1956

*June 8, 11, 12
*Oct. 2

AND

TOMBILL GOLD MINES LIMITED (*Plaintiff*) ..... } APPELLANT;

ROBERT M. P. HAMILTON, PHILIP D. P. HAMILTON, WILLIAM S. HARGRAFT, THE GENERAL ENGINEERING COMPANY LIMITED AND GECO MINES LIMITED (No Personal Liability) (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Interpretation—Agreement to provide services as "mining consultants"—Extent of obligation—Acquisition of new claims.

G. Co. carried on a business of operating or managing mining properties on behalf of others, advising on questions of mining and metallurgy, and supplying the services of qualified mining engineers for persons who required them. It entered into an agreement with T. Co. (a mining company) to provide "an engineer's services" for a stated number of days in each month, in return for a monthly "retainer". H, a qualified mining engineer employed by G. Co., was the person most frequently consulted by T. Co. While the agreement was still in effect H learned of a discovery made by a prospector who was not in any way connected with T. Co., and went to inspect the claims. Before leaving he had a telephone conversation with the president of T. Co., in which he told him that he was going on a trip for other clients and if possible would "get some claims staked in the same approximate area" for T. Co. He secured an option on the claims and then returned to Toronto, where he and the officers of G. Co. proceeded to raise the money to take up the option. He offered T. Co. an opportunity to participate, but this offer was declined. T. Co. later brought this action, claiming an accounting of the profits made by the defendants out of the transaction, on the ground that all claims and other mining interests or properties that came to H's attention were to be submitted to T. Co.

Held (Kerwin C.J. and Cartwright J. *dissenting*), the action must fail. The written agreement was not ambiguous in its terms, and it did not require G. Co. and its employees to bring to the plaintiff's attention any properties or prospects of which they learned, or impose any of the other obligations suggested by the plaintiff. This was a complete answer to the plaintiff's claim. Nothing in the telephone conversation before H's trip had the effect of imposing such an obligation on the defendants.

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

Per Kerwin C.J. and Cartwright J., *dissenting*: In all the circumstances disclosed by the evidence, and particularly the telephone conversation, the acquisition of these claims by H on behalf of himself and the other defendants constituted a breach of trust, and the plaintiff was therefore entitled to the profits made by them as a result of that breach of trust.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1), affirming the judgment of Gale J. (2), dismissing the action.

T. Sheard, Q.C., S. H. Robinson, Q.C., and *W. D. Jordan,* for the plaintiff, appellant.

C. F. H. Carson, Q.C., F. A. Beck, Q.C., and *A. Findlay, Q.C.,* for the defendants, respondents.

THE CHIEF JUSTICE (*dissenting*):—For the reasons given by Roach J.A. the appeal should be allowed except as against the defendant Geco Mines Limited, as to which the action stands dismissed. In my opinion, the plaintiff is entitled to judgment against the other defendants for the amount of profits which they recovered on the transfer to Geco Mines Limited of their title to or interests in all the claims in question in this action. This is not the view of the majority of the members of this Court and it therefore becomes unnecessary to decide whether interest should be allowed by the Senior Master of the Supreme Court of Ontario, to whom I would have referred the matter. The plaintiff would be entitled as against those other defendants to its costs of the action and of the appeals to the Court of Appeal and to this Court, while no costs would be payable to Geco Mines Limited in any Court.

The judgment of Taschereau, Locke and Abbott JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal taken by the preent appellant from the judgment of Gale J. at the trial (2), by which the appellant's action was dismissed. Roach and J. K. Mackay JJ.A. dissented and would have allowed the appeal.

(1) [1955] O.R. 903, [1955] 5 D.L.R. 708.

(2) [1954] O.R. 871, [1955] 1 D.L.R. 101.

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The appellant is a mining company incorporated under the Ontario *Companies Act* in the year 1935 and, during the period with which we are concerned, owned certain mining properties in the province, carried on prospecting and held shares in other mining companies.

