GOLDBERG v. TRIMBLE AND BENNETT.

1905. *March* 27, *May* 16. INNES, C.J., and MASON and CURLEWIS, J.J.

Partnership.—Agency.—Scope of partnership transactions.—Improper use of partnership information.—Interest of partner in conflict with interests of firm.
Laches.- -Special defence.

G entered into partnership with T and B for the purpose of purchasing and thereafter realising certain landed property and shares belonging to one H. All profit or loss resulting from the transaction was to be equally shared. The shares in question were shares in a company whose chief asset consisted of a number of valuable building stands in Johannesburg. T and B purchased half of these stands from the company for their own benefit, without giving notice of the transaction to G, their co-partner. *Held*, that the transaction was in conflict with the interests of the partnership, and incompatible with the fiduciary relationship existing between partners, and that T and B were liable to account to G for one-third share of any resulting profits.

Though G became aware of the purchase by T and B shortly after its completion, he at that time had no knowledge of the details of the transaction. *Held*, that under the circumstances a delay of six months in bringing his action was not unreasonable, and that the defence of *laches* could not be successfully raised against his claim. *Semble*, the defence of *laches* should be specially pleaded.

Appeal from decision of SMITH, J., in the Witwatersrand High Court ([1905] T.H. 58).

The facts appear from the judgments.

Ward (with him *Williamson*), for the appellant: By the agreement of the 10th February, 1902, the parties to this action were in partnership as regards all interest in or arising out of these stands. These stands and the shares in the Sigma Building Syndicate were so inextricably involved with each other that it was impossible to touch the interests of the one without affecting in some material way the interests of the other. The

duty of Trimble and Bennett towards Goldberg was the duty of one partner towards another, and so far as Trimble alone was concerned there was the added duty of an agent to his principals. No person in a fiduciary capacity is allowed to put himself in such a position that his own interests and those of the *cestuis que trust* are in conflict with each other. See *Burton* v. *Wookey* (23 R.R. 249); *Costa Rica Railway Co.* v. *Forwood* ([1901] 1 Ch. 746); *Boston Deep Sea Fishing Co.* v. *Ansell* (39 Ch. Div. 339). *Bentley* v. *Craven* (18 Beav. 75); see also *Crosby's* case and *Palmer's* case on the same question.

Leonard, K.C. (with him *Saul Solomon* and *Kelsey*), for the respondents: There was no partnership in this case; the contract between the parties only amounted to a *societas particularis*. It was a *societas* formed solely for dealing with the assets of this particular business and agreement. There was no fiduciary relationship between Trimble and Goldberg. Trimble's duty was limited by the four corners of the agreement of the 10th February, 1902. All the information acquired by Trimble with regard to the joint assets could not benefit him solely and individually; it must benefit the joint assets. The logical conclusion of plaintiff's contention would be that a shareholder in a joint-stock company could not buy from the company, and this reduces the position to an absurdity.

Ward, in reply.

Cur. adv. vult.

Postea (May 16):—

INNES, C.J.: The action is one for a declaration that the plaintiff is entitled to share in the profits of a purchase of landed property made by the defendants. On certain points there is a direct conflict of evidence; but a brief statement of those facts which are not really disputed will be sufficient to indicate clearly the issues between the parties.

In the beginning of January, 1902, one William Emil Hollard of Pretoria was possessed of a considerable amount of landed property, of which he was desirous to dispose, and which was under offer to a syndicate whose members included the defendant

Bennett, at that time resident in Durban, Natal. Trimble did not belong to the syndicate: nor apparently did Goldberg, though he acted as intermediary, and was, in case the sale went through, to receive a substantial commission. Early in January the intending purchasers obtained from Mr. Attorney Dumat a report upon the assets under offer to them. These consisted of some farm property, of stands with buildings thereon both in Johannesburg and Pretoria, and of a number of shares in an undertaking called the Sigma Syndicate. The report dealt exhaustively with the values of all the properties, compared them with the prices at which they were scheduled by Hollard, and embodied the opinion of the writer upon the venture considered as a whole. It came to this, that if there was a rise in the market (which was considered probable) the purchasers would be likely to make a moderate profit upon the Pretoria and most of the Johannesburg properties, and a very considerable, though indeterminable, profit upon the Sigma stands, and possibly on a few of the Johannesburg stands. It was mainly the shares, however, which gave to the purchase of the assets a very real speculative interest.

