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Ridgewood Resources Ltd. v. Henuset

[1982] A.J. No. 641

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Appeal No. 13591

Alberta Court of Appeal
Calgary, Alberta

Moir, Haddad and Laycraft JJ.A.

February 4, 1982.

Counsel:

A.D. Hunter, for Ridgewood Resources Ltd.
D. Haigh and B. Poznanski, for Arthur Henuset.

The judgment of the Court was delivered by

1 **LAYCRAFT J.A.**:-- The issue on this appeal is whether the respondent, Henuset is liable for the misuse of confidential information given him by the appellant, Ridgewood. The appellant alleges that Henuset was able to purchase certain developed and undeveloped oil lands using the information and that as a result, Henuset holds as trustee for it "a minimum 10 per cent carried interest" in the lands. There is an alternative claim for damages. Ridgewood's action was dismissed at trial.

2 In 1978 the United States parent company of Cardo Canada Ltd. decided to sell its Canadian properties consisting of some producing oil and gas wells and a large area of undeveloped but

prospective oil and gas land. In preparation for the sale Cardo commissioned an independent firm of Engineers, Farries Engineering (1977) Ltd., to bring up to date its previous report evaluating the properties. This report, some 260 pages in length contained a massive compilation of technical and economic information relating to the properties designed to enable a prospective purchaser to evaluate them.

3 Cardo determined at an early stage of its effort to sell the property that it wished to deal directly with prospective purchasers and did not wish to use the services of any independent broker. Cardo made known the availability of its property in the limited circle of those organizations and persons it thought might be serious prospective purchasers. Through 1978 and 1979 it handed out copies of the Farries report, updated again in early 1979, to "over 20" different groups in Calgary alone in an attempt to attract a purchaser. It continued to deal itself, through its Canadian officer, Mr. McMillan, directly with prospective purchasers and explained it did not wish to use a broker. The reason for this preference was explained at the trial of this action by Mr. Dodge, an official of the American Company. He said that in the oil industry, brokers customarily burden a property with a percentage interest retained to themselves as a fee. That burden would change the economics of any transaction for a prospective purchaser so that the property would become less attractive or even unsaleable.

4 The appellant Ridgewood is a small independent company, without great resources, of which Bruce M. Miles is the principal shareholder. He first heard the Cardo properties were for sale from an acquaintance and occasional business associate and decided to investigate them. He was aware that Ridgewood did not have the resources to buy them on its own account. Mr. McMillan, the Canadian officer of Cardo engaged in the sales effort, states he would not have regarded Ridgewood as a serious purchaser and would have been apprehensive about handing the report to it for that reason. Mr. Miles was, however, acquainted with Mr. Dodge and approached him directly for a copy of the Farries Report. Mr. Dodge gave him a copy but did so with the injunction that it was to be used for Ridgewood's own account. He told Miles he didn't want the transaction "brokered up and down the street". He told McMillan that Miles had the report but would not be "brokering it" and would not be seeking a finders fee from any person. For his part, Miles was aware that he would need to attract other persons who would provide Ridgewood with financing.

5 One person Miles contacted because he thought he might be interested in the property was Norman A. Clark, a petroleum engineer who worked in the industry in that profession and was also the owner of a small oil company. Mr. Clark, was interested in working to evaluate the property in order to acquire an interest in it. Mr. Miles delivered a copy of the Farries Report to Clark, who proceeded to analyze it.

6 On July 17, 1979 Miles telephoned Henuset. He made known the availability of the property and suggested that Henuset join with Ridgewood in acquiring it. The proposal was that Henuset would provide all the money required in excess of bank financing and would give a 25 per cent "carried" interest to Ridgewood. This proposal, which bears a considerable resemblance to the

"brokering" which Cardo had forbidden, envisaged Ridgewood contributing no money at all to the transaction.

7 On July 18, Henuset and two of his advisors met with Miles and Clark. In the telephone call or at the meeting Miles produced the following information:

1. The fact that Cardo wished to sell its Canadian property,
2. The Farries Report which had been given him by Cardo

3.

(a) a letter dated July 4, 1979 written by Clark, giving his assessment of the Farries report. The first page and a half of the letter is a table of figures taken directly from the Farries report, Clark's contribution being to round off the numbers. The remainder of the letter, both McMillan and Clark, testified was a summary of information given by McMillan to Clark,

(b) two sheets of paper prepared by Clark, setting out his forecast of cash flow from the properties. These were in part forecasts of future gas prices made in the past by various consulting and banking institutions and in part extracts from the Farries report supplemented by information given to Clark by McMillan.

4. Various oral opinions by Miles and Clark, regarding the attractiveness of the property in the nature of sales talk to induce Henuset to accept the proposal.

