

Judgment of the Lords of the Judicial Committee of the Privy Council on the three Appeals (consolidated) of Charles W. Stapleton v. The American Asbestos Company, Limited, from the Court of King's Bench for the Province of Quebec (Appeal Side); delivered the 29th July 1912.

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ATKINSON.

SIR CHARLES FITZPATRICK.

[DELIVERED BY LORD ATKINSON.]

This is an Appeal into which, by Order of the Court of King's Bench (Appeal Side) for the Province of Quebec, three Appeals from three judgments of that Court, each dated the 22nd March 1911, were consolidated for the purpose of appeal to His Majesty in Council. The action out of which these Appeals arose was instituted by Charles W. Stapleton, the Appellant, to recover the sum of \$18,000, balance of a sum of \$23,000 commission at the rate of 10 per cent. on a sum \$230,000, the alleged purchase money of certain mining property situate at or near the town of Black Lake in the Province of Quebec, purchased by the Respondent Company from three other companies having interests in them, namely, The United Asbestos Company, The Glasgow and Montreal Asbestos Company, and The Manhattan Asbestos Company. The first of these companies was an English company having its head office in London, of which a Mr. Fisher was

the General Manager; the second was incorporated by a Canadian statute and had its head office in Glasgow, one Colonel Aitken being its President; and the third was an American company having its head office in New York, of which the Appellant, a resident in that city and a member of the Bar of the State of New York, and also of the Supreme Court of the United States, was President and Manager, as well as a creditor and a holder of its stock to a large amount.

The first-named company had leased its mining property to the last-named who had set up upon it valuable plant, and at the time of the sale worked it. These properties of the three companies adjoined or lay near each other, and the proportions in which the purchase money of \$230,000 was to be divided between them respectively were as follows: To the United Asbestos Company, \$100,000; to the Glasgow and Montreal Asbestos Company, \$90,000; and \$40,000 to the Appellant's company, the Manhattan. The Respondents' defence to this claim was a plea of fraud to the effect that the Appellant knowing that two of these companies, the Montreal and Glasgow and the United Asbestos were willing to accept the sums of \$75,000 and \$50,000 respectively for their respective interests, and that therefore these two companies, together with his own, were willing to accept a much less price than \$230,000 for their combined interest, falsely represented to the Respondents that this latter was the lowest price the companies would accept, and by means of that misrepresentation induced the Respondents to offer to purchase the three properties for this latter sum, and further to agree to pay the Appellant the commission, the balance of which, after giving credit for \$5,000 already received by him upon account, he sued for in the action.

The Respondents subsequently discovered that the Appellant, having thus agreed to obtain from them commission on the purchase money at 10 per cent. had, unknown to them, also contracted for and obtained what was alleged to be secret commission from the vendors, the companies other than his own, namely, \$6,750 from the Glasgow and Montreal Company, and \$12,350 from the United Company, making altogether \$19,100. That is a commission of \$42,100 on all, or over one-sixth of the purchase money.

On the discovery of these facts the Respondents filed a counter claim, claiming a repayment of the sum of \$5,000, the portion of the commission already paid by them, and also claiming to recover the commission received by him from the vendors. They based these claims on the ground that the Appellant was their agent, commissioned by them first to find out the lowest prices at which the two companies other than his own would sell their respective properties, and secondly to obtain the acceptance of their offer of \$230,000 for the three properties, and lastly to carry through the sale on their behalf.

By the judgments appealed against the Appellant's claim was dismissed and the Respondents were awarded on the counter claim a sum of \$17,500.

The two main, and as the pleadings stood, crucial facts upon which the Respondents' defence and counter claim rested were, first the alleged knowledge of the Appellant that the two companies other than his own would accept for their respective properties these two sums of \$80,000 and \$75,000, and secondly the fact that they, the Respondents, had constituted the Appellant their agent, not merely, as he contended, to submit their offer of \$230,000 to the vendors, but in addition to endeavour to procure the acceptance of this offer by those vendors. There is a conflict of evidence on both these points, and the evidence given in support

of the Respondents' contention is rather vague and weak. Their Lordships prefer, therefore, to deal with the case on the admissions, oral and written, made by the Appellant himself. And though they think that it is much to be regretted that when these admissions were extracted from the Appellant the pleadings were not amended so as to raise clearly and precisely the real issues between the parties, they are of opinion that there is enough averred in the pleadings as they stand to enable them to dispose of the case on the materials already mentioned, namely, the admissions of the Appellant himself, without taking by surprise or placing at a disadvantage either of the parties litigant.

