1953
*Oct. 21, 22, 23
1954
*May 19

JAMES EDMUND TAYLOR (*Plaintiff*) .... APPELLANT;

AND

SILVER GIANT MINES LIMITED and GIANT MASCOT MINES LIMITED (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Agent—Right to commission—Engaged to negotiate sale—Agreement made with party introduced by agent—Break in continuity of negotiations.

Desiring to dispose of a mining property, the respondent Silver Giant Mines Ltd. engaged the appellant as agent to negotiate a deal with the Hedley Mascot Gold Mines Co. Ltd. Subsequent to his engagement, the appellant signed a memorandum agreeing to a certain commission. Later he declined to be limited to that commission, but the Silver Giant company did not elect to treat his withdrawal as a repudiation.

The two companies were initially brought into relation with each other through the efforts of the appellant. The negotiations which followed were broken off by letter of the Silver Giant company to the Hedley Mascot company. Negotiations later carried on resulted in the parties entering into an agreement whereby the Hedley Mascot company acquired control of the property in question. The agreement reached differed in many material particulars from the one drafted before the break down.

The appellant took no direct part in the negotiations before the break down and none thereafter. His action against both respondents for a commission claiming that he had been the effective cause of the sale was maintained by the trial judge, but dismissed by the Court of Appeal.

Held: (Kellock and Estey JJ. dissenting), that the appeal should be dismissed.

Per Rinfret C.J., Taschereau and Locke JJ.: The arrangement between the appellant and the respondent was not a general employment in the sense in which that expression was used in *Toulmin* v. *Millar* ((1888) 58 L.T.R. 96), but the work which the appellant was invited to do was to negotiate a sale of the property. Had the negotiations initiated by him resulted in a sale, the claim to the commission would have been complete. Since, as found by the Court of Appeal, such negotiations broke down and were terminated and the appellant did not negotiate the sale eventually made, the claim for a commission failed.

The evidence did not support the view that the negotiations were broken off for the purpose of depriving the appellant of a claim to a commission, even though it be assumed that to do so would have afforded the appellant any legal remedy.

Per Kellock and Estey JJ. (dissenting): The evidence established that the appellant's engagement was that if he found a buyer who, as a result of his introduction, purchased the property, he would be entitled to a commission.

Construing the letter which broke off the negotiations in relation to what took place both before and after its writing, it did not constitute a break in the continuity of the negotiations. The attitude of both companies showed them to have been for some time and to be still, at the time of the writing of the letter, convinced that it was desirable an agreement should be made. Construed in the light of the evidence, the letter was but a continuation of the former efforts to conclude an agreement.

Since the appellant had agreed to the amount of his commission, he was precluded from now contending that he was entitled to the usual commission of 10 per cent. But since the shares which were to be his commission were not now available and since, having performed the service, he had an enforceable contract, he was entitled to damages, they being the value of the shares to be computed as of the date of the non-delivery or breach on the part of the respondent.

The fact that delivery of the shares was withheld did not provide a basis for the award of interest or of damage in respect to the withholding thereof.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment at trial in an action by an agent for a commission.

A. W. Johnson for the appellant.

Alfred Bull Q.C. and *D. M. M. Goldie* for the respondents.

The judgment of Rinfret C.J., Taschereau and Locke JJ. was delivered by:—

LOCKE J.:—Upon the question as to the employment of the appellant by the respondent Silver Giant Mines Limited, the learned trial Judge, after considering the conflicting evidence, made the following finding:—

(1) [1953] 9 W.W.R. (N.S.) 407.

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The plaintiff says that he was engaged by Wheeler, the President and Managing-Director of the Silver Giant Company, to negotiate a deal with the Hedley Mascot Company and that a deal was negotiated as a result of his services. The plaintiff's evidence to the effect that through his efforts a deal was negotiated is supported by the evidence of Dr. Dolmage, Tremaine and McLelan. I have no hesitation in accepting that evidence.

In delivering the unanimous judgment of the Court of Appeal (1) allowing the appeal of the present respondent from the judgment at the trial, Bird J.A. has said that he concluded from the reasons for judgment that the learned trial Judge had made, inter alia, a finding of fact that the plaintiff was employed some time prior to September 27, 1949, by the Silver Giant Company, through its President, Wheeler, as the company's agent to conclude a deal with the Hedley Company. This was expressed rather differently in a later passage in his reasons for judgment which read:—

> The language of the learned trial Judge when discussing, in his reasons for judgment, the employment of Taylor by the Silver Giant Company, leads me to the conclusion that the effect of the learned Judge's finding is that the employment which took place some time prior to September 27, 1949 was an employment to negotiate a deal, the compensation for such services not having been discussed or settled between the parties prior to September 27, 1949.

I think it is clear from the passage quoted that the learned Judges of the Court of Appeal agreed with the learned trial Judge, not only as to the fact of Taylor's employment by the Silver Giant Company but as to the nature of that employment, and there are thus concurrent findings of fact upon this question.

The question to be decided is as to whether the appellant did negotiate the deal, within the terms of this arrangement, which resulted in the acquisition of the undertaking of the Silver Giant Company by the respondent Giant Mascot Mines Limited, a company organized at the instance of the Silver Giant Company, and Hedley Mascot Gold Mines (N.P.L.) under the terms of an agreement entered into between them dated May 1, 1950. From the fact that the matter is not referred to in the reasons for judgment delivered by the learned trial Judge as to the effect of the breakdown of the negotiations between the Silver Giant Company and the Hedley Mascot Company, brought about by the letter from the solicitors for the

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former company to the Hedley Mascot Company dated February 6, 1950, I assume that it was not argued before him.

