No. 29 of 1951.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

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 Respondent.

RECORD.

1. This is an appeal from a judgment of the Court of Appeal for Ontario (Henderson, Laidlaw and Hogg, JJ.A.) delivered 8th November, 1950, dismissing an appeal by the Appellant from the judgment of the Supreme Court of Ontario (Smily, J.) delivered the 27th April, 1950. p. 347. p. 333.

2. The claim made in the action which was commenced on the 15th September 1947 was for an accounting of profits resulting from a transaction whereby certain shares of stock were sold by one Harry J. McMaster deceased (hereinafter referred to as " the deceased McMaster ") to the Respondent and subsequently resold by the Respondent. The action was brought by the deceased McMaster and after his death on the 30th November 1948 was continued by his executors by virtue of an Order dated the 8th September 1949 by the present Appellants as Executors of the Will of the deceased McMaster. The claim was founded upon the allegation that at the time of the sale of the shares by the deceased McMaster, the Respondent was under a fiduciary duty to him by reason of the relationship between them of solicitor and client and that there was a breach of that duty. p. 1. p. 434, l. 1. p. 433, l. 22. p. 2, l. 32.

3. The learned trial Judge was of the view that the Respondent was under a fiduciary duty but that he had discharged that duty. The Court of Appeal was unanimously of the view that no such duty existed and the majority (Hogg, J.A., dissenting) were also of the same view as the trial Judge that such duty, if it existed, had been discharged. Thus there are concurrent findings of fact in the courts below that there was no breach of duty. p. 341, l. 4. p. 346, l. 8. p. 348, l. 5. p. 355, l. 41. p. 361, l. 32. p. 348, l. 5. p. 358, l. 27. p. 359, l. 11. p. 362, l. 34.

4. In 1933 the deceased McMaster became associated with one W. G. Pulkingham and one A. G. Etherington in a company called Sovereign Potters Limited, incorporated to carry on a pottery business at Hamilton, Ontario. In addition to a certain number of preferred shares, the three men became entitled among them to 2,500 common shares of the company which were to be held in the ratio of 40 per cent. to the deceased McMaster, 40 per cent. to the said Pulkingham and 20 per cent. to the said Etherington. The persons constituting the financial group which assisted in financing the Company, in addition to receiving a certain number of preferred shares, also received among them 2,500 common shares.

p. 283, l. 18.
p. 284, l. 37.
p. 283, l. 40.

5. At the instance of the deceased McMaster, an arrangement was entered into in 1935 whereby the 2,500 common shares of Sovereign Potters Limited, to which the deceased McMaster, and the said Pulkingham and Etherington were entitled, were turned over to a holding company later called Carleton Securities Limited. The three men held the shares of Carleton Securities Limited in the same ratio of 40 per cent. to the deceased McMaster, 40 per cent. to the said Pulkingham and 20 per cent. to the said Etherington.

p. 284, l. 13.
p. 284, l. 30.

The interest of the deceased McMaster in Carleton Securities Limited was equivalent in value to 1,000 shares of Sovereign Potters Limited, but, since these 1,000 shares were held by Carleton Securities Limited, he was not in a position to dispose of them without the concurrence of the said Pulkingham or the said Etherington.

p. 290, l. 10.

6. The deceased McMaster was employed by Sovereign Potters Limited as plant superintendent from the outset until 1936 when he retired from that company. From that time until the sale to the Respondent he was anxious to dispose of his interest but the said Pulkingham and the said Etherington were for divers reasons unwilling to take any step which would have the effect of dissipating the block of 2,500 shares in Carleton Securities Limited which gave to the shareholders of Carleton Securities Limited 50 per cent. in the Common Stock of Sovereign Potters Limited and, although at every annual meeting of Carleton Securities Limited after 1936, the deceased McMaster asked the said Pulkingham and the said Etherington to find a purchaser of his shares in Carleton Securities Limited as such, he was in fact unable to dispose of these shares or realise the shares in Sovereign Potters Limited which these shares represented at any time prior to the matters in question in this action.

p. 288, l. 29.
p. 109, l. 32.
p. 168, l. 7.
p. 121, l. 4.
p. 122, l. 5.
p. 288, l. 25.
p. 323, l. 38.

