

HUGH HENDERSON AND MATILDA }
 HENDERSON (PLAINTIFFS) } APPELLANTS;

1909
 *Feb. 23.
 *March 29.

AND

KATHARINE A. THOMPSON (DE- }
 FENDANT) } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH
 COLUMBIA.

Vendor and purchaser—Agreement for sale of land—Principal and agent—Fiduciary relationship—Specific performance.

Where an intending purchaser, by disguising his intentions under the role of a disinterested friend imposed on the confidence thus established and induced the owner of land to accept an offer for the purchase of it which probably would not otherwise have been accepted without independent investigation, specific performance of an agreement for sale thus procured should not be enforced. *Fellowes v. Lord Gwydyr* (1 Sim. 63) discussed and distinguished.

APPPEAL from the judgment of the Supreme Court of British Columbia reversing the judgment, in favour of the plaintiff, by Martin J., at the trial and dismissing the action with costs.

The plaintiff, Hugh Henderson, residing at Rossland, B.C., visited the defendant, a resident of Seattle, Wash., ascertained that she was willing to sell a house and lot which she owned in Rossland, and offered to act in a friendly way on her behalf in securing a purchaser. Upon his return to Rossland, he entered into correspondence with her in which he represented that

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

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he was the agent of undisclosed principals desiring to purchase the property. He informed her that the house was in a dilapidated condition; that a good price could not be obtained and, after some letters and telegrams had passed between them, she accepted the price he offered and advised her to accept. She, afterwards, discovered that the proposed purchasers were the plaintiff, Hugh Henderson, and his wife and refused to carry out the sale. The action was then brought to enforce specific performance of the agreement for the sale of the property.

At the trial, Mr. Justice Martin, maintained the action with costs, and said:

“After further reflection upon this matter I can only form the opinion that the plaintiffs must succeed. The representations made by Hugh Henderson as to the condition of the house were substantially correct, and though I agree that it would have been more honourable if he had frankly stated the true position of the prospective purchaser, instead of trying to convey a false impression in that respect, still he was not acting in any fiduciary capacity towards the defendant, nor was she in any way prejudiced by his misleading statements. The case in principle cannot be distinguished from *Fellowes v. Lord Gwydyr*, in 1826 (1), and on the facts I must find for the plaintiffs. I need only add that I do not think that the letter of 12th February seeks to impose any new conditions, it simply expresses, though in not very clear and precise language, a layman’s idea of the way to complete the title in the circumstances.”

This judgment was reversed by the judgment now appealed from.

(1) 1 Sim. 63; 57 Eng. R. 502.

Shepley K.C. for the appellants.

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Ewart K.C. for the respondent.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I agree in the opinion stated by Mr. Justice Duff.

GIROUARD J.—I agree in the opinion stated by Mr. Justice Duff.

DAVIES J.—It is not open to doubt that if the parties to the contract sought to be enforced in this case stood towards each other in a fiduciary character, such as that of principal and agent, the court would not, under the facts so proved, lend its aid to enforce specific performance.

I have had no difficulty in reaching the conclusion on the evidence that the parties did stand towards each other in that relation. The appellant's own evidence satisfies me on the point. He admits that when he first visited the respondent in Seattle he had no intention of purchasing the property for himself and so gave her to understand and left her under the impression that he did not want to purchase, *but to procure for her a purchaser*. He disclaimed, it is true, her offer to pay him a commission for his services, but that, of course, made no difference, as he left her clearly under the impression he was to act as her agent to get her a purchaser.

When he returned to Rossland he continued the misrepresentation and led her by letters to believe that he was in treaty with some third party for the purchase, and advised her to accept that third party's offer

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as being the best he could get out of them. As a matter of fact it transpires that the third party was his wife and that he himself had an interest in the purchase. He, therefore, occupied a position where his interest and his duty conflicted, and the authorities are conclusive that, in such cases, where there is a non-disclosure of that which it was the plaintiff's duty to disclose no specific performance can be granted. In this case there was not only non-disclosure but misrepresentation of material facts.

The appeal should be dismissed with costs.

IDINGTON J.—Mr. Shepley for the appellant conceded that if any fiduciary relation existed between his client and the respondent there was an end to his appeal. I have no doubt that the proposition involved in this may be supplemented by the further proposition that if there was anything in the language and conduct of the appellant which might have reasonably induced the respondent to believe that the appellant was acting as her agent there was also an end to his appeal; notwithstanding his peculiar idiosyncracies which enabled him to convey this impression and at the same time find for himself his way to reconcile the plain facts with a denial of such an obvious conclusion as forces itself on the minds of other people when considering the same.

