MAGNUS DIAMOND MINING SYNDICATE v MACDONALD AND HAWTHORNE.

1909. *July* 30 and 31, *August* 2, 3, 4 and 16. MAASDORP, C.J and WARD, J.

Agency. — Use of information acquired in course of agency. — Agent's personal interest in conflict with duty to principal.—Disclosure of intention.

Where M and H, while directors and managers of A Corporation acquired information as to the value of a diamondiferous property, and used that information in order to purchase the property in competition with A Corporation without disclosing their intention to A Corporation, and M Co. had acquired all the assets of A Corporation, including rights of action, *Held* that M and H must be compelled to transfer the property and to account to M Co. for profits already received and sums alleged to have been expended by them in the purchase of the property, and to deliver the balance due to M Co. on such account.

The facts sufficiently appear from the judgment.

Blaine, K.C. (with him *P. U. Fischer*), for the plaintiffs: The defendants in the course of their negotiations or by means of their employment obtained information which they used to obtain the property, and consequently must account for the benefits acquired by them.

During the existence of their agency for the African Diamonds Corporation the defendants negotiated with the liquidators of the New Driekopjes to obtain the property for themselves, and consequently they have to account, whether the acquisition was made during their employment or after it.

On general principles see *Aberdeen Railway Co.* v. *Blaikie Brothers* (1 Macq. H.L. 461, and 9 Scots Rev. Rep. 365), judgment of CRANWORTH, C.J.; Bowstead on *Agency*, 3rd ed. p. 135, art. 51; *Laws of England* (vol. 1, p. 184, art. 395, and p. 189, art. 404).

The defendants must have acquired their information during

their stay on the mine from the 27th July to the end of October or till November, because the washing which yielded 5·58 carats a load took place in September, 1908, and that which yielded 11¼ carats to the load in October. The information derived from the drives in October was acquired by use of the company's plant and labour. Professor Young's report corroborates this contention. He was employed in October, 1908. The defendants remained managers of the company after the 30th September. After that date they went to the property and held themselves out as working in the same capacity as before. Defendants had no right to take possession of the property in October without the leave of the corporation. The liquidators of the New Driekopjes had no right to take possession without an order of court. The defendants acquiesced in the occupation of the property by the corporation. Even if the defendants were not in actual employment, under the circumstances they were not free to acquire the property for themselves. See *Carter* v. *Palmer* (54 Rev. Rep. at p. 158); Voet, 17, 2, 24; Pothier on *Partnerships* (Tudor's trans. par. 150); *Parr* v. *Crosbie* (5 E.D.C. 197, at pp. 210, 211, 212).

In September the defendants placed themselves in a position in which their interests conflicted with their duty, in consequence of which they subsequently acquired the property. See *Robb* v. *Green* ([1895] 2 Q.B. at p. 16); *Transvaal Cold Storage Co., Ltd.*, v. *Palmer* ([1904] T.S. at pp. 4, 21, 34); *Boston Deep Sea Fishing Co.* v. *Ansell* (39 Ch. D. at p. 367); *Costa Rica Railway Co.* v. *Forwood* ([1901] 1 Ch. 746).

The African Diamonds Corporation might have acquired funds. The fact that the defendants raised their offer to £500 prevented the liquidators from accepting the corporation's offer.

There must be full disclosure on the part of an agent. See *Costa Rica Railway Co.* v. *Forwood* (*ubi supra*); *Carter* v. *Palmer* (*ubi supra*); *Evans & Jones* v. *Johnstone* ([1904] T.H. at p. 249). It is not sufficient for the agent to give his principal enough information to put him on inquiry. See *Ford* v. *Abercrombie* ([1904] T.S. at p. 888); *Jones* v. *East Rand Extension Co.* ([1903] T.H. 325); *Frost* v. *Dolley & Co.* (7 E.D.C. 30).