7. In 1933 the Respondent assisted in the formation of Sovereign Potters Limited and was Secretary and Solicitor to that Company from its incorporation until after the date of his purchase of the deceased McMaster's shares of Carleton Securities Limited. In 1935 the Respondent assisted the deceased McMaster and the said Pulkingham and Etherington in connection with Carleton Securities Limited by making available to them the unused letters patent of a company known as Carleton Fruit Farms Limited the name of which was thereafter changed to Carleton Securities Limited. He appeared on the government returns of that Company as its secretary, but he did not in fact act as its secretary and did not attend any of its meetings.

p. 161, l. 29.
p. 199, l. 32.
p. 221, l. 10.
p. 329, l. 40.

8. In 1939 the deceased McMaster opened a new pottery business at Dundas, Ontario, which became incorporated as McMaster Pottery Limited in 1944. p. 18, l. 31. p. 21, l. 3.

9. According to the evidence which was accepted the Respondent acted as solicitor for the deceased McMaster or McMaster Pottery Limited on the following occasions only.

In 1938 he wrote a letter to New York patent attorneys in connection with the possible patenting of a wrench invented by the deceased McMaster. In 1944 he advised the deceased McMaster with respect to possible succession duties on his estate and drew his will. The same year he incorporated McMaster Pottery Limited referred to above. In 1945, upon the deceased McMaster purchasing a house, he performed the necessary legal services. In 1946 he made certain representations to the Department of National Revenue for McMaster Pottery Limited in connection with an excise tax matter. p. 22, l. 17. p. 441. p. 19, l. 22. p. 20, l. 28. p. 374. p. 20, l. 35. p. 24, l. 39. p. 378. p. 21, l. 15. p. 59, l. 20. p. 383.

These are the only professional services performed at any time by the Respondent for the deceased McMaster or McMaster Pottery Limited. The total amount of the fees for these services, apart from the purchase of the house, amounted to $580.00. His fee for services in connection with the house purchase was $40. After the incorporation of Sovereign Potters Limited in 1933, the Respondent did not at any time act for the deceased McMaster in connection with matters relating to Sovereign Potters Limited. After the change of name of Carleton Fruit Farms Limited to Carleton Securities Limited in 1935 the Respondent did not at any time act for the deceased McMaster in connection with matters relating to Carleton Securities Limited. p. 388. p. 60, l. 5. p. 380, l. 1. p. 53, l. 40. p. 60, l. 16. p. 169, l. 11. p. 200, l. 3. p. 207, l. 13.

10. The deceased McMaster employed various other solicitors during the same period. In 1939 he employed a Mr. Braden to assist him in getting started with his new pottery business. On another occasion he consulted a Mr. Lampard and in 1945 he engaged a Mr. Shaver in connection with the purchase of a property for McMaster Pottery Limited. p. 29, l. 25. p. 65, l. 35. p. 30, l. 3. p. 65, l. 38. p. 140, l. 37. p. 30, l. 9. p. 66, l. 3. p. 208, l. 6.

11. After a meeting of the directors of Carleton Securities Limited on the 19th September, 1946, the deceased McMaster gave to the said Pulkingham an option to purchase his shares in Carleton Securities Limited for $30,000 which was the equivalent of $30 per share of Sovereign Potters Limited. This price was that originally suggested by the deceased McMaster. Some time earlier he had offered to sell his shares for $25,000 and before that for $20,000. In the summer or early autumn of 1946 there was discussion between the said Pulkingham and one Robinson, a shareholder and director of Sovereign Potters Limited, as to the purchase by the said Robinson of the deceased McMaster's shares of Carleton Securities Limited but the proposal came to nothing. p. 289, l. 30. p. 290, l. 18. p. 305, l. 7 p. 122, l. 26.

