Indexed as:

Chevron Standard Ltd. v. Home Oil Co.

Between
Chevron Standard Ltd., and
Home Oil Co. Ltd. and Leeson

[1982] A.J. No. 744

[1982] 3 W.W.R. 427

19 Alta. L.R. (2d) 1

35 A.R. 550

64 C.P.R. (2d) 11

13 A.C.W.S. (2d) 454

Appeal No. 13124

Alberta Court of Appeal

McClung, Kerans and Stevenson JJ.A.

March 25, 1982.

(44 paras.)

Counsel:

D.P. McLaws, Q.C., J.E. Prothroe, Q.C., and D.C. Edie, for the appellant.
J.M. Robertson, Q.C., and R.A. Coad, for the respondents.

The following judgment was delivered by

1 THE COURT:-- This litigation raises, again, serious and recurring questions concerning the obligations of senior employees who have transferred their employment while possessed of, or exposed to, industrial secrets of value to both employers which may have been confidential in origin. The circumstances from which the action was brought are set forth fully in the judgment of Moore, J., (now A.C.J.), reported in (1980), 22 A.R. 451, but the skeletal facts of the matter are as follows.

2 The respondent John I.P. Leeson, an explorational geologist, had been employed by the appellant Chevron Standard Limited in varying capacities for some 23 years until early 1977. At the time of his resignation he served as the Acting-Chief Development Geologist for Chevron and resided in Calgary. Nonetheless he was dissatisfied with the advancement opportunities within Chevron and on January 13, 1977 he resigned to take employment with the respondent Home Oil Company Limited as its Canadian Exploration Manager. The learned trial judge found that Leeson's change of employment was properly motivated and was no hollow formality undergone in anticipation of the events which followed.

3 From 1974 onwards Chevron had pursued an active exploration program in Western Alberta commencing with the implementation of a seismic line progressing west from the Saskatchewan border and terminating in the general region of an earlier, 1957, Chevron well located within 21-49-13 W5th. The line extended approximately 40 miles into a deep geological basin known to the industry as the Winterburn Shale Basin. Earlier exploratory wells in the area, some drilled to Upper Devonian or approximate 9,000 ft. depths had been unproductive. However, advanced seismic technology available in the mid-1970s revealed to Chevron the presence of two geological anomalies within the Winterburn Shale Basin, in turn suggestive of pinnacle or isolated reefs associated with Upper Devonian oil-bearing pockets. Naturally elaborate secrecy surrounded Chevron's find, consequent land acquisitions and drilling programs. This total activity was interchangeably referred to in evidence as Chevron's Prime Prospect Area or Wolf Creek Play.

4 Competing evidence was led at trial as to the nature and extent of Leeson's exposure to the discovery and developmental activity which followed while he was still employed by Chevron which the learned trial judge put to rest by the following and other findings:

> Leeson's overall recollection of Chevron's Wolf Creek play was simply that it was a concept of Leduc reefs based on anomalies interpreted from seismic which lay west of the Pembina Oil Field. He was not involved in planning or implementation of Wolf Creek. He had no maps of the area and the only time he discussed it in detail with anyone was during the discussion with Pfaff and Pritchard at the Petroleum Club with reference to the reservoir model. He heard nothing at Chevron relating to Chevron's efforts to acquire land from Texaco. He knew nothing about Nairb in connection with the Wolf Creek play.

5 The Nairb involvement may be summarized as follows. In May 1976 Chevron had

commissioned Nairb Petroleum to drill a pathfinder well in LSD 11, 22-49-12 W5th. This well was licensed in the name of Nairb and originally to Mississipian depth. It was originally abandoned near the 2,000 ft. level but was respudded and relicensed to Devonian depth i.e. up to 11,200 ft. Production occurred on January 17, 1977, the date Leeson assumed his new Home Oil Employment. Throughout, Nairb Petroleum nominally pursued the drilling program on behalf of Chevron to shelter the involvement and interest of a major exploration company. Nairb was also employed in this way in attempts to acquire neighbouring lands.

6 Prior to Leeson's hiring Home's explorational activity in Western Alberta had been minimal. Although determined to regain regional exploration initiatives, Home's exploration department was in disarray from the standpoint of area property and experienced geologists and geophysicists. Home had neither land holdings in the Prime Prospect Area, any supportive data, nor little interest therein. However, within a few days of joining Home, Leeson read of the amended licensing of the Nairb well. This came from a public source. On January 26, 1977 a scout conveyed to Leeson the fact that the well was rumoured to be a discovery. Leeson at this time suspected the Nairb Well to belong to Chevron and knew that it was located within Chevron's Wolf Creek area of interest. By February 11, 1977 Home, upon Leeson's recommendation, committed itself to the assembly of a land position in the area. Home did so with alacrity and, in time, gained successful and valuable production. When Home's initiatives became known, Chevron brought action against Leeson and Home for declaratory injunctive and compensatory relief alleging a wrongful conversion of Chevron's industrial trade secrets.