Stratford (with him *De Jager*), for the defendants: The defendants' knowledge of the value of the farm was acquired prior to their employment as managers. They acquired no additional information afterwards. Their services terminated on the 1st October, or at any rate on the 13th. The corporation had no funds up to the 13th October. On the 7th November, 1908, Van der Velde was not agent for the corporation. There is no evidence that the defendants had notice of Van der Velde's offer. On the 19th October, at the meeting, they said that if the corporation did not complete the contract they would get the property for themselves.

The law on the subject is divided into two branches: (1) pure agency, (2) the stealing of information. As to (1), the profits must arise out of the agent's position as agent, and the agent must have power to acquire for his master. See *Tarkwa Main Reef, Ltd.*, v. *Merton* (19 T.L.R. 367). As to (2), in the case of stealing or taking information, it does not matter whether it is turned to account after the termination of the agency. See *Dean* v. *MacDowell* (8 Ch. D. 345); *Aas* v. *Benham* ([1891] 2 Ch. 244, *per* LINDLEY, J., at p. 255); *Carter* v. *Palmer* (*ubi supra*).

The plaintiffs had no power to acquire a right of action; the actions for breach of contract of service are not within the scope of the company. See *In re German Date Coffee Co.* (20 Ch. D. 169).

Blaine, K.C.: The acquisition of all the assets of the corporation is admitted in par. 3 of the plea, and this right of action is one of the assets.

Stratford: See Lindley on *Companies* (5th ed. p. 164); *Stephens* v. *Mysore Reefs* (*Kangundy*) *Mining Co., Ltd.* ([1902] 1 Ch. 745). There was no tender on the part of the African Diamonds Corporation to the defendants before liquidation.

Postea (August 16):—

MAASDORP, C.J.: This is an action brought by the plaintiffs in their capacity as the cessionaries of a right of action alleged to have accrued to the African Diamonds Corporation against

the defendants for the recovery of property and profits illegally acquired by them in breach of their duty as directors and managers of the said corporation.

Before entering upon the facts of the case, it will be well to dispose of a defence which was raised at the last moment at the end of the case, and in order to raise which defendants' counsel proposed to file, if necessary, an amended plea, a course which was very naturally objected to by plaintiffs' counsel. This proposed defence was that under their articles of association the plaintiffs could not competently acquire the cession of the action in question in this case, and that such acquisition was *ultra vires*. Now, it is quite clear that this defence, if it was intended to be raised, ought to have been raised by way of exception or plea in abatement. In addition to this, the defendants not only did not take the exception, but on the contrary, in par. 3 of their plea admitted the acquisition by the plaintiff company of all the assets of the African Diamonds Corporation, and, if this right of action was part of those assets, the defendants must be taken to have admitted the acquisition of the same. True, they say that the right of action, for reasons alleged by them, was not an asset of the corporation; but those reasons were proved to be groundless, and were not even maintained or argued in support of by the defendants' counsel. Further, the objects of the plaintiff company, as set forth in par. 8 of its articles of association were, amongst other things, "To acquire by purchase, concession, lease or otherwise any lands, mines, claims, prospecting rights, mineral and other rights and privileges of every description . . . and any other kind of real or personal property of every description." These words surely are wide enough to cover the cession of a right of action for the recovery of the mining property Welgegund and of the other claims made by the plaintiff company in its declaration. In addition to this, it is open to grave doubt whether the defence of *ultra vires* can be taken advantage of by the defendants at all. It is an objection which may be taken by the shareholders of the company, but it is also an objection which they may waive, and which they may at any time remove by an amendment of their articles of association.

In the meantime, until they take the objection, it does not lie in the power of any one else to take it. For all these reasons the Court is of opinion that this belated defence is not a good one, and ought not to be allowed.

