Privy Council Appeal No. 28 of 1977

Queensland Mines Limited – – – – – *Appellant*

v.

Ernest Roy Hudson and Others – – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES EQUITY DIVISION

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH FEBRUARY 1978

Present at the Hearing:

VISCOUNT DILHORNE
LORD HAILSHAM OF SAINT MARYLEBONE
LORD SIMON OF GLAISDALE
LORD EDMUND-DAVIES
LORD SCARMAN

[*Delivered by* LORD SCARMAN]

In this action brought by Queensland Mines Ltd. against its former managing director, Mr. Hudson, and two of his companies, the basic issue arises upon the plaintiff company's allegation that Mr. Hudson abused his position as its managing director to make a profit for himself. Queensland Mines claims an account from him of the substantial profit which he has already made, and the even more substantial profits which he expects to make, from certain mining operations, the opportunity to engage in which Mr. Hudson obtained by reason of his position as its managing director. Mr. Hudson denies that he was acting in a fiduciary capacity when by his own prodigious efforts he succeeded in proving the existence of commercially valuable iron ore deposits in an area covered by a mining exploration licence which he admits was issued to him in his name at a time when he was the managing director of Queensland Mines. Wootten J., sitting in the Equity Division of the Supreme Court of New South Wales, resolved this issue in favour of Queensland Mines, but dismissed the action as statute-barred. The company now appeals, by leave of the Supreme Court, to Her Majesty in Council. It seeks to uphold the finding of the judge on the basic issue but to reverse his decision that the action is statute-barred. The defendants, Mr. Hudson and his two companies, while seeking to uphold the judgment below, challenge the finding that his profit arises from an abuse of his position as the plaintiff's managing director. Save for the limitation point,

Mr. Hudson is, in effect, the appellant. For this reason their Lordships at an early stage in the appeal invited counsel for Mr. Hudson (and the other two defendants) to develop his submissions on the issue as to breach of duty. After full argument from both sides their Lordships reached the conclusion that the learned trial judge was in error in holding that Mr. Hudson acted in breach of his duty to Queensland Mines, and that he and the other defendants were entitled to have the action against him dismissed on that ground. Their Lordships have not, therefore, considered the limitation point upon which the defendants succeeded at trial.

The difficulty of the case lies not in the formulation of the law but in the analysis of the facts. At the beginning of his judgment which was delivered on the 6th October 1976 and covers 178 pages of the Record, the learned judge commented that the facts " have proved to be complex and voluminous, and have been made more difficult to unravel by reason of the long lapse of time." The comment is fully justified. Though their Lordships have reached the conclusion that in certain critical respects the learned judge's analysis was at fault, error in a case as ancient and complex as this is understandable. Indeed their Lordships wish to pay their tribute to the care and attention which the learned judge bestowed on the case.

The law governing the liability to account of one who is in a special fiduciary relationship with another has been authoritatively declared by the House of Lords in *Phipps v. Boardman* [1967] 2 A.C. 46. Though their Lordships in that case differed in their analysis of the facts, they were agreed on the law. They accepted (see Lord Hodson at p. 106) that the general principle was as stated by Lord Cranworth L.C. in *Aberdeen Rly. Co. v. Blaikie Brothers (1854)* 1 Macq. 461 at p. 471 :—

> " And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

Lord Upjohn, who dissented on the facts but not on the law, commented upon this dictum that the phrase " possibly may conflict " required consideration. He said, p. 124 B-C :—

> " In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict."

All their Lordships recognised that a limit has to be set to the liability to account of one who is in a special relationship with another whose interests he is bound to protect. Lord Cohen, at p. 102 G, said :—

> " . . . it does not necessarily follow that because an agent acquired information and opportunity while acting in a fiduciary capacity he is accountable to his principals for any profit that comes his way as the result of the use he makes of that information and opportunity. His liability to account must depend on the facts of the case."