7 The learned trial judge addressed the sequence of events leading up Home's February 11, 1977 commitment as follows:

> Waddell (Home's Vice-President of Exploration) explained to Leeson at the commencement of his employment with Home that it was necessary to get Home's exploration program back into the vanguard of Western Canadian exploration by making use of all the tax and drilling incentive programs. Waddell suggested Home's efforts should be directed toward the Foothills and the Deep Basin and the areas fringing the Deep Basin. The Deep Basin is that portion of the Western Canadian Sedimentary Basin sitting adjacent to the Foothills and below an arbitrarily selected sub-sea elevation of 9,000 feet. Anything deeper than 9,000 feet on the Devonian and to the west would be within the basin. The basin, which is west of Calgary and Edmonton, runs generally in a north-south line to a point north-west of Edmonton. It would include the West Pembina Basin.
>
> In 1977, the Alberta Government had in place an attractive drilling incentive program. On a $600,000.00 gross cost well, the effect of the drilling incentive credit together with the tax deduction allowable for federal and

provincial tax purposes reduced the net cost of a well to around $65,000.00.

When Leeson commenced his employment with Home on January 17, his first function was to familiarize himself with Home's existing projects. He immediately learned Home was involved in a three way joint venture seismic program with Canadian Superior and Union, known as the Deep Basin Group. Home was also involved in the Akuinu area near Township 67, Ranges 1-3 West of the 5th Meridian and had some involvement in three other areas - the Mouse Creek - Wolf Creek area, the Brightbank-Eden area and the Hamlin-Owl River area.

Leeson first became aware of the deeper depth of the Nairb well when the license was amended to authorize drilling to the Beaverhill Lake. This information was published in the Nickle Daily Oil Bulletin of January 12, 1977 (exhibit 239). He saw it within a few days after starting at Home while going through a backlog of material. The drill stem test started on January 17th and fluid recovery from the drill pipe occurred on January 18th. On January 22nd, 7" casing was run in the well and it was then cemented. Cement trucks are often observed by oil company scouts.

When the Nairb well 'blew in', it came in under such high pressure that nothing could be done to hide the event from curious eyes. Dr. Henderson admitted on examination for discovery, that a scout by the name of Hornberger was near the well when it 'blew'.

On or about January 26th, A.K. Mossfeldt, an oil scout employed by Home, heard a rumour that the Nairb well was a rumoured discovery and he reported it to Leeson who in turn instructed him to keep an eye on the Nairb well. Mossfeldt says he got his early information about the well being a discovery well from Amoco scout, P.G. Stalker. Stalker stated he never exchanged information with Mossfeldt. Be that as it may, clearly, Mossfeldt got his early information from oil scout sources.

Grant Polomark, an oil scout employed by Chevron, not being aware of Chevron's disguise (Nairb), telephoned his employer (Chevron) soon after the Nairb well was completed, reporting a D2 producer. The evidence does not reveal where Polomark got his information, however, he clearly got his

information both before and while visiting the well site with Stalker on February 10th or 11th. The security measures at the discovery well site were not strict and a document with confidential well information was found by Polomark who, at the time, was still unaware the well was a Chevron well. I am satisfied the information soon became available to many oil scouts. Mossfeldt, like Polomark, also obtained the same kind of information soon after the well was completed and passed on the information to Leeson and Waddell.

The oil scouts meet weekly in Calgary at 'Scout Check' where scouts exchange well logs and other information. There was a meeting on January 26th. Stalker concedes the Nairb well could have been a rumoured discussion at that meeting. Subsequent to the January 26th meeting, Mossfeldt reported that the well was a D2 discovery.

Home was in the practice of circulating wildcat well reports, gathered from various industry sources, to key employees from time to time. Home's wildcat well report of January 26th mentioned several wildcat wells, including the Nairb well, and referred to the Nairb well as circulating at a depth of 9,758 feet. The next wildcat report of February 9th, 1977 (exhibit 232) indicated the Nairb well as a rumoured Paleozoic (Upper Devonian) gas and oil discovery at 11,000 feet. The report from Mossfeldt of February 9th (exhibit 233) following Scout Check on February 9th, and circulated to key Home personnel, including Leeson and Waddell, refers to the Nairb well as follows:

> 'Rumoured Paleozoic oil and gas success after reaching 11000' (ft.). 7" casing was landed at 9758' (ft.) and further casing was not run below that depth. Under the name Guaranty Trust, a bonus of $1.3 million or $1,015.80 per acre for 1280 acres in Sec. 3 & 4 Township 50-12-W5 was paid on the February 8th (1977) lease sale.'