Of the Respondent Company which had its head office at Black Lake, one Henry H. Whitney, of the City of Boston, was at and before the date of the transaction in controversy, President, and one Edward Slade, of the City of Quebec, was General Manager and Treasurer.

The negotiations for the sale of these properties of the three companies, or at least of the two of them other than the Appellant's, may be taken to have opened by a letter of the Appellant to Slade, dated the 8th of August 1906, when the writer was about to visit London. The letter runs as follows:—

“ New York,

8th August 1906.

“ Dear Sir,

“ Referring to the subject of our conversation at Black Lake on Monday last, I find I shall not sail until Saturday, 18th August, instead of on the 11th as I had intended. Perhaps in the meantime you might be able to ascertain in a general way whether it would be worth while for me to get that the ‘rock bottom’ prices for these properties when I am in Europe. I shall be entirely willing to undertake the job if it is deemed important. Of course I do not expect you can speak ‘by the card’ at this stage of the game, but thought perhaps you might be able to indicate whether, under reasonable circumstances, the proposition would be attractive.

“ Very truly yours,

“ Mr. Edward Slade, (Signed) C. W. STAPLETON.

“ Black Lake, Canada,”

To this communication Slade replied by a letter, dated the 10th of August 1906, which ran as follows :—

“ Black Lake, P.Q.,

10th August 1906.

“ Dear Mr. Stapleton,

“ I am in receipt of your letter of the 8th. As I don't want my office to know that this matter is up for consideration, I am writing you m. s.

“ I went all over your mines the day after you were here and made a close examination of all the rock inside. There are some very good showings and also some very bad looking rock, which is to be expected in this district. As you know the mine has been extremely badly worked and would require a large expenditure to put them in good workable order.

“ I can say, however, that if you could get a sort of option or promise of sale from the proprietors on easy terms and at a reasonable figure, we would be willing to consider the proposition seriously immediately you had things in shape. But please bear in mind that we would not consider any fancy price, and in the case of the Canadian property it would have to be a very attractive price, as the mine looks awfully poor, and I went all over it.

“ Please let me know what you think could be done in the way of price and terms. I am afraid the prices you mentioned the other day are too high.

“ With regards and in haste,

“ Yours truly,

“ (Signed) EDWARD SLADE.”

The Appellant himself appeared to consider that this correspondence clothed him, at least, with authority, to ascertain, if it did not impose upon him a duty, to ascertain, on behalf of the Respondent Company the lowest prices at which the companies referred to would dispose of their respective properties. He said he had interviews with Mr. Fisher and Colonel Aitken, in which he endeavoured to obtain from them this information, but that both declined on behalf of their respective companies to name any price as the lowest they would take. So far he had done the job which he stated in his letter of the 8th of

August 1906 he was willing to undertake if it was made worth his while; but the strange and questionable thing about the Appellant's conduct on this occasion is this, that without communicating in any way with the Respondent Company, or either of their representatives, Whitney and Slade, he forthwith, on his own confession, took on hand quite another job, in conflict with the first. He arranged with Mr. Fisher and Colonel Aitken to get on their behalf, as representing their respective companies, offers from persons desiring to purchase these mines, and to submit them to the representative of the vendors for acceptance. The Appellant's duty to Mr. Fisher and Colonel Aitken under such an arrangement would be to get and submit the best offers he could procure. That, however, is by no means all. In his deposition in rebuttal, made on the 20th of January 1910, he volunteered to detail a conversation which he stated took place between Mr. Fisher and himself, (he was not sure whether or not Colonel Aitken was present), touching his commission. It is very instructive. The account of the conversation runs thus:—

