[1874-80] All ER Rep 1121

Smith v Anderson

Also reported 15 Ch D 247; 50 LJ Ch 39; 43 LT 329; 29 WR 21

COURT OF APPEAL

JAMES, BRETT AND COTTON LJ

13 JULY 1880

Company – Registration – Association of more than twenty persons – Trust – Trustees holding shares – Subscribers purchasing interests – Relationship regulated by deed – Legality – Companies Act, 1862 (25 & 26 Vict, c 89) s 4.

To render an unregistered company, association, or partnership illegal, within the Companies Act, 1862, s 4, held that there must be a joint relation of more than twenty persons for the common purpose of performing, jointly, a succession or series of acts such as to constitute a business, other than banking, which had for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof.

"Business" in the section was to be understood in the practical sense of the word as ordinarily used, and did not include an arrangement, the parties to which were not directly or indirectly to be parties to any contract. A mere subsidiary minor transaction, provided for under a trust deed, although it might result in gain, did not become a part of the object so as to bring the case within the section.

By a deed, reciting that divers persons had subscribed to purchase the scheduled securities (which were stock and shares of submarine telegraph companies of the nominal value of 420,000 pounds) and that 4,200 certificates were to be issued to subscribers, each certificate being in respect of 90 pounds subscribed, and providing that the holder was entitled to 100 pounds, part of the 420,000 pounds scheduled securities, and to the benefits under the deed, and reciting that, as part of the certificates, coupons of reversion, each providing that the holder would on the final division of the fund, after satisfaction of certificates and interest, be entitled to one four-thousand-two-hundredth part of the net profits of the trust, four persons, called "the trustees," covenanted with a fifth person, called the "covenantee" (on behalf of **all** the holders for the time being of the certificates) to hold the scheduled securities on the trusts of the deed. The annual produce was to be applied in payment of (i) expenses, including a limited remuneration to the trustees; (ii) interest at 6 pounds per cent, or, if an insufficient amount was available, proportionate division; (iii) in redemption of as many certificates as possible by purchase in the open market at not less than 120 pounds per certificate

or by tender from the certificate holders at not more than 120 pounds per certificate; (iv) in redemption of certificates to be selected by lot at 120 pounds per certificate. No certificate was to bear interest after withdrawal for payment or redemption. After redemption of **all** certificates, the securities remaining were to be divided among the coupon holders. The trustees might sell scheduled securities at a certain premium (but not otherwise unless expedient) the produce to be applied in the same manner as surplus income of annual produce (redemption by lot) or, with the consent of a special meeting of certificate holders, in re-investment in other securities to be held on the same trusts. Annual meetings of certificate holders were also to be held, and conducted according to Table A of the Companies Act, 1862, at which trustees' reports were to be considered, and auditors and new trustees appointed. Each new trustee might be required to enter into a new deed of covenant; and the deed contained the usual indemnity and other trust deed clauses.

Held: the arrangement was a trust, and there was not thereby created an illegal company, association, or partnership within the Companies Act, 1862, s 4.

Sykes v Beadon (1) (1879) 11 Ch D 170, and *Re Arthur Average Association for British, Foreign and Colonial Ships* (2) (1875) 10 Ch App 542, overruled.

R v Whitmarsh (3) (1850) 15 QB 600, approved.

Notes

The Companies Act, 1862, s 4, has been replaced by the Companies Act, 1948, s 434 (3 HALSBURY'S STATUTES (2nd Edn) 778).

Followed: *Wigfield v Potter (1881)* 45 LT 612; *Crowther v Thorley* (1884) 50 LT 43. Considered: *Re Siddall* (1885) 29 Ch D 1. Referred to: *Re Padstow Total Loss and Collision Assurance Association*, [1881-5] **All ER Rep** 422; *Re Faure Electric Accumulator Co*, [1886-90] **All ER Rep** 607; *Re Jones, Clegg v Ellison*, [1898] 2 Ch 83; *Re Macfadyen, Ex parte Vizianagaram Mining Co*, [1908] 2 KB 817; *IRComrs v Cornish Mutual Assurance (1924)* 41 TLR 70; *South Behar Rail Co v IRComrs*, [1925] AC 476; *Barclays Bank, Ltd v AG*, [1944] 2 **All ER** 208.

As to companies which must register, see 6 HALSBURY'S LAWS (3rd Edn) 83 et seq; and for cases see 9 DIGEST (Repl) 69 et seq.

Cases referred to:

(1) *Sykes v Beadon* (1879) 11 Ch D 170; 48 LJ Ch 522; 40 LT 243; 27 WR 464; 9 Digest (Repl) 72, 283.

(2) *Re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co* (1875) 10 Ch App 542; sub nom *Re Arthur Average Association, Ex parte Cory and Hawksley*, 44 LJ Ch 569; 32 LT 713; 23 WR 939; 2 Asp MLC 570, LJJ; 9 Digest (Repl) 71, 281.

(3) *R v Whitmarsh* (1850) 15 QB 600; 16 LTOS 108; 117 **ER** 586; sub nom *R v Whitmarsh, Re National Land Co*, 19 LJQB 469; sub nom *R v Joint Stock Companies Registrar, Re National Land Co*, 15 Jur 7; 9 Digest (Repl) 71, 277.