The respondent Hargraft is a mining engineer, with some 28 years' experience, employed by the respondent The General Engineering Company Limited, at the city of Toronto. The activities of this company may be generally described as those of operating or supervising the management of mining properties on behalf of others, advising on questions of mining and metallurgy and supplying the services of qualified mining engineers for those requiring the same.

In the year 1946 the appellant company had acquired a number of properties in the neighbourhood of Geraldton, Ontario, and employed Hargraft to supervise and direct the operations on them and the exploration of their various claims. In 1948 the appellant dispensed with his services and he entered the employ of the General Engineering company. Thereafter, by arrangements made by the appellant with that company, Hargraft rendered professional services to the appellant from time to time. The terms of these arrangements do not affect the matter to be decided in this action.

On January 22, 1952, the appellant wrote to the General Engineering company a letter which read as follows:—

> This is to confirm our recent discussion regarding an engineering contract for the year 1952.
>
> Our understanding is that you will be paid a retainer of $200.00 per month. We will be given a monthly credit of an engineer's services of five days per month—any time exceeding five days to be charged at $35.00 per day. It is understood, of course, that travelling expenses are extra.
>
> The above is satisfactory to this Company, and we would ask you to please confirm if this is your understanding.

This letter was written on the appellant's behalf by J. A. Grant, its president, and the principal witness on its behalf at the trial.

On January 26, 1952, the General Engineering company wrote to Mr. Grant acknowledging the letter and confirming the agreement covering our work as Mining Consultants to Tombill Gold Mines Limited for the year 1952.

No correspondence was exchanged between the parties in regard to the year 1953 but, as found by the learned trial judge, the engagement was continued in that year on the same terms, save that the monthly fee of $200 was reduced to $100 and the number of days for which the appellant was to have what was referred to as "a monthly credit of an engineer's services of five days per month" was reduced to $2\frac{1}{2}$ days per month.

While evidence was given of discussions which took place between the parties prior to January 22, 1952, and minutes of certain directors' meetings of the appellant in which the matter was discussed were put in evidence, none of these was admissible, in my opinion, the agreement covering the period in question having been reduced to writing and there being no attempt made to impeach its terms.

It is upon this agreement that the appellant must rely in support of the claim pleaded in para. 12 of the statement of claim in the following terms which, while relating to the earlier employment in the year 1949, are said to apply to the agreement made in respect of the year 1953:—

> Under the terms of its employment the Defendant The General Engineering Company Limited was to make available to the Plaintiff and the said Defendant did make available to the Plaintiff the services of the Defendant Hargraft to supervise the Plaintiff's further exploration of its mining properties and to seek out and develop new mining properties for the Plaintiff particularly in the Port Arthur Mining Division. All mining properties and interests in mining properties and options to purchase mining properties and interests in mining properties available for acquisition which came to the attention of the Defendant Hargraft and which he considered to have merit were to be submitted to the Plaintiff. In 1949 the said Defendant The General Engineering Company Limited was so employed on a retainer basis for a period of six months, and during 1950 was so employed on a per diem basis and from January 1st, 1951 was so employed continuously on an annual retainer basis plus a per diem charge to be made under certain circumstances.

At the time the agreements relating to the years 1952 and 1953 were made, the General Engineering company was actively engaged in carrying on its business, of the nature above referred to, at Toronto. In addition to managing certain mining properties, the services of its mining engineers were available to those requiring professional services of this nature. While this was undeniably so, the appellant takes the attitude that throughout this period and, indeed, continuously since the year 1949, an obligation

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had rested upon the General Engineering company to bring any mining properties or mineral claims, or, presumably, information received by them from prospectors in regard to ground that was not staked, to the attention of the appellant company. A company engaged in the activities carried on by the General Engineering company might, of course, agree to do this for reward but, as a practical matter, it appears to me inconceivable that it would do so for an amount such as was stipulated for in the agreement made in respect of the year 1953 or in any of the preceding years.

The agreement, it may be noted, does not stipulate anything of the kind and this is decisive of the question. The learned trial judge and all of the learned judges of the Court of Appeal have arrived at this conclusion.