“ Mr. Fisher said to me: ‘ Now, Stapleton, you have been
 “ ‘ doing a lot of work about this and spending a lot of money,
 “ ‘ and of course, if any sale occurs we shall expect you to
 “ ‘ be paid.’ I said: ‘ Of course, I shall expect to be paid,
 “ ‘ Mr. Fisher, if any combination or any sale is made, but
 “ ‘ naturally I had it in mind to look to the purchaser for
 “ ‘ that, because I thought would come more logically from
 “ ‘ the purchaser than it would from you people, whom I
 “ ‘ assume will perhaps be offered less than you think your
 “ ‘ property is worth.’ Then I said: ‘ There is another
 “ ‘ thing, Mr. Fisher, about it, I am asking you to do some
 “ ‘ work and you have already been to Scotland and you
 “ ‘ have to do more work at this end and possibly come
 “ ‘ to America. If anything is accomplished it will
 “ ‘ be only right that you should have something.’
 “ Mr. Fisher said: ‘ Well, of course, I could not consider
 “ ‘ anything that come in the way of commissions from
 “ ‘ my company.’ ”

So the Appellant, after having offered to the representative of one of the vendors a commission on the the sale of his principal's property, an offer which Mr. Fisher to his credit refused, returned to America commissioned on behalf of the vendors to obtain and submit offers for these mines, on the understanding that he should be paid commission if a sale took place, either in what he considered the more logical course, namely, by the purchaser, or if not, by the vendors. In the sequel, however, he apparently got rid of this preference for the more logical method of procedure and took commission from both sides, thus fleecing them impartially.

The Appellant on his return from England visited Black Lake on the 27th of October 1906. He had there an interview with Slade in which he says that he related to Slade, as best he could, all the conversation which had taken place between himself, Colonel Aitken and Mr. Fisher; gave him all the facts and circumstances; and further told him that in his, the Appellant's judgment, the result of his visit had been that the vendors had modified their views as to the value of their properties, and that a good substantial offer for them would be seriously considered. The Appellant then proceeded to enter more into details. He said Slade stated that he would see Mr. Whitney, that perhaps they would make some sort of offer, and that the Appellant thereupon said to Slade:—

“Now, Mr. Slade, this is another point that must be understood in any offer you make, viz., that it must be accompanied with ten per cent. commission for me in writing. And I said: ‘Now, while I have had some talk with the other side about commissions there is nothing fixed and nothing definite, and they are under no legal obligation, and I will have to look to you for the commission as I have no arrangement whatever on the other side.’ Of course, that was the absolute truth, because no arrangement had been made. We had merely talked about it as I have already explained. Mr. Slade said: ‘That’s

“ ‘all right. Mr. Whitney has had large experience in these
 “ ‘matters, and he understands all that, and I have already
 “ ‘spoken to him and there won’t be any question
 “ ‘about it.’

“ I said: ‘There is another point that I want to mention
 “ ‘Mr. Slade.’ He said: ‘We may not make an offer and
 “ ‘again if we do make an offer and it is accepted, Mr.
 “ ‘Whitney may not take this property to the American
 “ ‘Company. The American Asbestos Company is my
 “ ‘company and I am interested in it as a stockholder, and
 “ ‘as treasurer, but Mr. Whitney has various interests, and
 “ ‘he may take it over to the King property which he owns
 “ ‘and which adjoins you on the south, or he might take it
 “ ‘to a new company in which he might not let me partici-
 “ ‘pate. Now, in the event of his taking it to any company,
 “ ‘or if it goes to any company that is not my company and
 “ ‘I help you sell the property then I think I should share
 “ ‘in the commission.’

“ I said: ‘You are right, Mr. Slade, and as far as I am
 “ ‘concerned you shall. Let it be understood that if the
 “ ‘title to this property goes as the result of your offer, and
 “ ‘what conversation we have had and what you may do,—
 “ ‘if it goes to anybody except the American Asbestos
 “ ‘Company, then you are to share in the commission.’
 “ That is all there was said about it.

