PESO SILVER MINES LIMITED (N.P.L.) (*Plaintiff*) ..... APPELLANT;

1966

*April 27, 28
June 20

AND

STANLEY E. CROPPER (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Companies—Directors—Fiduciary relationship—Offer of mining claims considered and rejected by full board of directors—Interest in claims subsequently acquired by director—Whether director liable to account—Counter-claim for wrongful dismissal.

The respondent was the managing director of the appellant company which held about 20 square miles of mineral claims in the Yukon Territory. An offer made to the appellant by a prospector, Dickson, of three groups of unproven claims, one of which was contiguous to the appellant's ground and the other two some miles to the northeast, was considered by the company's full board of directors and was rejected.

After the appellant had rejected Dickson's offer and the matter had passed out of the respondent's mind, the possibility of a group being formed to acquire Dickson's claims was suggested to the respondent. It was agreed that the respondent and three others would take up these claims and they did so, each contributing an equal amount to finance the purchase. A company, *Cross Bow,* was incorporated to make the purchase, and the four participants put up in equal shares the money necessary to have the intervening ground between the groups of claims "staked blind" by Dickson. Shortly afterwards a public company, *Mayo,* was incorporated to take over, finance and develop the properties.

Some time later an offer by a company, *Charter,* to purchase a large interest in the appellant company was accepted. A term of the offer provided that the number of directors of the appellant should be increased to nine of whom five should be chosen by *Charter.* At a meeting of the new board, the respondent, acting in compliance with a notice from the chairman that it was imperative that all officers of the company make full disclosure of their connection with other mining companies, disclosed his interest in *Cross Bow* and *Mayo.* However, at a subsequent meeting of the board he refused to comply with the chairman's request that he turn over his interest in *Cross Bow* (and two other companies with which the present appeal was not concerned) at cost. Thereupon a motion was passed rescinding the appointment of the respondent as executive vice-president and as a member of the executive committee. The respondent was asked to vacate the offices of the company and the chairman asked him to resign as a director. The respondent refused to resign as a director but did so later and his resignation was accepted.

In an action commenced by the appellant a declaration was claimed that the shares in *Cross Bow, Mayo* and in two other companies acquired

* PRESENT: Cartwright, Martland, Judson, Ritchie and Hall JJ.

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by the respondent were held by him in trust for the appellant and it was asked that he be required to deliver the shares to the appellant or to account for the proceeds thereof. The respondent counter-claimed for damages for wrongful dismissal. At trial the action was dismissed and the counter-claim was allowed in the amount of $10,000. On appeal by the appellant to the Court of Appeal, the appeal was dismissed in so far as the appellant's action was concerned. However, the Court of Appeal reduced the respondent's damages from $10,000 to $6,500. An appeal and a cross-appeal from the judgment of the Court of Appeal were then brought to this Court.

Held: The appeal and the cross-appeal should be dismissed.

On the facts of this case it was impossible to say that the respondent obtained the interests he held in *Cross Bow* and *Mayo* by reason of the fact that he was a director of the appellant and in the course of the execution of that office.

When Dickson offered his claims to the appellant it was the duty of the respondent to take part in the decision of the board as to whether that offer should be accepted or rejected. At that point he stood in a fiduciary relationship to the appellant. There were affirmative findings of fact that he and his co-directors acted in good faith, solely in the interests of the appellant and with sound business reasons in rejecting the offer. There was no suggestion in the evidence that the offer to the appellant was accompanied by any confidential information unavailable to any prospective purchaser or that the respondent as director had access to any information by reason of his office. When the later proposal with respect to Dickson's claims was made to the respondent, it was not in his capacity as a director of the appellant but as an individual member of the public.

Regal (Hastings), Ltd. v. Gulliver et al., [1942] 1 All E. R. 378, applied; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438; *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co. Ltd. et al.*, [1958] S.C.R. 314, referred to.

As to the counter-claim, the trial judge had indicated that he would have fixed the damages at $6,500 were it not for the circumstances of the respondent's dismissal. This Court agreed with Bull J.A. that the claim having been founded on breach of contract the damages could not be increased by reason of the circumstances of dismissal whether in respect of the respondent's wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment. The Court was also in agreement with Bull J.A. that in view of the respondent's evidence that he remained unemployed for only five months the award should be reduced to $6,500.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Gregory J. in so far as that judgment dismissed the appellant's action for a declaration of constructive trust and allowing in part the appeal as to the judgment on the counter-claim. Appeal and cross-appeal dismissed.

