Privy Council Appeal No. 37 of 1941

David Tait and others - - - - - - - *Appellant*

v.

Herbert Prest Winsby - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13th OCTOBER, 1942.

Present at the Hearing:

LORD THANKERTON
LORD RUSSELL OF KILLOWEN
LORD MACMILLAN
LORD ROCHE
LORD ROMER

[*Delivered by* LORD MACMILLAN]

The questions with which this appeal is concerned arise out of a partnership which was entered into in terms of a memorandum of agreement, dated 21st March, 1935, between the appellant David Tait, a solicitor practising in Victoria, British Columbia, on behalf of his firm of Tait & Marchant, who are also appellants, and the respondent Herbert Prest Winsby, a mining broker and real estate agent in Victoria. Mr. Winsby is the plaintiff in the action and he claims an account of all dealings and transactions by the defendants Mr. Tait and Messrs. Tait & Marchant under the partnership agreement. He contends that the partnership subsisted down to the date of the raising of the action on 5th January, 1938. The contrary contention of the defendants is that the partnership came to an end in July or August, 1935. This is the cardinal issue upon which the fate of the case turns. It has given rise to much divergence of opinion among the learned judges in the three Courts which have dealt with the case in Canada. This is scarcely surprising in view of the lack of precision in the language of the partnership agreement and the casual conduct of the parties in their business relations.

The facts are fully set out and analysed in the judgments of Fisher, J., before whom the action was tried in the Supreme Court of British Columbia, and O'Halloran, J.A., of the Court of Appeal of the Province. It will suffice to recapitulate the main features.

It appears that on 14th March, 1935, the late Mr. Ewen Morrison of Vancouver, representing himself to be the authorised agent of the owners, executed a document granting to Mr. Winsby the right to sell seventeen mining claims in two groups known as the Gold Peak and Privateer and a single adjoining claim known as the Lone Star, all situated on the Zeballos River in Vancouver Island, at the price of $180,000 for the seventeen claims and $1,800 for the single claim. For the seventeen claims $5,000 was to be payable in cash within sixty days after the completion of the agreement to purchase, " balance payable 25 per cent. smelter returns or sooner "; for the Lone Star claim " $1,000 cash, balance arranged." There was a provision for the payment of a commission of $10,000 to Mr. Morrison

and a Mr. Cameron with whom he was associated. The document concluded with the words " This option to expire twenty days from date hereof."

Mr. Winsby had no capital of his own and if he was to turn this " option " to account it was necessary for him to get into touch with someone who could provide or influence the provision of the requisite finance. Time was short. He bethought himself of Mr. Tait with whom he had been acquainted in early days and who was known to engage in this line of business. On 18th March, 1935, he presented himself at Mr. Tait's office in Victoria and succeeded in interesting him in the proposition as a " good mining deal." Mr. Winsby there and then wrote out and handed to Mr. Tait a document agreeing that Mr. Tait should be entitled to " an equal undivided interest of one half in all moneys earned and accruing from an option held by me covering the purchase of two groups of claims known and recorded as the Gold Peak and Privateer." It was arranged that Mr. Winsby should go over to Vancouver to see Mr. Morrison with a view to obtaining a report on the claims. He had also mentioned that he might be able to obtain an option on some other claims. On his return to Victoria he again called on Mr. Tait. On this occasion he produced a further document, dated 19th March, 1935, which he had obtained from a Mr. Ray Pitre, whereby Mr. Pitre agreed to sell to him certain other mining claims on the Zeballos River, known as Van Isle, Rimy and Charity, " all for the sum of $15,000, payable $800 cash and balance 25 per cent. of the smelter returns until completion. Said $800 cash to be paid on or before the 30th day of May next." To the document a note was appended containing the statement " this option to be null and void upon failure to pay $800 cash on May 30th next." The claims covered by this second " option " adjoined the Gold Peak and Privateer claims and together, as Mr. Winsby pointed out to Mr. Tait with the aid of a plan which he produced, they constituted a " splendid group to finance or present to persons having capital."

