

1962

State of Utah v. Lake Hills : Brief of Respondent

Utah Supreme Court

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A. Pratt Kesler; Raymond W. Gee; Attorneys for Respondent;
Backman, Backman & Clark; Attorneys for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, for and on behalf
of the UTAH STATE SECURITIES
COMMISSION,

Plaintiff-Respondent,

-vs-

LAKE HILLS, a Utah corporation,
Defendant-Appellant.

Case No.
9695

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S. P. 6-1962

BRIEF OF RESPONDENT

Salt Lake County Court, Utah

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Ray Van Cott, Jr., *Judge.*

A. PRATT KESLER
Attorney General
RAYMOND W. GEE
*Chief Assistant Attorney
General*
State Capitol
Salt Lake City, Utah
Attorneys for Respondent

Backman, Backman & Clark
1111 Deseret Building
Salt Lake City, Utah
Attorneys for Appellant

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STATE OF UTAH, for and on behalf
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-vs-

LAKE HILLS, a Utah Corporation

Defendant-Appellant.

Case No.
9695

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action against the defendant, Lake Hills, for an injunction precluding the public sale or attempted sale of its Class C interest debentures (Exhibit 3) and its Thrift Plan Certificates (Exhibit 4) unless registered with the Utah Securities Commission.

DISPOSITION IN LOWER COURT

The lower court granted summary judgment and an injunction as prayed by the State of Utah, plaintiff. The summary judgment was granted on stipulated facts, exhibits and the pleadings.

RELIEF SOUGHT ON APPEAL

Defendant-Appellant prays for reversal of the decision, and judgment in its favor as a matter of law.

STATEMENT OF FACTS

The Plaintiff-Respondent is in substantial agreement with the statement of facts set forth in the brief of appellant. However the respondent has not stipulated that no part of the earnings of Lake Hills inures to the benefit of any private stockholder or individual. This is a factual matter, unresolved by this litigation. For purposes of this appeal, it is true that judgment was granted in favor of the respondent, even assuming the validity of appellant's assertion in this respect.

For clarification, following the filing of the complaint in this action and responsive pleading, the defendant, Lake Hills, indicated and gave assurance of no sales of the instruments; the case was, therefore, in abeyance until Lake Hills expressed intent to issue the instruments and both parties, therefore, desired resolution of the matter.

The defendant intends to sell to the residents of Utah pursuant to public sale its Class C interest debentures (Exhibit 3) and Thrift Plan Certificates of Obligation (Exhibit 4). The sole question involved in this matter is whether these instruments must be registered with the Utah Securities Commission before such offering.

ARGUMENT

POINT I

THE CLASS "C" DEBENTURES AND THRIFT PLAN CERTIFICATES OF OBLIGATION OF DEFENDANT ARE "SECURITIES" AS DEFINED IN THE UTAH SECURITIES ACT.

Section 61-1-4(1), Utah Code Annotated 1953, as amended, provides in part:

"When used in this chapter the following terms shall, unless the context otherwise indicates, have the following respective meanings:

"(1) 'Security' shall include any note, stock treasury stock, bond, debenture, or evidence of indebtedness; * * *."

Exhibit 3, on file herein, denominated as Lake Hills Class C "interest debenture" falls within the foregoing statutory definition.

A "bond" has been defined as: "A certificate or evidence of debt;" "A debt on which interest is paid;" "A written obligation," etc. Black's Law Dictionary, Bond, p. 224; 11 C.J.S., Bonds, p. 398.

The word "debenture" partakes of several common definitions, including: "Any instrument (other than a covering or trust deed) which either creates or agrees to create a debt in favor of one person or corporation, or several persons or corporations, or acknowledges such debt." Black's Law Dictionary, Debenture, p. 489; see also 25 C.J.S., Debenture, p. 1301.

The Lake Hills Class C interest debenture involved in this case falls within the definition of "bond," "deben-

ture” and is also an “evidence of indebtedness.” The instrument is, therefore, a “security” under the statutory definition in Section 61-1-4, Utah Code Annotated 1953, as amended.

Exhibit 4, denominated, “Lake Hills Thrift Plan Certificate of Obligation,” is by its terms an “evidence of indebtedness,” denoting an obligation of the corporation in favor of the holder. It likewise follows that this instrument is a “security” under the statutory definition set forth in Section 61-1-4, Utah Code Annotated 1953, as amended.

Despite the statutory definition aforementioned, defendant apparently claims that an instrument is subject to securities regulation only if it meets the statutory definition and *in addition* is dealt with commercially and participates in the earnings or profits of the issuer.

The authorities cited by defendant in support of his position have application to those statutory definitions of “securities” which are of the catch-all variety and might be susceptible of several meanings, some of which have no relationship or similarity to instruments generally deemed “securities.” Such phrases as “investment contract” or the Utah statutory catch-all “and any other instrument commonly known as a security,” (See Section 61-1-4, U.C.A. 1953), may well require the analysis defendants contend.

However, in the case of a bond, debenture, or evidence of indebtedness of the type in question, the statutory definition is clear in its inclusion—and the instruments fall within the generally accepted defini-

tions of "bond," "debenture," or "evidence of indebtedness."

