See para. 17

Case Name:

RIDGEWOOD RESOURCES LTD. v. HENUSET

[1981] A.J. No. 747

29 A.R. 240*

8 A.C.W.S. (2d) 204

Alberta Court of Queen's Bench
Judicial District of Calgary

Quigley, J.

March 16, 1981

(9 pages) (24 paras.)

CASES JUDICIALLY NOTICED:

Saltman Engineering Co. Ltd. et al. v. Campbell Engineering Co. Ltd., [1963] 3 All E.R. 413, ref'd to. [para. 3].
Terrapin Ld. v. Builders Supply Co. (Hayes) Ld. et al., [1960] 5 P.D. & T.M. 128, ref'd to. [para. 3].
Seager v. Copydex Ltd., [1967] 2 All E.R. 415 (C.A.), ref'd to. [para. 3].
Slavutych v. Baker et al., 55 D.L.R.(3d) 224, ref'd to. [para. 3].
Stephenson v. Babiy Finance Corp. Ltd. et al., [1978] 5 W.W.R. 645, ref'd to. [para. 3].
Peter Pan Manufacturing Corp. v. Corsets Silhouette Ltd., [1963] 3 All E.R. 402, ref'd to. [para. 3].
Cranleigh Precision Engineering Ltd. v. Bryant, [1964] 3 All E.R. 289 (Q.B.D.), ref'd to. [para. 3].
Guyer Oil Co. Ltd. et al. v. Fulton and Gladstone Petroleum Ltd. (1977), 16 N.R. 465 (S.C.C.), ref'd to. [para. 3].
Bendix Home Systems Ltd. v. Clayton et al., [1977] 5 W.W.R. 10, ref'd to. [para. 3].
Robin-Nodwell Mfg. Ltd. v. Foremost Developments Ltd. and Nodwell, 52 C.P.R. 244, ref'd to. [para. 3].
International Tools Ltd. v. Kellar et al., [1966] 2 O.R. 201, ref'd to. [para. 3].
R.I. Crain Limited v. Ashton and Ashton Press Manufacturing Company Limited, [1949] O.R. 303, ref'd to. [para. 3].

AUTHORS AND WORKS JUDICIALLY NOTICED:

Jones, G., Article respecting breach or misuse of confidential information, 86 L.Q. Rev. 463 [para. 3].
Prothroe, Q.C., J.E., Article respecting breach or misuse of confidential information, 16 Alta. L. Rev. 256 [para. 3].

COUNSEL:

A. D. HUNTER and N. K. MACHIDA, for the plaintiff
D. R. HAIGH, for the defendant

This case was heard before QUIGLEY, J., of the Alberta Court of Queen's Bench, Judicial District of Calgary, and judgment was delivered on March 16, 1981.

[*page242] [para1] **QUIGLEY, J.**:-- In this action the plaintiff alleges that it supplied to the defendant evaluation material of a confidential nature under circumstances which required the defendant to use the information for the joint benefit of both parties or not at all. The plaintiff alleges the defendant used the confidential information for his own account and to the exclusion of the former. The plaintiff seeks a declaration that the defendant holds part of certain properties acquired by him as trustee for the former and an order for an accounting and a conveyance of that interest to the plaintiff. The plaintiff also claimed damages for breach of fiduciary duty.

2 While counsel for the plaintiff conceded that no contractual relationship existed between the parties, it seems clear the law recognizes that a confidential relationship may arise outside of contract. The majority of cases alleging breach of confidence arise out of a contractual fiduciary relationship and in particular from employer - employee relationships. Under such circumstances it is not usually difficult to determine the intentions of the parties relative to certain information exchanged between them or made available by one to the other. Once the contractual or fiduciary relationship has been established, the determination of whether certain information is confidential and whether it may be used or passed on to others is much easier than in a case such as this, where no such contractual relationship exists. The facts in this case are of particular importance.

