

In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

BETWEEN
J. F. LANGER (Defendant) - - - - - Appellant

AND

McTAVISH BROTHERS LIMITED (Plaintiffs) - Respondents.

and Cross Appeal (Consolidated)

Case for the Appellant.

RECORD.
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10 1. This is an Appeal by the Defendant in the action from a majority
judgment of the Court of Appeal of British Columbia dated 19th August
1929. The Defendant had appealed to that Court from a judgment of the
Trial Judge based upon the findings of a jury made in the form of answers
to certain questions put to it. The trial Judge gave judgment for the
plaintiffs and on the appeal, the Appellant was in part successful inasmuch
as the Court of Appeal, by a majority, directed a new trial. Mr. Justice
M. A. MacDonald, in a minority Judgment, was for allowing the appeal in
full and for dismissing the action and the Appellant on this Appeal asks
that the latter judgment may be sustained and the action dismissed and
20 his counter-claim allowed.

2. The basis of the defence was that, as the jury (in effect) found,
the Plaintiffs were guilty of a fraudulent concealment of material facts in
relation to the Contract sued upon; and this appeal turns mainly upon
the precise effect of the jury's answers to certain questions which are set
out below, in paragraph 7 hereof.

3. The Plaintiff Company (hereinafter called "the Respondents")
was a private Company consisting of two brothers named McTavish, and
was engaged in business as brokers, real estate agents and promoters. The
Company had no financial standing and the two brothers individually were
30 in debt with heavy judgments against them. p. 219.
p. 220.

p. 2. 4. The Respondents brought their action for a balance of \$78,750 alleged to be due on a contract dated 17th November 1927 whereby Appellant was to buy from Respondents 750,000 shares of the Alamo Gold Mines Limited for the price of \$93,750. Of this purchase price \$15,000 had prior to action been paid by the Appellant and the return of this sum was (with other relief not now material to be considered) claimed by the Appellant by his counter-claim in this action.

p. 9.

pp: 3-9. 5. The Appellant, by his defence and counter-claim, entered various defences to the action of which the only one material for the purposes of this case was an allegation that Respondents had fraudulently induced the Appellant to enter upon the Contract by representations to the effect that the property of the Alamo Company was a proved mine with large quantities of commercial ore, that during July and August 1927 the mine manager discovered that the mine was worthless, having no ore of commercial value and that the previous reports on the mine were untrue; that he reported these facts to the Respondents who fraudulently concealed them from the Appellant and, knowing that he remained in ignorance, obtained from him the Contract sued upon. 10

6. The facts established at the trial so far as material to be stated for the purposes of this Appeal may be summarised as follows:— 20

pp. 176-177.
pp. 180-109.

(A) The Mining property of the Alamo Company was situate in the State of Oregon in the United States. It consisted of two groups, the Alamo Mine and the Evans Group. The Alamo Mine is the material one in this case; it was an old mine which had been opened up and operated. It had been abandoned upwards of 20 years ago and its tunnels had caved in so that little could be learned by inspection.

p. 222.
p. 180.
p. 399.
p. 403.

(B) Early in 1925 a man named Code secured the property for a nominal sum and the Alamo Company was formed in March 1925 to take it over with a Capital of \$3,000,000 divided into 30 3,000,000 shares: The incorporators were the aforesaid McTavish Brothers, and three other persons named Code, Thomas, and Barnes who issued the shares and divided them equally between themselves, 600,000 shares to each. One of the McTavish Brothers became the Chairman and President, the other the Secretary and Treasurer, the other three persons being also directors.

p. 414.
p. 74.

(C) During 1926 one Howard was engaged (either by the Respondents or by the Alamo Company) to sell stock and in the autumn of that year he succeeded in interesting the Appellant in the prospects of the property and introduced him to the Respondents. It was represented to the Appellant both by 40 Howard and the Respondents that they believed they had a very valuable mine, such representations being founded upon

p. 56.
p. 58.
p. 60.

pp. 105-109.

certain reports (hereinafter sometimes called the Earlier Reports) which were produced and shown to him, i.e. :—

(1) The McGuigan Report (Ex. 30) 29th October 1923. p. 395.

