Bingham v. Shumate

Between
Bingham et al., and
Shumate et al.

[1912] B.C.J. No. 71

17 B.C.R. 359

British Columbia Supreme Court
Victoria, British Columbia

Morrison J.

Heard: March 28 - 30, 1911
Judgment: April 15, 1911.
British Columbia Court of Appeal
Victoria, British Columbia
Macdonald C.J.A., Irving and Galliher JJ.A.
Heard: January 19, 22 and 23, 1912.
Judgment: April 1, 1912.

Counsel:

Maclean, K.C., for the plaintiffs.
Bodwell, K.C., for the defendants.

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1 April 15, 1911. **MORRISON J.**:-- The dealings material to the issues in this suit culminated in the agreement of the 24th of October, 1907. The plaintiffs seek to annul that agreement and have invoked the aid of the Courts for that purpose, charging the defendants in unmistakable terms with fraud. Fraud is the gravamen of their pleadings.

> "A relevant charge of fraud ought to disclose facts necessitating the inference that a fraud was perpetrated upon some person specified":

Lord Watson in Salomon v. Salomon & Co. (1897), A.C. 22 at p. 35.

2 It looks to me like an appeal to credulity to urge that a man with the physique and admitted ability of Ex-senator Bingham, or that attorneys of the status of the plaintiffs Edmunson and Travis should have been induced to put their hands to the document in question by any artifice or coercion

of the defendants, who, with deference, did not strike me as being either physically or mentally equipped to cope with them in a transaction of the nature in dispute.

3 It appears sometimes to be overlooked that in this country fraud is dealt with as fraud when one is confronted with it in the Courts of justice, and not as a mere word to be indiscriminately put upon the pleadings and records. When charged it must be clearly proven, and when proven an effective remedy is applied.

4 In this case the evidence is conflicting, and a critical review of it would serve no good purpose. The plaintiffs must be held to their bargain, into which I find they deliberately entered.

5 The action is therefore dismissed, with costs. There will be judgment for the defendants on the counterclaim, with costs in terms of sub-paragraph (a) of their claim. [17 BCR Page361]

The appeal was argued at Victoria on the 19th, 22nd and 23rd of January, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Counsel:

Maclean, K.C., for the appellants.
Bodwell, K.C. (Mayers, with him), for the respondents.

Cur. adv. vult.

6 April 1, 1912. MACDONALD C.J.A.:-- The trial judge has negatived the fraud or misrepresentation charged by the plaintiffs against the defendants in connection with the trust agreement. In this I think he was right, but I think he was in error in finding in defendant Shumate's favour on his counterclaim.

7 By the contract of the 24th of October, 1907, which declared the rights and interests of the parties in the subject-matter of this action, it was agreed that defendant Shumate should have the right and privilege of selling the timber licences mentioned in the pleadings without reference to his associates and cestui qui trustent, provided he did so on the terms specified in the agreement. By his counterclaim, alleging that he had made a sale to Messrs. Fields in accordance with said power, defendant Shumate asked that the plaintiffs be ordered to execute the documents of sale. The licences being vested in himself as trustee, he had no need of the plaintiffs' concurrence, nor of their signatures to the documents, provided the sale was within the power. If the sale were not within the power, then the plaintiffs should not have been ordered to concur. The order, therefore, that the plaintiffs should execute these documents was, in my opinion, unnecessary, and the judgment on the counterclaim should be reversed.

8 It would not be necessary, in my view of the case, to say more, were it not for the contention before us that defendant Shumate should be removed from his trusteeship. That, question was not properly before us at all, although it was referred to and argued to a certain extent by Mr. Maclean for the plaintiffs. Mr. Bodwell took some objection, but Mr. Maclean was not stopped. It was not called to our attention that no claim of [17 BCR Page362] this kind was made in the pleadings, nor was the question raised in the notice of appeal. That being so, we ought not to make the order asked for. It is quite apparent that no evidence was directed to it. The evidence that was relied upon in what little argument there was, was directed to an entirely different issue. Shortly, Mr. Maclean's

