Court File No.: BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF **YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.**

APPLICATION UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

Book of Authorities of the "Class A LPs"

(YongeSL Investment Limited Partnership, 2124093 Ontario Inc., SixOne Investment Ltd., E&B Investment Corporation, and TaiHe International Group Inc., 2504670 Canada Inc., 8451761 Canada Inc., and Chi Long Inc.)

(Ms. Athanasoulis' Appeal from the Disallowance of her Profit-Sharing Claim)

November 22, 2023

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TAB 1

2010 ONSC 4099
Ontario Superior Court of Justice

Charlestown Residential School, Re

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In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of Charlestown Residential School of the Town of Caledon, In the Province of Ontario

Reg. Janet E. Mills

Heard: March 26, 2010
Judgment: July 21, 2010
Docket: Estate No. 32-1187570

Counsel: J.R. Smith for Creditor, Wayne Dunster
R.J. van Kessel for Trustee

Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.2 Disallowance of claim

Headnote
Bankruptcy and insolvency --- Proving claim — Disallowance of claim — Appeal from disallowance — General principles
Bankrupt was residential school that made assignment into bankruptcy — Creditor was former employee who had been promised annual retirement allowance for rest of his life — Creditor's entitlement was secured by promissory note — Creditor had received annual payments up to time of assignment — Creditor submitted proof of claim for unsecured debt in amount of $397,130.24 based on his anticipated life expectancy — Trustee in bankruptcy disallowed entire claim — Trustee refused to produce personnel records that she relied upon — Creditor commenced appeal and filed additional evidence on basis that he was entitled to hearing de novo — Trustee brought motion for determination of whether creditor was entitled to hearing de novo — Motion granted — Appeals of this nature were generally to proceed as true appeals unless hearing de novo was required to prevent injustice to creditor — Such approach recognized experience and expertise of trustee, as well as finality of decisions as provided in s. 135(4) of Bankruptcy and Insolvency Act — It was also reasonable to place positive onus upon creditor to properly prove claim at first instance — Granting degree of deference to trustee promoted efficient administration of estate while ensuring aggrieved creditor was afforded proper justice — Appeal could proceed as de novo hearing in circumstances where injustice would result if appeal was restricted to record — In present case, trustee reviewed materials not available to creditor, so injustice would have resulted if appeal proceeded solely on record consisting of documents submitted by creditor.

Table of Authorities
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Eskasoni Fisheries Ltd., Re (2000), 16 C.B.R. (4th) 173, 2000 CarswellNS 116, 187 N.S.R. (2d) 363, 585 A.P.R. 363 (N.S. S.C.) — considered

Galaxy Sports Inc., Re (2004), 2004 BCCA 284, 2004 CarswellBC 1112, 20 R.P.R. (4th) 1, 240 D.L.R. (4th) 301, 1 C.B.R. (5th) 20, 29 B.C.L.R. (4th) 362, 200 B.C.A.C. 184 (B.C. C.A.) — followed

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Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 135 — referred to

s. 135(2) — considered

s. 135(4) — considered

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

***Reg. Janet E. Mills*:**

1 This motion is in respect of a Notice of Disallowance issued by the Trustee in response to a Proof of Claim filed by the Creditor. The preliminary decision to be made is whether the hearing is to be a true appeal of the Disallowance or if it is to be a hearing *de novo* of the merits of the claim such that new or additional evidence may be adduced in support of the claim. For the reasons set out below, I have concluded that appeals of this nature are generally to proceed as true appeals based on the materials relied upon by the Trustee in the decision to disallow a claim. However, in this particular case, the appeal is to be a hearing *de novo* as to proceed otherwise would result in an injustice to the creditor.

2 On April 3, 2009 Charlestown Residential School ("Charlestown") made an Assignment in Bankruptcy and listed Mr. Dunster as an unsecured creditor with an estimated claim of $210,000. A Proof of Claim was filed on June 29, 2009 by counsel on behalf of Mr. Dunster, valuing the claim at $397,130.24. Attached to the claim was Schedule A which purported to be a Statement of Accounts, a Canada Life "internal use only" chart of Life Expectancy, a Memorandum of Agreement dated June 30, 2004 (the "Agreement") and a Promissory Note issued the same day by Charlestown to support the Agreement.

3 Mr. Dunster was previously employed by Charlestown for many years as its Executive Director. It was agreed between them that Mr. Dunster would retire effective June 30, 2004 and that he would receive an annual allowance on a gratuitous basis in accordance with a prescribed payment schedule. There was no stated termination date but the Agreement did provide the payments would end immediately on the death of Mr. Dunster or upon his violation of certain covenants contained in the Agreement. The Promissory Note was to stand as collateral security to the undertaking to pay the allowance as contained in the Agreement.

4 The payments were made as contemplated until Charlestown's assignment. In valuing the claim for bankruptcy purposes, Mr. Dunster relied upon the Canada Life chart of Life Expectancy to calculate the years remaining on the Agreement. The chart specifically states that it is for Canada Life internal use only and that is was effective as at June 15, 2001. There was no medical evidence offered to support the current health of Mr. Dunster or whether the chart continued to be relevant for calculating life expectancy in 2009.

5 After reviewing the Proof of Claim, the Trustee concluded there were serious issues related to the Claim and contacted counsel to discuss her concerns. The Trustee invited counsel to provide additional information but none was forthcoming.

6 On September 14, 2009 a Notice of Disallowance was issued by the Trustee disallowing the Claim in whole pursuant to subsection 135(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*"). The Disallowance was founded on the basis that the payment of the allowance to Mr. Dunster was characterized in the Agreement as "gratuitous" and therefore was not a debt enforceable at law. Further, the absence of a termination date for the payment obligation made it vague or uncertain and the Promissory Note did not stand as an independent debt instrument. Lastly, the Trustee relied upon the *Employment Standards Act* and common law for any entitlement Mr. Dunster may have had to reasonable notice for the termination of his employment. For all these reasons, the Claim was disallowed.

7 An appeal of the Notice of Disallowance was issued within the statutory 30 day limitation period as provided in subsection 135(4) of the *BIA*. Following the commencement of the appeal, the Trustee delivered an Amended Notice of Disallowance to include additional bases upon which her decision was founded, specifically that the Canada Life chart was not appropriate documentation to value the Claim and that the amount of the Claim was not calculated on a current value basis with the appropriate discount for the acceleration of the payments.

8 In her affidavit, the Trustee also states that she reviewed the corporate books and records in her assessment process and as a result of the information contained therein, she concluded the Claim ought to be disallowed. As the information related to the personnel records of Mr. Dunster, the Trustee refused to divulge the particulars of the information without the consent of Mr. Dunster or a court order to ensure his privacy was protected. To the date of the hearing, the information had not been disclosed to Mr. Dunster and it was not made available to the court, although it had apparently influenced the Trustee in her decision to disallow the Claim at first instance and in the amended disallowance.

9 The Creditor has attempted to address the concerns expressed by the Trustee in the Notice of Disallowance by submitting additional evidence to support the Proof of Claim. Counsel for the Trustee objects, maintaining the appeal should be in the form of a true appeal and, in the absence of a motion to adduce fresh evidence, based solely on the evidence presented to the Trustee. Counsel for the creditor submits the appeal is a hearing *de novo* where the creditor may introduce evidence in addition to that originally put before the Trustee. There are competing lines of case law in the country on this issue.

10 The decision of the Registrar in *Eskasoni Fisheries Ltd., Re*, 2000 CarswellNS 116 (N.S. S.C.), held that where a creditor appeals to the court from a Trustee disallowance, the appeal is to proceed by way of trial *de novo*. The Registrar found that the court is not limited to only the information that was before the Trustee, but rather was entitled to accept and consider all relevant information in assessing the admissibility of the claim. If there is then a further appeal taken from the decision of the Registrar or Judge, the appeal is a true appeal and ought to be limited to the court record. The distinction was made on the basis that the Trustee is acting as an administrator of the bankruptcy estate when determining whether to admit or disallow proven claims. There is no hearing and there is no formal record created. To ensure justice is served, the appeal to the Registrar must proceed as a hearing *de novo.*

11 The countervailing position is taken by the British Columbia Court of Appeal in *Galaxy Sports Inc., Re*, 2004 CarswellBC 1112 (B.C. C.A.) where it was held that an appeal under s.135(4) of the *BIA* is not intended to be a trial *de novo* but a true appeal. The court specifically declined to follow *Eskasoni Fisheries Ltd.* on the basis that BC law makes it clear that unless the statute that provides for the appeal also states that it is to be in the form of a trial *de novo*, the appeal will be an ordinary appeal.