[1] (1965), 54 W.W.R. 329, 56 D.L.R. (2d) 117.

J. S. Maguire, Q.C., and *K. S. Fawcus*, for the plaintiff, appellant.

D. T. Braidwood, Q.C., and *F. A. Melvin*, for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] dismissing an appeal from a judgment of Gregory J. in so far as that judgment dismissed the action and allowing in part the appeal as to the judgment on the counter-claim. Norris J.A., dissenting, would have allowed in part the appeal as to the judgment in the action and allowed the appeal as to the counter-claim *in toto*.

In the action the appellant claimed a declaration that the shares in Cross Bow Mines Limited, hereinafter referred to as "Cross Bow", Mayo Silver Mines Limited, hereinafter referred to as "Mayo", and in two other companies acquired by the respondent were held by him in trust for the appellant and asked that he be required to deliver the shares to the appellant or to account for the proceeds thereof. The respondent counter-claimed for $10,000 damages for wrongful dismissal. In this Court the appellant limited its claim to the shares in Cross Bow and Mayo and consequently we are not concerned with the claims in regard to the shares in the two other companies which were asserted in the Courts below.

The findings of fact made by the learned trial judge were concurred in by the Court of Appeal and were not challenged before us. In order to appreciate the questions to be decided it is necessary to set out the facts in some detail.

The respondent resides in Vancouver. At the date of the trial, in December 1964, he stated that he had had twenty years of successful business experience. He was then president of Traders Investment Limited in Vancouver and of several mining companies. He has a practical knowledge of mining and had done some prospecting for himself in 1958 and 1959.

In 1959, R. Verity, D. Ross and the respondent caused a company, Tanar Gold Mines Limited, hereinafter referred

[1] (1965), 54 W.W.R. 329, 56 D.L.R. (2d) 117.

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to as "Tanar" to be incorporated and became its first directors. At the invitation of the respondent C. S. Walker also became a shareholder and director of Tanar.

On March 17, 1961, Tanar caused the appellant to be incorporated as a private company. Walker, Verity and the respondent were its first directors and a month later three additional directors, Whittal, Lennox and Hodges were duly appointed. Tanar transferred to the appellant a number of claims in the Mayo district in the Yukon Territory which it had acquired from one C. D. Poli together with additional claims which had been staked on Tanar's instructions. In return for these, shares in the appellant were issued to Tanar.

On September 18, 1961, the appellant was converted into a public company and from time to time a considerable number of its shares were sold to raise funds to explore, develop and add to its properties. Until the commencement of the action the appellant, Tanar and Cal-Mac Gold Mines Ltd., another company which Tanar had caused to be incorporated, had their offices in the same suite in Vancouver.

By the end of 1961 or early in 1962 the appellant had acquired, in addition to the claims which it had been formed to take over, a further 128 claims from the Barker Estate. In the result in the spring of 1962 it held about 20 square miles of mineral claims in the Yukon and was doing field work and exploration thereon. It had strained the financial resources of the appellant to take over the Barker claims. The appellant had been advised by its engineers that it should spend on the properties it then held from $40,000 to $50,000 per month during 1962. The acquisition of additional claims would have involved increased expenditures and the appellant neither needed nor wanted any more ground at this time.

On April 20, 1961, the respondent was appointed managing director of the appellant at a monthly salary of $750 which was increased to $11,000 per annum in June 1962.

Early in the spring of 1962 a prospector, Dickson, was endeavouring to sell three groups of claims in the Mayo district totalling 126 claims. One group was contiguous to the appellant's ground, a second was about five miles to the north-east and the third about eleven miles to the

north-east. The claims were unproven and of speculative value. Dickson's asking price was some $31,000 in cash together with a block of shares in a public company to be formed to take over the property. Dickson approached Dr. Aho, a consulting geologist who was retained by the appellant and by many other mining companies. Dr. Aho suggested that Dickson should offer the claims to the appellant and he did so. Dickson's offer was considered by the full board of directors of the appellant in March 1962, and was rejected. On this point there are concurrent findings of fact which were expressed as follows in the reasons of Bull J.A.:

> It was common ground, and so found by the learned trial Judge, that this decision rejecting the acquisition was an honest and considered decision of the appellant's board of directors as a whole and done in the best of faith and solely in the interest of the appellant, and not from any personal or ulterior motive on the part of any director, including the respondent.

