1957
*Oct. 17, 18, 21
1958
Feb. 11

MIDCON OIL & GAS LIMITED (*Plaintiff*) APPELLANT;

AND

NEW BRITISH DOMINION OIL COMPANY LIMITED AND THOMAS L. BROOK (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Trusts and trustees—Constructive trust—Principal and agent—Whether agent has made profit resulting from relationship.

Agency—Whether relationship exists—Profit made by agent arising from relationship—Whether principal entitled to share in profit.

M. Co. and N.B. Co. entered into an agreement for the development of petroleum and allied rights beneficially owned by N.B. Co. The agreement provided that if oil or gas was found N.B. Co. should have the right to act as "operator". Natural gas in large quantities was found and N.B. Co. elected to exercise its right to act as operator.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

In order to obtain a market for the natural gas found, N.B. Co., with other interests, caused to be incorporated a new company for the manufacture of chemical fertilizers. A large block of shares in this company was issued to N.B. Co. and the company, having built its plant, entered into a contract to buy a large part of the output of the field to which the agreement with M. Co. related. N.B. Co. and M. Co. together caused to be incorporated another company for the construction of a pipe-line for the conveyance of the gas from the field to the chemical company's plant and to the city of Medicine Hat, which had also agreed to buy part of the gas.

M. Co. claimed that it was entitled, on payment of its share of the cost, to one-half of the shares in the chemical company issued to N.B. Co.

Held (Rand and Cartwright JJ. dissenting): M. Co. could not succeed. The agreement expressly provided that it should not create any agency or partnership between the parties and nothing that was done pursuant to the agreement gave rise to any fiduciary relationship that would require N.B. Co. to account to M. Co. for the profit made by it from the shares of the chemical company. Its only duty was to act in good faith towards M. Co. in the negotiations for and in the sale of the gas developed from the field. *Keech v. Sandford* (1726), Sel. Cas. Ch. 61; *Ex parte James* (1803), 8 Ves. 337, distinguished.

Even if there was some fiduciary relationship in other respects, the trial judge had expressly accepted evidence that N.B. Co. obtained its shares in the chemical company simply because it was the primary promoter of that company and not by reason of the existence of the field or of the fact that it was the operator under the provisions of the agreement.

Per Rand and Cartwright JJ., *dissenting*: It was the making of the agreement between the two companies and the development of gas under that agreement that made it possible for N.B. Co. to seek a means of profiting from the sale of the gas. Without the interest in the gas, there would have been no opening for the production of fertilizer. In these circumstances, it must be held that N.B. Co. participated in the promotion of the chemical company in its capacity as operator under the agreement, and that it must therefore account to M. Co. for its resulting profit.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Primrose J.[2] Appeal dismissed, Rand and Cartwright JJ. dissenting.

W. B. Williston, Q.C., and *H. C. Kerr*, for the appellant.

R. A. MacKimmie, Q.C., for the respondents.

[1] (1957), 21 W.W.R. 229, 8 D.L.R. (2d) 369.

[2] (1956), 19 W.W.R. 317.

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

The judgment of Kerwin C.J. and Taschereau and Locke JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] dismissing the appeal of the present appellant, the plaintiff in the action, from a judgment of Primrose J.[2] which dismissed the action.

The facts disclosed by the evidence are as follows: On May 22, 1950, the Department of Mines and Minerals of the Province of Alberta, by a document referred to as a "reservation of petroleum and natural gas rights", granted to British Dominion Drilling Company Limited the right, *inter alia*, to drill wells, subject to the provisions of *The Mines and Minerals Act* of the Province, now R.S.A. 1955, c. 204, and to the regulations respecting drilling and production operations of oil and natural gas wells in defined areas, of land situate in township 6, range 7; township 6, range 8; township 6, range 9, and township 7, range 9, all west of the fourth meridian. Such reservation was accepted and its terms were agreed to by the drilling company. By an instrument in writing dated July 31, 1950, British Dominion Drilling Company Limited acknowledged that it held the said reservation in trust for the respondent company and agreed to deal with it in such manner as might be directed by the latter company and to perform certain services as trustee, at its expense.

On March 1, 1951, the appellant and the respondent company entered into the agreement upon which the present action was brought. In view of the nature of the appellant's claim, it is necessary to examine its terms in detail. For the sake of brevity the parties were referred to as "Mid Continent"* and "New British", respectively. After reciting the reservation granted as aforesaid to British Dominion Drilling Company Limited and that it was held by that company upon terms that it would hold any and all leases from time to time issued pursuant thereto in trust for the respondent company, the agreement

[1] (1957), 21 W.W.R. 229, 8 D.L.R. (2d) 369.

[2] (1956), 19 W.W.R. 317.

*The name of the appellant company at the time of this agreement was "Mid Continent Oil & Gas Limited".—ED.

stated that the appellant

> desires to join with New British in the exploration of the Area of Joint Operations for petroleum and natural gas and related hydrocarbons, and in the event the same are discovered, to join in the development and production of any or all of said substances

upon the terms thereinafter defined. After defining the "area of joint operations" by reference to an attached map, the agreement provided that the appellant should drill or cause to be drilled at its expense one test well in lsd. 4, section 25, township 6, range 8, such well to be drilled to "contract depth" as defined, provided that if a show of oil or gas should be encountered at a lesser depth the drilling might, by mutual consent, be discontinued and the well completed at a lesser depth as agreed upon. In such event, all well-sinking costs and production-completion costs were to be borne in equal proportions by the parties and the appellant was required forthwith to commence the drilling of another well to contract depth.

The appellant further agreed to enter into a contract for the drilling of the test well with a responsible drilling contractor and to assume all responsibility for providing, as required, drilling equipment and drilling casing, and the respondent agreed to act as the "operating party", as thereinafter defined, during the drilling of the test well at an agreed fee for supervision and management. Upon completion of the test well, the respondent was obligated to cause to be assigned to the appellant an undivided half interest of the rights of New British in the reservation. A further term required both parties, in the event of their acquiring any further petroleum and natural gas rights in any lands within the area of joint operations in which the other party had not an interest, to offer to the other an undivided half interest upon payment of one-half the cost of acquisition.