The Sigma Syndicate was registered as a company under Law 5 of 1874, and there were some remarkable features about its constitution and its articles. The only assets which it possessed consisted of fifty-eight stands—situated, twenty-eight on Government Square, and the balance on Marshall Square. In fact, it would seem to have been formed to take over from the Marshall's Township Syndicate two open spaces which had been originally reserved for public use, and to convert them into building sites. It had a capital of £25,000, of which no less than £23,000 was held by the four directors. The articles contained a clause that the ownership of each share should give a right to a proportionate share in the ownership of the company's assets. And a further clause allowed a director to make contracts or agreements of any kind with the company, without being bound to account for the profits accruing therefrom, provided that he gave notice of his interest and refrained from voting in the matter.

After considering Dumat's report the intending purchasers

desired an extension of time. But Goldberg did not support the application, for he was desirous of buying himself. Having been introduced to Trimble by the manager of the African Banking Corporation at Durban, he proposed to him that they should go in for the venture together. Trimble agreed, on condition that Bennett, who seems to have been a man of considerable means, should also become a party. Arrangements were made with the bank for financing the first instalment, and on the 14th January Goldberg, who had been acting for the syndicate, wired to Hollard, advising him not to grant any extension of time, and saying that he was able to purchase the assets himself. Further correspondence ensued, and on the 23rd January Goldberg wired that the first instalment was being remitted by Trimble through the bank, and that the purchase was thereby concluded. The original syndicate then disappeared from the scene.

The next step was the execution of a memorandum of agreement between Goldberg, Trimble and Bennett. By it they agreed to enter into a partnership for the purpose of purchasing, in equal shares, certain assets in the Transvaal belonging to Hollard. Profits and losses were to be equally borne: in the case of any difference, the opinion of the majority was to prevail; no partner was to dispose of his interest without the written consent of the others; and all dealings with the property of the partnership were to be transacted through Trimble, to whom the other partners were to give powers of attorney to act for them in all such dealings. This deed was dated 10th February, 1902: and on the same day special powers were executed in his favour by Goldberg and Bennett, which authorised him to sell and transfer all or any of the properties and shares purchased by the partnership.

Trimble proceeded at once to Johannesburg, where he was to meet Hollard, to settle the details connected with the purchase and the securing of the balance of the price, and then to sign on behalf of his partners and himself a contract embodying the terms finally decided upon. It is common cause that before he left Natal the partners discussed the value of all the propositions which they had agreed to buy, and amongst others the value of

the Sigma shares and of the stands which the Sigma Syndicate owned. Goldberg was well acquainted with the position of these stands, and knew that they were very valuable. Trimble was shown Duma's report, and there can be no doubt that, from that source, and from the conversation with his partners, he was fully posted in the matter. Indeed, so soon as he knew that the Sigma stands were situated on Government and Marshall Squares, his knowledge of the locality must have told him that they constituted an asset of great value. The purchase-price of all the properties was £95,000; the number of Sigma shares included among them was 5500, or more than one-fifth of the entire share capital; and they were scheduled in the contract of sale with Hollard, which was subsequently executed, at the sum of £30,000, or nearly one-third of the total price.

On his arrival at Johannesburg Trimble saw Hollard, and came to a satisfactory understanding with him on all points; and on the 14th February the formal deed of sale was executed, Trimble signing it on behalf of his partners as well as personally. As soon as this had been done he went with Hollard to inspect the properties. In the course of this inspection Hollard stated that the Sigma Syndicate were intending to sell their stands on Government Square; on Trimble's inquiring the price he was referred to Davis, the secretary. He did see Davis, and obtained an option for fourteen days at £110,000 for the twenty-eight stands. He then communicated with Bennett, and finding that the latter was willing to join in the purchase and to finance it, he exercised the option, and bought the stands for Bennett and himself, without communicating at all in the matter with Goldberg. In order fully to understand the position, it is necessary to refer to the letters which Trimble wrote to his partners at this time. Under date the 15th February he addressed a communication to Bennett and Goldberg jointly; with it he sent a copy of the agreement of purchase which he had signed and of the bond which had been passed to secure the balance of the price. He went fully into the negotiations with Hollard which had preceded the signing of the agreement, and made special mention of the arrangements come to with regard to the custody of the Sigma share certificates, pending the payment of the price

at which they had been scheduled in the agreement. It is not quite clear whether, on the 15th, he had formed any definite idea of purchasing the Government Square stands; but at any rate the letter contains no reference to that subject.