(4) *Cox v Hickman* (1860) 8 HL Cas 268; 11 **ER** 431; sub nom *Wheatcroft v Hickman*, 9 CBNS 47; sub nom *Cox v Hickman*, *Wheatcroft v Hickman*, 30 LJCP 125; 3 LT 185; 7 Jur NS 105; 8 WR 754, HL; 36 Digest (Repl) 435, 91.

Also referred to in argument:

Wallingford v Mutual Society (1880) 5 App Cas 685; 50 LJQB 49; 43 LT 258; 29 WR 81, HL; 10 Digest (Repl) 1176, 8193.

Bear v Bromley (1852) 18 QB 271; 7 Ry & Can Cas 507; 21 LJQB 354; 19 LTOS 60; 16 JP 710; 16 Jur 450; 118 **ER** 101; 9 Digest (Repl) 71, 279.

Moore v Rawlins (1859) 6 CBNS 289; 28 LJCP 247; 33 LTOS 205; 23 JP 566; 5 Jur NS 941; 141 **ER** 467; 9 Digest (Repl) 71, 278.

Duvergier v Fellows (1828) 5 Bing 248; 2 Moo & P 384; 7 LJOSCP 15; 130 **ER** 1056; affirmed (1830) 10 B & C 826; (1832) 1 Cl & Fin 39, HL; 10 Digest (Repl) 1175, 8184.

Appeal by the defendants from a decision of SIR GEORGE JESSEL, MR.

By an indenture, dated 6 Sept 1871, made between the defendants, Sir James Anderson, Sir Daniel Gooch, Bart, Marquis of Tweeddale (by his then name of Lord William Hay) Rear-Admiral (then Capt) Sherard Osborn, since deceased, and John Pender (therein called "the said trustees") of the one part, and the defendant Sir Philip Rose (therein called "the covenantee") for and on behalf of **all** the holders for the time being of the certificates thereinafter mentioned, of the other part, after reciting that divers persons had subscribed in or for the purchase by the said trustees of the stock, shares, and debentures of certain submarine telegraph companies, the particulars of which were set forth in the first schedule thereto, and that the said stocks, shares, and debentures had been transferred to, and then stood registered in the books of, the said companies respectively, and that it was intended to issue to the said subscribers 4,200 certificates in the form set forth in the second schedule thereto, a certificate of the nominal amount of 100 pounds being delivered in respect of every subscription for 90 pounds, and reciting that it was also intended to issue, as part of the said certificates, documents in the form set forth in the third schedule thereto, and thereinafter called "coupons of reversion," one of such coupons being delivered in respect of every subscription for 90 pounds, in addition to the said certificate of 100 pounds, it was witnessed that, for divers good considerations the said trustees thereunto moving, they, the said trustees and every combination and single one of them, for themselves and himself, did thereby covenant with the covenantee, his executors, administrators, and assigns, for and on behalf of **all** the holders for the time being of the said certificates:

1. That the said trustees, or the survivors or survivor of them, or the executors, or administrators of such survivor, and **all** new trustees to be appointed as thereinafter provided (thereinafter called the trustees) should hold the said stock, shares, and debentures so transferred (and thereinafter called the scheduled securities) and **all** annual produce thereof, on trust to give effect to the provisions of the deed.

2. That the annual produce of the scheduled securities should be applied - first, in payment of **all** expenses during the preceding year, but so that the ordinary expenses of the year 1871, or in any subsequent year, including **all** remuneration to the trustees

and auditors, and the bankers' commission for payment of dividends and redemptions, should not exceed 2,000 pounds; secondly, in payment of interest at 6 per cent per annum on the nominal amount of the certificates to the holders thereof for the time being; thirdly, in the redemption, as thereinafter provided, of so many of the certificates as the surplus income arising from the said securities should be competent to redeem.

3. That the trustees should make their payments of interest half-yearly, on April 15 and October 15 in every year, the first payment of interest to be for three months, and to fall due on 15 October 1871.

4. That if in any year the annual produce of the scheduled securities should, after payment of **all** expenses, be insufficient for payment of interest at 6 per cent per annum as aforesaid on the nominal amount of the certificates, the available moneys should be divided amongst the holders of the certificates pari passu, and the deficiency of such interest should form a first charge on **all** subsequent receipts, subject only to the annual allowance for expenses.

5. That the trustees should, as soon as conveniently might be after 15 April 1872, and thenceforward after April 15 and October 15 in every year, apply any surplus income remaining in their hands, after payment of such expenses and interest as aforesaid, in redeeming as many of the certificates as they should be able by either of the following methods, or partly by one method and partly by the other, to redeem: (i) by purchase of the said certificates in the open market, provided that

the price paid for each of the said certificates should be less than 120 pounds; (ii) by tender from the certificate holders for the redemption of the certificates held by them, provided that no tender should be accepted at a higher price than 120 pounds.

6. That notice of the intention of the trustees to receive tenders for the redemption of certificates should be given by advertisements in such newspapers as the trustees should select.

7. That if, at the expiration of any year after the redemption of as many certificates as possible by either or both of the methods, the trustees should have surplus funds applicable to the redemption of certificates, they should redeem, as thereinafter mentioned, as many certificates as such surplus funds should be competent to redeem, at the price of 120 pounds for each certificate.

8. That the certificates to be redeemed (as in the last clause mentioned) should be selected by lot in the presence of a notary public, the selection to be made on such day and at such place as the trustees should appoint, notice thereof being given in some London daily paper at least one week previously, and that any holder of a certificate might attend.

