Judgment 2 of 1978

IN THE PRIVY COUNCIL

No. 28 of 1977

ON APPEAL
FROM THE SUPREME COURT OF
NEW SOUTH WALES
EQUITY DIVISION

IN PROCEEDINGS 292 OF 1973

QUEENSLAND MINES LIMITED

Appellant (Plaintiff)

ERNEST ROY HUDSON,

SAVAGE IRON INVESTMENTS PTY. LIMITED

and

INDUSTRIAL AND MINING INVESTIGATIONS PTY. LIMITED

Respondents (Defendants)

CASE FOR THE RESPONDENTS

SOLICITORS FOR THE APPELLANT

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Sydney. N.S.W.

By their Agents:

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FROM THE SUPREME COURT OF NEW SOUTH WALES

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ACTION NO. 292 of 1973

BETWEEN :

QUEENSLAND MINES LIMITED

APPELLANT (PLAINTIFF)

- and -

ERNEST ROY HUDSON
SAVAGE IRON INVESTMENTS PTY. LIMITED and
INDUSTRIAL AND MINING INVESTIGATIONS PTY. LIMITED

RESPONDENTS (DEFENDANTS)

RESPONDENTS' CASE

1. This is an appeal by Queensland Mines Limited ("QM") from a decision of the Supreme Court of New South Wales, Equity Division (Wootten J.) on 6th October 1976 dismissing QM's claim for declarations and consequential orders against Ernest Roy Hudson, Savage Iron Investments Pty. Limited and Industrial and Mining Investigations Pty. Limited to the effect that the Defendants held certain exploration licences in Tasmania at the Savage River and contractual rights to royalties as constructive trustees for QM beneficially. The appeal is brought pursuant to leave granted by that Court. p. 758 l.27 p. 760

2. The principal issues in this appeal are whether QM's claim is (as the learned trial judge held) barred by section 69 of the Trustee Act, 1925 (N.S.W.) either directly under section 3 of The Limitation Act, 1623 (21 Jac.1, c.16) or indirectly under subsection (3) of section 69 of the Trustee Act, 1925 (N.S.W.), or otherwise and, if not, whether Hudson became a constructive trustee of the exploration licences for QM subsequently p. 750 l.7 to p. 751 l.11

to his acquisition of the legal title thereto as an express trustee for parties other than QM by reason of the existence of what the learned judge described as a "commercial expectation" that QM "would be given an opportunity" by those other parties "to participate in the venture" which they had contemplated promoting but which they abandoned shortly after Hudson acquired legal title to the relevant exploration licences, and whether QM, in any event, had effectively assigned for reward whatever rights or claims to beneficial ownership of the exploration licences it might have had to Dubar Trading Pty. Limited ("Dubar") which had in turn abandoned in favour of the Defendants or assigned those rights or claims to the corporate defendants, and whether QM had by retention for many years of the purchase price paid to it by Dubar for the assignment of such claims or rights ratified the assignment if made but without authority; and whether the claims of QM having accrued in 1961 were by 22nd February 1973, when the Plaintiff commenced its proceedings, barred by the Plaintiff's laches acquiescence and delay or became subsequently barred.

p. 707 11.19-22

p. 664 11.23-25

3. Exploration licences for iron ore and coal were granted by the Tasmanian Government to Hudson on 23rd February, 1961. At the time of grant, the learned judge found that QM had no "legal right to any beneficial interest in them or in the company which was to be formed to exploit them". It had, he found, no more than "what might be called a commercial expectation that it would be given an opportunity by Mr. Korman or Stanhill to participate in the venture". QM's expectation was founded "on the commercial realities known to Mr. Korman and Mr. Hudson at least, that it was, in considerable measure, due to the use of the services of the managing director of QM" (i.e. Hudson) "and the use of the name, reputation and funds of the company that the protracted endeavours to establish an iron and steel industry was bearing fruit". Thus, there was a "commercially reasonable expectation, although not a legally enforceable right, that QM would have an opportunity to participate to its financial advantage in the venture" which Korman and Stanhill contemplated promoting.

p. 625 11.14-16

p. 707 11.15-19

p. 707 11.19-22

p. 707 1.28 to p. 708 1.12

p.708 11.16-20

4. Hudson was the Managing Director of Australasian Oil Exploration Limited ("A.O.E.") when he first met Mr. Stanley Korman in 1958

p. 584 1.29 to p. 585 1.24

through Ridgway, a geologist. Korman was the principal and dominating personality of a group of companies known as the Stanhill Group of which Stanhill Consolidated Limited ("Stanhill") was the principal company. Factors Limited ("Factors") was a public company listed on Australian Stock Exchanges and controlled at Board level by Korman through Stanhill. Hudson and Korman agreed that Factors and A.O.E. should form QM to develop a potential uranium deposit known as "Anderson's Lode". At Korman's request Hudson reluctantly accepted the managing directorship of QM on a part-time basis for an initial period of six months, later extended. Hudson was provided with staff and an office in Sydney by Kathleen Investments Limited (of which he was also Managing Director) from which he conducted the affairs of Kathleen Investments Limited, of A.O.E., and of other commercial activities in which he was engaged. There were kept there stocks of stationery designed for use by the various companies and for personal use.

p. 585 11.18-21
p. 585 1.28 to p. 586 1.4
p. 585 11.21-28
p. 126 1.33 to p. 127 1.14
p. 486 11.8-12
p. 587 11.27-29
p. 585 11.5-7
p. 585 11.7-12
p. 197 11.18-21
p. 357 11.1-2

5. QM's corporate objectives were defined by a formal agreement (dated 20th January 1959) between Factors and A.O.E. which provided that those activities should be confined to the exploration and development of Anderson's Lode. It was to be a "one purpose" company only. However, several months later it acquired another, potentially uranium bearing lease nearby known as the "Skal Lease" in consequence of agreement between Oswald Burt the Chairman of Factors and Hudson on behalf of A.O.E.; special arrangements were made between those shareholders for funding that project. Burt was opposed to QM engaging in any other activities; Hudson persuaded him to agree to QM "looking at" mining prospects brought to it by prospectors so long as that only involved using the geologists' time and not the expenditure of any money on development; if anything emerged as a potentially viable prospect a new company would be formed between the shareholders, to exploit it. QM did thereafter "look at" some few prospects but all were turned down. QM "did, however, acquire

Exhibit 2 Vol. IV pp. 844-851
p. 586 11.4-10
p. 586 1.29 to p. 587 1.13
p. 587 11.13-16
p. 588 11.7-13
p. 588 11.14-19
p. 588 11.12-14
p. 589 1.25 to p. 590 1.6

a small interest in blue metal in Queensland." QM employed Ridgway as a geologist. Korman, had some years earlier developed an ambition to establish in Australasia, a steel industry. He had had Ridgway (then an employee of Dominion Mining N.L. which was one of the Korman or Stanhill Group of companies) looking for iron ore in Queensland. Korman asked Hudson whether he knew of any suitable iron ore deposits. Hudson knew nothing but made enquiries and suggested an investigation of iron sands in New Zealand; at Korman's request he arranged for one Palmer to undertake a feasibility study of those sands which was produded in April 1959. Upon the expiration of the initially agreed period of 6 months as QM's managing director, and, the learned judge found, motivated on Korman's part by his desire to retain Hudson's services in the Group Korman arranged for Hudson's re-engagement as managing director of QM at an annual remuneration of £7,500. The learned judge found that this was the only remuneration which Hudson received from the Group for the various tasks which he performed in connection with the development of a possible iron and steel industry.

