Supreme Court of Canada
Stahl v. Miller, (1918) 56 S.C.R. 312

Date: 1918-03-05

Charles Stahl *(Plaintiff) Appellant;*

and

William Miller and John Kildall *(Defendants) Respondents*.

1918: February 27; 1918: March 5.

Present: Sir Charles Fitzpatrick C.J. and Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale of Land—Principal and agent—Vendor agent of purchaser—Rescission.

W. M., a member of the firm of "J. J. M." real estate brokers, was one of two trustees appointed by order of court to sell certain lands in Vancouver with liberty to employ "J. J. M." as agents. S. carried on real estate transactions through this firm or its other member and had given W. M. a power of attorney to buy and sell land for him in and around Vancouver. The other member of the firm of "J. J. M." purchased some land for S. from the trustees and an agreement for sale was signed by the latter as vendors and by W.M. as attorney for S. The purchase price was paid with money of S. in his agent's hands. The agreement was not sent to S. until five years after it was signed and he at once repudiated it and brought action for rescission.

Held, reversing the judgment of the Court of Appeal (37 D.L.R. 514), that as the evidence did not shew that S. was aware, until he received the agreement, that his attorney W. M. was one of the vendors, and as he acted promptly as soon as the fact came to his knowledge he was entitled to rescission of the agreement and repayment of the purchase price.

The defendants were sued personally and not as trustees.

Held, per Fitzpatrick C.J. and Anglin J., that as they purported to sell to S. as beneficial owners the proper parties are before the Court. No application to amend has been made but as a matter of grace if they now elect to amend judgment can be entered against them in both capacities.

APPEAL from the decision of the Court of Appeal for British Columbia[1], by an equal division of opinion upholding the judgment at the trial in favour of the defendants.

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[1] 37 D.L.R. 514. Reporter's note. The report of the judgment of the Court of appeal states that Martin J. was in favour of dismissing the appeal to that court whereas he and McPhillips J. were to allow it.

The facts of the case are fully stated in the above head-note.

A. L. P. Hunter for the appellant. The rule is well settled that an agent to buy cannot buy from himself. *Harrison* v. *Harrison*[2]. And the extent of the agent's interest and fair nature of the transaction are immaterial, *Bank of Upper Canada* v. *Bradshaw*[3]; *Cavendish-Bentinck* v. *Fenn*[4].

It was for the defendants to prove that Stahl was aware of the position of his agent or ratified the purchase. *De Bussche* v. *Alt*[5].

Cassidy K.C., for the respondents. The nondisclosure of Miller's interest as trustee would not avoid the sale. *Guy* v. *Churchill*[6]. And he had no beneficial interest in the property. See *Great Western Insurance Company* v. *Cunliffe* [7]; *Norreys* v. *Hodgson*[8].

THE CHIEF JUSTICE.—The appellant carried on speculations in real estate in Vancouver through the firm of J. J. Miller, real estate brokers in that city, and the respondent, William Miller, was a partner in the firm. On the 13th March, 1907, the appellant gave the respondent, William Miller, a power of attorney

> to execute for him all documents, agreements for sale and deeds of land in connection with the purchase or sale of lands in Vancouver and absolute authority to do all acts, deeds, matters and things necessary to be done in and about the premises.

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[2] 14 Gr. 586.
[3] L.R. 1 P.C. 479.
[4] 12 App. Cas. 652.
[5] 8 Ch. D. 286.
[6] 60 L.T. 740; 62 L.T. 132.
[7] 9 Ch. App. 525.
[8] 13 Times L.R. 421.

By an order of the court of British Columbia, made on the 13th September, 1910, certain lands of one Christina Kildall, deceased, were vested in the respondents, W. Miller and Kildall, upon trust for

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sale and to stand possessed of the proceeds upon the trusts therein mentioned

> with liberty to the trustees to employ the firm of J. J. Miller & Company as agents for the subdivision and sale of the said lands at a commission, etc,

and it was further ordered

> that the trustees receive by way of remuneration as trustees, etc.