9. That the trustees or trustee present on each such selection should superintend the selection by lot, and the result of each meeting for selection should be recorded in a book which should be open for the inspection of the holders of certificates, and should be advertised in some London daily paper within three days following the actual selection.

10. That if any holder of a certificate shall so require, the notary public present at such selection shall make a statutory declaration of the result of such selection by lot.

11. That no certificate should carry interest after it had been drawn for payment, or after the acceptance of a tender for the redemption of such certificate had been notified to the holders thereof, whether its amount had been demanded and received by its holder or not.

12. That if any holder of a certificate drawn for payment should not demand and receive the amount thereof within six months from the date of such drawing, it should thereupon be advertised twice in a London daily paper, and, if not then demanded within six months from the date of such advertisement, the amount should not be payable till the final division of the fund.

13. That so soon as **all** the certificates should have been so redeemed, the securities then remaining subject to the trusts of the deed should be realised under the direction of the trustees, and the net proceeds thereof divided between the holders for the time being of the coupons of reversion in the proportion of the nominal value of the said coupons held by them respectively.

14. That if the undertakings of the submarine telegraph companies, or any of them, should during the continuance of the trust be purchased by or on behalf of Her Majesty the Queen, her heirs or successors, or any foreign government, the scheduled securities, or any of them, should be redeemed, and it should thereupon be decided by a unanimous resolution of the trustees at a special meeting that it was expedient to terminate the trust, such resolution should be confirmed at a meeting of the certificate holders, the trust should thereupon be terminated, and the securities remaining subject to the trusts should be realised under the direction of the trustees, and the net proceeds thereof, after satisfying interest, should be employed in the redemption of the certificates, and the remainder should be divided between the holders of coupons of reversion as above mentioned.

15. That **all** moneys received on account of the trust might, if the trustees thought fit, until the next time of distribution, be invested in the purchase of Exchequer bills, or be placed at a deposit account in the names of the trustees in the bank, and that any interest arising from such interim investment should be dealt with as part of the annual produce of the scheduled securities.

16. That the scheduled securities should be deposited in the names of the trustees and kept at the bank, and that the dividends and **all** other moneys paid on account of the securities should be collected and received by the bank.

*[**1874-80**] **All ER Rep 1121** at 1125*

17. That the trustees should keep proper accounts of **all** receipts and payments made by them, and of **all** other matters proper to show the position of the trust securities, and the manner in which the trustees performed their duties.

18. That the trustees, at their discretion, might sell any of the scheduled securities, if and when capable of being sold in the market, and that they should be sold by the trustees at a premium of not less than 30 per cent over the price at which the same were purchased or taken over by the trustees, and that the proceeds of such sale should be applied by the trustees as thereinafter provided.

19. That, except as in cl 18 provided, none of the scheduled securities should be sold or otherwise converted into money, unless at a meeting of the trustees called with express notice of the object, at which there should be present not less than four trustees, it should be unanimously resolved by the trustees present that it was expedient for the interest of the certificate holders that certain of the securities (to be specified in

the resolution) should be sold and converted into money or otherwise dealt with or disposed of.

20. That the produce of every sale or conversion as aforesaid should be applied in the same manner as the surplus income arising from the annual produce of the scheduled securities; provided always, that it should be lawful for the trustees, if it should be so decided by a unanimous resolution of the trustees, at a meeting called with express notice of the object, at which **all** the trustees were present in person or by proxy (such resolution to be confirmed at a meeting of the certificate holders summoned for that purpose by advertisement) to invest the produce of any such sale or conversion, or any part of the same, in the purchase of such securities, of the same character as the scheduled securities, as they should select for that purpose, and that **all** securities so purchased should be held subject to the trusts of the deed as if they had formed part of the original scheduled securities.

21. That the trustees might appoint a secretary and delegate to him such duties in connection with the trusts as they might think fit, including a power to sign documents on their behalf, and might pay to him such salary or other remuneration as, having regard to the total amount allowed for expenses, they might think fit.

22. That the trustees might deduct for the year 1871, and in every subsequent year, by way of remuneration to them for the trouble and responsibility undertaken by them, any sum not exceeding in the aggregate 1,200 pounds per annum.

23. That the trustees should once in a year, by advertisement in some two public daily newspapers published in London, call together a meeting of the certificate holders.

24. That at such meeting no person should be present who did not produce his certificate, and that persons should vote in proportion to the value of the certificates produced by them.

25. That the proceedings of the meeting should, so far as might be, be conducted in the manner prescribed in Table A to the Companies Act, 1862.

26. That the business of the meeting should be (a) To receive and consider a report from the trustees on the condition and affairs of the trust; (b) to appoint auditors to audit accounts, and report to the next meeting of certificate holders; (c) To elect new trustees to supply vacancies.

27. That each of the auditors should receive such annual payment, not exceeding 50 pounds, as the meeting appointing them should direct.

28. That if it should be unanimously decided by the trustees at a meeting called with express notice of the object, at which not less than four trustees should be present in person or by proxy, that any extraordinary expenses should be incurred, they might incur the same accordingly, subject to the same being confirmed by resolution of the certificate holders at any general meeting.

29. That trustees might vote by proxy.

30. That on death, incapacity, or retirement of a trustee the general meeting of the certificate holders by resolution might appoint a new trustee, and thereupon the securities, subject to the trusts, should be delivered into the custody as aforesaid of such new trustee jointly with the continuing trustees.