A few days after—on the 20th February—Trimble wrote to Bennett a letter in which the following passages occur: "Now to business—*re* Sigma shares—I see a good spec. for you and I, but no others, if we can manage it—and it must be strictly in confidence between us; I have gained certain information which is of very great value. I cannot write you what it is; but I can say this—I think you and I can make money out of it. The Sigma Syndicate, as you are aware, owns twenty-eight stands on Government or Church Square. . . . I want to buy those at from £4000 to £4500 each, to take the lot. I fancy I can get the lot at £4000 each, but I am not certain, so that I must have discretion up to £4500 each. You may depend on it I will do the best I can. I know that £32,000 is now offered for four of them, so I expect to do a good thing in retailing them out. As to terms, I think they will accept £10,000 cash to close the deal, balance in three, six, nine, twelve months at 6 per cent. Now, by my buying the lot at that price I make for you and Goldberg and myself roughly £10,000, which will come back to us in dividends in Sigma shares. And when I sell the lot to the party I bought the mules for in a former transaction with you, I have no doubt you will understand the source of my information." The letter then went on to request Bennett to back the writer's overdraft for £20,000 in order to finance the transaction, and proceeded as follows: "This is a chance I don't want to miss, and I pay a friend £1000 when the deal is closed; you will understand my liberality, which I cannot discuss here." Within a day or two after the despatch of this very remarkable epistle, Trimble must have received Goldberg's reply to his letter of the 15th February; in it the latter approves generally of the terms arranged with Hollard, and proceeds to put the following question: "What is your opinion *re* buying out the other holders of the Sigma Syndicate?" So far as the correspondence shows this query was not replied to, and no word was written to Goldberg regarding the proposals embodied in the letter of the

20th February to Bennett. On the 8th May, 1902, Goldberg wrote again, stating that he was about to sail for England, and was anxious for information about their joint venture; he wanted as full a report as possible as to the market value of the various properties. On the 9th June Trimble wrote a lengthy report to his copartners. In reference to the shares, it contained this passage: "The Sigma Building Co. has sold twenty-eight stands on the Government Square for £110,000 on terms. Our interest in that will be, as far as I can learn, about £10,000, which I hope we will get back in dividends in due course." It will be noted that the fact that the stands had been bought by Trimble and Bennett for their joint benefit was in this letter carefully kept back from Goldberg.

The plaintiff remained some time in England, returning to Durban about December, 1902. There is a conflict of evidence as to the date when he first became aware of the transaction into which Trimble and Bennett had entered. His statement is that he knew nothing about the purchase of the Sigma stands until March, 1903, when they were being advertised for resale. Trimble and one of his witnesses say that at an interview which took place at the end of 1902 or early in 1903 he admitted that he knew that they were the purchasers, and added that he thought that they might have let him have "a show"; to which Trimble replied that Goldberg could hardly expect to participate, seeing that he had difficulty in regard to his share of the money required for the Hollard purchase. It will be necessary to revert to this point at a later stage.

After his return from England the plaintiff withdrew the power of attorney given to Trimble on the 10th February, 1902; he was dissatisfied, he said, with the expenditure incurred and the charges made by the latter in respect of the property purchased by the partnership from Hollard, and also with the fact that no sales had been effected of the assets. In view of the deadlock which then arose, the partners decided to meet together and thoroughly thrash matters out. They came together on the 7th and 9th April, 1903, and minutes were kept of the proceedings. It was agreed to sell certain properties as soon as possible, at fixed prices—Trimble to act as auctioneer. He was

also to receive £1000 for his work and outlay in connection with the properties during 1902, and his remuneration as managing partner during 1903 was determined. So far as the minutes go there is nothing to show that Goldberg made any mention at these meetings of the purchase by his copartners of the Sigma stands. He admits that he did not bring the matter forward, and says that he was acting on the advice of his solicitor, who thought that the partnership matter had better be settled first.