Coming now to the merits of the case, it appears from the evidence that in the year 1907 the New Driekopjes Diamond Mining Co. was in liquidation, and was the owner of a certain mining property called Welgegund, on which there was a partially developed diamond mine, and of which the liquidators were anxious to dispose. During that year the defendant Hawthorne, who was a speculator, visited the farm a couple of times and had a survey made of the property by a mining engineer called Wilson. He was so well satisfied with the information thus obtained by him that he was anxious to purchase the property for himself, but was unable to do so on account of want of funds. At the same time a certain Van der Velde, who either was, or was supposed to be, a man of means, was making inquiries about the same property, and in course of time these two gentlemen came into touch with one another, and in the early part of 1908 Hawthorne approached Van der Velde with a view to his acquiring the property for a company called the "African Diamonds Corporation." The upshot of the negotiations between them was a letter written by Hawthorne and countersigned by Van der Velde to the liquidators of the New Driekopjes Co. on the 29th April, 1908, stating that Van der Velde had been appointed *to represent the African Diamonds Corporation*, and to do all things necessary *to secure the Welgegund property for that corporation*, and that the company was prepared to take over the property, and he accordingly made an offer for the same.

It is not quite clear what was the result of this letter, but on the 18th May, 1908, a written agreement was entered into between the liquidators of the New Driekopjes Co. and Van der Velde personally (no mention being made of the corporation), by which the former agreed to sell the farm Welgegund to the latter for the sum of £6600, upon certain terms as to payment, which were partly carried out, and, as to the rest, need not be mentioned, seeing that they were subsequently

modified by the letter of the 31st July from the liquidators to Van der Velde. It is important, however, to note, with respect to both Hawthorne's letter of the 29th April and the agreement of the 18th May, that the only security the liquidators were to have for the fulfilment of the contract consisted of certain shares in other companies belonging to Van der Velde, and this will explain the conduct of the liquidators in insisting upon dealing with Van der Velde personally, and refusing to recognise the corporation in the matter.

It will be unnecessary for the purposes of this case to decide what exact relationship subsisted between Van der Velde and the African Diamonds Corporation, whether the former was in the position of a trustee in connection with the purchase or not, as Van der Velde has been at all times willing to regard the property as purchased for the corporation, and has done his best to secure the property for them. But, however this may be, it appears that on the 22nd May the defendant Hawthorne, purporting to act for himself and Macdonald, entered into a written agreement with Van der Velde, which was afterwards confirmed and adopted by Macdonald, in which he undertakes the management of the mine situated on the farm, together with Macdonald. From the body of this agreement it appears that it was practically entered into by Van der Velde on behalf of the corporation, seeing that part of the consideration to be paid to Hawthorne was to consist of shares in the corporation and that the contracting parties were to be discharged in case the corporation should ultimately fail to acquire the property Welgegund. No wonder, therefore, that in July the services of the defendants under their agreement of the 22nd May were automatically transferred to the corporation.

On the 31st July, as already stated, the terms of the agreement of the 18th May were modified; and with respect to the terms of this modification, the only thing that, for the purpose of this present action, it is necessary to mention is that the sum of £250 was to be paid on the 30th September, and the balance of the purchase-price on 31st October. In the meantime the defendants had become directors of the

African Diamonds Corporation, and on the 29th July Van der Velde had by written agreement ceded all his rights under the agreement of the 18th May to the corporation, and he states that the modification of the 31st July, though not ceded to the corporation, was obtained by him on behalf of the corporation, and that all the interested parties were aware of this fact. The value of diamond properties must at this time have been seriously depreciated, owing, no doubt, to the state of the market, and this will no doubt account for what would otherwise have been a rather impudent proposal for a further modification of the agreement contained in Van der Velde's letters of the 14th and 30th September, and for the fact that that proposal is not treated as mere impudence by the liquidators in their reply of the 1st October. The importance of these letters, however, as far as the defendants are concerned, lies in the fact that an offer was made by Van der Velde, which, if accepted, would have obviated the necessity of the payment of the £250 on the 30th September, and that this offer was only refused on the 1st October. The £250, as a matter of fact, was not paid on the 30th September, but notwithstanding this the corporation apparently maintained that this circumstance did not invalidate the agreement of the 18th May, as modified by the letter of the 31st July, and they, or rather Van der Velde's attorneys, conveyed this contention to the liquidators in a letter dated the 3rd October, and on the 29th October they gave them notice of action and of an application for an interdict. This seems to have given pause to the liquidators, who by their letter of the 3rd November showed that they did not consider the negotiations as fully closed. Further correspondence and interviews followed, which terminated in a letter dated the 7th November from Van der Velde's attorneys to the attorneys of the liquidators, in which an offer of £3000 is made in full settlement, a banker's guarantee being promised. That this offer of a banker's guarantee was not a mere sham is shown by the fact that the £3000 had been actually placed at the disposal of Van der Velde in the Standard Bank, and Daly, on behalf of the attorneys for the liquidators, states that they never doubted that the guarantee

would be forthcoming. This offer was not replied to until the 12th November, when it was refused by letter from the liquidators' attorneys, and the reason of the delay will be explained when we deal with the intervening conduct of the defendants.