31. That every new trustee should, at the cost of the trust fund as one of its ordinary expenses, enter into a covenant with a covenantee to be named by the remaining trustees for the time being, for the acts of himself and his co-trustees, in the same manner and to the same effect as the covenant therein contained, and that on the delivery of such deed of covenant to the covenantee **all** liability of the preceding trustee or his estate should thenceforth cease.

32. That in the event of the general meeting of certificate holders so requiring, the trustees for the time being would, at the cost and expense of the trust fund as one of its ordinary expenses, enter into a deed similar to the present one with a new covenantee or covenantees, to be named by such general meeting.

33. That the trustee should not be under any obligation in any circumstances to sell, call in, or convert into money any of the securities, or to take any proceedings for the purpose of recovering or enforcing payment of any securities, or of the dividends or interest payable thereon, that they should be indemnified, etc (as in an ordinary trust deed) and that they might retain out of the trust funds **all** expenses sustained or properly incurred by them, and not thereinbefore expressly provided for, in carrying into effect the trusts.

The first schedule comprised a list of stock and shares in various telegraph companies, the nominal amount of the whole of which was 400,036 pounds.

The certificates were signed by the trustees, and were in the following form:

"The Submarine Cables Trusts. Certificate for 100 pounds. This is to certify that the holder of this certificate is entitled to the sum of 100 pounds, part of the nominal amount of 420,000 pounds forming the Submarine Cables Trusts, and to **all** the benefits secured to the holders of certificates by the deed of trust of which a copy is hereon endorsed."

The coupons of reversion were signed by the trustees, and were in the following form:

"The Submarine Cables Trusts. Coupon of Reversion. This is to certify that the holder of this coupon will, on the final division of the funds of the above-mentioned trust, after satisfaction of certificates and interest, be entitled to one equal four-thousand-two-hundredth part of the net proceeds of such funds in accordance with the terms of the deed of trust a copy of which is endorsed on the certificate to which the coupon is annexed."

The trustees issued a prospectus, inviting the public to subscribe money to purchase shares in the Submarine Cable Company. The plaintiff was a certificate holder, and in March 1879, he (on behalf of himself and **all** other holders of certificates) commenced the present action against the surviving trustees, alleging the sale and purchase of stock, shares, and debentures under the deed; that drawing by lot had taken place; that the Submarine Cables Trust was, and the defendants and the certificate holders were, contrary to law, an association consisting of more than twenty persons formed after the passing of the Companies Act, 1862, for the purpose of carrying on business that had for its object the acquisition of gain by the association, or by the individual members thereof, without being registered as a company under the said Act, or in pursuance of any other Act of Parliament, or of any letters patent, and without being a company engaged in working mines within and

subject to the jurisdiction of the Stannaries; and that the drawing by lot of certificates was illegal, and constituted the association an illegal association; and the plaintiff claimed that the trusts, or such of them as were not contrary to law, might be carried into execution under the direction of the court; that the stocks, shares, debentures, and other property of the trust might be divided between the plaintiff and the other certificate holders in proportion to the amount subscribed or paid by them, or otherwise according to their interests; and that the trustees might be restrained from drawing by lot for the purpose of purchasing certificates.

[1874-80] All ER Rep 1121 at 1127

The action came on for hearing before SIR GEORGE JESSEL, MR, who gave judgment for the plaintiff.

Chitty, QC, and Speed for the defendants.

Ince, QC, and CB McLaren for the plaintiff.

16 JULY 1880

JAMES LJ:

With **all** deference to the very clear opinion to the contrary, often repeated, of the Master of the Rolls, he has not put a construction on this Act of Parliament which I find it possible to concur in. The Companies Act, 1862, was no doubt intended to prevent mischief of some kind, the mischief being, as was very well put by counsel for the defendants, that arising from persons having contracts with fluctuating bodies, and not knowing who the persons comprised in such bodies were. Large trading undertakings carried on by large bodies of persons - fluctuating bodies - put persons dealing with them to very great difficulty and expense, and were a public mischief which required to be repressed.

That being the sort of mischief aimed at, what is it that the enactment has done? It enacts by s 4 that

> "No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any business other than banking that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof."

It is very difficult to my mind to understand what the difference is between a company and an association. My intellect is not capable of comprehending the difference. The word "association" in effect, though it is now commonly used, is, speaking etymologically, an inaccurate word. "Association" does not describe the thing formed; but, properly and etymologically, describes the act of associating together, from which act of associating there is formed a company or partnership, or a body of what counsel for the plaintiff called socii. But I believe the difference or what was meant as the difference, according to the vernacular we use in these things, between a company or an association and an ordinary partnership is this: an ordinary partnership is a partnership composed of definite individuals, bound together by contract between themselves, to continue for

some joint object either during pleasure or during a limited time, the partnership being essentially composed of the persons originally entering into the contract with one another. A "company" or "an association," which words I take to be synonymous, is an arrangement by which parties intend to have a partnership which would be constantly changing, that is to say, to have what I may call a succession of partnerships - a partnership today consisting of certain members, a partnership tomorrow consisting of some of those members only and some others who have come in, there being a constant shifting of the partnership, a determination of the old, and a creation of a new partnership - formed with a view, and always formed with the intention, so far as the contracting parties can by agreement between themselves, that the new partnership shall take on itself the assets of the old partnership; an object which could not be effected in point of law by any arrangement between the persons themselves, unless the persons contracting with them, by a novatio, authorised the change, or unless the change was authorised by special provisions in Acts of Parliament, which have given sanction to such arrangements, and, to a certain extent and under certain circumstances, have allowed the change to be effected.

