Privy Council Appeal No. 103 of 1913.

Cecil M. Merritt - - - *Appellant,*

v.

Gordon E. Corbould and others - - *Respondents.*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH MAY 1914.

Present at the Hearing:

LORD DUNEDIN.
LORD MOULTON.
LORD PARKER OF WADDINGTON.
LORD SUMNER.
SIR GEORGE FARWELL.

[*Delivered by* LORD SUMNER.]

The appellant, the plaintiff in the action, sued for commission due to him as the defendants' agent for procuring a purchaser at their price and on their terms of certain shares in and assets belonging to the Canadian Pacific Lumber Company, Limited, in which the respondents were interested. At the trial he was successful. His evidence was accepted and his claim was allowed. The Court of Appeal of the Province of British Columbia reversed the decision of the Trial Judge, and the plaintiff brings this Appeal by leave of that Court.

The appellant and the respondents among them held all the common stock of the above-named Company. It was not prosperous, and they wished to sell their shares and the Company's undertaking. The defendants instructed the plaintiff to try, when in England, to find persons there who would come forward with

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the requisite money in accordance with various alternative schemes, but before he had concluded anything a contract (called "the Meredith agreement") was concluded in British Columbia to effect the common object. This, it is agreed, put an end to such authority as the plaintiff had prior to its date, namely, 6th January 1910.

The plaintiff, however, had been negotiating with a firm of Johnson, McConnell and Allison, of Montreal, two of whose members were in Europe at this time, and had reached a point at which things promised well. Accordingly he cabled to the defendants such an account as induced them to suspend the operation of the "Meredith agreement" to give him time to come to terms with this firm. The plaintiff's authority is to be collected from a cable sent to him on 11th January 1910, which has to be read in connection with the surrounding circumstances, and particularly with the plaintiff's own cable of 10th January, to which it was the answer. Those cables ran as follows:—

"Jan. 10, 1.30 p.m.

"Johnson wants refusal possibly fourteen days with "lumber fixed assets three twenty thousand cash provided "lumber stock value $100,000.00 if not purchase price "reduced *pro ratâ*. Shareholder assume lawsuit retain "book debts capital stock transfer with agreement "vendors repurchase limits $150,000 think can sell at "this price.

MERRITT."

"Jan. 11 10.

"Will sell all shares two hundred forty thousand and "market price for lumber shareholders assume lawsuits "retaining book debts Tees agreement and limits Meredith "finally consents if closed fourteen days, you may sell "limits not less one hundred and thirty if mill sold.

TUPPER."

By a separate cable the plaintiff was at the same time promised a commission of 5 per cent. The cable signed "Tupper" was sent on behalf of all the defendants.

Armed with this authority the plaintiff proceeded with his negotiations and concluded a bargain with Messrs. Johnson, McConnell and Allison for the purchase by them of the common stock and bonds of the Company for $240,000, and of the lumber at the mills for a sum equal to its value on 18th January. He consulted an eminent London solicitor, who drafted a formal agreement, and this was actually executed on the purchaser's behalf on 18th January. It was never executed on behalf of the vendors, the defendants, as the owners of shares and the Company, as owner of the lumber, because the defendants, or some of them, thought that on a rising lumber market they could do better elsewhere and cried off. In that state of the market Messrs. Johnson, McConnell and Allison were eager to buy, and would have paid $240,000 down, waiving the stipulations of the formal agreement, if they could have got the respondents to recognise the bargain, but in fact the matter came to nothing, and no attempt was made to enforce any bargain on their part.

The plaintiff claimed that he had earned his commission and that he was none the less entitled to be paid for his work though the defendants had refused to conclude or to carry out the bargain with the purchasers whom he had found. The defence was that he was employed to find purchasers on the terms of the cable of 11th January 1910; that he found purchasers only on terms which went beyond the limits of that authority, and that accordingly nothing was due. This is the whole question, viz., did the terms of the formal agreement conform to or depart from the mandate contained in the cable? There is no question of law involved, and when reduced to what is essential the case is simple.

The plaintiff's claim, as pleaded, was that he earned his commission not by effecting an introduction simply but by carrying through a negotiation. He rested his case on his having brought about an agreement of purchase, expressed in the document prepared by the solicitor, Mr. Russell, and signed on behalf of the purchasers. That claim was never amended. It is true that some attempt was made at the trial to prove that on the 25th January the purchasers offered to pay the whole $240,000 out of hand, and this evidence the Trial Judge believed, finding also that "the plaintiff did "everything which it was possible for an agent "to do; he found a purchaser able and willing "to buy." The plaintiff, however, must be held to his pleaded case, all due objections having been taken by the defendants' counsel at the trial, nor is there any evidence that the plaintiff was to be paid merely for finding a buyer possessed of $240,000, and willing to pay it if the respondents could come to terms with him. His employment clearly was to effect a sale and to carry through the negotiations outlined in his cable of 10th January with the parties named therein, provided he did so on the terms and within the authority contained in the cable of 11th January.

The Court of Appeal held that the plaintiff had not satisfied this proviso, and with this conclusion their Lordships agree. The actual bargain contained two terms of special importance here; it made the price payable by three instalments, the first of 2,000*l.* payable on 18th January "by way of deposit forfeitable as "thereinafter mentioned," and it provided that "if the purchasers fail to comply with this agree-"ment their deposit or any other sum they may "have paid shall be absolutely forfeited, but the

"vendors shall have no further claim against "them for damages."

The $240,000 mentioned in the cable of 11th January is no doubt to be taken in connection with the words "three twenty thousand cash" in that of 10th January. It is not necessary to decide whether "cash" here actually meant "cash down and not by instalments" or meant "money only and not money's "worth, that is all cash and no shares," but, as the sale was a sale of shares and goods, there was neither reason for the purchase price to take the form of shares in the same company nor any suggestion of the formation of any other. Be this as it may, it is clear that if the contract had not provided for payment by instalments there would have been no question of any forfeitable deposit, and if there had been no forfeitable deposit, there would have been no stipulation that damages *ultra* should not be recoverable. The plaintiff received no possible authority under the cable of 10th January, or otherwise, to bargain away his principals' right to recover damages to the full in case of breach of the contract, and this was an integral and material part of the only contract that he procured. He made a contract which he was not authorised to make. That could not entitle him to his commission.

It is said that the 2,000*l*. might have been adequate as damages, and is at any rate a substantial sum. So it is, but it might not have been enough, and the vendors ought to have been entitled to claim such damages in full as they could prove, until they agreed to the contrary. It is said that the vendors could have got specific performance. However that may be and without deciding that question, it is plain that they were entitled to their remedy by way of damages, if they chose. The plaintiff cannot excuse the fact that he bargained this away without

authority by pleading that he did not leave his principals without any remedy at all. Finally it is said that the draft was prepared by Mr. Russell, in what he considered to be a proper form, and that it is in a usual form. It may or may not be usual, and certainly nobody blames the solicitor, but certainly also, the defendants had not delegated to him any power to amplify the plaintiff's authority. They had recommended the plaintiff to consult him, but even if they could be treated as his clients, they did not authorise him to do anything beyond the terms of their cable. Mr. Russell could not invest the plaintiff with an authority which he himself did not possess, and was not authorised to give.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

CECIL M. MERRITT

v.

GORDON E. CORBOULD AND OTHERS.

[DELIVERED BY LORD SUMNER.]

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