It is necessary now to go back to trace the connection of the defendants with the matters we have been dealing with thus far, and to see how far it will bear the test which will be brought to bear upon it when we deal with the law on the subject. It is clear from what I have already said that the defendants, when they entered the service of Van der Velde, knew that the latter, in negotiating with respect to the Welgegund property, was doing so with a view to making it over to the African Diamonds Corporation, and that they transferred their services to the corporation with a full knowledge that one of the main objects of the company was to acquire that property in pursuance of the agreements entered into by Van der Velde with the liquidators, and that their services were required on the property with a view to such ultimate acquisition. In addition to being managers of the mine on the property, they were also directors of the corporation, and thus became subject to all the responsibilities and liabilities of directors of companies under similar circumstances. The case therefore resolves itself into the question as to what were the duties of the defendants, as such managers and directors. Now there can be no doubt that one of their first duties as directors, to use the words of Lindley on *Companies* (6th ed. vol. 1, p. 510) was "so to conduct the business of the company, as to obtain for the benefit of the shareholders the greatest advantages that could be obtained consistently with the trusts reposed in them by the shareholders," and therefore to do their utmost to obtain the Welgegund property upon the most favourable terms possible under the existing circumstances. But what was their actual conduct? As early as the middle of September, 1908, we find them approaching the liquidators of the New Driekopjes Co., through their secretary, Rintoul, with a view to purchasing the Welgegund property for themselves. And here it may be as well to in-

terpolate that, in considering the evidence relating to the negotiations of the defendants with the liquidators, the Court is prepared to accept the evidence of Rintoul in preference to that of Mr. Mitchell, one of the liquidators, as it was quite clear that Rintoul had really managed all the affairs of the liquidation, and that Mitchell knew very little about them.

Relying, therefore, upon the evidence of Rintoul, which we accept most unreservedly, we find that, from about the middle of September, the defendants, either jointly or singly, saw Rintoul almost daily with reference to the purchase of the ground for themselves; and, instead of guarding the interests of their company, we find them discussing the financial position of their company and of Van der Velde with him in a most free and irresponsible manner, pointing out to him that neither Van der Velde nor the corporation was in a position to pay the money due under their agreement, and importuning him with a view to getting the property for themselves. Rintoul pointed out to them that it was useless for them to approach the liquidators, as Van der Velde had the farm till the 30th September, on which date he would have to pay £250; to which they replied that they knew Van der Velde could not pay. Things went so far that on the 29th September they interviewed the attorneys of the liquidators, in company with Rintoul, when they were informed that the liquidators could do nothing until after the 30th September. Accordingly they saw Rintoul again on the 1st October (they being still directors), when he informed them that Van der Velde had made default in the payment of the £250 due on the 30th September. This information it is safe to say they would not have obtained from Rintoul if it had not been for their connection with the corporation and the intimate relationship which had in consequence been established between them and Rintoul. Acting upon this information, they on the 2nd October wrote a letter to the liquidators in which they say: "Our attention has been called to the fact that, through failure on the part of Mr. Van der Velde to carry out the obligation contained in a deed of sale of the farm Welgegund, district of Winburg, O.R.C., and subsequent conditions referring to such

deed as are contained in a letter addressed to Mr. Van der Velde on the 31st July and duly accepted by him," and in consequence they make an offer of £2500 for the property. Here again all the information which induced them to make the offer was acquired by them merely through their previous connection with Van der Velde and the corporation and through their being directors and managers of the corporation.