The Nickle Daily Oil Bulletin reported frequently on the progress of the Nairb well from the date it was licensed. The Nickle Bulletin of December 29, 1976 reported that Nairb was drilling a well at A11-22-49-12 West of the 5th Meridian and pinpointed the location by reference to the old Cal Standard Cynthia well abandoned several years earlier. On January 12, 1977, the Bulletin reported the well was being drilled by Nairb under confidential status on acreage transferred to the operator from Pacific Pete in November 1976 and that the Energy Resources Conservation Board had authorized drilling to a depth which

> would bottom in the Beaverhill Zone at 11,200 feet. It is apparent that there was much public knowledge about the Nairb well in January and early February, 1977.
>
> Chevron, being aware of their discovery prior to a Crown sale scheduled for February 8th, decided to bid on lands in Sections 3 and 4 in Township 50 at the Crown sale through and under the guise of Nairb Petroleum for security measures.

and further:

> On February 10, Leeson approached Waddell and told him that in view of the Nairb deep discovery that it would be prudent if they held back farming-out any acreage in the area. Certainly, any company holding acreage in the area would be of like mind. He then indicated to Waddell that there might be an opportunity to capitalize on the information from the Nairb well by making what he called a strategic land approach to people with substantial holdings under the Pembina Field which he had coloured on the map (exhibit 261) that is to say, Texaco, Texaco Canada, Hudson Bay and Amoco.
>
> Waddell was already aware of the Nairb discovery having received a copy of Mossfeldt's first report. He had also received a copy of the February 8th Crown sale results as a matter of course. Waddell already had a strong impression that the Nairb well was a significant discovery, as he felt the $1.3 million paid for two sections of land essentially underscored the significance of the rumoured D2 oil and gas discovery.
>
> Waddell said Leeson explained the general stratigraphy of the southeastern edge of the Winterburn Basin. Waddell agreed with Leeson that Home should get a position in the area.

Home proceeded to do so.

8 The significance of the input of legitimate and open industry or public information concerning the Nairb well when weighed against the curious timing of Home's employment of Leeson and its commitment to enter the Prime Prospect Area led the learned trial judge to robust findings concerning the propriety of Leeson's role in the decision taken on February 11th by Home. They included:

> Leeson did not acquire detailed information about the Wolf Creek play in the

> process of working on the forecasts nor did he ever learn any details relating to the location of the anomalies.

and

> The evidence is clear that Leeson knew nothing about the well before he left Chevron except for noting the licensing of the well to a depth of 8500 feet.

and

> I am satisfied on the evidence that Leeson did not know the location of the anomalies when he left Chevron and further that he did not divulge to Home, or any of its employees, any information he may have known about Chevron's Wolf Creek play or Chevron's exploration and seismic in the Wolf Creek area.
>
> There is no evidence, implied or otherwise, which would indicate that Leeson divulged any details which might be considered of a confidential nature pertaining to Chevron's exploration and seismic program in the Wolf Creek or Prime Prospect areas.

And significantly:

> There is no evidence that Leeson made use of any confidential information or that Home sought or endeavoured to elicit confidential information from Leeson.

9 Brigaded to these findings was Leeson's denial of any wrongdoing as given in his evidence. It is important to these reasons that they be set forth:

> Q. Now, Mr. Leeson, following the commencement of your employment with Home Oil did you at any time communicate with Home Oil or to any officer or employee of Home Oil any confidential information which you had obtained from Chevron during your employment with Chevron?
> A. No, I did not.
> Q. Did you in the course of your work for Home Oil use any confidential information from Chevron when you were taking part in the decision to approach Texaco and Hudson's Bay and Amoco for farmouts?
> A. No, I didn't.
> Q. Did you make any use yourself of any such confidential information during the further negotiations with Texaco which led to the completion of a farmout agreement on June 2nd, 1977?
> A. No, I didn't.

Q. Did you make any use of any such confidential information in connection with the planning or execution of any operations on any lands in the prime prospect area at any time after January 17th, 1977 when you joined Home Oil?
A. No, I didn't.

10 Chevron's action was dismissed, the learned trial judge finding inter alia,

> Home Oil conducted its business in a fair manner, in a competitive industry, and did so without seeking and without the benefit of information which might have been confidential to Chevron.

11 Chevron, the appellant, advances several grounds inviting reversal of the trial judgment herein. We will deal with them in order.

1. Did the trial judge err in his perception of the extent of Chevron's confidential trade secrets?

12 The statement of claim alleged that Chevron's industrial trade secret was the location of the Prime Prospect Area and the extent and character of the specific anomalies therein. In his judgment Moore, J., characterized the trade secrets as follows:

(1) The fact that Chevron had disclosed, through seismic, anomalies, believed to be pinnacle reefs of Upper Devonian Age.
(2) The location of the anomalies.
(3) That Nairb was an undisclosed agent for Chevron.
(4) That Guaranty Trust Company was an undisclosed agent for Chevron in the purchasing of two sections of land.
(5) Generally, Chevron's exploration and seismic program over lands located in the Wolf Creek area.