During the year 1953, prior to the acquisition of the properties to which this action relates, Hargraft had rendered services to the appellant in regard to a uranium property in Saskatchewan and a nickel prospect in the Emo area of Ontario, and Grant had on very many occasions consulted him about various properties as to which he sought information. These were, apparently, all in respect of properties which had come to Grant's attention from other sources.

Shortly following July 14, 1953, the General Engineering company received a letter dated at Geraldton from a prospector, Roy Barker, which said:—

Dear Mr. Hargraft

We have been prospecting this spring and have found a big break that looks good to us.

We have sent samples to Milton Hersey Wpg. and Bell Haileybury, they say our average samples sent [*sic*], 7% copper and 25% zinc in one sample sent.

We are sending you some samples, if you care to check these assays and are interested let us know. It's a new part for prospecting.

Barker was a part-time prospector who was not connected in any way with the appellant company, though he had on an earlier occasion endeavoured to interest it in a prospect which Hargraft had looked at for the appellant and found worthless.

The General Engineering company was at the time engaged in some mill construction work for the McLeod Cockshutt Mining Company which had an operating mine

adjoining the property of the appellant, and Hargraft had intended going to Geraldton in connection with this work early in August and wrote to Barker on July 20, 1953 suggesting he would meet him then. As a result, however, of a further message from Barker, he decided to go earlier and wired saying that he would be there on July 28.

It is necessary in Ontario, to enable a person to stake a mineral claim, to have a miner's licence issued under the provisions of *The Mining Act,* R.S.O. 1950, c. 236. During the year 1946 when Hargraft, before associating himself with the General Engineering company, had been employed by the appellant, the latter had obtained a mining licence in his name and this had been renewed and the annual fee of $5 paid by the appellant between that time and the time in question. Hargraft had discussed with the two Hamiltons who were principals in the General Engineering company the letter from Barker and they had agreed with him to share the expense of examining the property, the location of which was then unknown to any of them. As doing this might require the staking of other claims, Hargraft telephoned to Grant to get the number of his own mining licence. According to Hargraft, he had earlier that spring spoken to Grant about his licence saying that he preferred to renew it himself, but Grant had said that as it was only a matter of $5 he would renew it with his own. Such licences expire annually on March 31. Hargraft said that when he telephoned to Grant he asked if the latter had renewed the licence and asked for the number, saying that he was going on a trip for other clients and that "if it was possible I would try and get some claims staked in the same approximate area if I could for Tombill". According to Grant, when Hargraft telephoned he had asked for his (Grant's) mining licence and then said he would like to have his own licence and asked for the number of it. Grant said he gave the information requested. He remembered nothing about any further conversation at that time.

Hargraft went to Geraldton and met Barker and two other prospectors who were associated with him in staking the claims and proceeded by air to their location, which proved to be at a place some 80 miles south-east of Geraldton near Manitouwadge Lake. His examination showed Hargraft that the claims might be very valuable and, after

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arranging with prospectors to stake a number of additional claims adjoining those they had previously staked, and after going to the property of the McLeod Cockshutt company and doing the work for that company which he had proposed to do early in August, he returned to Toronto.

Much has been made in the case of the reference made by Hargraft, according to his own account, to the matter of "other clients". Those to whom he referred were, according to him, named Easson and McConnell. According to Hargraft, before he had proceeded to the property, one of the Hamiltons had spoken to Easson while he himself had spoken to McConnell about this property that had been drawn to their attention and said that the latter had said that they could count on him up to $1,000. Neither Easson nor McConnell was called to give evidence and whatever discussion took place with either of these men appears to have amounted to nothing more than suggesting to them that they had what might be an interesting prospect which they might wish later to participate in and that McConnell, at least, agreed to contribute to the extent mentioned.