12 The Court of Appeal in *Galaxy* was prepared to grant considerable deference to the experience and expertise of the Trustee in restructurings and insolvency. The Court noted:

> If "fresh evidence" — i.e., evidence not before the trustee or chair at the time of his or her decision — were to be adduced in Supreme Court on appeal *as a matter of course*, it seems to me that much would be lost in the way of efficiency in the operation of the bankruptcy scheme generally. Creditors who neglected to file proofs of claim in compliance with the requirements of s. 124 would suffer no practical consequences if, in Farley J.'s phrase, they could expect to "cooper up" their proofs at a later date in court; and the business now conducted at creditors' meetings by trustees (who are generally supervised by inspectors under the *BIA*) would be largely co-opted to courts of law, with all the attendant expense, delay and formality.

13 The Alberta Court of Queen's Bench appears to have attempted to align the *Eskasoni* and *Galaxy* decisions in *San Juan Resources Inc., Re*, 2009 CarswellAlta 98 (Alta. Q.B.), finding that a hearing *de novo* ought not be as of right, but rather restricted only to those cases where an injustice might result if the creditor is not permitted to adduce new or fresh evidence.

14 This approach is compelling in so far as it recognizes the experience and expertise of the Trustee who, by the provisions of s. 135 of the *BIA*, is required to carefully examine every proof of claim and act equitably in determining whether to allow or disallow a claim. Where additional information is needed, the Trustee is entitled to request further documentary support for the Proof of Claim to assist in making a final determination and, in accordance with s. 135(4), the decision of the Trustee is to be final and conclusive unless appealed within thirty days of the notice of disallowance having been served.

15 It is also reasonable to place a positive onus upon a creditor to properly prove his or her claim in bankruptcy at the first instance.

16 By granting a degree of deference to the decision of the Trustee, this appeal process promotes an efficient and cost effective means by which to administer a bankruptcy or insolvency estate while ensuring that an aggrieved creditor is afforded proper justice. An appeal may proceed as a *de novo* hearing in circumstances where an injustice would be the result if restricted to just the record.

17 Correctness is the appropriate standard of review for the disallowance of a proof of claim; reasonableness is the standard to be applied to factual decisions made by the Trustee exercising his or her discretion, such as the valuation of a contingent or unliquidated claims (*Galaxy Sports Inc., Re*, *supra*.).

18 Where an error has been committed by the Trustee or the interests of justice would only be served with an appeal *de novo*, it is open to the court to direct the appeal proceed accordingly failing which, the appeal of a Notice of Disallowance ought to proceed based on the record before the Trustee.

19 In the case before me, the Trustee appears to have reached out to the creditor's counsel by telephone for additional information but the request was not reduced to writing so it is unclear as to the nature or extent of the information sought. Further, the Trustee reviewed materials not otherwise available to the creditor to assist in formulating her decision to disallow the claim. This alone amounts to an injustice if the appeal was to proceed based solely on the record of the documents submitted by the creditor.

20 In addition, the Trustee relies upon an Amended Notice of Disallowance delivered without leave of the court nor with the consent of the creditor as is required for the amendment of pleadings (*Eskasoni Fisheries Ltd., Re*, *supra*.) subsequent to the launching of the appeal from the original Notice of Disallowance. One must conclude that the additional grounds for disallowance were only considered by the Trustee after the appeal was commenced and the Amended Notice of Disallowance was an effort by the Trustee to "cooper up" the original notice. It would be an injustice to allow the Amended Notice of Disallowance to stand and to deny the creditor the opportunity in a hearing *de novo* to fully respond with all relevant evidence to the grounds for disallowance raised by the Trustee.

21 As such, in the ordinary course, appeals of a Notice of Disallowance issued by a Trustee pursuant to s. 135(4) of the *BIA* are to proceed as true appeals unless to do so would result in an injustice to the rights of the aggrieved creditor. The appeal of the Notice of Disallowance issued in this Estate shall proceed by way of a hearing *de novo* before a Registrar in Bankruptcy as, based on the evidence before me, to proceed otherwise would result in an injustice to Mr. Dunster. I am not seized of this matter.

Motion granted.

TAB 2

SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV- 21-00673521-00CL

DATE: October 31, 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: **OSC V GO-TO DEVELOPMENTS HOLDINGS INC**

BEFORE: JUSTICE JANA STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
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Ian Aversa	KSV Restructuring Inc.	iaversa@airdberlis.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Greg Azeff	Oscar Furtado	gazeff@millerthomson.com
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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE STEELE:

Overview

[1] The Receiver brings this motion asking the Court to uphold the disallowance of Oscar Furtado's claim against Go-To Stoney Creek Elfrida LP ("Stoney Creek LP") and Go-To Stoney Creek Elfrida Inc. ("Stoney Creek GP", and together with Stoney Creek LP, "Stoney Creek").

[2] Mr. Furtado was the principal of the 23 Receivership Respondents, including Stoney Creek LP and Stoney Creek GP.

[3] Mr. Furtado was the president and sole director of Stoney Creek GP. Stoney Creek GP was the general partner of Stoney Creek LP.

[4] Further background on this proceeding can be found in my decision in *Ontario Securities Commission v. Go-To Development Holdings Inc., et al*, 2023 ONSC 5921 and in Patillo J.'s endorsemen, *Ontario Securities Commission v. Go-To Developments Holdings Inc.*, 2021 ONSC 8133. As noted in my decision, at para. 28, the receivership appointment in this case was made under the *Securities Act* following an application made by the Commission.

[5] Further to the claims procedure set out in the Claims Procedure Order, dated April 7, 2022, Mr. Furtado submitted a proof of claim against Stoney Creek in the amount of $867,769, which was disallowed by the Receiver on or about March 28, 2023. Mr. Furtado's claim arose from guarantee fees, pursuant to Guarantee Fee Agreements between Stoney Creek LP, by its general partner, Stoney Creek GP, and Mr. Furtado, as guarantor (dated Feb. 27, 2018, Nov. 19, 2019, and Dec. 18, 2020).

[6] On or about April 11, 2023, Mr. Furtado delivered a notice of dispute in respect of the Receiver's disallowance of his claim.

[7] On or about June 6, 2023, the Receiver advised Mr. Furtado and the other stakeholders that "[i]f the Stoney Creek [disputed claim] is not withdrawn in the following weeks, the Receiver intends to bring a motion to Court to have the Receiver's disallowance of the claim upheld." Mr. Furtado subsequently confirmed that he would not withdraw the disputed claim.

Analysis

Was the Receiver correct in having disallowed Mr. Furtado's claim against Stoney Creek?

[8] The Receiver was correct in disallowing Mr. Furtado's claim against Stoney Creek.

[9] The Receiver reviewed the three Guarantee Fee Agreements. The Receiver noted that the Guarantee Fee Agreements were only signed by Mr. Furtado (in his personal capacity as the guarantor, and as the corporate signing officer for Stoney Creek). The Guarantee Fee Agreements provide that Go-To Stoney Creek LP "agrees to pay to the Guarantor [Furtado] an annual guarantee fee equal to 5% of the total principal amount guaranteed by the Guarantor from time-to-time under the Guarantees." The Receiver submits that this is another example of self-dealing by Mr. Furtado, which was not disclosed to the investors.

[10] The Receiver does not dispute the existence of the Guarantee Fee Agreements or that they provide for a guarantee fee payable to Mr. Furtado from Stoney Creek. The Receiver disallowed Mr. Furtado's claim against Stoney Creek for the following reasons, set out in the Notice of Disallowance of Claim:

a. It constitutes undisclosed, related-party agreements made by a fiduciary in breach of the fiduciary's contractual and/or common law duties. Without limiting the generality of the foregoing, neither Go-To Stoney Creek LP's Limited Partnership Agreement dated October 20, 2017 (the "LP Agreement") nor Go-To Stoney Creek LP's "Investment Opportunity" brochure to investors dated March 2019 (the "IO Brochure") discloses your entitlement to any guarantee fees. The IO Brochure goes even further, in that it specifically references that "*The General Partner and the Builder will sign for all third party financing and provide the Banks with all personal guarantees when required,*" and your name is not specifically referenced. Additionally, the IO Brochure does not reference that any guarantor would be entitled to a fee for providing a guarantee. If the intention was that you personally would be entitled to a guarantee fee, such entitlement should have been explicitly disclosed in the IO Brochure and the LP Agreement. ...;

b. In the alternative, if disclosure of the related-party fees can somehow be inferred from the LP Agreement (which the Receiver does not believe to be the case), the fees would still breach section 5.12 of the LP Agreement, which requires such fees to be "*reasonable and competitive with the cost of similar goods or services provided by an independent third party*." You have provided no evidence to the Receiver that the purported guarantee fees are reasonable and competitive with what could have been obtained from an independent third party. In fact, the purported guarantee fees are five times higher than a similar purported guarantee fee between yourself and Go-To Niagara Chippawa LP (which is an Affiliate, as defined in the LP Agreement, of Go-To Stoney Creek LP); and

c. In the further alternative, you have not provided any evidence to the Receiver that you had the financial wherewithal to pay the subject guarantees if called upon (in other words, that Go-To Stoney Creek LP received anything in exchange for purportedly agreeing to the guarantee fees). This is particularly noteworthy, as the subject guarantees increased from $2.4 million as of February 27, 2018, to $6 million as of November 19, 2019 to $10.65 million as of December 18, 2020.