13 Addressing the obstacle posed by the learned trial judge's clear finding that Leeson did not know the specific location of the Devonian anomalies, Chevron urges that Leeson's admitted knowledge of Chevron's concept or hypothesis of the existence of seismic anomalies of attractive geological significance was sufficient to constitute a trade secret in itself enjoinable in the hands of Home. It is said that once the concept was known the application of that concept to specific drilling locations became routine and therefore the learned trial judge unduly limited himself in his findings. To answer this submission reference must be had to the events and, importantly, their sequence after Leeson joined Home. It is clear that before committing itself to a land assembly or drilling program, Home had acquired knowledge from legitimate industry sources that the Nairb well was a D2 discovery well of significance and that substantial prices had been paid by Guaranty Trust -- obviously acting for an undisclosed principal -- for nearby lands. There was also the realization that other oil companies held nearby lands with farmout possibilities. The drilling climate was also stimulated by the availability of attractive tax incentives for drilling then offered by the Alberta

Government. These factors common to and being common knowledge within the industry were legitimate sources of information available to Home and would be, in our opinion, unsullied by any generic "concept" of seismic anomalies to which Leeson may have been privy. When Chevron elected to drill the Nairb well into the Upper Devonian levels industry interest in the well itself and what it might represent, was bound to be engaged. In our view this ground must fail even conceding, for the purpose of argument, that the learned trial judge was unduly restrictive in his visualization of the actual trade secret deserving protection. Moreover, a considered review of the trial judge's approach to the problem does not sustain the appellant's complaint. The trial judge's inclusion into the category of trade secrets of "Generally Chevron's exploration and seismic program over lands located in the Wolf Creek area" together with his finding that Home Oil conducted its business without "... the benefit of information which might have been confidential to Chevron" would seem to demonstrate that he was at least alert to the issue now posed by the appellant. Consideration of the trial judge's finding that "Leeson did not divulge to Home or any of its employees any information he may have known about Chevron's Wolf Creek Play or Chevron's exploration and seismic in the Wolf Creek area" is a further indication that he was not reversibly restricted in his gauge of the extent of the confidential information deserving of protection.

2. Did the learned trial judge err in law in failing to equate Leeson's knowledge of Chevron's confidential information to that of Home?

14 The trial judge's finding that there was no evidence that Leeson made use of any confidential information is challenged by Chevron as irrelevant and unnecessary to fix Home with liability because Leeson's knowledge by virtue of his managerial employment within Home, became that of Home without the necessity of proving any dissemination or disclosure.

15 Again, the appellant must navigate the trial findings. In our view, the conclusion that no improper use was made by Leeson, and therefore Home, of Chevron's confidences dispels this submission. The organic theory of corporate management discussed in cases such as H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham, [1957] 1 Q.B. 159 (C.A.), is of no help to the appellant in view of the trial judge's conclusion.

(3) Inevitability of "use" in the circumstances.

16 Much of the argument was devoted to the inevitability of use by Leeson of confidential information as must be inferred from the acceptance of certain admitted or undisputed facts. Mindful of the usual appellate strictures imposed by findings of credibility, Mr. McLaws referred us to the distinction between facts inferentially drawn from specific preliminary facts and preliminary facts standing alone on foundations such as credibility. The distinction was put, for example, by Viscount Simonds in Benmax v. Austin Motor Co. Ltd., [1955] A.C. 370, as the difference between perceiving and evaluating facts. In attacking the trial judge's finding that there was no evidence of Leeson's "use" and therefore that of Home, the appellant points to thirteen admitted or proven facts within the evidence and invites this court to evaluate their collective weight in reviewing the

correctness of the negative "use" finding made below. They deserve to be listed.

17 In promoting Home's involvement in West Pembina,

(1) Leeson, admittedly, knew of the Chevron "concept" or "hypothesis" which was derived from the finding of anomalies suggestive of Upper Devonian reefs at Wolf Creek.
(2) The seismic work done at Wolf Creek showed the existence of anomalies and this was confidential information known, as such, to Leeson,
(3) Leeson hoped that the drilling locations promoted by him for Home would contain anomalies similar to those exposed by Chevron.
(4) Leeson knew the Nairb well was being drilled for Chevron at least at the time of the February 11th. commitment.
(5) Leeson knew the Nairb well was in the Wolf Creek area and knew of its Upper Devonian depth.
(6) Leeson activated Home's interest and subsequent entry into the Wolf Creek play.
(7) Prior to Leeson's arrival Home did not have available to it the knowledge, resources geological or geophysical, or the explorational appetite to have independently embarked upon the land assembly or exploration undertaken by it later.
(8) Home moved speedily, following Leeson's hiring, to gain posture and prominence in Wolf Creek.
(9) Leeson pointedly directly Mossfeldt, Home's scout, to acquaint himself with the Nairb well specifically and Chevron's companion operations generally.
(10) Leeson initially preoccupied himself with the Wolf Creek area although his hiring as Home's Canadian Exploration Manager was brought about by Home's desire to return to the "mainstream" or vanguard of Western Canadian exploration.
(11) Home was not possessed of any employee who had knowledge of the trends or geology of the rim of the Central Winterburn Shale Basin in the Wolf Creek area until Leeson joined the Company.
(12) Although successive licensing of the Nairb well and its apparent success was in the public domain, only Home, among Chevron's competitors, moved to acquire land positions and drilling opportunities in the area.
(13) When Leeson resigned from Chevron he was cautioned by Dr. Henderson, Chevron's head of exploration activity, that Chevron did not expect to see Home surface suddenly in the Wolf Creek area.