It was further provided that after the completion of the test well the respondent company should have the right to act as operator and to continue as such from year to year until it should give the appellant 30 days' notice of its desire to relinquish such right. Upon failure of the respondent company to take over such duties or upon its relinquishing the same, the appellant was required to act

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Locke J.

as operator. After such completion, all development, production and operation costs, except as otherwise provided, were to be borne in equal proportions by the parties.

The duties of the operator were detailed at length in paras. 8 and 15 of the agreement. Of the many provisions dealing with the matter, the following, contained in para. 15, require consideration: subpara. (a) declared that the operator, though one of the parties to the agreement, should be deemed to act as an independent contractor and that all claims and liabilities arising out of the operations should be a joint responsibility of the parties unless otherwise expressly provided for: subpara. (b) provided that, subject to the approval of the other party with respect to the location and drilling of wells, the operator should have full charge and control of all leases and reservations and other petroleum and natural gas rights but should confer with the representative of the other party in all matters pertaining to the drilling of new wells, the depth to which they were to be dug, the abandonment of any such wells, and any other matters of "capital or serious consequence affecting the rights of the respective parties therein". By subpara. (g) the operator was required to keep at its offices in Calgary full and accurate records of its operations under the agreement and, by subpara. (h), to render to the other party a statement showing details of the expenditures made on behalf of the parties.

Paragraph 16 reads:

> On or before the twentieth (20th) day of each month Operator shall render to the Non-operator a full and complete accounting of all oil, gas, gasoline and other related hydrocarbons produced and saved during the preceding month after deducting royalties and oil and gas consumed in operations hereunder, and expenses. Non-operator hereto shall not be entitled to take in kind its share of production or make arrangements for the share of production or make arrangements for the disposal thereof.

Paragraph 20 declared that no agency or partnership relationship was created by or between the parties by the execution of the agreement or by its provisions.

By para. 21 it was declared that the term of the agreement should be from its date until entire abandonment by mutual consent or until one of the parties should wholly withdraw in the manner provided, or so long as commercial production of oil or gas was being obtained.

A schedule to the agreement, referred to as "Accounting Procedure", defined in precise detail the purposes for which expenditures might be made by the operator for the development and operation of the enterprise. The word "operator", as used in the schedule, was described as meaning the party designated to conduct the development and operation of the leased premises for the joint account. The expenditures authorized relate entirely to such as would be incurred for drilling and operating oil or gas wells in the area of joint operations and it contains no reference to outside operations looking to the sale of such oil or gas, if discovered.

As a result of the operations carried on by the parties under this agreement, natural gas in large quantities was found in the area of the joint operations and five wells were drilled. The evidence does not indicate that any oil or other mineral substance was recovered during the drilling of these wells or that any gas was sold until the contracts hereinafter mentioned were entered into. The field is situated some 45 miles southwest of Medicine Hat and became known as the Etzikom field.

While doubt upon the matter seems to have arisen at a later date, it was apparently assumed by the respondent that, as the operator under the agreement, it had power to sell the gas produced from the field upon terms to be agreed upon with the appellant.

The respondent Brook was at all relevant times the president of the respondent company, and the only evidence tendered on behalf of the appellant consisted of the documents and the admissions made by him upon an examination for discovery. According to Brook, he understood that under the agreement it was the duty of his company to endeavour to find a market for the gas. It was, of course, manifestly in his company's interest to do so. There was no market in the vicinity and he was unable to arrange for the sale of the gas to companies exporting gas to the United States or to the Canadian Western Natural Gas Company or Trans Canada Pipe Line Company Ltd. at a price which would be profitable. As a map of the oil and gas fields of Alberta filed in evidence shows, there were at the relevant times and now are many gas fields capable of large production in the Province of

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Locke J.

Alberta. The appellant did not call any evidence that suggests, and it is not suggested, that there was at the time in question or thereafter any profitable outlet for the large reserves of gas discovered in the Etzikom field, and the only offer received for the purchase of the rights of the parties in the leases obtained was in an insignificant amount. In these circumstances, Brook, in his own words, which were made part of the plaintiff's case, "promoted a chemical plant" which has since been established at Medicine Hat, thus creating a market for almost half of the estimated reserves of gas in the Etzikom field, and also enabling the negotiation of a profitable contract for the sale of gas to the City of Medicine Hat.

It appears that in January 1954 an officer of the Consolidated Mining and Smelting Co. Ltd., which manufactures nitrogenous fertilizer in Calgary and elsewhere, suggested to Brook that a fertilizer plant might be located in the southern part of the Province more readily available to the prairie markets and the northern and north-western markets in the United States. For the manufacture of ammonium nitrate and ammonium phosphate which was contemplated, and of anhydrous ammonia, a basic ingredient of these fertilizers, and the production of nitric and sulphuric acid, phosphate rock, sulphur and natural gas were required in large quantities. Phosphate rock was readily available from Idaho and sulphur from gas fields not far distant producing sour gas. The Etzikom field, as well as other fields closer to Medicine Hat, offered a supply of the required natural gas. Brook, apparently without reference to the appellant company, through Frank McMahon of Calgary was introduced to an engineering firm in New York, Ford, Bacon, Davis Inc., by whom he was brought into contact with an American company, Commercial Solvents Corporation, engaged in the production of fertilizer and other chemicals in the United States. In the result, in association with these parties and with a firm of American underwriters, Northwest Nitro-Chemicals Ltd. was incorporated under the provisions of *The Companies Act,* now R.S.A. 1955, c. 53, with the necessary powers for the establishment of a fertilizer plant upon a site to be purchased in Medicine Hat.