That is the sole distinction between a "company" or "association" and a "partnership." But the Companies Act, 1862, s 4, provides that

> "No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any business."

The trust deed before us is said to constitute an association of more than twenty persons formed after the commencement of this Act "for the purpose of carrying

on any other business." I am unable to agree with the Master of the Rolls in the conclusion that the present case comes within any part of that section. I cannot find in this arrangement any association whatever between the persons who are supposed to be socii. I cannot conceive how anything can be a company or association unless there are persons of whom that company or association is formed. Here one man goes with 100 pounds in his hands and buys from the trustees who have got the property in them a 100 pounds certificate with **all** the chance of profit attaching to it. Another man goes the next day and takes his 100 pounds to the same people, and gets from them another certificate, by which he gets from them a right to share in the funds which they have got in their hands. The first man knows nothing of the second, and the second knows nothing of the first; they have never come into any arrangement whatever as between themselves. There never has been anything amounting to any mutual right or obligation as between them. The man who takes it today, or who may have it today, and the man who took it yesterday, and who may be selling to somebody else a week hence, are, from the first, entire strangers, who have entered into no contract whatever with each other, and have not entered into any contract with the trustees, or with any trustee on behalf of the other, there being nothing pointing to any mandate or delegation of authority to anybody to act for the shareholders between themselves, and nothing, as it appears to me, by which any liability could ever be cast on the shareholders, either as between themselves, or as between themselves and anybody else.

This is no more an association within the meaning of the Companies Act, 1862, s 4, than the persons who subscribe for railway debentures, or the Bolivian bondholders, whom we have recently had before us, or creditors in *Cox v Hickman* (4) were an association. Persons who have no mutual rights and obligations do not, according to my view, constitute an association because they happen to have a common interest, or an interest generally, in something which is to be divided between them. But going beyond that, it does not appear to me that it can, in any practical sense of the word, in any sense in which any man of business would use it in dealing with this thing in the city or anywhere else, be said that the persons in this case were formed for the purpose of carrying on any business. The association, that is to say, the body of subscribers, or the body of certificate holders, do not, as it appears to me, carry on any business by themselves or by any agent. I am unable to conceive any state of circumstances in which the law would give any right to the body of shareholders as such, or fix any liability on them as such. I cannot conceive any state of circumstances in which it could be averred that any contract had been made by or on behalf of the body of certificate holders,

either by any member of themselves or by any agent or manager for them. I cannot conceive how people can be said to carry on business when they cannot enter into contracts. They can hardly be said to carry on business when it is utterly inconsistent with what they have done, with what they have said, and with the whole arrangement, that they should be parties directly or indirectly, either themselves or through any agent for them, to any contract, or be liable for any act of misfeasance or neglect of any manager, agent, or servant.

They could not employ a servant. What is the business? If there is any business at **all** it is to be carried on by the trustees. Whatever is to be done is to be done by the trustees. The Master of the Rolls considered that these trustees were, in substance and in law, shareholders. With **all** deference to the Master of the Rolls, I cannot help thinking that the whole fallacy of his judgment arises from that fallacy. To my mind the distinction between a director and a trustee is an essential distinction. It lies in the very nature of things. A trustee is a man who is the owner of the property - the principal who deals with the property as principal, as owner, and as master-subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his cestuis que trust. The same individual may fill the office of director, and of trustee having property, but that is a rare, exceptional, and casual circumstance. The office of director is that of a servant. He may be called a director, but, as

between himself and the company, he is a paid servant. He never enters into a contract for himself; he cannot sue; he cannot be sued unless he exceeds his authority, when he may be sued as any other agent might, but he enters into contracts for his principal, and that principal is the company of which he is a director, and for which he is acting. That seems to me to be the broad distinction between the two.

Then, supposing that what is to be done here is to be done by trustees, is what the trustees are to do under the deed a business? In my opinion it is not. There is nothing to be done which comes within the ordinary meaning of "business," and nothing more than what is done by trustees under a marriage settlement who have large properties vested in them, and who have very extensive powers of disposing of and changing investments, selling them, and re-investing the money, according to their discretion and judgment, with or without the consent of their cestuis que trust. There is here over 400,000 pounds worth of stock of a particular kind, and I can easily conceive that a millionaire or some other rich person in this country might have 400,000 pounds of similar securities, and might vest them in his trustees with every trust which is contained in this instrument, with every power and every control. Everything would be as applicable to that trust as it is applicable to the trust contained and expressed in the instrument before us. No doubt there is power in cll 18, 19 and 20 of disposing of the investments, and of selling and re- investing in some security with the assent of the certificate holders. It is no more than a power to be exercised with the consent of a general meeting (which would be quite as well expressed in an ordinary trust deed) of the cestuis que trust themselves. This seems to be a trust deed of property for a good investment spread over a great number of things in order that the one may equalise the other, so that persons who choose to invest their money in this way may avail themselves of that, which I believe is one of the most certain things in this world of **all** uncertain things, and which is called "the doctrine of averages." Out of a certain number of things of this kind some will lose and some will gain, some will pay large dividends and some will pay small dividends; and it appears to me that the object, and the legitimate object, of the persons who were invited to join in this company was to have an investment of their money under such circumstances that they might look for a high dividend with a very considerable security for the capital which they were investing.