On his return to Toronto, having obtained an oral option for the claims, he and the Hamiltons proceeded to raise the money to comply with the terms of the option. None of the claims had been staked in the name of Tombill or on its behalf but, on instructions from the two Hamiltons, Hargraft telephoned to Grant on August 6 to offer the appellant an interest of 25 per cent. in the option. Hargraft's account of what took place differs to some extent from that of Grant. According to the former, he told him that he had returned from his trip, that the property was one that warranted further investigation and that a group was being formed to take it over, that it was a base metal property, and gave him the names of two of the prospectors. He said that he told Grant that the General Engineering company was to have the management both of the financing and of the property in the very early stages, to which Grant replied that he would have no part of anything that General Engineering was to manage and hung up the receiver, terminating the conversation. According to Grant, when Hargraft telephoned, he said that they had an option on a group of claims and were offering the Tombill company an opportunity to participate, though he did not say to what

extent. Thereupon, according to Grant, he said they would not be interested, that General Engineering were acting for Tombill as consultants and the property would belong to Tombill. While Hargraft denies that the latter statement was made, the attitude said to have been expressed was at least consistent with the claim now advanced in the action.

Thereafter, the General Engineering company informed the Tombill company that they wished to terminate the arrangement existing between them and that Hargraft's services would be no longer available. Hargraft, the Hamiltons and their associates thereafter formed the respondent Geco Mines Limited and caused the claims, both those staked by Barker and his associates and those staked by them on Hargraft's direction, to be conveyed to that company and, apparently, profited greatly in the transaction.

The claim of the appellant as pleaded, that under the terms of the employment the General Engineering company undertook to seek out and develop mining properties for the plaintiff and that all mining properties and interests in mining properties and options to purchase mining properties and interests in mining properties available for acquisition which came to the attention of the defendant Hargraft and which he considered to have merit were to be submitted, failed. The agreement of January 22, 1952 is not ambiguous and it contains none of these suggested provisions. I have read with care all of the extensive evidence adduced at the trial of this action, apparently in an endeavour to establish that these obligations rested upon the General Engineering company. Even if this evidence as to what occurred between the parties prior to the agreement of January 22, 1952 had been admissible in evidence, and in my opinion none of it was, it would not support the appellant's claim. It is true that in some instances Hargraft suggested areas in which the appellant might conduct prospecting and examined some prospects which came to his attention in the course of work done by him for the appellant, as in the case of the worthless prospect located by Barker, but this cannot vary the terms of the written agreement or support the claims advanced in the terms hereinbefore quoted.

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This being so, I must confess my inability to understand how the discussions between Hargraft and Grant after Barker's letter of July 14, 1953 had been received but before the former left to examine the property, could have imposed upon Hargraft and his employers an obligation which theretofore did not exist. These respondents were under no duty to submit Barker's letter or the prospect referred to to the appellant. They were, as pointed out by the learned Chief Justice of Ontario, at perfect liberty to negotiate for the acquisition of these properties on their own behalf or on behalf of any other client. They had decided to investigate the property on their own behalf and had mentioned the matter to Easson and McConnell, suggesting that they had a prospect in which the latter might be interested, and McConnell had agreed to contribute to the expense of the examination. They had already decided upon this when Hargraft telephoned to Grant and asked for his mining licence and told him that they were going to examine a property for other clients and, if there was an opportunity, would stake some claims for Tombill. This was clearly simply gratuitous on the part of Hargraft and there is no pretence whatever in the evidence given on behalf of the appellant that it had been arranged that the trip which resulted in the staking of further claims and obtaining the option was made on behalf of the appellant. Hargraft and the Hamiltons had intended to offer a participation up to 25 per cent. to Tombill but, whether Grant's account of what occurred when Hargraft telephoned him on August 3 or that given by the latter be accepted, Grant refused to have anything to do with the matter and, according to Hargraft, terminated the conversation before he had an opportunity to offer him the proposed participation.

Hargraft clearly acted improperly when he obtained another mining licence and when the additional claims staked by Barker and his associates under Hargraft's licence were recorded. These matters are proper to be referred to as affecting his credit but, otherwise, have no bearing on the matter to be determined, which is one as to the construction of the written agreement. Whether it was inaccurate for him to say to Grant that he was going to examine the

property on behalf of other clients is, in my opinion, equally irrelevant since he and the Hamiltons were completely free to stake the property on their own behalf if they wished to do so.