argument was that because, defendant Shumate entered into an agreement of sale with Messrs. Fields, which was not strictly in compliance with his power of sale, we ought to hold that he was not a fit and proper person to remain a trustee. What Shumate did was to sell, or attempt to sell, the licences for the price mentioned in his power, but instead of requiring the whole 50 per cent. in cash, the purchasers were to pay sufficient to give the plaintiffs half of their interest in cash and the balance in a year, Shumate's interest to be otherwise arranged. There is no evidence that in such an arrangement Shumate was to get any more advantageous terms than the plaintiffs; in fact, for aught the evidence shows, they may have been much less advantageous. That question was not sifted down, because it was not in issue.

9 I do not understand the law to be that whenever a trustee makes a mistake as to the extent of his powers he ought to be removed from his trusteeship. Now, had the issue been raised and Shumate charged with dishonesty in connection with the alleged sale to the Fields, evidence might have been forthcoming to shew that he acted as he believed honestly and in the interest of the partnership, and without seeking any peculiar advantage for himself. To allow this issue to be raised now would be most unjust to said defendant.

10 I think, therefore, the judgment dismissing the action should be sustained, but that part of it based on the counterclaim should be reversed.

11 A question of account was referred to in argument, but as I remember, counsel for the plaintiffs did not press that.

12 IRVING J.A.:-- The learned trial judge dismissed the plaintiffs' action, and on the counterclaim directed that the defendants should execute all documents necessary to enable [17 BCR Page363] the defendant Shumate to carry out a sale to Messrs. Fields. This portion of the judgment is easily dealt with.

13 The evidence at the trial shews that Shumate has not sold the property to Fields, and there is no contract between Shumate and Fields. At the most, Fields was prepared to buy the plaintiffs' interest.

14 Then as to the appeal on the original action. The notice of appeal is that the judge below only considered one branch of the plaintiffs' claim for relief - that is, the application to set aside and cancel the deed of the 23rd of October, 1907, on the ground of fraud. The other ground is for an order for accounts, and the removal of Shumate from his office as trustee. The notice, I feel, ought to have been more explicit, and the only doubt I have about the order that should be made is the vagueness of the notice of appeal.

15 Shumate, in his letter of 16th November, 1910, did not disclose the true facts of the case, and, in my opinion, he is unfitted to be a trustee. Had he been honest, he would have written Bingham: "I can get you $10 an acre for your share; will you take it?"

16 The removal of a trustee - as a rule - is a delicate matter. The main principle for the Court to proceed upon in exercising its jurisdiction, is the welfare of the beneficiaries. The matter of the exercise of this power was discussed in Letterstedt v. Broers (1884), 9 App. Cas. 371, by Lord Blackburn.

17 In Forster v. Davies (1861), 4 De G.F. & J. 133, it was laid down by Turner, L.J. that the mere fact of there being dissension between one of the several cestui qui trustent and the trustee was not a

sufficient ground for the trustee's removal. But the letter, in my opinion, is sufficient to shew that Shumate should be removed from his position as trustee, and a receiver appointed.

18 As to the objection that the removal of a trustee was not specifically asked for, in my opinion the prayer in the original claim for a receiver was sufficient. In view of the fact that the action asked to set aside the trust deed; that it is merely a technical objection, and as the merits are all against Shumate, [17 BCR Page364] and as there has been no surprise or disadvantage to Shumate by the formal omission, I would not give effect to it: Gorman v. Dixon (1896), 26 S.C.R. 87. In In re Wrightson (1908), 1 Ch. 789 (where Warrington, J. refused to remove a trustee), the learned judge said that there was power to remove although not prayed for.

19 I would discharge the order made by MORRISON, J. and dismiss the action so far as false representations are concerned, but remove Shumate from the trusteeship, and order him to account. Divide the costs of the action below; direct Shumate to pay costs of the counterclaim, and of this appeal.

20 GALLIHER J.A. concurred in the conclusions of MACDONALD C.J.A.

Appeal dismissed.

Solicitors for appellants: Elliott, Maclean & Shandley.

Solicitor for respondents: C. K. Courtney.