In the result on 21st March, 1935, Mr. Tait on behalf of his firm and Mr. Winsby for himself executed a memorandum of agreement constituting a partnership between them. The terms of the document are as follows:—

> " That the parties hereto have agreed to be and become partners in the business only of purchasing and taking over and forming a Syndicate upon, developing, managing or selling the groups of claims situate in the valley of the Zeballos River in the Nootka Sound area, Vancouver Island, British Columbia, comprising thirty-six (36) mineral claims, made up of the ' Gold Peak ' and ' Privateer ' group (17 claims), the ' Lone Star ' Claim, and ' Van Isle ' and ' Rimy ' group (16 claims) and the ' Charity ' No. 1 Mineral Claim and any and all other mineral claims rights, interests, etc., which the parties or either of them may acquire or become interested in in that area.
>
> " The said partnership is upon an equal basis, namely, a one undivided half interest in the said transaction to the said Tait, and an undivided one half interest to the said Winsby.
>
> " The parties shall share equally in all profits of whatsoever nature or kind arising or accruing from the entire transaction, whether by way of commissions or profits made at any stage of the transaction, or earnings of any kind whatsoever in connection therewith, save and except legal fees which shall belong to the firm of Tait and Marchant;
>
> " It is agreed between the parties hereto that all agreements and other documents relating to the said transactions shall be in the name of the said Tait who shall hold an undivided one-half interest therein in trust for the said Winsby unless and until the said Winsby shall name another trustee to hold his said interests, or shall decide to have them transferred into his own name."

Subsequently, towards the end of April or in the beginning of May, the parties agreed that Mr. Tait's share should be 65 per cent. and Mr. Winsby's 35 per cent. and the second paragraph of the agreement was altered accordingly, though with characteristic casualness no corresponding alteration was made in the third and fourth paragraphs. The explanation of the provision in the last paragraph is that Mr. Winsby had been in trouble in his early days and had suffered a year's imprisonment on a conviction for bribery, so that it was deemed inadvisable that his name should appear.

On 23rd March, Mr. Morrison signed a memorandum acknowledging receipt from Mr. Tait of a deposit of $50 on account of the purchase of the Privateer and Gold Peak claims and setting forth the terms of the proposed transaction.

Mr. Ray Pitre came over to Victoria and the parties arranged that he and the other owners of the Van Isle and Rimy claims, fifteen in all, should execute in favour of Mr. Tait a formal option of purchase of these claims. An agreement to this effect was entered into, dated 1st April, 1935.

Mr. Tait at once set about endeavouring to interest possible investors. Matters, however, had not gone far when, on 28th March, two of the owners of the Gold Peak and Privateer claims repudiated Mr. Morrison's authority to grant the option which he had given to Mr. Winsby on these claims. Despite protests and efforts, including a new offer, on Mr. Tait's part, they remained obdurate and the Gold Peak and Privateer claims passed out of the transaction. In a final letter to Mr. Morrison, who had requested the return of the relative map, documents and samples, Mr. Tait wrote on 16th May that " our hope and endeavour will be to retain quiet and amicable relationship with the Gold Peak partnership." The learned trial judge thus expresses himself: " Upon the whole of the evidence, including the correspondence as aforesaid, I am satisfied and find that the option covering the Gold Peak and Privateer groups of mineral claims, originally held by the plaintiff and later on by the defendant Tait for the partnership, had lapsed at or near the end of May, 1935, to the knowledge of the plaintiff and that the partnership had no interest in either the option or the said mineral claims at the end of May, 1935." With this finding their Lordships are in agreement.

The Gold Peak and Privateer project having thus failed, the partners were left with only the option on the Van Isle and Rimy claims to exploit, for the Lone Star and the Charity claims also fell out of the transaction and nothing more was heard of them. The partners accordingly addressed themselves to the task of making the best of the Van Isle and Rimy option, their sole remaining asset. They endeavoured to form a syndicate to finance the project along with another claim called Fair View Consolidated, but met with no success. By the end of June they found themselves at an end of their resources. When Mr. Winsby asked—" What shall we do? ", Mr. Tait could only reply—" As far as I can see, we are absolutely finished."

When the position of matters was explained by Mr. Tait to Mr. Pitre at an interview about the 10th of July the latter pointed out the difficulty in which he and his associates were thus placed. If they were to retain their rights certain " assessment " work had to be carried out on the claims and for this some money was needed. Mr. Tait and Mr. Pitre finally decided to try to form a syndicate to provide funds on the footing that Mr. Pitre and his associates should be " grub-staked " for their work on the claims. Mr. Pitre insisted that Mr. Winsby should not have anything to do with this new scheme. A draft memorandum was prepared providing for a syndicate to consist at first of sixty units of $100 each to which the Van Isle and Rimy claims should be transferred. Fifteen of the units were to be allotted to Mr. Tait and Mr. Winsby as vendors in consideration of money expended by Mr. Tait and the work which both had done. Mr. Pitre did not object to Mr. Winsby sharing in these fifteen units provided he had no other associations with the matter. The memorandum provided for the issue of further units to the original subscribers or with their consent to new subscribers.