McGuigan was in charge of operations when the mine was operated in 1903. His report (in effect) stated that there had been 5,000 feet of development work done in tunnels upraises, cross-cuts, etc. It stated that ore values of gold showed the entire width, averaging \$3.00 \$8.00 and \$17.00 per ton with picked samples running \$40.00 to \$60.00 per ton. The report described the various tunnels, etc, and the veins of ore located. (If this report had been true, this mine was practically a proved and very valuable mine. But it was afterwards proved to be quite untrue.)

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(2) Two blue prints (Exs. 18 and 19), "Cross-sections of Alamo Vein and workings" and "Ore blocks in Alamo Mine." These blue prints showed the various tunnels, cuts, etc. They marked the veins of ore and their values running mostly from \$8.00 to \$10.00 per ton, and showed ore blocked out 194,000 tons valued at \$8.00 per ton. (These blue prints were in fact incorrect as a record of the workings.)

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(3) The first Barnes Report (Ex. 46) 3rd June 1925. This was a report made by the said Barnes from surface indications and dump pannings only. The report stated that Barnes found the McGuigan Report to be correct.

(The Appellant in his evidence stated that he relied particularly on the first Barnes Report. Barnes afterwards found that this report was incorrect.)

(D) The Appellant, upon the representations thus afforded to him had at the latter end of 1926 and early in 1927 invested considerable moneys in acquiring an interest in the mine, but these matters although originally forming the subject of a claim in the action are no longer in issue and this Appeal, as above stated, has reference only to the later transaction of the 17th November 1927.

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(E) Early in 1927 the said Barnes who, as above stated, had a large proprietary interest in the mine and had been at the Evans Mine during 1926 was sent down as Mine Manager to superintend the workings and development of the Alamo Mine. He was considered by the Respondents to be "one of the best known Gold operators on this part of the coast." Work started about the end of May and in June and July 1927 he got into the old tunnels and traced the workings as described in the McGuigan Report. One of the McTavish Brothers (D. N. McTavish) was

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p. 80.
p. 482.

with him at the mine during a part of these months, the Appellant being at that time on a visit to England. As a result of his investigations during this period Barnes became satisfied that the mine was worthless and that the McGuigan Report was false, (as the jury have found). He told this to McTavish in the latter part of July, 1927, and stated that he wished to quit "I told him that I was dissatisfied with the thing, that I did not think "there was anything of value that I could find, and I did not "want to spend anybody else's money when I would not spend "my own. I could not see any chance of finding anything and 10
"I did not want to spend money on it." It was ultimately arranged that Barnes should carry on for a few more weeks until another Engineer could be got and Barnes actually left the property before the middle of August and shortly afterwards resigned his directorship of the Alamo Company.

pp. 81-82.

p. 82.
p. 99.

pp. 482-483.

(F) On 13th August 1927 D. N. McTavish who by that time had returned to Vancouver from Oregon wrote to the Appellant in London (Ex. 24). This letter refers to Barnes having got into the old tunnel 1,200 feet and that he found a certain porphyry dyke referred to in the earlier reports, but Barnes' failure to find 20
any gold and his discovery that the mine was valueless and the McGuigan report was false were entirely suppressed by the writer: he told the Appellant no more than this:—"I heard some intima-
"tion to the effect that Barnes had expressed some dissatisfaction. "I excused him on the ground that since his operation last Spring "he was anything but well." (Barnes testified that he was in good health at this time.) The writer then intimated that he was letting Barnes go and that he was getting a Mr. Fellowes to take his place.

p. 76.

p. 333.
p. 495.

(G) Fellowes went to the mine about the 15th August and from 30
that time onwards it was managed by him. On 7th November he reported progress in the Alamo tunnel. He is awaiting reports and maps to find out what is ahead of him.

p. 496.

(H) On the 10th November the Respondents issued a bulletin to the Shareholders of the Alamo Company. It said, in part:
"We were recently favoured with a visit from Mr. McGuigan who
"did all the early development on the Alamo property and who
"with several Mining Engineers reports large bodies of good ore
"all ready to be taken out. Just as soon as we have the tunnels
"in proper shape he will make a trip to the property and assist in 40
"the work of locating the ore bodies."

p. 497.

(I) On the 15th November Fellowes wired to the Respondents:
"Into the ore lower tunnel in Alamo sampling lower and No. 2

“ tunnel to-day vein big looks good. Got five feet of quartz east
 “ cross cut lower tunnel. Ruby Creek taking samples to assay.
 “ Will try to wire results by Saturday ” (i.e. the 19th November).

