

Herbert Lancelot Button and others - - - - *Appellants*

v.

East African Goldfields Limited and others - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 22ND MAY, 1939.

Present at the Hearing :

LORD THANKERTON

LORD PORTER

SIR GEORGE RANKIN

[*Delivered by* LORD THANKERTON]

This appeal is from a judgment of the Court of Appeal for Eastern Africa, dated the 13th September, 1937, which reversed a judgment of the Supreme Court of Kenya, dated the 17th May, 1937, given in favour of the appellants, who are plaintiffs in the action.

In the action, which was instituted on the 2nd February, 1937, the appellants challenge the validity of a sale made on the 19th December, 1936, by the first respondent to the second respondent, of certain mining interests in Kenya Colony, which had originally belonged to the first appellants and were the subject of an agreement (hereinafter called the "option agreement") between the first appellants and Kenya Development Limited, which was the predecessor in title of the first respondent, dated the 24th July, 1935, which is in the following terms:—

" Memorandum of Agreement made this 24th day of July One thousand nine hundred and thirty-five Between Herbert Lancelot Button, Prospector, William Douglas Forrester, John Gordan Ralph, Miners and Agnes Marion Ralph, Married Woman all of Yala in the Colony of Kenya carrying on business in co-partnership under the style or firm of Button & Ralph Syndicate (hereinafter jointly referred to as the Syndicate) of the one part and Kenya Development Limited a limited liability Company having a registered office situate at Nairobi in the Colony aforesaid (hereinafter referred to as the Company) of the other part Whereas the Syndicate is the owner of the several mining interests particulars whereof are set out in the schedule annexed hereto And Whereas the Company has for the last three months or thereabouts and is now carrying out sampling and development operations on the said mining interests Now it is mutually agreed and declared by and between the parties hereto as follows:—

" 1. In consideration of the sum of Shillings One hundred and twenty thousand to the Syndicate paid by the Company (the receipt whereof the Syndicate hereby acknowledges) the Syndicate hereby

grants to the Company the exclusive option to take over the said mining interests for flotation sale or disposal in such other manner as the Company may in its discretion think best at any time prior to midnight between the Fifteenth and Sixteenth days of July One thousand nine hundred and thirty-six upon the terms and in the manner hereinafter appearing.

“ 2. The Company shall pay to the Government all rents fees and other outgoings payable in respect of the said mining interests and perform and comply with all development and other Government conditions attached thereto or incidental to the ownership thereof respectively and will keep indemnified the Syndicate and each of the members thereof its and their respective estate and effects from and against all actions claims and demands on account of the same respectively until the option hereby granted is surrendered or expires.

“ 3. The Company may relinquish the option at any time by giving one week's notice in writing to the Syndicate and provided that the Company shall have performed a *pro rata* proportion of the Government development requirements for the portion of the said option period up to the date of expiry of such notice then it shall be under no further obligation to the Syndicate save for any right of action or claims accrued or incurred prior to the date of such expiry.

“ 4. The Company shall during the continuance of the option be free (subject only to performance of its above-mentioned obligations) to develop the said mining interests to such an extent and in such manner as the Company finds desirable.

“ 5. The Syndicate shall be at liberty at all times up to the said Sixteenth day of July One thousand nine hundred and thirty-six (whether or not the option be exercised prior to that date) to continue milling ore for its own profit provided always:

“ (a) that the Syndicate shall not take ore from a greater depth than fifteen feet from the surface;

“ (b) that the tonnage milled shall not exceed on an average ten tons in any one working day, and

“ (c) that the Syndicate's right under this Clause shall not be permitted to interfere in any way with the development operations of the Company under the discretion given to it by the last preceding clause.

“ 6. The Company shall be at liberty at all times during the continuance of the option to extract and mill ore from any depth exceeding fifteen feet from the surface but the proceeds of sale of all gold won after deducting the Government royalties exigible in respect thereof and all the costs of and incidental to such sale shall be paid forthwith into an account to be opened with the Kisumu Branch of the Standard Bank of South Africa Limited in the joint names of the Company and the Syndicate and:—

“ (a) in the event of the said option being surrendered or expiring shall become the sole property of the Syndicate and shall be paid out to it accordingly: but

“ (b) in the event of the said option being exercised shall be taken over by the Company along with the said mining interests and dealt with as part of the properties the subject of the option hereby granted accordingly.

