IN THE PRIVY COUNCIL

No. 29 of 1951

ON APPEAL FROM THE COURT OF APPEAL

FOR ONTARIO

B E T W E E N :

ROBERT J. McMASTER and JAMES McMASTER, Executors of the Estate of Harry J. McMaster (Plaintiffs) Appellants

- and -

NORMAN W. BYRNE (Defendant) Respondent

CASE FOR THE APPELLANTS

Record

1. This is an appeal from a judgment of the Court of Appeal for Ontario dated the 8th day of November, 1950 dismissing with costs the Appellants' appeal from a judgment of Smily J. dated the 27th April, 1950 which had dismissed with costs the Appellants' action, commenced on the 15th September, 1947 by Harry J. McMaster (hereinafter referred to as "the Plaintiff") who died on the 30th November, 1948 and whose executors, the Appellants, continued the action. — P.347; P.333; P.1; P.433 L.25 - P.434 L.28

2. The action was against the Respondent as confidential adviser and solicitor of the Plaintiff for an accounting by the Respondent of the Respondent's profits in respect of a transaction in March and April, 1947 between the Plaintiff and the Respondent; or for other appropriate relief. — Pp.1-4

3. The Plaintiff, who had been a plant superintendent in a china factory in the United States, came to Hamilton in Ontario from the United States in 1933, and with two associates, Pulkingham — P.14 Ll.1-5; P.13 L.28-P.15 L.9

Record

P.16 Ll.8-17

and Etherington, formed a company known as Sovereign Potters Limited, in which they held some preferred stock and 50% of the common stock until the common stock held by them was transferred to a holding company, Carleton Securities Limited, in which the Plaintiff had a 40% interest. The Plaintiff was the plant manager and a director of Sovereign Potters Limited but in 1936 resigned and in 1939 started in Dundas near Hamilton, in partnership with his son (the first Appellant) and Anna Dorothy McMaster, McMaster Potteries, which was incorporated through the agency of the Respondent on the 24th November, 1944 as McMaster Pottery Limited, a private company, of which the Respondent was one of the first directors. From the time he left Sovereign Potters Limited the Plaintiff wished to have Carleton Securities Limited broken up, and consulted the Respondent on the matter.

P.372 Ll.10-38
P.15 Ll.27-39
P.18 L.31-P.19 L.8
P.374 Ll.26-29
P.378 L.8
P.27 L.28-P.29 L.4

P.4 L.16
P.15 Ll.1-13
P.16 L.13-P.17 L.43
P.161 Ll.29-37; P.256 L.1 - P.259 L.44
P.18 Ll.5-16
P.22 L.17-P.33 L.35; PP.442-444
P.19 L.22-P.20 L.24
P.260 Ll.4-32; P.436 L.31; P.439 Ll.5-10
P.24 L.39-P.25 L.31; Pp.378-382.
Pp.383-387
P.27 L.28-P.28 L.44; P.94 L.25-P.96 L.45; P.102 Ll.24-44; P.140 Ll.9-36

4. The Respondent was a barrister and solicitor practising in Hamilton. He had acted for the Plaintiff and his associates in the formation of Sovereign Potters Limited and of Carleton Securities Limited and was the secretary and solicitor of both companies. The Appellants contend that the Respondent was also clearly the Plaintiff's confidential adviser concerning his shares and negotiations for the sale thereof. In 1936 the Respondent had edited the statement in which the Plaintiff explained why he was leaving Sovereign Potters Limited. In 1938 the Respondent obtained for the Plaintiff advice about patents. The Respondent advised the Plaintiff about his personal estate, and liability for succession duties. The Respondent in December 1944 drew the Plaintiff's will and was named as an executor therein, until replaced by a codicil executed in November, 1948. The Respondent retained possession of the will until after the 1st July, 1947. In 1945 the Respondent acted for the Plaintiff in the purchase of a dwelling house. In 1946 the Respondent conducted correspondence with the Department of National Revenue concerning the taxation of McMaster Pottery Limited. The Plaintiff frequently consulted the Respondent about breaking up Carleton Securities Limited and about disposing of his interest in Sovereign Potters Limited. The Plaintiff and the Respondent were close personal friends,