18 From these 13 facts we are asked to conclude, contrary to the learned trial judge, that there was "... a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what the plaintiffs allege happened did in fact take place." See Milgrim, Trade Secrets, 1978, New York, Matthew Bender,

Vol II at 795. But the analysis cannot end there. At the risk of repetition when Chevron decided to drill the Nairb well into the Upper Devonian level, the risk that the industry's attention would be drawn arose. More so when its success became known. Even the expanded parameters of what was confidential sought by Chevron in this appeal do not inhibit or permeate the sources of information available to Home, amongst Chevron's competitors, which encouraged the taking of a competitive position which Home did. This included the purchase and review of seismic data and geological advice available from industry sources and consultants together with knowledge of ongoing drilling activity in the area by Nairb and Chevron, as well as associated Crown land purchases for provocatively high prices.

19 We, in effect, are asked to conclude that Leeson, previously cautioned by Dr. Henderson about Home's potential appearance in Wolf Creek, consciously delayed Home's entry into the field until sufficient "industry" facts emerged to sanitize Home's commitment. The conclusion that Leeson's confidences springboarded, to employ the term used in Seager v. Copydex Ltd., [1967] 2 All E.R. 415 (C.A.), Home into West Pembina depends when all the evidence is considered, on several assumptions of fact strongly resolved against the appellant by the trial court. We refer mainly to the input of and weight given by the trial judge to other "uncontaminated" industry facts which forged Home's decision.

20 In our view this ground of appeal is, in its substance, an attack upon the credibility of the Leeson testimony. First, some elementary geology must be reviewed. It was canvassed in great detail at trial. But the essence is that the question here is three dimensional: the Chevron concept involved not only projections of geographic contours but also an idea of geological time and stratigraphies.

21 Dealing with the latter notion first, and at great risk of oversimplification, the hydrocarbons so much prized in this age are found at various depths in subterranean Alberta. At certain ages past, a particular stratum in the earth's mantle was the earth's surface. These ages are named. The two of greatest interest here are called the Nisku Age, often called the D2, and an older age, the Leduc Age, often called the D3. Both are of an age generically called the Upper Devonian. Turning to the question of land contour, the Prime Prospect Area of Chevron lay principally within a Devonian sea called the Winterburn Shale Basin, a deep structural basin, the bottom of which exposed rock formations of Leduc Age. The surface of the basin was shale or compressed clay. Bordering it, generally, to the southeast lay a geological occurrence of Nisku Age known as the Nisku Shelf or Nisku Outer Shelf which was composed of a carbonate platform. In turn, the Nisku Shelf was bordered generally to its southeast by the Nisku Barrier Reef, also called the Nisku Barrier or the Nisku Barrier Reef Edge. The area where the shale deposits of the Winterburn Shale Basin met the carbonate platform -- the Nisku Outer Shelf -- was referred to in the evidence as the left or north edge of the Nisku Shelf or the edge of the Winterburn Shale.

22 The geologist looks for pockets in the earth's stratum where hydrocarbons may collect. Reefs are ideal pockets, and reefs then, as reefs now, grew in shallow, warm seas. The seismic anomalies

stumbled across by Chevron were indicative of reefs, and in an area where none previously were thought to exist. Chevron did considerable research in an attempt to characterize the correct age of these reefs, map the area at that age, and locate more anomalies. During this period, before any wells were drilled, a thesis or concept developed. This concept was that the reefs had originated in either Nisku or Leduc time in the deep basin off the edge of the carbonate platform. Now, all seem to agree that the reef Chevron found started to grow in a minor transgression in Nisku time. But, earlier, one theory was that they were Leduc reefs which grew up through time to the Nisku age. However, one geologist, as early as April, 1976, put forward the "Nisku" theory at a meeting.

23 The first proposition of Chevron at trial was that Leeson, when he left Chevron, knew all this and wrongly took this confidential concept with him to Home. Leeson acknowledged only that he was aware that the Chevron concept was that there were Leduc reefs out in the edge of the Winterburn Shale Basin, and denied that he had any understanding that the concept included any idea that these reefs existed in Nisku time. He was believed in this assertion.

