D. STANLEY McLEOD AND STEWART MORE (PLAINTIFFS) ..... } APPELLANTS;

AND

R. SWEEZEY (DEFENDANT)..... RESPONDENT.

1943
*Nov. 15, 16.
1944
*Feb. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Trust—Mines and Minerals—Prospector given mission under agreement, with knowledge disclosed to him as to mineral area—Subsequent staking by him of claims in same area for benefit of himself and others—Whether fiduciary relationship between him and other parties to first agreement—Whether latter entitled to share in prospector's interests acquired through said subsequent staking—Constructive trust.

Plaintiffs and defendant were prospectors. Plaintiffs had in 1923 come across indications of asbestos in a place north of Bird river in Manitoba, and had staked and recorded claims, which lapsed; and had later at times prospected in the area. In 1937 plaintiffs disclosed the area to defendant and an agreement was made whereby defendant undertook "to stake and record a certain group of Asbestos Mineral Claims in the Bird River area of Manitoba" for the consideration of a one-fourth interest therein; plaintiffs were to pay the cost of recording and, for that and for "imparting the special knowledge in directing [defendant] to the geographical location for these staking operations", plaintiffs were to hold a three-fourths interest in the claims so staked. As found by this Court on the evidence, though the presence of asbestos was emphasized, any other discovery was contemplated; the parties knew that the district generally was mineralized and that any staking would embrace all possibilities. Plaintiffs furnished defendant with a small sketch and description of the location and directed where he could find a cache of mining tools.

*PRESENT:—Rinfret, Kerwin, Hudson, Taschereau and Rand JJ.

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Defendant went to the district and on his return reported that he had staked four claims but that there was no asbestos and it was not worth while to record them; and consequently plaintiffs did nothing further. At a subsequent time defendant communicated with other parties regarding what he thought were good prospects in said district and recommended them for further examination; and in the result, under agreements, defendant made visits to the area and staked claims, which were recorded, and which ultimately became subjects of options, defendant being entitled to an interest in what might be realized for the claims. Against this interest of defendant plaintiffs asserted a right.

Held: Plaintiffs had bargained for defendant's mature judgment and for that not only on the possibility of asbestos; the expression in the agreement "asbestos mineral claims" was descriptive of what had been originally staked (there was no such thing in the mining law as an "asbestos mineral claim"; a claim staked and recorded covered all minerals except a few specifically reserved by statute); plaintiffs desired an expert opinion on those claims in the totality of their possibilities. That was the measure of defendant's duty as the fiduciary of plaintiffs in acting upon their disclosure of their special knowledge of mineral indications; defendant undertook to apply his experience to everything found in the area of the claims and, on the strength of the opinion so formed, to stake, if that was called for, and to advise plaintiffs of that opinion. Defendant owed to plaintiffs the utmost good faith in his examination of the structure, formation, and other evidence of the land to which he was directed, and a duty to give them an unreserved account of what he had found and what, in his judgment, the mineral prospect was. He failed to observe that duty. Therefore, as to any interest held by defendant, acquired through the conversion and realization of property which he obtained through information gained in the course of the service he undertook for plaintiffs, he held it as a constructive trustee, and was liable to account to plaintiffs for their share of monies realized. (It would have been proper to take his outlays into account, had there been evidence of any.) Plaintiffs' share of that interest and monies was three-fourths (whether they were entitled to that only—as the Court was inclined to think—or to all, was not in question in this Court). (This Court directed amendment of the judgment for plaintiffs at trial, so as to exclude from its effect certain properties which this Court held were not within the area in respect of which plaintiffs' rights applied.)

