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In the Supreme Court of Newfoundland.

Between Newfoundland Banking & Trust Corporation, Limited, Plaintiff and The Reid Newfoundland Company, Ltd., Mines & Forests (Newfoundland) Limited and Newfoundland Power & Paper Company, Limited, Defendant.

(Continued.)

"2. Mr. H. B. Thomson drew the attention of the Board to the difficulty of this position in taking part in discussions affecting the Nfld. Banking & Trust Corporation, Ltd. (Hereinafter referred to for brevity as the "Trust"), on account of his being financially interested in that Company and he expressed his willingness to resign from that Board of this Company in order to simplify the position. After consideration of the matter, and in view of the valuable assistance rendered by Mr. Thomson in matters in which the Trust is not in any way involved, it was VOTED: that Mr. Thomson be requested to remain on the Board of this Company, and that it be understood that he would not take part in or vote on any discussion or questions in which the interests of the Nfld. Banking & Trust Corporation might be concerned. Mr. Thomson expressed his willingness to remain on the Board on these terms.

"3. The Board then proceeded to discuss several questions relating to the proposed sale of certain properties through the Trust, and Mr. Thomson and Major J. A. MacDonald were present by invitation to answer any questions which might be put by the Board.

"4. It was VOTED to proceed with the proposed sale of the Humber Valley property through the Trust, on the terms already communicated to the Trust in London by cable, which are subject to such modifications as may be arranged by conference with Mr. R. Blakstad on his proposed visit to Newfoundland next month.

"5. It was VOTED to proceed with the proposed sale of the Gander Valley property through the Trust on the terms already communicated to the Trust in London by cable; and also the Trust to be authorized to proceed with the proposed borrowing of sixty thousand pounds required for the purchase of the Timber Estates areas on the terms similarly communicated, provided no better terms can be served in time to guarantee the arrival of the money here not later than October 31st when our option on these areas expires.

"6. It was VOTED to offer for sale through the Trust to an exploration Company to be formed the Messrs. Reid's options on Little Bay Mine and Tilt Cove Mine, in conjunction with the ungranted mineral rights over all the Reid Newfoundland Company's lands, the capitalisation of such Exploration Company and the terms of its development operations to be settled later. It was tentatively suggested that the capital be £1,800,000 of which the vendors should receive in cash and shares seven hundred thousand pounds; six hundred thousand pounds to be retained for working

capital, and the remaining five hundred thousand pounds to be used for promotion expenses. The Trust will be required to find £150,000 by the end of September, 1926, to provide for taking up the options on Little Bay and Tilt Cove. The sale agreement will be required to contain a provision that if the Reid Newfoundland Company's experts recommend the development of a particular property, the Exploration Company must elect either to abandon that property or to undertake its development. If it elects to abandon it, or if it does not proceed with the development work required within five years from the receipt of the recommendation, the Reid Newfoundland Co. shall have the right to take over that particular property on tender to the Exploration Company of its cost to that Company, including both its proportionate fraction of the original purchase price and any sums expended upon the development by Exploration Company.

"7. Mr. Conroy reported that he had arranged with Major MacDonald to propose and forward to London draft forms of conveyances suitable for the use in connection with the various properties. In course of sale, with the schedule of the different areas involved, and examples of the different classes of title.

Meeting Adjourned until 3 p.m.

Meeting Renewed 3 p.m., all the Directors present except Mr. Thomson.

"8. The remuneration to be paid to the Trust in connection with the various properties was discussed, and it was voted: that the Trust be paid out of the purchase price of the Gander Valley property by instalments proportioned to the instalments received and payable at the same time, a commission of 10 per cent. on the entire purchase price; and that no commission be paid for the raising of the 600,000 pounds loan against the property unless better terms can be secured than those now offered, in which event the matter will be taken up again for consideration.

"VOTED: That a similar commission of ten per cent. be paid to the Trust out of the purchase price of the Humber Valley property. VOTED: That the Trust ought to receive a commission or profit of at least ten per cent. of the amount coming to the Vendors under the projected sale of the Exploration Company, and that if their profit on the promotion of this Company does not amount to ten per cent. of the price received by the Vendors, the Vendors will make up the difference."

A copy of this minute was given to Major MacDonald and submitted by him to the Trust on his return to London and the Trust by letter dated Sept. 29, 1926, accepted the terms therein. Mr. H. D. Reid and Mr. R. G. Reid were elected as Directors of the Trust.