p. 590 11.6-12 Exhibit E4 Vol. V p. 1148

p. 592 11.15-18

p. 592 11.18-20

p. 592 11.23-27

p. 596 11.17-23

p. 594 11.21-24

p. 596 11.7-13

6. The learned judge found that Korman was, "an entrepreneur who built a very considerable financial empire using a network of companies, an empire which finally collapsed in the aftermath of the 1961 credit squeeze" and that Korman "regarded the various companies in the group not primarily as separate entities with their own interests to be considered but rather as so many instruments that he could deploy for his various purposes as occasion required. He was thus quite likely to develop a proposition for some enterprise to a fairly advanced stage without deciding, or at all events announcing, which of the various companies ... would actually undertake the project."

p. 590 11.24-28

p. 591 11.16-25

Wootten J. also found that Hudson's activities in relation to the iron ore deposits were not "carried on with a view to the development of an iron and steel industry by QM" but that "The investigations and negotiations ... were at the behest of Mr. Korman, on the basis that he desired to add an iron and steel industry to the activities of his group" and that there had "probably been no firm decision

p. 596 11.27-29

at this stage as to what company structure would be used ... more probably it would have been the function of a new company established for the purpose within the group." Additionally he found that Hudson at the relevant time believed that "it was reasonable to expect" that because of his participation in the relevant negotiations and investigations "QM would receive a substantial benefit which he" in 1960 "valued at some £30,000 to £40,000" and that "Hudson saw the possibility of benefit flowing to QM because it was in his capacity as managing director of QM that Mr. Korman was using his services in relation to the proposed ventures". The respondent submits that the reason lastly assigned by the learned judge was erroneous and that the correct inference to be drawn from the learned judge's findings and the evidence was that the expectation of benefit was the consequence of the fact that QM had acted as a negotiating agent for Korman and Stanhill and, as such, had used what abilities and reputation it had to aid the negotiation for the benefit of Korman and Stanhill and had advanced some moneys of its own in relation to the negotiations and investigations pending recoupment by Stanhill.

p. 596 l.29 to p. 597 l.15
p. 602 l.7-11
p. 602 l.25 to p. 603 l.4
p. 708 l.20-23
p. 699 l.28 to p. 700 l.17

7. Prior to the Savage River negotiations, investigations and negotiations in relation to the New Zealand iron ore sands had been carried out, with no expectation that QM should be the promoter or proposed vehicle for the intended steel industry. Hudson's services "were treated by him and Mr. Korman as a contribution from QM which would ultimately be recognised in some way if the enterprise got off the ground". ... Hudson "did not have authority from QM" to engage in the Savage River negotiations for the purpose of obtaining "exploration licences with a view to the establishment of an iron and steel industry" in Tasmania. It was the practice within the Stanhill Group for expenses to be paid from any convenient company account in an appropriate place and to be adjusted through the Melbourne accounting office of the Group by credit and debit to and from the appropriate companies. Hudson

p. 604 l.12-14
p. 605 l.24-28
p. 699 l.22-28
p. 605 l.7-13
p. 16 l.28-42
p. 151 l.21-25
p. 493 l.18-32
p. 549 l.4-31

had no part in this process merely authorising payment of some expenses from QM's Sydney account and causing the appropriate information to be sent to Melbourne for processing.

p. 147 1.43 to p. 148 1.9
Exhibit 6 Vol. V p.1153-6
p.140,1.24 to p.141,1.41
p.544,1.34 to p.545,1.22

8. In late 1959 at Korman's request, Hudson arranged for one, Palmer, to investigate on Stanhill's behalf the Tasmanian Savage River iron ore deposits, the existence of which was widely known. Palmer investigated and reported favourably; Hudson at Korman's behest took up the task of negotiating with the Tasmanian authorities and principally through one Symons of the Department of Mines. Those negotiations were initiated by a letter written on QM's letterhead, signed by Hudson as Managing Director, and purporting to be written by QM as agent for undisclosed principals though containing reference to Korman's desire to be granted (in company with Hudson) an interview. Korman, in subsequent correspondence, himself referred to QM's investigations as having been carried out on behalf of Stanhill, and stated Stanhill's desire to promote a public company for the purpose of carrying out detailed investigations of the problems associated with the establishment of a steel industry using Savage River ore, such company to have an initial issued capital of £750,000; he indicated Stanhill's willingness to underwrite that and all subsequent capital requirements. Korman made it clear that the approach was being made by Korman or Stanhill as promoter and that, as the learned judge found, QM's prior activity had been as investigator on behalf of Stanhill; as well the learned judge found that "it would have been of importance in obtaining the confidence of the Tasmanian Government that an established mining company was involved in the venture." It may, however, be observed that at the time QM was not and had not been engaged in any activities as a mineral producer but had merely been a prospector. His Honour found that, by late 1960, QM was "mothballed" because no contracts for its potential production could be obtained. The formal board decisions to that effect were taken

p. 609 11.18-19
p. 53 11.30-47
p.464 11.21-27
p. 610 1.10 to p. 611 1.6
p. 611 11.23 to p. 614 1.6
p. 612 11.6-7
p. 614 11.24-27
p. 608 11.16-20

in March and April 1961; Hudson's appointment as managing director of QM was terminated on 1st March 1961 with effect from 15th March 1961 and no successor was appointed. Between 27th April 1961 and 13th February 1962 there were no meetings of the QM Board. Hudson's negotiations with the Tasmanian authorities were initiated in August, 1960, about the time when the "mothballing" decision was in contemplation. In December 1960/January 1961 Hudson and Korman finally agreed upon the basis on which application should be made to the Tasmanian Government for an exploration licence. It, as the learned judge found, was "that a public company would be formed for the purpose of carrying out all investigations to enable a decision to be made as to the economics of establishing an integrated steel industry. The task was... not to be undertaken by Stanhill or by any existing company in the Korman or Stanhill group, but by a new company to be formed within the group." Moreover his Honour found that it was "thus necessary for somebody to obtain the issue of the relevant exploration licences as a basis for the promotion of the company." Korman asked Hudson personally to sign as applicant the letter (written on plain paper) embodying the application. The letter was dated 31st January 1961, but was handed to Symons in Tasmania early in February 1961. It was as follows:-

p. 608 1.28 to p. 609 1.5 Exhibit E8 Vol. VI p. 1373

p. 609 11.23 & p. 610 11.10-12

p. 617 11.26-28

p. 617 1.28 to p. 618 1.10

p. 618 11.10-13

p. 618 11.15-18 p. 620 11.8-14

16 O'Connell St.,
SYDNEY.

31st January 1961.

The Director of Mines,
Mines Department,
HOBART.

Dear Sir,

In making the attached Application for an Exploration Licence, I confirm the purpose is to carry out, over a period of 2 years, developmental and technical investigation at an estimated cost of £1 million to ascertain if an integrated steel industry, at an approximate cost of £100 million/£150 million can be economically established in Tasmania.

