Martin v. Columbia Metals Corp.

Ontario Judgments

Supreme Court of Ontario - High Court of Justice

Parker J.

June 4, 1980.

No. 13288/77

[1980] O.J. No. 146 | *12 B.L.R. 72*

Between Frank John Martin, Thomas Marshal Martin, Sharon Beder (Mrs.), Elm Construction Company Limited, Robert Dye, John Lipton, Nancy Schwartz (Mrs.), Vincent Wayne Rice, Corinne Gloria Rice, Thor Eaton, David Ewart Bennett, David Roy Gilbert, Lionel Walters, Shazale Holdings Ltd., Max Trachter and Lysander Investments Limited, carrying on business as Columbia Investment Syndicate, plaintiffs, and Columbia Metals Corporation Limited, defendant

(10 pp.)

Counsel

P.B.C. Pepper, Q.C. and P.B. McCutcheon for the plaintiffs. R.G. Slaght for the defendant.

PARKER J.

1 This action arises from the default in payment of a debenture executed by the defendant in favour of the Bank of Montreal. The debenture was assigned to the plaintiffs who now sue for the amount owing.

2 There is no dispute as to default. The defence is that the plaintiffs Martin and Gilbert as directors of the defendant company were insiders, that Beder, although not a director, was privy to the information discussed at directors' meetings and therefore an insider, and that the Syndicate itself was an insider at the time the debenture was purchased by the plaintiffs.

3 The defendant alleges that by purchasing the debenture, the plaintiffs have damaged the defendant and affected the equity of all the shareholders. Also that by reason of the breach of fiduciary duties by Martin, Gilbert and Beder, the plaintiffs have no right to the debenture and are required to account to the defendant for the purchase.

4 At the time the debenture was purchased by the plaintiffs it was common knowledge that the

defendant was insolvent. The shares of the company had been delisted on both the Toronto and Vancouver Stock Exchanges and there was no market for the sale of the shares. Prior to the purchase of the debenture by the plaintiffs, Mr. Dennis, the president of the company, had learned from the bank that it was prepared to sell the debenture at a discount. He proposed to the board that the company purchase the debenture. The directors considered the proposal and decided that it should not. The debenture covered all the assets of the company, most of which were worthless. It also covered some mining claims in British Columbia which might have some value.

5 After the company decided that it did not wish to purchase the debenture, Mr. Dennis proposed to some of the plaintiffs who were minority shareholders that they should consider purchasing the debenture, otherwise the bank might sell the debenture to anyone who would buy it. If third parties acquired the only asset of the company then the company's shares would be worthless and the shareholders would lose their entire investment. This proposal was not secret. The plaintiffs tried to get as many shareholders as possible to put up enough money to buy the debenture from the bank. Some shareholders were willing to do so; others, including the major shareholders, were not.

6 After the debenture was assigned to the plaintiffs by the bank for approximately $85,000.00 a demand was made on the defendant by the plaintiffs' solicitor for payment on the debenture. When no payment was made this action was commenced. At that time the plaintiffs offered the debenture to the defendant at their cost. The offer was not accepted. At the commencement of the trial of the action, counsel for the plaintiffs once again offered to transfer the debenture to the company at their cost, but the offer was not accepted.

7 The defendant takes the position that it is entitled not only to any profit the plaintiffs have made, but to the debenture itself. The defendant is not prepared to pay either the amount paid for the debenture or the costs paid to acquire it. If the contention of counsel for the defendant is correct, it would mean that the major shareholders who refused to contribute to the fund to pay off the bank would benefit whereas the shareholders who have put up additional capital to preserve the assets of the company would lose it. The plaintiffs have made no profit from the debenture. The only asset is still an unproved mining claim that may not realize the amount paid for the assignment. To complicate matters further, since the institution of the action, the charter of the company has been cancelled. The company is only a shell without assets, and no one has applied to revive it.

8 Counsel for both sides have thoroughly canvassed the authorities in the area of the fiduciary duty of directors and insiders. The case of Regal (Hastings), Ltd. v. Gulliver et al., [1942] 1 All E.R. 389, laid down two clear enunciations of the law applicable to cases involving the liability of a director to his company arising out of his fiduciary relationship. The first, simply stated, is that liability to account does not depend upon proof of mala fides but arises when anyone who has duties of a fiduciary nature to perform enters into "engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect" (p. 381). The second is that a director standing in a fiduciary relationship must account for any profit

made by him if it was earned by reason of, and in the execution of his office. Lord Russell states at p. 386 of the case:

> "My Lords, with all respect I think there is a misapprehension here. 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."

