1927
*Nov. 3.
*Dec. 16.

O. E. VARETTE (DEFENDANT) .... APPELLANT;

AND

S. SAINSBURY, I. W. C. SOLLOWAY, C. A. GENTLES AND D. M. HOGARTH (PLAINTIFFS) .... RESPONDENTS.

AND

TREMOY LAKE SHORE MINING SYNDICATE .... (DEFENDANT).

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

New trial—Discovery of new evidence as ground for

A new trial, applied for on the ground that new evidence has been discovered since the trial, should be granted only where the new evidence proposed to be adduced could not have been obtained by reasonable

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

diligence before the trial and is such that, if adduced, it would be practically conclusive. (*Young* v. *Kershaw,* 16 T.L.R. 52, at pp. 53-54, cited).

An action for specific performance of an alleged agreement for sale of a "unit" in a mining syndicate was dismissed at trial. Plaintiffs appealed, and, alternatively, asked for a new trial on the ground of discovery of new evidence. The Appellate Division, Ont., without passing on the main appeal, granted a new trial. Defendant appealed to this Court and asked that the judgment at trial be affirmed.

Held: The new trial should not have been granted; the proposed new evidence could have been ascertained with reasonable diligence before the trial; also, it could not conclusively establish plaintiff's case, as the fact proposed to be proved could not affect the judgment unless the relation of vendor and purchaser existed between the parties, and this Court, on the evidence, sustained the trial judge's finding that that relation did not exist. The appeal was allowed, and the judgment at trial, in its result, restored.

APPEAL by the defendant Varette from the judgment of the Appellate Division of the Supreme Court of Ontario, which vacated and set aside the judgment of Masten J. dismissing the plaintiffs' action, and ordered a new trial.

The action was for specific performance of an agreement alleged to have been made by the defendant Varette for sale of a "unit" in a certain mining syndicate, or, in the alternative, for damages for failure to make delivery. Masten J. dismissed the action. The plaintiffs appealed to the Appellate Division of the Supreme Court of Ontario, asking for a reversal of the trial judgment, and in the alternative, for a new trial on the ground of the discovery of new evidence. The Appellate Division did not pass upon the main appeal, but granted the plaintiffs' motion for a new trial. The defendant Varette appealed to this Court, and asked that the judgment of Masten J. be affirmed. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs, and the judgment of Masten J. restored.

G. H. Kilmer K.C. and *H. H. Davis* for the appellant.

W. N. Tilley K.C. and *J. F. Boland* for the respondents.

The judgment of the court was delivered by

RINFRET J.—The Tremoy Lake Shore Mining Syndicate owned certain mining claims in the province of Quebec. It had already disposed of 90 per cent of its interests to the

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Noranda Mines Limited and the remaining 10 per cent was also under option to the same company. This 10 per cent interest was divided into 100 parts, called units or points; and between the members of the syndicate—thirteen in all—these units or points were held in unequal proportions formed of several entire units or portions of units. It was understood that, pending the exercise of its option by the Noranda company, each owner could deal with any of his units or portions of units as if they had been shares in a company.

The Noranda Mines Limited had formed The Horne Copper Corporation. For a time, and until the Noranda company exercised its option, the 10 per cent interest was represented by shares of the Horne corporation held by the syndicate in undivided ownership and evidenced by one certificate of that corporation. For that reason, the units were sometimes referred to as Horne units. A stock ledger was kept for the syndicate, in which the names of the transferees of units or portions thereof were successively registered.

The appellant Varette was a bookkeeper for a firm of contractors in New Liskeard and acted as secretary-treasurer for the syndicate. The respondents Sainsbury and Solloway were mining brokers of Toronto, having their offices together, and jointly interested in making commissions out of the sale of these units.

On the 16th September, 1925, Solloway wrote to Varette:

> I phoned you last evening and wired you to-day and am now awaiting a reply * * * I can place all the units amongst my friends that you can let me have at a reasonable figure. What I shall expect you to do is that you are in touch with the owners and you can get a price from them, make a fair profit for yourself and pass them on to me * * *.

No reply to this communication appears to have been made by Varette.