The limit was described in varying terms. Viscount Dilhorne, who (with Lord Upjohn) also dissented on the facts, emphasised the need to define the scope of the trust and the scope of the agency (p. 91). Lord Cohen, in the passage to which reference has already been made (p. 103),

said that liability to account must depend on the facts of the case. Lord Hodson put the limit in words, which the Board accepts as an authoritative formulation of a real limitation upon the liability:—

> "Nothing short of fully informed consent which the learned judge found not to have been obtained could enable the appellants in the position which they occupied having taken the opportunity provided by that position to make profit for themselves (p. 109 D)."

Lord Guest (p. 117 G) said:—

> "In the present case the knowledge and information obtained by Boardman was obtained in the course of the fiduciary position in which he had placed himself. The only defence available to a person in such a fiduciary position is that he made the profits with the knowledge and assent of the trustees. It is not contended that the trustees had such knowledge or gave such consent."

Lord Upjohn thought it necessary to examine the facts to determine whether a person in a fiduciary relationship with another had placed himself in a position where there was any possibility of a conflict between duty and interest (124B and 133B).

All their Lordships attached importance to the case of *Regal (Hastings) Ltd. v. Gulliver*, a decision of the House of Lords in 1942 but not reported until 1967, when it appears as a note to *Phipps v. Boardman* [1967] 2 A.C. 134. In the *Regal* case Lord Wright said that an agent, a director, a trustee or other person in an analogous fiduciary position cannot defeat a claim to account for profits acquired by reason of his fiduciary position upon any ground "save that he made profits with the knowledge and assent of the other person" (p. 154 B–C). In the course of the judgment under appeal, Wootten J. examined the case law in great detail and reached a conclusion from which their Lordships would in no way dissent. He said (p. 711 of the Record):—

> "That obligation [*i.e.* the duty owed by Mr. Hudson as managing director to Queensland Mines] 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."

In their Lordships' opinion, therefore, the facts have to be examined to determine whether Mr. Hudson acted in a way in which "there was a real sensible possibility of conflict" between his interest and the interest of Queensland Mines, and whether in exploiting for himself the opportunity provided by the mining exploration licence obtained by him while managing director he did so with the informed consent of Queensland Mines. The learned trial judge found against Mr. Hudson on both these questions. Their Lordships are very conscious of their duty to respect a trial judge's findings of fact. In particular, they accept the judge's finding that Mr. Hudson was an unsatisfactory witness. But, if upon an examination of events and documents, the existence of which is beyond dispute, it becomes clear that the learned trial judge drew the wrong conclusions, it is then the duty of their Lordships' Board to substitute their view of the facts for that of the trial judge. In the present case, after a full examination of the relevant facts—a task in which their Lordships have been greatly assisted by learned counsel—, their Lordships have reached the clear conclusion that in the circumstances there was after the 13th February 1962 no real, sensible possibility of a conflict of interest between Mr. Hudson and Queensland Mines, and

that Queensland Mines were fully informed as to the facts and assented to Mr. Hudson's exploitation of the mining exploration licence in his own name, for his own gain, and at his own risk and expense.

In 1958 Mr. Hudson was chairman and managing director of Australasian Oil Exploration Ltd. (" A.O.E."), a company almost wholly owned by Kathleen Investments Ltd., of which he was also managing director. A.O.E. had an option over an area in Queensland known as Anderson's Lode, which was known to contain uranium. A.O.E. lacked the finance to take up the option. Mr. Stanley Korman, who in 1958 was still a major figure in Australian business and financial circles, was eager to develop an interest in mining, and, more particularly, to develop a steel industry based on an iron ore mining enterprise. Mr. Hudson and Mr. Korman got together. They agreed to form Queensland Mines Ltd., for the purpose of exploiting the Anderson's Lode option with funds to be provided by Mr. Korman. A.O.E. was to have a 49% interest in the company and Factors Ltd. a 51% interest. Factors was a company controlled by Stanhill Consolidated Ltd., the principal holding company of Mr. Stanley Korman and his family. It was a term of the bargain between Mr. Hudson (acting on behalf of A.O.E.) and Mr. Korman that Queensland Mines should not be used for any business other than the exploitation of uranium. Queensland Mines Ltd. was incorporated on the 19th January 1959 and, at the first meeting of directors, which took place on the 24th January, Mr. Hudson was appointed managing director for a period of six months.

