

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

BETWEEN

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

AND

McTAVISH BROTHERS LIMITED (Plaintiff) - - Respondent.

and Cross Appeal (Consolidated)

Case for the Respondent.

RECO

10 1. This is an appeal from an Order of the Court of Appeal of British Columbia dated the 19th August 1929 ordering a new trial of the action and setting aside the Judgment of Mr. Justice W. A. Macdonald in the Supreme Court of British Columbia dated the 4th January 1929, wherein judgment was entered for the Respondent (Plaintiff) for the sum of \$78,750.00, with costs, and the Appellant's (Defendant's) Counter-claims against the Respondent (Plaintiff) and against the Alamo Gold Mines Limited were dismissed, with costs.

p. 387.
p. 373.

2. The principal questions to be decided in this appeal are :—

20 (1) The construction of certain answers given by the jury to the questions put to them by the learned Judge at the trial.

p. 370.

 (2) Whether, having regard to the said answers of the jury, the Court of Appeal was right in ordering a new trial.

p. 387.

3. The Respondent is a Joint Stock Company incorporated under the laws of the Province of British Columbia, having its head office at No. 503 London Buildings, 626 West Pender Street, in the City of Vancouver, in the Province of British Columbia.

p. 2, ll. 10-13.

RESPONDENTS' CASE.

p. 278, ll. 6-7. At all material times to this action P. D. McTavish was President of
 p. 217, ll. 37-38. the Respondent Company and D. N. McTavish Secretary thereof.

p. 2, ll. 13-15. The Appellant is a builder and resides at 3290 Granville Street, in
 the Municipality of Point Grey, in the Province of British Columbia.

p. 500. 4. By a letter dated 17th November 1927 from the Respondent to
 the Appellant, with a Memorandum endorsed thereon signed by the
 Appellant confirming the contents thereof and acknowledging the receipt of
 the Stock Certificates therein set out, the Respondent agreed to sell to the
 p. 402, ll. 28-30. Appellant 750,000 shares of the Alamo Gold Mines Limited, a Mining
 Company incorporated under the laws of British Columbia, at 12½ cents per 10
 share, making a total of \$93,750.00. Of this, the sum of \$21,000 was to
 be paid by the transfer on request free from all incumbrances of two lots
 belonging to the Appellant on Granville Street between 9th and 10th
 Avenues, in the City of Vancouver, \$5,000.00 in cash on execution of the
 Agreement, the balance of \$67,750.00 to be made up as follows :—

1st March 1928	\$10,000.00
1st June 1928	\$10,000.00
1st September 1928	\$23,875.00
1st December 1928	\$23,875.00
				\$67,750.00
				\$67,750.00

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The Agreement also provided that as each quarterly payment fell due the Appellant was to deliver to the Respondent his Promissory Note at three months without interest covering the quarterly payment next thereafter falling due.

The payment of the above-mentioned sum of \$10,000.00 due on the 1st March 1928 and the sum of \$5,000.00 payable in cash on execution of the Agreement were duly acknowledged in the said letter of the 17th November 1927. The only sums paid under the said Agreement are the said sums of \$10,000.00 and \$5,000.00 leaving the balance of \$78,750.00, 30
 the subject-matter of this action, unpaid.

The terms of the contract are fully set forth at page 500 of the Record.

p. 513, l. 1. 5. By a letter dated the 23rd January 1928 the Respondent wrote
 to the Appellant requesting the delivery of the conveyance of the two lots
 p. 514, ll. 17-18. referred to in the Agreement of the 17th November 1927 but the Appellant
 refused to deliver a conveyance of the said lots. On the 6th of March the
 p. 515, ll. 25-26. Appellant repudiated all liability under the said Agreement and refused

to make any payments thereunder. Whereupon the Respondent commenced an action in the Supreme Court of British Columbia claiming the sum of \$78,750.00, the balance of the purchase price under the said Agreement. p. 1, ll. 10-13.

6. By his Defence and Counter-claim the Appellant pleaded :—

(1) That he was induced to enter into the said Agreement by certain misrepresentations made to him by the Respondent with regard to the value of the mining properties owned by the Alamo Gold Mines Limited, and the quality of the ore contained therein ; that in particular the Respondent represented that certain reports relating to the Alamo Mines made by mining engineers were true and accurate. p. 6, ll. 7-10.
p. 4, ll. 28-29.
p. 4, ll. 38.
p. 5, l. 12.
p. 5, ll. 22-24.
p. 536.
p. 423.
p. 321.
p. 395.
p. 398.

(2) That the Respondent fraudulently concealed from him certain information received in the months of July and August 1927 from one David Barnes the Manager of the Alamo Gold Mines Limited to the effect that the mining operations were worthless, that there was no ore of commercial value in the mines and that further development was useless. p. 6, ll. 19-20.
p. 6, ll. 16-18

(3) That the Respondent misrepresented that 3,000,000 shares of the Alamo Gold Mines Limited had been properly and legally issued, and thereby induced the Appellant to enter into the said Agreement. p. 7, ll. 44-46.
p. 7, l. 43.

