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V. VIVAUDOU, INC. Paris New York

Supreme Court

MORNING SESSION.

WEDNESDAY, July 15. (Continued.)

MR. HUNT—Do you take the same position of MacDonald and Greenwood being the Trust as to those payments to them for management expenses.

MR. EMERSON—That was a personal agreement. That is quite distinct, and it was made quite clear. So far as we know, or so far as we cared for that matter, it is quite immaterial in whose name the Little Bay Option was; we were asked to perform this work for the Reid Company on a commission basis of ten per cent. Now, subsequently the scheme was altered and the Little Bay Coppers, Ltd., or some similar Company, was formed, and they agreed to give us ten per cent. of what they receive from that.

MR. HOWLEY—But the Reid Newfoundland Company did not.

MR. EMERSON—Well, let us see the actual position there. If your Lordship will look at the correspondence on that point, which is contained in the Pleadings, Page 55, there is a letter written by Mr. Forbes, who is a Director of the Reid Company, on Reid Company paper, the Natural Resources Department, in which he says:—“You will remember that on the 31st of January a scheme was drawn up covering Newfoundland Coppers, Ltd., and Little Bay, comprising an issued capital of \$1,500,000, of which we were to receive \$500,000. At that time the question of commission to the Trust was discussed and the principle was laid down that the Trust would obtain ten per cent. of the amount received by us. Under the present modified scheme Little Bay holders will receive \$166,666 in shares, the British Metals Corporation will receive \$141,666 in shares, and my associates will receive \$141,666 in shares. The British Metals Corporation and ourselves subscribed for the purchase of \$25,000 each in shares. Under these conditions the commission of the Trust will be \$141,666 in shares. Please confirm our understanding in this regard.”

And then we write back: “We beg to acknowledge receipt of your letter of the tenth instant, referring to the commission to be paid the Trust on this transaction. At a meeting of the Board of the Trust on the 11th instant, the commission of ten per cent. on the amount received by H. D. Reid, yourself and partners, for the sale of your interests in copper properties in green Bay, was confirmed. I am therefore instructed to say that the amount of \$141,666 worth of shares in the new company for the purchase of Little Bay Copper property, is the correct amount of commission due to us on this transaction. We will be glad to hear what your views are with regard to the handing of the further forty thousand odd acres of copper lands, and it seems to us we could continue our negotiations with the British Metals Corporation and prepare the way for active operations in the very near future, if we could be advised as to your idea of the policy to be pursued. We shall be glad to hear your views in this connection.”

Now, my Lord, there is nothing in that which negates the idea that the Reid Company is interested. They are not mentioned by name, it is true, but in Forbes' letter he says that “ten per cent. of the amount received by us” under the present modified scheme is payable to Trust. The British Metals Corporation and ourselves. Who is “ourselves”? The Reid Company.

MR. HOWLEY—Well now, how do you make that out?

MR. EMERSON—I do not see who else it can be.

MR. HOWLEY—There is no reference to the Reid Company there.

MR. EMERSON—The word is “us.” It might very easily be that the associates would be the Reid Company.

MR. HOWLEY—Does not your own letter show that you know who “ourselves” is?

MR. EMERSON—H. D. Reid, yourself and partners. Who are the partners? We do not know; probably the Reid Company. At any rate, so far as we are concerned, it is the Reid

Company, and then the reference there to the British Metals Corporation, I submit, clinches the matter. The only transaction of which there is any evidence in connection with the British Metals Corporation is this one over Little Bay, and Mr. Conroy in his letter of the 15th November said that in bringing them into touch with the British Metals Corporation were have performed a valuable service.

The fact that the Reid Newfoundland Company has not got any shares in this matter is quite immaterial to us. Let them go out in the market and buy them and deliver us our shares. They entrusted us with the work and they must pay the bill. Even this letter here of ours to Mr. Forbes makes no reference to Mr. R. G. Reid. The whole thing was nebulous so far as we were concerned; we were acting for the Reids on the basis of the Exploration Company, and this would have been formed had the Reids kept faith with the British Metals Corporation.

MR. HUNT—Under what Minute did you find the £150,000?