I quote hereunder from his evidence including the letter referred to and which is also copied, what I think leaves it open fairly to infer that the appellant's language and conduct led and purposely was intended to lead the respondent to the belief that he was acting as her agent, as her friend, doing her friendly service without compensation and to her implicitly trusting

him accordingly. I think he thereby gained the advantage of a few hundred dollars in the price she asked, but at the same time lost any right he could have to enforce specifically a bargain he claims to have been made to appear in writing.

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Q. Who brought up the subject matter of the sale at all? A. Mrs. Thompson.

Q. You called at her house in Seattle? A. Yes, sir.

Q. Did you have the purchase by yourself in view? A. Not at the time—no.

Q. What do you mean by that? A. I had no intention of purchasing the house at the time.

Q. But you had the intention of discussing the matter of the purchase with her on that occasion? A. Well, I intended to talk about the property—yes.

Q. That is about her house here? A. Yes.

Q. You were wishing then to purchase? A. To get a purchaser.

Q. You didn't want it yourself? A. I didn't want it myself at that time.

Q. So that when you left her she was under the impression that you yourself did not want to purchase? A. Yes.

* * * * *

Q. So that during all these negotiations and this correspondence Mrs. Thompson thought you were acting as an independent adviser? A. No, I don't think she did.

Q. What position then was she to think that you occupied? A. As a purchaser—as getting a purchaser.

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Q. That is not the question I asked you. What position would Mrs. Thompson think you occupied in connection with this sale? A. I don't know what position—I wrote an offer. * * *

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Q. Were you yourself to have any interest in it? A. Well, yes. *

By Mr. MacNeill. Q. You state here, Mr. Henderson, in your letter of January 24th (Exhibit 1), that the best offer you could get was \$1,250. Did you really try to get a better offer than that? A. No, I didn't try. * * *

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Rossland, B.C., February 4, 1907.

Mrs. K. A. Thompson,

Dear Madam,—Your letter received and contents noted. You did not mention anything about the electric fixtures, taken from the rooms, whether you have them stored here or not. Also one of the windows that got broke by the explosion have they settled with you

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for the damages done, or have you put in a bill claiming any damages, as the property looks to a disadvantage. *I have seen the party to-day and the best I can get out of them is one hundred more, or \$1,350 all clear.* While the price is very low I don't think I would miss a sale. If you decide to sell, wire me, as they are looking at other properties, so I told them I would have you wire at my expense, and send your deed to Macdonald & Winn, who will forward you the money when the title is got. I remain,

Yours respectfully,

H. HENDERSON.

It is to be observed that the appellant swears positively he had no intention of purchasing the house at the time, and yet was to get a purchaser. What can all this mean but what I have said?

I think this appeal should be dismissed with costs.

DUFF J.—I doubt whether the documents produced sufficiently disclose the essential elements of an agreement between the respondent and a contracting purchaser; but, as the point does not appear to have been considered in the earlier stages of the litigation, I will deal with the case upon an examination of the topics which have been fully discussed before us and in the court below.

The appellant, before entering upon the correspondence on which the action is founded, intentionally led the respondent to believe that, as a friend, he was willing to help her to procure a purchaser for her house. Having thus begun, he opened the correspondence; and, in that correspondence, he professed himself to be acting as the intermediary between her and an offering purchaser. He tells her with particularity of interviews with this intending purchaser; an offer made and an advance on that offer; implies fruitless efforts on his part to procure a further advance; exaggerates the marks of dilapidation he finds on a visit to

the property, and advises the respondent not "to miss a sale." The appellant, all the while, was negotiating on his own behalf and the respondent learned of the elaborate deception thus practised upon her only when the action was brought. In these circumstances the appellant sues for specific performance.

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I think the appeal fails on this short ground. The facts either admitted or proved by the correspondence shew that the appellant, by disguising his real aims under the role of a disinterested friend and imposing on the confidence thus established, induced the respondent to act upon his advice and to accept an offer which it is probable she would not otherwise have accepted without, at all events, independent investigation. It does not require the authority of any specific decision to shew that a plaintiff who has procured a contract by such contrivances is not in a situation entitling him, on the basis of that contract, to advance a claim to equitable relief.

I will add only a word about *Fellowes v. Lord Gwydyr* (1). When that case comes to be examined by a court competent to review it, it may be found that, whatever is to be said about the decision itself, the reasoning on which it was based by Lord Lyndhurst as well as by the Vice-Chancellor is not quite reconcilable with principles established by more recent decisions. But there can be no doubt that, to the facts of this case, as I view them, that decision can have no application. In *Fellowes v. Lord Gwydyr* (1) the parties were at arms length and the Lord Chancellor, moreover, declined to draw the inference that the misleading conduct of the vendors had operated upon the mind of the

(1) 1 Sim. 63.

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purchaser to induce him to make the purchase. These circumstances alone are sufficient to deprive the decision of any relevancy to the points in controversy on this appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *E. S. H. Winn.*

Solicitor for the respondent: *A. H. MacNeill.*