(J) On the 16th November Fellowes wired to the Respondents: “ Total width ten feet First side solid quartz. Next
 “ mixed with Country rock. Good wall both sides. Starting
 “ drift on quartz to-day. Sending samples Alamo and Ruby
 “ Creek to-day.” p. 499.

10 (There is no doubt that the Appellant was influenced by this
 latter telegram and wished to get in before the assays became
 known.) p. 136.

(K) On the 21st November 1927 (four days after the Contract
 sued upon) the result of the assays became known. They were
 found to be of no commercial value at all and showed that the
 pessimistic reports of Barnes made in the previous July and con-
 cealed by the Respondents were justified and that the mine was
 worthless. p. 157-159.
 p. 501.
 p. 503.

7. The action was tried before Mr. Justice W. A. Macdonald and a
 jury on the 3rd December 1928 and eight following days and a large body
 20 of oral and documentary evidence was given. At the conclusion of the
 evidence and speeches the trial Judge summed up the case to the Jury and
 the following questions (with two further questions not now material) were
 submitted to them and answered in the following manner :— p. 358.
 p. 364.

QUESTIONS.

1. Did the Plaintiff or its
 agent duly authorised in that
 behalf make representations
 to the Defendant Langer as
 facts, matters which were
 material and not matters of
 opinion ?

2. If the answer be in the
 affirmative then state which
 (if any) of such representations
 were untrue.

3. Were such representa-
 tions made with the intention
 of thereby inducing the Defen-
 dant Langer to contract with
 the Plaintiffs for shares in the
 Alamo Mines Ltd.

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ANSWERS.

1. Plaintiff and their agents
 in our opinion did not make
 any statements other than
 those contained in the
 reports they had on the Alamo
 property. p. 370.

2. None of them.

3. Yes.

QUESTIONS.

ANSWERS.

4. Did such representations induce the Defendant Langer to enter into the Agreement of 17th November 1927 relying on such representations and believing them to be true ?

4. Yes.

5. Did David Barnes when manager of the Alamo Gold Mines Ltd. in or about July or August 1927 report to the Plaintiffs that the properties of the Alamo Company were worthless, possessing no ore of commercial value ?

5. Yes.

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6. If the answer to the last question be in the affirmative then was such report concealed by Plaintiffs from Defendant Langer ?

6. Adverse statement not reported, and later good report was reported.

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7. If the answer to the two previous questions be in the affirmative then was defendant Langer induced to enter into the Contract of 17th November through such concealment ?

7. No : we believe defendant bought on Fellowes' telegram of the 16th November 1927.

8. The learned trial Judge, in his charge to the jury with reference to Q. 5 had said as follows :—

p. 361.

“ This involves a direct attack upon the Plaintiff of fraud.

“ It is my duty to inform you, under the relationship existing
 “ between the Plaintiff and Defendant, if they had acquired know- 30
 “ ledge of the condition of the mine as outlined in this question, then
 “ it was their duty to inform Langer to that effect, and furthermore,
 “ it was a most fraudulent act on their part to have then negotiated
 “ and carried into effect an agreement for the sale of shares in
 “ that Mining property.”

p. 373.

9. Upon the above findings both parties claimed to be entitled to judgment and after hearing arguments the trial Judge gave judgment for the Plaintiff for \$78,750 and costs and the counter-claim for \$15,000 was dismissed with costs. In the course of his judgment the Judge said 40
 “ I think, however, that the result based upon the finding of the jury turns

p. 372.

“ on the weight to be attached to the answer to Question 7 : the jury might have simply answered the question in the negative, but they supplemented their finding by, as it were, giving their ground as follows : “ ‘ We believe that Defendant bought on Fellowes’ telegram of the 16th ‘ November 1927.’ In other words, they find that the concealment of the information that had been received by the Plaintiff in July had no bearing upon the negotiations and purchase of the shares by the Defendant Langer in November following. They apparently concluded that such concealment was not material and did not induce the contract.”

10 10. The Appellant submits that the real effect of the findings of the jury upon the questions submitted may be accurately paraphrased as follows :—

(1) Plaintiff originally made no representations other than to furnish Appellant with the Earlier Reports i.e. McGuigan’s Report, the blue prints and the first Barnes Report.

(Questions 1, 2 and 3.)