3 At the outset it must be borne in mind that at no time during its' negotiations or dealings with the defendant did the plaintiff expressly caution the former that the information it imparted was confidential in nature or that it was to be used solely for the purpose of the joint purchase of the properties by the two parties. It is the submission of the plaintiff however, that the confidential nature and restriction on the use of whatever information was given can be easily implied from all the circumstances. Two articles were brought to the attention of the court - each dealing with the breach or misuse of confidential information. The one is authored by Gareth Jones and is found in Vol. 86, The Law Quarterly Review at page 463 and the other by J.E. Prothroe, Q.C., is contained

in Vol. XVI, Alberta Law Review at page 256. In addition reference was made to several authorities including Saltman Engineering Co. Ltd. et al. v. Campbell Engineering Co. Ltd., [1963] 3 All E.R. 413; Terrapin Ld. v. Builders Supply Co. (Hayes) Ld. et al., [1960] 5 P.D. & T.M. 128; Seager v. Copydex Ltd., [1967] 2 All E.R. 415 (C.A.); [*page243] Slavutych v. Baker et al., 55 D.L.R.(3d) 224; Stephenson v. Babiy Finance Corp. Ltd. et al., [1978] 5 W.W.R. 645; Peter Pan Manufacturing Corp. v. Corsets Silhouette Ltd., [1963] 3 All E.R. 402; Cranleigh Precision Engineering Ltd. v. Bryant, [1964] 3 All E.R. 289 (Q.B.D.); Guyer Oil Co. Ltd. et al. v. Fulton and Gladstone Petroleum Ltd. (1977), 16 N.R. 465 (S.C.C.); Bendix Home Systems Ltd. v. Clayton et al., [1977] 5 W.W.R. 10; Robin-Nodwell Mfg. Ltd. v. Foremost Developments Ltd. and Nodwell, 52 C.P.R. 244; International Tools Ltd. v. Kellar et al., [1966] 2 O.R. 201 and R.I. Crain Limited v. Ashton and Ashton Press Manufacturing Company Limited, [1949] O.R. 303. These authorities set out the general and particular principles governing the matters in issue.

4 Where parties enter into tentative but abortive negotiations confidential information communicated by one to the other may place a duty on the recipient of the information not to use it to the detriment of the one providing it. Such a duty may be easily ascertained where the confidential information is a trade secret or a patent or invention of some description. It is also much easier to designate such kinds of information as confidential in nature as opposed to other kinds of information. However, what the plaintiff must establish is firstly, that the information imparted to the defendant was in fact confidential information and secondly, that the defendant used such confidential information for a purpose detrimental to the plaintiff.

5 The evidence discloses that the information given by either Miles, president of the plaintiff company, and/or Clark, acting on behalf of Miles, to the defendant and/or his agents consisted of the following:

"(1) The fact that Cardo Canada Ltd. had offered certain gas and oil properties for sale.

(2) The Farries Report (Exhibit #1) an evaluation prepared by an independant engineering consultant for and at the direction of the principals of Cardo, the vendors of the properties.
(3) A letter dated July 4, 1979 (Exhibit #2) written by Clark to the plaintiff setting out Clark's assessment of the Farries Report.
(4) Gas price forecasts prepared in 1977 setting out the predictions of several consulting and banking institutions [*page244] together with two sheets prepared by Clark setting out his cash flow forecast of the Cardo properties (Exhibit #3).
(5) The Barksdale file (Exhibit #4).
(6) Sundry expressions of opinion by Clark and/or Miles to the defendant and/or his associates."

6 The evidence falls far short of satisfying me that the fact Cardo Canada Ltd. properties were for sale was confidential information. In my view it was publicly known to many persons and

corporations active in the oil and gas industry. Miles himself learned of it from an officer of Red Arrow Drilling Co. Ltd. The evidence of McMillan and Dodge clearly established that, while the properties were not advertised for sale in industry journals, they had been on the market for a considerable time period before Miles notified the defendant about it on July 17, 1979. The fact that Dodge did not want the properties sold through an agent or broker did not clothe the fact of sale with any cloak of secrecy. Nor did the fact that the defendant may not have known the properties were for sale prior to being contacted by Miles give an air of confidentiality to the information they were for sale. If it were otherwise it would mean that any time a real estate agent informed a third party that property already on the market was for sale, the third party would be receiving confidential information.