At this stage of the case the ambiguity of their conduct seems first to have occurred to them, or at any rate an apprehension of possible future complications, and consequently, to put themselves right, as they thought, in the eyes of the law, if not *in foro conscientiae*, they sat down and wrote a letter to their company resigning their directorships, but saying nothing about their position as managers. These two letters were sent on the same day (the 2nd October) by one and the same hand (that of one or other of the defendants) and upon one and the same occasion to their destination, but in order to be strictly correct in law the bearer of these missives first delivered the resignation and then immediately thereafter delivered the letter addressed to the liquidators. Later upon the same day they, in company with Rintoul, interviewed the attorneys for the liquidators, when they were informed that nothing could be done with the farm until Van der Velde's rights should have lapsed on the 31st October. Notwithstanding this they continued visiting Rintoul almost daily in connection with their proposed purchase, and there can be very little doubt that during these interviews they must have ascertained from Rintoul that Van der Velde and the African Diamonds Corporation had taken up the position that their agreement with the liquidators was not yet at an end, and that they had actually threatened them with an action and interdict; at any rate Daly showed defendants the summons on the 3rd November, and says that they knew all that was going on. On the 1st November Macdonald interviewed Rintoul to ascertain from him whether Van der Velde had come up to the scratch, and was informed in the negative.

Nothing further was done by the defendants until the 12th November, and this was no doubt in consequence of informa-

tion they had received from Rintoul and also perhaps in the hope that they might still succeed in getting their offer of £2500 accepted by the liquidators. In this last expectation, however, they were disappointed, because, as already shown, on the 7th November Van der Velde made his offer of £3000. This offer was not immediately refused, but was held over for reasons which appear from the evidence of Rintoul and Daly. It appears that on the 10th or 11th November the defendants saw Rintoul, when Macdonald told him that they, the defendants, would have to increase their offer as they had heard from Mitchell (one of the liquidators) that an increased offer had been made by Van der Velde, and they thought it very hard lines. Thereupon they wrote a letter to the liquidators on the 11th November increasing their offer to £3000. This offer was accepted by the liquidators on the 12th November, and it was only after this acceptance that a letter was written to Van der Velde refusing his offer of the 7th November. Now it is quite clear from the evidence of Daly and Rintoul that the reason for the delay in replying to Van der Velde was the fact that they knew that the defendants were in the field, and were very anxious to get the property for themselves. Daly says in so many words that the liquidators would have accepted Van der Velde's offer if the defendants had not been in the field, and that Van der Velde's offer was refused in consequence of the increased offer made by the defendants. True, Rintoul says that as between Van der Velde and the defendants, the liquidators preferred dealing with the defendants, because their financial position (or rather that of Macdonald) was more secure, and because Van der Velde had proved himself a rather unsatisfactory person to deal with; but as far as Van der Velde's offer of the 7th November is concerned, his financial position was rendered perfectly satisfactory by a banker's guarantee, and the only thing which actually decided the liquidators to accept the defendants' offer was a matter of personal preference in favour of Macdonald.

These being the circumstances of the case, let us consider the law applicable to them, the plaintiffs alleging (1) that the defendants, whilst acting as managers and directors of the

African Diamonds Corporation and by reason of such employment, obtained valuable information regarding the yield and prospects of the mine on Welgegund, and in consequence thereof, and contrary to their duty whilst still in such employment, acquired the property for themselves on the 12th November, 1908, and (2) that, whilst still in such employment, the defendants entered into negotiations with the liquidators of the New Driekopjes Co., with a view to acquiring the property for themselves, and thereafter did acquire the property for themselves as a consequence of such negotiations.

Now, the general principle of our law, as well as that of the law of England, is the very simple rule that a person, who occupies a fiduciary position, such as that of agent or partner or of a director or manager of a company, is bound to exercise the utmost good faith or *uberrima fides*, as it is termed in our Roman-Dutch authorities, towards his principal or partner or the company in whose service he is employed as manager or director; see *Parr* v. *Crosbie* (5 E.D.C. at p. 211); *Transvaal Cold Storage Co.* v. *Palmer* ([1904] T.S. at p. 21); *Ford* v. *Abercrombie* ([1904] T.S. at p. 884). It is only in the application of this rule to any particular set of circumstances that any difficulty arises. Still the rule has been elucidated by so many weighty and valuable decisions, as well in our South African courts as in the English courts, that there ought not to be any insuperable difficulty in applying it to the circumstances of the present case.

