

Laura McEwan - - - - - *Appellant*

v.

Arthur Cosens and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1934.

Present at the Hearing :

LORD BLANESEBURGH
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD ALNESS.
SIR SIDNEY ROWLATT.

[*Delivered by* LORD THANKERTON]

This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated the 8th June, 1933, reversing a judgment of the Court of Appeal of British Columbia, dated the 7th March, 1933, which had affirmed a judgment of the Supreme Court of British Columbia dated the 10th December, 1932.

The writ in the present action was issued on the 5th August, 1931, by the present appellant, as administratrix of the estate of Hiram Stevenson, and as suing on behalf of the heirs of James Proudfoot, against the respondents as executors of the estate of Daniel Lindeborg and administrators of the estate of Andrew Lindeborg. The appellant was held by the Trial Judge not to be entitled to sue on behalf of the heirs of James Proudfoot, and has since continued the action only as administratrix of the estate of Hiram Stevenson.

The appellant as such administratrix seeks to recover from the respondents one-quarter of the amount paid by the appellant in

that character for judgment and costs in an action in the Supreme Court of British Columbia between one William F. Harris as plaintiff and Daniel Lindeborg, administrator of the estate of Andrew Lindeborg, Duncan C. Barbrick, administrator of the estate of James Proudfoot, the present appellant, administratrix of the estate of Hiram Stevenson, and Daniel Lindeborg as defendants. That action had been determined by a judgment of the Supreme Court of Canada, dated the 23rd December, 1930, in which judgment was given for Harris for \$50,000 and costs against the present appellant as representing the estates of Stevenson and Proudfoot, the action against Lindeborg being dismissed. During the course of the proceedings Barbrick, the representative of the Proudfoot estate had died, and the present appellant had been made the representative of that estate for the purposes of the action.

The appellant, having settled the Harris judgment by paying the amount thereof and costs, proceeded as the legal personal representative both of Stevenson and Proudfoot to claim in the present action against the Lindeborg estates for \$27,724.52, being one-half of the amount so paid by her, but, as already explained, the claim was limited to one-quarter—\$13,826.26—by the Trial Judge, who gave her judgment for that amount. That judgment was upheld unanimously by the Court of Appeal of British Columbia, but was reversed by the Supreme Court of Canada, which dismissed the action.

The circumstances leading up to the Harris action may be briefly stated as follows:—James Proudfoot, Hiram Stevenson, Andrew Lindeborg and Daniel Lindeborg were miners and prospectors and had become owners interested equally in a group of mineral claims in Northern British Columbia known as the Big Missouri Group. In 1925 that group was sold by them for \$300,000; the last instalment of the purchase price, of the amount of \$100,000, was paid early in 1928. By that time, Duncan C. Barbrick represented the estate of Proudfoot, who had died in 1910, the present appellant represented the estate of Stevenson, who had died in 1917, and Daniel Lindeborg represented the estate of his brother Andrew, who had died in 1925.

The writ in the Harris action was issued on the 18th July, 1928, and Mr. R. M. Macdonald, barrister and solicitor, was retained by all the defendants to defend the action. When the statement of claim was delivered on the 11th September, 1928, it disclosed that the claim of Harris was a claim to one-third of the price realised for the Big Missouri Group and was based on an alleged oral agreement in June, 1909, between Harris, then the owner of three mineral claims known as the Jumbo Group, with Proudfoot and Stevenson, whereby Proudfoot and Stevenson were to do whatever work was necessary to and keep up all assessments and record the same on all the ground within the boundary of said group, manage, group and look after said claims, and the

handling, selling, optioning and crown granting of said claims, for which Proudfoot and Stevenson and their associates were to receive two-thirds of all the money and profits derived therefrom, and Harris was to receive a one-third share of all monies received in respect to the said claims and all other claims grouped therewith by selling or otherwise, after deducting all expenses. It was further alleged that Proudfoot, Stevenson and the two Lindeborgs had entered into possession of the Jumbo Group, but had allowed these claims to lapse on the 8th August, 1909, and on the 9th August, 1909, Stevenson and Daniel Lindeborg had relocated the Jumbo Group as the Big Missouri and Kansas Mining Claims and recorded said claims on the 10th August in their two names; and, further, that on or before the 9th August, 1909, Proudfoot, Stevenson and the two Lindeborgs had agreed to consolidate the Big Missouri and Kansas claims with certain adjoining claims under the name of the Big Missouri Group for the purpose of optioning and selling them.