Record

addressing each other as "Harry", or "Scratch", and "Norm". On the 6th December, 1946 the Respondent rendered a bill of costs to "McMasters Potters Limited" which included personal items. P.374 L.12; P.379 L.23; P.382 L.31; P.383 L.7; P.26 Ll.8-18 P.388

5. According to the evidence of Mr. Pulkingham, called by the Respondent, the Plaintiff had after 1936 been continuously anxious to dispose of his shares in Carleton Securities Limited at a price which was increased from $20,000 to $25,000 and then to $30,000, which the Plaintiff had been asking for at least a year. Mr.Etherington in September 1946 had suggested that the Plaintiff put his offer to sell into writing; and as a result the Plaintiff gave Mr. Pulkingham an option to buy the Plaintiff's shares in Carleton Securities Limited for $30,000. This option was renewed, and expired at latest on the 23rd March,1947, and was transferred to the Respondent on the 21st March, 1947. Mr. Etherington appears to have regarded the option as an authority to act on the Plaintiff's behalf in effecting a sale,as it was given as a result of his saying "Well, Harry, we cannot lead a buyer to your doorstep without having your commitment in writing." The option also began with a request to find a purchaser. P.288 Ll.25-41; P.290 Ll.18-24; P.289 L.3-P.290 L.24; P.163 Ll.32-44; P.327 L.41-p.329 L.19; P.164 Ll.20-27

6. On the 10th December, 1946 there was a directors' meeting of Carleton Securities Limited. In late October or early November, 1946 an English company, Johnson Brothers (Hanley) Limited, had made indirect approaches with a view to acquiring control of Sovereign Potters Limited, and Mr. Pulkingham, Mr. Etherington and Mr. Robinson wanted to obtain $1,500,000. This information was not disclosed to the Plaintiff at the directors' meeting "because it was too nebulous", but Mr. Pulkingham states that Mr. Etherington suggested that the Plaintiff should not be in too big a hurry to sell his stock "because there may be negotiations in the not too distant future to sell this company or the shares of this company." Mr. Etherington's recollection was that he (having in mind the Johnson negotiations) said there was a deal in the offing, but said nothing more. Nevertheless it was upon this occasion that the Plaintiff agreed to renew the option to Mr.Pulkingham for 100 days. P.291 Ll.1-11; P.114 Ll.30-42; R128 L.38-P.129 L.24; P.292 Ll.13-32; P.326 Ll.5-24; P.292 Ll.34-41

Record

P.391 Ll.11-40

7. Mr. Johnson of the English company had visited the works of Sovereign Potters Limited in the autumn of 1946 and had expressed interest in obtaining control. His interest continued after a minimum price of $1,500,000 had been suggested. In January, 1947 Mr. Johnson sent a representative to look over the plant, and early in March reaffirmed his interest, indicated that a price of $160 for each preference share and $150 for each common share, excluding Carleton Securities Limited, would be acceptable, and asked to be recommended to a firm of solicitors.

P.294 Ll.24-31
P.311 L.27-P.312 L.6
P.389
P.296 Ll.6-39
P.304 L.32-P.305 L.6
P.163 Ll.32-44

8. In the negotiations with the English company the Respondent was actively associated with Mr. Pulkingham and Mr. Etherington. The matter was discussed in the Respondent's office in January, 1947. On the 6th March, 1947 the Respondent had recommended solicitors to act for the English company. On the 21st March, 1947 Mr. Pulkingham informed the Respondent that it looked as though the negotiations might come through. The existence of Mr. Pulkingham's option was up to that time unknown to the Respondent, but it was transferred to him at this interview on the 21st March, 1947.

P.164 Ll.2-10

9. Having got the option with knowledge of the promising developments in the negotiations with the English company, the Respondent at once telephoned to the Bank of Toronto to have available $30,000 in legal tender. He also arranged to see the Plaintiff on the following morning.

P.165 Ll.6-45
P.390 Ll.28-44
P.164 L.36-P.165 L.5
P.390 Ll.1-25

10. At the interview between the Respondent and the Plaintiff and his son (the first Appellant) on the 22nd March, 1947, there was a discussion about a grievance of the Respondent that he had been promised but had not received any shares on the formation of Sovereign Potters Limited, and the Respondent wrote down a statement about it which the Plaintiff signed. The Respondent was anxious not to have to commit himself too soon as regards the shares, and he obtained a new option from the Plaintiff on his shares at a price of $30,000, available for 30 days.