During the time that the respondent was an officer of the appellant there were between 200 and 300 mining properties offered to it; it was usual for it to receive two or three of such offers a week.

After the appellant had rejected Dickson's offer and the matter had passed out of the respondent's mind, Dr. Aho came to the respondent and suggested the possibility of a group being formed to acquire Dickson's claims. After some discussion it was agreed that Dr. Aho, Walker, Verity and the respondent would take up these claims and they did so, each contributing an equal amount to finance the purchase. Dr. Aho who knew the property advised his associates that he was unaware of any specific mineralization thereon and it is common ground that the purchase was a highly speculative venture.

In May 1962, Cross Bow was incorporated to make the purchase, the four participants put up in equal shares the money necessary to have the intervening ground between the groups of claims "staked blind" by Dickson thus increasing the total holdings to approximately 326 claims. Shortly afterwards Mayo was incorporated as a public company to take over, finance and develop the properties and Cross Bow received 600,000 escrowed shares of Mayo for the properties out of which Dickson received his agreed proportion. Later the respondent and his associates bought for cash about 50,000 free treasury shares of Mayo at

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10 cents to 12 cents per share. The respondent was at all relevant times a director of both Cross Bow and Mayo.

In November 1963, Charter Oil Company Limited, hereinafter referred to as "Charter", offered to purchase 1,000,000 shares of the capital stock of the appellant at the price of $1 per share, payable $200,000 on the date of closing and $200,000 on or before the tenth days of February, April, June and August, 1964. It was a term of the offer that Charter should have an option to purchase an additional 400,000 shares of the appellant at $1 per share at any time prior to October 11, 1964, and that at the annual meeting of the appellant to be held on December 16, 1963, the number of directors of the appellant should be increased to nine of whom five should be chosen by Charter. It was provided that these five should be P. O. Berliz, H. M. Beaumont, D. G. Buchanan, D. M. Clark and N. Johns and that P. O. Berliz should be appointed Chairman of the Board. This offer was accepted and the acceptance was approved at a meeting of the appellant's directors held on December 10, 1963. At the annual meeting of the appellant on December 16, 1963, the five persons named above were elected directors and the other four elected were C. S. Walker, P. L. Whittal, S. D. Anfield and the respondent.

At a meeting of the directors of the appellant held on December 16, 1963, following the annual meeting the following resolution was passed:

> Appointment of Officers
>
> Upon Motion it was resolved that the following persons be appointed officers of the Company for the ensuing year:
>
> | | |
> |---|---|
> | P. O. Berliz | Chairman |
> | C. S. Walker | President |
> | S. E. Cropper | Executive Vice-President |
> | D. M. Clark | Secretary-Treasurer |

It was also resolved that the respondent's salary be increased by $2,000 per annum, thus bringing his yearly salary up to $13,000.

According to the evidence of Mr. Walker, who was called by the plaintiff, there was a disagreement between Berliz and the respondent in regard to the making of the payment of $200,000 from Charter to the appellant which fell due in February 1964 and this resulted in "a spirit of unfriendliness between the two of them". On February 26, 1964,

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Berliz sent a memorandum to the respondent reading in part: "It is imperative that all officers of Peso Silver Mines make full disclosure of their connection with other mining companies." At a meeting of the executive committee of the appellant on March 6, 1964, the respondent disclosed his interest in Cross Bow and Mayo and repeated this at a meeting of the directors of the appellant on March 16, 1964. At the last-mentioned meeting Berliz asked the respondent if he was prepared to turn over his interest in Cross Bow (and two other companies with which we are not now concerned) at cost. The respondent stated that he would give the matter further consideration. The meeting was later adjourned to the following day. When it reconvened Berliz repeated his request and the respondent refused. Thereupon a motion was passed rescinding the appointment of the respondent as Executive Vice-President and as a member of the Executive Committee. The respondent was asked "to vacate the offices of the Company" and Berliz asked him to resign as a director. The respondent refused to resign as a director but did so later and his resignation was accepted at a meeting of the directors on April 8, 1964.