Briefly, the manner in which investigations will be proceeded with are:-

a) Immediate steps will be taken to establish means of access and to commence a geological survey.

b) A Public Company to be known as Tasmania Steel Investigations Ltd., shall be incorporated in Victoria with a paid up capital of £1,000,000 being the estimated expense of carrying out all necessary geological, geophysical, aerial surveys and all other developmental work and technical investigations, as will enable a decision to be made as to the economics of the establishment of such a steel industry. Stanhill Consolidated Ltd., will contribute £500,000 to such Capital and will undertake the formation of the Company in Tasmania.

c) Drilling of the ore body will commence within a period of three months and will continue throughout the two year period at an estimated cost of £250,000 to £300,000.

d) Anticipated expenditure during the first three months is £50,000 and for the next three months £100,000. As the Company builds up a technical staff, both local and overseas, expenditure will increase and it is estimated expenditure, during the following three six-monthly periods will be approximately £250,000 each.

e) The Company will form an association with Overseas steel organisations whose technical staff will undertake investigations of the most economic method of treatment and provision has been made in the estimate for the erection of a Pilot Plant.

f) Overseas capital investment will be limited to 25% of capital and the project if successful will be predominantly Australian.

g) As the question of site is one of great importance, the Company will, with your consent, drill all known iron ore deposits in Tasmania. p. 618 1.20 to p. 620 1.7

Yours faithfully,
(Sgd.) E.R. Hudson.

On 23rd February 1961 there were issued to Hudson, exploration licences EL 4/61 in respect of iron ore and EL 5/61 in respect of coal. Licence EL 4/61 contained (inter alia) the following conditions:- p. 625 11.14-26

"I. The licensee within seven days of the issue of this licence shall take steps to commence preliminary works necessary for the investigation of the area.

II. The licensee shall commence drilling operations within a period of not less than three months and shall be continued during the term of this licence and all extensions thereof, a minimum of two plants capable of boring to at least 1,000 feet to be employed and boring to be at the minimum rate of 10,000 feet in each period of six months ... p. 626 11.12-24

V. The licensee undertakes to proceed with due expedition to incorporate in Victoria a Public Company to be known as Tasmania Steel Investigations Ltd. with a paid up capital of £1,000,000 being the estimated expense of carrying out all geological and geophysical surveys, metallurgical research investigations diamond drilling and such other investigations as will enable a decision to be made as to the economics of the establishment of a steel industry in Tasmania.

VI. In accordance with the terms of his application for this licence the licensee undertakes to expend in actual investigational work £50,000 during the first three months of the term of this licence and £100,000 during the next three months, and at the rate of £250,000 each period of six months which might hereafter be

granted as extensions of the term of this licence...". p. 627 11.4-25

By this time Hudson had been made aware by Korman of the probability that he would not be able to go ahead with the proposed venture because of group liquidity problems. The learned judge found that Hudson "simply went ahead on the basis of the enthusiastic reports he had received from the geologist, Mr. Ridgway, in the hope that if, as seemed likely, Korman was unable to provide financial backing, he would be able to obtain it elsewhere." On 8th March 1961 Korman told Hudson that there was no possibility of him proceeding and Hudson communicated that fact to Symons on 21st March 1961. p. 627 11.43-46 p. 629 11.7-12 p. 629 11.18-20 p. 630 11.22-24

9. The learned trial judge found, correctly, as the respondents submit, that Hudson "did not at the time of obtaining the licences hold the beneficial interest therein as a constructive trustee for QM" since Hudson had made the relevant application, had been granted and had accepted the licences as "a bare trustee", the trust, as his Honour found, "being in favour of the company to be formed". The preferable view, as the respondents submit, is that the trust was in favour of Korman or Stanhill, each of whom intended to promote the new company but little or nothing turns on it. Stanhill through Korman thereafter decided not to continue "and disavowed any interest in the exploration licences", with the result, prima facie, that Hudson held "the legal estate in certain property in which nobody claimed a beneficial interest" and prima facie, therefore, "Hudson's legal title made the licences his to do with as he wished", subject to the Tasmanian Government's right to revoke the licences which it did not do. The Tasmanian Government, "acquiesced in the position that Mr. Hudson would hold the licences, and would endeavour to comply with the conditions to the extent that he was able without the participation of Stanhill or the formation of the proposed company". His Honour, as well, expressly found that when he originally acquired the licences Hudson did not do so by virtue of his position as Managing Director of QM and as trustee for QM. p. 664 11.4-5 p. 664 11.7-9 p. 664 1.25 p. 665 11.12-15 p. 665 11.18-21 p. 665 11.18-21 p. 665 1.26 to p. 666 1.4

10. As has been earlier mentioned QM's involvement (through Hudson) in the negotiations prior to the grant of the licences was found by the learned judge to have been as agent for Korman and/or Stanhill. So too, it is submitted, was the expenditure, whether in fact ultimately reimbursed or not. The learned judge also found that none of QM's money was used for payment of expenses incurred nor any sums debited to it after the acquisition of the licences by Hudson who himself or through his companies defrayed all such expenses. Nevertheless one matter which appeared to the learned judge to be of some significance should be mentioned. On 9th February 1961, before the grant of the licences, Hudson wrote to the Tasmanian Department of Mines on QM notepaper a letter in which he stated that "this Company" would accept responsibility for costs in connection with a new drill hole to be drilled with a drill then situate in the area. The learned judge found that Hudson had no authority from QM to give that undertaking and that he had "every reason to believe that neither the board of the company nor either of its two shareholding companies would have been willing to give such an undertaking". Hudson explained his action as having been inappropriate but, no doubt, it was based upon his belief that Korman or Stanhill would defray or recoup any actual liability incurred in accordance with group accounting practice. QM in fact incurred no liability, the accounts when rendered being paid by Hudson or by his companies. In like manner on 6th March 1961, Hudson had written to the drilling company on QM notepaper undertaking responsibility for the drilling costs; again QM in fact incurred no consequential liability.

p. 699 l.28 to p. 700 l.4

p. 657 ll.25-28

p. 621 ll.9-12

p. 621 ll.24-28

p. 623 ll.4-12

p. 623 ll.27-29

p. 624 ll.6-18

p. 623 ll.27-29

11. The learned judge found that in consequence of the letter to the Tasmanian Mines Department by which the abovementioned undertaking was given, "Hudson was making use of his position as managing director of QM and of the reputation of that company to assist in the obtaining of an exploration licence in his own name" (although for Korman or Stanhill). It is respectfully submitted that that conclusion is erroneous; it omits the fact of essential significance as earlier found by his Honour, namely, that Korman and Stanhill

p. 708 ll.20-23

had employed QM as agent to assist in the negotiations with the Tasmanian authorities to obtain the licences to be held beneficially for Korman and Stanhill or the company to be formed. In its capacity as agent it was, it is submitted, well within the scope of its agency to proffer through its managing director the relevant undertaking. So considered, it is submitted, it was erroneous to conclude that Hudson personally was mis-using his office as managing director of QM in writing the letter or that there was, in the circumstances, any conflict of personal interest and duty or any possibility thereof at that time; rather the agent for Korman and Stanhill (QM) was merely proffering its personal undertaking in support of its principal to whom it (QM) owed the fiduciary duty of such an agent.

p. 664 11.7-22
p. 699 1.28 to p. 700 1.17
p. 708 11.20-23

12. Following the withdrawal of Korman and Stanhill, on 21st March 1961 Hudson sought permission from the Tasmanian authorities to carry on personally at a reduced rate of work and expenditure whilst he sought someone else to replace Korman and Stanhill. Symons, with the concurrence of the Minister acquiesced in Hudson continuing on this basis. After 21st March 1961, Hudson spent a great deal of time seeking to enlist support for the Savage River project but everyone turned the proposition down, a major problem being the high titanium content of the ore, which was generally thought to make it unsuitable for steelmaking. The learned judge found that Hudson proceeded with the "licences in his own name or the name of his own company, and without there being any reference to or assistance in any form from QM or any of the companies in the Stanhill Group" and that by "dint of enormous personal effort, persistence, business ability and risk-taking investment, Mr. Hudson sucoeeded in creating a viable industry out of a project for which for a long period he was able to find no backing at all". He also found that "Hudson was not keeping his project secret in any way but, on the contrary, was seeking a backer from any source, and I have no doubt that had there been any possibility of backing from QM or from any of the companies associated with it, Mr. Hudson would have welcomed this with open arms."