After Major MacDonald returned to London about the middle of September, the negotiations were continued with Lord Rothermere through Mr. Cowley for the sale of the Gander Valley property and resulted in an agreement dated October 1st, 1926, between Mr. H. D. Reid, President of the Reid Company, as vendor, and Mr. John Cowley and Sir Andrew Caird as purchasers that in consideration of the sum of £2,000 the purchasers "shall have the option of purchasing" 187,973 acres of freehold land situated in the Gander Valley together with the timber rights and water powers; the option to be exercised not later than the 31st December; if the purchaser exercised the option, the vendor would sell and the purchaser would purchase the premises for £222,073, payable in six equal annual instalments with interest on the unpaid instalments; the vendors to show good title within 21 days and no objection to be made or compensation to be claimed on account of any error in description of land or quantities of pulpwood or timber. The purchaser paid the £2,000 and the Trust received 10 per cent. of that amount.

The purchaser had the property examined by cruisers who reported that the quantity of the pulpwood represented by the vendors in the option agreement to be upon the property, was not there and the solicitors of the purchaser were not satisfied with the title shown to some of the property. In consequence the purchaser declined to exercise the option and in November claimed a return of the £2,000 deposit. The vendors refused to repay the £2,000 and disputed the accuracy of the reports of the purchasers' cruisers upon the pulpwood

on the property and their solicitors reports on the titles. The cruisers were examined as witnesses at the trial on the report. After carefully considering the evidence and the report, I am not satisfied that the report is a complete report of the wood upon the property. It is perhaps unfortunate that the proposal made by the vendor's solicitors to have an amendment of the property omitted was not acted upon. This terminated the negotiations in respect to the Gander property with the exception of some brief negotiations with Mr. Edwards, Chief Minister in London. Nothing further was done through the Trust with a view of the sale of the Gander properties, because after the early part of May, the Reid Co. refused, under circumstances to which I shall refer later, to conduct any further negotiations through the Trust.

Under these circumstances the Trust claims to be paid a commission of ten per cent. on the sum of £220,073, purchase money under the agreement (less the £2,000 paid for the option), with Mr. Cowley and Sir Andrew Caird. If the Trust is entitled to a commission on this transaction, it must be claimed under provisions of the commission agreement contained in the Minute of the Reid Company of August 14, 1926 that "The Trust be paid out of the purchase price of the Gander Valley property on instalments proportioned to the instalments received and payable on the entire purchase price." The Trust arranged the sale of an option upon the property for £2,000 and was paid a commission of £200. If now claims to be entitled to a commission on the remainder of the entire purchase price named in the agreement, on the grounds that it had found a purchaser. A purchaser is a person who either buys or binds himself by an agreement to buy. If it found a person who was prepared to bind himself by contract to buy on terms accepted by the vendor and by the default of the vendor "was prevented from doing so, it might according to circumstances be entitled to be paid the commission or in the alternative to remuneration on a quantum meruit basis. The rule is, stated by Lord Esher, M.R. in *Grogan vs. Smith*, 7 T.L.R. 132, to be "In order to earn a commission, the agent was to get a purchaser, an actual purchaser, not merely a person who might become a purchaser but none who would enter into a binding contract binding him to purchase the lease. It was true that the Plaintiff had the alternative right of action if he could show he did obtain a person who was ready and willing to enter into a binding contract; if he could show that the two parties, vendor and purchaser were really agreed as to all the terms of the contract; that it was prevented from becoming a binding contract only by reason of the refusal or default of the vendor in refusing to make the agreement valid and binding." In the present case did the Trust find an actual purchaser of the Gander Valley property in Mr. Cowley, or Sir A. Caird? or were they prepared to enter into a binding contract of purchase, the terms of which were finally agreed upon between the parties and was prevented from doing so by the default or fault of the Defendants? I do not think so. What Mr. Cowley and Sir A. Caird bought was an exclusive option or right to purchase the property or not as they at their own discretion might decide within the time fixed by the agreement. For that right they paid the sum of £2,000. When a person obtains an exclusive option to buy a property upon agreed terms he does not enter into a binding contract to purchase the property. An option to buy is merely an agreement by which one of the parties is given time to consider whether he will buy or not. He is not bound to buy. He is absolutely free. It is evident that such an agreement is entirely different from a mutual agreement to sell and buy a property, under which both parties are bound one to the other. Under an option, the vendor is bound but the purchaser is free. If he decides to buy the vendor must sell. If he decides not to buy, the vendor has no remedy. It is a contract to sell, not a contract to buy. The Trust was entitled to be paid and was paid a commission on the purchase price of the option, but I do not think it was entitled to be paid a commission upon the purchase price offered to the purchaser in the option agreement. In the present case, the holders of the option gave two reasons why they did not exercise the option, though they need not have given any reason, had they so wished, namely, that the report of the cruisers showed the timber represented by the vendors to be on the property, was not there and that they were not satisfied with the title to some of the lands. Neither of these reasons was accepted by the Reid Company but it had no means of testing the accuracy of either, owing to the one-sided nature of the agreement. I do not think that failure to convert the option into a binding agreement was due to any default or fault of the Reid Company. The purchaser may have been disappointed in the report of their cruisers, but they were under no binding contract to purchase, their decision was final and the vendor was powerless, he had no remedy whatever. His position was entirely different from that of a person who had made a mutually binding contract to purchase under which the vendor would have had the right to test the accuracy of the reasons given for not carrying out the contract.