Following the examination of the property of the Silver Giant Company made by Dr. Dolmage, the consulting geologist of the Hedley Mascot Company, in September of 1949, which resulted in his making a favourable report on the property to that company, active negotiations were carried on between the two companies and, early in October, they had practically reached an agreement whereby the property of the Silver Giant Company would be acquired by a new company to be formed, and the Hedley Mascot Company would, in addition to giving financial aid, install upon the property a ball mill then situate upon its property at Hedley, B.C. The two companies were to be paid for their respective contributions by shares to be issued in the new company. On October 31, 1949, the solicitors for the Hedley Mascot Company wrote that company to say that the form of the agreement to be executed by the parties had been settled by them with the solicitors for the Silver Giant Company but this document was never executed, apparently owing mainly to difficulties in arranging the financing of the new company. Negotiations were continued during the month of November and on December 12 the solicitors for the Silver Giant Company wrote to Dr. Dolmage making a proposal as to the one point upon which they said the parties were not in accord. Following a meeting of the directors of the Hedley Mascot Company held on December 13, 1949, Dr. Dolmage, on behalf of the Hedley Mascot Company, wrote to the solicitors for the Silver Giant Company making a counter proposal which was rejected by a letter from the said solicitors bearing the same date, which stated that the only acceptable proposal was that made in their letter of December 12.

While it is not very clear from the evidence as to the nature of the negotiations carried on between that date and January 27, 1950, it is, I think, evident that during this interval the principal officers of the two companies continued to negotiate in the hope of reaching an agreement. On the last mentioned date the minutes of a meeting of the Board of Directors of the Hedley Mascot Company state that the General Manager reported to the meeting

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the nature of a proposal which he had re-negotiated with the Silver Giant group, which differed in material respects from the terms of the draft agreement which had been referred to in the letter from the solicitors of October 31, 1949. The directors approved the proposal, subject, however, to the approval of the shareholders and the company making an arrangement with the fiscal agents of the company to purchase 400,000 shares of the company's stock at .25 cts a share. On January 30, 1950, the solicitors for Hedley Mascot wrote to the Silver Giant Company formally proposing an agreement and stating its terms. This proposal was considered at a meeting of the directors of the Silver Giant Company held on February 4, 1950, to consider, in the language of the minutes, "the last and final offer of Hedley Mascot Gold Mines Ltd." At this meeting it was unanimously resolved that the proposal be rejected and this decision was communicated to the Hedley Mascot Company by a letter dated February 6, 1950, the concluding portion of which read:—

> Under these circumstances we are directed by our clients to advise you that the protracted and fruitless negotiations which have been carried on must now be considered to be at an end.

On September 27, 1949, when apparently it was contemplated that an agreement between the two companies would be reached, the appellant had attended an informal meeting of the directors of the Silver Giant Company, at which time he signed a memorandum agreeing to accept 30,000 shares of the Silver Giant Company "as my commission on any deal with Hedley Mascot Gold Mines Ltd. (N.P.L.) whereby they get control of Silver Giant Mines Ltd. or the property." The memorandum further stated that these shares were to be the full amount of the appellant's commission and were to be issued on the deal being completed to the satisfaction of the Silver Giant directors. There can be no doubt, in my opinion, that this agreement on the part of Taylor referred to services theretofore rendered for bringing the parties together and to any services that he might render thereafter. According to the evidence of some of the directors of the Silver Giant Company who were present at this meeting, Taylor then represented that he was on friendly terms with Dr. Dolmage and some of the other directors of the Hedley Mascot Company and could thus be of material assistance in completing a

deal. Earlier, according to the uncontradicted evidence of W. G. Mackenzie, the President of the Hedley Mascot Company, Taylor had told him that he was a friend of Wheeler and could arrange to "fix this thing up." Assuming that the appellant expected a commission from the Silver Giant Mines Company for his services for negotiating a deal with Hedley Mascot, it appears to be the case that prior to the meeting of September 27 he had intended also to claim a commission from the Hedley Mascot Company. In a conversation with Mackenzie he had suggested to him that that company should pay him a commission if a deal went through and he (Mackenzie) had told him that the Hedley Mascot Company had no commitment with him at all. The date of this discussion is not made clear in the evidence. Mackenzie thought it was in August 1949 that Taylor asked for a commission from Hedley Mascot and said that somebody had to pay him a commission, either one company or the other, at which time Mackenzie said he told him that his company was not committed and made it clear to him that he was not acting as its agent in any capacity. Whatever prompted his action in the matter, Taylor reappeared at Wheeler's room, where the arrangement of September 27, 1949, had been made, within a few days thereafter and said that he was not satisfied with the amount of the commission, that he had agreed upon and said that he would decline to be bound by it and wanted a commission of 10 per cent. Wheeler and Allen, one of the directors of the Silver Giant Company who was also present at the meeting, said that at this time Taylor told them that the Hedley Mascot Company was declining to pay him any commission, which was apparently his reason for demanding a larger amount from Silver Giant. The directors of the Silver Giant Company declined to change the arrangement and by letter dated January 7, 1950, Taylor wrote them to say that he withdrew from the agreement of September 27, 1949, adding:—

> That memorandum related only to a particular deal I was then negotiating for you with Hedley Mascot Mines Ltd. (N.P.L.). That deal did not go through and I refuse to be limited by the memorandum of September 27, 1949 as to commission earned in respect of any deal now pending with Hedley Mascot Mines Ltd. (N.P.L.).