It is convenient at this stage to note that Mr. Hudson was re-appointed managing director on the 1st July 1959, and continued in that office until the 15th March 1961. Thereafter he continued as a director until December 1971.

Finance was duly provided for Queensland Mines by Factors. A decision was taken to extend Queensland Mines' activities to another uranium mining enterprise, known as " the Skal lease ". It is, however, certain that, notwithstanding their agreement to the contrary, Mr. Korman and Mr. Hudson were prepared to use, and did use, Queensland Mines to further, at least in its early stages, Mr. Korman's ambition to develop his interest in mining iron ore and establishing a steel industry. This project was the subject of intense discussion between Mr. Korman and Mr. Hudson in 1959 and 1960. They were advised that an opportunity might exist in New Zealand. Mr. Hudson made a number of visits—expenses paid for by Queensland Mines—to New Zealand but ultimately (May 1960) the idea had to be abandoned.

By the summer of 1960 Queensland Mines had completed drilling at Anderson's Lode and in the area of the Skal lease. The company could do no more until somebody was found ready to take up a mining lease to exploit the uranium. No one was immediately forthcoming, and a decision was reached by Mr. Korman, Mr. Hudson and the other directors to " mothball " Queensland Mines—by which they meant to keep the company in being, but inactive until such time as somebody evinced an interest in Anderson's Lode or the Skal lease.

Mr. Hudson and Mr. Korman, disappointed by their New Zealand lack of success, now turned their attention to Australian possibilities of iron ore mining. On the 16th August 1960 Mr. Hudson wrote to the Director of Mines in Tasmania: and in September he went to Hobart to discuss the possibility of proving iron ore in commercially valuable deposits in the area of the Savage River. Mr. Korman was very interested.

In November (or thereabouts, for the exact date is not certain), Mr. Korman and Mr. Hudson met the Premier of Tasmania and his advisers. The proposal on the table was the issue by the Tasmanian Government of a mining exploration licence for iron ore in the Savage River district. There was, however, a difficulty. The Tasmanian Government felt under an obligation (arising from past services) to give the Australian Rio Tinto company first opportunity to proceed with the Savage River project, if it so desired. Accordingly, the Rio Tinto company was given until the 21st December 1960 to make a decision.

Towards the end of 1960 Mr. Stanley Korman's group of companies was beginning to suffer from "cash flow" difficulties. Mr. Korman was becoming acutely aware that he would have great difficulty in finding the capital to finance the exploitation of an iron ore exploration licence, let alone the development of a steel industry. Nevertheless he had not yet abandoned hope. When Rio Tinto made it known, as they did in early January 1961, that they were not interested, Mr. Hudson and Mr. Korman busied themselves in the preparation of an application for a licence to explore iron ore deposits in the Savage River district. Mr. Hudson went to Hobart, where he was told that the Government would make a decision on the 23rd January whether to entertain a licence application by him. He was advised to apply for two licences—to cover coal as well as iron ore. The application was signed in Mr. Hudson's name on the 31st January, and taken by him to Hobart in February.

At this stage Mr. Hudson and Mr. Korman had in mind to form a new company to exploit any licence obtained. Nevertheless they found it convenient to use Queensland Mines for the time being. That company (no doubt out of funds provided by the Factors loan) paid Mr. Hudson's expenses. The Tasmanian Government were informed that Queensland Mines had prospected widely and had amassed very considerable knowledge and expertise. Further, when it became necessary that the cost of drilling a specific hole at Savage River should be met, an indemnity for the small sum needed was offered by Queensland Mines and accepted by the Government. The trial judge's finding that in these negotiations Mr. Hudson was using the resources and good name of Queensland Mines to secure the licences is clearly correct.