12. In the latter part of October or early November 1946 the said Pulkingham, who was at this time President and General Manager of Sovereign Potters Limited, received an intimation that Johnson Brothers (Hanley) Limited, an English pottery company, might be interested in acquiring an interest in Sovereign Potters Limited. This was discussed p. 429, l. 19. p. 114, l. 30. p. 128, l. 37. p. 292, l. 42.

by the said Pulkingham with the said Etherington and the said Robinson who were also at this time directors of Sovereign Potters Limited, but no one else was notified of the enquiry because so many similar approaches had been made that it was not regarded seriously. A letter not itself in evidence at the trial was written to Johnson Brothers (Hanley) Limited shortly after that conversation in which it was suggested that the directors of Sovereign Potters Limited would not be inclined to recommend the sale of the shares of the company for less than $1,500,000.

13. At a meeting of the directors of Carleton Securities Limited on
p. 292, l. 13. p. 326, l. 1. 10th December, 1946, the said Etherington advised the deceased McMaster not to be in too great a hurry to sell his shares because there might be negotiations in the not too distant future to sell Sovereign Potters Limited
p. 292, l. 33. or its shares. On or shortly after that date the deceased McMaster renewed for 100 days his option for the sale of his shares to Mr. Pulkingham for $30,000. At the time of that meeting a voting pool of the shares of the financial group, holders of the other 2,500 common shares of Sovereign
p. 291, l. 26. p. 310, l. 44. p. 409. Potters Limited, was being formed and there was talk of a possible reorganisation of Sovereign Potters Limited which would have the effect of giving the financial group control of the company. A ten-year pooling agreement was entered into in February 1947.

p. 391. 14. In January, 1947, a representative of Johnson Brothers (Hanley) Limited looked over the Sovereign Potters Limited plant. In the previous autumn one Johnson had visited the plant on behalf of the same company.
p. 247, l. 1. Early in 1947 the said Pulkingham, in reply to the letter to Johnson
p. 296, l. 8. Brothers (Hanley) Limited, received a letter or telegram (not in evidence at the trial) in which Johnson Brothers (Hanley) Limited said that the figure of $1,500,000 referred to in the letter from Sovereign Potters Limited was out of the question.

15. Early in March, 1947, the said Pulkingham received a cable from Johnson Brothers (Hanley) Limited asking him to suggest the name
p. 295, l. 10. of a firm of Canadian solicitors who might look after their interests if they
p. 306, l. 44. p. 389. commenced negotiations. The said Pulkingham enquired of the Respondent and in a letter to the said Pulkingham dated 6th March, the Respondent suggested a firm of solicitors in Toronto (Messrs. Mason, Foulds, Davidson and Gale) which was subsequently instructed.

16. In an interview with the Respondent on 21st March, 1947,
p. 163, l. 21. the said Pulkingham told the Respondent of the option he had obtained on the shares in Carleton Securities Limited belonging to the deceased McMaster, the previous December, which was due to expire on 23rd March,
p. 304, l. 32. 1947. According to the evidence, this was the first knowledge the Respondent had that there was such an option. The said Pulkingham told the
p. 210, l. 8. Respondent he did not propose to exercise his option and the Respondent
p. 229, l. 6. thereupon took from Pulkingham an assignment of it. The said Pulkingham
p. 304, l. 28. p. 230, l. 9. knew more than the Respondent of the state of the negotiations with Johnson Brothers (Hanley) Limited. The Respondent then made an
p. 164, l. 2. appointment by telephone to see the deceased McMaster at his house the next morning, 22nd March, 1947.

17. The Respondent saw the deceased McMaster the next morning. p. 164, l. 12.
He told him of obtaining the assignment of the said Pulkingham's option.
After some discussion the deceased McMaster gave the Respondent a new p. 390.
option on his shares in Carleton Securities Limited for 30 days at $30,000.
The deceased McMaster named this price, which was the same as had been
specified in the option to the said Pulkingham.

According to the evidence of the Respondent which appears to have
been accepted by the trial Judge, the deceased McMaster appeared to
know as much as the Respondent about the state of the negotiations p. 166, l. 5.
10 with Johnson Brothers (Hanley) Limited. According to the Respondent
they discussed the figure of $1,500,000 which the said Pulkingham had
given to Johnson Brothers (Hanley) Limited and the Respondent told
him he had recommended the Mason Foulds' firm in Toronto and that he
intended to see this Mr. Foulds soon. The deceased McMaster thought
the $1,500,000 was a fantastic figure and that a sale was not very probable.
The deceased McMaster's son Robert McMaster was present at the
interview.