“ 7. In the event of the said option being surrendered or expiring the Company shall nevertheless be entitled within a reasonable time thereafter to remove from the properties all machinery portable houses tools and other movable assets introduced by the Company and then remaining thereon.

" 8. During the continuance of this option hereby granted the Company will permit the duly authorised representative of the Syndicate at all reasonable times to enter upon and examine the claims and/or area or areas (by giving notice) the subject of this Agreement and/or inspect all assay sheets of the Company relating thereto. Provided Always that all information so given to or acquired by such representative or by the Syndicate shall be treated as strictly confidential and shall not be divulged to any person who is not a party to this Agreement without the consent in writing from the Company.

" 9. The said option shall be exercised by the Company delivering to the Syndicate written notice in that behalf (which notice shall be irrevocable) at any time prior to the expiration of the said option period and thereupon the following provisions shall have effect that is to say:—

" (a) the Syndicate shall deposit with the Company the registration certificates exclusive prospecting licences and other documents of title relating to the said mining interests together with duly executed blank forms of transfer of the same respectively:

" (b) the Company shall proceed to dispose of the said mining interests (along with any gold deposited under the provisions of Clause 6) by flotation sale or otherwise in such manner as it may in its discretion think best not later than the thirty-first day of December One thousand nine hundred and thirty-six:

" (c) the Syndicate shall be entitled to receive and be paid thirty per cent. of the nett consideration payable upon such disposal by flotation sale or otherwise or in any other way derived by the Company therefrom (either shares or cash as the case may be) and the balance of such consideration shall belong to the Company: and

" (d) after exercise of the option and pending such disposal as aforesaid the provisions of Clauses 2, 4 and 6 shall continue in full force.

" 10. The Company shall be entitled by payment to the Syndicate of the further sum of Shillings Sixty thousand at any time prior to midnight between the Fifteenth and Sixteenth days of July One thousand nine hundred and thirty-six to extend the period of the said option for a further year; and in such event the foregoing provisions shall be read and construed in all respects as if the year ' 1937 ' had originally been written in lieu of the year ' 1936 ' appearing in Clauses 1 and 9 (b) but Clause 5 shall be read and construed in such manner that the rights thereby conferred upon the Syndicate shall continue until such time as the option is exercised but not thereafter. The said sum of Shillings Sixty thousand so paid shall in the event of the option being exercised be credited by the Syndicate against the proportion of the nett consideration ultimately receivable by it (shares to be taken at par value for such purpose) but shall not in any event be repayable.

" 11. Nothing herein contained and nothing carried out or effected pursuant to the provisions of this Agreement shall constitute or be deemed to constitute a partnership between the parties hereto.

" 12. Any notice in writing required to be given pursuant to the foregoing provisions shall for all purposes be deemed to have been duly given if sent by registered post addressed (as the case may be) to the Syndicate P.O. Box 89, Kisumu, or to the Company P.O. Box 275, Nairobi, and shall also (if posted in the said Colony) be deemed to have been duly delivered upon the expiration of eight days from the date of such posting as aforesaid.

" 13. All monies from time to time payable to the Syndicate hereunder shall be deemed to have been duly paid if and when lodged to the credit of its account with the said Kisumu Branch of the Standard Bank of South Africa Limited.

" 14. The Syndicate shall be entitled at any time prior to the exercise of the said option to transfer all its interest and benefit in this Agreement to a private limited liability Company about to be incorporated for that purpose called ' Ralph and Button Mining Company Limited ' and the Company shall not be entitled to make any objection thereto Provided always that the said Ralph & Button Mining Company Limited shall not be entitled further to assign without the prior consent of the Company in writing.

" 15. This Agreement supersedes all agreements heretofore made between the said parties in respect of the said mining interests and the same are hereby cancelled accordingly."