The action was commenced on March 19, 1964.

The appellant submits that the shares in Cross Bow and Mayo held by the respondent are property obtained by him as a result of his position as a director of the appellant, without the approval of the latter's shareholders, and that equity imposes upon him an obligation to account to the appellant for that property which is unaffected by the circumstances that he acted throughout in good faith, that the appellant had decided for sound business reasons not to acquire the property and had suffered no loss by reason of the respondent's actions.

Counsel for the appellant founded his argument on the decision of the House of Lords in *Regal (Hastings), Ltd. v. Gulliver et al.*[1], in which the principles of equity relating to the liability of a person who acquires property in regard to which a fiduciary relationship exists are considered and the leading cases are reviewed. The judgment in *Regal* has been followed by this Court in *Zwicker v. Stanbury*[2] and in *Midcon Oil & Gas Ltd. v. New British Dominion Oil*

[1] [1942] 1 All E.R. 378. [2] [1953] 2 S.C.R. 438.

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Co. Ltd. et al.[1] Counsel for the respondent accepts the statements of the law contained in *Regal* and submits that their application to the facts of the case at bar does not result in imposing liability on the respondent.

It is not necessary to review the somewhat complicated facts of the *Regal* case. While each of the Law Lords stated his reasons in his own words, there was no difference in substance between their statements of the test to be applied in determining whether or not the directors were liable to account for the profit which they personally had made on the purchase and resale of shares in a subsidiary of *Regal*. It will be of assistance to consider the actual words which were used.

Viscount Sankey said, at p. 381:

> In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cestui que trust*.

Lord Russell of Killowen, with whose reasons Lord Macmillan, Lord Wright and Lord Porter agreed, said at p. 385:

> We have to consider the question of the respondents' liability on the footing that, in taking up these shares in Amalgamated, they acted with *bona fides*, intending to act in the interest of Regal.
>
> Nevertheless they may be liable to account for the profits which they have made, if, while standing in a fiduciary relationship to Regal, they have *by reason and in course of that fiduciary relationship* made a profit.

and at p. 386:

> The rule of equity which insists on those, who *by use of a fiduciary position* make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides*; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, *in the stated circumstances*, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

Later on the same page he posed and answered the question which he regarded as the crux of the case:

> Did such of the first five respondents as acquired these very profitable shares acquire them *by reason and in course of their office of directors of*

[1] [1958] S.C.R. 314.

Regal? In my opinion, when the facts are examined and appreciated, the answer can only be that they did.

and at p. 389:

In the result, I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares *by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office*, are accountable for the profits which they have made out of them.

In *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co. Ltd. et al., supra,* at p. 327, Locke J., giving the judgment of the majority of this Court quoted this passage and said that it summarized the ground on which the judgment of the House of Lords proceeded. The difference of opinion in this Court was not as to the principles of law stated in *Regal* but as to whether the facts of the case fell within those principles.

In the course of his short concurring speech Lord Macmillan said at p. 391:

The sole ground on which it was sought to render them accountable was that, being directors of the plaintiff company and therefore in a fiduciary relationship to it, they entered *in the course of their management* into a transaction in which *they utilised the position and knowledge possessed by them in virtue of their office as directors,* and that the transaction resulted in a profit to themselves.

and at pp. 391 and 392:

The issue thus becomes one of fact. The plaintiff company has to establish two things, (i) that what the directors did was *so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors;* and (ii) that what they did resulted in a profit to themselves.

Lord Wright said at p. 393:

Many instances can be quoted from the books of the stringency with which the courts have enforced the rule that a director must account to his company for any benefit which he obtains *in the course of and owing to his directorship,* even though the benefit comes from a third person and involves no loss to the company.

Lord Porter said at p. 395:

The legal proposition may, I think, be broadly stated by saying that one occupying a position of trust must not make a profit which he can acquire *only by use of his fiduciary position,* or, if he does, he must account for the profit so made.

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and on the same page:

> Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon breach of duty but upon the proposition that a director must not make a profit *out of property acquired by reason of his relationship to the company of which he is a director.*

The phrases which I have italicized in some of the passages quoted above appear to me to state in varying words the principle which Lord Russell of Killowen laid down, at p. 389 of the *Regal* judgment, in the passage quoted above which was adopted by Locke J. in the *Midcon* case.