According to the evidence of the Respondent which appears to have
been accepted the Respondent did not know at this time that the said
20 Johnson had visited the Sovereign Potters Limited in the autumn of p. 247, l. 1.
1946, or that another representative had come out in January, 1947.
There is no evidence that the deceased McMaster knew of these visits.

18. The option price of $30,000 on the deceased McMaster's shares
of Carleton Securities Limited which represented his original holding of
1,000 shares of Sovereign Potters Limited was the equivalent of $30 per
share of Sovereign Potters Limited.

19. On 27th March, 1947, the Respondent accompanied the said
Pulkingham to Toronto for an interview with Mr. Foulds, the solicitor p. 174, l. 26.
engaged by Johnson Brothers (Hanley) Limited. The Respondent did p. 263, l. 19.
30 not know in any detail what had taken place with Johnson Brothers p. 212, l. 28.
(Hanley) Limited until immediately prior to the interview with Mr. Foulds.
A full report of that interview and of the negotiations to that date was p. 391.
made by the Respondent in a letter dated 27th March, 1947, addressed p. 214, l. 11.
to the directors of Sovereign Potters Limited.

20. On 8th April, 1947, the Respondent saw the deceased McMaster p. 170, l. 36.
and exercised the option by purchasing the deceased McMaster's shares
of Carleton Securities Limited for $30,000. In discussing the possible sale
to Johnson Brothers (Hanley) Limited the Respondent said to the deceased p. 37, l. 18.
McMaster: "You know I am taking a gamble on this." The deceased p. 74, l. 42.
40 McMaster said he did not wish the Respondent to take a gamble on his p. 174, l. 1.
behalf. It is submitted that there can be no doubt that the learned trial p. 346, l. 1.
Judge was correct in finding as a fact, as he did, that this referred to the
possibilities of the successful conclusion of the negotiations with Johnson
Brothers (Hanley) Limited as the Respondent said, and not as was alleged
by Robert McMaster to the possibility of gaining control of Carleton
Securities Limited. It is further submitted that at this early stage the
Respondent's purchase was in truth highly speculative and of doubtful
advantage.

21. The negotiations between the shareholders of Sovereign Potters Limited and Johnson Brothers (Hanley) Limited continued for many weeks after 8th April, 1947. In these the Respondent took a very active part and assumed heavy personal liabilities in the hope that he would succeed in having a transaction completed. It seemed at various times that the negotiations would come to nothing. Finally, on 15th May, 1947, the Respondent on behalf of the shareholders of Sovereign Potters Limited sent to Johnson Brothers (Hanley) Limited a document referred to in the evidence as an ultimatum that a definite offer must be made by Johnson Brothers (Hanley) Limited before 1st June, 1947, at a price based on $127.00 for each common share and that payment must be made by 30th June, 1947. Johnson Brothers (Hanley) Limited on 21st May, 1947, cabled their acceptance of the offer subject to availability of Canadian dollars but owing to certain requirements of the Bank of England it became necessary for the Respondent and others to pledge their credit in Canada for large amounts in order to make it possible to close the transaction. The vicissitudes of the negotiations are set out in the evidence of the Respondent and the communications referred to therein. It is submitted from these that it is clear that the transaction was frequently in jeopardy and at times appeared to be definitely at an end.

p. 175, l. 3 to p. 199, l. 18.
p. 425, l. 24.
p. 211, l. 24.
p. 417.
p. 192, l. 33.
p. 194, l. 14.
p. 423, l. 20.
p. 428.
p. 396 to p. 428.

22. After a meeting of shareholders of Sovereign Potters Limited held on 14th May, 1947, at which time the negotiations with Johnson Brothers (Hanley) Limited had advanced very considerably beyond the stage they had reached on 22nd March, 1947, or 8th April, 1947, and the proposed price of the common shares had been reduced from $150 to the final price of $127, one Marsales had a conversation with the deceased McMaster which he described in his evidence as follows :—

p. 313, l. 6.
p. 313, l. 18.