p. 630 11.22-29
p. 631 11.5-8
p. 632 11.18-21
p. 633 11.5-8
p. 651 11.11-16
p. 651 11.18-23
p. 652 11.13-19

13. The extent of the task, the persistence, the money and the effort required is summarised

at pp. 651-657. The three respondents had by 30th June 1974, expended on the overall project $A1,131,390 (without allowance for Hudson's services). Exploration and drilling in that part of the area (not yet mined) and negotiations and investigations with a view to establishing a steel industry have continued at the expense of the respondents and are continuing. The learned judge in observing upon the measure of compensation which ought (if need be) to be awarded to Hudson and his companies said:- p. 656 11.29 to p. 657 1.5 p. 656 11.24-27

> "It has been remarked that in some cases proper remuneration for what has been done by the fiduciary may allow him to keep most or all of the benefit he has acquired (McLean op. cit. at p. 220). This may be such a case. Mr. Hudson has indeed made a silk purse out of a sow's ear, and the value has been added by an extraordinary combination of astonishing effort, skill, business acumen, financial risk-taking and sheer persistence. Mr. Hudson's contribution has been one that no employer could normally expect from any employee, however highly remunerated. It is a case in which any realistic quantum meruit assessment would have to be closely related to the value of the achievement." p. 758 11.8-21

14. The learned judge held that QM's claim was for declarations that the exploration licences held by Hudson or his companies were held beneficially for QM and for an account of profits by each respondent in respect of royalties received by the respondents in consequence of the relevant agreements and transfers of those parts of the whole area originally the subject of EL 4/61 as had passed into the hands of independent third parties were barred by the expiration of 6 years from the time when they first arose, deciding that the limitation provisions of section 69 of the Trustee Act 1925 (N.S.W.), were applicable to those claims. The respondents submit that the learned judge was correct in so deciding for the reasons expressed by him. In short, his Honour held that section 6 of the Limitation Act 1969 (N.S.W.) applied to make applicable to the relevant claims either the provisions of section 3 of The Limitation Act, 1623 p. 750 11.7-13 pp. 738 to 751

(21 Jac. 1,c.16) or of section 69 of the Trustee Act, 1925 (N.S.W.), in each case the limitation period being six years. The latter provision applied if the basis of the claim against the respondents is as constructive trustees (as the appellant claimed); the former applied if the basis is simply that of debtor-creditor in respect of profits made. The respondents submit that the latter provision is applicable and, in the alternative, the former.

p. 738 l.15 to p. 739 l.15

p. 739 ll.4-15

15. The operation of section 69 of the Trustee Act, 1925, (N.S.W.) is excluded in the two cases set forth in sub-section (1). Otherwise it applies, as the learned judge held, to the respondents as "trustees" within the meaning of the Act. Section 69 (1) provides as follows:-

p. 750 ll.7-13

> "In any action suit or other proceeding against a trustee or any person claiming through him, the provisions of this section shall have effect:
>
> Provided that this section shall not affect any action suit or other proceeding where the claim is founded upon any fraud or fraudulent breach of trust to which the Trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use."

No allegation of fraud was made. A similar exception was construed by the Judicial Committee in Taylor v. Davies (1920) A.C. 636 where it was held (at 653) that it applied only "where a trust arose before the occurrence of the transaction impeached and not to cases where it arose only by reason of that transaction".

p. 747 ll.23-25

The Board distinguished between a person who was sometimes called a constructive trustee but was in truth an actual trustee (who was not entitled to the benefit of the exception) and a person who had taken possession in his own right, but was liable to be declared a trustee by the court by reason of a breach of a legal relation, the latter person having the benefit of the exception.

Taylor v. Davies was followed in Clarkson v. Davies (1923) A.C. 100. The appellant at the hearing conceded that if the relevant limitation provision was section 69 of the Trustee Act, QM's claim against Hudson was barred thereby.

p. 749 11.15-20

16. It is further submitted that the learned judge rightly rejected the appellant's submission that, assuming its claim to beneficial ownership of the relevant property was barred, as aforesaid, it was, nevertheless, entitled to an account of profits for the period of six years prior to the institution of the proceedings, viz. 22nd February 1973.

p. 751 1.16 to p. 752 1.13

17. The respondent also submits that his Honour rightly rejected, for the reasons expressed, the further submission of the appellant that since the exploration licences were transferred to the third defendant in 1968, within the six year period, QM's claim against it was not barred.

p. 753 11.4-8

18. Alternatively, the respondents submit that the basis of the appellant's claim was a debtor/creditor relationship and that the applicable limitation provision was The Limitation Act 1623, section 3.

It is not to the point, it is submitted, to rely, as his Honour did, upon Keech v. Sandford (1726) Sel.Cas.t.King 61;25 E.R. 223 as demonstrating that in all cases of breach of fiduciary obligation the basis of liability is constructive trusteeship. There an express trustee who had taken a renewal of a lease previously held as trust property and claimed to hold it personally, was held to be a trustee. The respondents by contrast rely (inter alia) upon the decisions of the Court of Appeal in Lister & Co. v. Stubbs (1890) 45 Ch.D. 1 and Metropolitan Bank v. Heiron (1880) 5Ex.D. 319, where a fiduciary found to be in receipt of money in breach of his obligations not to make personal profits by reason of his office was held to be an equitable debtor rather than a constructive trustee, for the reason (inter alia) that the property is regarded as held adversely to the claimant until decree or order.

p. 740 1.13 to p. 741 1.23

The learned judge regarded Lister & Co. v. Stubbs and Metropolitan Bank v. Heiron as resulting from a misunderstanding and not as resulting from a "proper application of prior authority" and treated Phipps v. Boardman (1967) 2 AC 23 as having decided the contrary. The respondents submit that the learned judge erroneously interpreted what was said in Phipps v. Boardman where, it is submitted, no consideration was given to the distinction, because it was immaterial in the circumstances of that case and of the order, in fact, made. The respondents submit that the liability of a fiduciary to account for profits in cases which do not involve the receipt by the fiduciary of property already legally or equitably owned by the party to whom the duty is owed, derives from the general principle that a fiduciary must not profit personally from his office. It is a liability to account only for personal profits made by him, cf. Regal (Hastings) Ltd. v. Gulliver, at first instance, (1942) 1 All E.R. 378, where it is seen that the judgment was for a sum of money equal to the profit. On appeal, (1967) 2 A.C. 134, the orders were confirmed; moreover, the defendant Gulliver escaped liability because, in his case, his trust made the profit (no doubt with knowledge of the fiduciary's activities) and he did not. In such cases a constructive trust does not arise until and unless it is created by an appropriate decree of the Court. The liability of the fiduciary to account for personal profits made, in this class of case, is thus that of a debtor, whether legal or equitable. Lister v. Stubbs (1890) 45 Ch.D.1; Metropolitan Bank v. Heiron (1880) 5 Ex.D. 319; Boston Deep Sea Fishing & Ice Co. v. Ansell (1888) 30 Ch. 339 at 367-8 per Bowen, L.J.; Reading v. A.G. (1951) A.C. 507.

p. 744 l.14-18
p. 745 l.20 to p.746 l.17

19. Further it is submitted that if a liability to account presently enforceable, (that is, not statute barred) exists then it is, in consequence of the abovementioned submissions and authorities, a liability of Hudson to account for personal profits and not a liability of the two respondent companies. The liability of Hudson is to account for profits made by him; the profits arose (if at all) when he transferred the exploration licences in 1963 to the second respondent. No subsequent or contemporaneous liability arose in the corporate respondents because they had

been guilty of no breach of duty to QM; nor did they take property to which, at that time, QM had any legal or equitable title. Metropolitan Bank v. Heiron (supra).