MR. EMERSON—The scheme did not go ahead. As soon as the British Metals Corporation came out here they immediately started in to deal with property which had not been discussed in London but was brought up by Mr. Forbes with them in such a way that they ultimately withdrew from the matter. I am rather glad my learned friend pointed that out. “The Trust will be required to find £150,000 by the end of September, 1920, to provide for taking up the options on Little Bay and Tilt Cove.” For whom? The Reid Brothers or the Reid Newfoundland Company?

MR. HUNT—The Reid Brothers.

MR. EMERSON—Why do they make an agreement with us to find £150,000? It is quite clear that the interests of the Reid Brothers and the Reid Newfoundland Company in this property are the same. What their exact relationships are, we do not know.

Now, my Lord, this scheme which was then in the minds of the parties would, as I say, have resulted in a very large development under the Exploration Company. It is one of these cases again where it was not recognized that the duty of the principal to the agent existed at all, and, as Major MacDonald shows in his evidence, when the British Metals Corporation, with the support it had from the Government, the British Government, came out here to deal with the Little Bay Mines, they found that some other scheme had been arranged and that they wanted to change the plans which had already been formulated, with the result that the whole thing was thrown up, and a very large development by a corporation of such good standing was undoubtedly nipped in the bud.

I think I shall finish after lunch, my Lord, in about half an hour.

KENT, J.—Are you going to settle the question of the admissibility of Mr. Cowley's evidence?

MR. HOWLEY—I was going to ask your Lordship to hear me for a minute or two on the case to which Mr. Emerson referred yesterday, when Mr. Emerson is finished.

Recess was then taken until 2.30.

with us. Now, on the 15th November, 1921, Mr. Conroy writes the letter in which he tells us that he is going to pay us a commission that is to be settled by arbitration, if the money was raised through the Armstrongs; and in assenting to that letter, we presumed that the Reid Company would try to raise the money through the Armstrongs, or to put the matter accurately, to get the assistance of the Armstrongs in raising the money if the Armstrongs got the contract; which meant, of course, the contract to supply the additions and extensions which it was intended that the \$1,000,000 issue should be used for.

There is no evidence that there was any effort made by the Reid Company after writing that letter to carry on the negotiations with the Armstrongs where we left off. There is no evidence that they tried to get the Armstrongs' assistance to raise this money by the issue of these bonds or of any arrangement with the Armstrongs that they were to get the contract for supplying these additions and extensions; and we have to accept it therefore, that when that letter was written, the Reids abandoned any effort to raise the money through the Armstrongs or with their assistance. Therefore the agreement in that let-

ter has been broken by the Reids; and we ask your Lordship to assess the services which we have performed as if the matter had been brought to a conclusion.

In that connection evidence has been given in correspondence between Jackson and Conroy which has been produced here. It is not in the volume, but your Lordship will remember that there was a correspondence between these gentlemen in which it was shown that enquiries had been made in the city of London as to what should be paid in these cases, and it varied from one to four per cent.; and I think your Lordship will come to the conclusion, although the correspondence on the matter is not clear, that Jackson himself was rather inclined towards the four per cent. I think he says in one of his letters that the person who refers to the four per cent. is the most reliable of those he made enquiries from.

I therefore ask your Lordship to give us a judgment on the matter of the quantum for a substantial sum, anywhere from one to four or five per cent.

Now, for the question of the quantum, my learned friend has argued—I am speaking now of the quantum generally, if your Lordship finds yourself compelled to deal with us on the basis of a quantum meruit; my learned friend has argued that the payments of the sums of £250 and £400 a month, and the £175 a quarter, is the payment of the quantum. I submit that that is not the position. I think I can give your Lordship a very exact analogy in the cases which have been quoted both by my learned friend and myself, dealing with the Gander-House Agents case. Your Lordship will have noted that the House Agents charged a fee varying from five pounds to twenty pounds for what they call their trouble in case the sale does not come off; but if the sale comes off, he gets his commission. Now, the cases that we had under consideration in connection with the Gander were cases where, through the fault of the principal, the sale did not come off



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AFTERNOON SESSION.

MR. EMERSON—My Lord, the last item, or practically the last item in connection with which there is a particular claim is the St. John's Light and Power Company.