On the 11th of July Mr. Tait, Mr. Winsby and Mr. Pitre met at Mr. Tait's office. The new proposal was fully explained to Mr. Winsby and he agreed to it. In particular he agreed that of the vendors' fifteen units five should be allotted to Mr. Tait on behalf of his firm in consideration of the cash advanced by them, which by this time amounted to nine hundred or a thousand dollars, while the remaining ten units should be divided between him and Mr. Tait on the partnership basis of 65 per cent. and 35 per cent., which gave Mr. Winsby three and a half units. Mr. Tait agreed on behalf

of his firm to start the new syndicate with a subscription of $400, representing four units. Mr. Pitre in his evidence corroborated Mr. Tait's account of what passed at this interview and stated that Mr. Winsby agreed to take what was offered to him. He did not remember the details but he was clear that "there were definite arrangements to settle the thing right there; that was the end of it so far as Mr. Winsby was concerned." After this meeting Mr. Winsby's visits to Mr. Tait's office entirely ceased and for the next two and a half years Mr. Tait saw Mr. Winsby only twice, once in the street and once in the latter's house.

The syndicate was duly formed under the name of the Nootka Gold Mining Syndicate. Fifteen units were allotted to Mr. Tait and his nominees in exchange for the assignment of the Van Isle and Rimy option and in recompense for the time and money expended by him and them in acquiring and developing the proposition. Sufficient other subscriptions were obtained to set the syndicate going and trustees were appointed to hold the option on behalf of the syndicate.

In October, 1937, the syndicate succeeded in promoting a company under the name of Man-O-War Mines Limited to take over and work the Van Isle and Rimy group of claims and five other adjacent claims which had been staked on behalf of the syndicate. On 20th November, 1937, the trustees for the syndicate assigned as vendors to the Man-O-War company all the assets of the syndicate in consideration of 300,000 shares to be allotted to them or their nominees. The trustees subsequently nominated Messrs. Tait and Marchant for 114,000 shares and Mr. Winsby for 7,000, representing respectively 57 units and 3½ units in the syndicate at 2,000 shares per unit.

The 57 units which the appellants had by this time come to hold included the 11½ units which were their share of the 15 units which formed the consideration for the transfer to the syndicate of the Van Isle and Rimy option, 4 units for which they originally subscribed $400 in cash and 6 units received by them as remuneration for their services in the management of the syndicate, making up 21½ units. The balance of 35½ units appears to have been received by the appellants in consideration of cash advances made by them.

The 3½ units in respect of which Mr. Winsby was nominated for 7,000 shares were those which he accepted as his share of the consideration for which the partnership transferred its interest in the Van Isle and Rimy option to the syndicate. These 7,000 shares were duly allotted to Mr. Winsby as an individual and the appellants raise no question as to his right to them.

Meantime, after the formation of the syndicate and its acquisition of the Van Isle and Rimy option but before it had disposed of its assets to the Man-O-War company, Mr. Tait and Mr. Pitre acquired an interest in certain claims on the Zeballos River, known as the Pilgrim group, from some miners named Ildstad with whom they entered into an agreement bearing date 1st August, 1936, but actually executed in November, 1936. These Pilgrim claims are described in the agreement as being "in apparent conflict with the Privateer group," being the group mentioned in the partnership agreement of 21st March, 1935, the option on which the partnership had failed to secure. Mr. Tait entered into fresh negotiations with the owners of the Privateer group and Mr. Morrison and as a result on 10th December, 1936, in consideration of a payment of $1,000, he acquired a new option on the Privateer group. By thus bringing the Pilgrim and the Privateer claims into the same hands he succeeded in merging their conflicting interests. In January, 1937, a company was incorporated under the name of Nootka Zeballos Gold Mines Limited, later changed to Privateer Mine Limited. To this company in May, 1937, Mr. Pitre and Mr. Tait sold their rights in the Privateer and Pilgrim claims and in conjunction with certain associates they also sold to it some other claims known as the Progressive group, all in consideration of the allotment of 90,000 shares in the company. The appellants appear to have received approximately 30,000 of these shares for themselves and they are said to be now very valuable.

Mr. Winsby evidently heard of these transactions and of the promising prospects of the Privateer mine. In November, 1937, he called twice on Mr. Tait at his office which he had not visited since April, 1935. According to Mr. Tait, however, all that was discussed on these two occasions was the matter of the issue to Mr. Winsby of his shares in the Man-O-War company. On 22nd November, 1937, Mr. Winsby addressed a letter to Mr. Tait in vague general terms but stating that he had retained a firm of solicitors to represent him " in my full interest in the partnership." This was followed by the issue of the writ in the present action on 5th January, 1938, when for the first time he formulated his claim against the appellants.