The company was incorporated with an authorized capital of 5,000,000 common shares of the par value of 1 c. and 10,000 preferred shares of the par value of $100. As the prospectus filed with the Registrar of Companies for the Province shows, very large sums of money were required for the acquisition of a site and the construction of the chemical plant at Medicine Hat. Part of the required capital was provided by the purchase by Commercial Solvents Corporation and the respondent company of preferred shares, the respondent company purchasing 3,330 of such shares at par. Of the common shares, 2,600,000 were allotted at par to Commercial Solvents Corporation, the underwriters Eastman, Dillon and Company, Ford, Bacon & Davis Inc., the respondent company and Frank McMahon who had taken part in the promotion of the company. Of these shares, the respondent company purchased 749,998.

The underwriters, following the filing of the prospectus, offered to the public $8,500,000 of debentures and 850,000 shares of common stock of the chemical company, and the company agreed to sell to a Canadian bank bonds of a par value of $12,000,000 secured by a first mortgage on the undertaking. With the funds so subscribed by the respondent company and others and the moneys raised in this manner, the chemical plant was established at Medicine Hat. It is apparent that, at the time of the public issue in August 1955, the prospects of the company were favourably regarded as the common shares were selling at an amount in excess of $1.50 and, at the time of the trial, were quoted on the market at a higher figure.

According to Brook, in order to justify the building of a gas pipe-line to convey the gas to the chemical company's plant, it was necessary to procure some other outlet for part of the available supply in the Etzikom field. There were other available gas-fields closer to Medicine Hat than the Etzikom field, and those promoting the Northwest Chemical company were approached by those controlling one of these fields with offers. Brook, both in the interest of his own company and of the plaintiff, wished to obtain a firm contract from the Northwest company and was able to do so at a price satisfactory to the plaintiff and to the respondent company, conditional upon the construction

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Locke J.

of the necessary pipe-line. After lengthy negotiations, he was successful in negotiating a contract for the sale of part of the gas from the Etzikom field to the City of Medicine Hat. With two contracts calling for the delivery of gas over a long period of years thus secured, the respondent company caused to be incorporated South Alberta Pipe Lines Ltd. under *The Companies Act of Alberta,* the shares of this company being subscribed equally by the plaintiff and the respondent company and, following this, the respondent company, with the approval and consent of the plaintiff, entered into an agreement with the South Alberta company defining the terms upon which it would transport natural gas from the Etzikom field to the premises of the chemical company at Medicine Hat and to the city. It is the only possible inference to be drawn from the evidence that it was due to the efforts of Brook and the fact that he was one of the promoters and his company a large shareholder of the chemical company that these contracts for the sale of the gas were obtained.

It is the case for the appellant that in selling or endeavouring to sell natural gas from the Etzikom field the respondent company stood in a fiduciary relationship to the appellant and that, as the control of the sale of the gas enabled the respondent company to obtain its share interest in the chemical company, that interest is held on behalf of the two contracting parties and, accordingly, on payment of one-half the cost of the purchase of the common and preferred shares, the appellant is entitled to a conveyance of one-half of the number subscribed for and allotted to the respondent company. As the statement of claim puts it,

> the corporate Defendant has gained advantage by availing itself of its character and position as operator and that the advantage gained is held by the corporate Defendant in part at least for the benefit of the Plaintiff.

While the provisions of the agreement are most explicit in defining the duties of the operator, they are not clear as to what they were in regard to the disposing of any oil or gas discovered. The position of the parties, following the discovery of natural gas in quantities, appears to be that of tenants in common of the leases obtained from the Province and of the minerals, including natural gas in and under the lands so leased. There is no fiduciary relationship

between tenants in common of real estate as such, a question which must be taken as settled by the judgment of the House of Lords in *Kennedy v. De Trafford et al.*[1] If, therefore, a fiduciary relationship existed between these parties, it resulted either from the terms of the agreement, or from what was done pursuant to its terms.

While para. 11 provides that after the completion of the test well the respondent company should have the right thereafter to act as operator, that clause by its concluding sentence refers to an operating program for the further exploration and development of the area of joint operations. Paragraph 15(b), however, declares that the operator shall have full charge and control of, *inter alia,* all leases and other petroleum and natural gas rights and para. 16 requires the operator to render an account of all gas produced and saved. Whatever meaning is to be attributed to the word "saved", this, at least, indicates that the respondent company was required to deal with the oil or gas produced for the joint account, and the reference in sched. B, defining the accountancy procedure, to the operator as the person designated to conduct the development and *operation* of the leased premises appears to me sufficient to cast upon the operator the duty of attempting to sell or otherwise turn to account any minerals discovered.

If this gave a right to sell the minerals, that right was not one which could be exercised by the operator otherwise than with the consent of the other party by reason of the further provisions of para. 15(b), which required it to confer with the designated representative of the other party regarding "any matters of capital or serious consequence affecting the rights of the respective parties therein", as to which agreement of both parties was required. It is also of importance to note, as declared by para 20, that the parties in terms provided that the relationship existing between them in carrying out the terms of the agreement was neither partnership nor that of principal and agent. Subparagraph (a), declaring that the operator was deemed to act as an independent contractor in discharging its duties, may have been intended to refer to the duties of superintending the drilling operations, purchasing equipment and discharging the obligations defined in such detail

[1] [1897] A.C. 180.

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Locke J.

other than the sale of any minerals discovered. If intended to extend to the last-named duty, it would appear to merely accentuate the fact that the parties did not intend that the operator was to act *qua* agent.

As the evidence shows, Brook understood the agreement to give to his company the right to negotiate for the sale of the gas in the Etzikom field. Obediently to its terms, he advised the appellant company of the endeavours made and of their failure. The appellant apparently had no suggestions to make as to marketing the gas and the only offer obtained for the sale of the rights of the parties in the field was a sum of $20,000, which was apparently regarded as too insignificant to require consideration.