> " We had this conversation, and I mentioned to him that I had heard about him selling his stock, and he laughed and said, yes, he says, he had, he had got rid of it at last. I said : ' Well, if this deal should happen to go through '—which I did not think it would, and neither did he—I said : ' Byrne will not make quite as much money as he would have last meeting, because we have pulled the price down to 127,' and he said : ' That is right, but ' he said, ' I got what I wanted, and I don't care if Byrne makes a million ; I hope he does '."

Moreover the deceased McMaster did not at any time after the Respondent took up his option and before the announcement of the sale communicate with the Respondent or raise any objection to the sale to Johnson Brothers (Hanley) Limited.

p. 207, l. 39.

23. The purchase by Johnson Brothers (Hanley) Limited of all the outstanding shares of Sovereign Potters Limited and Carleton Securities Limited was completed 27th June, 1947.

p. 429.

24. In the light of the evidence, and particularly that referred to in paragraphs 9 and 10 hereof, it is submitted as clear, and both the learned trial Judge and all the Judges of the Court of Appeal so decided, that the relationship of solicitor and client did not exist between the deceased McMaster and the Respondent at the date of the transaction in question. Moreover it is also submitted that the Judges of the Court of Appeal

were correct in deciding as they did, that any relationship of confidence that may have arisen from any earlier relationship of solicitor and client did not extend to the shares sold by the deceased McMaster to the Respondent, and had in any event come to an end by the material time. The Respondent had not at any time acted as solicitor for the deceased McMaster in respect of the latter's shares in Carleton Securities Limited or in respect of the indirect interest those shares gave to the deceased McMaster in Sovereign Potters Limited.

The learned Judges in the Court of Appeal were unanimous in their view it is submitted rightly, that the Respondent was under no fiduciary duty to McMaster at the time of the transaction in question. p. 348, l. 5. p. 355, l. 41. p. 361, l. 32.

25. Even if this view were incorrect it is submitted that the learned trial Judge and the majority of the Court of Appeal were correct in holding that any fiduciary duty there may have been was fully discharged by the Respondent. At the time of the transaction in question it is submitted that the Respondent disclosed to the deceased McMaster without reservation all the information then in his possession, which was very little, with respect to a possible sale to Johnson Brothers (Hanley) Limited. His transaction with the deceased McMaster was in itself a fair one having regard to the disadvantages of the deceased McMaster's position as a minority shareholder in Carleton Securities Limited and to the unlikelihood, as it seems to have appeared at that time, of a sale being carried through with Johnson Brothers (Hanley) Limited.

There are concurrent findings of fact by the courts below that the Respondent disclosed without reservation all the information in his possession concerning the possible deal with Johnson Brothers (Hanley) Limited and that the transaction was a fair one having regard to all the circumstances. It is submitted that these findings were correct and should not be disturbed. p. 343, l. 16. p. 344, l. 1. p. 348, l. 5. p. 358, l. 27. p. 359, l. 11.

26. The action was tried at Hamilton in February, 1950, by The Hon. Mr. Justice Smily, who delivered judgment on 27th April, 1950, dismissing the action. The learned trial Judge after reviewing the evidence concluded that strictly speaking the Respondent was not the deceased McMaster's solicitor at the time of the option to the Respondent and certainly the Respondent was not acting as solicitor for the deceased McMaster in the particular transaction in question. Nevertheless, he thought that the relationship of confidence naturally arising from the earlier relationship should be presumed to have continued and that the Respondent should bear the onus of upholding the transaction. For the purpose of the remainder of his judgment, he assumed that a relationship of confidence did exist. He was of the opinion that, in the light of the facts existing at the time of the option and sale of the shares to the Respondent, the transaction was a fair one, having regard to all the circumstances. After again pointing out that the Respondent was not acting as the deceased McMaster's solicitor *in hac re* nor in respect of any other matter at that time, he expressed the further opinion that there was no advice which the Respondent, if acting as the deceased McMaster's solicitor and diligently advising his client, could have given which would have affected the deceased McMaster's decision. In any event he found as a fact that all material information in the possession of the Respondent was also known to the deceased McMaster. p. 333. p. 340, l. 39. p. 341, l. 15. p. 344, l. 1. p. 344, l. 38.