It is manifest from the foregoing narrative that Mr. Winsby's purpose in the present proceedings is to secure participation in the valuable shares in the Privateer Mine Company which Messrs. Tait & Marchant have acquired, while also claiming to participate in their shares in the Man-O-War company. To achieve this it is essential for him to establish that his partnership with the appellants was still subsisting when they acquired those shares and that they acquired them on behalf of the partnership.

The appellants, in support of their contention that the partnership had come to an end before they acquired the shares in question, invoke section 35 of the British Columbia Partnership Act (R.S.B.C. c. 213) which enacts that—

> " Subject to any agreement between the partners a partnership is dissolved . . . (*b*) if entered into for a single adventure or undertaking by the termination of that adventure or undertaking."

An identical provision is contained in section 32 of the Imperial Partnership Act, 1930.

Before setting out the varying fortunes of the parties in the Canadian courts it is necessary to notice a special plea tabled by the appellants in their defences, namely, that the plaintiff was disqualified from bringing the action because he was not in possession of a free miner's certificate at the material dates. They founded on the Mineral Act, R.S.B.C. 1924 c. 167 and amendments thereto and the Mineral Act, R.S.B.C. 1936 c. 181. Section 12 of the latter Act provides that:

> " Subject to section 13 no person or joint stock company shall be recognised as having any right or interest in or to any mining property unless he or it has a free miner's certificate unexpired."

Section 13 (3) provides that:

> " A shareholder in a joint stock company need not be a free miner and though not a free miner shall be entitled to buy, sell, hold or dispose of any shares therein."

Mr. Tait held a free miner's certificate throughout but Mr. Winsby had no certificate until he obtained one on the eve of raising his action. The argument was that as Mr. Winsby held no certificate he could not legally have any right or interest in any mining claims or options and consequently was debarred from asserting any rights in the mining claims or options in question. Their Lordships mention the point but, as will appear, they do not find it necessary to pronounce upon it as they propose to proceed upon other grounds in disposing of the appeal.

The case came on for hearing in the first instance before Fisher, J., in the Supreme Court of British Columbia. The learned judge held that the plaintiff was not barred from raising the action by reason of his not possessing a free miner's certificate at the material dates. As to the partnership, he held that it was for a single adventure or undertaking, namely, the adventure or undertaking of turning to profitable account, through the medium of a syndicate, the options mentioned in the partnership agreement; that after the option on the Gold Peak and Privateer claims proved to be unauthorised the partnership ceased to have any further interest in these claims and was thereafter confined to the exploitation of the Van Isle and Rimy claims; but that the partnership's adventure or undertaking did not terminate when the option on these claims was transferred to the Nootka Gold Mining Syndicate but continued to subsist until the syndicate sold the option to the Man-O-War company in November, 1937. Consequently the learned judge held that Mr. Winsby was entitled

to an account with respect to the shares in that company issued to the appellants but that the partnership had no interest in or concern with the shares acquired by the appellants in Privateer Mine Limited.

In the Court of Appeal, to which the plaintiff appealed and the defendants cross-appealed, Martin, C.J. and Macdonald and Sloan, JJ.A. decided against Mr. Winsby solely on the ground that he did not at the material times possess a free miner's certificate. McQuarrie, J.A. and O'Halloran, J.A. agreed with the trial judge that the partnership was confined to a single adventure, but, differing from him, they held that the adventure terminated when the syndicate was formed and Mr. Winsby accepted 3½ units in satisfaction of his whole remaining interest in the partnership. The appeal accordingly failed, the cross-appeal was allowed and the action was dismissed.

In the Supreme Court of Canada on further appeal there was again divergence of judicial opinion. The learned Chief Justice, Sir Lyman Duff, agreed with the trial judge that the partnership was still in being when the Man-O-War company took over the Van Isle and Rimy option from the syndicate, but, differing from the trial judge, was of opinion that the transaction whereby the appellants acquired shares in Privateer Mine Limited also came within the scope of the partnership so as to render the appellants accountable to Mr. Winsby for these shares. Davis and Crocket, JJ., took the same view as the Chief Justice. On the other hand Hudson, J., with whom Kerwin, J., concurred, agreed with the view of O'Halloran, J.A. in the court below, holding that on the formation of the syndicate and the transfer to it of the Van Isle and Rimy option the purpose of the partnership was finally fulfilled and that nothing remained to be done but to divide the proceeds of the transaction, which was duly effected. None of the judges of the Supreme Court took the view that the want of a free miner's certificate precluded the plaintiff from suing.

