Privy Council Appeal No. 29 *of* 1951

Robert J. McMaster and Another - - - - - - - *Appellants*

v.

Norman W. Byrne - - - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH APRIL, 1952

Present at the Hearing:

THE LORD CHIEF JUSTICE OF ENGLAND (LORD GODDARD)
LORD NORMAND
LORD RADCLIFFE
LORD ASQUITH OF BISHOPSTONE
LORD COHEN

[*Delivered by* LORD COHEN]

This is an appeal from a decision of the Court of Appeal for Ontario affirming the decision of Smily J. who dismissed the appellants' action with costs.

The action was commenced by the late Harry J. McMaster on the 15th September, 1947. By his Statement of Claim McMaster claimed from the respondent who is a barrister and solicitor practising in the city of Hamilton an accounting of the profits derived by the respondent from a transaction between them relating to 1,000 shares in a company called Carleton Securities Limited.

The history of the matter (stating for the moment only facts which are not in dispute) is as follows. In the year 1933 McMaster and two associates by name Pulkingham and Etherington promoted a company called Sovereign Potters Limited. The capital of that company consisted of a number of preference and 5,000 common shares. Of the common shares half were issued to the group who provided finance for the company, the other half being issued to the three promoters. Pulkingham and McMaster each received 1,000 shares and Etherington 500 shares. The respondent acted in the formation of the company on behalf of all the interested parties and he became and has at all material times been the secretary of the company, Sovereign Potters Limited.

McMaster was anxious to tie up the holdings of the three promoters so that there could not be a majority interest formed against any one of them. With this in view the promoters took over a company Carleton Securities Limited and transferred to it their respective holdings of common shares in Sovereign Potters Limited. They received in exchange shares in Carleton Securities Limited, McMaster receiving 1,000 shares. Again the respondent acted in the taking over of Carleton Securities Limited for the purpose above mentioned and was appointed secretary of it. In this case, however, it appears that he never in fact acted as secretary.

McMaster became a Director and Production Superintendent of Sovereign Potters Limited on its formation and remained in that capacity until November 1936 when he fell out with his colleagues and resigned.

Under an agreement with Sovereign Potters Limited McMaster was under obligation not for three years after the termination of his service directly or indirectly to enter into competition with Sovereign Potters Limited within the Dominion of Canada. When that period expired in 1939 McMaster set up in business on his own account in Dundas under the name of McMaster Potteries. In 1944 that business was transferred to McMaster Pottery Limited and again the respondent acted for McMaster in the incorporation of the company. In the same year the respondent advised McMaster as to the probable liability for succession duty on his estate when he died. In 1946 McMaster, acting no doubt on behalf of McMaster Pottery Limited, consulted the respondent as to the liability of that company for excise duty.

Going back to the year 1944, in that year the respondent drew up McMaster's will under which he was appointed one of the executors and trustees, the other being McMaster's wife. That will was duly executed and remained in the respondent's custody until after the transactions which gave rise to the present dispute. It was then removed from his custody and on the 16th November, 1948, McMaster executed a codicil appointing his two sons executors and trustees in place of the executors named in the original will.

On the 6th December, 1946, the respondent's firm rendered an account to McMaster Pottery Limited for their services aforesaid to that company and to McMaster personally. The respondent says that apart from the matters mentioned in that account the only other matters in respect of which he acted for McMaster were (*a*) in 1938 the patentability of a wrench which McMaster had designed and (*b*) in 1945 the purchase of a house ; he says that on the latter occasion he had nothing to do with the negotiations ; he merely dealt with the conveyancing business.

Robert McMaster deposed to a number of visits and telephone calls by McMaster to the respondent. The respondent did not agree as to the frequency of these events and maintained that if and so far as McMaster ever raised any question with him about Carleton Securities Limited, it was in his capacity as secretary of Sovereign Potters Limited, 2,500 common shares of which constituted the only asset of Carleton Securities Limited.

The evidence of Robert McMaster shows that on three occasions his father employed a solicitor other than the respondent. According to Robert McMaster's evidence on the first occasion it was because it was thought that the solicitor concerned, Mr. Braden, could exert influence to procure some plant required for the family business ; on the second occasion the solicitor, Mr. Lampard, was employed for some unspecified business at the request of one of McMaster's daughters ; on the third occasion Mr. Shaver was employed by both vendor and purchaser on the acquisition by McMaster Potteries Limited of a piece of land.