The mining interests set out in the Schedule consisted of an exclusive prospecting licence and certain mining claims, but at some date between the date of the option agreement and the 19th December, 1936, the prospecting licence was converted into further mining claims, and the whole of them may be conveniently referred to as the mining claims.

On the 15th July, 1936, the first respondent, to whom the interests of the Kenya Development Company under the option agreement had been transferred, duly exercised the option by notice in terms of clause 9 of the option agreement. The assignment to the first respondent was confirmed by an agreement dated the 1st October, 1936, and it is not now disputed that the first respondent takes the place of the Kenya Development Company under the option agreement.

By agreement dated the 19th December, 1936, the first respondents sold the mining claims, which were the subject of the option agreement, to the second respondent. The material parts of the agreement are as follows:—

" Whereas the Vendor is well entitled to Four hundred and sixty-seven (467) Mining Claims particulars of which Claims are set out in the Schedule hereto:—

" Now it is agreed as follows:—

" 1. The Vendor will sell and the Purchaser will purchase as on and from the Fifteenth day of July, 1936, all that estate right title and interest of the Vendor of and in the said Mining Claims subject to the conditions and obligations upon or subject to which the same are held but free from encumbrances all of which are hereinafter referred to and deemed to be included in the expression ' the Scheduled Properties. '

" 2. The consideration for the sale shall be the sum of Shillings Twenty thousand (Shgs. 20,000/-) to be satisfied by the allotment to the Vendor or its nominees of Four thousand (4,000) shares of the Purchaser of Shillings Five (5) each credited as fully paid in the capital of the Purchaser.

" 3. The purchase shall be completed on or before the Thirty-first day of December One thousand nine hundred and thirty-six in manner following:—

" The Vendor shall on or before the said thirty-first day of December One thousand nine hundred and thirty-six execute or procure to be executed transfers of the Scheduled properties in favour of the Purchaser and shall hand or procure to be handed the same together with the relative Certificates of Registration of Lode Locations to the Purchaser.

" So soon as the said Transfers of the said Mining Claims shall have been duly registered possession of the Scheduled properties shall be given to the Purchaser and the shares aforesaid forming the consideration for the said sale shall be allotted credited as fully paid.

" 4. The description of the Scheduled properties herein contained is believed and shall be taken to be substantially correct and if any error or mis-statement be discovered therein the same shall not annul the sale nor shall any compensation be allowed to or by either party in respect thereof. The Scheduled properties are sold subject to all rents fees incidents of tenure rights of way water and other easements if any affecting the same.

" 5. Until completion of the purchase the Vendor shall carry out all work which is necessary to comply with the minimum working conditions of the Mining Ordinance and Regulations in force in Kenya Colony. As from the said Fifteenth day of July One thousand nine hundred and thirty-six the Vendor shall be deemed to have been holding and working the Scheduled properties for the benefit of and on account of the purchaser and the Vendor shall account to the Purchaser for all moneys and other benefits received while so carrying on the same and if necessary the same shall be apportioned between the Purchaser and the Vendor on the said Fifteenth day of July One thousand nine hundred and thirty-six and the Vendor shall be indemnified by the Purchaser against all rents fees rates taxes expenses and all other liabilities and outgoings of the Vendor accrued or incurred after the said Fifteenth day of July One thousand nine hundred and thirty-six. The Purchaser or its agents servants or workmen shall at any time during the continuance of this Agreement be entitled to enter upon the Schedule properties for the purpose of inspecting and carrying out exploratory and development work thereon and taking samples of ore."

On the 6th January, 1937, blank transfers of the claims in question, which had been forwarded by the appellants' solicitor in a letter dated the 24th December, 1936, to which reference will be made later, were completed by the first respondent in favour of the second respondent and registered. It appears that the documents of title, also referred to in clause 9 (a) of the option agreement were deposited with the first respondent at some time or other, but no special point appears to turn on this.