Meanwhile Trimble and Bennett were advertising their Sigma stands for sale; they were advertised first in March, and again on the 11th June. Shortly after the last-named date some of the stands must have been sold; for Goldberg and Trimble both allude to the fact in the evidence which they gave in an action brought at Durban to recover from Goldberg his *pro ratâ* share of the expenses incurred in connection with Hollard's properties. That evidence was given on the 26th June, so that the sale must have taken place at some date between the 11th and the 26th. On the 9th and the 11th July he caused letters of demand to be written by his attorneys at Pretoria and Durban respectively; in those letters he claimed from Trimble and Bennett one-third of any profit made by them out of the purchase of the Sigma stands. But neither in those letters nor at any time prior thereto did he offer to undertake a share of the liability incurred in respect of the purchase. As a fact, however, the stands sold well. For less than half the number the defendants have received about £100,000; the remainder are still on their hands.

In June, 1904—nearly a year after the date of his letters of demand—the plaintiff took out the summons in the present action. The declaration originally filed was based upon the written deed of partnership of the 10th February, 1902. It alleged, however, that it was the intention of the parties to acquire, as a partnership asset, the Government Square stands, and that if the deed did not express that intention it ought to be amended. The plaintiff claimed a proportionate share in the profits (if any) already made and in the balance of the stands still unsold. The declaration, which was argumentative and verbose in the extreme, was excepted to as being embarrassing

and as disclosing no cause of action. This exception was sustained by the High Court, and the declaration was quashed. Another was substituted for it, and it is this second declaration which now sets out the plaintiff's contentions. The main feature of this declaration is that it alleges two partnerships; one (called the first partnership) the terms of which were embodied in the written deed of the 10th February, 1902; and another (called the second partnership) by which the parties, also on the 10th February, but after they had executed the deed, verbally agreed to become partners in a new venture, namely, the purchase either of the Sigma stands, or else of the remaining Sigma shares (some 20,000 in number), whichever might be possible. The plaintiff's contentions, after stating the facts, are:—

(1) That the acquisition of the twenty-eight stands was a partnership transaction.

(2) That it was made by Trimble as agent for the second partnership.

(3) That the defendants were not entitled to purchase from the Sigma Syndicate property belonging to it, without the knowledge and consent of the plaintiff.

(4) That the acquisition of the stands and their resale was in competition and rivalry with the objects of the first partnership.

On the strength of one or other of these contentions the plaintiff claims:—

(*a*) An account of the profits already made and payment of a *pro ratâ* share thereof, and a declaration that he is entitled to share in a similar proportion in the remainder of the stands.

(*b*) In the alternative, damages for the acts and default of the defendants as partners and agents, which he assesses at one-third of the amount of the profits made and to be made on the transaction.

(*c*) He also asks that the partnership deed may if necessary be amended; and he demands an interdict and the appointment of a receiver.

The learned judge who tried the case in the first instance found as a fact that no verbal agreement to enter into what is called "the second partnership" ever took place. Not only do I

think that there is abundant evidence to support that finding, but the version of this second agreement set up by the plaintiff seems to me so opposed to all the probabilities of the case, that it was not possible, when it was denied, to entertain it. Indeed, I cannot help thinking that this subsequent verbal contract would never have been heard of had the plaintiff not been desirous of strengthening the case which he had endeavoured to make in his first declaration. Under these circumstances I do not propose to discuss the reasons of the learned judge upon this point, except to say that I entirely agree with them.

That being so, there was only one agreement of partnership, the terms of which were embodied in the deed executed on the 10th February, 1902. And the purchase of the twenty-eight stands was not in itself a partnership transaction, nor was it strictly within the scope of the partnership. The terms of the deed make it clear that the signatories to it agreed to become partners only in respect of the assets which Hollard was seeking to sell, and which were scheduled at prices amounting in all to £95,000. The stands never directly formed part of those assets, and as the deed stood no two of the parties could have compelled the third to join in purchasing them.

The plaintiff's first and second contentions must therefore fail. As to the fourth contention, I also agree with the reasoning of the learned judge. The purchase and sale of these vacant stands did not in my opinion constitute such an entering into competition with the partnership as to entitle the plaintiff to the relief which he seeks.