It is clear that from the time McMaster resigned his posts with Sovereign Potters Limited he was anxious to realise his interest in that company which was represented by his holding of shares in Carleton Securities Limited. He appears to have raised that matter each year at the annual meeting of Carleton Securities Limited which was held to discuss how the voting interest of that company in Sovereign Potters Limited should be exercised. Ultimately McMaster granted Pulkingham an option to purchase his shares in Carleton Securities Limited for $30,000. The option was granted on or about the 19th September, 1946, and was a ninety days option. It was renewed for a further 100 days. It appears, though this is not absolutely clear, that on the 21st March, 1947, the option had not expired but was due to expire in the course of a day or two.

There had been several feelers for the purchase of the business of Sovereign Potters Limited but nothing had come of any of them before the autumn of 1946. An intimation was then received that an English company, Johnson Brothers (Hanley) Limited (hereinafter referred to as Johnsons) might be interested in obtaining a controlling interest in Sovereign

Potters Limited. This was followed by a visit by Mr. Johnson, a director of Johnsons, to the plant of Sovereign Potters Limited. Pulkingham, who was conducting the negotiations on behalf of Sovereign Potters Limited, intimated to Johnsons that he doubted whether the Board of Sovereign Potters Limited would recommend the sale of the whole of the shares of Sovereign Potters Limited for less than $1,500,000. Early in March, 1947, Mr. Johnson telephoned to Pulkingham that his company was sincerely interested in buying control and early in the same month he telegraphed that a lower price namely $160 per share for the preference shares and $150 per share for the common shares, representing as Their Lordships are told a total sum of over $1,000,000, might be acceptable to Johnsons. By the same cable he asked Pulkingham to recommend a Canadian solicitor to act for Johnsons and intimated that a draft agreeement would be sent. Pulkingham asked the respondent to suggest a solicitor and on the 6th March the respondent suggested Messrs. Mason, Foulds, Davidson & Gale. Pulkingham and the respondent discussed the situation and decided that a board meeting of Sovereign Potters Limited must be convened to discuss the position. This was summoned for 28th March and the facts set forth above and other relevant facts were embodied by the respondent in a letter dated the 27th March which he circulated to all the Directors of Sovereign Potters Limited.

It is not clear how many of the above mentioned facts were known to the respondent before the 22nd March, 1947; nor is it clear what facts (if any) relating to the Johnson negotiations were communicated by the respondent to McMaster at the interview on the 22nd March, 1947, mentioned below. It seems however that at the meeting of Carleton Securities Limited on the 10th December, 1946, Etherington had advised McMaster not to be in a hurry to sell his stock as there might be negotiations to sell Sovereign Potters Limited.

On the 21st March, 1947, the respondent had an interview with Pulkingham at which he gave the respondent some information about the negotiations with Johnsons. He also told the respondent about his option on McMaster's shares in Carleton Securities Limited. The respondent obtained an assignment of this option and fixed an appointment with McMaster for the following day, the 22nd March, 1947. At that interview at which there was also present McMaster's son, Robert, the respondent obtained from McMaster a fresh option for 30 days at the same price $30,000. He also got McMaster to sign a document containing a statement that McMaster knew that the respondent was supposed to share in the promoters' shares in Sovereign Potters Limited, having been told this by Etherington on several occasions. The respondent exercised the option on the 8th April.

It seems clear that from the time he obtained the option the respondent played a very active and helpful part in the negotiations with Johnsons. There were several hitches, for instance to meet the views of the holders of preference shares as to the division of the spoils as between the preference shares and the common shares in Sovereign Potters Limited an adjustment in the price per share for each class of shares became necessary; again there was difficulty in securing for Johnsons the Canadian dollars required to complete the purchase. These difficulties were overcome and on the 2nd June the respondent cabled to Mr. Johnson an acceptance of his final offer. On completion of the sale the respondent received $127 per share.