In February 1961 Mr. Korman's affairs went into crisis. He told Mr. Hudson of his difficulties on the 19th. On the 23rd the Tasmanian Government issued to Mr. Hudson in his name two mining exploration licences, EL4/61 (iron ore) and EL5/61 (coal). On the 8th March 1961 Mr. Korman told Mr. Hudson that there was no possibility of his proceeding with the licences; he had not the capital resources to do so.

Mr. Hudson was now in a position of the utmost difficulty. Queensland Mines had been formed as a means for channelling Korman funds into the uranium options held by A.O.E. Nevertheless he and Mr. Korman had used the company to advance their negotiations for an iron ore licence. The venture in iron ore, like that in uranium, was upon the assumption that Korman funds would be available. Such funds might, or might not, be channelled through Queensland Mines. Now that Korman funds were not to be available, Mr. Hudson was confronted with immense obligations owed by him personally under the licences to the Tasmanian Government and no resources with which to meet them. A.O.E. had combined with Factors to form Queensland Mines because they needed finance for uranium development. It was not suggested in evidence that A.O.E., or Queensland, had, without the Korman provision, funds to develop the iron ore project. That source of finance having

dried up, Mr. Hudson was left with nothing save only his personal resources and a company which it had already been decided to " mothball ".

Mr. Hudson responded to the situation with energy, and also with openness. Nothing was now, or hereafter, concealed. Mr. Hudson never sought to hide anything that he did. On the 15th March he resigned as managing director of Queensland Mines—no doubt so that he could devote all his energy to the iron ore venture. His cliff-hanging but ultimately successful endeavour to exploit the iron ore licence was widely known and followed in Australian mining circles and in the press. On the 21st March he told the Tasmanian Director of Mines that Mr. Korman had withdrawn. He also told him that he, Mr. Hudson, intended to honour his own obligations and to seek finance to enable him to do so. On the 30th May he was able to inform the Tasmanian Government that he had formed a company (the second defendant) which was to be " capitalised by myself and which will bear all expenses up to the date of the formation " of a public company. Certainly, Mr. Hudson conducted correspondence with overseas interests and others under the name of Queensland Mines until the 1st May 1961, but not thereafter. From that date until success ultimately crowned his efforts he was on his own, running all the risks and meeting all the expense. In June 1963 he succeeded in interesting an American company. By this time he had proved the existence of valuable deposits. In 1964 application was made for a mining lease of part of the land covered by the exploration licence (EL4/61). On the 3rd June 1966 a mining lease of this land was granted to subsidiaries of the American company. Mr. Hudson's reward was a right under his contract with the American company to royalties upon the ore mined.

Their Lordships agree with the learned trial judge's conclusion that the opportunity to earn these royalties arose initially from the use made by Mr. Hudson of his position as managing director of Queensland Mines. He must, therefore, account to that company unless he can show that, fully informed as to the circumstances, Queensland Mines renounced its interest and assented to Mr. Hudson " going it alone " *i.e.* at his own risk and expense and for his own benefit.

Their Lordships have reached the conclusion that by February 1962 at the latest, and possibly much earlier, the board of Queensland Mines, fully informed as to all relevant facts, had reached a firm decision to renounce all interest in the exploitation of the licence and had assented to Mr. Hudson taking over the venture for his own account. The learned trial judge, however, has found that Mr. Hudson deliberately refrained from revealing to Queensland Mines the fact of its interest in the licence. He said that: —

> " in my view, Mr. Hudson has not established any informed consent to his appropriation of the opportunity on the part of Queensland Mines, whether by directors, general meeting or shareholders, or any rejection of the opportunity which was not tainted by Mr. Hudson's non-disclosure to the company of relevant facts."