On the facts of the case at bar I find it impossible to say that the respondent obtained the interests he holds in Cross Bow and Mayo by reason of the fact that he was a director of the appellant and in the course of the execution of that office.

When Dickson, at Dr. Aho's suggestion, offered his claims to the appellant it was the duty of the respondent as director to take part in the decision of the board as to whether that offer should be accepted or rejected. At that point he stood in a fiduciary relationship to the appellant. There are affirmative findings of fact that he and his co-directors acted in good faith, solely in the interests of the appellant and with sound business reasons in rejecting the offer. There is no suggestion in the evidence that the offer to the appellant was accompanied by any confidential information unavailable to any prospective purchaser or that the respondent as director had access to any such information by reason of his office. When, later, Dr. Aho approached the appellant it was not in his capacity as a director of the appellant, but as an individual member of the public whom Dr. Aho was seeking to interest as a co-adventurer.

The judgments in the *Regal* case in the Court of Appeal are not reported but counsel were good enough to furnish us with copies. In the course of his reasons Lord Greene M.R. said:

> To say that the Company was entitled to claim the benefit of those shares would involve this proposition: Where a Board of Directors considers an investment which is offered to their company and *bona fide* comes to the conclusion that it is not an investment which their Company ought to make, any Director, after that Resolution is come to and *bona fide* come to, who chooses to put up the money for that investment

himself must be treated as having done it on behalf of the Company, so that the Company can claim any profit that results to him from it. That is a proposition for which no particle of authority was cited; and goes, as it seems to me, far beyond anything that has ever been suggested as to the duty of directors, agents, or persons in a position of that kind.

In the House of Lords, Lord Russell of Killowen concluded his reasons, at p. 391, with the following paragraph:

> One final observation I desire to make. In his judgment Lord Greene, M.R., stated that a decision adverse to the directors in the present case involved the proposition that, if directors *bona fide* decide not to invest their company's funds in some proposed investment, a director who thereafter embarks his own money therein is accountable for any profits which he may derive therefrom. As to this, I can only say that to my mind the facts of this hypothetical case bear but little resemblance to the story with which we have had to deal.

I agree with Bull J.A. when after quoting the two above passages he says:

> As Greene, M.R. was found to be in error in his decision, I would think that the above comment by Lord Russell on the hypothetical case would be superfluous unless it was intended to be a reservation that he had no quarrel with the proposition enunciated by the Master of the Rolls, but only that the facts of the case before him did not fall within it.

As Bull J.A. goes on to point out, the same view appears to have been entertained by Lord Denning M.R. in *Phipps v. Boardman*[1].

If the members of the House of Lords in *Regal* had been of the view that in the hypothetical case stated by Lord Greene the director would have been liable to account to the company, the elaborate examination of the facts contained in the speech of Lord Russell of Killowen would have been unnecessary.

The facts of the case at bar appear to me in all material respects identical with those in the hypothetical case stated by Lord Greene and I share the view which he expressed that in such circumstances the director is under no liability. I agree with the conclusion of the learned trial judge and of the majority in the Court of Appeal that the action fails.

It remains to consider the counter-claim. In this Court the appellant did not argue that the dismissal without notice was justified unless it should be held that the respondent was under a duty to account to the appellant for his interests in Cross Bow and Mayo; consequently the

[1] [1965] 1 All E.R. 849 at 856.

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only remaining question is as to the quantum of damages. The learned trial judge awarded the respondent $10,000 which represented the balance of his salary for the year ending December 16, 1964. He indicated, however, that he would have fixed the damages at $6,500 were it not for the circumstances of the respondent's dismissal, namely that the unsubstantiated allegations of impropriety made against him and the fact of his dismissal so shortly after Charter had taken control of the appellant could not fail to damage his reputation among mining men. I agree with Bull J.A. that the claim being founded on breach of contract the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the respondent's wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment. I am also in agreement with Bull J.A. that in view of the respondent's evidence that he remained unemployed for only five months the award should be reduced to $6,500.

For the above reasons I would dismiss both the appeal and the cross-appeal with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Clark, Wilson, White, Clark & Maguire, Vancouver.

Solicitors for the defendant, respondent: Sutton, Braidwood, Morris, Hall & Sutton, Vancouver.