7 I have no hesitation in holding that the Farries Engineering Report, (Exhibit #1) does not fall within the classification of confidential information. It was neither prepared nor commissioned by the plaintiff. Copies of the report had been in circulation since January and were made available by the vendor to anyone who appeared to be genuinely interested in contemplating the acquisition of the Cardo properties. Dodge attached no restrictions on the use Miles could make of the copy of the report given to him. The only caution given to Miles by Dodge was that he did not want Miles to broker the deal. The Farries Report was necessary and basic information that would be required to be provided to any prospective purchaser just as a descriptive brochure would be in an ordinary sale of real estate. The plaintiff did not have any exclusive right to purchase the properties, nor any first right of refusal with Dodge. It is true that according to Miles, he informed the defendant on July 17th that "he had been placed in a position to be a contender for the purchase" of the properties. In my view the evidence is clear that any [*page245] genuine purchaser able to satisfy the terms of the offer to sell was a contender for the purchase of the properties. The fact that Miles possessed a copy of Exhibit #1 did not place him in any preferential position whatever, nor did it arm him with any information of a confidential nature. Such information would be made available to any prospective purchaser.

8 Exhibit #1 was voluntarily left with the defendant at the meeting of July 18th with no admonition whatever about its use being restricted or its contents being confidential material. It is interesting that Miles, who had the report for some two months, had not even bothered to read it himself prior to tabling it at the first meeting with the defendant.

9 Exhibit #2, the letter written by Clark was itself prepared from Exhibit #1 and from information given to Clark by McMillan. McMillan was available and prepared to give any information about the Cardo properties to any prospective purchaser and indeed had done so prior to Clark's enquiries and subsequent thereto. According to Clark he had earlier informed Miles that he was interested in acquiring oil and gas properties to form the base for an oil company. In May Miles informed Clark that the Cardo properties might be available for acquisition. Miles said he did not have enough time to look into the matter. Clark testified that he informed Miles he was not interested in receiving the Farries Report on a consulting basis but was interested in perusing the matter as a joint venture, presumably with Miles.

10 Clark reviewed Exhibit #1, obtained some information from the Conservation Board, made comparisons of the forecasted prices by other consultants and banking institutions and reached some conclusions. Amongst these was that the Farries Report was reasonably accurate as far as the forecast for producing wells was concerned. Clark found it more difficult to value the non-producing lands and in order to make his own evaluation of these lands had visited with McMillan personally and by telephone. As a result, as of July 4th it was his opinion that the proposition was a feasible one. Unfortunately neither he nor Miles could finance the purchase themselves and time was running out if they hoped to be able to submit an offer on the property.

11 Exhibit #2 was therefore used by the plaintiff company as part of the information placed before the defendant in an attempt to persuade him to accept the plaintiff's proposal whereby the defendant would provide the funds necessary to effect [*page246] a purchase of the Cardo properties. The plaintiff further proposed that any balance required could be obtained from commercial lenders on the strength of the forecasted cash flow of the properties. Clark candidly admitted in his examination-in-chief that the defendant at the meeting, asked the question: "What do you people want out of this?" According to Clark, either he or Miles replied "We would like to be carried for 25% of the acquisition". The defendant then enquired what might happen in respect to future capital cost requirements and whether Miles and Clark expected to be carried on that as well or would they pay their own share. Clark stated: "We could not explain how we could carry our share. We did not have a detailed deal to propose to Mr. Henuset. We only had a one minute telephone conversation (i.e. he and Miles) the previous day". He and Miles had not even agreed between themselves what their proposal to the defendant should be. This evidence indicates that Miles in particular, was travelling on an unstructured hope he could obtain a substantial benefit without any investment or risk to the plaintiff.

12 In any event the evidence satisfies me that Exhibit #2 was information that was of little or no assistance to any prospective financial backer whom Miles or Clark hoped to interest in the proposition outlined at the July 18 meeting by Clark and/or Miles. In my opinion, before information can be properly classified as confidential, it must be information which has some apparent beneficial quality. The summary of the Farries Report was not newly created information, but merely a consolidation of existing non-confidential information as I have already held the Farries Report to be. Exhibit #2 purported to show that the cash flow would be sufficient to obtain bank financing - but the totality of the evidence satisfies me that Exhibit #2 was deficient in this respect. In this sense it was not information at all but misinformation. I therefore hold that Exhibit #2 is not confidential information.