There remains the third contention, which appears to me to present greater difficulty, and to be of far more importance, than the others. It would appear, from the reasons of the learned judge, that at the trial the plaintiff supported this contention on the ground that, in view of the nature of the syndicate and the terms of its articles, the partners as owners of 5500 shares were actually legal owners of a corresponding portion of the stands, and that Trimble was really buying property which partly belonged to Goldberg. That argument was not allowed to prevail. But it seems to me that in support of the third contention it might also have been argued that Trimble, as the agent and

partner of Goldberg, could not purchase the Sigma stands without violating those obligations of good faith which the fiduciary relation in which he stood to the latter imposed upon him. That therefore he ought not to have purchased them for himself, or, having bought them, ought not to claim to retain the profit. These are arguments which I think might have been advanced under cover of the third contention. That they were pressed and elaborated at the trial is clear from the concluding portion of the judgment. The learned judge, though he considered that strictly speaking they did not arise on the pleadings, dealt very fully with them. It seems to me that he was right in doing so, and that really they were covered by the pleadings. Certainly the appeal was argued almost entirely on those grounds, and I think that we are bound to deal with them.

The authorities, both Roman-Dutch and English, on the question of the right of a principal or partner to claim profits made by an agent or copartner, were fully considered in the comparatively recent case of *Transvaal Cold Storage Co.* v. *Palmer* ([1904] T.S. 4), and no good purpose would be served by quoting them *in extenso* again. The facts of the present case are not entirely covered by any decisions then referred to. Because, in this instance, the agent or partner did not buy any of the property which he was empowered to sell, or which his firm was able to deal in; but he bought half the assets which made one of such properties valuable. It remains to be seen whether an application of the general principles which govern the duties of agents and partners towards those whom they represent will entitle the plaintiff to relief.

The position in which Trimble placed himself, by entering into a secret arrangement to purchase the stands, was one which no agent ought to allow himself to occupy. His duty when he arrived in Johannesburg was to obtain the best price possible for the Sigma shares, in common with the other partnership properties; and to take advantage of every reasonable and proper opportunity to enhance their value. The value of the shares depended entirely upon the value of the stands which constituted the only assets of the Sigma Syndicate. The moment he decided to endeavour to acquire one-half of those assets for

Bennett and himself, his interests and his duty were diametrically opposed. The higher the price at which he bought, the better for Goldberg and the original firm; the lower the price the more advantageous would it be for himself and Bennett. If they could acquire the stands cheaply, their profits on a resale would more than make up for the diminished dividend which would accrue to them as owners of two-thirds of the 5500 shares.

That the transaction was not an honest one appears clear from the terms of the letter to Bennett of the 20th February. "I pay a friend," wrote the artless Trimble, "£1000 when the deal is closed; you will understand my liberality, which I cannot discuss here." Trimble admitted in the box that this £1000 was to be paid as secret commission, though the name of the recipient was not disclosed. It was probably paid either to some person who had influence with the syndicate, to induce the directors to accept Trimble's offer, or to some person who he thought could control the Government offer, so as to ensure that that offer should not be raised. If we knew to whom the money was promised and why, it might throw some further light upon the transaction. In any event it was a discreditable one for Trimble to enter into. Not only so, but it involved a distinct breach of the good faith and duty which, as managing partner of the firm sent up specially to dispose of its assets, he owed to Goldberg, his fellow-member. That he was to some extent conscious of this is shown, I think, by the care which he took to conceal the transaction from Goldberg. And that the firm did sustain actual prejudice is also clear, though the claim of a partner for relief under such circumstances exists quite independently of the fact that his interests have been adversely affected. Trimble, as he informed Bennett, was quite prepared to pay £4500 each for the stands, or £126,000 in all. As a fact he obtained them for £110,000; so that he purchased them for £16,000 less than he himself was prepared to offer.

Now if the twenty-eight stands had figured in the list of scheduled properties of which Trimble had to dispose, there can be no possible doubt that he would not have been allowed to make a profit by buying them himself. And I do not think that, in principle, the matter can be different because the firm

was interested primarily in the syndicate shares, and not directly in the syndicate assets. After all, it was the Sigma stands which constituted the value of the Sigma shares, and the partnership was as vitally concerned in the price obtained for those stands as if one-fifth of each stand had been actually registered in its name.