P.32 Ll.8-31

11. The son's account of the interview, as regards the option, was that the Respondent stated that the old option, which the Respondent brought with

Record

him, had expired and that the Respondent tore it up; that the Respondent tried to get the price reduced below $30,000 because of the company's heavy bank loan; that the Respondent wrote out the option which was signed by the Plaintiff and witnessed by the son; that the Respondent asked them to keep the transaction secret; and that nothing was said about any negotiations for the purchase by anybody of Sovereign Potters Limited. P.32 Ll.32-45 P.33 Ll.2-3 P.33 Ll.4-8 P.35 Ll.12-32; P.88 L.23-P.90 L.2

12. The Respondent when asked what conversation took place on the 22nd March 1947 with regard to the Johnson proposals, at first replied that the Plaintiff knew practically as much about the deal as did the Respondent, which was not a lot. He then said the possibility was discussed; that a lot was said about it; that $1,500,000 was mentioned, and that the Plaintiff thought it fantastic. The Respondent said it was the Plaintiff who tore up the old option. What the Respondent alleges to have been said about disclosure was not put to the first Appellant either generally or in detail. The first Appellant did not hear any rumours about the negotiations until the second week in May, 1947. P.166 Ll.5-11 P.166 Ll.13-34; P.167 Ll.26-36 P.171 Ll.23-38 P.38 Ll.1-18

13. On the 8th April, 1947 the Respondent exercised the option, received the stock certificates and paid to the Plaintiff $30,000 later receiving back from him $38 for stock transfer tax. The $30,000 was paid in cash and at the Respondent's request was put in a safety deposit box for fear of information leaking out if the cash were deposited in the Plaintiff's bank. In due course the Respondent received from the English company for these shares $127,000 out of the total purchase price of $1,034,000. Pp.398-399 P.35 L.36-P.37 L.17 P.156 L.28-P.157 L.3; P.198 L.21-P.199 L.18

14. The Plaintiff first learned of the negotiations in May 1947, and obtained his first definite knowledge from a local newspaper of the 27th June, 1947. The Plaintiff thereupon consulted his solicitor who, on the 5th July, 1947, wrote to the Respondent alleging that the relationship of solicitor and client existed between the Respondent and the Plaintiff; that full disclosure had not been made, and that the Plaintiff was entitled to the profit made by the Respondent, amounting to $97,000 less the stamp transfer tax payable on the P.46 L.11-P.47 L.37 P.429 P.430 L.20

Record

Pp.431-433
P.50 Ll.9-32
P.1

transfer of the shares to the English company. These allegations were not dealt with until after pressure. The Respondent replied by a letter, not in evidence, dated the 2nd August, 1947. The writ in the action was issued on the 15th September, 1947.

15. By section 11 of the Evidence Act (R.S.O.1937 c.119, now R.S.O. 1950 c. 119 s.12) it is provided:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

Pp.334-346
P.340 L.24-P.341 L.14
P.338 Ll.1-29
P.341 L.15-P.342 L.21
P.339 L.42-P.340 L.5
P.343 Ll.16-52
P.344 Ll.1-16
P.346 Ll.8-12

16. The learned trial judge held that the Respondent was the Plaintiff's chief legal adviser and that the confidence arising from the relationship of solicitor and client existed between the parties at the time of the transaction. He had held that the Respondent was at that time in possession of all the information then available concerning the negotiations for the sale. The learned trial judge, however, dismissed the action on the ground that in his opinion no information which the Respondent could have given to the Plaintiff would have affected the Plaintiff's decision to sell; and consequently there was no withholding of relevant information. He relied, amongst other things, on a conversation in May 1947 between the Plaintiff and one Marsales. The learned Judge also considered that the transaction was fair, and would not have been affected by proper legal advice. Accordingly, he held that there had been no breach of a fiduciary duty.