Judgment of the Court of Appeal for Manitoba, 51 Man. R. 129, reversed.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Manitoba (1) reversing the judgment of Major J. (2) which (by the formal judgment) declared that 75 per cent. of all the benefits which the defendant had received or to which he was or might thereafter become entitled under certain agreements (agreement between

(1) 51 Man. R. 129; [1943] 2 W.W. R. 497; [1943] 4 D.L.R. 391.
(2) 51 Man. R. 129, at 131-140; [1943] 1 W.W.R. 287; [1943] 1 D.L.R. 471.

defendant and Mac's Mining Syndicate and the members thereof other than defendant, and agreement between defendant and Page; which are referred to in the reasons for judgment in this Court *infra*) were and would be received by him as trustee for the plaintiffs, declared that the defendant had received under the terms of said agreements certain sums which were received by him as trustee for the plaintiffs, and adjudged their recovery by the plaintiffs from the defendant with interest, granted an injunction and appointed a receiver, ordered that the defendant as trustee for the plaintiffs account to the plaintiffs for 75 per cent. of all money and shares of stock received by him under the provisions of said agreements, and ordered assignment on demand of shares of stock. By the formal judgment in the Court of Appeal, the appeal to that Court was allowed, the judgment of Major J. set aside, the order for receiver vacated and the action dismissed.

The material facts and circumstances of the case and the questions in issue are dealt with and discussed in the reasons for judgment in this Court now reported and in the reasons (reported as above cited) in the Courts below.

E. K. Williams K.C. for the appellants.

P. C. Locke and *H. B. Monk* for the respondent.

The judgment of the Court was delivered by

RAND J.—This appeal grows out of a transaction between three mining prospectors of Winnipeg. The plaintiffs, as early as 1923, had come across indications of asbestos in some rough country lying to the north of the Bird River in the Lac du Bonnet mining district of Manitoba and had staked four claims covering about two hundred acres. These were recorded but for lack of money were allowed to lapse. Between that time and 1937, however, on various occasions they visited the area and from time to time did prospecting on it.

The defendant had a high reputation as a prospector in Manitoba. He was acquainted with the plaintiffs and on one occasion when they happened to be together, towards the end of September, 1937, the latter intimated that they knew what they thought was a promising mineral spot in an out-of-the-way place, indicating its general location

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and that, with his assistance, something might be made of it. He readily took up the suggestion with the result that they went to the office of two mining brokers and there drew up a memorandum as follows:

> It is hereby agreed by the party of the first part that he will undertake to stake and record a certain group of Asbestos Mineral Claims in the Bird River area of Manitoba, for the consideration of a one-fourth or 25 per cent. interest in the group of claims so staked.
>
> It is hereby agreed by the parties of the second part that they will provide the necessary funds for the cost of recording such claims in the Mining Recorder's office in the Province of Manitoba, and for the further consideration of imparting the special knowledge in directing the party of the first part to the geographical location for these staking operations, that for so doing these things the parties of the second part are to receive a three-fourths or 75 per cent. interest in the claims so staked.
>
> It is further agreed by the party of the first part that he will execute the necessary transfers of the said claims at the time of recording. These transfers to be executed in blank and delivered to the parties of the second part.
>
> It is further agreed that the parties of the second part shall have full power to act in all matters respecting the business affairs in connection with the said claims. It is understood that such business affairs shall mean to include that of the disposal of the said claims.

The evidence of the plaintiff More and the witnesses Wither and Ward makes it clear that, although the presence of asbestos was emphasized, any other discovery was contemplated. The parties knew that the district generally was mineralized and that any staking would embrace all possibilities.

The plaintiffs furnished Sweezy with a small sketch and description of the location and indicated where he would be able to find a cache of mining tools. With this information the defendant, shortly thereafter, went out to look over the land. According to his own statement, he reached a section of bush in which he found evidences of previous prospecting and found also a few tools which he took to be those of the plaintiffs. He says also that he staked four claims.

On his return, as he gives it, he reported having done the staking, but protested somewhat violently that there was no asbestos and that it was not worth while to record the claims. On the strength of that opinion, which the plaintiffs accepted with all confidence, nothing further was done.