I think there can be no doubt upon the evidence that the promotion of the chemical company by Brook was undertaken in the hope that such a plant would provide a possible market for the gas field in which his company held an undivided half interest. No one would have the hardihood to suggest that under the terms of the agreement there was any obligation resting upon the respondent company to provide a market or to venture its own money in an enterprise which might become a purchaser of gas from the field. The existence of natural gas in large quantities and of sulphur in southern Alberta and of the required phosphate rock in the adjoining State of Idaho obviously made possible, in the opinion of the experts consulted by Brook in New York, the establishment of a synthetic fertilizer plant in the area. It was, apparently, this state of affairs that enabled Brook, with the assistance of McMahon, to induce the engineering firm, Commercial Solvents Ltd., and the underwriters to join with them in forming the chemical company. That company was incorporated on August 9, 1954, but the location of the plant at Medicine Hat was not decided upon until other locations where natural gas was available had been considered by the Commercial Solvents corporation. Thus, as shown by Brook's evidence, a location near Okotoks, Alberta, was considered, there being near that place a field containing hydrogen-sulphide gas from which the sulphur required could be delivered at less expense than at a location such as Medicine Hat. A location at Lethbridge was also considered, the Solvents company spending in all over six

weeks in surveying suitable locations. Some ten miles distant from Medicine Hat, there was a much larger gas field containing gas suitable for the chemical company's operations which could have been obtained by the chemical company at a lesser cost than the terms ultimately agreed upon for gas from the Etzikom field. It was, in my opinion, the fact that the respondent company was one of the principal promoters of the enterprise and was willing to put a large amount of its own money into it, and the fact that by negotiating a contract for the sale of a substantial quantity of the gas in the field to the City of Medicine Hat it was possible to finance the building of a pipe-line, that made it possible to negotiate the favourable contract with the chemical company.

In the lengthy negotiations which resulted in the successful launching of the chemical company's undertaking, the appellant company took no part. At some unspecified time an official of the appellant company asked Brook if they could obtain some of the chemical company's stock at the price paid or to be paid by Brook, McMahon and the other promoters and was told that there was none available. Apparently the respondent company and the Commerical Solvents corporation had agreed long prior to the public offering of shares in August 1955 that they would subscribe for preferred shares in the amounts above mentioned. The actual share subscription by the respondent company was made on May 26, 1955, at which time it paid $333,000 in cash for the preferred shares and for the common shares 1 c. per share. It was only when this was done by the respondent company that the Commercial Solvents corporation purchased and paid for the preferred shares which it had agreed to take. The agreement for the sale of gas to the chemical company was made on June 3, 1955, and to the City of Medicine Hat on August 10, 1955, the latter being subject to compliance by the City with the requirements of *The City Act*, R.S.A. 1955, c. 42, both sales being approved by the appellant. It is of course, clear that the common shares issued to the promoters at the par value of 1 c. were saleable for very much more than this but, as I see the matter, that is an irrelevant consideration in determining the issues in the present case. The respondent company, McMahon, the engineering firm, the Solvents

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Locke J.

corporation and the underwriters who had formed the company, clearly had control of it and the decision to allot the common shares at this figure was, no doubt, regularly made. If anyone may complain of the allotment of these shares, it is not the appellant.

While the agreement expressly provided that the operator should not act *qua* agent, which I think should be taken to apply not merely to what was done regarding the development and operation of the property but in the sale or attempted sale of the minerals discovered, and while any such sale could be made only on terms approved by the other party, this does not mean that the respondent company did not owe to the appellant the duty to act in good faith in its efforts to sell. Thus, by way of illustration, had the respondent company, having in mind its own interest or prospective interest in the chemical company, negotiated a sale to that company at what was, to its knowledge, less than the fair value of the gas or less than could have been obtained, and without disclosing that fact induced the appellant to agree, I think an action for the resulting damage would lie. But nothing of that kind is suggested. On the contrary, the prices agreed to be paid by the chemical company and by the City were higher than could have been obtained elsewhere and the appellant, fully aware as to the facts, approved the making of the contracts.

The fact, however, that such a duty rested upon the respondent in its efforts to find a purchaser for the gas does not impose any liability, in my opinion, affecting the shares purchased by it under the above-mentioned circumstances. The principle upon which *Keech v. Sandford*[1] and *Ex parte James*[2] were decided has no application to a relationship such as here existed. The reason for the rule applied in these cases, as pointed out by Lord Redesdale L.C. in *Griffin* v. *Griffin*[3], is public policy. *Keech v. Sandford* was an infant's case and *Ex parte James* that of a purchase by a solicitor to the commission of a bankrupt's estate, where Lord Eldon, after stating the principle that had been applied in the earlier case, said in part (p. 345):

> This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than

[1] (1726), Sel. Cas. Ch. 61, 25 E.R. 223.
[2] (1803), 8 Ves. 337, 32 E.R. 385. [3] (1804), 1 Sch. & Lef. 352.

upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases.

In the present case, however, the respondent was the owner of an undivided half interest as to which it was entitled to bargain on its own behalf, except to the extent that that right was limited by the agreement. The authority given to it by the appellant in respect of its interest was to bargain for a sale but not to make the sale without its approval and consent. I know of no principle, of either law or equity, which in these circumstances restricted in any manner the liberty of the respondent to take part in the promotion of a company and to acquire shares in that company, in the hope that it might become a possible purchaser of the gas or which could conceivably give any right to the appellant to participlate in the purchase or to recover damages, in the absence of bad faith on its part of the nature above suggested. It is impossible, in my opinion, to suggest that any reason of public policy requires the application of the rule in *Keech v. Sandford.*

The principle sought to be invoked on behalf of the appellant is stated in Bowstead on Agency, 11th ed. 1951, at p. 95 in these terms:

> Every agent must account to his principal for every benefit, and pay over to the principal every profit, acquired by him in the course of, or by means of, the agency,

without the principal's knowledge and consent.

It is this rule that was applied to the directors of a company in *Regal (Hastings), Ltd. v. Gulliver et al.*[1] There Lord Russell said in part (p. 389):

> . . . I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them.

The authorities as to the liability of those acting in various fiduciary capacities were examined at length in the judgments delivered in that case. The above quotation, however, summarizes the ground upon which the judgment proceeded.

[1] [1942] 1 All E.R. 378.

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Locke J.