p. 347. 27. An appeal to the Court of Appeal for Ontario was dismissed.

p. 348, l. 5. 28. Henderson, J.A., who gave the first judgment concurred in the following judgment of Laidlaw, J.A. He added his opinion that it did not enter the minds of either the Respondent or McMaster that the transaction in question was one between solicitor and client and he found as a fact that they did not at that time stand to each other in that relation. He thought that the evidence of Marsales, an independent and disinterested witness whose credit nobody had assailed, showed that in the latter part of May, 1947, the deceased McMaster was perfectly satisfied with the terms of his option to the Respondent, thereby corroborating the evidence of the Respondent in all material matters.

p. 348, l. 42. 29. Laidlaw, J.A., examined in detail the evidence as to all matters which it might be suggested caused the relationship of solicitor and client to exist between the Respondent and the deceased McMaster at the time
p. 355, l. 41. of the transaction in question. His finding was that at that time the deceased McMaster and the Respondent were not related to one another as client and solicitor and there was no confidential relationship of a similar character between them. Because of the importance given to it in the course of the argument, he went on to consider the further question of whether, if, contrary to his finding, the Respondent was under a special duty at the time of the transaction, there was a breach of that duty. He
p. 358, l. 9. saw no reason to discredit the evidence given by the Respondent and pointed out that the learned trial Judge had not done so. He was satisfied
p. 358, l. 27. from that evidence and found that before the deceased McMaster gave the option to the Respondent, the Respondent disclosed without reservation all the information in his possession concerning the possible deal with
p. 358, l. 11. Johnson Brothers (Hanley) Limited. He was also satisfied on the evidence that the transaction was a fair one having regard to all the circumstances.
p. 361, l. 25. He also held that there was sufficient corroboration of the Respondent's evidence to satisfy the provisions of the Evidence Act.

p. 361, l. 32. 30. Hogg, J.A., agreed with Laidlaw, J.A., that, on 22nd March, 1947, and for some time before that date, the relationship of solicitor and client did not exist between the Respondent and the deceased McMaster.
p. 362, l. 8. He would have found it difficult to conclude, however, that the Respondent had placed before the deceased McMaster, when he secured the option, all of the information he had at that time as to the negotiations with Johnson Brothers (Hanley) Limited. He was of opinion that the
p. 364, l. 21. Respondent's evidence that the relationship of solicitor and client did not exist at the date of the transaction in question was sufficiently corroborated.

31. The Respondent submits that this appeal should be dismissed for the following among other

REASONS

(1) BECAUSE at the time of the transaction in question no relationship of solicitor and client or other fiduciary relationship existed between the Respondent and McMaster.

(2) BECAUSE any relationship of confidence that may have arisen from the fact that the Respondent had in the past acted as solicitor to the deceased McMaster in other matters did not extend to the disposal of the shares which are the subject matter of the transaction in question, and was not in existence at the time of the transaction in question.

(3) BECAUSE even if the Respondent was under a fiduciary duty to the deceased McMaster at the time of the transaction in question the Respondent in fact discharged such duty.

(4) BECAUSE the Respondent disclosed to the deceased McMaster without reservation all the information in his possession at the time of the transaction in question concerning the possible sale to Johnson Brothers (Hanley) Limited.

(5) BECAUSE the transaction between the Respondent and the deceased McMaster was on the evidence a fair one having regard to all the circumstances.

(6) BECAUSE there are concurrent findings of fact by the courts below that the Respondent disclosed without reservation all the information in his possession concerning the possible sale to Johnson Brothers (Hanley) Limited and that the transaction was a fair one having regard to all the circumstances, and such findings should not be disturbed.

(7) BECAUSE the material facts deposed to by the Respondent are corroborated by other evidence.

(8) BECAUSE the judgments of the trial Judge and the Court of Appeal were right in their conclusion, and so far as this was favourable to the Respondent in their reasoning.

C. F. H. CARSON.

HAILSHAM.

No. 29 of 1951.

In the Privy Council.

ON APPEAL

from the Court of Appeal for Ontario.

BETWEEN

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 Respondent.

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