(4) That by an oral Agreement made on or about the 20th November 1927 between the Appellant and the Respondent, the said Agreement of the 17th November 1927 was rescinded. p. 6, ll. 39-41.

The Appellant therefore claimed by way of Counter-claim a rescission of the said Agreement and repayment of the sum of \$15,000 paid by him under the said Agreement. He further claimed from the Respondent and the Alamo Gold Mines Limited various sums previously invested by him in the Alamo Gold Mines Limited, but these claims were not pressed at the trial and are not in issue in this Appeal. p. 9, ll. 15-21
p. 9, ll. 11-14.
p. 9, l. 37.
p. 351, ll. 4-6.
p. 351,
ll. 39-40.

7. The action was tried before Mr. Justice W. A. Macdonald and a Special Jury on the 3rd of December 1928. In the course of the hearing Mr. D. N. McTavish, the Secretary of the Respondent Company, stated in evidence that he had shown the Appellant prior to the Agreement various mining reports made by mining engineers relating to the property of the Alamo Gold Mines Limited ; that he had not vouched for the accuracy of these reports, and had made no representations as to the value of the property or the ore contained therein apart from the information contained in the said reports ; that the Appellant, who has considerable mining p. 373, l. 5.
p. 217,
ll. 37-33.
p. 192,
ll. 12-15.
p. 193,
ll. 5-7.
p. 193,
ll. 21-22.
p. 193, ll. 7-8.
p. 193,
ll. 40-43.

p. 194,
ll. 37-38.
p. 197,
ll. 25-26.
p. 194,
ll. 15-16.

experience, had paid several visits to the property and had taken samples of ore for testing ; that he had relied on his own judgment in entering into the Agreement.

Among the various mining reports put in evidence were the following :—

p. 480, l. 20.

(1) A letter from David Barnes, the Manager in charge of operations at the mines, dated the 6th August 1927, in which (inter alia) he states :—

p. 480,
ll. 23-27.

“ Have spent most of the day on the Alamo Hill, trying to find where Roy Evans find hits the Alamo and as near as I can judge, neither one of the tunnells have cut it as it is further up the hill than where the shaft is. Roy’s find prospects good and the Alamo will have to cut it.” 10

This letter was subsequent to the verbal report alleged to have been fraudulently concealed by the Respondent.

p. 497, l. 20.

(2) A telegram dated the 15th November 1927 from one Walter C. Fellows, a registered mining engineer, who succeeded Barnes as Manager, which is as follows :—

p. 333,
ll. 15-16.

p. 497, l. 20.

“ Into the ore lower tunnel in Alamo sampling lower and number two tunnel to-day Vein big and looks good stop got five feet of quartz east crosscut lower tunnel Rubycreek taking samples to assay will try to wire results by Saturday stop big storm on.” W. C. Fellows. 20

p. 366.

8. Certain questions were put to the jury by the learned Judge and the questions and the answers of the jury to them are as follows :—

p. 366, l. 37.

Question (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 ?

p. 367, l. 1.

Answer : 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. 30

p. 367, l. 4.

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

p. 367, l. 6.

Answer : None of them.

p. 367, l. 7.

Question (3).—Were such representations made with the intention of thereby inducing the Defendant Langer to contract with the Plaintiff for shares in the Alamo Mines Limited ?

p. 367, l. 10.

Answer : Yes.

p. 367, l. 11.

Question (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 ? 40

p. 367, l. 14.

Answer : Yes.

Question (5).—Did David Barnes, when Manager of the Alamo Gold Mines Limited, on or about July or August 1927 report to the Plaintiff that the properties of the Alamo Company were worthless, possessing no ore of commercial value ?

Answer : Yes.

Question (6).—If the answer to the last question be in the affirmative then was such report concealed by the Plaintiff from the Defendant Langer ?

Answer : Adverse statement not reported—and later good report was reported.

Question (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 1927 through such concealment ?

Answer : No, we believe Defendant bought on Fellows' telegram of the 17th November 1927.

Question (8).—Did Plaintiff subsequent to the said 17th November agree with the Defendant Langer to rescind and abandon the said contract ?

Answer : No.

Question (9).—Was the consideration for the transfer by Wm. B. Code to the Alamo Gold Mines Limited of the Alamo Mines 3,000,000 fully paid and non-assessable shares of the Company or was the consideration 1,500,000 shares ?

Answer : Yes, 3,000,000 shares.

9. The Honourable Mr. Justice W. A. Macdonald stated in his reasons for judgment on the 4th January 1929 that he saw no great difficulty in interpreting and implementing the jury's intent as shown by their answers to the questions submitted.