If, contrary to my opinion, it were the case that the duty cast upon the respondent company extended beyond that requiring it to act in good faith towards the appellant in the negotiations for and in the sale of the gas and was that of an agent or equivalent to that of a director of the company, I am nonetheless of the opinion that this action was properly dismissed.

At the trial, Brook swore that the respondent company did not get the shares in question in the chemical company by reason of the existence of the Etzikom field or of the fact that it was the operator under the provisions of the agreement, but obtained them simply due to the fact that it was the primary promoter of the chemical project. The learned trial judge said in terms that he accepted Brook's evidence. There is no evidence to the contrary. In the Appellate Division, Johnson J.A., with whom Ford J.A., now C.J.A., agreed, came to the same conclusion.

The evidence, in my opinion, clearly supports these findings of fact and I would dismiss this appeal with costs.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J. (*dissenting*):—By an agreement dated March 1 and effective as of January 15, 1951, between the appellant and the respondent New British Dominion Oil Company, in these reasons to be called "Midcon" and "New British" respectively, the former undertook to bear the expense of drilling a test oil or gas well to a specified depth on lands the petroleum and allied rights in which, for the purposes here, may be taken as being then owned by the latter. On the completion of the well, regardless of its result, New British was to transfer to Midcon an undivided one-half interest in the rights and the subsequent development, in accordance with elaborately stated provisions, was to be on behalf of both. New British was entitled to elect to become "the operator" for such purposes and to continue so indefinitely, subject to relinquishment on notice. Generally speaking, to be operator meant having authority to proceed with the exploitation almost as if the property were one's own. Expenses and the profits were to be borne and shared equally, with the operator receiving a management fee based on specified monthly rates for each drilling

and producing well. Accounting was provided for; in limited cases action was to be taken after consultation with, and in some only with the consent of, the other party.

The test well was completed at least before July 1953, the exact date of which does not appear; gas in commercial quantities was tapped; and New British elected to take over as operator.

The scope of management included marketing the product. Some question of this was made and Mr. MacKimmie pointed out the absence of any express provision for it. But the matter is put beyond controversy by the supplementary agreement of July 15, 1953, which, in several references to "marketing" by the operator, necessarily assumes it; and that it is presupposed in the main agreement is to me beyond doubt.

That in fact was the view on which the operator, New British, acted. The respondent Brook, president and director, the leading spirit in the development, agreed that disposal rested solely with New British. As he put it:

> As operator, naturally our job both on our own account and the account of Mid Continent*, was to find a market for this gas, first, an obvious potential market. There were no actual markets. . . . We felt it was our duty to obtain a market for the gas production, the gas capable of production.

At the trial Primrose J. rejected the contention that the operator bore in any degree a fiduciary relation to Midcon and dismissed the action. In the Appellate Division the Court found that relation present. With this finding I agree; the operator, so developing, exploiting and marketing a jointly-owned product for a joint benefit, has reposed in him that reliance and confidence which constitute a trust relation. But notwithstanding that finding, the Court held the transaction attacked to be beyond the range of the trust and dismissed the appeal. It is that conclusion that gives rise to this appeal.

When the test well was completed and the reserves of gas were indicated, marketing became the immediate exigency. This would entail, among other things, a distributing trunk-line and heavy consumption agencies of which, from the evidence of Brook, there was little or

* The name of the appellant company at the time of this agreement was "Mid Continent Oil & Gas Limited".—ED.

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Rand J.

nothing actually available at the time. A potential market depended on the geographical areas that could economically be served and on the scale of consumption. After much enquiry and examination and the rejection of a number of suggested means, such as a "tying-in" with the Calgary supply from Turner Valley by way of the Bow Island storage, export to Montana, and access to the Trans-Canada system, from a remark dropped to Brook, the idea arose that the situation might lend itself to the establishment of a chemical fertilizer plant, the gas requirements of which would be on a large scale. With that and the other primary constituents, sulphur and phosphate rock, as well as a market for the product, within economic reach, industrial success might be achieved which would at the same time meet the marketing problem. Preliminary investigation seemed to confirm this likelihood and the operator entered upon a promotion to that end. Contact was made with persons experienced in such matters in New York and in the course of 15 months or so data dealing with all aspects of such an undertaking were obtained, on the basis of which a scheme was formulated which ultimately materialized.

The plan involved the incorporation of a company, a substantial portion of the capital of which would be supplied by New York groups and New British. The plant was to be built at Medicine Hat and to it a pipe-line would be constructed from the gas field. The new company would enter into an agreement with the operator for the purchase of its gas supplies. At the same time discussions had been carried on with the council of Medicine Hat from which New British felt assured of a good market to supplement the City's own distribution supply.

The company was formed in August 1954 under the law of Alberta as Northwest Nitro-Chemicals Limited. Of the preferred shares 3,300 were, on or about May 30, 1955, purchased by the operator at the par value of $100 and the other groups as well bought a large block each. Common shares were at the same time allocated to the groups, of which New British received 749,998 at the price of 1c. each or $7,499.98. The common shares sold to these parties represented approximately 70 per cent. of the 3,750,000 ultimately issued. It is the ownership of that preferred and common stock issued to New British with which this

litigation is concerned. Midcon contends that the purchase was made by New British either as operator or in such circumstances as attached to it the right of Midcon as the beneficiary of a fiduciary relation to claim an interest in it; New British denies that the purchase touches or can be treated as touching that capacity, and claims that it was made by New British as a detached and independent purchaser free from any such responsibility toward Midcon.

In accordance with the arrangement, Brook became an officer and director of Northwest Chemicals. The original and chief interests, Commercial Solvents Corporation, Ford, Bacon, Davis Inc., Eastman, Dillon and Company, of New York, and New British entered into agreements with Northwest Chemicals by which they were reimbursed for their preliminary work and expenses and the first three severally engaged for future engineering, management, advisory and other services. New British received $50,000, a large part of which represented expenses that could have been brought into its accounts as operator. The contract for gas with Northwest dated June 3, 1955, provided, over a period of 20 years, for a supply up to a maximum of 19,500,000 cubic feet per diem, if the field could produce it. Without prejudice to the controversy which had then arisen between Midcon and New British, that contract was approved by Midcon on July 8, 1955. The pipe-line was built by a company jointly owned by Midcon and New British, and by agreement dated August 10, 1955, the net returns from the sale of gas were charged with the cost of the line until either payment in full of its cost or the conclusion of the contract with Medicine Hat. The latter event took place somewhat later but as of August 8, 1955, and 36.25 billion cubic feet of gas from the total reserves was "dedicated" to its fulfilment.