9 In Peso Silver Mines Ltd. v. Cropper *(1965), 56 D.L.R. (2d) 117* at p. 156, Bull, J.A., considers the Regal (Hastings) Ltd. case:

> "It was the second principle of law as set out in the Regal (Hastings) Ltd. case that the appellant most strongly urged to support his submission that the respondent should be held accountable. It was said, with respect to the Cross Bow and Mayo transaction, that, as these properties were put up for sale to the appellant in the first instance the subsequent acquisition by the respondent and the two other directors was by reason of the fact that they acquired the knowledge of and about the properties qua directors and that therefore their personal transaction was one made by 'reason of being directors' and 'in the course of execution of that office'. I cannot agree. I consider that the authorities require that to come within the rule, the impugned transactions must, as stated by Lord Russell, be by reason of the fact, and only by reason of the fact, that they were directors and in the course of the execution of that office. That clearly was the situation in the Regal (Hastings) Ltd. case where the whole transaction was implemented by the directors carrying out their duties as required by their company in a company transaction but in which they were personally involved. ... In the case at Bar, undoubtedly the knowledge of the Cross Bow properties came to the respondent and others because they were directors of the appellant. Also it cannot be questioned that these directors were acting only as such and in execution of that office when they considered and rejected the offer to the company of the properties in question. But their later negotiation for and acquisition of the mineral claims, although based on such knowledge acquired as aforesaid, could not, in my respectful opinion, be said to have been done 'only' in their capacity as directors and 'in the execution of that office'. Once again, these properties were not something the appellant had brought within the ambit of its business or plans. They along with others, were simply offered to it and rejected. I cannot think that the mere acquisition of knowledge in a directors' meeting qua director in itself would bring any subsequent dealing with the subject-matter into the realm of being in the execution of that office."

In his reasons for decision in Peso Silver Mines Ltd., Mr. Justice Bull refers on p. 157 to the unreported Court of Appeal decision of Greene, M.R. in Regal (Hastings), Ltd. Greene, M.R. writes that:

> "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 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."

The decision of the Court of Appeal was reversed by the House of Lords in this case but Lord Russell made a reference to it in the final paragraph of his judgment. He commented:

> "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 is 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."

Bull, J.A., concludes at p. 158, "As Green, M.R., was found to be in error in his decision, I would think that the above comment by Lord Russell 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 Rolls, but only that the fact of the case before him did not fall within it". Earlier in his judgment at p. 155, Mr. Justice Bull states that an "out-and-out bona fide rejection by the company would be the best evidence that any later dealings with the property by anyone would not be against its interests."

10 In his judgment in Canadian Aero Service Ltd. v. O'Malley et al. *(1973), 40 D.L.R. (3d) 371*, Laskin, J. considers the Peso case in coming to a decision. He writes at p. 390:

> "There is a considerable gulf between the Peso case and the present one on the facts as found in each and on the issue that they respectively raise. In Peso there was a finding of good faith in the rejection by its directors of an offer of mining claims because of its strained finances. The subsequent acquisition of those claims by the managing director and his associates, albeit without seeking shareholder approval, was held to be proper because the company's interest in them ceased.
>
> . . .
>
> Whether evidence was overlooked in Peso which would have led to the result reached in Regal (Hastings) Ltd. v. Gulliver (see the examination by Beck, 'The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered', 49 Can. Bar. Rev. 80 (1971), at p. 101) has no bearing on the proper disposition of the present case. What is before this Court is not a situation where various opportunities were offered to a company which was open to all of them, but rather a case where it had devoted itself to originating and bringing to fruition a particular business deal which was ultimately captured by former senior officers who had been in charge of the matter for the company. Since Canaero had been invited to make a proposal on the Guyana project, there is no basis for contending that it could not,

> in any event, have obtained the contract or that there was any unwillingness to deal with it."

In his judgment, Laskin, J. emphasized that he was not to be taken as "laying down any rule of liability to be read as if it were a statute". He writes at p. 391:

> "... The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge."

11 I find that at the time the debenture was purchased by the plaintiffs it was common knowledge that the defendant was insolvent and that the bank was prepared to discount the debenture to anyone prepared to buy it. I find this information was not acquired by Gilbert and Martin only by reason of their office and that there was a bona fide rejection of the opportunity to purchase the debenture by the corporation before the members of the Syndicate were approached to buy it. In my opinion the defendant falls within the exception set out by Laskin, J., at p. 390 of the Canadian Aero Service case and under the circumstances there was no breach of any fiduciary relationship. The plaintiffs are therefore entitled to judgment as asked with costs and the counterclaim is dismissed with costs.

PARKER J.
