

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of William J. White and Another v. Samuel Simpson Sharpe, from the Court of Appeal for Ontario; delivered the 29th July 1910.*

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PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ATKINSON.

LORD SHAW.

LORD MERSEY.

[DELIVERED BY LORD MACNAGHTEN.]

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This is an Action to enforce specific performance of an Agreement dated the 23rd May 1907 for the sale of shares in a mining company. The Agreement states certain representations as the basis of the contract; it sets them out in detail. On the 1st June 1907, after a visit to the property in company with the Plaintiff, and a refusal by the Plaintiff to extend the time for payment, the Defendant W. J. White telegraphed to the Plaintiff as follows:—"Representations made by you not found to be true. Contract cancelled." The Defendant was asked by telegram and letters to state in what respect the representations were not true. He made no answer. Sharpe, the Plaintiff, then brought this Action for specific performance. The defence was a charge of fraud and nothing else. On that issue the parties went to trial. The learned Judge, after seeing and hearing the witnesses, made a decree for specific performance. He

believed Sharpe. He did not believe White. He found that there was no ground for any charge of fraud. That finding of his was very clear on all points. The Court of Appeal, to whom the case was afterwards taken, also pronounced in favour of the Plaintiff, but in a more hesitating manner. The learned Judges in the Court of Appeal seem to have been much impressed by a point which was abandoned in the opening before this tribunal. All the material parts of the evidence have been read, and their Lordships are of opinion that there is no foundation whatever for any of these charges of fraud. So far as the defence goes on the ground of fraud, there is not a tittle of evidence to support it.

But another defence has been raised this morning to this effect, that in the course of the negotiation a representation was made which was not strictly and accurately true. There was a misrepresentation made inadvertently, and on the ground of that misrepresentation it was said the Court ought not to enforce specific performance. Now it is to be observed that neither in the original defence, nor in the course of the trial, nor in the printed case laid before this Board, was any such ground relied upon as a defence to the Action. The Judge of first instance alludes to a case of innocent misrepresentation, as he calls it, but he says, assuming that would make the contract non-enforceable, he is against the Defendant on the question of fact, that is to say, he holds that in fact there was no misrepresentation at all. The alleged misrepresentation, such as it was, was this: Sharpe was asked, before the Defendant went to visit the ground, what had been done in the way of development. Sharpe replied, by wire: "Not much development, only two or three acres scratched over. One shaft about 45,

“ another about 25 feet.” Sharpe had forgotten that a diamond drill had been put in some time before he was interested in the property. When they were on the ground together the circumstance was recalled to his memory by an observation of White’s, and then he told White all about it. White made no objection at the time. He did not complain that Sharpe’s wire was misleading, or that he ought to have been told about the diamond drill before. Sharpe said at the trial very fairly that, if the diamond drill had been in his mind when he sent the wire to White, he would certainly have mentioned it, and worded his telegram differently.

Nobody seems to have thought that experiment of any importance, neither the Judge nor the witnesses, until this morning, when it has been urged upon the Board as a defence to specific performance. It has frequently been laid down that a person is not to be permitted at the very last moment before the ultimate Court of Appeal to raise defences which were never thought of before. It seems to their Lordships that the representations on which the Contract was to stand or fall are to be found in the Agreement, and that those representations, including a representation as to the extent of development work, have all been proved or admitted to be true.

Their Lordships therefore think there is no defence to this Action for specific performance, and that the Appeal ought to be dismissed, and dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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WILLIAM J. WHITE & HELEN WHITE

v.

SAMUEL SIMPSON SHARPE.

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LONDON :

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1910.