J. J. Miller, who or whose firm were agents for the appellant, on the 10th December, 1910, purchased of the lands of the deceased Christina Kildall six lots for the appellant; and the respondent William Miller signed the agreement as one of the vendors and also acting under his power of attorney signed the name of the appellant as purchaser.

The appellant had no knowledge of the transaction until after it was completed and, as J. J. Miller retained the documents in his possession, the appellant was not informed of all the facts until he obtained the agreements on the 23rd October, 1915. On the 15th November, 1915, he wrote to the respondents giving notice to rescind the contracts for sale.

On the trial Macdonald J. gave judgment for defendants apparently on the ground that they were only trustees and the Kildall estate was not before the court.

On appeal, Macdonald C.J.A. thought that lapse of time and also the fact that the transaction was a fair one was a sufficient defence. Neither of these grounds can prevail here. *Hitchcock* v. *Sykes*[9].

It is also argued that although the respondents are the registered owners of the property they are not in reality the beneficial owners and therefore there is no conflict of duty by reason of the fiduciary relationship in which William Miller stood. But William

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Miller by the order of the court had absolute power to sell, and he had authority to buy under his power of attorney from the appellant. For his services as trustee, W. M. Miller was entitled to a commission on the sale and in addition he received his share of commission paid the firm of J. J. Miller, who were the selling agents for the respondents. A trustee for sale is no more competent to purchase the trust property as agent for a stranger to the trust than he is to buy it for himself.

As I am of opinion that this case cannot be distinguished from the numerous cases in which it has been clearly established that an agent cannot act for both vendor and purchaser, the appeal should be allowed.

Reference may be made to the case of *Clark* v. *Hepworth,*[10] recently before this court, and to *Armstrong* v. *Jackson*[11].

I entirely concur in the disposition made by Mr. Justice Anglin of the objection that the proper parties are not before the court.

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[9] 49 Can. S.C.R. 403.
[10] 55 Can. S.C.R. 614.
[11] 86 L.J.K.B. 1375.

Appeal allowed with costs.

IDINGTON J.—The respondents, being registered owners of the lands in question which had been subdivided into small lots, entered into three written agreements purporting to be for the respective sales of some six in all of said lots to the appellant for prices therein named.

The respondents for themselves each executed these agreements and Miller did likewise on behalf of appellant by virtue of a power of attorney he held from the appellant.

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This was done without consultation with appellant and without disclosure to him of the position they occupied as trustees for the sale of the said subdivision.

The respondent Miller was a member of a firm sometimes designated "J. J. Miller" and at other times as "J. J. Miller & Company," carrying on business as real estate agents in Vancouver.

The appellant was a farmer in British Columbia, resident some fifty odd miles from Vancouver, who had some years previously paid the firm fifteen hundred dollars to invest.

It was stated by counsel for appellant, and not denied, that on several occasions prior to this transaction parts of that money or other moneys coming into the hands of said firm as agents of the appellant had been used in making real estate purchases for him, but in each case only after having submitted to him the proposal so involved.

In this instance now in question that prudent and proper course was departed from in the way already stated without any excuse so far as I can see unless presuming upon the confidence they had acquired by reason of the said prior dealings.

The appellant was first informed of these transactions in an incidental sort of fashion by letter some months afterwards.

He does not seem to have been for some years fully informed of what really did take place, and then, on discovery of the nature of the transactions thus entered into, sought to be relieved therefrom and went so far as to propose to sacrifice what had been paid and give a quit claim of any interest he might be supposed to have acquired. The respondents declined this offer. It was not until he sought and got the

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assistance of a solicitor that he discovered the use which, as stated above, had been made of his power of attorney.

The respondents, it turned out, were trustees for the family of the respondent Kildall. As such they were entitled to a commission, and beyond that the J. J. Miller firm were entitled to a further commission as real estate agents effecting such sales, as made, of the lots in question. Of this latter commission the respondent Miller was entitled to receive and did receive one half.

The alleged sales are now attacked herein and rescission sought by appellant on the ground that the relations of the respondent Miller to him, and the duties owing thereunder, were such as to render it impossible in law for him as vendor to bind appellant without full disclosure of his actual position and interest in promoting such sales and then thereupon procuring the actual assent of appellant thereto.