Almost two months later, on November 10, Varette wired to Solloway:

> I have offered to-day for sale subject to immediate acceptance one unit of Tremoy Lake Shore Mining Syndicate at $8,750 flat. If interested, wire at once.

Both parties agree that the telegram should be read: "I am offered to-day, etc." or "I have, offered to me to-day for sale * * * ; one unit, etc."

Solloway wired, on November 14, to Varette:

Will accept your offer on Noranda unit at price quoted. Meet me on 47 to-morrow without fail as I cannot stop off.

The unit thus offered and accepted was subsequently taken up and there is no controversy over it.

As agreed, Solloway met Varette at the New Liskeard railway station, on the arrival of train no. 47. He confirmed the purchase already made and expressed his desire to buy other units. Varette said he might be able to send another; and it is this second unit that is the subject of the present litigation.

Solloway was going into the north country and expected to be away for a few weeks. He told Varette that, during his absence, Sainsbury would act for him and would look after the units. By telegraph from New Liskeard he advised Sainsbury in Toronto of the result of his interview with Varette and again, by letter the same day from Ramore, a station further north. Telephone messages and telegrams were afterwards exchanged between Sainsbury and Varette concerning the forwarding of papers to complete the sale of the first unit and the possibility of procuring other units.

On November 21, Varette sent a telegram addressed to Solloway as follows:

Can offer one unit same price delivered Toronto Wednesday morning.

This telegram went to Sainsbury in due course and the offer was accepted by telephone. At the same time, there was talk of a third unit.

On the 26th November, Varette telegraphed:

One unit leaving twenty-seventh. Have still one more. This will be the last available. Wire reply if satisfactory.

The " one unit leaving twenty-seventh " was the second unit, which is the subject-matter of this action. The "one more" unit referred to in the telegram was the third one, with which we are not concerned.

The second unit was never delivered. On November 30, Varette telegraphed:

Other parties have offered more money. Cannot procure the unit offer (sic).

Sainsbury went to New Liskeard in an effort to procure units himself from the holders. He was offered one at $9,500. He could not go beyond $9,100, and could find none at that price.

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Sainsbury, having vainly attempted to procure delivery of the second unit from Varette, brought action for specific performance. He alleged he had entered into the agreement on behalf of C. A. Gentles and D. M. Hogarth, and they were joined as co-plaintiffs. At the beginning of the trial, Solloway was also added as a party plaintiff.

The action was dismissed by Masten J. on the ground that its subject-matter was realty and the Statute of Frauds afforded a sufficient defence. He also expressed the view that Varette "never agreed to act as a personal or direct vendor," but only "as an agent in securing offers from members of the syndicate who were willing to sell one or more shares and submit them to Solloway."

The plaintiffs served the ordinary notice of appeal praying for the reversal of the trial judgment. They subsesequently served a supplementary notice of motion to set aside the judgment upon the ground that the learned trial judge had erred in refusing an application made by them at the close of the trial to amend by claiming damages for breach of warranty of authority; and, in the alternative, for a new trial on account of the discovery of new evidence.

The Appellate Division did not pass upon the main appeal, but granted the motion for a new trial.

Varette now appeals and submits that the judgment of the trial judge should be affirmed. The respondents, while upholding the order of the Appellate Division, contend that judgment should have been given in their favour and their action should be maintained.

On an application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that, if adduced, it would be practically conclusive. *Young* v. *Kershaw* (1).

The new evidence upon which the respondents based their application was produced—as it had to be—before the Court of Appeal and, for the present purpose, no other evidence can be relied on. The only new disclosure it makes is the precise date of the sale of a unit to one Tim-

(1) (1899) 16 T.L.R. 52, at pp. 53-54.

mins. The fact of the sale itself had already been stated by Varette in his examination for discovery and at the trial. Counsel for respondents then had full opportunity of cross-examination, and the papers in respect of that transaction were produced. It was then noticed that the document evidencing the Timmins' sale did not bear a date; but it can hardly be contended that, with reasonable diligence, such date could not have been ascertained before the trial. The subsequent ascertainment of the exact date under those circumstances was not, in our view, a discovery of new evidence within the rule of law governing the right to a new trial.

But the respondents' application lacked yet another requirement, which is that the proposed new evidence would not conclusively establish the plaintiffs' case.