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The Silver Giant Company did not elect to treat this letter as a repudiation of the agreement of September 27, 1949, and as between the appellant and that company matters were in this state on February 6, 1950, when negotiations were broken off by it.

It is quite apparent from the evidence that the appellant was not familiar with the nature of the negotiations being carried on between the two companies between September 1949 and the date these negotiations broke down and took no part in them but, as pointed out by the learned trial Judge, it is undoubtedly the case that his services for the purpose of assisting in them were available if they had been required by either party. It is equally clear, however, that the experienced business men who, with their advisers, were carrying on the negotiations between August 1949 and February 6, 1950, could not be assisted in any way by Taylor. Taylor apparently knew nothing of the proposal that the two companies should collaborate in forming a third company which would acquire the Silver Giant property and the mill machinery from Hedley Mascot. He had apparently rendered the only service of which he was capable towards negotiating a deal when he brought the parties together in April 1949 and enlisted the interest of Dr. Dolmage and his associates in the Silver Giant property.

It was admitted by the appellant and is made abundantly clear by the evidence that he took no part in the further negotiations between the two companies after February 6, 1950, which ultimately resulted in their entering into the agreement of May 1, 1950. It is, in my opinion, impossible upon the evidence to suggest that the Silver Giant Company broke off negotiations on February 6, 1950, for the purpose of depriving the appellant of a claim to a commission, even though it be assumed that to do so would have afforded the appellant any legal remedy. The evidence does not support any such view. At the directors' meeting of February 4, 1950, at which the directors of Silver Giant decided to reject the offer of the Hedley Mascot Company and terminate the negotiations, the question of interesting other mining companies in the company's property was discussed and the solicitor reported on certain discussions which he had had with the officials of the two companies and with an inventor and was instructed to

endeavour to interest the Bralorne Mines Ltd. in the property. On February 23, 1950, the directors of the Hedley Mascot Company met and considered various mining properties where their available milling machinery, which was no longer required at Hedley by reason of the exhaustion of the ore, might be useful. The minutes show that three of such properties were considered and the general manager was instructed to arrange for an examination of one of these properties. The company had a substantial amount of cash in its treasury at this time and Dr. Dolmage and the general manager reported to the Board that a proposal had been made to them that the company take an interest in the drilling of an oil well in the Leduc oil fields in Alberta and instructions were given to investigate the matter. No mention appears in these minutes of any negotiations with the Silver Giant Company which were apparently considered as having been abandoned.

There is no dispute as to the manner in which the negotiations which thereafter resulted in the agreement with the Silver Giant Company of May 1, 1950, were initiated. W. G. Mackenzie was the President of the Western City Company Ltd., a financial concern which had at an earlier date underwritten shares of the Hedley Mascot Company and otherwise been interested in its financing. Mr. P. E. Wootten, the general manager of the Western City Company had known generally of the negotiations which had been carried on between the two mining companies and had been informed by Mackenzie early in February 1950 that they had been terminated. At a date fixed by him as early in March 1950, he had talked with Mackenzie about the possibility of again opening negotiations and the latter had suggested to him that he make an effort to do so. Wootten did not know either Wheeler or any of the other directors of the Silver Giant or their solicitor Mr. Jestley and had never heard of Taylor. On March 8, Mackenzie telephoned to Jestley and arranged for Wootten to see him and, after doing so, took the matter up with Wheeler and Thompson, one of the other directors of Silver Giant. The negotiations thus initiated by Wootten were continued during the months of March and April. Mr. R. H. Cunning, who had been for many years a director of the Hedley Mascot Company, and Wootten, who had been appointed as a committee of one by the directors to carry on the negotiations.

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apparently acted together in endeavouring to arrange a deal. The Silver Giant Company also appointed a committee to negotiate on its behalf and on March 29, 1950, they submitted a proposal to Gunning, wherein they suggested terms which they were apparently prepared to recommend to the directors of their company. Counter-proposals were made and on April 21, 1950, a written memorandum containing heads of an agreement was signed on behalf of the Hedley Mascot Company by Mackenzie and Gunning and by Wheeler and Thompson on behalf of Silver Giant and this was followed by the preparation and execution of the agreement of May 1, 1950.

The agreement thus eventually reached differed in many material particulars from that drafted early in October 1949. Both that draft and the agreement finally reached provided for the formation of a new company to acquire the mining properties of the Silver Giant and part of the milling machinery of the Hedley Mascot but, while the earlier draft would have given the Silver Giant Company 49 per cent of the issued capital stock of the new company and Hedley Mascot 51 per cent, these proportions were changed to 45 per cent and 55 per cent in the agreement reached. Further, the earlier draft would have required the Hedley Mascot Company to advance a total sum of $250,000 to the new company and such further funds, in addition, which the directors of the new company might decide to be necessary to bring the property into production and to operate the mill. The agreement reached obligated the Hedley Mascot Company to furnish at such times as the directors of the new company might decide all of the funds necessary to bring the said mineral claims into economic production and to operate the mill and, of this amount, Hedley Mascot was to be reimbursed only to the extent of $165,000 of the funds so supplied out of the first smelter returns. By the earlier draft, Silver Giant Company were to receive as part of the consideration 300,000 fully paid shares of Hedley Mascot and this figure was reduced to 200,000 of such shares in the agreement finally reached. I think the proper inference to be drawn from the evidence is that the main obstacle to the completion of a deal between the two companies in the Fall of 1949 was the inability of the Hedley Mascot Company to finance its part of the proposed activities of the new company upon