In any event, the instruments involved here are to be offered the public and are dealt with commercially. Although a debenture or bond does not participate in the earnings or profits of the corporation as may equity securities, the bonds and debentures in this case do represent an investment of funds with a view to receiving a profit, income, or return through the efforts of other than the investor for the use of his money, for the payment of interest to the holder of the bond constitutes such a profit, income, or return.

POINT II

DEFENDANT'S DEBENTURES AND CERTIFICATES OF OBLIGATION ARE NOT EXEMPT UNDER SECTION 61-1-5(5), UTAH CODE ANNOTATED 1953.

Defendant claims Exhibits 3 and 4, if securities, would be exempt under Section 61-1-5(5), Utah Code Annotated 1953. That section provides:

"Except as otherwise expressly provided, the provisions of this chapter shall not apply to any of the following classes of securities:

"(5) Any security issued by a corporation organized exclusively for educational, benevolent, fraternal, charitable or reformatory purposes and not for pecuniary profit, no part of the net earnings of which inures to the benefit of any private stockholder or individual."

The original Articles of Incorporation of defendant are set forth in Exhibit 1 and the amended Articles of Incorporation in Exhibit 2. The amended Articles of Incorporation of Lake Hills indicates the corporation is organized to purchase, lease or otherwise acquire, own, operate, manage and conduct one or more cemeteries for the disposition of the human dead. Other purposes or powers of the corporation are incidental to or in furtherance thereof. Clearly, as shown in its articles, the corporation is not organized *exclusively* for educational, benevolent, fraternal, charitable, or reformatory purposes. It, therefore, follows that the exemption of Section 61-1-5, Utah Code Annotated 1953, *supra*, is inapplicable to defendant.

Defendant apparently appeals to its by-laws and proposed operations, as set forth in its brief, pp. 10-14, for support of its conclusion that the exemption aforementioned is applicable. However, the "act of incorporation is a compact between the corporation and the sovereignty whence its powers came, * * * ." *Petition of Collins-Doan Co. (N. J.)*, 70 A.2d 159, 13 A.L.R. 2d 1250. See also *Garey, et al. v. St. Joe Mining Co.*, 32 U. 497, 91 P. 369; 13 Am. Jur., Corporations, pp. 221-222. Therefore, since the powers of a corporation are derived from the sovereignty or law of its creation, it is fundamental that no by-law or other unilateral action of the corporation can extend or enlarge those powers. 13 Am. Jur., Corporations, pp. 288-289.

The purposes and powers of defendant Lake Hills are those set forth in its corporate charter, and such purposes and powers show that the corporation is *not*

organized exclusively for educational, benevolent, fraternal, charitable, or reformatory purposes. We submit that the cases of *Lexington Cemetery Co. v. Commonwealth, ex rel Unemployment Compensation Commission* (Ky.), 181 S.W. 2d 699, and *Proprietors of Cemetery of Mt. Auburn v. Fuchs* (Mass.), 25 N.E. 2d 759, are further support for the proposition that Lake Hills is not a "charitable" institution within the scope of Section 61-1-5(5), Utah Code Annotated 1953, and by the same reasoning as set forth therein, Lake Hills would not qualify as an educational, benevolent, fraternal, or reformatory institution. See also in this connection Black's Law Dictionary and Words and Phrases: sub verbo; Educational; Benevolent; Fraternal; Reformatory.

Defendant makes some point of its exempt status before the Federal Internal Revenue Service. We submit this status before a federal agency as immaterial to the problem at hand. Moreover, the exempt tax status undoubtedly results from the fact that defendant is a cemetery company. See Title 26, Section 501(c)(13), U.S.C.A. . If anything, this is further indication that Lake Hills is organized for the purpose of conducting or operating a cemetery and not for the purposes authorizing exemption under Section 61-1-5(5), Utah Code Annotated 1953.

POINT III

DEFENDANT'S SUBJECTION TO CHAPTER 11, LAWS OF UTAH 1955, DOES NOT EXEMPT IT FROM THE PROVISIONS OF THE SECURITIES ACT.

Defendant argues the inapplicability of the Utah Securities Law because the Legislature in 1955 enacted an act governing the operation of cemeteries and the

entrusting of endowment care funds. Chapter 11, Laws of Utah 1955. We submit that act and Chapter 1, Title 61, Utah Code Annotated 1953, as amended, are not in conflict, and both applicable to defendant. Chapter 1, Title 61, Utah Code Annotated 1953 concerns itself with fair and full disclosure regarding the issuance of securities; Chapter 11, Laws of Utah 1955, (8-4-1, et seq., U.C.A. 1953, as amended) relates to entrusting of endowment care funds and the operation of cemeteries. The funds received from the sale of the interest debentures and certificates of obligation of defendant are not regulated by Chapter 11, Laws of Utah 1955, nor is any regulation of such instruments contemplated by that statute.

CONCLUSION

The summary judgment in favor of the plaintiff and issuance of the injunction against the sale of securities of defendant should be affirmed.

Respectfully submitted,

A. PRATT KESLER

Attorney General

RAYMOND W. GEE

Chief Assistant Attorney General

Attorneys for Respondent