The main question in the appeal is whether the sale of the mining claims by the first respondent to the second respondent was made in accordance with the provisions of the option agreement. The appellants' leading contention was that, in exercising the authority to dispose of the mining claims conferred by the agreement, the first respondent owed to them a fiduciary duty to make such disposal in the best interests of both parties, and that the first respondent had failed to show that the sale to the second respondent was of such a nature. It is important to note that no charge of bad faith or fraud is made against the first respondent. The appellants also maintained that the sale to the second respondent was not a flotation, sale or disposal within the meaning of the contract for reasons to which their Lordships will refer later. It is clear that if the appellants fail in these two contentions, none of the other questions so fully and ably argued before the Board will require to be considered, as they related to the relief to be granted.

In their Lordships' opinion, the option agreement was of an unusual nature, and little aid to its construction is to be obtained from decisions on other contracts, and that is true not only of the subject matter and terms of the contract, but also of the relationship to each other in which the parties stood under the contract.

The powers conferred on the second respondent, on exercise of the option, are defined by clause 1:—"to take over the said mining interests for flotation sale or disposal in such other manner as the Company may in its discretion think best". The concluding words "upon the terms and in the manner hereinafter appearing" relate to the carrying out of the disposal, and refer to clause 9.

Clause 9 (a) puts a duty on the first appellants to provide the first respondent with the necessary documents, and it seems clear that the blank transfers were intended to be filled up in favour of the disponees. Clause 9 (b) adds nothing to clause 1, except the inclusion of gold deposited under clause 6, and perhaps an exhortation to the first respondent after exercising the option to dispose of the properties with dispatch. Clause 9 (c) deals only with the division between the parties of the nett consideration received by the first respondent upon such disposal; and clause 9 (d) merely deals with the position pending such disposal.

The subject matter of the contract was certain mining claims and a prospecting licence, which had not yet matured into a claim or claims. The purpose of the contract was the development of these mining interests, which would involve substantial expenditure, by the first respondent or its predecessor, with a view to their disposal. Their Lordships are not satisfied that, on exercising the option, the first respondent became owner, in any proper sense, of the mining claims, but, in their Lordships' opinion, the first respondent had a full and unfettered discretion as to the disposal of the claims by flotation sale or otherwise, and their Lordships see no reason for limiting the wide discretion expressly given by implication of a fiduciary duty. The relationship of the parties is not that of partners, or trustee and *cestui qui* trust, or principal and agent, or mortgagor and mortgagee. The only element of trust that might be said to arise is the duty of apportionment under clause 9 (c). Their Lordships agree with the opinion of Dalton C.J. on this point.

As regards the substance of the sale by the first respondent to the second respondent, the appellants founded on this not only as showing a breach of the fiduciary duty alleged by them, but also in order to maintain that the sale was not a disposal by flotation sale or otherwise within the meaning of the contract. It was said that "flotation" is a transaction which contemplates from the start an immediate prospect of expansion and development, and further, that the disposal contemplated must be such as will result in the consideration being distributed between the parties in the proportions provided by clause 9 (c). It was

said that the sale here in question did not conform to either of these requirements; that, in substance, it merely extended the time for disposal of the claims by the first respondent, who held the control in shares, while making the appellants share in the cost of development; and that, while the apportionment of the shares was mathematically correct, the controlling holding of the first respondent was necessarily more valuable per share by reason of such power of control. Their Lordships are unable to accept either of these contentions. Good faith is of course essential, but bad faith is not alleged. The contract gives the discretion in the widest terms, and, expressly contemplates that the consideration may take the form of shares, the first respondent getting seven shares for every three that the appellants get, and there is no reason to assume that the smaller shareholder will be unfairly dealt with, or will be without the protection given by law to minority shareholders.

In view of the opinion above expressed, this appeal must fail, and it becomes unnecessary to deal with any of the further questions argued.

Accordingly, their Lordships will humbly advise His Majesty that the decree of the Court of Appeal for Eastern Africa dated the 13th September, 1937, should be affirmed and that this appeal should be dismissed with costs.

In the Privy Council

HERBERT LANCELOT BUTTON
AND OTHERS

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EAST AFRICAN GOLDFIELDS LIMITED
AND OTHERS

DELIVERED BY LORD THANKERTON

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