[11] In Mr. Furtado's notice of dispute, he disagreed with the Receiver's position regarding the obligation to disclose the guarantee fees. He stated: "Mr. Furtado disagrees entirely with the assertion that there was any requirement or obligation on his part to disclose the entitlement to guarantee fees." Mr. Furtado now argues that the guarantee fee obligation was disclosed in any event in Stoney Creek LP's 2019 financial statements.

[12] Mr. Furtado, as a fiduciary of both Stoney Creek GP and Stoney Creek LP, was obliged to disclose his personal contractual entitlement to guarantee fees tied to bank loans to Stoney Creek LP. The Guarantee Fee Agreement is between Stoney Creek LP and Oscar Furtado. It is executed by Mr. Furtado personally and by Mr. Furtado, as the President & CEO of Stoney Creek GP. In making this agreement, Mr. Furtado was contracting that Stoney Creek LP would pay him an annual guarantee fee equal to 5% of the total principal amount from time to time guaranteed by him under the guarantees.

[13] As noted above, Mr. Furtado was the sole director and president of Stoney Creek GP. As such, he owed fiduciary duties to Stoney Creek GP: s. 134 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (Ontario). Mr. Furtado, as the sole director of the general partner, also owes a fiduciary duty at the limited partnership level: *Extreme Venture Partners Fund I LP v. Varma*, 2021 ONCA 853, at para. 96, where the Court of Appeal stated:

> [I]t would be an anomalous result if the law offered no remedy for the breach of a directors' fiduciary duty in circumstances where the limited partnership suffered the resulting loss. If that were the case, directors could act with impunity to damage the interests of the limited partnership, including by engaging in self-dealing, and there would be no remedy for such a breach of fiduciary duty. The law of fiduciary duties, which is based in equity, should not brook such a lacuna in its remedies.

[14] Stoney Creek's limited partnership agreement provides that: "The General Partner shall exercise its powers and discharge its duties honestly, in good faith and in the best interests of the Partnership."

[15] Mr. Furtado, in executing the Guarantee Fee Agreements as an officer of Stoney Creek GP, was doing so as an agent of the corporation. Directors and officers of a corporation act as agents of the corporation, particularly when developing company business: *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2008 BCSC 27, at para. 133.

[16] Fiduciaries are subject to certain duties, including the duty of full disclosure. As noted by the Court of Appeal in *Advanced Funding Corp. v. Bannick* (1979), 27 O.R. (2d) 193, at 196:

> One of the prime fiduciary duties of an agent is that of full disclosure. Wherever it appears that the agent is going to profit from the agency over and above the remuneration agreed to be paid by the principal, the duty of disclosure must be rigorously enforced by the Court, and it must be shown that after full disclosure, the principal has expressly or by necessary implication consented to the agent making a profit. The principle has been stated in many cases [citations omitted].

[17] Mr. Furtado argues that if he was required to disclose the guarantee fees, he did so because they were referenced in the 2019 financial statements. The 2019 financial statements have been withdrawn by the auditor.

[18] The notes to Stoney Creek LP's 2019 financial statements include the following statements:

- The Partnership has an agreement with Oscar Furtado (Guarantor), ultimate beneficial owner of the Class B unitholders, to guarantee the repayment of the indebtedness amounts outstanding. The Guarantor is entitled to an annual guarantee fee equal to 5% of the total principal amount guaranteed by the Guarantor. During the year ended December 31, 2019, $nil (2018 - $60,143) in guarantee fees was paid and is included in land inventory.

- During the year ended December 31, 2019, $34,521 (2018 - $nil) in guarantee fees was payable to the Guarantor and is included in accounts payable and accrued liabilities and land inventory.

[19] In determining whether there was disclosure of the guarantee fee agreement with Mr. Furtado, the Receiver relied upon the Limited Partnership Agreement and the investment marketing brochure for the Stoney Creek project. Mr. Furtado pointed to the fact that the Receiver had not relied upon the 2019 financial statements in suggesting that the Receiver had not fully investigated his claim. The 2019 audit opinions were withdrawn by PwC, the auditor. In a letter from PwC to the Receiver, copy to Mr. Furtado, dated March 7, 2022, the auditor stated:

> PwC has determined that the auditor's reports to the Shareholder of GTDH and Partners of the Go-To Group for financial year 2019 as well as the auditor's report to the Partners of Go-To Spadina for financial year 2020 should not be relied upon by any party and as such, we are withdrawing these opinions.
>
> This letter is to notify management, and those charged with governance – in this case Mr. Furtado and the Receiver – that PwC, as previous auditors of the Go-To Group and GTDH, seeks to prevent any reliance on the Auditor's Reports for the periods in question. Please take the necessary steps to ensure that anyone in receipt of the Audited Financial Statements, including that our Auditor's Reports thereon, are informed of this situation and advised not to rely on same.

[20] The Receiver notes that section 5.12 of the Limited Partnership Agreement (between Stoney Creek GP, Go-To Development Holdings Inc. and each party who executes the agreement and agrees to be bound as a limited partner) could potentially be an applicable provision if there was evidence that the guarantee fees were reasonable and competitive with what would be provided to a third party. However, that provision would not obviate the need for disclosure. Section 5.12 of the Limited Partnership Agreement provides:

> The General Partner may employ or retain an Affiliate of the General Partner (which for greater certainty includes Go-To Holdings) on behalf of the partnership to provide goods or services to the Partnership, provided that the cost of such goods or services are reasonable and competitive with the cost of similar goods or services provided by an independent third party.

[21] There was no evidence that the guarantee fee claimed by Mr. Furtado is "reasonable and competitive with the cost of similar goods or services provided by an independent third party" such that it could fall within section 5.12. I note that Mr. Furtado did not swear an affidavit on this motion.

[22] The Go-To marketing brochure for the Stoney Creek project, entitled "Investment Opportunity", does not disclose that limited partner investor funds will be used to pay guarantee fees to the related party, Mr. Furtado. The "Summary of Key Considerations" in the brochure discloses the following with regard to the structure of the deal and the bank financing:

> Deal Structure/Liability
>
> - The Limited Partners have limited liability on their investment.

- The General Partner, Go-To Developments, has unlimited liability. The General Partner and Builder will sign for all third party financing and provide the Banks with all personal guarantees when required.

- The Limited Partners only fund the original purchase of the land, related closing costs and initial soft costs. The Investor will not be required to provide any additional funding to complete the project.

Bank Financing

- Financing for development and construction is obtained from the Bank.

- The Banks will not provide construction financing until the following is achieved:

  a. The land is properly zoned.

  b. The City has approved the plans for development.

  c. The project has pre-sold a minimum of 70% of the homes in a given phase.

- When the Bank does provide financing, this is done using the appraised value of the land. The appraised value of the land continues to increase at each stage of the development process. As an example, upon completion of zoning the appraised value of the land increases. There is a further increase in the appraised value when City approvals are obtained and again when pre-sales occur.

[Emphasis added.]

[23] The marketing brochure distributed to potential investors in the Stoney Creek project describes which costs investors are responsible for and does not mention guarantee fees. The brochure mentions that the General Partner and Builder will sign for third party financing and provide personal guarantees where required, but does not state that Mr. Furtado may provide personal guarantees, nor does it specify that any guarantee fees will be paid if a personal guarantee is provided.

[24] Mr. Furtado points to section 5.13 of the Limited Partnership Agreement, which provides:

> The validity of a transaction, agreement or payment involving the Partnership and an Affiliate of the General Partner is not affected by reason of the relationship between the General Partner and such Affiliate or by reason of the approval or lack thereof of the transaction, agreement or payment by the directors of the General Partner, all of whom may be officers or directors of or otherwise interested in or related to such Affiliate.

> The parties hereto acknowledge that: (i) the General Partner and Go-To Holdings may have the same directors, officers, direct or indirect shareholders, employees and affiliates; and (ii) that Go-To Holdings and the directors, officers, shareholders, employees and affiliates of each of Go-To Holdings and the General Partner are engaged in a wide range of investing and other business activities, which may include, direct and/or indirect, ownership and development of real property. Consequently, the directors, officers or employees of the General Partner will only devote as much time as is necessary (but not all of his or her full time) to supervise the management of the business and affairs of the Partnership.

[25] Mr. Furtado submits that any disclosure obligation is eliminated by the inclusion of section 5.13 in the LPA. The Receiver agrees that section 5.13 permits the entering into of an agreement such as the Guarantee Fee Agreements. However, the Receiver submits that section 5.13 does not obviate the need to disclose the fee agreements and fees. I agree.