There is a dispute as to the extent to which McMaster was aware of the progress of the negotiations with Johnsons, but it is clear that he knew of the agreement finally reached by the 5th July, 1947, when his solicitors wrote to the respondent alleging that on the 8th April, the date on which the respondent exercised his option, the relationship of solicitor and client subsisted between McMaster and the respondent and that accordingly the respondent was accountable to McMaster for the profit he made out of the transaction i.e. $97,000. Their Lordships think it well to observe that the material date for determining whether a duty

of confidence between the respondent and McMaster subsisted is the 22nd March when the option was granted and not the 8th April when it was exercised. Receiving no satisfaction, on the 15th September, 1947, McMaster issued the writ in this action.

McMaster died on the 30th November, 1948, but on the 8th September, 1949, an order of revivor was made and his executors became the plaintiffs in the action. The action came on for trial before Smily J. and on the 27th April, 1950, he dismissed the action. He held that the respondent was not acting as McMaster's solicitor in the particular transaction in question but added:

> " Nevertheless, while I think that at the time of the transaction in question between the defendant and Mr. McMaster it must be said the relationship of solicitor and client in a strict sense had discontinued, I think it must also be said that the confidence naturally arising from such a relationship should be presumed to have continued, as was said by Parker J. (as he then was) in *Allison* v. *Clayhills* 97 L.T. 709. And, as was also said by Parker J. in the same case, although the relationship of solicitor and client in its strict sense has been discontinued, the same principle, namely, that the onus of upholding the transaction would rest upon the solicitor, applies as long as the confidence naturally arising from such a relationship is proved or may be presumed to continue."

He found however that there had not been a breach of the fiduciary duty owing by the respondent to McMaster and accordingly dismissed the action.

The plaintiffs appealed from the decision and the Court of Appeal for Ontario dismissed the appeal. Laidlaw J.A. who delivered the principal judgment stated the questions which the court had to determine as follows:—

> "(1) Was the relationship between the respondent and the late Harry J. McMaster on March 22nd, 1947, when the respondent obtained from Mr. McMaster on option to purchase his shares of Carleton Securities Ltd., of such a character as imposed on the respondent a special duty in respect of the transaction?
>
> (2) If there was such a duty on the part of the respondent, was there a breach of it? "

The Judges of Appeal were unanimous in answering the first question in the negative. On this basis it was not necessary to decide the second question but all three judges expressed their opinion on it. Henderson J.A. and Laidlaw J.A. were of opinion that before McMaster gave the option the respondent disclosed without reservation all the information in his possession concerning the possible deal with Johnsons. Hogg J.A. disagreed. He was of opinion that the facts set out in the respondent's letter of the 27th March, 1947 to the Directors of Sovereign Potters Limited were known to him before his interview with McMaster on the 22nd March and that these facts, or the most important of them relating to the negotiations with Johnsons, were not known to McMaster and were not placed before him by the respondent before the latter secured the option.

That being the position in the Canadian courts Mr. Carson for the respondent argued before this Board that the decision of the Court of Appeal or the majority of the judges thereof was correct but he took the preliminary point that there were concurrent findings of fact that even if the confidence arising from the former relationship of solicitor and client continued, the duty owing to McMaster by the respondent had been fully discharged.

If he were right on this point, there would be an end of the matter, but their Lordships are unable to accede to this argument. There is a clear finding in favour of the respondents by the majority in the Court of Appeal, but there is no corresponding finding by Smily J. in the court of first instance. He makes no finding of fact as to what was known to

the respondent prior to the interview of the 22nd March, 1947 or as to what the respondent told McMaster on that occasion. On the contrary he says:—

> "Now as to the defendant having disclosed, without reservation, all the information in his possession, this in my opinion means information which might assist or affect Mr. McMaster in deciding whether to enter into the transaction. As I have previously indicated, in my opinion there was no such information in the defendant's possession at that time. I do not believe any of the information mentioned in the letter of March 27th, previously referred to, would have made any difference to Mr. McMaster's desire to sell his stock at the price mentioned."

and:—

> "It seems abundantly clear on all the evidence, and having regard to Mr. McMaster's efforts over the years to get rid of these shares, that there was nothing in the situation then existing which would have caused him to miss this opportunity."