8 At no time did Miles caution Henuset that any of the information was confidential nor did he expressly impose any restraint on its use. None of the information given to the meeting could be termed secret information. That the property was for sale was widely known in the group of persons and organizations who would be interested in it though it was not known to Henuset until Miles told him. The Farries Report had been distributed within this group and of course, it was not Miles' property. Cardo had handed it to many people and had never imposed any conditions on its use, apart from the caveat that it was not to be used "to broker" the property. Mr. McMillan gave evidence at the trial on this aspect.

Q. Right. Now, in any of your activities in 1978 or 1979 in the circulation of the Farries report to possible purchasers, did you ever specify to anyone that it was a secret or confidential report or that the information you were giving them in answer to their questions was secret or confidential, Mr. McMillan?

A. No. The information was not -- in other words, I wouldn't expect the person who is looking at it and examining it to run up and down 8th Avenue like the town

> crier and circulate it around, I don't expect that, but if the person wanted to divulge the information to somebody else, a cohort of theirs or something or several people at a luncheon, no, it wasn't confidential in the manner like, say, seismic information or land information that would pertain to sale, no, very definitely no.

9 The evidence of Henuset and his advisors is that the Clark letter and the forecasts of gas prices were not used by them. They regarded themselves as at least Clark's equal in extracting information from the Farries Report and in forecasting cash flows which were dependent on gas prices. They did not consider, on their own analysis, that the property could support a carried interest or even sustain a large degree of bank financing. The expressions of opinion they regarded as mere salesmanship.

10 The learned trial judge reviewed at length the evidence relating to the Farries Report, the Clark letter, and the forecast of gas prices and held that none of it was confidential information. There was ample evidence to justify these conclusions. Of the Farries Report, he said:

> I have no hesitation in holding that the Farries Engineering Report, (Exhibit No. 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.

11 Of the Clark letter the learned Trial Judge said:

> the evidence satisfies me that Exhibit No. 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 No. 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 No. 2 was deficient in this respect. In this sense it was not information at all but misinformation. I therefore hold that Exhibit No. 2 is not confidential information.

12 Dealing with the forecasts, he said:

> In regard to Exhibit No. 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.

13 Mr. Henuset was absent from Calgary from July 19 until Sunday, July 22. On July 20, Mr. Brock a chartered accountant who advised Henuset attended with Miles at McMillan's office. Mr. McMillan discussed the properties with Brock and impressed Brock with his knowledge and expertise. Mr. Brock at this meeting obtained considerable technical information from McMillan and commenced to have a favorable impression of the transaction. At this meeting it was McMillan and not Miles who answered Brock's questions about the cash flow potential of the properties.

14 On Sunday evening, July 22, after Henuset's return to Calgary, Miles telephoned him to suggest that Henuset accompany him to Denver on the following day to discuss the properties with Dodge. Henuset was again not available but it was agreed that Miles would telephone him from Denver and if the property was still available for purchase, Henuset would fly to Denver Monday evening. That was done and Henuset, Miles and Dodge met in Denver on Tuesday, July 24. Miles and Henuset returned to Calgary on the same flight that evening.

15 At the meeting on July 18, and during the telephone call on July 22, there was discussion about the interest Ridgewood would acquire. All were clear that Ridgewood proposed to contribute no money to the purchase. Henuset would provide all funds and Ridgewood's interest would be "carried" presumably as a reward for its services in making his transaction known. On July 18 Miles said that he sought a 25 per cent carried interest. When asked whether Ridgewood, would contribute to future expenses, there was no answer since Miles and Clark, then got into a discussion between themselves about that aspect. There was also mention about 15 per cent as a possible figure. On Sunday evening during their telephone call 15 per cent was again mentioned, as well as 10 per cent but again no conclusion was reached. A discussion at the Calgary airport after their return from Denver was equally inconclusive.

16 On July 25 Henuset telephoned Miles to obtain a file of documents which the latter had carried from Denver. It was urged before the trial judge that this was a further instance of information supplied by Miles to Henuset The learned trial judge, however accepted Henuset's evidence that this file of confidential maps had been given to him by Cardo at his request. Since he had no brief case and Miles did, he asked Miles to carry the file to Calgary, and on July 25 was simply recovering it from Miles. The trial judge's finding on the credibility of the differing evidence of Miles and Henuset in this respect cannot be challenged.

17 From July 25, Henuset and Miles ceased to deal with each other on this transaction. Henuset continued negotiations directly with Cardo; Miles attempted to interest other prospective purchasers

in the property. On July 26, Henuset telephoned Miles and said that he could not make an offer for the Cardo property if he was required to give Ridgewood a carried interest. He said he was prepared to pay a normal finder's fee but Miles did not agree.

18 On July 26, Henuset made an offer for the land directly to Cardo which was rejected. On August 3 he made another offer as a result of which he purchased the property at the price originally suggested to Miles, though with somewhat different terms of payment. On September 11, Miles and Henuset talked about a finder's fee of one per cent ($55,000) but agreement was not reached and this action resulted.

19 The Statement of Claim pleads that the information Miles gave to Henuset was of:

> a confidential nature supplied to the defendant in circumstances importing an obligation of confidence and that the same was used by the defendant for an unauthorized purpose, to wit: the purchase of the Cardo properties by the defendant for his own account and to the exclusion of the plaintiff.