[26] The only disclosure of the guarantee fees is in the notes to the financial statements, which have been withdrawn. The notes do not disclose the total quantum of guarantee fees potentially payable to Mr. Furtado (over $860,000), nor do they disclose the means of calculating them. While the 2019 balance sheet discloses loans payable by Stoney Creek LP in the amount of $6,350,000, the notes do not specify the quantum of guarantee fees. The guarantee fee amount payable to the guarantor (Mr. Furtado) in 2019 ($34,521) would not suggest to someone reading the statements that the fees potentially payable to Mr. Furtado would be of the magnitude claimed. Mr. Furtado points to the guarantee fee agreement, which contemplated additional guarantees being provided. The 2020 iteration of the guarantee fee agreement contained the total indebtedness that was guaranteed in the amount of $10,650,000. However, as noted, the guarantee fee agreement, signed by Mr. Furtado for Stoney Creek and Mr. Furtado personally, was not disclosed. In any event, considering that this was a lucrative related party transaction, one would expect full disclosure, including to investors in the limited partnership. As noted by this Court in *Klana v. Jones* (2003), 35 B.L.R. (3d) 236 (Ont. S.C.J.), at para. 44:

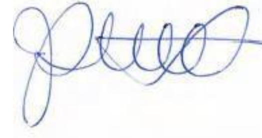
> The duty owed by an agent to its principal requires the agent to make full disclosure of material facts which place or may place the agent in a conflict of interest. The duty of full disclosure extends to every material fact regarding the subject matter of the agency, which clearly would contemplate financial disclosure. The onus of providing that there was adequate disclosure lies with the agent. It is not sufficient for the agent merely to disclose that he or she has an interest or to make a statement that would signal the principal should inquire. "Material information means information that a reasonable person would consider likely to operate on the principal's judgment." The test for whether information is material is objective. [Citations omitted.]

[27] I am satisfied that Mr. Furtado had a duty to provide full disclosure of the guarantee fee arrangement, which he failed to do.

Disposition and Costs

[28] The Receiver's request for the Court to uphold the Disallowance Order is granted.

[29] Mr. Furtado shall pay the Receiver's costs fixed in the amount of $14,500 (including taxes and disbursements) forthwith.



Date: November 9, 2023

TAB 3

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TURVEY AND MERCER v. LAUDER

Supreme Court of Canada, Kerwin C.J.C., Rand, Kellock, Locke and Cartwright JJ. May 24, 1956.

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Arthur S. Pattillo, Q.C., for appellant.

J. W. deB. Farris, Q.C., and *John Taggart,* for respondent.

KERWIN C.J.C. concurs with RAND J.

RAND J.:—This action arises out of an agreement to pool the voting power of certain shares in Hayes Manufacturing Co. Ltd., a company incorporated under the *Companies Act* of British Columbia. The appellant Mercer and the respondent Lauder were owners of the common stock in Lauder Mercer & Co. Ltd., an investment company which had underwritten a public issue of Hayes on the occasion in June, 1946, of the acquisition by that company of the shares of the Lawrence Manufacturing Co. Ltd. The subscription was not a success, leaving the investment company the holders of a large number of the common and 1,400 of the preferred shares, the latter being convertible into the former at the rate of 1 to 15. The total issue of the common was 107,620 of which Lauder personally held 16,580,

Mercer 8, one Burke 6,216, the public generally, 10,329, what was known as the Harrison group, 41,500 and the investment company 32,987.

The investment company early concluded that the business of Hayes needed new direction and the result was the engagement in August of 1946, as president and general manager, of the appellant, Turvey, then the comptroller of Powell River Co. Ltd., a paper producer of industrial strength. At that time Turvey purchased from the investment company 10,000 shares of common at $2.50. But the business did not improve as expected and in May of 1949, following a refusal of Turvey to agree that the company should redeem the 1,400 preferred shares of the investment company at $97, his resignation was asked for by Lauder and was given. Shortly thereafter, in May, 1949, a voting trust was entered into embracing 13,500 of the investment company's shares and the 41,500 of the Harrison group which was to continue until December 31, 1952.

Under the new control the business of Hayes still languished. Lauder and Turvey were not on speaking terms when in the autumn of 1950 the former, seeking new management, made overtures for a renewal of relations with Turvey through the manager of the Powell company. Turvey responded favourably, and from September to November meetings were held in which various propositions, looking, by concerted action, to a change in management and new measures to invigorate the business of Hayes, were discussed. For steps of this nature voting control was necessary. That could be obtained by pooling their interests together with those of Mercer and the investment company, by acquiring the Burke shares and the control of at least 1,020 of those held in small lots by members of the public, and by the conversion of the 1,400 preferred. In that situation the voting strength would be:

Investment company	9,487
Lauder	16,580
Mercer	8
Turvey	10,000
Burke	6,216
Public	1,020
Converted preferred	21,000
Total	64,311

The total common in this situation would be 128,620. It was believed by Lauder and Mercer that approximately 4,500 of the

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public shares were held by persons friendly to them, the support of whom they might depend on.

What Turvey was concerned with was a control which would be not only effective but also dependable, and he made it a condition of his co-operation that a fair-minded third person be associated with them, who, with himself and Lauder, would determine the policy of the company's affairs. That person he found in Mercer, Lauder's associate. In the result these measures were decided upon: a voting trust to bring in shares owned by the public; the acquisition by purchase of the Burke holdings, and an agreement between the three governing the total control thereby to be secured.

The public voting trust was drawn up on December 1, 1950, to terminate on August 17, 1951, and by March 12, 1951, shares to the number of 6,286 had been brought under it. Two shareholders at Chilliwack, B.C., holding 1,150 shares between them, declined to enter the trust but were willing to sell at $2 a share, and at that price the shares were purchased by the investment company in the name of Lauder. The Burke shares likewise were purchased and were distributed, 2,000 each to Lauder and Mercer and 2,286 to Turvey.

The agreement is dated December 8, 1950, and its pertinent provisions are as follows:

"WHEREAS the parties own common shares of Hayes Manufacturing Company Limited (hereinafter referred to as the 'Hayes Company') as follows:—

The said Lauder	16,580
The said Mercer	8
The said Turvey	10,000:

"AND WHEREAS the said Turvey as Trustee for all parties hereto is negotiating for the purchase from one Stanley Burke of a further 6,216 Common shares of the Hayes Company:

"AND WHEREAS the said Lauder, Mercer and Turvey are the Trustees named in a Voting Trust Agreement dated as of the 1st day of December, 1950 relative to Common shares of the Hayes Company:

"AND WHEREAS the parties have agreed that all of their Common shares in the Hayes Company shall be voted in accordance with the instructions of any two of them:

"AND WHEREAS the said Lauder and the said Mercer are the principal shareholders of Lauder Mercer & Company Limited, which said company owns 9,487 Common shares of the Hayes Company and the said Lauder and the said Mercer have agreed that the said 9,487 Common shares shall be subject to the same

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voting arrangement and subject to the terms of this agreement as the said Lauder and the said Mercer have herein agreed to with respect to the Common shares of the Hayes Company owned by them personally:

"AND WHEREAS Lauder Mercer & Company Limited also owns Preferred shares of the Hayes Company and the said Lauder and the said Mercer have agreed that, subject to the approval of the Bank of Toronto or of any other person or corporation which may have a lien or charge on the said Preferred shares, they will cause the said Lauder Mercer & Company Limited to convert sufficient of the said Preferred shares of the Hayes Company into Common shares (in accordance with the convertibility privileges attaching to such Preferred shares) as may be necessary to obtain voting control of the Hayes Company:

"NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and of the mutual covenants, provisos and conditions herein contained, the parties agree as follows:

"1. It is agreed that the said Common shares owned by each of the parties hereto and the Common shares owned by Lauder Mercer and Company Ltd. and the Common shares which may be issued by the Hayes Company upon the conversion of the Preferred shares hereinbefore mentioned shall be voted in accordance with the instructions of the majority in number of the parties hereto and that any party hereto who shall attempt to vote his shares other than in accordance with the majority in number of the said parties or who shall make or attempt to make any agreement or agreements with any person or persons wherein the said party agrees or purports to agree to vote his shares other than in accordance with the instructions of the said majority shall upon the payment to him of the sum of Fifty Cents (50c) for each Common share by the parties constituting the said majority, assign, set over and transfer unto such parties his said Common shares free and clear of any liens, charges or encumbrances. This provision shall apply with respect to the 9,487 Common shares of the Hayes Company owned by Lauder Mercer & Company Limited as though the said shares belonged to the said Mercer personally. The provisions of this paragraph shall be deemed to stand in lieu of any claim for damages against any of the parties who may commit a breach of the covenant to vote his shares of the Hayes Company in accordance with the instructions of the majority.

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"2. The said Lauder and the said Mercer as principal shareholders of Lauder Mercer & Company Limited covenant to cause the said Lauder Mercer & Company Limited to convert sufficient of its Preferred shares of the Hayes Company (in accordance with the convertibility privileges attaching to such Preference shares) as may be requisite and necessary to enable the parties hereto to obtain voting control of the Hayes Company. This covenant is subject to any necessary consent of the Bank of Toronto or of any other person or corporation who may have a lien or charge on the said Preferred shares of the Hayes Company belonging to Lauder Mercer & Company Limited."