The basis of the finding appears to be the lack of evidence that Mr. Hudson ever informed Kathleen Investments Ltd. or its subsidiary, A.O.E., that through his activities as managing director Queensland Mines had an interest in the licence.

The judge's finding that Queensland Mines was not informed as to the existence of its interest in the licence, in their Lordships' opinion,

cannot stand. The board of Queensland Mines knew of the company's interest at all times. From 1959 until 1962 the directors were Mr. Redpath (Chairman), Mr. Hudson, and the son of Mr. Stanley Korman, Mr. David Korman, who kept him closely informed as to all his business activities. On the 13th February 1962 Mr. Redpath resigned, and was succeeded by Mr. Gladstones. Both these gentlemen were directors of Factors and knew all there was to know about the negotiations. Mr. Redpath, a witness whom the judge believed, gave in evidence a vivid account of a discussion between him (chairman of Queensland Mines, it is to be remembered), Mr. S. Korman, and Mr. Hudson, which he placed after the issue of the licence and at the time Mr. Korman was informing his co-adventurers that he must withdraw,—*i.e.* late February or early March 1961. Mr. Redpath recollected that " we [a term which must have included Queensland Mines of which he was chairman] were unable to conform to the requirements of the licence " and that Mr. Hudson said that " he would have to do whatever he possibly could to keep faith with the arrangements he had made with the Tasmanian Government, even if it meant bringing in other people to do the work, to carry it out."

Mr. Hudson (as the judge has expressly found) then added a very important comment, that " he was personally involved in the negotiations ". Mr. Redpath was asked whether he made any reply to Mr. Hudson's statement and his answer was: " Only to agree with him."

This conversation took place some 7 or 8 months after the board of Queensland Mines, in agreement with Mr. S. Korman, had decided to " mothball " the company. The course of events, so far as Queensland Mines is concerned, can be traced from a number of company records which survived to be produced at the trial. On the 4th October 1961 the Factors board met, Mr. Gladstones, Mr. Redpath, Mr. Stanley Korman and Mr. David Korman present. It was minuted that the Tasmanian licences " were obtained for and on behalf of Queensland Mines Ltd." On the 1st November the Factors board met again, Mr. Stanley Korman being absent abroad. They had before them a report on a discussion with the Premier of Tasmania, and it was agreed that a number of outstanding matters, including that of the Tasmanian licences, should be referred to a Queensland Mines board meeting. On the 6th December the Factors board met again. The minute records the recognition by those present that it would be necessary to hold a directors' meeting of Queensland Mines to discuss, among other matters, the " permits for development of the iron and steel industry in Tasmania ". Queensland Mines was, of course, inactive—and had been so since the summer of 1960. Its board met on the 13th February 1962. Mr. Redpath resigned from the board, his place being taken by Mr. Gladstones. Both these gentlemen were directors of Factors and present at the board meetings to which reference has been made. Both of them were in close touch with Mr. Hudson: and Mr. Redpath had taken part in the critical conversation with him and Mr. S. Korman in February 1961. The minute of the meeting of the 13th February 1962 records a number of " mothballing " decisions—selling off unwanted pieces of property, tidying up loose ends, and so forth. For instance, it was resolved to accept an A.O.E. offer of £2,000 for " the purchase of the interest, if any, that Queensland Mines Ltd. might have in Blue Metal Projects at Southport and Moggill ". When the meeting reached the matter of the " Tasmanian Iron Ore ",

> " Mr. 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.

> There was no question of any Promoters Profits in the plan which envisaged the forming of a Company to develop the area.
>
> It was agreed that in view of all the explanations and the large amount of cash that would be required to finance the project, nothing could be gained by pursuing the matter any further."

Mr. Gladstones signed these minutes as " read and confirmed " on the 6th June 1962.