24 He also gave evidence that, after he heard that the Nairb well had proven reefs in Nisku or D2 time, he developed what he considered to be a new thesis, one quite different from and quite independent of what he understood to be the Chevron concept. This was that the Nairb well had found a reef on, or just off, the carbonate platform, the area to the north of and west of the Nisku Barrier Reef which, in Nisku time, was of higher elevation and where, therefore, seas would likely be shallower and reefs encouraged. He describes his thesis in this way:

> It's a classical theory, really, and if you have a barrier reef with a platform in front of it which gradually dips off into -- the term starved basin has been used here, and the classical theory is a favourable area for finding reefs in front of this barrier reef, there is a fairway in front of the reef up to and maybe just after the drop-off start into the basin.

25 He ties this theory closely to the notion, obtained independently from his Chevron knowledge, that the Nairb discovery was a Nisku reef. He says:

> Well, once you have that information that they have a D2 discovery, I say to my mind if you sit down and think about it, look at it, and if you know the basic geology of the area, there is what I would call an almost classical hypothesis that's available to you to explore.

26 As we understand the matter, this thesis was not precisely correct. The reefs did not follow the line of the barrier reef except in the most general way. Also, Leeson had misremembered the Chevron concept.

27 The plaintiff appellant argued, in effect, that the only errors made by Mr. Leeson were in his testimony. But the appellant could not shake his credibility before the learned trial judge. The learned trial judge believed Leeson when he says he operated and advised Home on this thesis. This

case might have been different had the appellant succeeded, by expert testimony, in demonstrating not only that the Leeson thesis was fallacious but also that it was impossible: that no reasonable geologist could have come to the conclusion he did in the way he says he did. But, the appellant failed in this endeavour. At the end of the day therefore, the issue was one of credibility and it was resolved by the learned trial judge against the appellant. To reverse the trial judge on this point would be a bald retrial of the case at appellate level.

(4) Home's duty to employ Leeson, in non-contentious undertakings

28 Error is supposed on the failure of the trial judge to impose upon Home a duty to avoid placing Leeson in an area where the knowledge he did possess would inevitably conflict with the interests of Chevron. The prudence of the succeeding employer in assigning non-competitive duties to the transferring employee in Mobil Oil of Canada v. Canadian Superior & Neilsen (1979), 19 A.R. 100, [1979] 4 W.W.R. 481, is cited. But discretion is not duty. It was corporate policy alone and not an obligation of law that dictated the course chosen in Mobil v. Neilsen. Kirby, J., who tried the case, did not equate the practice to any duty imposed at law to do so. Here, Phillips, president of Home, advised Leeson at the outset of his hiring that Home would not expect him (Leeson) to disclose anything proprietary to his previous employer.

29 To a large degree Chevron's contention is answered by the trial findings concerning "use" as well as the limits of Leeson's actual knowledge. In addition the duty sought by Chevron is not easily reconciled with the observations of Lord Atkinson in Herbert Morris Limited v. Saxelby, [1916] A.C. 688, at 699 where he said:

> If that is what is meant, then such oppression, if it existed does not concern him alone. The general public suffer with him for it is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and of all those who desire to employ him.

Of course a qualification must be supplied and we would, in that respect, embrace Moore, J's, statement:

> It is essential that individuals always be entitled to improve their position by changing jobs. So long as they do not, in the process, divulge to their new employer or his agents information that may be considered confidential. To hold otherwise would virtually make employees prisoners of their employer.

30 Leeson was under no contractual commitment to Chevron to avoid competitive employment upon departing Chevron. What he did agree to at the outset of his employment was to avoid disclosure of confidential information gained by his Chevron employ. The trial findings demonstrated no breach of that agreement.

(5) Real possibility of conflict

31 The appellant contends that in recognition of the problems of proof facing plaintiffs in confidential trade secret cases "the courts have developed the proposition that the real possibility of misuse will fasten the defendant with liability". Boardman v. Phipps, [1967] 2 A.C. 46, and Morkin v. Boras, 18 A.R. 236, [1978] 2 W.W.R. 385, are quoted in support. We do not believe that the principles extractable from these cases redefine Chevron's burden of proof. Both dealt with the fiduciary obligations of solicitor and trustees arising, in Boardman, from misuse of information obtained during a professional relationship and in Morkin from contractual opportunities made possible again by that relationship between solicitor and client. Neither purports to dispense with the essential evidentiary link between proven misuse and accountability. In Boardman equitable principles of long standing governing fiduciaries in instances of conflict or possibility of conflict were reaffirmed by the House of Lords. But its authority has not been extended to the condemnation of mere proximity to possible conflict. Use, again, is the key. In Canadian Aero Service Limited v. O'Malley et al., [1974] 2 S.C.R. 592, it was held that faithless fiduciaries must answer for their default according to their gain. Nonetheless the breach of faith must, at least, be inferentially supportable. Laskin, C.J.C., said at 609:

> The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company as for example by reason of legal disability, to participate in the transaction. An analogous situation, albeit it not involving a director, existed for all practical purposes in the case of Phipps, v. Boardman, which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest.