“ Q.—Then, there was no absolute promise of a com-
 “ mission?

“ A.—There was no absolute promise of a commission.
 “ What happened is simply what I have stated.

Slade was examined as to this conversation. His evidence is wholly unsatisfactory. All he said (page 102) is that he could not remember seeing the Appellant at Black Lake in October 1906 or having any conversation with him, but that what the Appellant stated might be true. He distinctly swears, however, that on the important day, the 1st of November, following upon the transaction on which so much turns in the case, he was not aware that the Appellant expected to receive a commission from the United Asbestos and the Glasgow and Montreal companies if the sale went through. Mr. Whitney’s evidence touching the point of the payment of this commission by the vendor companies to the Appellant is to the

same effect, he did not, he said, know of it until the 28th of February 1908, and at page 101 he makes the further important statement that had he known the Appellant was acting as agent for the vendors and receiving a commission from them he never would have consented or agreed to pay him the commission of \$23,000. The reason why Slade's evidence in reference to this interview of the 27th of October is unsatisfactory is not far to seek. He had yielded to the temptation which Mr. Fisher withstood, and arranged with the Appellant that he should get some share of the latter's commission of \$23,000. He was in this position, therefore, when he gave his evidence, that if the Appellant's claim was defeated he would lose that share, the amount of which, but the amount alone, was in controversy between them. Mr. Fisher was not examined, Colonel Aitken was. No evidence is given as to any arrangement touching commission having been made between the vendors and the Appellant, other than that made with them in September 1906, until the month of November 1906. This latter will be hereafter referred to. Their Lordships have some doubt, therefore, whether the representation the Appellant alleges he made to Slade upon the 27th of October was a candid or accurate representation. The arrangement was scarcely, they think, so undefined and contingent as he represented it to be. Now, in this state of circumstances, Messrs. Whitney and Slade called upon the Appellant at his office in New York late in the afternoon of the 1st of November 1906. The Appellant says he expected them earlier, but he had not been idle while he awaited their arrival. He had during the interval negotiated with Messrs. Robinson and Hopper an offer for the purchase of the property of the United Asbestos Company and the Appellant's Company, the Manhattan Asbestos Company, for \$140,000. It was not an uncon-

ditional offer, it was subject to two most burdensome conditions, first that the price was to be reduced by \$15,000 in case the litigation in reference to the boundary line (of the property presumably) should be decided against the Defendants in a suit then pending, and secondly, that the companies which the Appellant represented were "to assume the costs and responsibility" and carry on the existing litigation. The offer was embodied in a letter dated the 1st of November 1906, signed by H. H. Robinson, and addressed to the Appellant. This letter contained the important paragraph following:—

" This offer is made upon the understanding that you are
" to proceed to London immediately and to use your best
" endeavours to insure the acceptance of this offer."

It was drawn up in duplicate, one copy being kept by Mr. Robinson. At the bottom of this latter is written a letter which the Appellant, at page 48, practically admits he signed, their Lordships think. It ran as follows:—

" New York, 1st November 1906.

" Mr. H. H. Robinson.

" Dear Sir,

" I have received a proposition from you of which
" copy is hereto annexed and agree to carry out the pro-
" position as far as I am able to do so, and I will proceed to
" London at once on the proposition and endeavour to carry
" it through.

" Very truly yours,

" CHARLES W. STAPLETON."

The moment these documents were exchanged, the Appellant was no longer a free agent in these matters. He was bound in morals and in law to do his utmost to procure the acceptance of Robinson's offer, and by consequence the rejection of every other offer for the purchase of the properties of the United and Manhattan companies, whether by themselves or in conjunction with other properties competing with Robinson's offer. Common honesty, good faith, as well as legal

contract, would have constrained any man, not indifferent to the obligations these things concurrently impose, to refuse to undertake any mission involving the defeat of the very thing he was bound to forward. This was the position of the Appellant when, Robinson's deal being concluded, he interviewed Whitney and Slade. It was a long interview. During it he made a great profession of frankness and candour, calculated to win their confidence, but in their Lordships' view he concealed some important facts, misrepresented others, mislead Messrs. Whitney and Slade as to the true position of things, and by these discreditable means induced them to make an offer of purchase which, had they known the truth, they, or Whitney, at least, never would have made. Now, the Appellant's statement is as follows, page 41 :—