Putting entirely aside the oral evidence of Mr. Hudson, their Lordships can put only one construction upon the events following upon the withdrawal of Mr. S. Korman in February 1961 and culminating in the Queensland Mines board meeting of the 13th February 1962. The board of the company knew the facts, decided to renounce the company's interest, whatever it was, in the Tasmanian iron ore venture, and assented to Mr. Hudson doing what he could with the licences at his own risk and for his own benefit. The position after the 13th February can be put in either of two ways. It can be said that from that date the venture based on the licences was " outside the scope of the trust and outside the scope of the agency " created by the relationship of director and company,—a relationship which continued to exist between Mr. Hudson and Queensland Mines. Or it can be said that on that date Queensland Mines gave their fully informed consent to pursue the matter no further and to leave Mr. Hudson to do what he wished or could with the licences. In their Lordships' opinion it does not matter how it is put. Liability to account must, as Lord Cohen said in *Phipps v. Boardman (supra)* at p. 103, " depend on the facts of the case ". And the facts of this case are that with the fully informed consent of the Queensland Mines board Mr. Hudson was left on his own, for better or for worse, with the Tasmanian licences—certainly from the 13th February, but in truth from a much earlier date, *i.e.* ever since Mr. Redpath, chairman of the company, Mr. S. Korman and Mr. Hudson had discussed the consequences of the Korman withdrawal.

This being the conclusion of their Lordships' Board, it is unnecessary to consider the march of events after February 1962. It is to be noted, however, that on the 7th March 1962 the Factors board (Mr. Gladstones in the chair) noted that Mr. Gladstones was now the chairman of Queensland Mines and that " the company was working on a very limited budget, and Mr. Hudson was endeavouring to dispose of the assets." There was, however, a strange incident in March, which in their Lordships' opinion supports the view that by February 1962 the board of Queensland Mines had firmly decided that they were no longer interested in the Savage River iron ore licences. In his search for finance Mr. Hudson had entered into negotiation with Dubar Trading Pty. Ltd. Dubar, like many others, was well aware of the history of the matter, and sought from Queensland Mines an assurance that they were no longer interested. Dubar obtained a release of the interests (if any) of Queensland Mines and the Stanhill group of companies in the Savage River licence by a payment to Queensland Mines of £2,500. By letter addressed to Dubar and dated the 20th March 1962 the Secretary of Queensland Mines acknowledged

> " receipt of the sum of £2,500 in full settlement of all interest of this company and of Factors Ltd. and the Stanhill Group in iron ore deposits in Tasmania known as Savage River and Bligh River."

The learned trial judge noted that this transaction came as a complete surprise to Mr. Hudson. Indeed, he knew nothing of it until Dubar told him in a letter dated the 22nd March. It was, however, well known

to the chairman of Queensland Mines, who had negotiated it. Indeed on the 4th April 1962 he reported it to the Factors board. Whether or not the trial judge was correct (which their Lordships greatly doubt) in taking the view that this transaction was not binding upon Queensland Mines, their Lordships see in it a clear confirmation that Queensland Mines, Factors and Stanhill were by March 1962 no longer interested in the Savage River licences. The boards of these companies had escaped, to their own great relief, from the Tasmanian venture and were only too pleased to pick up a small sum (as also they had done from A.O.E. in the matter of the Blue Metal Project) from an interested party who required assurance that there would be no title difficulties if he participated in the venture.

The judge appears to have thought significant the absence of evidence that A.O.E. or Kathleen Investments were kept in the picture. This could be relevant only if the matter of the licences could be said in the circumstances to fall outside the scope of the authority of the board. There is no indication that it did, and every indication that all concerned treated it as a board matter. The shareholders were Factors and A.O.E., both of whom were represented on the board. It is inconceivable that A.O.E. was not aware of Queensland Mines' early interest in the venture and of the manner and circumstances of the company's escape after the Korman collapse.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The plaintiffs must pay the costs here and below.

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DELIVERED BY
LORD SCARMAN

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