Now, one of the first rules laid down by the courts is that an agent is not entitled to put himself in competition with his principal in any matter connected with the agency entrusted to him; he may not place himself in any position in which his interest and his duty may conflict; see *Transvaal Cold Storage Co.* v. *Palmer* ([1904] T.S. at pp. 33, 34); or, as it is put by Lord CRANWORTH in the *Aberdeen Railway Co.* v. *Blaikie Brothers* (9 Scots Rev. Rep. at p. 370), he will not "be allowed to enter into engagements, in which he has or can have a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed

to be raised as to the fairness or unfairness of a contract so entered into." So far is this rule carried that it has been laid down that if directors "choose to enter into contracts in cases in which they have or may have a conflicting interest, the law will denude them of all profits they may make thereby, and will do so notwithstanding the fact that there may not seem to be any reason of fairness why the profits should go into the pockets of their *cestuis que trust*, and although the profits may be such that their *cestuis que trust* could not have earned them all." See *Costa Rica Railway Co.* v. *Forwood* ([1901] 1 Ch. 746). See also *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (39 Ch. D. 340).

Now, the defendants well knew when they entered into the service of Van der Velde, that it was the intention of the latter to make over his agreement with the liquidators to the African Diamonds Corporation. They also knew, when they transferred their services to the latter corporation, that one of its main objects was to obtain the Welgegund property for itself, and they were cognisant of all the negotiations going on between Van der Velde, acting in the interests of the corporation, if not as its agent and representative, and the liquidators. Notwithstanding this, as early as the middle of September, 1908, and without the knowledge or permission of Van der Velde or the corporation, they began to approach the liquidators with a view to purchasing the property for themselves. True, it is said that their proposals to purchase were subject to the agreement with the corporation or Van der Velde not going through. Still they were putting themselves into a position and were proposing to enter into engagements in which their interests might conflict with those of their employers, and which did ultimately most seriously so conflict. It is said in defence of their conduct that they did this with the full knowledge of the corporation, but the rule of law on this point is that an agent is not allowed to enter into any such transaction, unless he has first made to his principal the fullest disclosure of the exact nature of his interest, and the principal has assented to his doing so. See *Costa Rica Railway Co.* v. *Forwood* ([1901] 1 Ch. 746). In the case of *Ex parte James*

(7 Rev. Rep. 56) Lord ELDON, L.C., stated: "This doctrine as to purchase by trustees, assignees and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases. The principle has been carried so high, that where a trustee in a renewable lease endeavoured fairly and honestly to treat for a renewal on account of the *cestui que trust*, and, the lessor positively refusing to grant a renewal for his benefit, the trustee, as he very honestly might under those circumstances, took the lease for himself, it was held that even in such a case it is so difficult to be sure that there was not a management, a difficulty that might exist in a much greater degree in many other cases having the same aspect, that the lease taken by the trustee from a person, who would not renew for the benefit of the *cestui que trust*, should be considered taken for his benefit; and should be destroyed rather than that the trustee should hold it himself under those circumstances. . . . The principle is, that as the trustee is bound by his duty to acquire all the knowledge possible, to enable him to sell to the utmost advantage for the *cestui que trust*, the question, what knowledge has he obtained, and whether he has fairly given the benefit of that knowledge, to the *cestui que trust*, which he always acquires at the expense of the *cestui que trust*, no court can discuss with competency or safety to the parties. . . . Another case might happen, and I believe has happened. A person, knowing not only the surface value, but that there are minerals, buys upon the rent; and gains all that advantage. How can that be found out, if he chooses to deny it? Therefore the courts have said, it is better for the general interests of justice that in some cases a loss should be sustained by the *cestui qui trust*, than a rule should be established, which would occasion loss in much more numerous cases. . . . The rule is, that a trustee shall not become the purchaser, until