What, then, was the character of the part played in all this by the operator, and its bearing upon the share purchase? On February 4, 1954, the directors of the operator had passed a resolution which, after reciting:

> WHEREAS it appears that in the interest of the Company an ammonium nitrate plant be established in or near the Etzikom gas field in which this Company has substantial interest and which would afford a market for large quantities of this Company's gas produced from such field; and

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Rand J.

WHEREAS it further appears that the operation of such a plant should be profitable and that it is desirable that the Company should be placed in a position to receive a share of the profits of the plant and also participate in its management and control;

declared that:

the President be, and he is hereby authorized, instructed and empowered to negotiate and, if possible, to conclude such agreements or arrangements with Commercial Solvents Corporation, and Ford, Bacon, Davis Inc., both of New York, as he may approve for the participation of this Company with them in the erection, equipment and operation of such plant in or near the Etzikom field and either as a direct participant therein or as a shareholder of a company formed for such purposes, within the following limits . . .

Among those limits were that the interest to be acquired by the company should be not less than 30 and not more than 40 per cent. of the venture and that the cash outlay should not exceed $750,000; and it authorized the president to arrange a loan secured by a charge on the company's interests in the Etzikom field up to that amount.

In a memorandum prepared on the following day, Brook sets forth an account of his inquiries, investigations and conferences in New York and the more or less definite understanding that had been reached, which on the previous day he had given the directors, and on the strength of which the resolution was passed. The opening paragraph is significant:

For the past several weeks our Company has been conducting an investigation of the possibilities of obtaining an additional market over and above the Montana Power market for our jointly held and wholly owned gas reserves in the Etzikom gas field.

It should be mentioned that the joint area comprised 31 sections of a total of 43 sections forming the total reserve: and the portion "wholly owned" by New British, 12 sections, was thus 28 per cent. of the entire area. The discussions were stated to have reached to the detail of the capacity of the ammonium plant, the estimated requirements of gas, and the price to be paid for it. The gas, "reformed" and treated chemically, was, as its principal use, for the manufacture of anhydrous ammonia, the basic product from which ammonium nitrate and phosphate were obtained. At that point Brook had requested time to obtain the necessary authority from his directors to close a "firm deal" in New York and to "explore the possibilities of the financing and be prepared and

authorized to pledge the company's net recoverable gas reserves at Etzikom for that purpose". These "net recoverable" reserves were the total reserves and included the 36 per cent. interest of Midcon.

It does not appear whether in these negotiations the joint ownership and relations between Midcon and New British were disclosed to the other parties although by August 1955 the interest of Midcon had become known apparently for the purposes of reference to the contract with Northwest Chemicals in the prospectus of the latter. New British had negotiated as owner or in absolute control of the entire gas resources, but it could do so for the joint interests only as operator.

That the entrance of Brook upon the search for a market and his participation in working out the scheme were under the authority given by the resolution of February 4 is indisputable; and that that authority was to act as operator—whether exclusively so or as both operator and owner is for the moment immaterial—is, in my opinion, equally so. The disposal of the gas was the instigation of the market quest; the operator would have violated its fundamental duty if it had not taken every reasonable step to complete the exploitation of what was discovered at the sole cost of Midcon. It could at any time have given up its role as operator and cast that responsibility on Midcon; in that event, the latter could not bind the exclusive interest of New British, and one can imagine the attitude of Brook had Midcon been the author of the scheme.

It is argued that location of the plant at Okotoks and at Lethbridge was seriously considered by the New York groups. Against this it was the duty of New British as operator to exert all its influence, which Brook, as its representative, did, and successfully; but even if the ultimate decision of those groups had divorced the scheme from the Etzikom gas field, the interest of Midcon in any stock of the new company taken by New British is not to be assumed to have been obliterated by that circumstance.

In the agreement with Northwest Chemicals, New British "dedicated", so far as required, 61 billion cubic feet of the estimate of 143 billion for the entire field to

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Rand J.

the fulfilment of its obligations. By that act it placed the property of Midcon under the bond of the contract, a contract which was an integral feature of the scheme. New British was dealt with as primarily concerned with furnishing gas; and in that capacity it became both a seller and an associate in the new enterprise. The acceptance of a share of the risks involved was bound up as an entirety with its agreement to supply that essential raw material. There is neither a syllable of evidence nor a tittle of inference that New British assumed or was looked upon by the other negotiators in two distinct aspects, as an independent promoter of Northwest Chemicals and as owner of the gas field; there was one role and one capacity.

In the development of the idea of an industry, participating in its organization undoubtedly suggested itself, but that is a far cry from its being the initial and basic purpose. The risk of an expensive drilling that might have produced nothing assumed by Midcon, on which New British received a supervision fee of $1,000, made it possible for Brook to go seeking a means of profit from the sale of gas; and the emergence of a possible benefit arising from those means became an incidental accretion to, a mere graft on, what, to the operator, was the central object. Without the interest in the gas, fertilizer production would have remained to him an unknown process and an unguessed-at industrial opportunity. It was the control of this vital ingredient that gave him a negotiating standing, and admitted him to the group of investigators; it was in that capacity that he was paid for his work and expense in promoting the scheme, that he became one of those furnishing the investment capital and accepting the risks involved, and that he entered upon the contracts that bound the gas reserves to the new organization and to Medicine Hat. In the face of all these matters of fact, the view that the promotion of the new enterprise was as a severed and disparate interest of New British, as if marketing the gas was an incidental feature, as if the Etzikom field indeed had not existed at all, becomes untenable.