Even assuming that the unit sold to Timmins was the same unit previously offered to Solloway on the 21st November—an assumption at best doubtful upon the evidence of record—that fact could not affect the judgment unless the relation of vendor and purchaser was proven to have existed between Varette and Solloway or Sainsbury. The trial judge held that such relation did not exist. The Appellate Division directed a new trial without hearing counsel for Varette on that point. It now becomes the duty of this court to consider that question.

The best way to approach this aspect of the case is first to determine with which of the two Toronto mining brokers, Solloway or Sainsbury, the appellant Varette contracted, if at all, in making the bargain alleged in connection with the second unit. Before deciding upon the intention of the parties to an agreement, it is, of course, necessary to ascertain who the parties were.

In our view, Solloway was the man with whom Varette made whatever bargain was made, and Sainsbury acted throughout merely on behalf of Solloway.

It should first be noticed that Sainsbury and Solloway both had desks in the same office in the Royal Bank Building. They were working together. In the words of Sainsbury:

> The idea was that he (Solloway) had several prospective buyers for a number of units and we were working together.
>
> Q. You and Solloway were working together? Yes.

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The proposition for the purchase of the second unit came up during the conversation between Solloway and Varette at their meeting at the New Liskeard railway station on November 15. The agreement concerning the first unit was then concluded and Varette advised Solloway that he might be able to "pick up" some other units. Solloway said he was going to Lightning River and would be away possibly three weeks, but to send them down to his office, "that he had a man in his office who would look after it the same as if he were there."

Prior to his leaving for the north, Solloway had told Sainsbury about his relations with Varette. Sainsbury knew of Varette's letter to Solloway of November 10 concerning the first unit and of Solloway's reply of the 14th November that he would take the unit. On that date, Sainsbury himself telephoned to Varette "to tell him of the circumstances that Solloway was leaving and that he would take care of the business at this (the Toronto) end * * * in Solloway's place." Further, Sainsbury knew that Solloway was advising Varette to the same effect.

After his interview with Varette at New Liskeard, on the 15th November, Solloway telegraphed to Sainsbury from Swastika:

One Horne unit (N.B.—That was the first unit) going to Imperial Bank Monday at price quoted in letter stop Varette may be able to send another unit end of week. Present this telegram to Wilkinson as authority for you to get unit.

He confirmed this by letter from Ramore (another railway station up north) on the same day:

I saw Varette and he promised me to send a Horne Unit to Imperial Bank to-morrow at same price he wrote me and to try and *get me* another unit by the end of the week.

I wired you from Swastika to 304 Royal Bank. Now don't fail to take up the unit and don't fail to keep me a share of your profit.

There is no use of wiring Varette for units, as he will do his best to get another one.

Sainsbury admits that this letter made clear to him that Varette was buying a unit for Solloway.

Varette got busy and on November 21 he was able to telegraph the offer of the second unit:

Can offer one unit same price delivered Toronto Wednesday morning. Telephone me 157 New Liskeard.

This telegram was addressed to Solloway. In accordance with his arrangements with the latter, Sainsbury re-

ceived and opened the telegram. He thereupon telephoned to Varette: "I got your wire addressed to Solloway." He pretends having then told Varette that "he was the buyer and not Solloway" and that afterwards he went on to deal with Varette under his own name. This is denied by Varette who swears positively that the offer was accepted "on behalf of Solloway." Varette's statement was accepted by the trial judge, who said: "Where his (Varette's) evidence differs or varies from that of Sainsbury and Solloway, I prefer the evidence of Varette." On the record, we agree with the learned trial judge and accept Varette's version, which is more consistent with the course of events and, moreover, does not present the difficulty involved in Sainsbury's story that he had taken advantage of Solloway's absence and had broken faith with him.

When Solloway returned, he wrote Varette that Sainsbury had advised him that he was "sending two more units" and thanked him "for this business." On the whole, the conclusion must be that, in these transactions, Sainsbury was "Solloway's man." So Varette understood; and, in that he was perfectly justified. For that reason, he sent all his communications to the office where Sainsbury was acting in Solloway's place. There is no doubt that Sainsbury completed the transaction in respect of the first unit for Solloway's account. He acted in the same capacity with regard to the second unit. The agreement as to the latter, as in the case of the first one, was a bargain between Varette and Solloway, represented by Sainsbury.