Mr. Macdonald, who is a lawyer of high standing, and whose evidence has been accepted by all the Courts, says :—

“ Until I got the statement of claim I did not know what the Harris claim was founded upon. When I saw his statement of claim I saw, as it sets out, an allegation of an agreement alleged to have been entered into by Harris with Proudfoot and Stevenson, and a further allegation that that agreement was entered into by Proudfoot and Stevenson on their own behalf and on behalf of their associates. I filed and delivered a demand for particulars as to who the associates were, and the reply was that the associates were the Lindeborgs. Well, it at once appeared that a question arose there, if Proudfoot and Stevenson did enter into the agreement that Harris alleged, how could they bind the Lindeborgs, unless they could show that the Lindeborgs had authorised Proudfoot and Stevenson to enter into it on their behalf, and it raised an issue of the agency between Proudfoot and Stevenson and the Lindeborgs; consequently it raised the defence which I have set out there in paragraph 20, that if there was any such agreement entered into by Proudfoot and Stevenson, it was not on behalf of the Lindeborgs, nor was there any authority to enter into it on behalf of the Lindeborgs.”

Mr. Macdonald thereupon saw Daniel Lindeborg and, although Mr. Macdonald was not sure, it may be taken that Barbrick was not present; it is agreed that the appellant was not present. As the result of the interview with Lindeborg, Mr. Macdonald continued to act for all the defendants and he put in two separate statements of defence, one on behalf of the Lindeborg interests and one on behalf of the Proudfoot and Stevenson interests. These statements were identical, with the one exception of paragraph 20 of the Lindeborg statement—referred to above by Mr. Macdonald. Although an additional counsel was taken in on behalf of Lindeborg at one stage of the proceedings, without direct intervention on the part of Mr. Macdonald, it seems clear that Mr. Macdonald continued to act for all the defendants throughout the case. In result, the agreement between Harris

and Proudfoot and Stevenson was held to have been established, but the Lindeborg defence in paragraph 20 was upheld.

The present claim is wholly based on the interview between Mr. Macdonald and Daniel Lindeborg, and it is stated in paragraph 15 of the appellant's statement of claim as follows :—

“ On the occasion of the said Macdonald receiving the Statement of Claim in the action and receiving instructions for the defence it was explained to the said Daniel Lindeborg by the said Macdonald that the Lindeborgs had a separate and inconsistent defence to that of the Defendants Laura McEwan, administratrix of the Estate of Hiram Stevenson deceased and Duncan C. Barbrick, Administrator of the Estate of James Proudfoot deceased, and the said Macdonald found it necessary as the solicitor for all parties to consider if he was free to continue to act as solicitor for all the defendants, or whether he should advise Mrs. McEwan and Duncan C. Barbrick to engage a separate solicitor because of the separate and independent defence available to the Lindeborgs. This position was explained to the said Daniel Lindeborg by the said Macdonald and the said Lindeborg represented and agreed with the said Macdonald as solicitor for all the parties that he, on behalf of himself and his brother, would share equally with the said Laura McEwan and Duncan C. Barbrick, as to principal and costs in any judgment which might be given against them jointly, or against Mrs. McEwan and Duncan C. Barbrick separately. On this distinct understanding the said Macdonald agreed to act for all the parties and that Mrs. McEwan and Proudfoot interests could be represented by him, and continued to do so throughout the trial, and the appeals until after final judgment as aforesaid in the Supreme Court of Canada.”

Daniel Lindeborg being dead, Mr. Macdonald is the only witness as to what passed at this interview, and his evidence is as follows :—

“ Q. Well, tell us what you told Mr. Lindeborg. A. I pointed this situation out expressly to Mr. Lindeborg and told him that at first sight it seemed to me that it became necessary to sever his defence.

Q. Why did you tell him ? A. Well, the situation on the statement of claim.

The Court : Q. Just what you told him, Mr. Macdonald. A. Yes. Rendered this situation as a possible outcome, that Harris might recover judgment for the amount that he is suing for against Proudfoot and Stevenson estates, and fail to show any agreement by the Lindeborgs with them. That was the situation, the possible situation that presented itself to me, and which I explained to Mr. Lindeborg.