Nor, it is submitted can the corporate respondents be made liable upon the ground of participation with knowledge of the fiduciary's (Hudson's) breach of duty. Neither of them had any connection with the matter until all relevant events found by the learned judge to have constituted Hudson's breach of duty had occurred. If it be right, that no constructive trust could arise to replace or satisfy the equitable debt or obligation to account until the court's decree, the corporate defendants took property in which the whole legal and equitable title resided in the transferor. That transfer did not involve any unconscientious acceptance of the relevant property such as to justify the court's intervention on any equitable ground. It merely left Hudson with his pre-existing obligation (upon the assumption for this purpose that the learned judge's primary finding was correct) to account; it neither extinguished nor diminished these profits for which Hudson is or remained liable to account nor is there any suggestion that Hudson's transfer at that time was otherwise than for full value.

20. Upon the question of the accountability of the respondents for the profits made the learned judge concluded:-

(i) The investigations and negotiations prior to the grant of the exploration licences were carried on by QM at the behest of Korman and for his and Stanhill's purposes - not for QM's own purposes. Korman and Stanhill intended that the Savage River undertaking would be carried out by a company to be formed - not by QM. Hudson acquired the licences in his personal capacity - not for QM; QM at that time acquired no legal or beneficial interest in anything. p. 596 l.29 to p. 597 l.1 p. 700 ll.12-14 p. 707 ll.15-19

(ii) Korman and Stanhill regarded Hudson, being managing director of QM, as a person appropriate to be called on to do work on behalf of the Group. p. 700 ll.4-8

(iii) "In the investigations and negotiations which led up to the acquisition of the legal title in the exploration licences Mr. Hudson used his position as managing director of QM, used the name, prestige and credit of QM and expended the funds of QM, all of which contributed in some degree to the ultimate granting of the licences." Hudson "actively used his position as managing director and the known reputation, funds, credit and property of the company in the obtaining of something which was within the legal powers of the company to obtain." p. 663 11.22-29 p. 705 11.9-13

(iv) "There was a commercially reasonable expectation, although not a legally enforceable right, that QM would have an opportunity to participate to its financial advantage in the venture" which Korman and Stanhill proposed to promote. p. 708 11.16-20

(v) "When Mr. Korman and Stanhill withdrew and abandoned their interest, they left Mr. Hudson, who had acquired his position as a fiduciary of QM, without any obligation to them, but still a fiduciary to QM". "That obligation was twofold, namely that he should not make a profit or take a benefit through his position as fiduciary without the informed consent of his principal, and that he should not act in a way in which there was a possible conflict between his own interest and that of his principal. To proceed to exploit the exploration licences without reference to QM involved a breach of both aspects of his duty." Hudson's "opportunity to exploit the exploration licences ... flowed from his office and the use of his office as director of QM". p. 710 11.26-30 p. 711 11.4-12 p. 701 11.22-25

The respondents submit that each of the conclusions in paragraphs (iii), (iv) and (v) are erroneous.

21. Firstly, the respondents submit that any "commercial expectation" of QM was to be offered an opportunity to participate in a company to be formed by Stanhill to investigate and promote the ore deposits; it was not an expectation of participation in the development or mining of the relevant areas. When Korman and Stanhill abandoned their proposal to form the relevant company the "commercial expectation" of QM terminated and this plainly preceded Hudson's acquisition of the beneficial interest previously held for Korman and Stanhill.

p. 708 11.16-20
p. 596 11.24-29
p. 617 1.28 to p. 618 1.10

22. Secondly, having regard to his findings that the investigations and negotiations prior to the issue of the licences were carried out by QM as Korman and Stanhill's agent, it was wrong to conclude that Hudson had used the name prestige and credit and expended the funds of QM otherwise than as QM's agent or officer. The use and expenditure were QM's acts and not Hudson's; they were not uses or acts done for Hudson's benefit or advantage but by QM for Korman. The fact that QM's activities for Korman's benefit aided in the achievement of the ultimate grant of the licences could not create any special fiduciary relationship between Hudson and QM which subsisted thereafter.

p. 614 11.17-21
p. 615 11.13-18
p. 664 11.7-22
p. 699 1.28 to p. 700 1.17
p. 708 11.20-23

23. Thirdly, it was, it is submitted, erroneous to conclude that Hudson had "acquired his position" (that is, as trustee of the licences for Korman) "as a fiduciary of QM", and/or by use of his office. The fact that Korman elected to choose not QM but Hudson personally to take the legal title to the licences may have been motivated by the fact that Hudson was managing director of QM but it did not involve Hudson in using his office for his personal profit nor create any situation or potential conflict of interest and duty. Neither Korman's abandonment of his proposals nor his release of the Korman and Stanhill beneficial interest in the licences was in any way aided by Hudson's office of managing director of QM which, in any event QM had on 1st March 1961 resolved to terminate as from 15th March 1961. Hudson's only fiduciary duty in respect of the licences once granted to him was to Korman and Stanhill.

p. 710 11.26-30
p. 700 11.4-12
p. 664 11.23-25
p. 710 11.17-23
Exhibit E8 Vol. VI p. 1373

24. Fourthly, in the light of the findings that Hudson had frequently asked if QM or the Stanhill Group was able to come into the Savage River project and that they had consistently told him they could not and that he had "no doubt that had there been any possibility of backing from QM or from any of the companies associated with it, Mr. Hudson would have welcomed this with open arms" and that "the only reason he did not make formal proposals to QM, Factors, A.O.E. or Kathleen Investments to promote the venture was that he knew that it would have been a complete waste of time, both because of the financial position of those companies and because of their general policy orientation" and that "Certainly, the directors of those companies knew that the opportunity was there but were not interested" and that "the general view was ... that he (Hudson) was made to go on with a venture which Rio Tinto had deliberately declined", it was erroneous for the learned judge to conclude that Hudson was accountable to QM for any profits made from the Savage River venture. Moreover, it was, it is submitted, erroneous in the light of the findings referred to in the next paragraph and of the finding that "given the economic circumstances" it "probably was most unlikely, that QM would have reversed its existing policy and decided to endeavour to exploit the exploration licences", to conclude that that was relevant because" the subsequent demonstration by the fiduciary that the principal would have been unwilling or unable to avail itself of the opportunity does not absolve him of his obligations to disclose" or to account.

p. 648 11.4-7
p. 652 11.15-19
p. 661 11.19-25
p. 661 l.25 to p. 662 l.4
p. 702 11.19-24
p. 718 11.9-13

cf. N.Z. Netherlands Society v. Kuys (1973) 2 All E.R. 1222 at 1225; Walden Properties Ltd. v. Beaver Properties Pty. Limited (1973) 2 N.S.W.R. 815 at 847 per Hutley J.A.; Peso Silver Mines v. Cropper (1966) 58 D.L.R. (2d) 1.