the basis of the division of the shares of that company then proposed and that the success of the negotiations initiated by Wootten was attributable to the financial arrangements which the Western City Company were prepared to make to finance the operations on the different terms then agreed to by the Silver Giant Company. The agreement finally reached appears to me to have been more favourable to the Silver Giant Company than that under discussion when the negotiations broke down in February.

The appellant's case is that, having introduced the Silver Giant property to the Hedley Mascot Company and an agreement having eventually been reached for the acquisition of its property by the new company that was formed under the name Giant Mascot Mines Limited, voting control of which was given by the terms of the agreement to the Hedley Mascot Company, his right to a commission is complete. No point is made on behalf of either party that the sale was to the new company rather than to the Hedley Mascot Company and it is common ground that this circumstance does not affect the question to be determined. The appellant says that he found a purchaser to whom eventually the Silver Giant property was sold on terms agreeable to it and that, accordingly, the commission has been earned.

It is impossible, as has been so clearly pointed out in the reasons for judgment delivered in the House of Lords in *Luxor* v. *Cooper* (1), to state any general rule by which the rights of the agent or the liability of the principal under commission contracts are to be determined. As Lord Russell said, the contracts by which owners of property desiring to dispose of it put it in the hands of agents on commission terms are not, in default of specific provisions, contracts of employment, in the ordinary meaning of those words, since no obligation is imposed on the agent to do anything. In the present matter, the work which the appellant was invited to do was to negotiate a sale of the property. The argument for the appellant really is that the arrangement made was a general employment, in the sense in which that expression was used by Lord Watson in his judgment in *Toulmin* v. *Millar* (2), an expression which Lord Atkinson said, in delivering the judgment of the

(1) [1941] A.C. 108.

(2) (1888) 58 L.T.R. 96.

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Judicial Committee in *Burchell* v. *Gowrie* (1), meant that should the property be eventually sold to a purchaser introduced by the agent he would be entitled to commission at the stipulated rate. I am unable to agree with this contention.

It is apparent from the evidence as to the discussion which took place between the directors of the Silver Giant Company and Taylor on September 27, 1949, and from the terms of the memorandum then drawn up by one of the directors and signed by Taylor, that the directors interpreted the arrangement between them as entitling Taylor to a commission of the amount mentioned in the memorandum, for his services theretofore rendered and such further assistance as he might be able to render in negotiating a sale of the property, if such a sale should result from the negotiations then being carried on. Had these resulted in a sale, as the directors of the company obviously then contemplated would be the case, the appellant's claim to the agreed commission would have been complete. The learned judges of the Court of Appeal have unanimously found upon the evidence that those negotiations broke down and were terminated. This is the only finding before us on this question of fact since, no doubt for the reason which I have above indicated, the learned trial judge did not deal with the matter. After examining with care all of the evidence in this case, I respectfully agree with the opinion expressed by Mr. Justice Bird, in delivering the judgment of the Court, that the appellant did not negotiate the sale of the Silver Giant property, within the meaning of the offer made to him, and that the services rendered by him were not the effective cause of the sale.

I would dismiss this appeal with costs.

The dissenting judgment of Kellock and Estey JJ. was delivered by:—

ESTEY J.:—The appellant at trial recovered judgment for $33,000 for services rendered by him to and at the request of the respondent Silver Giant Mines Limited (hereinafter referred to as Silver Giant) in introducing a

(1) [1910] A.C. 614 at 626.

buyer who purchased its mine. This judgment was reversed in the Court of Appeal (1). Appellant in this appeal asks that the judgment at trial be restored and varied by increasing the amount thereof.

The learned trial judge found that the plaintiff was requested by Silver Giant prior to September 27, 1949, to and did find a buyer that purchased its mine.

The learned judges in the Court of Appeal were of the opinion that there was evidence to support the finding as to the appellant's request, but reversed the learned trial judge because

> . . . there can be no room for doubt that on February 6, 1950, the parties, having failed to agree on terms which were mutually satisfactory, the negotiations initiated by Taylor were finally determined.

The respondent Silver Giant contends that there are no concurrent findings of fact relative to employment prior to September 27, 1949, and that the finding of the learned trial judge to this effect should be reversed. It further contends that on that date (September 27, 1949) the appellant entered into an agreement with Silver Giant for services to be rendered thereafter which was never carried out. In the alternative, if there was any other agreement, it was that the appellant should "initiate, negotiate and conclude a deal," which he did not perform and that in any event whatever agreement may have been entered into it was determined as found by the learned judges in the Court of Appeal.

The reasons of Mr. Justice Bird, written on behalf of the Court (1), rather support the conclusion that there are concurrent findings of fact relative to employment prior to September 27, 1949. Even if, however, the contention of the appellant be accepted, the evidence fully supports the finding of the learned trial judge upon this point.