He seems to have considered that the necessity for disclosure was to be tested by the probable reaction of the particular individual to whom the disclosure should have been made whereas in their Lordships' opinion the proper test is what would be the natural reaction of the reasonable man. Their Lordships may add that it seems particularly undesirable to apply the test adopted by Smily J. in a case where the particular individual was dead and could not give evidence before the court. In the result their Lordships are of opinion that Smily J. posed to himself the wrong question and made no findings of fact relevant to the point on which the Court of Appeal based their decision. Their Lordships must therefore proceed to consider what is the proper answer to the questions propounded by Laidlaw J.A.

On the first question their Lordships find themselves in complete agreement with Smily J. that notwithstanding that the respondent was not acting as solicitor for McMaster in the transaction now in dispute the confidence arising from the relationship of solicitor and client which had existed between the respondent and McMaster must be taken to have continued to be in existence at the time of the interview between them on the 22nd March, 1947. The Court of Appeal or at any rate Henderson J.A. and Hogg J.A. came to the conclusion, no doubt correctly, that the respondent was not acting as solicitor for McMaster on that date. They seem to have been under the belief, but as the observations of Parker J. in *Allison* v. *Clayhills* (*supra*) show under the erroneous belief, that that was the end of the matter. The passages from the judgment of Parker J. which were cited by Smily J. clearly show that the duty of the solicitor may continue after the relationship of solicitor and client in its strict sense has been discontinued.

Parker J. goes on to say at page 712:—

> "In considering whether in any particular transaction any duty exists such as to bring the ordinary rule into operation, all the circumstances of the individual case must be weighed and examined. Thus, a solicitor may by virtue of his employment acquire a personal ascendancy over a client and this ascendancy may last long after the employment has ceased, and the duty towards the client which arises out of any such ascendancy will last as long as the ascendancy itself can operate. Again, a solicitor may by virtue of his employment acquire special knowledge, and the knowledge so obtained may impose upon him the duty of giving advice or making a full and proper disclosure in any transaction between himself and his client, though such transaction may take place long after the relationship of solicitor and client in its stricter sense had ceased to exist. And there may be other circumstances which may impose a duty on a solicitor, which duty may continue to exist after the relationship of solicitor and client in the strict sense has ceased."

It is impossible to define precisely what circumstances will justify the inference that the confidential relationship continues. The more important factors in the present case which have led their Lordships to agree with the conclusion of Smily J. on this point are:—

(1) the fact that McMaster employed the respondent in a number of important business transactions in which McMaster was interested in particular (*a*) the acquisition of Carleton Securities, Ltd., and the transfer to that company of the promoters' holdings in Sovereign Potters Limited, (*b*) the formation of McMaster Pottery Limited.

(2) the fact that the respondent was employed by McMaster in the matter of the testator's will, and was named as one of his executors therein and remained in charge of the will until the parties fell out in July, 1947.

(3) the events of 22nd March, 1947, when at the instance of the respondent, McMaster not only granted the option but signed the document (exhibit 12) witnessing that Etherington had promised McMaster a portion of the vendor's share in Sovereign Potters Limited.

Their Lordships must point out that if, as the respondent testified, he came to that interview ready to buy McMaster's holding in Carleton Securities Limited for $30,000 the grant of the option was a transaction solely for the benefit of the respondent, and against the interest of McMaster. Moreover there was no possible advantage to McMaster in signing the document exhibit 12.

As in their Lordships' view the respondent was under a duty to McMaster on the 22nd March, 1947, it becomes necessary to consider what the measure of that duty was. It is plain that the respondent did not discharge that duty unless he communicated to McMaster all material facts within his knowledge, a description which their Lordships think would include the facts within his knowledge as to the negotiations between Sovereign Potters Ltd. and Johnsons. It is also plain that the onus of upholding the transaction lay on the respondent.

The majority of the Court of Appeal found that there had been full disclosure, basing themselves on some answers given by the respondent as follows:—

"(Q.) What was said about it?—(A.) Well, there was quite a lot said about it, Mr. Mason. It was on the basis that all I knew at that time was that there had been with Mr. Johnson for a million and a half, and that I had recommended Mason Foulds, and that I was going to go and see him soon.

(Q.) That is substantially what you knew about it at the time?—(A.) That is substantially what I knew about it at the time.

(Q.) Was that or was that not discussed with Mr. McMaster?—(A.) Yes, sir."