It seems too clear for argument that a sale made under such circumstances was void and could only be upheld by something in the nature of ratification. These sales have been upheld by the learned trial judge and the equal division of the Court of Appeal.

The learned trial judge seemed to recognize the principles of law governing such a transaction, but to feel unable to give relief because the respondents were in fact trustees appointed by the court and had not been attacked as such, and that respondent Kildall owed no duty to the appellant.

I cannot assent to either of these propositions. In the first place, I think and most respectfully submit that the sooner the court which had control of such a trustee called upon him to explain and if possible

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excuse such an apparently loose mode of discharging his duties as its appointee, the better.

The appearance of the documents should have indicated to him that his co-trustee was, as attorney for the alleged vendee, venturing on a something that called for explanation. He should not have been a party thereto unless and until it was made quite clear that the proposed vendee in truth understood and approved of his attorney's action in buying.

The reasons assigned by the Court of Appeal for dismissing the appeal are of a different and more arguable nature. With great respect, however, I am unable to adopt them.

I do not think the appellant was called upon to give his evidence or explanation until something much more direct and cogent had been given than appears in the evidence of Mr. J. J. Miller.

The respondent Miller had, apart altogether from his monetary interest, placed himself in the position of attempting to discharge two inconsistent duties. One he owed to his *cestuis que trustent* and the other to the appellant.

His relation to the former also as a partner of the firm which had been given the duty of selling the lands in question has been made the basis for a number of ingenious submissions which are untenable, however plausible.

I think the appeal should be allowed with costs throughout and the alleged agreements of purchase rescinded and the moneys paid by appellant or received by respondents on account of the transactions in question be repaid with interest.

ANGLIN J.—The respondents, as trustees for the sale of the Kildall estate, sold the property in question

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to the appellant. In the agreement of sale, however, they assumed the position of vendors in their personal capacity.

On their own statement, one of them, William Miller, was a partner in the firm of "J. J. Miller," carrying on business as real estate agents at Vancouver, B.C. John J. Miller, the other partner in the firm, was the agent for the sale of the property. He was at the same time the agent of the appellant, who resided at Whonnock, B.C., to invest moneys deposited by the latter with the firm of "J. J. Miller" in desirable real estate, and, as such, he bought from the respondent trustees the property in question for the appellant. William Miller, the other member of the firm, and one of the trustees for sale, as attorney for the appellant, executed on his behalf the agreement to purchase.

Upon the mere statement of these facts the conflict of duty on the part of John J. Miller is so apparent that it is obvious that the transaction must be voidable by the appellant unless he was aware of the agency of John J. Miller for the vendors when the contract was made or subsequently learned of it and with such knowledge ratified or acquiesced in what had been

done. If the facts that the trustees for sale were to be remunerated by a 3% commission and the sale's agent by a 7% commission are taken into account, the element of interest in conflict with duty is superadded.

The learned Chief Justice of the Court of Appeal thus summarizes the evidence as to knowledge and acquiescence on the part of the appellant—quite fairly, if I may say so:

> J. J. Miller, while not quite positive, says that shortly after the making of the agreement in question, and therefore about five years prior to the bringing of this action, he told the appellant that it was the Kildall estate and not the defendants who were the real vendors of the property. He also adverts to certain advertisements which he

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> says appellant must have seen and which he thinks disclosed the fact that J. J. Miller was the selling agent of the Kildall estate;

and on this evidence the learned Chief Justice assumes knowledge and finds ratification by the appellant apparently because he "did not think fit to give evidence * * * to rebut the evidence of J. J. Miller."

With great respect, the suggestion of an interested witness that "the appellant must have seen" certain advertisements, and that he "thinks" these advertisements "disclosed the fact that J. J. Miller was the selling agent" cannot be accepted as satisfying the burden of proof which lay on the respondents, rescission being sought, to establish that the dual position of their agent, J. J. Miller, and the conflict between his duty to them and his duty to the appellant and between his interest and the latter duty became known to the appellant, and that he either expressly or by implication elected to uphold the transaction. *Cavendish-Bentinck* v. *Fenn*[12], at page 666; *De Busche* v. *Alt*[13], at page 313. The respondent did not make a *primâ facie* case of the knowledge essential to ratification or acquiescence such that the appellant was called upon to displace it.