I can see nothing like an attempt at evading the Act, or avoiding it, of creating anything but what the deed, on the face of it, purports to be - a mode by which people are to make their investments with security, and so as to produce a high rate of dividend. Under those circumstances, I am of opinion that the judgment of the Master of the Rolls must be reversed.

BRETT LJ:

In this case it is necessary to construe the Act of Parliament carefully, and in so doing one is obliged to consider almost every word, and almost every phrase, in it, and, as one has often to do, to translate, if possible, into the most accurately scientific form, idiomatic English which is not, even in an Act of Parliament, used in its strictly grammatical sense, but in a business sense.

The Companies Act, 1862, s 4, is in a negative form, and it begins by saying that:

> "no company, association, or partnership, consisting of more than twenty persons shall be formed."

To bring a case within these words there must be a joint relation of more than twenty persons for a common purpose, which common purpose must be the performing jointly of a succession of acts. It will not be sufficient if the relation existed for a purpose which is to be completed by the performance of one act. The persons must also be so related as to form a company, or a partnership, or an association. I have some difficulty in seeing at this moment what would be an association for the purpose of carrying on a business which would be neither a company nor a partnership, but I should be sorry to say that, by the ingenuity of men of business,

there may not some day be formed a relation among twenty persons which may not be strictly either a company or a partnership, but still be an association. It must, however, according to **all** ordinary rules of construction, if not, strictly speaking, a company or a partnership, be an association of a similar kind. It must be a relation established between twenty persons for the purpose of carrying on business. It is well known that the phrase "for the purpose" is an English idiom, but here it means "in order that" such company, association, or partnership, shall carry on a business. The business is to be carried on by those twenty persons, or by more than twenty persons, whatever may be the meaning of that word "business." The words "for the purpose of carrying on a business" exclude the case of an association for doing one particular act which is never to be repeated. "Carrying on" implies a repetition of acts, or a series of acts, and the series of acts must be such as to constitute a business.

There are many things which everybody understands to be a business. There may be new businesses which at the present time are not known. But the word "business" might, in a grammatical sense, have been made to include something which no ordinary person would call a business, and inasmuch as the legislature did not desire to use the word in so large a sense, and did not wish to recapitulate in terms every kind of business, they used words confining the meaning of that large word, "business" to a certain style of business, viz, that which has for its object the acquisition of gain. Gain is to be the result of the business - not of one particular act, but of a series of acts which forms a business. When the gain is acquired, it is either a gain by the company, association, or partnership, or a gain by the individual members thereof. Where the gain is to be distributed with reference to the former description of the congregation of persons, as where there is a company (which is a joint-stock company, a corporation, or a quasi corporation) and the individuals are mere shareholders, the gain acquired by the business carried on by such a company is a gain by the company, and is not by the individual shareholders. But where there is an ordinary partnership, or an association

which, not being a joint stock company, or a corporation, is like a partnership, the gain is not by the whole body as distinct from the individuals, but by each individual partner.

The point to be considered, however, is, whether there is any association of persons for the purpose of carrying on a business at **all** within the meaning of the section; ie, whether the persons are carrying on a business which, if successful, is to result in the acquisition of gain. If any set of persons here can be said to be within the category described, who are those persons? I cannot agree with the statement of the question which was laid down by the Master of the Rolls in *Sykes v Beadon* (1). He said that the point which he had to consider was, whether the thing was an association or company formed for the purpose of gain either by the association or by the individual members thereof - whether it was an association or company formed for the purpose of gain. But he omitted to state that the question was whether there was an association or company formed for the purpose of carrying on a business, because, according to his view, it would be immaterial whether the gain was to be a gain which was to be the result of a business, or whether it was not. He seems to me to have left out those words which I think were purposely put into the statute for a definite object, viz, to deal not with people who were associated together for the purpose of obtaining gain, but with people who were associated together for the purpose of carrying on a business.

If there were in the present case any persons at **all** who were associated for the purpose of carrying on any business such as is described in this section, they must have been either the trustees or the certificate holders. I will first consider the case of the trustees. They were not, as I construe the deed, to enter on a series of acts, which acts, if successful, would obtain a gain. They were joined together for the purpose of, once for **all**, investing certain money which was delivered into their hands, and not by a repetition of successful investments to obtain gain. They were not associated together for the purpose of speculating in shares. That was not their business. There was no reason why, when they had once made an

investment, it should ever be changed. Therefore, it seems to me that the primary and substantial object of their associating together was not for the purpose of carrying on a business which, if successful, would result in the acquisition of gain. It is true that, under a very subsidiary state of circumstances, which is described in cl 20, it might be said that what they would have to do would result in a gain. But even if that be so with regard to the transactions under cl 20, which I doubt, yet that is a subsidiary, and not a substantial part of what the trustees had to do. If what they have to do, as the substantial object of the deed, is not a business, the subsidiary part is not a part of their business.

In several cases, including *R v Whitmarsh* (3) it was decided that a mere subsidiary, minor transaction, described in the deed, does not become a part of the object, so as to bring the case within the statute. If the trustees themselves were formed for the purpose of carrying on a business within the meaning of the section, they were not acting illegally within the meaning of the section, because they are not of the number of twenty.