he enters into *a fair contract*, that he may become the purchaser, with those interested. . . . The question is . . . whether a person, who had a confidential situation previously to the purchase, had at the time of the purchase shaken off that character by the consent of the *cestui que trust* freely given after full information; and bargained for the right of purchase." Similar views were repeated by Lord ELDON in the case of *Coles* v. *Trecothick* (7 Rev. Rep. 167), where he stated: "As to the objection to a purchase by the trustee, the answer is, that a trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of the circumstances, proving that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken, by the trustee, of information acquired by him in the character of trustee. . . . If an adventitious advantage accrued, yet, if the party had not divested himself of the character of trustee by an unqualified, authorised contract for liberty to buy, the *cestui que trust* is entitled to the most casual advantage that might arise." The rules laid down by Lord ELDON were adopted and applied in the later case of *Carter* v. *Palmer* (54 Rev. Rep. 145) and also in several others.

In the present case the defendants were trustees not for the purposes of sale, but for the purposes of purchase; under the special circumstances of the case, however, they were in a similar position as if they had been agents to sell, inasmuch as they were both as directors and managers in actual possession, on behalf of the African Diamonds Corporation, of the property which it was intended to buy, and the principles laid down in the cases referred to will therefore apply to the fullest extent. The reasons given for the case quoted by Lord ELDON in *Ex parte James*, with reference to the acquisition of a lease by a trustee after having honestly failed to obtain a renewal of the same for the *cestui que trust*, are especially applicable to the present case. Where is there any evidence in this case that Van der Velde or the African Diamonds Corporation had full knowledge of the negotiations going on between the de-

fendants and the liquidators of the New Driekopjes? The only evidence on this point is an allegation that at a meeting of the directors or shareholders of the African Diamonds Corporation held on the 22nd September (an allegation, however, which is denied by the witnesses for the plaintiffs), Hawthorne stated that neither he nor Macdonald were going to lose their money, and if the African Diamonds Corporation did not buy the property, they would try to do so. Hawthorne himself says that he decided about the middle of September to get the property for themselves, if the corporation did not find the money; but he admits that he never at any time told the corporation that he had made an offer for the property. It is quite clear, therefore, that there was no full information given by the defendants to the corporation or Van der Velde, and it is almost unnecessary to add that the latter did not at any time consent to release the defendants from their trusteeship nor to the defendants buying the property for themselves. This being so, there can be no doubt that before the end of September the defendants had entered into negotiations with the object of entering into engagements with respect to which their interests might possibly conflict with their duty. We will consider what happened later on when we deal with the subject of the information of which they are alleged to have made an illegal use.

In the first count of their declaration the plaintiffs say that the defendants, while in their employ as directors and managers, obtained valuable information, and by means of, and in consequence of, this information they acquired the property for themselves, whilst still in such employ. To this the defendants reply that all the information they had with respect to the value of the mine they had acquired before they became managers or directors, and that they acquired no additional information whilst they were such. They further say that they in fact acquired the property only after they had ceased to be directors and managers. With respect to the first of these contentions, it must be pointed out that the information which defendants allege they had before they entered into the service of Van der Velde was information which had been

acquired by Hawthorne, and that under the agreement of service of the 22nd May, 1908, he received valuable consideration for the services rendered by him to Van der Velde, and such services must have included the information he had given Van der Velde with respect to the property, and thus such information became the property of Van der Velde and afterwards of the African Diamonds Corporation, and thus ceased to be the property of Hawthorne or of the defendants, and the case is reduced to the same position as if the information had been acquired during the period of their service. It is impossible also for any court, as was pointed out by Lord ELDON in the cases of *Ex parte James* and *Coles* v. *Trecothick* (*ubi supra*), to ascertain and to decide what additional knowledge and information the defendants may or may not have acquired during the time of their directorship and managership. It is inconceivable, however, that they acquired no additional information. One thing at any rate is certain, namely, that they became intimately acquainted with the details of the various agreements belonging to Van der Velde and the African Diamonds Corporation, and of their negotiations with the liquidators, which placed them at an advantage over any one who had not the same means of information, and in a position to compete with advantage even against the African Diamonds Corporation itself. It was solely the unfair use made by them of this information which enabled them first to make their offer of £2500 on the 2nd October with some prospect of its being entertained, and of afterwards capping Van der Velde's subsequent offer of £3000 by a similar offer of £3000, which was accepted on the 12th November, 1908.