He ordered that the series of questions submitted by Counsel should be filed and form part of the Record, and said that no objection was taken to the questions finally submitted to the jury. The submission of Counsel for the Defendant that questions 5 and 6 coupled with 3 and 4 entitled him to judgment had involved considerable discussion and citation of authorities and consideration of the letter from Barnes of the 6th August 1927 subsequent to the unfavourable report so found by the jury of July 1927. This letter, although it passed uncommented by Counsel did not pass unobserved by the jury who had the exhibits before them. The jury had found that the Defendant had bought on the Fellows' telegram of the 16th November and that the concealment was not material and had not induced the contract.

p. 373. Accordingly judgment was entered for the Plaintiff for \$78,750.00 with costs and the Counter-claims of the Defendant against the Plaintiff and the Alamo Gold Mines Limited were each dismissed with costs.

p. 373, l. 34. 10. Notice of Appeal was entered on the 19th January 1929 and on the 4th June 1929 the Court of Appeal (J. A. Macdonald, C.J., Archer Martin, McPhillips and W. A. Macdonald, JJ.) delivered judgment ordering a new trial of the Action.

p. 376, l. 13-15.
p. 376, l. 18. 11. The learned Chief Justice in his reasons for judgment stated that it was the Respondent's duty to have disclosed Barnes' opinion to the Appellant, and that it was a fraud on the Respondent's part to have "failed to report" that opinion. Further he held that there was no evidence to justify the inference that the Appellant would not have been influenced by Barnes' unfavourable opinion if it had been disclosed. At the conclusion of his judgment however, he stated that he could not say that there was no evidence on which a jury was competent to pass, since the question of fraud was for the jury, but that they, owing perhaps to the manner in which the questions were framed, had been led into grave error. He therefore ordered a new trial of the claim and counter-claim. 10

p. 377, l. 7-9.

p. 377, l. 25-28.

p. 377, l. 28-29.

p. 377, l. 38-39.
p. 379, l. 1-7. Mr. Justice Archer Martin held that a new trial was necessary owing to the indefinite answer of the jury to questions 6 and 7. Mr. Justice McPhillips held that the Respondent's fraud had been established, but that the proper course was to order a new trial. Mr. Justice W. A. Macdonald held that the Respondent's fraud had been established and that the Appellant was entitled to judgment. 20

p. 386, l. 19-24.

12. It is respectfully submitted that the learned Chief Justice, Mr. Justice McPhillips and Mr. Justice W. A. Macdonald were wrong in holding that the answer of the jury to question 6 necessarily involved a fraud on the part of the Respondent. It is submitted that the wording of the jury's answer negatives the presumption of fraud and favours the inference that the Respondent's failure to report Barnes' opinion was innocent of fraudulent intent. 30

Further it is submitted that the necessary inference from the jury's answer to question 7 is that the Appellant would not have attached much importance to Barnes' opinion if it had been disclosed. There is considerable evidence to show that both the Appellant and the Respondent had a poor opinion of Barnes' ability. In these circumstances, it is submitted that the Respondent's failure to disclose Barnes' opinion is perfectly consistent with their good faith.

p. 387. By the Formal Order dated the 19th August 1925 the appeal was allowed, with costs, except in so far as Counter-claim of the Defendant 40

(Appellant) against the Respondent, the Alamo Gold Mines Limited was dismissed, with costs, a new trial was ordered, and costs of the trial were ordered to abide the result of the new trial.

13. From this Judgment of the Court of Appeal of British Columbia the Appellant obtained leave to appeal to His Majesty in Council on the 4th September 1929 on payment of security of £500, which was duly approved by the Court of Appeal of British Columbia on the 1st October 1929, but it is respectfully submitted on behalf of the Respondent that the Appellant is not entitled to judgment for the following, amongst other

p. 388,
ll. 32-33.
p. 390, l. 8.

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REASONS.

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- (1) BECAUSE upon the true construction of the answers of the jury to the questions put to them by the learned Judge at the trial, the Respondent was entitled to judgment.
- (2) BECAUSE the construction placed upon the answers of the jury by the learned trial Judge was right and ought to be affirmed.
- (3) BECAUSE the answer to question 6 does not imply that the Respondent was fraudulent.
- (4) BECAUSE the true inference to be drawn from the wording of the answer to question 6 and from the answer to question 7 is that the Respondent's failure to report Barnes' verbal statement to the Appellant was innocent of fraud.
- (5) BECAUSE the Court of Appeal failed to consider fully and sufficiently the letter of the 6th of August 1927 written by Barnes to the Respondent at a later date than his said statement.
- (6) BECAUSE the question of fraud is one for the jury, and the jury have not found that the Respondent was fraudulent.
- (7) BECAUSE the Judgments of the learned Judges of the Court of Appeal, in so far as they held that the Respondent was fraudulent, were wrong.
- (8) BECAUSE the utmost relief to which the Appellant is entitled is an Order for a new trial.

GEOFFREY LAWRENCE.

RICHARD D. HYDE.

14. Special Leave to Cross Appeal to His Majesty in Council having been granted on the 16th day of July 1931 on payment of security of £400 your Petitioner humbly submits the same ought to be allowed and the judgment of Mr. Justice W. A. Macdonald given on the 4th January 1929 be restored and affirmed for the following amongst other reasons.

No. 26 of 1930.

In the Privy Council.

ON APPEAL

*From the Court of Appeal of British
Columbia.*

BETWEEN

J. F. LANGER (Defendant) *Appellant*

AND

**McTAVISH BROTHERS
LIMITED** - (Plaintiff) *Respondent.*

Case

FOR THE RESPONDENT.

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