" Then, finally, when they did come I said, ' You are
 " ' pretty late in getting here. You have put me in an
 " ' embarrassing position, because I already have an offer
 " ' and have already promised to go to London and submit
 " ' it and I am bound to do so, and I want to say to you
 " ' frankly that I regard it as a fair offer, and you must not
 " ' be deceived about it, and if you have any idea of offering
 " ' a small price for this property it seems to me you will
 " ' not stand very much chance with this offer in my pocket,
 " ' because I am bound to submit it.' I said, ' You are now
 " ' a little late and these other people have made me this
 " ' offer.'

" There was quite a little conversation along that line
 " and Mr. Whitney commenced to intimate that they would
 " like to offer about two hundred thousand dollars, and I
 " finally said to them, ' We may as well be frank. There is
 " ' no use of our spending time over this matter now in
 " ' further negotiations. I will say this to you, that you
 " ' will have to make an offer as good or better than two
 " ' hundred and thirty thousand dollars (\$230,000) for
 " ' those three properties, or I don't think you will stand a
 " ' very good chance of getting them.' "

Then, after explaining how he arrived at the figure of \$230,000, namely, by basing his calculation on Robinson's offer, and the option

his company had obtained to purchase the property of the United Company for \$100,000, he stated thus:—

“ I said, Gentlemen, I don't know whether these companies will accept the offer or not. I don't know anything about that; all I can do is to go over and submit it, and I have now to submit this other offer also. I am bound to submit both. Finally, he said, one or the other of them. All right, we will make an offer of \$230,000.”

It would be difficult to suggest a more artful *suppressio veri* and *suggestio falsi* than this evidence discloses. The Appellant never alluded to the legal contract he had entered into not only to submit Robinson's offer, but “to use his best endeavours to insure” its acceptance, and to proceed to London to carry it through. On the contrary he impliedly represented that he was as free with regard to one offer as to the other, equally bound to submit both for acceptance, but not bound to press the acceptance of one to the necessary rejection of the other. That representation by the Appellant of his position and obligations was a false representation, and he knew it to be false. It was a misrepresentation of a most important fact. It was calculated to mislead, for no one possessed of his senses would, in their Lordships' view, employ, at a cost of \$23,000, an agent to submit for acceptance an offer of purchase of which that agent was in effect bound by contract with another to procure the refusal. If Mr. Whitney's evidence, which is not impeached, is to be believed, then the suppression by the Appellant on this point, of the real facts did mislead him, and did induce him to make the offer which he swears he never would have made had he known the truth. Their Lordships are therefore forced to the conclusion, which appears to them to be irresistible, that the truth was concealed and the real state of facts impliedly, if not expressly, misrepresented by the Appellant

in order to deceive the Respondents. A gross fraud was, in their view, practised by him upon the Respondent Company through its representatives. It was a fraud inducing the contract, the fruits of which the Appellant now seeks to gather, but it would, they think, be against every principle of justice to permit him to do so. That however is not all. The Appellant used this offer of Robinson as a rival bid to force a higher offer from the Respondents. He never suggested that there were any onerous conditions attached to Robinson's offer which despite the nominal amount of the purchase price might render it less acceptable to the vendors than the offer of a lesser price without conditions. The fair inference from the Appellant's evidence is, their Lordships think, that in these negotiations with the Respondents Robinson's offer was represented as an offer unfettered by conditions which might decrease its value. That is, in their view, the natural impression which would be produced on the mind of anyone who listened to what the Appellant states he said. If so, it was a false impression, produced by the Appellant's suppression of the truth. If he was about to use it as a means to induce the Respondents to make an offer more attractive than Robinson's for the properties with which it was conversant, he ought to have either truly represented what the latter was in fact, or at least have abstained from suggesting or causing it to be understood that it was something better than it was in fact. Mr. Atkin for the Appellant contended that if the Respondents knew that the Appellants had arranged or contracted to receive commission from the vendors as well as from the purchasers and had consented to it they could not complain. That is no doubt so, but the burden of proving their knowledge and consent on this point rests upon the Appellant. He made