(Clause three provides for a partial reimbursement of any loss suffered by the investment company in the event of the conversion of the preferred shares.)

"4. If, on the 17th day of August, 1951 the total Common shares held by the parties hereto, plus the shares held by the said Lauder, Mercer and Turvey as Trustees of the Voting Trust, plus the total number of Common shares which could be obtained by the conversion of all Preferred shares held or controlled by the said Lauder Mercer & Company Limited are insufficient to give to the parties hereto voting control of the Hayes Company then this agreement shall be considered cancelled, void and at an end.

"5. If, on the 17th day of August, 1951, the parties hereto have control of the said Hayes Company, this agreement shall continue in full force and effect; until terminated and put an end to by the decision of a majority of the parties hereto.

"6. The parties covenant each with the other that during the currency of this agreement, none of them will sell or dispose of any of his Common shares of the said Hayes Company, save as provided in paragraph 1 hereof.

"7. Turvey admits and declares that in negotiating for the purchase from the aforementioned Stanley Burke of 6,216 Common shares of the Hayes Company he is acting on behalf of himself, the said Lauder and the said Mercer jointly and that each of the parties hereto will be beneficially entitled to 2,072 of the said shares. They said Lauder and the said Mercer covenant, in the event of the said sale being completed, to pay the said Turvey as and when the same shall become due their proportionate amount of the purchase price of the said shares.

"8. The parties agree each with the other that the provisions of paragraph 1 of this agreement shall apply to their portion of the Burke shares, if acquired, in the same manner as to the

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Common shares of the Hayes Company now held by each of them."

This agreement seems to have been concluded without the knowledge of the Harrisons, but it soon became known to them and about December 22nd a representative approached Turvey with an offer to buy which was declined. On February 19, 1951, Lauder communicated to Mercer the information that the Harrisons had offered to sell to him at $2.75 a share, at the same time intimating that he had grown weary of the contest and was disposed to purchase. To this Mercer expressed his assent and referred him to Turvey. The latter raised no objection to the purchase, but avers that he mentioned the new common shares in relation to the conversion of the preferred. Agreement on the terms between Lauder and the Harrisons was evidently reached a few days later because on February 26th Lauder and Turvey signed a joint letter to Patmore, then secretary of Hayes, informing him of his appointment as manager and setting forth the terms of the engagement.

On March 12, 1951, the formal contract for the purchase was signed. It was contemplated that Lauder and Mercer with another named Hall, who ultimately withdrew, should take one-third of the total each. The price was payable one-third down, one-third in 6 months and the balance in 12 months. The stock was delivered on execution and the balance secured by the deposit with a power of sale of 928 of the 1,400 preferred shares. Upon this sale the 1949 voting trust was dissolved and the 13,500 shares of the investment company released. A week later, Lauder, Mercer and Turvey were elected the directors of the company. On May 19, 1951, at Lauder's suggestion, the public voting trust was released. August 17th, the time limit for conversion of the preferred shares, passed without action being taken. At that time the actual voting control under the terms of the agreement inclusive of the Chilliwack shares but excluding the Harrison lot was short of a majority by approximately the 21,000 shares to be furnished by the conversion.

On December 29, 1951, the directors fixed January 24th for the annual meeting of the company and Lauder had already made it known that he would then propose the appointment of five directors instead of three. Both Turvey and Mercer objected to the increase and Turvey, in writing, requested a prior meeting with Mercer and Lauder which was set for the morning of the annual meeting. At this preliminary discussion Lauder reiterated his determination to propose two additional directors and the other two made clear their decision under the agree-

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ment to vote against an increase. When at the shareholders' meeting an amendment to enlarge the number to five was put, Lauder was formally asked if he intended to support the amendment with all the shares held by him, and upon his answer that he did, an enjoining order was served which earlier in the day had been granted in this action restraining him from voting any of his shares contrary to the instruction of Turvey and Mercer. Later, on March 30, 1953, a tender on behalf of Turvey and Mercer was made to Lauder under cl. 1 of the agreement of a sum representing 50c a share for all so held.

The relief claimed was a declaration as to the shares owned or controlled by Lauder subject to the agreement, an order directing Lauder to transfer them to the appellants, and in the alternative, damages and such other relief as might be proper. It is not disputed that Lauder had been instructed as to the manner in which the shares bound by the agreement should be voted; and that he intended to vote all of his shares in disregard of the instruction is not, on the evidence, open to question. But it was held by the trial Judge that none of the Harrison shares were bound by the instruction; that they could be voted by Lauder as he saw fit; and the action was dismissed with costs.

On appeal this judgment was affirmed, Davey J.A. dissenting. O'Halloran and Sidney Smith J.J.A. agreed that none of the Harrison shares were subject to the agreement. The former also considered the agreement to have ended on August 17th because at that time the parties did not have the majority control specified. Davey J.A. construed the agreement as attaching to all shares at any time during its continuance held by the three parties. It should be stated that in both Courts the Harrison shares were seemingly treated as an indivisible block; no argument was made nor was the question considered that less than the whole number might be affected leaving what remained free.

In this Court the claim for delivery of the shares was abandoned and the relief limited to a declaration that the agreement remained in force; that in addition to the shares specified in the agreement, sufficient of those purchased from Harrison as were necessary to furnish a majority were subject to instruction under the agreement; and a permanent injunction restraining them as well as all others bound from being voted otherwise than in accordance with any such instruction.

That the agreement was terminated on August 17th was not seriously contended and I have no doubt that, as the appellants contend and as Lauder assumed until at least late in the autumn

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of 1951, it was at the time of the meeting and is now in force. The controversy on that footing revolves around the determination of the shares subject, for voting purposes, to its provisions.

The agreement had as its object the creation of a voting control over the shares specified to be directed by the majority decision of the three individuals acting as such. The argument on behalf of the respondent tended to make it appear that this balance of decision was to rest upon such a control within the group of any two of the parties to it, and that the contest lay, in fact, between the share power of Turvey and Mercer and that of Lauder. Only on this view could the argument based on the failure of Mercer to take up and pay for a full one-third on the number of the Harrison shares be pertinent. But for the purposes of decision or instruction by the three persons, it made no difference how their ownership was distributed; it was all to be voted one way according to the instruction of any two regardless of their holdings.

Mr. Farris argued that on March 12th the parties had achieved an actual control regardless of the two features mentioned which superseded the agreed control. But the parties were not bargaining to bring about a *de facto* control subject to the will of those actually possessing it; what they provided for was a control that, as between the parties, bound a majority of the total common issue. Turvey, in particular, having had one experience with Lauder and having agreed to place his interest upon the judgment of Mercer, was not intending to provide a means of transferring a domination from the Harrisons to Lauder.

When, then, the preferred shares were mortgaged to secure the private contract of Lauder and Mercer, the right of conversion lost, and the public voting trust released, what was the position of the shares so acquired? The Court of Appeal seemed to agree that the Chilliwack shares were bound because they were purchased instead of being brought under the public voting trust, and in that view I concur. There the parties themselves felt the fact of substitution and treated the shares accordingly. But similar considerations underlie the number lost through the nullification of conversion; and the question is whether Lauder is to be permitted to disregard his obligation to bring about conversion and to use the preferred for the purchase of other common shares sufficient to destroy that control to which he has bound himself.

The answer to that is the application of a long-established principle in our law that equity looks upon that as done which

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ought to be done. In the words of Hanbury's Modern Equity, 6th ed. at p. 552, where "A is bound in equity to do something for B, but leaves that thing undone, equity will be astute to seize on something else that he *has* done, and render that thing available for the benefit of B". It is implied that the other act is appropriate to substitution for the act not done and that it enables the contract to be performed so far according to its terms. The authorities from which that statement is drawn are numerous, and I think it desirable to give the particulars of several of them.

In the leading case of *Lechmere* v. *Lechmere* (1735), Cas. temp. Talb. 80, 25 E.R. 673, by marriage articles the husband covenanted to lay out within a year of his marriage and with the consent of the trustees, £30,000 in the purchase of freehold lands in fee simple in possession to be brought under a settlement. At the time of the marriage he was seized of lands in fee and after the marriage purchased other estates in fee, some in possession, and contracted for the purchase of others. He died intestate without issue and without having purchased. It was held that £30,000 should be applied as directed, but that as part performance there should be included those purchased in fee in possession subsequently to the marriage, notwithstanding that the purchases had not been made within a year, or with the consent of the trustees.

In *Sowden* v. *Sowden* (1785), 1 Bro. C.C. 582, 28 E.R. 1311, the covenant was to pay money to trustees to be laid out by them in the purchase of land. The money was not paid to the trustees but the covenant was deemed to be performed in part by the purchase of land by the covenantor himself.