25. Fifthly, the learned judge, it is submitted, was wrong in regarding as irrelevant the facts that QM was a "one purpose" company bound by a formal agreement of its shareholders to confine its operations to specific uranium development (and mining of it only if contracts become available), and had effectively since October 1960 been "mothballed", that at least one of its shareholders (Factors) was unwilling to broaden that "one

p. 587 11.13-16
p. 586 11.18-29
p. 608 11.16-20
p. 589 11.26 to p. 590 l.6

purpose" and the dominant personality of the group of which Factors was part (Korman) had no intention or contemplation that QM should engage in the exploitation of the exploration licences, that Hudson's office of managing director terminated about the time when Korman abandoned his interest in favour of Hudson and before Hudson took any step towards exploitation of the licences on his own account and that the licences at that time involved only what could be seen as onerous expenditure of money and time. It is submitted that those facts were relevant to the question of what (if any) fiduciary obligation Hudson had in relation to QM when Korman released his and Stanhill's beneficial interest to Hudson and when Hudson appropriated that interest to himself as legal owner upon being approved by the Tasmanian authorities, as holder of the licences on that basis. The respondents contend that at neither time did Hudson have fiduciary obligations to QM in respect of the use of the Korman and Stanhill beneficial interest or of any of his subsequent activities in relation thereto. It is not by reason of the use of every opportunity which arises or piece of information which is obtained in the course of the exercise of a director's office or of a fiduciary's function that a liability to account arises: Aas v. Benham (1891) 2 Ch. 244; Dean v. McDowell (1878) 8 Ch. D. 245 at 354; Birtchnell v. Equity Trustees (1929-30) 42 C.L.R. 384.

p. 596 11.24-29

p. 710 11.17-22

p. 757 11.21-26

p. 630 1.22 to p. 631 1.8

The learned judge in these circumstances failed to consider the question "To whom (if anyone) relevantly was Hudson a fiduciary?" and "As such fiduciary what duties did he have?" It is submitted that precise analysis would have resulted in the conclusion that, in the circumstances, Hudson owed no relevant fiduciary duty to QM. The acquisition of the licences with the attendant financial obligations was removed from any existing or contemplated venture or undertaking of QM and, as well, clearly to everyone concerned, quite outside its existing or contemplated financial capacity: cf. Birtchnell v. Equity Trustees (supra); Peso Silver Mines v. Cropper (1966) 58 D.L.R. (2d) 1.

p. 661 11.19-25 Exhibit 16 Vol. V p. 1201

26. Sixthly, the evidence does not disclose any profit made or acquired by the first defendant by the use of a fiduciary position as a director of QM or otherwise. The evidence

does not disclose the acquisition of any property of or to which QM could have become entitled. It is not suggested by the evidence that any profit was acquired by the mere grant of the exploration licences. The Tasmanian Government clearly expressed its refusal to issue the exploration licences except to a licensee who would embark upon the investigation and establishment of an integrated iron and steel industry at obviously substantial expense. Stanhill gave such an undertaking. Such property as the exploration licences constituted was acquired for that purpose only. It is submitted that as a matter of law and as a matter of fact QM had no relevant interest of any kind in that proposal. QM's role had been purely negotiatory and depended entirely upon the initiative of Stanhill.

p. 709 11.22-29
p. 616 11.13-19
p. 626 11.32-41
p. 611 1.23 to p. 612 1.41
p. 618 11.20-34

27. Seventhly, Hudson's negotiating acts (as QM) prior to the grant of the licences were in aid of an undertaking or venture of Korman and Stanhill, not of QM. The learned judge founded his conclusion upon the principles formulated in Regal (Hastings) Limited v. Gulliver (1967) 2 A.C. 134. These principles are, it is submitted, based upon the avoidance of any possibility of conflict between the fiduciary's personal interest and his duty to the relevant plaintiff. See also Boardman v. Phipps (supra). The learned judge found that QM had "a commercial expectation" in relation to Korman's venture. To state generally that Hudson stood in a fiduciary relationship to QM does not enable the conclusion to be drawn that he is therefore liable to account in the circumstances disclosed by the evidence in this case. The nature of the fiduciary duty to QM depends upon its business and commercial interests. QM had no such relevant business or commercial interest which could place Hudson in a conflict situation. Hudson's fiduciary duty to the plaintiff is to be ascertained by reference to the interest of QM in the proposed iron and steel industry and could only have arisen or been realised by Stanhill's participation. It came to an end on the withdrawal of Stanhill and it follows in the respondents' submission that there could be no conflict in any relevant sense between the duty owed by Hudson to QM and Hudson's own personal interests because QM had no expectation of any offer of profitable participation through Korman thereafter.

p. 699 1.29 to p. 670 1.4
p. 707 11.19-24

28. Eighthly, upon the learned judge's findings, after Korman abandoned his proposals Hudson, prima facie, held the legal estate in the licences in which no-one claimed a beneficial interest. As the learned judge said Mr. Hudson could accordingly do with the licences as he wished. p. 665 ll.7-15 p. 665 ll.16-18

The Tasmanian Government could have revoked the licences but it did not. By virtue of the disclaimer and the consent of the Tasmanian Government to Hudson's proposal to press on with the project himself by attempting to interest other parties in it, Hudson acquired the licences in circumstances amounting to a re-grant of the licences to him free of any claim of actual or contemplated previous participants. The statutory nature of the licences and the conditions attached thereto and the grantor's right of revocation distinguished the licences from other pure prospector's interests. p. 665 ll.18-25

29. Ninthly, it is submitted that the learned judge erred in finding that according to English law it was in the present circumstances "enough that Mr. Hudson acquired by the licences by the use of his office as managing director" of QM. The respondents contend that upon the facts found by the learned judge there was no evidence or no sufficient evidence to enable the inference to be drawn that Hudson acquired the licences for himself by use of his office as managing director and certainly not by misuse. Rather, he acquired them by direction and at the behest of Korman. Nothing Hudson did in taking the grant or applying for it was done as managing director of QM. That office and QM were each irrelevant to the application for a grant of the legal title to the licences. Nothing that occurred in and about Hudson's appropriation of the beneficial interest in the licences involved the use of his office; indeed by that time he was no longer managing director. Moreover, the respondents contend that the learned judge erred in law in deciding that it was enough that Hudson acquired the licences by the use (in the circumstances found by him) of his office as managing director if as seems the case he meant thereby that by acting therein for QM, that company had aided its principal Korman to acquire the beneficial interest in the licences. p. 709 ll.8-10 p. 709 ll.8-10

30. The learned judge found that the relevant knowledge which QM might have had was of three descriptions and that that described in paragraphs (a) and (c) was in QM's possession and that of its directors at relevant times:-

(a) that Hudson had acquired the exploration licences as trustee for a company to be formed by Stanhill and Korman.

(b) that in the investigations and negotiations leading up to the application for these licences and the granting thereof use had been made of the name and prestige of QM, of the services of its managing director and of its funds.