The Silver Giant, incorporated in 1947, owned a lead mine which was not in production. The appellant, a prospector and miner, stated that in 1948 Wheeler, President of Silver Giant, asked him if he "could get a buyer for it" (Silver Giant mine). As a result, appellant, on August 4, 1948, visited the mine. Wheeler was there and accompanied him upon his inspection and assisted in getting

(1) [1953] 9 W.W.R. (N.S.) 407.

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certain samples. On that occasion appellant says he mentioned Hedley Mascot Gold Mines Limited (hereinafter referred to as Hedley Mascot), when Wheeler explained his inability to do business with its officers, but said: "If you can and you make a deal, all right, it doesn't matter to me, I want to sell the mine." Wheeler does not dispute the fact of the visit, the inspection nor the taking of samples, but denies any reference to a sale of the mine then or upon any previous occasion. His explanation of appellant's visit is that he had previously endeavoured to sell shares to him and he would not invest until he had seen the mine. This explanation was obviously not accepted by the learned trial judge.

After this visit, and again with the concurrence of Wheeler, appellant spoke to Dr. Dolmage, a consulting geologist with Hedley Mascot, to whom he stated that Silver Giant "looked like a good thing." For some time the matter remained in abeyance because of an option Silver Giant had given to Siscoe Gold Mines Limited, of which the appellant was informed. This option was not exercised and expired March 15, 1949.

Thereafter Wheeler asked appellant "to go ahead." As a consequence, in April, 1949, he saw Dr. Dolmage who asked that appellant bring Wheeler to his office. This appellant did upon several occasions. Dr. Dolmage was apparently sufficiently impressed to discuss the matter with Mackenzie, President of Hedley Mascot, and a minute of Hedley Mascot directors on April 29, 1949, discloses that:

> The President told the Meeting that Dr. Dolmage had been talking to him about this property, which appeared to have merit, and that he had therefore asked him to attend this Meeting so that he might fully report to the Board.

After Dr. Dolmage's report and "considerable discussion," the minutes disclose that Dr. Dolmage

> was requested to have a further talk with Mr. Wheeler to see whether or not something tangible might be reduced to writing, in order that the Board might feel justified in asking Dr. Dolmage and Mr. Tremaine to proceed to the Silver Giant property to make a complete study and report back to the Board of Directors.

Two days later, April 28, 1949, appellant accompanied Wheeler to Dr. Dolmage's office, where possible terms were discussed and Dr. Dolmage drafted a proposal in which Hedley Mascot would provide the mill, equipment and

capital for operating the mine and would receive 1,700,000 shares of Silver Giant. Wheeler admits that he went with and at the request of the appellant to Dr. Dolmage's office; that in the course of the discussion, the fact that Siscoe was out of the way was mentioned and also "about how many shares were issued" of Silver Giant. He does not, however, admit any discussion about a proposed agreement. In fact he says he did not there see the proposal and, if he had, he would not have agreed to it. He, however, admits that the proposal was shown to him by McLelan, Secretary of Silver Giant, about the date thereof (April 28, 1949) and that it came from Dr. Dolmage's office. McLelan was not asked as to the proposed agreement, but does say:

> . . . sometime in April Mr. Wheeler brought Taylor in, introduced him to me and told me that Taylor was negotiating a deal between Silver Giant and Hedley Mascot. I told Mr. Wheeler at the time, I said, 'Do you think they will negotiate with you?'

However much Wheeler may insist he knew nothing of any proposal of April 28, a letter from Mackenzie, President of Hedley Mascot, dated May 12, 1949, commences:

> We are writing you with reference to our negotiations for the proposed purchase of 1,700,000 Treasury shares of your company.

Further letters were exchanged, which are not material hereto.

Dr. Dolmage was away during July and August and in his absence Hedley Mascot merely kept negotiations open. Appellant states that in August Wheeler complained that the deal was "going pretty slow" and asked him if he (appellant) "could get him contact with Mackenzie, the President." As a result of arrangements made by appellant, Wheeler, Dr. Dolmage, appellant and possibly Thompson went to Mackenzie's office. On September 7, 1949, Hedley Mascot, through its Secretary William Patterson, submitted in writing a request for an option in Silver Giant mine. This request was not acted upon.

Dr. Dolmage states that in September appellant and Wheeler came to his office and in the course of their urging him to visit the mine, appellant "went so far as to offer to pay my fees and expenses." Thereafter, possibly the next day, in any event, September 14, appellant and Wheeler again visited Dr. Dolmage's office, when Wheeler brought maps, samples and other information relative to the Silver

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Giant mine. Upon that occasion Dr. Dolmage again discussed a possible agreement, but, while he inferred that Wheeler would enter into an agreement, he (Dr. Dolmage) "was unable to pin him down to anything very definite." A few days later, September 18, Dr. Dolmage and Wheeler went to the mine, where they remained two or there days. Dr. Dolmage, referring to this visit, stated:

> My conclusion very definitely was that the mine came nearer to satisfying the requirements of our company than anything we would be likely to find.

When asked what the requirements were, he stated:

> We hadn't very much money but we had a first class mill which was standing idle and we had no ore to use that mill on.

About the end of September, or early in October, the parties had reached a practical agreement, a draft of which was prepared but never executed. Tremaine, General Manager of Hedley Mascot, was of the opinion that it would have been executed but for the difficulty Hedley Mascot experienced in arranging the necessary financing.