The other question to be determined is what was, between Varette and Solloway, the agreement concerning this second unit. As already stated, it took form during the interview of Varette with Solloway at the New Liskeard railway station, on November 15. We have the account of that interview in a letter written shortly afterwards by Varette and with which Solloway expressed himself to be in complete accord. This letter derives singular value from the fact that, at the time it was written, Sainsbury was threatening suit. Solloway knew it and therefore was apt to be more careful in his assent to Varette's statements.

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It is nothing to the purpose that later, when called as a witness, he attempted to explain away the force of this assent on the ground that he had then no "knowledge of the telegrams that had passed between Sainsbury and Varette." Knowledge of those telegrams could have no bearing on the question of what had been the original agreement between Varette and Solloway and the nature of the relations thereby created between them. In our view, moreover, these relations were not by the telegrams referred to modified in any essential particular.

Upon returning from the North, Solloway had written to Varette, on November 28:

Dear Mr. Varette,—I just returned to the city yesterday and Mr. Sainsbury advised me that you are sending two more units. I wish to thank you for this business and, upon receipt of this letter, I wish you would kindly write and let me know if there are any other units for sale and I shall be very grateful indeed if you will send on to me, at the Imperial Bank, Adelaide and Victoria Sts. Branch, Toronto, any units that come on the market, and advise me that they are coming.

Thanking you and hoping to hear from you at your earliest convenience, I am,

Yours very truly,
I. W. C. SOLLOWAY.

On December 13, Varette wrote:

Dear Mr. Solloway,—In going over my correspondence to-night for filing, I run across yours of November 28. (We leave out the passages having no reference to the point we are now discussing).

The day I met you at the Station I advised I had one unit and you said to pick up any more available—that Sainsbury, acting for you, would look after same.

I immediately set to work to obtain some more—and got the promise of one and a partial promise on another, I did not have them tied up—only a promise. In the meantime I wired Sainsbury, but also in the meantime word came from Toronto that some one was offering more money and I could not get the units. This offering of more money for four units, as far as I can find out, was only talk.

I could not and have been unable so far to obtain anything further. I do not feel that I was dealing with Sainsbury at all, but with you under your instructions that Sainsbury was acting for you.

This is the exact position I am in at present and I told Sainsbury, when he was here, I would do the best I could. He advised that a writ would be issued against me if I did not produce.

On December 21, Solloway replied (and again we leave out whatever is unnecessary):

Dear Mr. Varette,—I have been out of town and received your letter of December 13 yesterday. I am expecting you into the office should you

come to Toronto and I will look forward with much pleasure to having a talk with you.

* * * *

I quite agree with what you say in your letter and I do not see that they have any complaint to make. However I hope to see you in the near future.

Yours very truly,
I. W. C. SOLLOWAY.

As will therefore appear, both Solloway and Varette agree on the crucial point that the understanding between them was not an agreement to transfer and sell, but only an agreement to procure units "that came on the market." We have already stated that, to our mind, the subsequent letters and telegrams exchanged with Sainsbury did not affect this original agreement. They are all reproduced in this judgment. Taken as a whole and viewed in the light of the initial interview with Solloway, they bear out the view taken by the learned trial judge that "Varette never agreed to act as a vendor of his own shares" and the relations of vendor and purchaser never existed between Varette and Solloway.

The result is that the motion for a new trial ought not to have been granted and that the appeal should be allowed, for the reasons we have given. Our judgment does not imply approval of the application made by the learned trial judge of the *Statute of Frauds*.

Nor do we express any opinion on the question of misrepresentation by Varette of his authority as an agent. The trial judge gave his reasons why he thought the amendment putting this claim forward should not be permitted and he did so without prejudice to the right of either Sainsbury or Solloway making this claim later. This was a matter of discretion with which this court would interfere only under most exceptional circumstances, which are not present in this case.

The appellant should have his costs here and in the Court of Appeal and the judgment of Masten J. should be restored.

Appeal allowed with costs.

Solicitor for the appellant: *F. L. Smiley.*

Solicitors for the respondents: *Macdonell & Boland.*