(c) knowledge that Hudson was using the exploration licences as a basis for seeking financial support or otherwise working towards the establishment of some sort of iron and steel industry in which he would have a beneficial interest. p. 660 l.14 to p. 661 l.7

Wootten J. accepted that Hudson did not make formal proposals to QM, Factors, A.O.E. or Kathleen Investments to promote the venture only because to do so would have been a complete waste of time, and that the directors of those companies knew that the opportunity was there but were not interested. He found however, that the matters in paragraph (b) above were not shown to be known to QM. Nevertheless, they were known to Hudson and the learned judge found that it was reasonable to infer they were known to Korman, his son David, and to some extent to Redpath. He did not find that they were known to Gladstones and he found that there was no evidence of any sufficient disclosure at the meeting of the board of Queensland Mines held on 13th February 1962. p. 661 l.19-23 p. 661 l.25-27 p. 662 l.12 to p.663 l.10 p. 662 l.18-21 p. 662 l.21 to p. 663 l.10

31. The respondents, however, submit that in the light of the knowledge found to have been possessed by Korman, his son David, and Redpath and of the evidence referred to in paragraph 33 hereof the inference was irresistible and should have been drawn that p. 662 l.12-25

Gladstones possessed all relevant knowledge and that all directors heard Hudson's report to the meeting of QM directors on 13th February 1962 and that that meeting in good faith approved the retention by Hudson and the other respondents free of any benefit to QM of all interest in the exploration licences; consequentially the learned judge should have held that Hudson and the other respondents were not thereafter accountable to QM. From 17th April 1963 to 22nd May 1964 the directors of QM were Hudson, Korman and his son David who, knew all the facts described in paragraphs (a), (b) and (c). It is submitted that in the general circumstances found by the judge the irresistible inference was that, being fully informed, the only three directors of QM during that period consented to Hudson pursuing the venture exclusively for his own account free of any claim to benefit by QM. Moreover those facts were known to Korman and his son David at the time of the Factors board meeting of 4th October 1961, when David Korman and Redpath were the directors of QM with Hudson; at that time they were told by Korman senior that the licences had been obtained for and on behalf of QM. Such knowledge is equivalent or more than equivalent to knowledge of the facts set out in paragraph (b). Those three persons were directors of QM between 15th January 1959 and 13th February 1962.

Exhibit 73 Vol. IV p. 881
p. 660 l.14 to 661 l.12
p. 662 ll.12-21
Exhibit 73 Vol. IV p. 811
p. 644 ll.5-17
Exhibit 73 Vol. IV p. 811

32. The respondents further submit that the learned judge correctly held that Dubar Trading Pty. Limited (Dubar) had in 1962 passed any rights to whatever interest QM had in the Savage River leases or venture to Hudson or the respondent companies or alternatively, that Dubar effectively assigned those rights, (if any) to the corporate respondents by deed dated 15th October 1974. The respondents also submit that the learned judge correctly held that Hudson was not precluded from asserting the validity of the transaction of 20th March 1962 between Dubar and QM and that the assignment was not rendered ineffective by reason of lack of writing, in each case for the reasons expressed.

p. 718 l.21 to p. 719 l.10
p. 735 l.7 to p. 736 l.9
p.737 l.30 to p. 738 l.6

33. The respondents further submit that the learned judge should have drawn the inference

that Gladstones when purporting to sell for £2,500 the interest (if any) of QM to Dubar had actual authority so to do or, alternatively, had ostensible authority on which Dubar had relied and thereby acquired a good title by estoppel upon which the corporate respondents might now rely. Further, the respondents submit that the receipt by QM of the purchase money of £2,500 and its retention up to the time of hearing, in the circumstances, constituted ratification of the purported sale (if made without authority) or estopped the appellant from alleging it was made without authority. The learned judge found that the sale was negotiated by Gladstones, the chairman of Factors, and, after 13th February 1962, the chairman of QM. The QM board did not meet between 27th April 1961 and 13th February 1962 because QM had been "mothballed". Phillips signed at Gladstones' direction a letter in the following terms:- p. 720 11.20-26 p. 643 11.22-24 p. 609 11.9-14

20th March 1962.

The Secretary,
Dubar Trading Pty. Ltd.,
66 Clarence Street,
SYDNEY. N.S.W.

Dear Sir,

This is to acknowledge receipt of the sum of Two Thousand Five Hundred Pounds in full settlement of all interest of this company and of Factors Limited and the Stanhill Group, in Iron Ore Deposits in Tasmania known as Savage River and Bligh River.

Yours faithfully,
QUEENSLAND MINES LIMITED
((Sgd.) W.D. Phillips
W.D. Phillips
Secretary. p. 640 11.4-20

The fact of the receipt by QM of the purchase money of £2,500 and its purpose came to Hudson's knowledge shortly after 22nd March 1962. The receipt of the purchase money was shown in the company's books of account (inter alia) as "purchase of interest, if any, in Tasmanian Iron and Steel". One Barrell, an officer of Dubar (which had entered into an agreement with Hudson to finance some exploratory work (inter alia) on the Savage River p. 638 1.11 to p. 640 1.23 p. 643 11.4-8

area) in 1961 heard suggestions of possible claims to the area by the Stanhill Group. He met Korman and others and discussed that question; Korman spoke of Stanhill, Factors, QM and others but made no specific claim. He saw Gladstones who undertook to investigate the position. Finally, in 1962 a price of £2,500 was agreed between Gladstones and Barrell for "whatever the rights were". Gladstones died before the proceedings were heard. Some light was thrown upon the events by various documents including minutes of Factors amongst which was one of 4th October 1961, when Korman claimed that Hudson had obtained the relevant licences "for and on behalf of QM". The Factors minute of 6th December 1961, (so far as presently relevant) is as follows:-

p. 663 11.13-25
p. 640 11.24-30
p. 640 1.30 to p. 641 1.13
p. 641 11.22-27
p. 642 11.11-12
p. 644 11.5-14

"DIRECTORS PRESENT:

Mr. V.T. Gladstones (in the Chair) Messrs. S. Korman, C.R. Daley, I.K. Redpath, L. Korman, D. Korman, and J.C. Carrodus, Mr. E.E. Fookes and the Secretary were also in attendance.

Exhibit 10 Vol. VI p. 1527

'It was agreed that outstanding matters relating to Queensland Mines Limited be deferred until a report is received from that Company. It was suggested that it would be necessary to hold a Directors' Meeting of Queensland Mines Limited to discuss the following matters:

1. Agreement with Tasmanian Government relative to permits for development of the Iron and Steel Industry in Tasmania.'"

p. 644 11.29-37

The minutes of Factors of 10th January 1962 and 7th February 1962 disclose that it was actively seeking to arrange a meeting of the QM board to discuss matters which plainly concerned Korman's claim previously made in respect of the Savage River areas.

p. 645 11.4-15

On 13th February 1962 a meeting of Queensland Mines' board was held, the minutes of which disclose that Gladstones was elected to the board and to the office of Chairman and that Hudson "gave a lengthy report on the

negotiations that had taken place with the Tasmanian Government with regard to developing Iron Ore Deposits in Tasmania" and that "in view of all the explanations and the large amount of cash that would be required to finance the project" QM decided not to pursue "the matter any further". p. 645 11.16-35

Thereafter a Factors minute of 4th April 1962 recorded a report by the Chairman (Gladstones) that "on behalf of QM he had accepted £2,500 from Duval Holdings Ltd., as purchase of the interest of" QM in the Tasmanian iron ore deposits and a resolution to confirm that action. Redpath was a director of QM until 13th February 1962; p. 646 11.17-28 Hudson, Gladstones and David Korman (a son of Stanley Korman) were the directors of QM then present. The learned judge found that David Korman was closely associated with his father in the business activities and "would have known a great deal about the development of the Savage River project and would almost certainly have known of the approach of Dubar to his father". In those circumstances, it is submitted, that although the QM minutes do not refer expressly to the Dubar assignment the correct inference was that Gladstones was authorised to enter into the relevant agreement on behalf of QM with Dubar. A letter dated 26th March 1962 from Duval Holdings Pty. Limited, (a company associated with Dubar) to the Premier of Tasmania states that Gladstones was understood expressly to represent QM as well as the Stanhill Group and that the amount of the expenditure by relevant companies was made available by Gladstones, thereby indicating that Gladstones had access to the QM books of account; the purchase price of £2,500 was the equivalent of the expenditure shown by those books to have been made in respect of the Tasmanian iron and steel venture; it was, thus, erroneous to conclude that Barrell dealt with Gladstones merely on the "basis of a general belief that he was a person of importance in the Stanhill Group". p. 647 11.13-18 Exhibit 29 Vol. VI pp. 1560-1 p. 636 11.28-30 p. 725 11.8-10