In *Tubbs* v. *Broadwood* (1831), 2 Russ. & M. 487, 39 E.R. 479, a tenant for life sold part of a settled estate under the authority of an Act of Parliament which directed him to lay out the consideration money in the purchase of other lands and to settle them to the same uses. The tenant purchased lands but died without having settled them as required. The remainderman was denied recovery of the sale money against the personal estate of the tenant and the purchase attributed to the covenant. In extending the principle to the duty under the statute Lord Brougham L.C. said: "It may be true, as has been strongly pressed by the Plaintiff's counsel, that this is the first time in which the doctrine of *Lechmere* v. *Lechmere* (Cas. T.T. 80; 3 P. Wms, 211) has been carried beyond the case of covenant; but the principle of that case is directly applicable to the present. The whole doctrine proceeds upon the ground that a per-

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son is to be presumed to do that which he is bound to do; and if he has done anything, that he has done it in pursuance of his obligation.''

In *Frederick* v. *Frederick* (1721), 1 P. Wms. 710, 24 E.R. 582, the prospective husband applied to the Court of Aldermen of the City of London for leave to marry an orphan of the city, the daughter of a freeman. One of the conditions of the permission given was that the husband should take up his freedom of the city within one year next ensuing, and lay out certain trust money, but he did neither. On his death the widow brought a bill to declare the personal estate to be distributed as if he had become a freeman, notwithstanding the terms of his will. Macclesfield L.C. states the proposition, which he applied, as follows [pp 713-4]: ''The demand is grounded upon this rule, that where one for a valuable consideration agrees to do a thing, such executory contract is to be taken as done; and that the man who made the agreement shall not be in a better case, than if he had fairly and honestly performed what he agreed to. This is to be taken as a contract made by the Court of Aldermen with Mr. *Frederick* himself; and now the question is, whether he shall by will give away his personal estate, contrary to his own agreement? When Mr. *Frederick* engaged to take upon himself the freedom of the city, it was the same as if he had agreed that the personal estate which he might die possessed of should go according to the custom of the city of *London*, one third to his widow, and another third to his children.''

In *London, Chatham etc. R. Co.* v. *South Eastern R. Co.*, [1892] 1 Ch. 120 at p. 143, Lord Lindley L.J. states the rule as ''a person is not allowed to derive any advantage from his own wrongdoing, and that, in order to prevent this, a Court of Equity will treat him as having done that which he ought to have done''.

I agree with the Courts below that the Harrison shares are not by express terms within the agreement. The last sentence in cl. 8 seems to me, as it did to McInnes J. at the trial, to be conclusive: ''The provisions of paragraph 1 of this agreement shall apply to their portion of the Burke shares, if acquired, in the same manner as to the Common shares of the Hayes Company now held by each of them.'' Nor did the right to purchase at 50c extend to the common shares resulting from the conversion; consequently the substituted form of the latter cannot take on such an incident. But cl. 1 makes it clear that the remedy of purchase was neither exclusive nor to affect any other remedy open to restrain a violation of the obligation of

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voting in respect of any of the shares including those from conversion.

On August 18th, the following, then, was the position of the parties. The majority required was 53,812; the shares specified in or attributed to the agreement, including the 3,310 acquired by Mercer, numbered 45,601, leaving 8,211 short of a majority, and that additional number must be taken for voting purposes to be so appropriated. If in the meantime any of the former have been sold, the number must be added to that figure.

There remains the question of costs. To give effect to the claim made in this Court is justified only if failure to advance it at the trial has not resulted in any prejudice to the respondent and that no further evidence could have been presented which might have affected the result. I can see no possibility of either and no particular was specifically suggested; the essential facts were examined to the fullest degree; they were, in fact, the salient and substantive features of the controversy; and any obscurity which concealed their prominence was caused by matter more or less irrelevant. The issue relating to the acquisition of the shares at 50c was, in reality, a subordinate issue; on the face of the facts the essence of the dispute was voting control over shares not otherwise subject to that provision. Mr. Pattillo drew our attention to para. 1 of the reply: "The plaintiffs say that if all of the defendant's shares are not subject to the said agreement, which is not admitted but is denied, then that such number of the said shares as with those held by the plaintiffs would be required to give control of Hayes Manufacturing Co. Ltd. were and are so subject." That was a proper reply and if urged as it was before us the plaintiffs would have been entitled to succeed. Considering the adamant position taken by the respondent, a trial of the facts became inevitable; and if the claim as now made had been urged, the case might have ended with the first judgment. The failure to make it has probably resulted in bringing the case before both upper Courts.

The appeal should be allowed and the judgments below set aside. The appellants will be entitled to a declaration that the agreement is in force and to an order enjoining the respondent from refusing or failing, directly or indirectly, to vote or to cause to be voted the common shares owned by him or the investment company and specifically made subject to the agreement and the number of substituted shares necessary to a majority voting control by the appellants, the respondent and the investment company, and from disposing of any of them, otherwise than in accordance with the terms of the agreement, with

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leave to either party to apply. The appellants will have their costs of the action and the respondent his costs in the Court of Appeal; there will be no costs in this Court.

KELLOCK J. concurs with RAND J.

LOCKE J.:—I respectfully agree with Davey J.A. that the proper construction of the agreement of December 8, 1950, is that the voting control provided for by that document was intended to apply and applied to common shares of the Hayes company acquired by any of the three parties to that agreement after its date and that, accordingly, the shares purchased by Lauder from the Harrisons, at least to the extent required to effectively control the company, were subject to its terms. I am also in agreement with the reasons given by that learned Judge for arriving at his conclusion. With due respect for contrary opinions, I think them to be unanswerable.

During the argument addressed to us on behalf of the respondent, it has been said that the real purpose of the parties to the agreement was attained when effective control of the company was obtained by the purchase of the Harrison shares. I think it to be clear beyond question that this is not what was intended by any of the parties when they entered into the agreement. It was not merely to wrest control of the company from the Harrison interests that they agreed to join forces: rather was it to obtain control to be exercised by the three parties in agreement, or by any two of them, a very different thing indeed.

At the very outset of the negotiations, Turvey had openly stated to his solicitor, Mr. Douglas Brown, in Lauder's presence, that he did not trust the latter. The plan devised to ensure that Turvey, whose shareholdings were very much less than those of Lauder and of Lauder, Mercer & Co. Ltd. combined, would be fairly treated, was to vest voting control in these two parties and a third person acceptable to both of them. Turvey believed that Mercer, who was Lauder's business associate, would act fairly and proposed him as the third party, and this was acceptable to Lauder. It appears to me to be quite certain that Turvey would not have agreed to pool his shares with those of Lauder and of Lauder, Mercer & Co. Ltd. upon any other basis.

My consideration of the evidence satisfies me that it was not until some time in 1952 that Lauder conceived the idea that the shares he had acquired through the Harrisons were not subject to the terms of the agreement.

The Harrisons had apparently learned that Turvey had decided to throw in his lot with Lauder and approached him in December, 1950, with a view to buying his shares. According to

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Turvey, he had not then signed the agreement but he considered himself bound by his arrangement with Lauder and declined to sell. When Lauder commenced his negotiations with the Harrisons and found that they wished to sell their shares, he telephoned Mercer to ask him if he was agreeable to the purchase and if he wished to participate to the extent of one-third of the shares. Lauder was examined for discovery in advance of the trial and an extract from his examination relating to this incident reads:

"Q. And you discussed the matter with Mercer when he was down in Los Angeles, in February, didn't you? A. I had forgotten that, but now you recall it, I think that is correct. Q. You phoned him there, and asked him if he was agreeable to that? A. Yes. Q. Instead of the conversion? A. I guess so."

According to Mercer, when Lauder telephoned to him, one of the arguments advanced by him in favour of the purchase was that "he figured it would be a lot cheaper for us to do so than having to convert our preferred stock into common stock." Mercer had asked Lauder to communicate with Turvey and he did so and, according to Turvey, he said that he had no objection to the purchase "if they stayed (*sic*) in lieu of conversion under our agreement of December 8". At the trial, Lauder denied that he had agreed that the Harrison shares were to be subject to the agreement and the learned trial Judge found that no agreement had been made to this effect. In considering the matter, however, the learned Judge appears to have overlooked the admission made by Lauder on his discovery and does not appear to have given consideration to the fact that Lauder did not require Turvey's consent to purchasing the shares and that the effect of Turvey's evidence was simply that Lauder had led him to believe that the purchase was made in lieu of the conversion of the preferred shares which he and Mercer were obligated by the agreement to make. The finding at the trial seems to rest mainly upon the improbability of Turvey relying upon a verbal agreement by Lauder, in view of his evidence as to his unreliability. In view of my conclusion as to the proper interpretation of the agreement, this finding does not in any event affect the issue.

What followed, to my mind, affords further evidence that Lauder at this time intended that the Harrison shares, or at least a sufficient number to ensure control, should be voted under the terms of the agreement. The shares were bought on March 12, 1951, and, on March 19, 1951, at a meeting of the directors of which Lauder was chairman, Turvey was elected

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a director of the Hayes company in the place of Garnett, one of the Harrison group, and also appointed a vice-president of the company. The agreement of December 8th did not deal with the question of the directorate of the Hayes company but only with the share control of the company. The appointment, however, to my mind, indicates that there was at that time no change in Lauder's idea as to the control to be exercised by the three of them.