Some time in November, when the thirty days for recording had elapsed, the defendant communicated with a Captain Page, manager of a shipping company, and also with a barrister named Buhr, regarding what he thought were good prospects in the district in question, and recom-

mended them for further examination. In the result, under agreements with both, he went back in the early part of December, 1937, and in February of 1938, and either personally or by others under his direction staked twenty-four claims which included the four said to have been staked in October as well as the four originally staked by the plaintiffs in 1923. Later on other stakings were made, both in that area and some distance from it. These claims were recorded and on some, at least, of them assessment work was done by him. In 1942 chrome was discovered in the district. Ultimately, an option was given by Page to the Hudson Bay Exploration and Development Company Limited, covering all of the stakings done by Sweezey and under his direction. For his share in the claims called Page, Smelter and Ace, numbering twenty-seven, Sweezey became entitled to 22½ per cent. of what might be realized for them. On the balance of the stakings, twelve in number, which cover what were known as the Robin and Buhr claims, he held a one-quarter interest in the Mac Syndicate, to which they had been transferred, and the total interests of which had been, in turn, optioned to Page for the considerations mentioned in a memorandum in evidence.

The trial judgment declared the defendant to hold all of these interests as to 75 per cent. of them under a constructive trust in favour of the plaintiffs, and in respect of cash received by Sweezey, the plaintiffs recovered the proportion that should have been paid over to them. On appeal that judgment was reversed; and the plaintiffs bring the controversy here.

The first question that arises is this: what was the precise undertaking of the defendant? Was it, as contended by him, merely an employment of his labour to stake the described claims without the benefit of his judgment on them or of the area in which they were to be found? I do not think so. The plaintiffs had special knowledge of mineral indications in this limited field off the beaten track of prospectors, and it was of value to them. To disclose that information meant to give up once and for all any advantage they thereby held; all would then be at large; and they did what they thought necessary to protect themselves accordingly. The obligation assumed by the defendant was what they took in return and it was all that remained to them.

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They had bargained for his mature judgment and for that not only on the possibility of asbestos. The expression in the memorandum of agreement, "asbestos mineral claims", was descriptive of what had been originally staked. The plaintiffs desired an expert opinion on those claims in the totality of their possibilities and not on one of them only. That, therefore, was the measure of the defendant's duty as the fiduciary of the plaintiffs in acting upon the disclosure of all the plaintiffs had of value; he undertook to apply his experience to everything found in the area of the claims and, on the strength of the opinion so formed, to stake, if that was called for, and to advise the plaintiffs of that opinion. There was no such thing in the mining law as an "asbestos mineral claim". A claim staked and recorded covered all minerals except a few specifically reserved by the statute. He, therefore, owed to the plaintiffs the utmost good faith in his examination of the structure, formation, and other evidence of the land to which he was directed, and a duty to give them an unreserved account of what he had found and what, in his judgment, the mineral prospect was.

The trial judge has found that he failed to observe that duty. Instead, he deliberately misled the plaintiffs into discarding the claims as prospects by falsely misrepresenting as to asbestos, and concealing as to other minerals, his own judgment of them.

Trueman J.A. conceded the existence of a fiduciary relation but treated the original undertaking as at an end in October upon the report of the defendant and acquiescence in it by the plaintiffs. I find difficulty in following this reasoning. That acquiescence was induced by fraud. How can a termination of such a relation so brought about be held to be effective while the fraud still operates? The fraud continued to have effect both on the plaintiffs in their acceptance of the misrepresentation of opinion and on the defendant in his acquisition and capitalization of the claims, and the original duty remained: *Carter* v. *Palmer* (1). I agree, therefore, that as to any interest held by him, acquired through the conversion and realization of property which he obtained through information gained in the course of the service he undertook, the de-

(1) (1842) 8 Cl. & Finn. 657 (8 E.R. 256).

fendant holds it as a constructive trustee and that he is liable to account to the plaintiffs for their share of the monies received in cash.