Their Lordships' attention was properly directed by counsel in the first place to the terms of the partnership agreement. It is a loosely framed document but their Lordships are satisfied that on a fair reading of it the parties thereby agreed to engage as partners solely in the undertaking of exploiting by the formation of a syndicate the mining options specified in the agreement. It is true that the enumeration of the specific claims is followed by the words " and any and all other mineral claims, rights, interests, etc., which the parties or either of them may acquire or become interested in " in the Nootka Sound area, but these words, in their Lordships' opinion, were intended only to cover the possibility of the partners acquiring further mining interests which they might be able to associate with the specified claims and dispose of along with them to the contemplated syndicate. The leading idea was undoubtedly the formation of a syndicate to take over the options which constituted the sole assets of the partnership and this was the enterprise in which the parties agreed to co-operate. The agreement contains no reference to any period of endurance of the partnership; this was natural enough if its only purpose was the profitable disposal of the specified claims, for the partnership would automatically come to an end when that purpose was achieved. If the intention had been to associate the partners in the general business of acquiring, developing and exploiting mineral claims, a period for the endurance of the partnership would surely have been stated. Then again there is no reference in the agreement to the provision of any capital, a fact which is inconsistent with the conception of a general business partnership but is explicable if the only intention was to turn to account in the short time available the specified assets of the partnership. Neither of the parties was by profession engaged in mining business; each had his own independent vocation; their association was solely for the purpose of a particular speculation. It was unlikely, to say the least of it, that Mr. Tait would enter into a partnership of indefinite duration and wide scope with Mr. Winsby in view of the latter's antecedents.

The appellants maintained that the parties on the occasion of their meeting with Mr. Pitre on 11th July, 1935, there and then agreed to terminate the partnership. The effect of what was said and done at that

meeting was rather, in their Lordships' view, to arrange the steps to be taken to dispose of the partnership's only asset and to allocate the proceeds between the partners. This necessarily implied the termination of the partnership and it was clearly recognised at the meeting that these steps afforded the only solution of the impasse which had been reached. Consequently when the syndicate was formed and the Van Isle and Rimy option was transferred to it the partnership enterprise came to an end.

Their Lordships do not follow the reasoning of the trial judge which led him to hold that the partnership continued to subsist until the syndicate in turn transferred its assets to the Man-O-War company. When the partnership received 15 units in the syndicate in consideration of the transfer of the Van Isle and Rimy option and when it was agreed by the partners that these 15 units should be divided between them in the proportion of $11\frac{1}{2}$ units to the appellants and $3\frac{1}{2}$ units to Mr. Winsby, the interest acquired by the parties in their respective units was an individual not a partnership interest. It was as an individual holding $3\frac{1}{2}$ units in the syndicate, not as a partner with the appellants, that Mr. Winsby received his 7,000 shares in the Man-O-War company. It was the syndicate, not the partnership, which sold the Van Isle and Rimy option with other assets to the company. The 114,000 shares which the appellants received represented not only the $11\frac{1}{2}$ units in the syndicate which they received as their proportion of the consideration for the transfer of the partnership assets to the syndicate but also $45\frac{1}{2}$ other units. These they received in their individual capacity in return for a subscription in cash, for services rendered and for cash advances, all to the syndicate and not to the partnership. Their Lordships fail to see how Mr. Winsby has any concern with these transactions between the appellants and the syndicate with which Mr. Winsby had nothing to do and to which he made no contribution of any kind. The appellants had no authority from Mr. Winsby to commit him or the partnership to any such transactions with the syndicate.

If then, as their Lordships hold, the partnership came to an end when the Van Isle and Rimy option was transferred to the syndicate and the partners received in units their proportions of the consideration for the transfer, it follows not only that the partnership had no concern with the 114,000 shares in the Man-O-War company allotted to the appellants and the 7,000 shares allotted to Mr. Winsby, but also that the partnership was equally unconcerned with the shares which the appellants acquired in Privateer Mine Limited, as the result of transactions with regard to the Privateer and other groups of claims entered into by the appellants after the termination of the partnership, when they were free to act independently of the partnership and in their own interest alone. The appellants are therefore under no liability to account to the respondent who has received in full his share of the partnership assets and has no further claim on the partnership.

Their Lordships will humbly advise His Majesty that the appeal be allowed, that the judgment of the Supreme Court of Canada of 20th December, 1940, be reversed and that the judgment of the Court of Appeal of British Columbia of 19th October, 1939, be restored. The respondent will pay to the appellants their costs in the present appeal and in the Supreme Court of Canada.

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v.

HERBERT PREST WINSBY

DELIVERED BY LORD MACMILLAN

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.