Besides its claim to be paid a commission, the Trust in the alternative claims remuneration on a quantum meruit basis for services rendered to and work done for the Reid Company at its request in connection with the Gander Valley property. This claim must be based on some agreement expressed or implied by the Reid Company to pay for those services rendered upon a quantum meruit basis. The only agreement as to remuneration is contained in the Commission Agreement of August 14, 1926 which specifically and separately gives the remuneration payable to the Trust in connection with each property. As to the Gander Valley property it says (paragraph 4), "It was VOTED to proceed with the proposed sale of the Humber Valley property through the Trust, on the terms already communicated to the Trust in London," and paragraph 8 says "The remuneration to be paid to the Trust in connection with the various properties was discussed, and it was VOTED that the Trust be paid out of the purchase price of the Gander Valley property by instalments proportioned to the instalments received and payable at the same time, a commission of 10 per cent. on the entire purchase price." It was contended that an agreement to pay the Trust a quantum meruit for its services would be implied if it was prevented by the Reid Co. to make a sale and earn its commission and that by revocation of its authority to sell to it so prevented. In the first place there was clearly no understanding at any time by the Trust, not to revoke the authority of the Trust to sell any of the property. The agreement received by the Trust effected a sale it would be paid with a commission, if not it had not performed its part of the bargain and would not have earned its commission. The Trust had a bare authority to sell. It had no interest in the property. The Reid Co. might, at any time, sell the property itself through someone else without committing a breach of its agreement with the Trust. In the next place, there is no evidence that the Trust would have made a sale of the property had the Reid Co. continued its authority to do so and it might be asked, how long was the Reid Co. to allow the agency of the Trust to continue before it could revoke it? For these reasons, I am of the opinion that the plaintiff cannot recover a quantum meruit for services rendered in connection with the Gander Valley property. The parties made a bargain which they put in writing. They are bound by it and the circumstances do not, it seems to me, justify the introduction into it of terms that were not expressed when the bargain was made.

When Major MacDonald returned to London after his visit to St. John's in August, 1926, negotiations with Mr. Blakstad in relation to the Humber scheme were continued, principally through him on behalf of the Trust. At the same time the Trust was endeavouring to work out with the Sir W. G. Armstrong, Whitworth Co., Ltd., with whom it had been in touch since the previous June, the terms of a contingent contract to construct the works and buildings and supply the machinery required should the deal go

through. Mr. H. D. Reid arrived in London during the latter part of Dec. 1926, and kept in close touch with the Trust of which he was then a Director and with the negotiations it was conducting. In February the terms of an option agreement were tentatively arranged with Mr. Blakstad and a draft prepared setting out the terms of a bargain. One of these terms was that Mr. Blakstad would form a Company through which the scheme was to be carried out. This draft was sent to St. John's for examination by Mr. Conroy, K.C., the general counsel and legal adviser in Newfoundland of the Reid Company and its subsidiaries. Mr. Conroy was of the opinion that the concessions granted to the Products Company under its contract with the Government were not assignable. He therefore advised that, as the important consideration so far as the Reid Company was concerned, was the development of the Humber Valley concessions and properties on commercial lines, and it was immaterial whether this was done through the Products Co. or through the new Company to be formed by Mr. Blakstad for that purpose, that the Products Co. be so

re-organized as to take the place of the proposed new company in the scheme. This suggestion was accepted and adopted by all and the negotiations with Mr. Blakstad proceeded on that understanding. The proposition then under discussion was the establishment of a large paper mill on the Humber. Mr. Blakstad had satisfied himself by reports from his engineers that the properties there were suitable for that purpose. The requisites for success of the scheme were a sufficient supply of timber to secure the continued operation of the mill and sufficient money available to finance it and to establish the industry on a profit earning basis. The success of the whole scheme depended on those two conditions. It was proposed to vest the Products Co., the right to cut timber over two million acres of land in the vicinity of the Humber and on the West Coast generally. The Reid lands were at this time according to its policy of the separation of its assets, carried out in December, 1926, vested in Mines & Forests, one of its subsidiaries, except the leasehold interest held by the

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In the Supreme Court

(Continued)

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