32 The learned trial judge quickly dismissed the appellant's submission on this point as having any application to Leeson's proven conduct. He said: "Suspicion of misuse of confidential information is insufficient -- there must be real evidence." We think he was correct. The cautionary words of Lord Selborne, L.C., in Barnes v. Addy, 9 Ch. App. 244, at 251 cited in Boardman v. Phipps, supra, are useful:

> It is equally important to maintain the doctrine of trusts which is established in this court and not to strain it by unreasonable construction beyond its due and corporate limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable application of them.

33 Nor would such a recasting of the usual burden of proof accord with that which is implicit in the authorities of Mobil Oil v. Superior & Neilsen, supra, and Guyer Oil et al. v. Fulton et al., 12 N.R. 627, [1976] 5 W.W.R. 356; [1977] 2 S.C.R. 791 (S.C.C.). The necessity of proof of actual

detriment to he who claims misuse of an industrial secret may in addition be drawn from Coco v. A.N. Clark (Engineers) Ltd., [1969] R.P.C. 41, Seager v. Copydex Ltd., [1967] 2 All E.R. 415, and Cranleigh Precision Engineering Ltd. v. Bryant et al., [1964] 3 All E.R. 289.

34 In Guyer v. Fulton the issue arose over the accountability of a consulting engineer retained to supervise the drilling of several oil wells who bid, following the cessation of his employment, successfully on certain competitive leases. Hall, J.A., in the Saskatchewan Court of Appeal examined the relationship existing between Fulton and his prior employer and concluded that no fiduciary relationship existed and that on the evidence Guyer was a mere servant. He observed:

> The respondent Fulton, therefore, does not become liable to the appellants by the mere acquisition of the lease. It must be shown that in acquiring the lease the respondent improperly made use of confidential information acquired during the term of his employment to the disadvantage of the appellants.

In reviewing Leeson's relationship with Chevron and what he was exposed to in connection with Chevron's Wolf Creek Play generally, despite his job description, we would not on the evidence characterize him as fiduciary to Chevron after leaving its employ, thereby attracting the higher duty and lesser standard of proof outlined by Laskin, C.J.C., in Canadian Aero, supra. Certainly the trial judge was not persuaded otherwise.

> The learned trial judge erred in his finding that Leeson's knowledge of the directional trend of the Nisku Shelf was general geological knowledge, and not confidential to Chevron.

35 This question was addressed at length in the argument of the appeal. It was urged that Home's decision to approach Texaco, who owned leases to the northeast of the location of the Nairb well, for drilling sites could only have been spawned by Leeson's knowledge of or familiarity with the northeast - southwest trend of the Outer Nisku Shelf and its perimeters -- knowledge secret and proprietary to Chevron. In simplistic terms, it is urged that Leeson and Home knew, with suspect haste, from the site of the Nairb well where Home should locate. Chevron says that this immutable fact demonstrates either conscious -- despite the trial findings or at least non-advertent use of Chevron's privileged concept.

36 A distinction must be made here between three things: the existence of the Outer Nisku Shelf, its precise boundaries, and its general trend. The existence of the Outer Nisku Shelf was generally known to geologists. On the other hand, its precise boundaries were not generally known but were known to Chevron. Leeson acknowledges that he knew that the Chevron concept was that some at least of these anomalies had been found out in the deep basin, and not on the shelf. But he says, and he was believed, that he did not know where precisely they were nor where precisely the boundary was between the shelf and the deep basin. It follows, firstly, that nothing in this destroys the thesis he says he formed after hearing that Nairb had found oil in the D2: his thesis was that the Nairb well was on the shelf and had found a reef on the shelf.

37 But, it is argued for the appellant, even if one accepts this evidence, how is it that Mr. Leeson knew to go to the north-east in search of oil? The answer which he gives is simple. He says that while he did not know the precise boundaries of the shelf, he assumed that the shelf boundaries followed -- in a general way -- the direction of the Nisku barrier reef. The Nisku barrier reef was a well-known geological occurrence and it had a southwest to northeast trend. Leeson says,

> Q. And why did you colour the Texaco and Amoco or Amoco and Hudson Bay lands?
> A. Well, after sitting down and thinking about the information that we had, that it struck me that there might be an opportunity for what I'd call a strategic land acquisition on what I thought to be the prospective area updip from this D2 discovery.
> Q. When you say updip, what do you mean by that?
> A. Well okay on this Nisku fairway northeast of what I would call a Nisku fairway northeast of the Nairb discovery, actually the whole trend is both northeast and east.

38 In short, his thesis was that the fairway would follow the direction of the Nisku barrier reef. The fact that this thesis was correct only in the most general way is not of significance. What is of significance is that the learned trial judge accepted his statement as an honest statement, and must have come to the conclusion that it was a reasonable one. Again, it was a credibility finding.