There can be no question but that we were employed by the Reid Company to work in connection with the flotation of the St. John's Light and Power Company's bonds for \$1,000,000 and I think it is also common ground that there was no fixed agreement in regard to the remuneration. When it arose, it arose under the relationship of agents which had been created by the oral agreement, and as a result of the contract of the parties; but it was very early realized that 10 per cent. on such transaction was higher than should be paid. Services of this kind are not in the same category as services where we sell an undeveloped asset, or float an enterprise for its development. This was a flotation of a series of bonds of a going concern, earning profits; and early the idea of a ten per cent. commission had been created by the oral agreement, but no agreement was reached as to the payment of commission or payment, to put it more accurately, of remuneration. Some discussions took place as to whether we should be treated in the same manner as though we were an issuing house of bonds and get one or two per cent. It is quite clear at any rate that up to the time that the November letter was written there was no agreement as to the remuneration to be paid for the issue of these bonds.

Consequently, our claim, apart from the letter of November 15th, is a claim for quantum meruit for services rendered. There is no doubt at all that we did perform the services. The file of correspondence that is put in evidence is ample testimony to that fact.

Then there is no doubt that on June 8th, 1921 this matter was taken out of our hands by the Reids. Apparently they also intimated to Armstrong that they must not negotiate further

with us. Now, on the 15th November, 1921, Mr. Conroy writes the letter in which he tells us that he is going to pay us a commission that is to be settled by arbitration, if the money was raised through the Armstrongs; and in assenting to that letter, we presumed that the Reid Company would try to raise the money through the Armstrongs, or to put the matter accurately, to get the assistance of the Armstrongs in raising the money if the Armstrongs got the contract; which meant, of course, the contract to supply the additions and extensions which it was intended that the \$1,000,000 issue should be used for.

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and it was held that the payment of this retaining fee, as it were—this payment for their trouble, his fees it is called in some cases for putting it on his books, was not considered as a payment of the quantum; and these agents were held to be entitled, when the breach of the agreement had taken place to a quantum, and the quantum was held to be the amount of the commission.

HON. MR. JUSTICE KENT—He could not get both.

MR. EMERSON—It is hardly clear whether they did or not; but in any event, there is a distinct agreement in those cases. In those cases, the fee for “putting it on the books,” and perhaps interviewing prospective purchasers without result. But there is no evidence here that those payments were intended to cover our services in cases where the sales went off owing to the default of our principals, or that we were handed these amounts that had to be credited to the principals in case of a quantum, be-

cause a quantum would only arise where an agreement had taken place. In order to bring these payments within the right of the principals to deduct them from the quantum, one would have to assume that they were held with that object in view, but a quantum would only arise in such cases if there has been a breach of the defendants of the agency agreement, and the court does not lean to that if the agents were paid either a quantum or a commission that contemplates a breach. A contract is presumed to be made in the contemplation of its being performed by the parties.

A quantum arises in two cases: where there is no specific agreement as to services. If I am engaged to perform services, it is implied that I will get reasonable remuneration. As soon as I have performed the services, I am entitled to sue “quantum meruit.” But that is not the position here. We are not suing quantum meruit because there is no specific agreement for remuneration. The only section which would give rise to a judgment for a quantum is the case of the Gander; but if your Lordship found that there was a commission agreement made with the Trust, and the Trust has performed all its services, but owing to the fact of the Vendor's misconduct the sale was abortive we would not be entitled to a commission qua commission, but that we would be entitled to a quantum, then the quantum in fact should be the amount of the commission. I think that if the judgment were strictly for a quantum, in settling the quantum the total amount of the commission should be recognized as being the quantum.

HON. MR. JUSTICE KENT—It would not necessarily follow that the quantum would be the amount of the commission. It may in some cases, and in others it may not.

MR. EMERSON—If the agent has performed all his work—all the work that he was called upon to do, I think it is general for the Court to look upon the commission as being the quantum. That is if we cannot get better evidence of what the ser-

vice are worth—but it seems to me that when a man says to me, “If you perform certain services, I will pay you a certain amount” that is the best evidence we could have as to the quantum to be paid to the agent. That is, if he has performed the services.

But as I say, it was never contemplated when these payments were made—certainly was not stipulated—that if the agents were paid either a quantum or a commission that the principals should get credit for these payments.

These are payments towards specific objects. The 250 pounds a month is in the nature of a retaining fee, or salary, whatever you like to call it, to MacDonald and Greenwood personally. It is not a payment to the Trust, and the Trust gets no benefit from it except through Greenwood and MacDonald's work. The 175 pounds a quarter is a payment towards the rent of offices and salaries

(Continued on 9th page.)