Mr. MacNeill : I presume, my lord, that all this is subject to the objection.

The Court : Your objection has been noted, Mr. MacNeill, and if you wish to, I do not see any reason for renewing it from time to time.

Mr. MacNeill : Yes, that is satisfactory, my lord. It is understood that my objection applies to all this.

Mr. Farris : Q. Go on, Mr. Macdonald. A. Well having explained the situation as it appeared to me to Mr. Lindeborg, I asked him whether under the circumstances it might not be necessary, in his opinion, for other solicitors to be engaged ; either I represent the Lindeborgs and somebody else represent the Proudfoot and Stevenson estates or I represent the Proudfoot and Stevenson estates and somebody else represent the Lindeborg interests. And Mr. Lindeborg's answer was, ‘ There is no necessity for that at all ; all the defendants in this matter stand or fall together ; whatever the outcome of it is, we share and share alike. You can go on and act for all and take any point of defence that you— ’ ”

Mr. MacNeill: You say that is in the statement of claim. I do not think it is.

Mr. Farris: I think it is all here. To clear up a little ambiguity, I will read paragraph 15. (Reading paragraph 15 of statement of claim).

The Court: It seems to me paragraph 15 is broad enough to cover that. You may go on, Mr. Farris.

Mr. Farris: Q. Very well, Mr. Macdonald. A. He further told me at that time to take any defence I could on behalf of any one of the defendants, that was available, as any such, if successful, would inure to the benefit of them all. Now, that is the substance of that conversation as well as I can recollect it. It satisfied me at the time that I was justified—

The Court: No, just a moment.

Mr. Farris: Q. Well, you could put it this way: As the result of that conversation what position did you take? A. Well, I did exactly what Mr. Lindeborg told me to do, and continued to act for all parties by delivering a separate defence raising this particular issue on their behalf."

It is admitted that Mr. Macdonald did not inform the appellant of what had passed between him and Lindeborg at this interview until shortly before the present claim was put forward in 1931, nor did he record it at the time by any entry in his books or by letter to Lindeborg, Barbrick or the appellant. Further, the appellant did not maintain that Mr. Macdonald had any authority from her to enter into any such agreement as is set forth in paragraph 15 of the statement of claim on her behalf.

In their Lordships' opinion, the first question to be decided is whether Mr. Macdonald's account of the interview is evidence of an agreement entered into between Lindeborg, acting on behalf of himself and his brother's estate, of the one part, and Mr. Macdonald, acting on behalf of Barbrick and the appellant, of the other part. If this be decided affirmatively, then two further questions will arise, as to the consideration and as to ratification by the appellant. The first question does not appear to have been considered by the Trial Judge or the Court of Appeal, but it clearly formed the main ground of the decision of the Supreme Court, as stated in the following passage:—

