 2 K.B. 704; [1920] 3 K.B. 409.

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have paid the claimant the right amounts already deposited with him in accordance with the law. *Schon v. New York Life Insurance Co.* (1); *Peyrae v. Wilkinson et al* (2); *In re British American Continental Bank and Crédit Général Liégeois' claim* (3).

Now there remains the question of interest, a question of law, unsatisfactory as it is in view of numerous conflicting decisions and which is never free from difficulty.

Is the claimant, under the circumstances of this case, entitled to interest from 1921? By wrongfully withholding the payment of these dividends contrary to law and as requested by the Custodian, the C.P.R., as a consequence of such default, retained the use and forbearance of these moneys. *Hoare v. Allen et al* (4); *Maryland Casualty Co. v. Omaha Electric L. and P. Co.* (5). Demand in writing by the claimant was also made for the payment of these dividends in 1920, when the C.P.R. were still in possession of the money representing such dividends. Indeed when a company declares a dividend on its shares, a debt immediately becomes payable to each shareholder in respect of his dividend for which he can sue at law; but that does not make the company, as contended at bar, a trustee of the dividend of the shareholder. *In re Severn and Wye and Severn Bridge Ry. Co.* (6). Should interest be recoverable by way of damages for undue delay or for wrongfully withholding the payment of a debt? *Marsh v. Jones* (7); *Webster v. British Empire Mutual Life Soc.* (8); *Arnott v. Redfern* (9); *Meredith v. Bowen* (10); *Caledonia Ry. v. Carmichael* (11); *Barry v. Van Den Hurk* (12). See also 41 Can. L.T. 733, 737 and 738. *Goodchap v. Roberts* (13); *Boardman v. Lake Shore and Michigan S.R. Co.* (14); *The Queen v. Grand Trunk* (15).

(1) [1922] 63 D.L.R. 475.

(2) [1924] 2 K.B. 166.

(3) [1922] 2 Ch. D. 589.

(4) [1789] Dallas R. (2 U.S.) 102.

(5) [1907] 157 Fed. R. 514.

(6) [1896] 1 Ch. D. 559.

(7) [1889] 40 Ch. D. 563; 60 L.T. 610 c.a.

(8) [1880] 49 L.J. Ch. 769; 15 Ch. D. 169; 43 L.T. 229.

(9) [1826] 11 Moore 209.

(10) [1836] 1 Keen 270.

(11) L.R. 2 Sc. App. 56 (per Lord Westbury).

(12) [1920] 2 K.B. 709.

(13) [1880] L.R. 14 Ch. D. 49.

(14) [1881] (Sickels C. of A.) 84 N.Y.R. 157.

(15) [1890] 2 Ex. C.R. 132.

Where a defendant by unreasonable conduct has delayed payment, has deferred it beyond stipulated or reasonable time, a plaintiff prejudiced thereby may obtain from the court interest by way of damages. A defendant may be liable to pay damages in shape of interest or otherwise for not having paid them at the proper time, as said by Lindly M.R. in *Manners v. Pearson* (1); *Suse v. Pompe* (2).

By 3 and 4 William IV, ch. 42, sec 28, it is enacted as follows:

XXVIII. And be it further enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing; so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

Under the Ontario Judicature Act, as set out in Holmsted and Langton, 2nd ed., p. 148, is found, under sec. 114, practically the same enactment with citations thereunder, reading as follows:

144. (1) On the trial of any issue, or any assessment of damages, upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable.

See *Towsley v. Wythes* (3); *McCullough v. Clemow* (4).

"Debt or sum certain, etc." The Act requires that the contract shall ascertain the sum and the time; the certainty of both must appear from the contract. But still, if all the elements of certainty appear by the contract, and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, that will be sufficient. Per Lindley L.J. in *London, etc. S.E. Ry. Co.* (5); and *McCullough v. Clemow* (ubi supra).

Further on at page 149:—

As regards the rule followed by Courts of Equity in the allowance of interest, Bacon V.C. said, in *Spartali v. Constantinidi* (6); "I take the law of this court to be perfectly clear and distinct, and to have prevailed for centuries, that upon the wrongful withholding of a debt, the party who wrongfully withholds it is liable to pay interest upon that debt. A jury might always have given it, I do not say it did, but it might always have given it at law. But without reference to what a jury might do, this court has given it in numberless instances. See *Rodger v. Comptoir d'Escompte*

(1) [1898] 1 Ch. D. 581.

(2) [1860] 8 C.B. (N.S.) 538.

(3) [1859] 16 U.C.Q.B. 139.

(4) [1895] 26 Ont. R. 467, at p. 473.

(5) [1892] 1 Ch. D. 120 at p. 144; see also 1893 A.C. 429.

(6) [1872] 20 W.R. 823.

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de Paris (1); but it is said that as regards legal claims the Courts of Equity always followed the law; see per Lindley L.J. *London, Chatham & Dover Ry. v. South Eastern Ry.* (2); *Booth v. Leicester* (3).

See also *The Bahia and San Francisco Ry. Co.* (4); *Mackintosh v. G.W.R. Co.* (5);. See also *Hull and Selby Ry. Co. v. N.E. Ry. Co.* (6); *Alexandra Docks and Ry. Co. v. Taff Vale Ry. Co.* (7); *Dalby v. Humphrey* (8) 29 American Digest verbo Interest—56.

In the present case the sum is *certain*. It is the amount of these dividends as payable from time to time in American currency equivalent to the Canadian dollar which should have been deposited with the Custodian. 2. It is payable at a *certain time*. That is a *sum certain* payable at the time of the release in 1921. 3. The sum certain is payable by virtue of a *written document*. That is the release duly filed; and had the C.P.R. complied with the law, these dividends would have been in the hands of the Custodian at the date of the release and duly paid by him. It would seem that the case comes within the ambit of the first part of the section and entitles the claimant to interest. And besides there was a demand in writing made by him to the C.P.R. in 1920, after the termination of the war when the C.P.R. were still in possession of the moneys.

In re *Boardman et al v. Lake Sh. and M.S. Ry. Co.* (9), interest was allowed on deferred payment of dividends when an unlawful appropriation of the moneys which were applicable to the payment of the same was made.

For the reasons above mentioned, the claimant is entitled to recover the dividends in question at the rate of exchange ruling on the date when each dividend became due and payable to the Custodian, as required by law,—and with interest thereon from 1st June, 1921, in the shape of damages for wrongfully withholding, contrary to law, the payment thereof.

Failing the parties herein to adjust the matter among themselves, in accordance with the above finding, leave is hereby reserved to either party, upon notice, to apply to

(1) [1871] L.R. 3 P.C. 465.

(2) [1892] 1 Ch. D. 120 at p. 142.

(3) [1838] 3 My. and Cr. 459; 1 Keen 247.

(4) [1868] L.R. 3 Q.B. 534.

(5) [1864] 4 Giff. Ch. R. 683.

(6) [1854] 5 deG. M. & G. 871.

(7) [1911] 28 T.L.R. 163.

(8) [1875] 37 U.C.Q.B.R. 514.

(9) (Sickels C. of A.) 84 N.Y.R. 157, at pp. 186 & 190.

this court for further directions in respect of the same and to adduce evidence enabling the court to do so.

Judgment accordingly.

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