Notwithstanding all that appellant had done prior to September 27, 1949, the respondent contends that appellant had not been requested to "get a buyer for it," and that whatever negotiations had taken place were not by virtue of any efforts on appellant's part. However, respondent's directors depose that about this time they concluded appellant should be asked to assist in the negotiations and invited him to an informal meeting of the directors at Wheeler's home. There the following agreement was entered into and signed by the appellant:

> I hereby agree to accept Thirty Thousand (30,000) shares of Silver Giant Mines Ltd. (N.P.L.) as my commission for any deal with Hedley Mascot Mines Ltd. (N.P.L.) whereby they get control of Silver Giant Mines Ltd. or the property. This amount of shares to be my commission in full and these shares to be issued to me on the deal being completed to the satisfaction of Silver Giant Directors.

The learned trial judge heard the directors present at that meeting depose that the agreement was in relation to future services only and stated: "I cannot accept this evidence." No explanation was offered as to why they selected the appellant to assist them in the negotiations at that time. They gave to him no directions or instructions. In fact, there does not appear to have been any difference in the relationship of the parties after September 27, 1949,

except that possibly appellant was not as active as prior thereto, perhaps because the parties had reached a point where a complete agreement was anticipated and, in any event, thereafter it was a matter of terms in regard to which he took no part. Three days thereafter, on September 30, the directors decided that "a committee of two or more directors do negotiate with the Hedley Mascot Mining Co. Ltd. or other Mining Company or Financial Group," yet the appellant's name is not there mentioned. Moreover, at the same meeting Mr. Jestley was appointed legal adviser to the company and appears soon thereafter to have conducted negotiations on its behalf.

The parties at that time had almost reached an agreement and it would appear that the learned trial judge rather accepted the evidence of appellant, who deposed that at the informal directors' meeting Mr. Thompson, who did most of the talking, said:

> 'Mr. Taylor, I want to get this commission settled'. I said, 'Have you settled on the deal', and he said, 'Just about'. 'We want to get this commission settled', and he said, 'How much will you take to get right down to brass tacks, what are you going to take for commission, we want to get this thing wound up quick', and I said, 'I will take 50,000 free shares for my commission'.

Appellant very shortly thereafter became dissatisfied with his remuneration as fixed by this agreement and made that fact known to the directors. Finally, on January 7, 1950, he endeavoured by letter to "withdraw my agreement to accept 30,000 shares." This letter of withdrawal was not accepted or otherwise acted upon by Silver Giant. It therefore does not affect the rights of the parties, as one of them cannot by such an act avoid his contractual obligations. *Sailing Ship "Blairmore" Co.* v. *Macredie* (1). His conduct and letter however are consistent with his contention that he was requested to find a buyer and that he had agreed upon remuneration for his services.

The finding of the learned trial judge that he did not accept the evidence of the directors upon this issue ought to be accepted not only because of the advantage the learned trial judge had in hearing and observing the witnesses as they gave their evidence, but also his conclusion finds support in the language used in the agreement and

(1) [1898] A.C. 593.

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more particularly when read and construed in the light of the evidence that preceded and immediately followed the making thereof.

This agreement was therefore intended, and must be accepted as fixing the appellant's remuneration. The making thereof by the directors was a ratification of Wheeler's request to the appellant and constitutes an answer to the contention on the part of Silver Giant that if Wheeler did employ the appellant he did so without authority.

The other terms of appellant's engagement were not in writing and must be ascertained from the language used by the witnesses, construed in relation to the circumstances under which they were made. Wheeler, at the outset, wanted appellant to "get a buyer for me." Subsequently, he used the words "if you can make a deal." These statements were made prior to the appellant interviewing any party. Appellant thereafter brought the parties together as prospective buyers and sellers and, at least in the early stages, assisted in interesting Dr. Dolmage and others in the merits of the Silver Giant mine. Throughout, he appears to have conducted himself in the manner described by Tremaine: "The main part he took was to try to iron out the difficulties that would crop up from time to time between us, and try to keep the different parties in contact." He never did, nor was he, upon the record, expected to enter into the involved and complicated negotiations that were apparently necessary. These were conducted at times by officials and experts of the respective companies, committees of their directors, their solicitors and finally by Wootten, Mackenzie, Gunning, Wheeler and Thompson.

The evidence relative to respondent's contention that appellant at times conducted himself in a manner inconsistent with the existence of any request to find a buyer prior to September 27 is either so vague or inconclusive that no conclusion adverse to the appellant ought to be based thereon.

The evidence establishes that appellant's engagement by Silver Giant was that if appellant found a buyer who, as a result of his introduction, purchased the property, he was entitled to a commission.

The negotiations continued and in December the parties thought there was only one difficulty to be overcome before an agreement might be made. On December 13 Hedley Mascot made an offer which was not accepted. Dr. Dolmage was in the hospital a short time at the end of December and when he came out in January the first day he was at the office he met Wheeler and Jestley, but again no agreement was made. Thereafter Dr. Dolmage did not have much to do with the negotiations. On January 30 the solicitors for Hedley Mascot made another proposal which the directors of Silver Giant considered and then directed their solicitor to write the following letter:

MacDOUGALL, MORRISON & JESTLEY

Marine Building,
355 Burrard Street,
VANCOUVER, B.C.
February 6, 1950.

DELIVER
Hedley Mascot Gold Mines Limited,
(Non-Personal Liability)
908 Royal Bank Building,
Vancouver, B.C.