In the opinion of Robson J.A., this is not a case in which the plaintiffs are entitled to follow assets as on a breach of trust, and he cites *Lister* v. *Stubbs* (1) as authority for that view. There the agent for purchase of goods had accepted from the seller substantial rebates, and action was brought to recover these monies as having been received to the use of the plaintiff. An application was made for an interim injunction to restrain the defendant from dealing with property into which it was alleged the monies received had been put or invested, and it was on appeal from a refusal of this injunction that the judgment relied upon was given. The holding, however, was strictly limited and it was to the effect that, until the right of the plaintiff to money of the sort in question had been established by a judgment, the court would not assist him in pursuing it into other forms of property. We are dealing here with quite a different situation. The duty of the defendant still attached to the acquisition of the claims and, in his negotiations with Page and Buhr, he must, because of his breach of confidence, be treated as acting on behalf of the plaintiffs as well as himself. It is not a question of receiving money belonging to other persons as was the case in *Lister* v. *Stubbs* (1), but rather of acquiring in the first instance property which in equity he must hold as a trustee: and any *res* into which it may be converted carries likewise the impress of the trust.

Robson J.A. refers also to the case of *Lydney* v. *Bird* (2) in respect of allowances that would have to be made the defendant for expenditures properly attributable to the acquisition of the trust property. Since he must be treated as acting on behalf of the three included in the venture, outlays properly made would have to be taken into account, but there is no evidence that he made any. So far as appears, he was paid for all the work he did, and the interests which he now holds under his agreement with Page and in the Mac Syndicate result solely from the transfer to them of the claims. If there had been such disbursements, they should have been brought to the

(1) (1890) 45 Ch.D. 1.

(2) (1886) 33 Ch.D. 85, at 95.

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attention of the trial court and, in the absence of any evidence bearing on them, I must assume that there was none.

My only difficulty is as to the extent of the property that was so acquired by him. The area described by the plaintiffs, on which Sweezey was to exercise his judgment and act, cannot, I think, be held to take in the eight Smelter claims that lie across the Bird River, nor the three Ace claims. These are too far removed from the Page, Robin and Buhr locations admitted by Sweezey to be included in the area of his original staking in October, 1937, to be considered within the range of his instruction and mission.

But his agreement with Page covers an interest in the twelve Page, the twelve Smelter, and the three Ace claims, and that interest is 22½ per cent. Four of the Smelter claims are within the plaintiffs' area. There is nothing in the agreement or in the evidence to indicate the relative values of the claims, but if there is any implication in fact it is, I think, that all the claims were dealt with as a unit and without regard to any difference in value. It is as of the time of the agreement fixing that percentage that any relative value would have to be determined and as if the plaintiffs then owned the Page and four of the Smelter claims, and the defendant the balance, and that the 22½ per cent. of total interest was divided between them. Of the twenty-seven claims, sixteen were, therefore, taken for the plaintiffs. The proportion attributable to them on a numerical basis would be 59·3 per cent., but three of the four Smelter claims in the plaintiffs' area appear from the map to be about equal in size to any one of the other claims. I would, therefore, allot as a proper proportion 56 per cent. as being the basis upon which a division should be made. No question arises as to whether the plaintiffs are entitled to all of the defendant's interest or only 75 per cent. of it, because counsel for the plaintiffs stated that he was satisfied with the latter proportion. Even without this statement, I am inclined to think that the claim should be thus limited.

The appeal, therefore, should be allowed and the original judgment amended by limiting the share of the plaintiffs in the property to which the defendant may become en-

titled under the Page agreement to 75 per cent. of 56 per cent. of that interest, and by reducing the judgment for $2,025 to $1,134. The plaintiffs should have their costs throughout.

Appeal allowed with costs.

Judgment at trial amended.

Solicitor for the appellants: *N. E. Munson.*

Solicitor for the respondent: *P. C. Locke.*