In agreement with the opinions expressed by the learned trial judge and the learned Chief Justice of Ontario, I consider that the evidence in this case does not disclose a cause of action and I would dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario (1) affirming, by a majority, a judgment of Gale J. (2), dismissing the appellant's action with costs. Roach and J. K. Mackay JJ.A., dissenting, would have allowed the appeal and awarded the appellant the relief claimed in the statement of claim, except as against the defendant Geco Mines Limited.

The relevant facts are fully set out in the reasons in the Courts below, [1954] O.R. at 871 and [1955] O.R. at 903, and it is not necessary to repeat them.

I am in substantial agreement with the reasons of Roach J.A. but, as I am differing from the learned trial judge and the majority in the Court of Appeal, I propose to state my reasons briefly.

Except on one point, there appears to be little, if any, difference between the findings as to the primary facts made in any of the reasons given in the Courts below. The difference of opinion is as to whether on such facts it should be held that the dealings of the respondents other than Geco Mines Limited with the claims in question in this action fell within the scope of the employment of The General Engineering Company Limited as agent of the appellant and whether the acquisition of those claims was a benefit derived by the respondents from such agency.

During the year 1952, the contractual relationship between the appellant and The General Engineering Company Limited was defined in a letter dated January 22, 1952, from the appellant to The General Engineering Company Limited reading as follows:—

This is to confirm our recent discussion regarding an engineering contract for the year 1952.

(1) [1955] O.R. 903, [1955] 5 D.L.R. 708.

(2) [1954] O.R. 871, [1955] 1 D.L.R. 101.

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> Our understanding is that you will be paid a retainer of $200.00 per month. We will be given a monthly credit of an engineer's services of five days per month—any time exceeding five days to be charged at $35.00 per day. It is understood, of course, that travelling expenses are extra.
>
> The above is satisfactory to this Company, and we would ask you to please confirm if this is your understanding.

This was assented to by The General Engineering Company Limited by a letter of January 26, 1952, reading as follows:—

> We wish to acknowledge and thank you for your letter of January 22nd, which sets forth our understanding of the agreement covering our work as Mining Consultants to Tombill Gold Mines Limited for the year 1952.

It is common ground that this contract was continued in 1953, subject to the variations that the monthly payment was reduced to $100 and the amount of engineer's services to be given was reduced to $2\frac{1}{2}$ days per month, and, so varied, was in force at the time of the events out of which this action arises.

I do not find it necessary to consider the exact nature of the services which the appellant, under the terms of its contract, was entitled to call upon The General Engineering Company Limited to perform as it is clear that such services would include the examination by Hargraft of a specific property or area for the purpose of advising the appellant whether or not it should endeavour to acquire the same. It was not, and could not be, disputed that, if the appellant had heard of Barker's discovery from sources unconnected with the respondents and had asked The General Engineering Company Limited to make an examination and report to it, The General Engineering Company Limited could not have acquired the property for itself.

Assuming the correctness of the view, entertained by all the judges in the Courts below, that the relationship between the parties in July and August 1953 was such that when Hargraft received Barker's letter of July 17, 1953, the respondents were free, if they saw fit, to acquire the claims for themselves, I am respectfully of opinion that the learned trial judge and the majority in the Court of Appeal have failed to give due weight to the arrangement made between Hargraft, representing the respondents, and J. A. Grant, representing the appellant, before the former set out for Geraldton.

The effect of the evidence as to the conversation between the two is accurately summarized by Roach J.A. in the following paragraph in his reasons (1).