13 In regard to Exhibit #3 I accept the evidence of Brock that the contents of that document were not even considered by him in evaluating the feasibility of recommending the defendant purchase the property. The forecasts by the other consultants was information available to anyone and I find them not to be confidential in nature.

14 Exhibit #4 is a file which was obtained from an officer of Cardo during the visit of Clark,

Miles and the defendant to Cardo's offices in Denver, Colorado. Miles testified that the file had been given to him by Barksdale. Miles inferred [*page247] that the defendant had later come into possession of the file after they returned to Calgary in a highly improper way and without obtaining Miles' permission. I do not accept Miles' testimony nor the innuendo it attempted to create. I accept the evidence of the defendant, that it was he and not Miles who asked for maps and other material relative to the properties and that Barksdale acceded to that request. Miles came into possession of the file merely because he was carrying a brief case while the defendant did not have one.

15 Miles own testimony militates against the credibility of his assertions on this point. He admitted he did nothing when informed the defendant had been to his office in his absence and removed the Barksdale file. He did not immediately call the defendant and demand its return or complain. It is true he obtained the file the following day but only for the purpose of making copies of the material. He then returned the file to the defendant's assistant! And this according to Miles was done after any proposed deal between the defendant and Miles was at an end.

16 The sundry expressions of opinion by Clark and/or Miles did not, in my view, constitute confidential information. They were merely expressions of opinion made for the purpose of persuading the defendant to accept their rather self-benefiting proposition. In any event such opinions were not germaine to the decision ultimately taken by the defendant to submit an offer to purchase the properties in question.

17 Finally, the plaintiff has failed to discharge the onus of establishing that whatever information it gave to the defendant, confidential or not, was used by the defendant to the detriment of the plaintiff.

18 In the Terrapin case (supra) Roxburgh, J., said in part at page 301:

"As I understand it, the essence of this branch of law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication . . ."

Lord Denning approved this statement in the Seager case (supra) at page 417.

19 Even if some or even all of the information provided to [*page248] the defendant could be considered as being confidential in nature, what detriment has the plaintiff suffered? In my view the plaintiff failed to establish that either on the day the defendant's offer was accepted or at any reasonable time thereafter it would have been in a position to bid on the sale let alone successfully acquire the properties either in whole or in part.

20 Miles confirmed both on discovery and at trial that when he and the defendant returned to Calgary from Denver on July 24th "there had been nothing finally agreed upon or fixed (and) no specific terms had been agreed upon or accepted by that time" between the plaintiff and the defendant.

21 Clark testified that on the following day, July 25th, he and Miles "decided to do something on our own". Clark confirmed that Miles told him on July 26th that the defendant had informed Miles that he and Clark were free to negotiate with any other persons. In fact they had already done so but had not informed the defendant. Under these circumstances I fail to see how the plaintiff can forcefully assert that any prior dealings it had with the defendant effectively eliminated the right of the latter to proceed to make an offer to purchase on his own. Ultimately of course, the defendant was successful in purchasing the properties and before closing he offered to pay the plaintiff a finder's fee or commission based on the purchase price paid. The plaintiff rejected it and commenced action.

22 In my view when Miles learned that the Cardo properties were for sale he hoped to acquire an interest in them and set about attempting to find a benefactor because his company did not have the means of entering into any serious negotiations to effect the purchase. Miles failed to persuade the defendant to enter into any arrangement which would result in the plaintiff acquiring ownership of a part of the Cardo assets at no financial risk. The efforts of Miles however were readily acknowledged by the defendant, who was prepared to pay Miles a finder's fee.

23 While it seems apparent that Miles did bring the vendor and the defendant purchaser together, he could not look to Cardo for a commission because Dodge had already made it clear to Miles he did not want the sale brokered. One might speculate that Miles refused the defendant's offer to pay a finder's fee in order to honour his committment to Dodge. In any event I find that no detriment was suffered by the plaintiff. [*page249]

24 In the result the plaintiff's action is dismissed with costs to the defendant on Column 5, the limiting rule not to apply.

Action dismissed.