Now, I come to the case of the certificate holders. Even if what had to be done was to be done by their agents, they were not associated for the purpose of carrying on such a business as here described, and for the reason that, even if what had to be done was done by agents of theirs, what had to be done was not to be a series of acts by which, if successful, they would obtain gain. Even supposing there was a business, the certificate holders were not the persons who were to carry on that business, or by that business to obtain gain.

That again raises the question whether the persons here carrying on the business were carrying it on for the certificate holders, or were carrying it on otherwise than for them. I take it that the persons who are called trustees are clearly such, and not agents, and therefore are not directors in the ordinary sense of the term. The distinction has been pointed out by JAMES, LJ, and I entirely agree with it. If one could see that the persons were merely called trustees, but that the duties which, under the deed, they had to perform were

really the duties of directors, then, although called trustees, the legal effect of the deed would be to make them directors. If these so-called trustees were trustees, the certificate holders, if associated, were not associated for carrying on the business, or what is said to be a business, producing gain. They could not have been made liable for any contract made by these trustees. It was of course urged, and very naturally urged, that they would be liable as undisclosed principals. But that is assuming that the persons who made the contracts are their agents authorised to bind them by their contracts, which is obviously incorrect. The business is not carried on by those persons, and it never can be where those who are to carry on the business are bona fide trustees, and not agents or directors. If there is a business which, if carried on by anybody, would be within the section, it is not carried on by the certificate holders, the cestuis que trust, who are the people who are said to be of a larger number than twenty, but by the trustees, who are not of the number of twenty. The case therefore is not within the statute according to either view.

That being so, I venture, with great deference, to differ from the Master of the Rolls. It seems to me that the view which I have taken of the statute carries with it also the implication that one does not agree with the decision of the Master of the Rolls in *Sykes v Beadon* (1).

Another case which has been mentioned is *Re Arthur Average Association for British, Foreign and Colonial Ships* (2). It is not, perhaps, absolutely necessary to determine whether that case, which related to a mutual assurance association, is within the statute, but I cannot help saying that it appears to me that the reasoning which brings me to the conclusion that the present case is not within the statute would bring me, as at present advised, to the same conclusion with regard to the case of a mutual assurance association. I cannot think that there is any business which is a business carried on in order to obtain a gain either for the association or for the individual members of it, within the meaning of the Companies Act, 1862. I am inclined to think that this is a true proposition, that no

transaction within the association or company, between the members of it, can be taken into consideration in order to determine whether the company or association was one formed to carry on a business within the meaning of the section.

COTTON LJ:

What we have to determine is, whether this is an association, company, or partnership within the meaning of the Companies Act, 1862. In my opinion, subject of course to one's general knowledge of the Act, it turns on s 4 of that Act. Section 21 has been referred to, but I do not think that has any material bearing on the question which we have to consider, because the companies which are referred to in s 21 might register under s 6 of the Act. What we have to consider is, not whether the persons under this trust deed, as I call it for the sake of shortness, could register under the Act, but whether they are bound to do so, and in default are an illegal association.

In arriving at the construction of the particular portion of the section on which the question turns, it is well to observe that the section begins with a restriction as to companies carrying on a well-known business, viz, the business of banking. Then comes a clause on which the question turns, which is to apply to companies other than banking companies, with certain exceptions; and that is material, because we have, without any refer-

ence to gain or anything else, a description of the business which companies mentioned in the first part of the section are formed to carry on.

In the second part of the section which we have to consider, we have in substance reference to companies carrying on any "other" business, with this qualification, that the business must be one for the acquisition of gain by the company, association, or partnership, or by its members; and that, in my opinion, shows that those words of this section, "for the purpose of carrying on any other business," or, if you like to leave out "other," "for the purpose of carrying on business which has for its object the acquisition of gain," are material and not to be disregarded, and that you cannot properly read this section as a section saying simply "any other association having for its object the acquisition of gain." In my opinion, to bring the case within the section, there must be a company, association, or partnership, which, by itself or its agents, is carrying on a business. The company, association, or partnership must be formed for that purpose. If it is formed for that purpose, before it carries on any business it must register, if within the Act. It is the forming of an association for a purpose which is struck at by the Act, and the purpose is in the first instance that of carrying on a business. Then the nature of that business is defined. It is not banking. Banking business is excluded. It must be a business having for its object the acquisition of gain by the company.

I do not think it is very material to consider that much vexed and contested word "association," and how it differs from "company" or "partnership"; but I think one may say that "association," if it is here intended to differ from "company" or "partnership," must be judged by the two companions between which it stands, that it must be something where the associates are in the nature of partners. It might have been intended to hit the case, which one has frequently seen, of a number of persons or a number of firms joining themselves together for the purpose of carrying on a particular adventure in order to make gain by it, as is very common; as for instance, where firms, one in London, another in Liverpool, and another in the East Indies, join together, the one to carry on the one part of the business, and the other to carry on the other - one partnership to get the orders, or to order and see what goods shall be selected, and the other to manufacture them, and the third when they are imported to India to sell them.