(2) The Earlier Reports, though given to the Appellant in the Autumn of 1926, were still relied upon by him in making his Contract of 17th November 1927.

(Question 4.)

20 (3) While these Earlier Reports were admittedly false, their falsity was not known to the Respondents at the time when they were first made.

(Questions 1, 2 and 3.)

(4) The Respondents in the Summer of 1927 knew of, and fraudulently concealed from the Appellant, Barnes’s later report to the effect that the mine was worthless, the McGuigan Report false and Barnes’s original confirmation of the McGuigan Report (i.e. the first Barnes Report) was mistakenly made.

(Questions 5 and 6.)

30 (5) The immediate inducement to the Appellant were Fellowes’ telegram of the 16th November but this was not the only inducement. The primary and basic inducement was the Earlier Reports which by their Answer to Q. 4 the jury found were still being relied on by Appellant.

(Questions 4 and 7.)

11. The Appellant further submits that the answer to Q. 7 does not affect the right of the Appellant to have the action dismissed and the counter-claim maintained and will rely upon the following considerations for this submission :—

40 1. The “ No ” in the answer is limited in its scope by what follows : “ We believe Defendant bought on Fellowes’ telegram “ of November 16th.” The jury were considering the immediate inducement only.

2. The jury could not have meant that Appellant's reliance upon and belief in the earlier reports would not have been shaken or affected by the adverse later report which was concealed. One of the Earlier Reports was the first Barnes Report by which Appellant said he had been particularly impressed. If, as the jury found in answer to Question 4, Appellant was still relying on this report after its author had repudiated it, it is impossible to say that a knowledge of the repudiation would not have affected the original inducements.

3. As a finding of fact, the answer involved only a conjectural opinion by the jury. They could not know what effect the truth would have had if told to the Appellant in July or August 1927, and an opinion that it would not have influenced his conduct is speculation only. 10

12. Upon the Appeal, all four Judges were unanimous that the judgment could not stand. The Chief Justice thought the answers disclosed the jury's opinion that the Appellant's mind would not have been influenced by Barnes's unfavourable opinion had it been disclosed and stated that "the latter is an inference from the evidence which I think wholly unjustified," and he further thought that the jury, owing perhaps to the manner in which the questions were framed were led into "grave error" and that there should be a new trial. Mr. Justice Archer Martin also thought that there should be a new trial. Mr. Justice McPhillips said, "In my opinion, fraud being present, the judgment of the learned trial Judge should have been for the Appellant non obstante veredicto" but he stated that two of his brothers being of the view that there should be a new trial—the Appeal being heard by four members of the Court—with a division of opinion it might be doubtful as to the effect and he therefore concurred in the view that a new trial should be had. Mr. Justice M. A. Macdonald fully reviewed the facts and evidence and held that the Appellant was entitled to have the Contract rescinded and to recover the \$15,000 claimed by the counter-claim. 20 30

p. 377.

p. 378.

13. The Appellant submits that the circumstances of the case entitle him to have the action dismissed and his counter-claim allowed for the following (amongst other)

REASONS.

- (1) THAT the findings of the jury established a fraudulent concealment of material facts by the Respondents which in turn had the effect of making the original representations of the Respondents fraudulent in their continuing effect. 40

- (2) THAT it was established by the findings of the jury that the Respondents induced the Appellant to contract by their fraudulent concealment or misrepresentation.
- (3) THAT the jury's answer to Question 7 is to be construed in a limited sense and not as negating the primary and basic inducement governing the Appellant's conduct as found in answer to Question 4.
- (4) THAT, if the answer to Question 7 involves that the jury found that Appellant would not have been influenced by Barnes's adverse report if it had been communicated to him there was no evidence to justify such a finding.
- (5) FOR the reasons given in the appeal judgments of Mr. Phillips and Macdonald, JJ., and in the main in the appeal judgment of the Chief Justice.

D. N. PRITT.

A. C. NESBITT.

No. 26 of 1930.

In the Privy Council.

ON APPEAL
*From the Court of Appeal of British
Columbia.*

BETWEEN
LANGER (Defendant) - - *Appellant*
AND
McTAVISH BROTHERS
LIMITED (Plaintiffs) - *Respondents.*

Case
ON BEHALF OF THE APPELLANT.

MARKBY, STEWART & WADESONS,
5 Bishopsgate, E.C.2,
Appellant's Solicitors.