[12] 12 App. Cas. 652.
[13] 8 Ch. D. 286.

On the contrary, there is really nothing whatever to shew that he knew anything of J. J. Miller's agency for the vendors until he saw the sale agreement some five years after it had been made; and he then promptly repudiated liability and sued for rescission within a reasonable time afterwards. Indeed, there is very little to indicate that he was aware at any earlier date that. William Miller, his own attorney, was also one of his vendors. As put by the learned trial judge:

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> There is no evidence before me to shew that the plaintiff knew that the purchase made on his behalf had been in the manner indicated. When it was brought to his attention by the agreement being produced he then took the position by letter, signed by himself, but probably prepared by his solicitor, that he intended to set aside the transaction on the grounds that are now urged.

I am, with respect, of the opinion, that the appellant's right to avoid the transaction, regardless of whether it was fair or unfair, advantageous or otherwise at the time it was entered into, is beyond question.

Objection is taken, however, to the constitution of the action in that the defendants are sued in their personal capacity, whereas they sold, in fact, as trustees for the Kildall estate. In the agreement for sale the vendors are not described as trustees. By it they purport to sell as beneficial owners and to assume the obligation of vendors in their personal capacity. They would, therefore, appear to have no good ground for contending that the necessary parties are not before the court. If for any reason they thought it desirable either in their own interest or in that of the Kildall estate to have that estate represented in this action by themselves in their capacity of trustees, it was their privilege, at any time before trial, to apply for the requisite amendment. Not having done so they should not be heard now to set up as a matter of right that it should have been made. But, as a matter of grace and indulgence, if they desire it, since it will entail no delay, expense or inconvenience to the plaintiff, I would be disposed to allow such an amendment to be made now. Judgment should be entered for the appellant as prayed in the statement of claim against the respondents in their personal capacity; and, if they elect to amend, also in their capacity as trustees.

The appellant is entitled to his costs of the litigation throughout.

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BRODEUR J.—Stahl had given a power of attorney to William Miller and to the firm J. J. Miller, of which William Miller was a member. He had left some money in the hands of the firm J. J. Miller for investment.

It happened that the Kildall estate, of which William Miller was one of the trustees, had some property for sale, and an agreement for sale of some lots was then signed by the trustees of the Kildall estate of which William Miller was one, in favour of Stahl, and the agreement was then signed by William Miller as agent for Stahl. The result is that Miller appeared in the same acts as one of the vendors and as agent of the purchaser.

The price which was paid was given by the Miller firm out of the moneys belonging to Stahl. The taxes were paid in the same way and Stahl was never told that his agent had been, at the same time, his vendors.

Some years after, when he discovered this illegal transaction, he repudiated it and took proceedings in rescission.

It is a settled rule that an agent authorized to buy cannot buy from himself and that if he does so without disclosing the fact to his principal the latter may repudiate the transaction. *Harrison* v. *Harrison*[14]; *Gillett* v. *Peppercorne*[15].

[14] 14 Gr. 586.
[15] 3 Beav. 78.

The fairness of the transaction is immaterial; and the agent might be acting with the best of good faith; but it does not make any difference, because an agent will never be allowed to place himself in a situation in which, under ordinary circumstances, he would be

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tempted to do that which is not the best for his principal. *Bank of Upper Canada* v. *Bradshaw*[16].

Besides, in this case, it is proved that the Miller firm which sold the lots for the Kildall estate was having a commission on those sales, and then William Miller, who was a member of that firm, who had a share in that commission, was naturally interested in disposing of those lots in favour of Stahl, which he had no right to do, being the agent of Stahl.

Stahl should, therefore, succeed in setting aside the agreement for sale and the judgment a quo should be reversed with costs of this court and of the courts below.

Appeal allowed with costs

Solicitor for the appellant: A. L. P. Hunter.

Solicitor for the respondents: A. G. Harvey.

[16] L.R. 1 P.C. 479.