> Accepting everything that Hargraft swears he told Grant—I am not concerned at the moment with what he now says he had in his mind and did not tell him—it would certainly convey to Grant the meaning that General Engineering was sending Hargraft into the mining country on behalf of some other client and that while there he, Hargraft, would, if conditions were favourable, stake some claims for Tombill; it was for that purpose that Hargraft required the number of his miner's licence. That was agreeable to Grant. He apparently did not state in terms that he agreed. If any expenses were to be incurred in connection with that staking Tombill was liable for them under its contract, and there was no suggestion by Grant that Tombill did not want any expenses incurred on its behalf. Hargraft knew perfectly well that Grant was agreeing to the proposal on behalf of Tombill.

It is not open to doubt that if, after satisfying the requirements of the respondents' "other clients", Hargraft had spent time making investigations and staking claims for the appellant, The General Engineering Company Limited could have treated the time so spent as a discharge *pro tanto* of its obligation to supply $2\frac{1}{2}$ days of engineer's service during the current month and could have required payment from the appellant at the contract rate for any additional time expended.

It is as to the existence of these "other clients" that the difference of opinion between the learned trial judge and the Court of Appeal in regard to the primary facts arose. The learned trial judge says (2) in dealing with the conversation between Grant and Hargraft:—

> At that time Mr. Hargraft honestly believed, as was the fact, that others beside the defendants were to have an interest in any claims that might be staked or acquired. Two gentelmen by the names of Easson and McConnell had already been approached with respect to the proposition and had agreed to advance $1,000 each toward the acquisition of title to the claims involved. Those two persons, therefore, were the "other clients" whom Mr. Hargraft had in mind when he spoke to Mr. Grant on that occasion although I think it is only fair to say that it was also planned to include the General Engineering company in any allocation of the claims if they appeared to have merit.

(1) [1955] O.R. at 925.

(2) [1954] O.R. at 879.

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The view of the majority in the Court of Appeal is expressed as follows by the learned Chief Justice of Ontario (1):—

> Hargraft made inquiry from the plaintiff as to the number of his licence for the purpose of staking the additional claims already referred to. At that time, he intimated to the president of the plaintiff company that he was going to Geraldton on behalf of other clients to look at certain property and that he might be able to stake some claims in the same area for the plaintiff. In my opinion, his statement to the president of the plaintiff company was untrue. It was true that he was going to Geraldton on the business of another client, but it was not true that he was going in to inspect the properties in question on behalf of other clients. He went to inspect those properties on behalf of himself and his associates.

The analysis of the evidence on this point made by Roach J.A. fully supports the conclusion, at which he also arrived, that there were no "other clients" on whose behalf the investigation of Barker's discovery was made by Hargraft.

There being then no "other clients" there remained the obligation undertaken by the respondents to the appellant, an obligation which prevented the former from acquiring the claims for themselves without being guilty of a breach of the fiduciary duty in relation to this particular property which they had undertaken in the arrangement made between Hargraft and Grant. I agree with Roach J.A. that the efficacy of this arrangement was not lessened by the circumstance that it was proposed by Hargraft to Grant.

We are not called upon to speculate as to the motives which prompted Hargraft to propose the arrangement which the evidence shews was made.

It is clear that once the true facts came to the knowledge of the appellant it promptly took the position that it was beneficially entitled to the claims in question.

For the reasons given by Roach J.A., with which I have already indicated my substantial agreement, and for those given above I would allow the appeal and direct judgment to be entered in the terms proposed in the final paragraph of the reasons of Roach J.A. As the majority of the Court are of opinion that the appeal fails it becomes unnecessary for me to consider whether the order referring the matter to the Master should provide for the charging of interest

(1) [1955] O.R. at 916-7

against the respondents. I would direct that the appellant recover its costs in this Court from the respondents other than Geco Mines Limited and would make no other order as to costs in this Court.

Appeal dismissed with costs, KERWIN C.J. *and* CARTWRIGHT J. *dissenting.*

Solicitors for the plaintiff, appellant: Holden, Murdoch, Walton, Finlay & Robinson, Toronto.

Solicitors for the defendants, respondents: White, Bristol, Beck & Phipps, Toronto.

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*PRESENT: Kerwin C.J. and Rand, Fauteux, Abbott and Nolan JJ.