A further significant circumstance is that some time in May, 1951, Lauder telephoned to Turvey saying that "we have control of the company now. There is no point in our holding these people's shares in the Montreal Trust. Let us return them". And, Turvey and Mercer agreeing, the voting trust agreement of December 1, 1950, made with certain members of the public who were shareholders of the Hayes company, which named Lauder, Turvey and Mercer as voting trustees, was terminated.

Paragraph 4 of the agreement of December 8, 1950, provided that it would terminate if on August 17, 1951, the total common shares held by the parties, plus the shares held by Lauder, Mercer and Turvey as trustees of the voting trust, plus the total number of common shares which could be obtained by the conversion of all preferred shares held or controlled by Lauder, Mercer & Co. Ltd. were insufficient to give to the parties hereto voting control. The date mentioned was the last day for the conversion of the preferred shares of the Hayes company under the terms upon which they were issued. Lauder and Mercer were, by the contract, obligated to convert a sufficient number of the preferred shares to ensure control, but the date was allowed to pass without the matter even being mentioned, for a reason that was obvious if the Harrison shares were affected by the agreement. I have no doubt that the reason for this was that all three of the parties considered that this was the situation.

The construction which the parties have themselves placed upon such agreement may, if there is doubt or ambiguity as to its terms, be looked at as an aid to construction (Phipson on Evidence, 9th ed., p. 682). In my opinion, the matters referred to by Davey J.A. which occurred after December 8, 1950, and those to which I have made reference above, indicate that all three of the parties to this agreement understood it in the same sense and acted accordingly until some time in the year 1952, when Lauder first took the position which gave rise to this litigation.

If this were not the proper interpretation of the agreement, a further question would arise which was not argued or con-

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sidered either in the Court of Appeal or at the trial. If the Harrison shares did not become subject to the terms of the agreement, it is now contended for the appellants that upon the equitable principle that equity looks on that as done which ought to be done, an obligation to vote those shares, or a sufficient number when added to those admittedly affected by the agreement to ensure control in the manner provided by its terms, was imposed upon Lauder. In view of my conclusion as to the proper interpretation of the agreement, I find it unnecessary to consider this question.

I would allow this appeal with cost throughout. Other than as to costs, I agree with the judgment proposed by my brother Rand.

CARTWRIGHT J. (dissenting):—The relevant facts are set out in the reasons of my brother Rand and I will endeavour to avoid repeating them.

The first question is as to the construction of the agreement of December 8, 1950. I agree with the view of the learned trial Judge that the shares covered by the provision that they shall be voted in accordance with the instructions of the majority of the parties are only those specified in the agreement, that is to say:

Owned by Lauder	—16,580 shares
Owned by Mercer	— 8 shares
Owned by Turvey	—10,000 shares
Owned by Lauder Mercer & Co. Ltd.	— 9,487 shares
Owned by Burke and acquired by the parties to the agreement	— 6,216 shares
	Total 42,291 shares

For the reasons given by the learned trial Judge and by my brother Rand I find it impossible to construe the agreement as covering other shares acquired after its date by any of the parties thereto.

While, in the view that I take of the whole case, the determination of the rights of the parties in regard to the 1,150 shares purchased from the shareholders at Chilliwack, B.C., ceases to be a matter of great importance, it is my opinion that these shares were not subject to the agreement of December 8th but that the actions of the parties indicate a tacit agreement to treat them as subject to the terms of the voting trust agreement of December 1, 1950, and that the obligation to vote them in accordance with its terms came to an end with that agreement on May 19, 1951.

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I am unable to accept the view that the agreement of December 8, 1950, terminated on August 17, 1951. It is true that the voting trust agreement of December 1, 1950, by its terms was to end on August 17, 1951, and the reason for this is not made clear; but the terms of para. 5 of the agreement of December 8th in unequivocal language provide for its continuance until terminated by the decision of a majority of the parties. The condition with which para. 5 opens, "If, on the 17th day of August, 1951, the parties hereto have control of the said Hayes Company", was fulfilled. On that date the number of shares required for control was 53,811 and the parties controlled at least the following shares:

Those set out above, subject to the agreement	—42,291
½ of "the Chilliwack shares" (owned by Lauder)	— 575
½ of "the Chilliwack shares" (owned by Mercer)	— 575
1/3 of the 41,500 shares purchased from the Harrisons which Lauder controlled	—13,833 1/3
1/3 of the 41,500 shares purchased from the Harrisons which Mercer controlled	—13,833 1/3
Total	71,107 2/3

For the purpose of deciding whether the parties had control it is unnecessary to consider what was the position, at the date mentioned, of the 1/3 of the Harrison shares which Blake had intended to purchase. It would appear from the reasons of the learned trial Judge that counsel for the respondent at the trial admitted that the agreement of December 8, 1950, continued in force as to the shares specified therein, and that the learned Judge acted on such admission. The respondent cannot now alter the position which he took in that regard. The passage in the reasons of the learned trial Judge to which I refer is as follows: "I have already dealt with what shares of the defendant are covered by the said agreement and inasmuch as the defendant on the trial stated that he had taken advice and found he was bound by the said agreement as to the shares covered thereby there is no purpose in continuing the injunction granted by Manson J."

It remains to consider whether the equitable relief proposed in the reasons of my brother Rand should be granted to the appellants. I do not find it necessary to deal with Mr. Farris' submission that the claim to this relief, having been put forward for the first time in this Court, ought not to be entertained. In my opinion the claim fails on the facts.

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The claim is based on the assertion that the respondent was bound to convert a sufficient number of the 1,400 preference shares held by Lauder Mercer & Co. Ltd. to give control to the parties and that he failed to do so. That he and Mercer were so bound by the terms of the agreement of December 8th is clear; but it is equally clear that both of the appellants acquiesced in the failure to make the conversion. It may be noted in passing that it was in their financial interest to do so. Neither in their pleadings nor their evidence did the appellants attempt to deny that they had agreed to the shares not being converted. On the contrary they asserted an express agreement by Lauder to treat the Harrison shares purchased by him and Mercer as standing in the place of the shares which the conversion would have produced. There are concurrent findings of fact supported by evidence which was expressly credited by the learned trial Judge that no such agreement was made. I did not understand counsel for the appellants to attack these findings, but quite apart from this it is my opinion that they should not be disturbed.

In view of these concurrent findings it is unnecessary to speculate as to why the respondents agreed that the shares should not be converted; but I agree with Mr. Farris' submission that in all probability the reasons were (i) that had Mercer fulfilled his agreement in regard to the purchase of the Harrison shares and had the purchase of those shares been carried out as planned, the *de facto* situation would have been that any two of the three parties acting together could have controlled the Hayes company, and (ii) it was to the financial advantage of each of the parties to avoid conversion if possible. That all the parties to the agreement of December 8, 1950, had agreed, some time before the date on which the right to convert expired, that conversion should not take place is I think clear from the evidence; if it were otherwise doubtful, it would be put beyond question by the fact of their voluntarily dissolving the voting trust agreement on May 19, 1951.

The principle quoted by my brother Rand from Hanbury's Modern Equity is, as he says, a long established one. As a matter of convenience I repeat it: "A is bound in equity to do something for B, but leaves that thing undone, equity will be astute to seize on something else that he *has* done, and render that thing available for the benefit of B".

In my view the reason that this principle has no application to the facts of the case at bar is that as soon as the appellants agreed that the shares should not be converted, the respondent

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was no longer bound in equity (or otherwise) to convert them.

Had it been otherwise, it would have been necessary to consider whether Mercer's failure (which he has made no offer to rectify) to carry out his obligation to pay for 1/3 of the Harrison shares, thereby throwing a very heavy financial obligation on the respondent, did not disentitle him to equitable relief, on the ground that he who seeks equity must do equity, and whether Turvey, who was always subject to the possibility of the agreement being terminated by the joint action of Mercer and Lauder, could claim to stand in any higher position than Mercer. However, in view of my conclusion that the appellants agreed that the shares should not be converted, I do not pursue this inquiry.

In my view the only relief to which the appellants are entitled is a declaration that the agreement of December 8, 1950, is still in force and applies to the 42,291 common shares of Hayes Manufacturing Co. Ltd. itemized in the second paragraph of these reasons. As this was conceded at the trial the learned trial Judge considered that no injunction was necessary. Should the respondent in the future, so long as the agreement remains in force, endeavour to vote any of such 42, 291 shares otherwise than in accordance with its terms the appellants would have a ready remedy.

In the result I would dismiss the appeal with costs.

Appeal allowed.

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TAB 4

1966 CarswellBC 90
Supreme Court of Canada

Peso Silver Mines Ltd. v. Cropper

1966 CarswellBC 90, [1966] S.C.R. 673, 56 W.W.R. 641, 58 D.L.R. (2d) 1

Peso Silver Mines Limited (N.P.L.) v. Cropper

Cartwright, Martland, Judson, Ritchie and Hall, JJ.