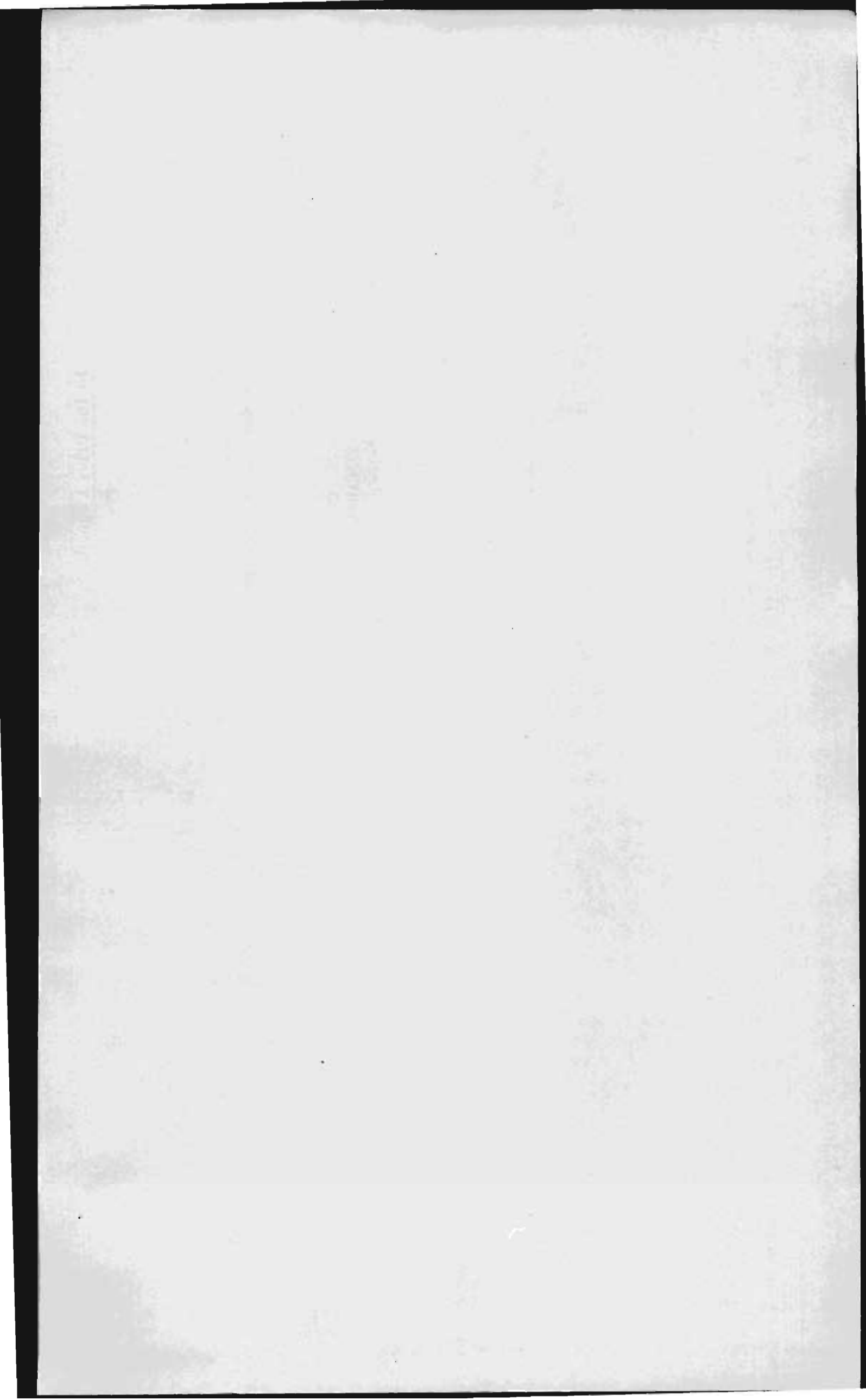
"The action can only succeed on a finding that Mr. Macdonald, in the conversation quoted, entered into an agreement on behalf of the respondent and Barbrick with Daniel Lindeborg, acting for himself and Andrew Lindeborg, to the effect set out in the clause quoted above from the statement of claim. Mr. Macdonald does not state in his evidence that he was entering into any agreement whatever on behalf of the respondent and Barbrick. The only point that he was discussing with Lindeborg was the question of whether or not he should continue to act for all parties; and the only agreement arrived at, according to this evidence, was that he should go on and act for all parties. There was no undertaking by Mr. Macdonald on behalf of the respondent and Barbrick that they should do anything at all."

Their Lordships are of opinion that this view of Mr. Macdonald's evidence is correct. Mr. Macdonald asked Lindeborg for instructions as to his employment as agent, and he received those instructions from Lindeborg, who gave a reason for the instructions. Their Lordships are unable to construe the reason so given as

an offer by Lindeborg, on behalf of himself and his brother's estate to the appellant and Barbrick through Mr. Macdonald as their agent, which required acceptance. The evidence of the witnesses Sloan and Nelson McEwan as to later conversations with Lindeborg do not assist the appellant on this point.

Their Lordships are therefore of opinion that the appellant has failed to prove the contract on which her claim is rested, and the questions of consideration and ratification do not arise. Their Lordships desire to make clear that they are only dealing with the claim of the appellant as made in the present action and as representing the Stevenson estate, and that so far as the Proudfoot estate is concerned they are not dealing with the claim, if any, which may be made by the proper representatives of that estate.

Their Lordships will humbly advise His Majesty that the judgment of the Supreme Court should be affirmed and that the appeal should be dismissed with costs.



In the Privy Council.

LAURA McEWAN

o.

ARTHUR COSENS AND OTHERS.

DELIVERED BY LORD THANKERTON.

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