The fact that the defendants resigned their directorship on the 2nd October, 1908, does not affect their position in any way. That resignation was merely an attempt to divest themselves of the responsibilities and obligations of their office, from which they could not in law free themselves without the consent of the corporation. The law as laid down in *Parr* v. *Crosbie* (5 E.D.C. at p. 212) with respect to partners applies equally to directors of companies: "Where a partner wishes to withdraw from a partnership, for the duration of which no specific

time is fixed, he may do so provided his wish be expressed *bonâ fide*, and not at an unreasonable or inconvenient time. But the renunciation is not made in good faith when the partner renounces in order to appropriate to himself alone the profit the partners had proposed to make when they entered into the partnership. If a partner renounces with a secret motive, such as that he may alone enjoy a gain which he knows awaits him, he may be compelled to share the gain with his partners." In addition to this, as was pointed out in *Carter* v. *Palmer* (54 Rev. Rep. at p. 157), the reason of the inability of the defendants to acquire the property for themselves, namely, the fact that they had acquired information whilst holding a fiduciary position, continued as long as the information continued, and therefore even after the fiduciary relationship had come to an end, and even up to the 12th or the 16th November, when the property was actually acquired by defendants. If they had not taken advantage of the information they had acquired whilst in the employ of the corporation in order to compete with them, the offer of the corporation of the 7th November, supported as it was by a banker's guarantee, would have been accepted, and the corporation would have become the owners of the farm Welgegund, together with all the profits attaching to their agreements with the liquidators of the New Driekopjes. The defendants in fact made use of the information obtained by them in order to defeat the negotiations which were going on between the liquidators and the African Diamonds Corporation, in which the latter, through Van der Velde, were attempting to obtain the property on easier terms than they had originally agreed for, an attempt in which the defendants, as directors, ought to have taken an active part, instead of working against their company, which was only defeated owing to their hostile action.

The case against the defendants is strengthened by the fact that, after their alleged resignation on the 2nd October, they went on to the property and continued their operations as before, making use of the plant and machinery and of the services of the employés of the company as before, opening

up three drives in the mine and employing Professor Young to report on the mine, and making use of the information thus obtained in order to assist them in floating the company they had in contemplation, and which was afterwards floated.

On all grounds, therefore, judgment must be for the plaintiffs, and the only question that remains is as to the form which the judgment is to take. The defendants have in the meantime entered into an agreement or lease with the company floated by them, and with that lease it is impossible to interfere. But the freehold of the farm is still vested in the defendants, and with that the Court can deal.

The judgment of the Court is for the plaintiffs: (1) For transfer of the farm Welgegund subject to the mortgages at present on the farm and the terms of the agreement entered into between defendants and the Welgegund Diamond Mining Co., Ltd. (2) For an order compelling the defendants to account to the plaintiffs for any moneys, shares, diamonds or other profits already received, won or derived by them in terms either of their agreement of purchase of the 10th November, 1908, with the liquidators of the New Driekopjes Diamond Mining Co. or of their agreement with the said Welgegund Diamond Mining Co., together with a statement of all sums alleged by the defendants to have been expended by them in connection with the purchase of the property and any other sums they may allege that they are entitled to claim from the plaintiffs. (3) For the cession, payment or delivery of all such moneys, shares, diamonds or profits as may upon such account or statement be shown to be due to the plaintiffs. (4) Costs of suit, less any costs specially incurred in connection with the last count of the declaration.

WARD, J., concurred.

Plaintiffs' Attorneys: *McIntyre & Watkeys;* Defendants' Attorneys: *Marais & De Villiers.*