Judgment: June 20, 1966

Counsel: *J. S. Maguire, Q.C.*, and *K. S. Fawcus*, for appellant.
D. T. Braidwood, Q.C., and *F. A. Melvin*, for respondent.

Related Abridgment Classifications
Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.g Fiduciary duties
III.1.g.iv Taking of corporate opportunity

Headnote
Corporations --- Directors and officers — Fiduciary duties — Taking of corporate opportunity
Agency — Fiduciary Relationship between Company and Directors — Secret Profits — Liability to Account — Offer Bona Fide Rejected by Company Accepted by Director.
Appeal and cross-appeal from the judgment of the court of appeal for British Columbia, reported at (1966) 54 W.W.R. 329, dismissing an appeal from the judgment of Gregory, J., which dismissed an action by the appellant for, *inter alia*, an accounting of profits allegedly improperly made by the respondent while holding the office of director of the appellant, and varying the amount awarded on the counterclaim for wrongful dismissal. Appeals dismissed.
The essential facts are as follows: Respondent, a businessman experienced in mining, was the managing director, at a salary, of the appellant and during his tenure of office he, with his co-directors, considered and *bona fide* rejected an offer of one, Dickson, to acquire some speculative mining properties located near the appellant's properties. Some time later the respondent, with others, formed a company and acquired the Dickson properties. Respondent, upon request, disclosed his interest in this company, and in another company associated therewith, to the appellant, and was asked to turn over his interests at cost. He refused, his appointment as executive vice-president was rescinded, and he was asked for his resignation as a director. Gregory, J. dismissed the appellant's action and awarded the respondent $10,000 damages for wrongful dismissal (reduced by the court of appeal to $6,500).
It was *held, per curiam*, that the appeal, and the cross-appeal, must be dismissed. The facts of the case at bar do not fall within the principles enunciated in *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (H.L. [E.]). In the instant case, while there is no doubt that the respondent stood in a fiduciary relationship to the appellant, he and his co-directors acted in good faith in considering and rejecting, for sound business reasons, the Dickson offer. There was no question that the offer made later to the respondent was accompanied by any confidential information unavailable to any prospective purchaser or that the respondent, as a director, had access to any such information by reason of his office; the offer was made to the respondent not in his capacity as a director but as an ordinary member of the public: *Regal (Hastings) Ltd. v. Gulliver, supra; Zwicker v. Stanbury*, [1953] 2 S.C.R. 438, reversing 30 M.P.R. 106, 1 Abr Con (2nd) 1140; *Midcon Oil & Gas Ltd. v. New British Dom. Oil Co. and Brook*, [1958] S.C.R. 314, at 327, affirming (1957) 21 W.W.R. 228, 1958 Can Abr 338, applied.

The judgment of the court was delivered by *Cartwright, J.*:

1 This is an appeal from a judgment of the court of appeal for British Columbia (1966) 54 W.W.R. 329, dismissing an appeal from a judgment of Gregory, J. in so far as that judgment dismissed the action and allowing in part the appeal as to the judgment on the counterclaim. Norris, J.A., dissenting, would have allowed in part the appeal as to the judgment in the action and allowed the appeal as to the counterclaim *in toto*.

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

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

4 The respondent resides in Vancouver. At the date of the trial, in December, 1964, he stated that he had had 20 years of successful business experience. He was then president of Traders Investment Limited in Vancouver and of several mining companies. He has a practical knowledge of mining and had done some prospecting for himself in 1958 and 1959.

5 In 1959, R. Verity, D. Ross and the respondent caused a company, Tanar Gold Mines Limited, hereinafter referred to as "Tanar" to be incorporated and became its first directors. At the invitation of the respondent, C. S. Walker also became a shareholder and director of Tanar.

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

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

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

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

10 Early in the spring of 1962 a prospector, Dickson, was endeavouring to sell three groups of claims in the Mayo district, totalling 126 claims. One group was contiguous to the appellant's ground, a second was about five miles to the north-east and the third about 11 miles to the north-east. The claims were unproven and of speculative value. Dickson's asking price was some $31,000 in cash, together with a block of shares in a public company to be formed to take over the property. Dickson approached Dr. Aho, a consulting geologist who was retained by the appellant and by many other mining companies. Dr. Aho suggested that Dickson should offer the claims to the appellant, and he did so. Dickson's offer was considered by the full board of directors

of the appellant in March, 1962, and was rejected. On this point there are concurrent findings of fact which were expressed as follows in the reasons of Bull, J.A., at pp. 364-5:

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

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

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

13 In May, 1962, Cross Bow was incorporated to make the purchase; the four participants put up in equal shares the money necessary to have the intervening ground between the groups of claims "staked blind" by Dickson, thus increasing the total holdings to approximately 326 claims. Shortly afterwards Mayo was incorporated as a public company to take over, finance and develop the properties and Cross Bow received 600,000 escrowed shares of Mayo for the properties, out of which Dickson received his agreed proportion. Later the respondent and his associates bought for cash about 50,000 free treasury shares of Mayo at 10 cents to 12 cents per share. The respondent was at all relevant times a director of both Cross Bow and Mayo.

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

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

> **Appointment of Officers**
>
> Upon Motion it was resolved that the following persons be appointed officers of the Company for the ensuing year:

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P. O. Berliz          Chairman
C. S. Walker          President
S. E. Cropper         Executive Vice-President
D. M. Clark           Secretary-Treasurer
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16 It was also resolved that the respondent's salary be increased by $2,000 per annum, thus bringing his yearly salary up to $13,000.

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

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

18 The action was commenced on March 19, 1964.

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

20 Counsel for the appellant founded his argument on the decision of the House of Lords in *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378, in which the principles of equity relating to the liability of a person who acquires property in regard to which a fiduciary relationship exists are considered and the leading cases are reviewed. The judgment in *Regal* has been followed by this court in *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438, reversing 30 M.P.R. 106, and in *Midcon Oil & Gas Ltd. v. New British Dom. Oil Co. and Brook*, [1958] S.C.R. 314, affirming (1957) 21 W.W.R. 228. Counsel for the respondent accepts the statements of the law contained in *Regal* and submits that their application to the facts of the case at bar does not result in imposing liability on the respondent.

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

22 Viscount Sankey said, at p. 381:

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

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

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

24 And at p. 386:

> The rule of equity which insists on those, who *by use of a fiduciary position* make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source

> of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, *in the stated circumstances*, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

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

> Did such of the first five respondents as acquired these very profitable shares acquire them *by reason and in course of their office of directors of Regal*? In my opinion, when the facts are examined and appreciated, the answer can only be that they did.

26 And at p. 389:

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

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

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

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

29 And at pp. 391-2:

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

30 Lord Wright said at p. 393:

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

31 Lord Porter said at p. 395:

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

32 And on the same page:

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

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

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

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

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

> To say that the Company was entitled to claim the benefit of those shares would involve this proposition: Where a Board of Directors considers an investment which is offered to their company and *bona fide* comes to the conclusion that it is not an investment which their Company ought to make, any Director, after that Resolution is come to and *bona fide* come to, who chooses to put up the money for that investment himself must be treated as having done it on behalf of the Company, so that the Company can claim any profit that results to him from it. That is a proposition for which no particle of authority was cited; and goes, as it seems to me, far beyond anything that has ever been suggested as to the duty of directors, agents, or persons in a position of that kind.

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

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

38 I agree with Bull, J.A. when, after quoting the two above passages, he says at p. 373:

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

39 As Bull, J.A. goes on to point out, the same view appears to have been entertained by Lord Denning, M.R. in *Phipps v. Boardman*, [1965] 2 W.L.R. 839, at 859, [1965] 1 All ER 849, at 856.

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

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

42 It remains to consider the counterclaim. In this court the appellant did not argue that the dismissal without notice was justified unless it should be held that the respondent was under a duty to account to the appellant for his interests in Cross Bow and Mayo; consequently the only remaining question is as to the quantum of damages. The learned trial judge awarded the respondent $10,000, which represented the balance of his salary for the year ending December 16, 1964. He indicated, however, that he would have fixed the damages at $6,500 were it not for the circumstances of the respondent's dismissal, namely, that the unsubstantiated allegations of impropriety made against him and the fact of his dismissal so shortly after Charter had taken control of the appellant could not fail to damage his reputation among mining men. I agree with Bull, J.A. that, the claim being founded on breach of contract, the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the respondent's wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment. I am also in agreement with Bull, J.A. that, in view of the respondent's evidence that he remained unemployed for only five months, the award should be reduced to $6,500.

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

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF **YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.**

Court File No.: BK-21-02734090-0031

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
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Proceedings commenced at Toronto

BOOK OF AUTHORITIES OF THE "CLASS A LPs"
(Ms. Athanasoulis' Appeal from the Disallowance of her Profit-Sharing Claim)

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