Pp.348-365
P.358 L.27-p.360 L.4

17. The Court of Appeal held that the relationship of solicitor and client did not exist at the time of the transaction and for that reason dismissed the appeal. Laidlaw, J.A., with whom Henderson, J.A. agreed, held that if the relationship had been found to exist, the Respondent had discharged his duty, and the transaction was

Record

fair. Laidlaw J.A. also held that the Respondent's evidence was sufficiently corroborated. Hogg J.A., on the other hand, held that if the relationship had existed, the Respondent had not discharged his duty. He also found that the evidence showed that the Respondent was aware of the exact state of the negotiations and did not disclose his information to the Plaintiff who was not aware thereof. Hogg J.A. was of opinion that the evidence of the Respondent that he was not the Plaintiff's solicitor at the material date was corroborated by the fact that no charges had been made for work after 1944.

P.360 L.5-P.361 L.29

P.362 Ll.8-40

P.362 L.41-P.365 L.32

18. It is contended by the Appellants that:

(a) The relationship of solicitor and client existed between the Plaintiff and the Respondent at all material times, or at any rate the confidence arising from the relationship of solicitor and client existed between the Plaintiff and the Respondent at the time of the transaction in question.

(b) The Respondent is shown by the evidence not to have discharged the duties required by that relationship.

(c) Once it is shown that the relationship has existed, the influence naturally arising therefrom will be presumed to continue unless the Respondent can show that the relationship and influence had ceased. To do this he must at least show that no confidence as to the sale has been placed in him, and that he had not acquired and had not the means of acquiring any peculiar knowledge of the property the subject matter of the sale to him.

(d) A solicitor who purchases from his clients takes upon himself the whole proof that the transaction is righteous. His duty is to show that he disclosed fully and without reservation all the relevant or material information in his possession, and either that he advised his client as fully as if the transaction were between the client and a stranger or that the client obtained competent and independent advice based on adequate information. The solicitor must disclose not

Record

only all matters which would affect the judgment of the client, but all matters which might possibly have a deterrent effect upon his decision to deal with the solicitor.

(e) It is immaterial whether or not the Respondent was taking a gamble in purchasing from the Plaintiff and whether or not the Plaintiff was willing to sell. Evidence as to unexpected difficulties in completing the sale and of efforts of the Respondent in respect thereto are irrelevant.

(f) The Court should take into consideration the haste with which the transaction was entered into, the secrecy surrounding it, and the client's known anxiety to sell his shares.

(g) The evidence of the Respondent as to disclosure and advice and the evidence as to termination of the relationship was not only entirely unconvincing but it cannot be accepted by the Court as there was not the corroboration required by the Evidence Act. In any event the Respondent's evidence where in conflict with other unimpeached evidence should not be accepted.

19. The Appellants therefore submit that the appeal should be allowed and the judgments below set aside and that judgment should be given for the Appellants for the amount claimed with interest and costs, for the following amongst other

R E A S O N S

1. BECAUSE at the material time the relationship of solicitor and client and, further or alternatively, the confidence arising from that relationship existed between the Plaintiff and the Respondent.

2. BECAUSE the Respondent failed in his duty to the Plaintiff by failing (a) to disclose to the Plaintiff all the relevant information known to the Respondent; (b) fully and properly to advise the Plaintiff concerning the transaction, and (c) to ensure that the Plaintiff had independent legal advice.

Record

3. BECAUSE, even if it had been established, it would be irrelevant that (a) the information known to the Respondent would not have affected the Plaintiff's mind; (b) the Plaintiff was anxious to sell his shares, or (c) the Respondent was taking a gamble in buying the shares.

4. BECAUSE there was no corroboration, or no sufficient corroboration of the Respondent's evidence.

10

5. BECAUSE the presumption against the validity of the transaction was not rebutted.

ANGUS C. HEIGHINGTON

FRANK GAHAN

THESE ARE THE ONLY PAPERS AVAILABLE IN THIS APPEAL.

Privy Council Office.

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B E T W E E N :

ROBERT J. McMASTER and JAMES McMASTER, Executors of the Estate of Harry J. McMaster (Plaintiffs) Appellants

- and -

NORMAN W. BYRNE (Defendant) Respondent

CASE FOR THE APPELLANTS

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