39 Mr. Leeson gave extensive evidence as to his earlier experience in making studies of the geology of this area albeit it with Chevron but unconnected to its Wolf Creek play:

> For instance, there is a map that I made, and I believe it may well be in use in Chevron, I think it was up until the time that I left, which is called Isopach of the Pre-Winterburn Reefoid Beds, and that was a map that went from the base of the Upper Devonian or Swan Hills up to the top of the reefoid beds within the Winterburn, various stages of reefs. And in connection with the mapping and exploration of the various reef objectives, I became very familiar with the stratigraphy of the Winterburn and the basic, the basic geological principles of deposition that relate to that formation.

And further:

> Q. All this work that you were doing then was of a basic nature?
> A. I would characterize it as the basic regional stratigraphy that must be done in order to develop ideas and concepts and plays, and with regard to the Upper Devonian, the main play that was looked for and the main objective over the years, of course, was reefs in the various stages. So that not only the reefs themselves that I have mentioned but the off reef stratigraphy must be studied in order to try to detect -- one of the things a geologist tries to do is to look for reef

> indicators in the off reef section and so, of course, one must study the off reef section in order to be able to do that.
>
> Q. Would you say that all this work that you have been describing was proprietary to Chevron?
>
> A. I would say that any concepts or any part of the work or concepts that were developed that went into a specific prospect in that context, you know, that leads to a specific prospect, then that is proprietary, but the basic regional stratigraphy and the knowledge thereof is something that is -- that's my basic work experience. If I can't use that any time that I'm employed as a geologist, I have no backlog of experience on which to fall back.

40 This evidence was not seriously attacked and legitimized this aspect of the Leeson thesis as did the conclusions of Norman Cowper, a consulting geologist retained by Home during the critical period.

41 Mr. Leeson's perception of the division between privileged knowledge and portable knowledge lawfully accompanying a departing employee in our view aligns with authority. Obviously all knowledge cannot be embargoed during an employment change. Nor should it be. We think the statement contained in "Conflicts of Interest in the Oil and Gas Industry", Morrison (1963) Rocky Mountain Mineral Law Institute 229 is coapt to the exploration industry generally and the facts found here. The author states:

> ... one who leaves the employ of another has the right to take with him all the skill he has acquired and all the information and knowledge he has received, provided nothing taken is the confidential property of the employer. Such skill, information and knowledge, as so limited, become a part of the individual's equipment and cannot be taken from him. However ... trade secrets are the property of the employer and cannot be taken or used by the former employee for his own benefit. Such a rule can probably be reasonably and fairly applied to geologists and landmen. The geologist who has worked as a corporate employee in a certain area has acquired a great deal of knowledge about ... conditions, formations and production characteristics of that certain area. All of this he surely could continue to use. As opposed to this, however, he cannot take with him seismograph information which has been developed by the corporation, detailed subsurface studies or unpublicized well information.

42 It was urged by the appellant that the Leeson thesis was destroyed by his admission in cross-examination that he was surprised to hear that the Nairb well got D2 production because, "I think out there in the edge of the Winterburn Shale Basin it's an unlikely place at that time to have gotten D2." Certainly, if by "in the edge of the Winterburn Shale Basin" Leeson, meant in the deep basin off the edge of the carbonate platform, the Nairb discovery did not support his thesis. It would have contradicted it. But it is not clear that he used those words in that sense. The remark was made

in the context of the suggestion that he thought that the oil had been found on the platform. This ambiguous statement is an insufficient foundation for the attack suggested by the appellant.

43 It was also argued strenuously that the learned trial judge confused the geology involved when he stated:

> He (Leeson) knew from his general knowledge as a geologist that the Nisku Barrier Reef trended from northeast to southwest in the Pembina area running parallel to the Nisku Reef.

On the basis of this slip, it is argued that he failed to clearly distinguish between the edge of the reef and the carbonate shelf or platform. However this may be, the judgment is replete with the trial judge's confidence in the evidence of Mr. Leeson. In our view, the passages to which we have referred, dealing with Leeson's theoretical analysis of the direction in which favourable drilling opportunities might be located, together with the assembly and employment of his general knowledge, are adequate support for the trial judge's conclusions, however they may now be subject to laboratory dissection. The admonitions included in Jaegli Enterprises Limited v. Ankenman and Taylor et al. (1981), 40 N.R. 4, S.C.C. June 22, 1981, are appropriate. In Jaegli, appellate courts were reminded that it is wrong to set aside a trial judgment where there is not palpable and overriding error and the only point at issue is the interpretation of the evidence as a whole. Facts are stubborn. Those found by Moore, J., in our view, preclude the success of this appeal and we would dismiss it with costs.

44 As the costs of the trial do not appear to have been resolved, we would direct that the costs of this appeal be fixed upon the scale to be set by the learned trial judge.

Appeal dismissed.