To this it is answered that New British received the shares not because of its interest in the gas field but because it was one of the promoters of the scheme, and with this I can readily agree; but to base the implied conclusion on

that fact by itself misses entirely the contention made. The question to be answered is this: In what capacity did New British participate in the promotion? And the answer is, in its capacity as operator. That special capacity was a matter of indifference to the associates and was unknown to them; its significance was solely to Midcon.

Whatever the private thoughts of Brook, the matters mentioned make them irrelevant. The fiduciary relation is that of a trust in one who is to act in relation to the beneficial interest of another. It creates a standard of loyalty that calls for a refined sensibility to duty, the exclusion of all personal advantage and the total avoidance of any personal involvement in the interests being served or protected, a sense of obligation not always appreciated by those who enter upon it. That that duty towards Midcon by the operator was not adequately sensed—if sensed at all—seems to be clear; in his own words, what Brook was doing was "none of their business"; and he seems to have been somewhat astonished when advised that the gas agreement with Northwest Chemicals required the confirmation of Midcon.

In addition to embarking upon the promotion with the prestige and influence of the apparent ownership of the gas field, implicating that property in the risks of a new industry, and by that means playing its role in the scheme, New British, in entering into the gas contract, as part of the scheme, produced a situation in which its duty as operator and its interest as a large shareholder in and having common directors with Northwest Chemicals, came into conflict. The conflict was not limited to the mere price of the gas; in the business itself of Northwest Chemicals the joint owners had an interest: the exploitation of Etzikom, including the operation of the pipe-line, was, to a substantial degree, put in dependence on the success as well as the continued harmonious attitude of the new company. Decisions on policy of the latter might have consequences seriously prejudicial to the interests of New British as operator as contrasted with those as shareholder, in eventualities which it is not necessary to detail.

In that aspect and as between Midcon and New British the contract was of voidable character; but in the circumstances, including the time already elapsed, the difficulties

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Rand J.

associated with marketing on the scale called for, and the material reduction in potential means of consumption brought about by the promotion of the new company, there was the strongest busines coercion on Midcon to ratify. That ratification—accepted by the operator as reserving all rights of Midcon arising out of the scheme—made the conflict permanent. This, added to the employment in the negotiations and the scheme of the power of the joint property, accumulated conditions which contaminated the integrity of action required of a fiduciary.

It is said that Midcon stood by and awaited the issue of the risks involved and that only when success seemed assured was the claim raised; but this is to misconceive the facts. The real risk lay and lies not in the conclusion of the scheme but in the successful operation of the fertilizer plant. From the standpoint of the operator, the scheme could have been promoted apart from any stock acquisition by New British and in that case its confidential responsibility would have been respected. If that participation was required by the other interests, the significance of the operator's property to the industrial risks is demonstrated: if it was not, what remained was simply the preference by New British of its own interest to that of its joint duty. When in October 1955 the demand was made, the scheme existed only in contractual arrangement; the construction of the plant was in its first stage and it was completed only in October 1956, three months after the trial. Its success or failure even then was as problematical as when agreement upon the scheme had crystallised.

The law of such a situation has been laid down consistently for several centuries in the Courts of England, of this country, and of the United States, and it will be sufficient here to refer briefly to some of the more striking applications of the principle embodied. The imperative character of the obligation is exemplified in *Keech v. Sandford*[1]. There a lease was held by a trustee; shortly before its term would expire the trustee endeavoured to obtain a renewal for the benefit of the *cestui,* which was refused; the trustee thereupon took a renewal in his personal right.

[1] (1726), Sel. Cas. Ch. 61, 25 E.R. 223.

Lord Chancellor King held the new lease to be bound by a constructive trust. At p. 223 of 25 E.R., he says:

> I must consider this as a trust for the infant; but I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que* use; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que* use.

In the notes to this case in White and Tudor's Leading Cases in Equity, 7th ed. 1897, vol. II, at p. 695, the scope of the rule so laid down is stated in these terms:

> Whenever a person clothed with a fiduciary or quasi fiduciary character or position gains some personal advantage by availing himself of such character or position, a constructive trust is raised by Courts of Equity, such person becomes a constructive trustee, and the advantage gained must be held by him for the benefit of his *cestui que trust.*

In *Regal (Hastings), Ltd. v. Gulliver et al.*[1], the directors of a parent company, which was endeavouring through a new company to acquire, by lease, two theatres, being required by the landlord to guarantee the covenants of the lease unless the paid-up capital of the new company amounted to £5,000—which the parent company was unable itself to effect beyond £2,000—agreed among themselves to take £3,000 of the stock individually. Ultimately the shares were sold at a profit which the parent company brought action against the directors to recover. The House of Lords, reversing the Court of Appeal, held the action well founded. Viscount Sankey, at p. 381, cited the language of Lord Eldon in *Ex parte James*[2]:

> The doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases.

He reproduced also the headnote to *Hamilton v. Wright et al.*[3]:

> A Trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have

[1] [1942] 1 All E.R. 378.

[2] (1803), 8 Ves. 337 at 345, 32 E.R. 385 at 388.

[3] (1842), 9 Cl. & Fin. 111, 8 E.R. 110.

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Rand J.

a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

In the Court of Appeal Lord Greene M.R., in upholding the directors, had based the question upon the good faith of the directors:

> That being so, the only way in which these directors could secure that benefit for their company was by putting up the money themselves. Once that decision is held to be a *bona fide* one, and fraud drops out of the case, it seems to me there is only one conclusion, namely, that the appeal must be dismissed with costs.

On this Lord Russell makes the following observation, at p. 386:

> My Lords, with all respect I think there is a misapprehension here. The rule of equity which insists on those, who by the use of a fiduciary position make a profit, being liable to account for that profit, in no case depends on fraud or absence of *bona fides*; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

Lord Wright recites the words of James L.J. in *Parker v. McKenna*[1], as did also Lord Russell:

> [The] rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; *for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.*

(The italics are Lord Wright's.)