Advertisement for Bayer Aspirin, including text: "Genuine BAYER ASPIRIN Say 'Bayer'—Insist! For Colds Headache Neuralgia Rheumatism Lumbago Pain. Accept only a Bayer package which contains proven directions. Handy 'Bayer' boxes of 12 tablets. Also bottles of 24 and 100—Druggists. Aspirin is the trade mark (registered in Canada) of Bayer Manufacture of Monoacetylsalicylic Acid."

Advertisement for Ido Collars, featuring a portrait of a man and text: "Ido COLLARS Trim and comfortable. GEO. F. IDE & CO., INC. 1201, N. Y., U. S. A."

Advertisement for Itchy Eczema All Over Face, featuring text: "ITCHY ECZEMA ALL OVER FACE In Pimples and Blisters. Healed by Cuticura. 'Eczema broke out in pimples and blisters and spread all over my face. It itched and burned causing me to scratch which made it worse. I could not sleep on account of the irritation, and could hardly talk because the sore eruptions were all around my mouth. The trouble lasted several months. I tried everything I could get but nothing helped me. I began using Cuticura Soap and Ointment and got relief. I continued the treatment and in about eight weeks I was completely healed.' (Signed) Wm. J. Romschack, Samburg, Sack. Cuticura Soap, Ointment and Talcum are ideal for daily toilet uses. Sample each free by Mail. Address: Cuticura Dept., Westchester, Ltd., 100, Strand, London, W. C. 2, England. Cuticura Shaving Stick 25c."

Advertisement for Beecham's Pills, featuring text: "A Clear Head and a keen brain are what you most need. When the digestive organs are not functioning properly, when the bowels are clogged, the blood carries the poisons generated by waste matter to the brain and nervous system. Keep your head clear and keen. BEECHAM'S PILLS cleanse the stomach, clear the head, tone up the entire system. Their mild healing action relieves constipation, and puts you in trim. Sold Everywhere in Canada. —By Bud Fisher"

Cartoon titled "MUTT AND JEFF" by Bud Fisher. It shows a salesman named Jeff trying to sell various products to a customer named Mut. Jeff's pitches include: "MUTT, I'M BARKING A HOUSE TO HOUSE-CANVASS WITH SOME USEFUL ARTICLES AND I'M GONNA LET YOU HAVE THE HONOR OF MAKING THE FIRST PURCHASE!", "SUSPENDERS, GUM, BUTTONHOOKS! HOW MANY CAN I SELL YOU?", "I NEVER USE THEM! HAVE YOU ANYTHING ELSE?", "YES, SAFETY RAZORS AND ATOMIZERS!", "I NEVER USE THEM! WHAT'S IN THAT BOX?", "IT'S ANOTHER THING YOU NEVER USE!", "WHAT IS IT?", and "SOAP!!". The cartoon ends with Jeff looking dejected and Mut looking thoughtful.

Fragmentary text from the right edge of the page, including "PRES", "We pay", "Glass", "design", "Crucif", "Fruit", "es. Cal", "Salver", "We're", "particu", "T. J. D", "The R", "Jan 6", "Supreme C", "(Continued from 8", "staff. That is, if", "ould have referenc", "all. The 400 pound", "really an advance", "ers on their possib", "ite, and the Reid", "credit for that was", "the personal commi", "I think the chanc", "the defendants' side", "there is no evidence", "these payments were", "upon as being a part", "er that they were", "was made, or by the", "fees.", "If I might draw", "the position of the", "these payments", "your Lordship appl", "to the Trust as well", "if I might draw", "be the analogy", "the letter from the", "Armstrongs, asking", "agents, at a fee of", "plus expenses and", "which they would", "tracts. It will not", "if the Armstrongs", "of their agency th", "would be defunct", "were a contract", "While on this", "only fair to my", "in this \$46,000", "in this expense", "more, when we", "tion the period", "than the 2,500", "was proposed to", "strong. In fact", "money over and", "a year, that was", "Armstrongs, would", "New", "Sme", "CANAD", "NEW", "NEW", "FRES", "CAL", "NEW", "SPAN", "RED", "CAL", "FRES", "PHONE", "ES &