Dears Sirs:

Inasmuch as the proposal submitted on your behalf through Messrs. Farris, Stultz, Bull & Farris by letter dated January 30, 1950, differs so materially from that which your negotiating committee had previously agreed upon we are instructed by Silver Giant Mines Limited (N.P.L.) to advise you that its Board of Directors at a meeting held on February 4, 1950, has unanimously rejected the same.

Under these circumstances we are directed by our clients to advise you that the protracted and fruitless negotiations which have been carried on must now be considered to be at an end.

Yours truly,

MacDOUGALL, MORRISON & JESTLEY
per 'H. L. Jestley'

The learned judges in the Appellate Court were of the opinion that whatever agreement may have been made with the appellant it was terminated by the foregoing letter of February 6, 1950. The learned judges emphasized that subsequent to the letter of February 6, 1950, the appellant had taken no part in the renewed negotiations and, indeed, that he was not even aware that the same were being carried on. They also pointed out that neither Dolmage nor McLelan had any part in negotiations subsequent to February 6. Mr. Justice Bird stated:

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that the earlier negotiations were terminated on February 6, 1950, and that thereafter the respondent made no contribution towards the consummation of a deal.

The letter of February 6, 1950, must be read and construed in relation to what took place both before and after the writing thereof. On December 12 the solicitor for Silver Giant concluded his letter: "that this offer to resolve the last difficulty in negotiations is final." On December 13 Hedley Mascot wrote: "Before permitting these prolonged negotiations to break off" the directors were making "one further proposal." On December 13 solicitor for Silver Giant replied "that the only proposal which is acceptable is that which we made to you as proposal (*a*) in our letter of December 12, 1949." There does not appear to be any further correspondence until January 30, when the solicitors for Hedley Mascot submitted another offer. It is in reply to this offer that the letter of February 6, 1950, is written and concludes with the words already quoted. In other words the parties had been writing in terms of finality upon other occasions with the evident hope that an agreement might be arrived at without further delay. The letter of February 6, 1950, is of the same type in so far as it states: "protracted and fruitless negotiations" must be considered "at an end." It is a fact that these negotiations through the solicitors did not continue, but, as upon previous occasions, another effort was made. Both parties had and still realized that an agreement was desirable and to their respective advantages. Wootten, Manager of Western City Company, the fiscal agents of Hedley Mascot, and who had been kept in touch with negotiations, immediately he heard they were at an end deposed: "I made a mental resolve that I was going to try and do my best to reopen it, if possible." He interviewed Mackenzie and as to these interviews, Mackenzie deposed:

> I always felt that the deal was a good deal for both companies and it was too bad if it was not consummated. . . . and anyway, we talked it over and Phil Wootten knew of this situation.

and again:

> 'Well, don't let this thing die. I would like to open it up again; I think I can do something. Will you let me have a crack at it?' Those were his exact words. I was going away and I said, 'Phil, if you think you can get the companies together, go ahead.'

Wootten found Mackenzie's associates in Hedley Mascot of the same opinion and later, when Wheeler and his associates in Silver Giant were interviewed, they entertained the same view. These were the circumstances under which the new negotiations were taken up and which resulted in the agreement of May 1, 1950. Tremaine, Manager of Hedley Mascot, aptly described the position when, referring to the negotiations and the letter of February 6, he stated:

> Officially they were supposed to come to a halt but actually there was still efforts being made by different members of the two firms to keep the thing alive to see if something couldnt' be arrived at.

Respondent, however, submits that the letter of February 6, 1950, constituted a complete and decisive break and contends that by virtue of this letter in the language of Lord Shaw of Dunfermline the continuity between the original relation and the ultimate transaction had been not merely dislocated but broken. Lord Shaw's statement reads as follows:

> (1) When it is proved—and it must, of course, be proved—that parties to a transaction are brought together, not necessarily personally but in relation of buyer and seller through the agency of an intermediary employed for the purpose, the law simply is that if a transaction ensues, then that intermediary is entitled to his reward as such agent; (2) nor is he disentitled thereto because delays have occurred, unless the continuity between the original relation brought about by the agent and the ultimate transaction has been not merely dislocated or postponed but broken; and (3), finally, the introduction by one of the parties to a transaction of another agent or go-between does not deprive the original agent of his legal rights, and he cannot thus be defeated therein.

This statement was made by Lord Shaw in *Bow's Emporium, Limited,* v. *A. R. Brett & Co. Ltd.* (1), where the agent recovered his commission notwithstanding that the vendor intimated in January and then positively stated in February that he had decided against the purchase. In fact the purchase was concluded in September through another agent. It was there held that the first agent was entitled to his commission. Viscount Haldane stated at p. 197:

> the agent who has got an agreement to be paid the commission, and who has introduced the purchaser, is entitled to it, even where the actual sale is not ultimately effected through him. The question is whether the services of the agent were really instrumental in bringing about this transaction.

(1) (1927) 44 T.L.R. 194 at 199.

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This case illustrates that a delay of months, together with the fact that the agent was not a party to the final negotiations may not constitute a break in continuity.

The cases of *Wallace* v. *Westerman* (1), and *Turner, Meakin & Co. Ltd.* v. *Yip* (2), were cited. These are cases where the sale was effected through a second agent whose commission has been paid or not disputed, and the first agent by action claims a commission. In the former the efforts of the first agent were concluded under circumstances that Chief Justice Macdonald said "show that the transaction was completely ended." In the second the efforts of the first agent ceased when he was told that the property had been sold. Robertson J.A., delivering the judgment of the Court, stated:

> At this time it is clear to me that the plaintiff had abandoned all hope of getting a higher offer . . . and were not themselves doing anything further in connection with the sale.