In *Zwicker v. Stanbury et al.*[2], the principle so formulated was applied where directors claimed shares in their company surrendered to them in their personal capacity in the course of negotiations entered upon by them as directors with a view to refinancing. A purchase of a second mortgage for one-half of its face value made in the same circumstances was declared to be limited to the sum paid for it.

In *Reading v. Attorney-General*[3], a member of His Majesty's forces was paid a large sum of money for accompanying, while dressed in uniform, loaded lorries carrying

[1] (1874), L.R. 10 Ch. 96 at 124.
[2] [1953] 2 S.C.R. 438, [1954] 1 D.L.R. 257.
[3] [1951] A.C. 507, [1951] 1 All E.R. 617.

whisky in and about Cairo and in that manner representing himself to be in the course of his military duties in order to avoid police inspection of the lorries. The money was seized on behalf of His Majesty and the proceeding was brought by Reading to recover it. It was held by the House of Lords that having obtained this money through the influence and under the cloak of his military service he must hold it for his principal. The right to recover the money and the right to keep it were distinguished by Lord Normand, but the remaining judgments go upon the equitable principle mentioned. In Lord Porter's words, at p. 514:

> . . . any official position, whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act.

A further exemplification is to be found in *Aberdeen Town Council v. Aberdeen University et al.*[1], where the town council as proprietor of lands for the benefit of the university was enabled as ostensible owner to acquire certain fishing-rights in relation to them, which were held to belong beneficially to the university.

In *Charles Baker Limited v. Baker and Baker*[2], an agent for leasing billboard sites, the practice followed by the company, who bought in his own right land which the owner had refused to lease, was held to be a constructive trustee for his principal.

In the United States the rule has been given a similarly strict application in a great variety of situations. In *Meinhard v. Salmon et al.*[3], a shop and office building on land held under a 20-year lease, was exploited as a joint venture by two persons, but managed exclusively by one of them to whom the lease had been granted. Three months before the term was to end, the landlord decided to combine the land with others adjacent on both sides and to place the whole under one lease. The managing tenant, without notice to his associate, took a lease for a term of 20 years renewable for 80 years. After seven years the existing building was to be demolished and a new structure erected at a cost of $3,000,000, with an average increase in annual rent of over $300,000. The new lease obtained through the *de facto* business access between the landlord and the tenant

[1] (1877), 2 App. Cas. 544.
[2] [1954] O.R. 418, [1954] 3 D.L.R. 432.
[3] (1928), 249 N.Y. 458.

1958

MIDCON OIL & GAS LTD. v. NEW BR. DOM. OIL CO. LTD. et al.

Rand J.

arising from the ostensible ownership of the lease was held to be subject to the joint interest at the election of the associate. The quantity of interest was determined by imposing a trust on shares in a new company to which the new lease was assigned, and by giving a majority of the shares to the managing tenant for the purpose of ensuring the continuance of the original arrangement that he should have the direction of the undertaking. In the course of his reasons, Cardozo Ch. J., speaking for the majority, uses language pertinent to the issue here. At p. 462:

> The two were coadventurers, subject to fiduciary duties akin to those of partners (*King v. Barnes*, 109 N.Y. 267). As to this we are all agreed. The heavier weight of duty rested, however, upon Salmon. He was a coadventurer with Meinhard, but he was manager as well.

At p. 464:

> The pre-emptive privilege, or, better, *the pre-emptive opportunity*, that was thus an incident of the enterprise, Salmon appropriated to himself in secrecy and silence.

The "pre-emptive opportunity" in the case before us is that advantage of New British attaching to its role as operator.

At p. 466:

> The very fact that Salmon was in control with exclusive powers of direction charged him the more obviously with the duty of disclosure, since only through disclosure could opportunity be equalized.

Featherstonhaugh v. Fenwick[1] is to the same effect. As Professor Austin Wakeman Scott, in his work on Trusts, 2nd ed. 1956, s. 504 (vol. 4, p. 3238), puts it:

> The principle, however, goes further than this and applies even where the interest purchased by the fiduciary for himself is not an interest in property of the beneficiary entrusted to him, or property which he has undertaken to purchase for the beneficiary, provided that the property which he purchases for himself is sufficiently connected with the scope of his duties as fiduciary so that it is improper for him to purchase it for himself.

The purchase of such an influential interest in the business to which the joint interest had been so largely committed, brings the present case within the range of that impropriety. Its complementary affinity to the joint interest is obvious; and the choice to be made by the operator was between self and fiduciary. New British was under no obligation to purchase and assume the risks of investment in such an enterprise, but having done so its capacity in so

[1] (1810), 17 Ves. 298, 34 E.R. 115.

doing, in the absence of consent by Midcon, was predetermined. To permit the operator to become, for example, by such means, the sole purchaser of the gas for its private benefit would destroy the essence of its duty: and the partial interest taken can be given no higher standing.

The loyalty of a fiduciary declared by these authorities means that he must divest himself of all thought of personal interest or advantage that impinges adversely on the interest of the beneficiary or that results from the use, in any manner or degree by the fiduciary, of the property, interest or influence of the beneficiary. Equity, in applying the rule as one of fundamental public policy, does so ruthlessly to prevent its corrosion by particular exceptions; by an absolute interdiction it puts temptation beyond reach of the fiduciary by appropriating its fruits.

The interest of the joint ownership on the acreage basis being approximately 72 per cent. of the total reserve, in the equitable adjustment of the interests of the parties that fact must be taken into account. To restore the balance of interest, 72 per cent. of the stock should be divided equally between them, giving to Midcon 36 per cent. of the shares now held by New British.

I would, therefore, allow the appeal, set aside the judgment at trial and declare that 36 per cent. of the preference and common shares of Northwest held by New British are under a constructive trust for Midcon, and that upon payment to New British of the price at which they were originally obtained a transfer to Midcon be made accordingly. The latter will have its costs throughout.

Appeal dismissed with costs, RAND *and* CARTWRIGHT JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Macleod, McDermid, McColough, Love and Leitch, Calgary.

Solicitors for the defendant, respondent: Allen, MacKimmie, Matthews & Wood, Calgary.