If, however, the sale was unauthorised, it is submitted that the receipt and retention of the purchase moneys gave rise to an irresistible inference of ratification. QM must be taken to have known what was entered in its books apart from the fact that Phillips, p. 642 1.29 to p. 643 1.8

Exhibit E1 Vol. VI p. 1545

its Secretary, knew expressly of the purported transaction and of the receipt of the purchase moneys. So, too, did Gladstones, its Chairman, as did other directors as well; its accounting officers and auditors must have been aware of the receipt of the purchase money, the purpose for which it had been received, and the absence of any minuted authority. Thus the correct inference from the retention of the purchase money forever thereafter and the long period which elapsed without any disavowal of the transaction was in favour of ratification. City Bank of Sydney v. McLaughlin (1909) 9 C.L.R. 615, McLaughlin v. City Bank of Sydney (1912) 14 C.L.R. 684. It was erroneous for the learned judge to set aside the Secretary's and other accounting officers' knowledge of what was in QM's books because it was not "within the domain" of "anyone except the board of directors" to know of the sale of the company's asset. What was, it is submitted, within the ordinary domain of QM's Secretary and its accounting officers was the receipt shown by its books for a purported sale and the absence of minuted authority for that sale. Thus, it should have been inferred at least that those officers would have performed their duty of bringing the matter to the knowledge of the company's appropriate officers and, if it be necessary, to the knowledge of the board of directors.

p. 646 11.17-28

p. 728 1.41 to p. 729 1.5

34. The respondents further submit that the learned judge was in error in rejecting the defence of laches, acquiescence and delay. For the purposes of this defence it was, it is submitted, irrelevant to consider whether Hudson had disclosed all material facts to QM, the relevant question, by contrast, being whether QM had, and at what time, sufficient knowledge that it might have a claim against Hudson arising out of breach of duty by him in relation to the Savage River licences and that, upon the evidence and the learned judge's findings, the only and the correct inference was that, at least by April 1962 QM did have such knowledge and also acknowledge that Hudson denied any such claim. Moreover, QM being aware of the general nature of the exploration required and of the expenditure necessary in the development of a mining project, it is submitted that the only inference or the correct inference was that the directors of QM or most of them (Korman, his son David Korman and Redpath) had sufficient

p. 755 11.19-20

knowledge of all relevant facts (so far as it might be necessary for them to have such knowledge) to require the conclusion that the proceedings were not commenced within a reasonable time, and that the defence had been made out. It is further submitted that it was erroneous to consider the question whether the proceedings were commenced within a reasonable time after Hudson ceased "to hold a position of authority" in QM. The learned judge should, it is submitted, have held that the proceedings had not been prosecuted with requisite diligence, particularly since QM sought no interlocutory relief in consequence of which it might have been required to contribute to mining and development costs and/or conditionally bear and share developmental and exploratory risks pending final hearing of its claim: Lamshed v. Lamshed (1963-1964) 109 C.L.R. 440.

p. 755 l.25 to p. 756 l.4

The courts will refuse relief, it is submitted, on the ground of laches in any circumstances where by reason of the plaintiff's delay it would be unjust to grant the relief which it seeks; Lindsay Petroleum Co. v. Hurd (1874) L.R. 5 P.C. 221 at pp. 239-240 and Nwakobi v. Nzekwu (1964) 1 W.L.R. 1019 at p. 1025. The defence is made out if a defendant can establish that the plaintiff by its delay has either acquiesced in the conduct of the defendant or caused or permitted the defendant to alter its position in reliance upon the plaintiff's non-intervention or otherwise permitted a situation to arise which it would be unjust to disturb; acquiescence in the strict sense by the plaintiff is not required to be shown and laches and acquiescence should be considered separately: Nwakobi v. Nzekwu (1964) 1 W.L.R. 1019 at 1024; Lindsay Petroleum Co. v. Hurd (supra); Erlanger v. New Sombero Phosphate Co. (1878) 3 App. Cas. 1218 at 1279. Laches (in the second sense referred to) has particular relevance in hazardous or speculative ventures such as mining enterprises: Clegg v. Edmondson (1857) 8 De G.M. & G. 787; 44 E.R. 593, Clements v. Hall (1858) 2 De G. & J. 173; 44 E.R. 954; and Boyns v. Lackey (1958) S.R. (N.S.W.) 395. For the purpose of this defence, it is submitted it is sufficient for the plaintiff to have knowledge or means of knowledge of a claim against the defendant: Stafford v. Stafford (1857) 1 De G. & J. 193, 44 E.R. 697; Allcard v. Skinner (1887) 36 Ch.D. 145. In

the present case the respondents submit that the appellant, being aware of what Hudson was doing and that it might have a claim in respect of the Savage River and having made a deliberate decision not to enquire further into the nature of the claim (if it did not know all the material facts as the respondents submit that it did), had sufficient notice or knowledge to tip the balance of justice in favour of withholding the remedy from the plaintiff: Lindsay Petroleum Co. v. Hurd (supra); In re Bailey, Hay & Co. Ltd. (1971) 1 W.L.R. 1357 at p. 1368; Allcard v. Skinner (supra) at p. 188 and p. 192; Erlanger v. New Sombero Phosphate Co. (supra) at p. 1279.

Wherefore the respondents submit that this appeal should be dismissed for the following amongst other reasons:-

REASONS

1. BECAUSE the learned judge correctly held that the claim was barred by section 69 of the Trustee Act, 1925 (N.S.W.).

2. BECAUSE in the events which happened none of the respondents were constructive trustees of the exploration licences for QM.

3. BECAUSE in the events which happened none of the respondents held the exploration licences upon trust for QM but held them beneficially.

4. BECAUSE upon the withdrawal of Korman and Stanhill any commercial expectation or relevant interest of QM thereby terminated and there ceased to be any possibility of conflict between Hudson's personal interest and his duty to QM.

5. BECAUSE upon the withdrawal of Korman and Stanhill and by reason of the arrangements made between Hudson and the Tasmanian Government subsequent to that withdrawal there was a re-grant of the exploration licences to Hudson beneficially.

6. BECAUSE the evidence does not disclose any profit made or advantage gained by Hudson by the use of any relevant fiduciary position.

7. BECAUSE Hudson was not liable to account to QM for any profits nor were either of the other respondents.

8. BECAUSE even if the respondents or any of them held the exploration licences upon trust for QM any profit made or advantage gained in relation thereto was made with the knowledge and assent of QM.

9. BECAUSE even if QM had any interest in the subject matter of the suit that interest had been validly assigned to Dubar and/or thereafter to the respondents.

10. BECAUSE QM was precluded by its laches acquiescence and delay from obtaining the relief sought in the action.

11. BECAUSE the judgment of the learned judge was correct and ought not to be reversed.

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