In both cases the courts went on to find that the effective cause of the sale was the activity of the second agent to whom a commission had been paid.

The issue of abandonment or determination must be ascertained upon a consideration of the facts of a particular case. In the present case the conclusion of negotiations between the solicitors does not constitute a break in the continuity of the negotiations. Both parties had been for some time and were, on February 6, 1950, still convinced that it was desirable an agreement should be made. This is evident both by virtue of the attitude of those associated with Hedley Mascot and that when they sought to reopen or continue negotiations, those associated with Silver Giant immediately acquiesced. In essence it was but a continuation of the former efforts to conclude an agreement.

The appellant, inasmuch as he had agreed on September 27, 1949, to the amount of his commission, is precluded from now contending that he is entitled to the usual commission of 10 per cent. Under the terms of that agreement of September 27, 1949, he would be entitled to an order directing the delivery of 30,000 shares. We were, however, told that these were not now available. The learned trial judge proceeded upon that basis and awarded damages. He found that, if the appellant had received

(1) (1928) 40 B.C.R. 35. (2) [1953] 8 W.W.R. (N.S.) 168.

these shares, he would have received 1,040 shares in the new Giant Mascot Mines Ltd. for each 1,000 shares he held in Silver Giant; the market value at the date of the trial of the shares in Giant Mascot Mines Ltd. was approximately $1 per share and he therefore fixed the commission payable to the plaintiff at $33,000. Respondent contends that the learned trial judge erred in that he should have determined the value of these shares as of the date of the breach, which was 42c, and awarded damages on that basis.

While one in the position of the appellant is under no obligation to find a purchaser and, therefore, not "employed" as that word is used in contracts of mutual obligations, once he performed the service there is an enforceable contract. As stated by Lord Russell of Killowen in *Luxor Ltd.* v. *Cooper* (1):

> The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent.

When, therefore, the agreement between Silver Giant and Hedley Mascot was concluded, appellant became entitled to 30,000 shares in Silver Giant. These were not delivered and, as they are not now available, he is entitled to damages.

In *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.* (2), it was held that Burchell, who had earned his commission, was, under the circumstances, entitled to damages. The sale price consisted of mortgage bonds, preferred and ordinary shares. The matter was tried in the first instance before a referee who found that the plaintiff was entitled to damages computed on the basis of the par value of the bonds and stock. This decision was affirmed in the Privy Council where Lord Atkinson, on behalf of their Lordships, stated at p. 626:

> It was quite open to the referee to take, as the measure of damages, what would have been Burchell's commission at the stipulated rate, 10 per cent, on the consideration actually received for the sale. This is apparently what he did. In their Lordships' view, therefore, the conclusions at which the referee arrived on the nature and limits of the appellant's employment, as well as on the amount of damages to be awarded, are not only sustainable upon the evidence, but are in themselves right.

(1) [1941] 1 All E.R. 33 at 44. (2) [1910] A.C. 614.

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In *McNeil* v. *Fultz* (1), defendant, on behalf of himself and others, acquired three licenses to search for coal. Subsequently and with the concurrence of all parties these licenses were included at a value of $27,000 in an amalgamation from which the parties were to receive bonds and shares in that amount. The defendant, who received the bonds and shares on behalf of himself and associates, wrongfully withheld a portion thereof. This Court affirmed the judgment in the Court of Appeal which gave judgment against the defendant for the cash value of the bonds and shares unaccounted for, calculated upon the basis of their selling value at the date of the default. In that case the bonds and shares improperly withheld had been disposed of. Sir Lyman Duff, delivering the judgment of the Court, stated at p. 206:

> Treated simply as a contractor who had agreed to deliver the bonds he is clearly liable to pay damages for the breach of his contract based upon the selling price of the bonds at the time when the obligation to deliver arose. Mayne on Damages, at page 195.

The damages must, therefore, be computed as of the date of the non-delivery or breach on the part of Silver Giant. When the agreement was concluded these shares may have, by virtue thereof, acquired a new and different value from that of the market immediately prior thereto. This possible value is not covered by the evidence and, therefore, a reference should be directed before the learned trial judge to determine this value.

The fact that Silver Giant withheld delivery of the shares does not provide a basis for the award of interest or of damages in respect to the withholding of the shares. *London, Chatham & Dover Rly. Co.* v. *South Eastern Rly. Co.* (2). In *The Custodian* v. *Blucher* (3), interest was allowed for the non-payment of money. This, however, was possible because of legislation in the province of Ontario, to which there does not appear to be any comparable legislation in British Columbia.

The appeal should be allowed and judgment directed in favour of the appellant for damages equal to the value of 30,000 shares at the time of the respondent's breach and failure to deliver the shares at the conclusion of the agree-

(1) (1907) 38 Can. S.C.R. 198. (2) [1893] A.C. 429.
(3) [1927] S.C.R. 420.

ment of May 1, 1950. This value or amount of damages to be determined upon a reference to the learned trial judge. The appellant is entitled to his costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *M. G. M. Lougheed.*

Solicitors for the respondents: *MacDougall, Morrison & Jestley.*