Those answers, said Laidlaw J.A., satisfied him that the respondent disclosed without reservation all the information in his possession concerning the deal with Johnsons. Their Lordships feel the same difficulty as did Hogg J. A. in accepting this view.

In the answers on which Laidlaw J.A. relies the respondent mentions only two facts in connection with the negotiations with Johnsons. The first is the original asking price of $1,500,000: the second is that he had recommended Mason Foulds & Co. to act as Johnson's solicitors in Canada. This, he says, was substantially what he then knew and was what he told McMaster. Other portions of his evidence tend to show that he knew of the reduced price of $160 per preferred share and $150 per ordinary share by 22nd March, 1947, and Pulkingham seems to have told him on the 21st March that it looked as though the negotiations might come through. There is nothing to prove that he passed on either of these pieces of information to McMaster. Looking at the evidence as a whole one is left in doubt as to whether there was not further material

information beyond that referred to in the passage cited by Laidlaw J.A. which the respondent had before the 22nd March, 1947, and which did not reach McMaster.

Counsel for the appellants urged on their Lordships that if they were left in doubt on this point the defendant had failed to discharge the onus which rested on him and that judgment should be entered for the plaintiffs for the amount claimed. Their Lordships are unable to accept this contention. The case made by the plaintiffs, relying on this point on Robert McMaster's evidence, was that nothing had been said on 22nd March about negotiations with Johnsons. This is in flat contradiction with the respondent's evidence and their Lordships are not assisted by any finding of the Trial Judge as to which witness he believed. Moreover some of the important points mentioned by Pulkingham were not put to the respondent. On the whole their Lordships have come to the conclusion that justice cannot be done without a fresh trial of the issue whether the respondent had discharged the onus resting on him by reason of the confidential relationship existing between him and McMaster on the 22nd March, 1947. Since the matter must be retried, their Lordships think it better to refrain from further comment on the details of the evidence.

There is one other matter to which their Lordships may usefully refer. It was argued on behalf of the appellants that if their Lordships were in favour of the appellants on the first question, the appellants were entitled to succeed as McMaster had had no independent advice. This argument was based on the observation of Stirling L.J. in *Wright* v. *Carter* (1903) 1 ch. 27 that "it must further be shown that the client had independent advice." Their Lordships respectfully agree with the comment of Parker J. on that dictum in *Allison* v. *Clayhills* (*supra*) where he says at p. 712:— "I doubt whether the learned Lord Justice really meant to lay this down as an invariable rule whatever might be the nature of the transaction in dispute, for if this were an invariable rule in all transactions it is difficult to see how either *Edwards* v. *Meyrick* (2 Hare 60) or *Montesquieu* v. *Sandys* (18 Ves. 313) were rightly decided." The question whether the facts of this case make independent advice indispensable is a matter for the judge who tries the issue. When all the facts have been ascertained the trial judge may, or he may not, consider that the question what was the proper price to ask for the shares was one which McMaster as a business man could well determine for himself if fully informed as to the facts.

Their Lordships have given consideration to the question of costs. The necessity for the new trial is due largely to the course which the proceedings took in the Courts in Canada. For this both sides must bear their share of responsibility and their Lordships think that justice will be done if each party has to bear his own costs of those proceedings. Before this Board the appellants have succeeded on one issue, but it will avail them nothing unless they succeed on the other issue in the new trial. Their Lordships think therefore that the respondent should pay only one half of the appellants' costs of appeal to this Board.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the judgments in the Canadian Courts set aside, that it be declared that on the 22nd March, 1947, the respondent by reason of the relationship of solicitor and client formerly subsisting between him and the late Harry J. McMaster owed a duty to the late Harry J. McMaster in relation to the acquisition of the option granted to the respondent by the said Harry J. McMaster on the date aforesaid and that the matter be remitted to the Supreme Court of Ontario for a new trial of the other issues outstanding between the appellants and the respondent in the action commenced by writ dated the 15th September, 1947. The appellants and respondent must respectively bear their own costs to this date of the proceedings in the Courts in Canada other than the costs made costs in the appeal to this Board by the order dated the 12th January, 1951. The respondent must pay to the appellants half the appellants' costs of the appeal to this Board.

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In the Privy Council

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[DELIVERED BY LORD COHEN]

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1952