Is this "conglomeration," as I will call it, of the persons who subscribe their money under this trust deed, an association formed to carry on any business within the meaning of the section having for its object the acquisition of gain? The effect of the deed, as I understand it, is a provision enabling a large sum of money, found by various persons, to be invested on a large aggregate of securities of a particular class, and of so large an amount as to give a fair average in that particular class

of security. It was obvious, on the doctrine of averages referred to by JAMES, LJ, that the investments being securities which, as a whole, produce large profits, though some may not produce profit, by taking a large number as investments just as any private individual might have done if he had a large fortune and liked to invest it in that way, in the result there would be a large sum to be divided, arising, not from any particular investment, but from the whole of the investments, and when the parties liked to sell, having this large aggregate including so many of the particular class giving a general average, their money would be returned to them with a profit, as those things, when once successful, do go up in price. But there is something more. The investments were made in the names of trustees for a large number. It was necessary to make provision for their conduct, as to how decisions were to be come to by the body of certificate holders, as to what was to be done with respect to the general business of the trust. Moreover, it was incident to this trust that there should be sometimes a change of investment. That is incidental to every trust, and provided for in ordinary trusts. Here we have, no doubt, a provision which at first sight is one which appears like carrying on a business. I refer to cll 18 and 20. But, as regards the transactions carried on by somebody, if it appeared that the real object was that the trustees should speculate even in this particular class of investments, the case would have stood in a very different position. There is nothing of that sort. The deed is not a provision that the trustees shall make a profit by selling and buying again securities of this class whenever, in their opinion, the turn of the market makes it advisable so to do. But it is in substance a trust deed, a deed providing how they are to hold, as trustees, securities of a large amount, with incidental provisions, enabling them, in certain

events, to sell some of the securities, and enabling them, when that is done, but only under special circumstances, not to speculate, but to reinvest.

In my opinion, that is not carrying on a business within the meaning of the Companies Act, 1862. It is a trust, a holding of trust property with certain provisions, and with such provisions only as are necessary, as a matter of practical business, in order to enable that to be done. But we have to consider not only that, but whether there is any association of persons more than twenty in number who are carrying on business by themselves or their agents. It was argued by counsel for the plaintiff that the mere fact of these persons putting money, without any contract or communication with each other, into a bank to a common account, to be invested by the trustees under the trusts of the deed, was an association carrying on business for the purpose of gain, that would not be carrying on business. They may do it for the purpose of profit, but most persons, when they invest their money, do it for the purpose of profit; that is to say, they expect they will get a profit either in the shape of dividends, or probably that it is an investment which will go up, and will produce a profit when, hereafter, they wish to realise.

How can it be said that the association, by themselves or by their agents, carry on a business? That they do it by themselves, I think, can hardly be contended. It was, however, and I will deal with the contention. **All** the power which the subscribers of this money had, was to attend sometimes at the meetings, and the meetings which were held most usually are provided for in cl 26. The only business was to receive and consider a report from the trustees on the condition and affairs of the trust, to appoint auditors to audit the accounts, and to elect new trustees to fill any vacancy in their body. It is impossible, in my opinion, to say that the certificate holders are by themselves in any way carrying on any business. That is simply receiving the accounts of the trustees, which ordinary cestuis que trust do without being supposed to carry on any business. It is exercising a power contained in every well-drawn trust deed - the power of appointing new trustees. How can it be said that, if there was a business to be carried on by the trustees in any way, the certificate holders are, by themselves, at those meetings, carrying on a business? **All** that cl 20 gives to the certificate holders is the power to assent, as cestuis que trust usually assent, when competent to do so, and not incapacitated

by infancy or otherwise, to a change of investment. Of course the number of cestuis que trust makes it necessary that those who are actually present may bind those who are absent, otherwise the assent of the cestuis que trust could never be effectually obtained or given; and therefore the deed takes a form which we find no doubt in a trust deed or articles of association of trading companies with reference to the meetings of the partners or socii. But here that is only the form. Here they are cestuis que trust meeting to give their assent, not members of the partnership joining to carry on and control the business of the partnership, even if this were a business carried on by the trustees.

Can it be said that the certificate holders carry on a business by their agents? In my opinion that cannot be maintained. The trustees here are the only persons who are dealing, and they are dealing, not as agents for some principal behind, but as trustees in whom the management of the property is vested, and who have the power of changing the investments and securities. It is just like the case, which often occurs, where executors or trustees under a will are directed to carry on a business. The fact that they are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal. They deal with those persons as the only persons contracting with outsiders; that is to say, those who deal and contract with them hold the trustees or executors as personally liable. The outside dealers have no right whatever, as against the persons beneficially interested, the cestuis que trust, to make them directly liable, or, possibly with the excepted case of a testator having directed a part of his assets to be employed in the trade, any claim whatever against the assets of the testator. Those dealing with executors so carrying on a business deal with them as persons ordinarily carrying on business. They look to no one else. But they do look to the executors, and even although the executors have a right of indemnity if they act properly, that in no way affects or enlarges the contracts which they enter into with third parties in carrying on a business. So far as there is any contract here to be entered into by the trustees, it is only a change of investments. So far as there is any business to be carried on, it is the business of the trustees, not as agents for principals behind,

but their own business; that is to say, the business in which they contract as solely liable to outsiders, whatever may be their rights as against those for whom they are trustees.

In my opinion, therefore, in this case the only alleged association of more than twenty persons being the persons who have contributed their money, they are not by themselves or their agents carrying on any business whatever. That cannot be said to be in any way an association hit by this Act. Of course, if the trustees are carrying on a business for the purpose of profit, there could be no objection under the Act to their doing so, as they are under the number of twenty. In my opinion, the view which the Master of the Rolls took cannot be maintained.

Appeal dismissed.

Reported by FRANK EVANS, ESQ, Barrister-at-Law.