20 It is clear that this pleading invokes the equitable jurisdiction of the court. Lord Denning, M.R., described this jurisdiction in a frequently quoted passage in Seager v. Copydex Ltd., [1967] 1 W.L.R. 923, at 931 as follows:

> I start with one sentence in the judgment of Lord Greene, M.R., in Saltman Engineering Co., Ltd. v. Campbell Engineering Co., Ltd. (1948), [1963] 3 All E.R. 413 at 414:
>
> > If a defendant is proved to have used confidential information, directly or indirectly obtained from the plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.
>
> To this I add a sentence from the judgment of Roxburgh, J., in Terrapin, Ltd. v. Builder's Supply Co. (Hayes), Ltd., Taylor Woodrow, Ltd. & Swiftplan, Ltd., [1960] R.P.C. 128 at 130, which was quoted and adopted as correct by Roskill, J., in Cranleigh Precision Engineering Co., Ltd. v. Bryant, [1964] 3 All. E.R. 289 at 301 - 302:
>
> > As I understand it, the essence of this branch of the 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, and

> springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.

> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.

A portion of this statement was quoted with approval by Spence, J., in a somewhat different context in Slavutych v. Baker (1975), 3 N.R. 587, [1976] 1 S.C.R. 254, at 262.

21 I confess to some uneasiness that an equitable remedy is sought by a person who seems to have disclosed the information in breach of the terms upon which he had himself obtained it. Mr. Miles was told, in a somewhat inelegant but completely comprehensible phrase, that he was given the Farries Report on terms that he would not "broker it up and down the street". He was not to burden the land with a carried interest. In my view he did precisely that. Then, and after he ceased to deal with Henuset he sought to attract purchasers just as a broker would do. He spoke in his evidence of the transaction as a "partnership" but it was not a partnership in which all partners were to invest money. Mr. Miles hoped to earn his interest for introducing the property, a plain breach of the terms on which he received the information.

22 This being an equitable cause of action ordinary equitable defences apply to it. In Argyle (Duchess) v. Argyle (Duke), [1967] 1 Ch. 302, the plaintiff sought to restrain her former husband from publishing confidences which she had communicated to him during marriage. It was urged against her that she had, herself, earlier published some of these confidences. Ungoed-Thomas, J., observed that a person coming to equity for relief must come with clean hands, "but the cleanliness required is to be judged in relation to the relief that is sought ..." (Page 332). On the facts he found that the two publications were "not of the same order of perfidy" and that the plaintiff was not disentitled to relief. The case is an instance, however, where ordinary equitable defences were considered in relation to this equitable cause of action.

23 This case was not argued before us on the basis that his own conduct disentitled Miles and his company to relief. I refrain therefore from considering the application of the rule to these facts. I must observe, however, that if the appellant succeeds on these facts, it means that every person to whom he spoke about the property was thereafter precluded from dealing with Cardo except on the footing that a carried interest was reserved. That was a plain breach of Cardo's condition and an obvious prejudice to Cardo's interest as owner.

24 In my opinion this appeal must fail, in any event, because the information transmitted by Miles to Henuset was not secret. It was in the public domain. During the course of argument it was contended that, though the information is not secret, the circumstances of disclosure may nevertheless produce a confidential relationship which makes the recipient liable for subsequent use

to the detriment of the giver of the information. In my view that is not a correct statement of the law. Both elements, secrecy of the information and the circumstance of confidential disclosure, must co-exist. In addition, to render the cause of action complete, there must, of course, be unauthorized use of the information to the detriment of the party giving the information.

25 In Coco v. A.N. Clark, (Engineers) Ltd., [1969] R.P.C. 41, the plaintiff alleged he had communicated secret information about the design of an engine during negotiations leading to a partnership and that the defendants had then proceeded, on failure of the negotiations, to use the design themselves. Megarry, J., traced the history of this cause of action and defined the elements of it, referring to the judgment of Lord Greene, M.R., in Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (1948), [1963] 3 All E.R. 413. At page 47 Megarry, J., said:

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R., in the Saltman case on page 215, must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.

26 Dealing with the requirement of secrecy he continued:

> First, the information must be of a confidential nature. As Lord Green said in the Saltman case at page 215, 'something which is public property and public knowledge' cannot per se provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge. But this must not be taken too far. Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components.

27 The information in this case did not have "the necessary quality of confidence about it." It was known to only a small group, but the community in which the information would have any significance was itself a small group. The witnesses spoke of having handed the Farries Report to "over 20" companies and persons in Calgary, to one or two in Edmonton and to several in Denver Among prospective purchasers of oil lands, the information was in the public domain. It did not matter that it was not known to Henuset. The communication of information which is in the public domain, though not known to the recipient, does not (apart from contract) make the recipient liable

for its use.

28 I would dismiss the appeal with costs.

qp/s/mek/jpn