an attempt to discharge that burden in his account of the conversation alleged to have taken place between him and Slade on the 27th of October. He renewed that attempt in his account of the conversation which took place between him, Whitney, and Slade upon the 1st of November. At page 43, after describing certain alterations made in the agreement then drawn up touching the commission payable by the purchasers, he said "I handed it" (meaning the agreement) "back to him" (meaning Whitney) smiling as I did so, "and he said you will get that" (meaning a sum of \$3,000) "out of the other side. I said "I hope to and more, but I "have no arrangement with the other side. I "cannot rely on them at all. We all had a "laugh over it." But why could he not rely upon them at all, since, according to his own account, it was Mr. Fisher who, again and again, suggested that he should get commission from the vendors? Mr. Whitney has, at page 104, distinctly denied that this statement was ever made by him.

The Appellant sailed for England on the 3rd of November 1906. He arrived in London on the 13th. He at once placed himself in communication with Fisher and Aitken. 'The Respondents' offer was accepted on the 13th of November. On the same day a letter was written by Messrs. Aitken, Mackenzie and Company to him to the following effect:—

"C. W. Stapleton, Esq.,

"New York.

"Dear Sir,

13th November 1906.

"Referring to the proposed sale of the property of
 "the Glasgow and Montreal Asbestos Company, Limited, at
 "Black Lake, Canada, we beg to state that it is understood
 "that your commission for carrying out the transaction
 "shall be 5 per cent. on one half of the purchase price of
 "\$90,000, and 10 per cent. on the remaining half of the

" price respectively \$2,250 and \$4,500, in all six thousand
 " seven hundred and fifty dollars, payment to be made in
 " cash and bonds proportionally as and when received.

" Yours truly,

" (Signed) AITKEN, MACKENZIE, AND CLAPPERTON,
 " Secretaries, The Glasgow and Montreal
 " Asbestos Company, Limited."

Yet in the face of this letter he, at page 44 of his evidence, renews the vain attempt to represent that the arrangement by the vendors to pay him commission was a kind of afterthought of Fisher's, having no connection with the acceptance of the Respondents' offer, and that till the 18th of February, when his work was done, the sale completed, and the commission actually paid, the vendors were not under any legal obligation whatever to pay him any commission. Their Lordships cannot accept this story. They think that commission was paid, most probably in accordance with the understanding arrived at with these vendors in the month of September on the occasion of the Appellant's first visit to London, but they are clear on this, that he obtained this commission from the vendors through and by virtue of his position as the bearer of the Respondents' offer, and equally clear, that on his own admission, he had acquired that position by means of his own fraud.

The Appellant's Counsel admitted, quite properly their Lordships think, that if this were the true view of the facts the Appellant could not either recover the money he sued for, or retain the money he had received from either vendor or purchaser in payment of commission. In their Lordships' view this is the true conclusion upon the facts. And they are therefore of opinion that the Respondents were entitled in law and justice to the relief awarded to them, though unfortunately they did not base their claim with sufficient fulness, clearness, and precision, on the ground on which their Lordships' conclusion

rests, namely, the admissions contained in the evidence of the Appellant himself. Their Lordships are, however, of opinion that in the averments contained in the 11th and following paragraph of the plea of the Respondents, coupled with those contained in the 6th and subsequent paragraphs of the Respondents' Cross-Demand, the true grounds on which the Respondents are entitled to the relief awarded to them are sufficiently set forth to enable their Lordships to hold that without any amendment of the pleadings the judgment appealed from was right, and should be affirmed, and this Appeal be dismissed ; and they will humbly advise His Majesty accordingly. The Appellant must pay the costs of the Appeal.

In the Privy Council.

CHARLES W. STAPLETON

v.

THE AMERICAN ASBESTOS COMPANY,
LIMITED.

DELIVERED BY LORD ATKINSON.

LONDON:

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