Neither in the court of first instance nor on appeal was the point taken for the defendants, that their liability to account for profits must be confined to such proportion thereof as the shares held by the partnership bore to the total capital of the syndicate. That proportion was exactly 22 per cent., for the partners held 5500 shares out of 25,000. But even if the point had been taken, I should not have felt able to hold that Trimble, though under the circumstances he could not, without a breach of faith, have purchased 22 per cent. of each stand behind the back of his partner, could nevertheless have acquired the remaining 78 per cent. with impunity. Goldberg, by virtue of the partnership shares, was, as it seems to me, interested in each and every stand held by the syndicate, and was entitled to object to his copartner making a profit for himself by the purchase of any one or more of them. It is not practically possible, in my opinion, to split up the purchase of each stand into two parts, and Trimble of course had never any idea of doing so. There is nothing in the evidence to show that a fifth share of a Johannesburg stand was in practice a saleable commodity: nor is it at all probable that it was. Even if it had been, I am not prepared to say that Trimble was justified in purchasing four-fifths of each stand for himself, while acquiring one-fifth for his firm. His duty to deal honourably and in good faith with his partners precluded him from so doing. As the holder of an undivided four-fifths of each stand, he would have had a very real advantage over the partnership. He would have been able to dictate the time and mode of resale (for a subdivision would have been impracticable), and for all practical purposes he would have had the firm at his mercy. If a partner in breach of his duty acquires property intimately connected with the business of the partnership, and which it is detrimental to its interests that he should hold for himself, he ought to be held to have

acquired it for the partnership, even though it may not fall directly within the scope of the firm's business (*Featherston-haugh* v. *Fenwick*, 17 Ves. 298; and see also *Russell* v. *Austwick*, 1 Sim. 52). I do not think, therefore, that if the point to which I have referred had been taken on behalf of the defendants, it would have succeeded.

If Trimble is liable to account to the plaintiff, then clearly Bennett is also liable: for he joined in the purchase and financed the operation with a full knowledge of all the facts. And in my opinion the plaintiff is entitled to share in the profits made by the defendants in respect of these stands. The conclusion at which I have arrived is strengthened by the fact that Trimble made use, for his own purposes, of information which he obtained as a partner of the firm and of opportunities which came to him while he was transacting its business. But I do not propose to discuss that aspect of the case in detail, because my decision is sufficiently based upon this broad consideration—that Trimble, while managing partner of the firm to which Goldberg belonged, and while expressly acting as agent of the latter, placed himself in a position in which his own interests were in direct conflict with his duty to the plaintiff: and that he cannot be allowed to retain for himself any resulting profit.

The question, however, whether Goldberg has not lost his claim to insist upon a share of the profits by his conduct after he became aware that Trimble and Bennett had acquired the stands, is one to which I have given much consideration. I have already drawn attention to the conflict of evidence as to the date when the plaintiff obtained this knowledge. He denies that he knew who the purchasers were until March, 1903. But the defendant and his witnesses depose to a conversation which took place some two months earlier, and in the course of which Goldberg admitted that he knew who had bought the stands. In the conflict regarding the question of the "second partnership," the learned judge accepted the statements of the defendant as more accurate than that of the plaintiff: and I assume therefore that Trimble is correct when he deposes that Goldberg knew, at the beginning of 1903, that he was the purchaser. He took no steps to claim any share in the contract until July—six

months later—by which time some of the stands had been re-sold at a very handsome profit. Does his conduct amount to *laches* so as to disentitle him to succeed?

Now the defence of *laches* is a special one, and ought to be expressly raised upon the pleadings. In the present case it was neither taken in the plea, nor was it so much as referred to during the argument. The Court, therefore, if it decided to give effect to it at all, could only do so after ordering a reargument of the case on that point, and, if necessary, an amendment of the pleadings. But I do not think such a course would be warranted, or that we should be justified in inviting the defendants to set up a case not made by them at the trial or on appeal, unless we were satisfied that the evidence as it stands establishes a *primâ facie* case that the plaintiff has been guilty of *laches*. And I do not think that it does.

It is quite true that the Court will be slow to grant such equitable relief as is claimed in this action to a plaintiff who, having been wronged by his partner, deliberately refrains for a considerable time from assuming any share of the responsibility which his joining in the venture complained of, when it came to his knowledge, would entail, and who postpones any assertion of his claim until a profit has been earned and all risk has disappeared. This is specially so when the venture or business, in respect of which relief is sought, is either of a highly speculative nature, or involves considerable outlay or risk to render it profitable. The point has been thus stated by Lord LYNDHURST (*Prendergast* v. *Turton*, 13 L.J., Ch. 269): "To allow the party to lie by in a case of this nature, to watch the course of events, to urge his claim if it should be to his advantage to do so, and to abandon it in case of a continuance of misfortune and loss, which as a proprietor he must have shared, would be at variance with the plainest rules of justice." This is not a question of abandonment: no man is presumed to give up or waive his rights, and there is nothing in the evidence which would point to any intention on the part of Goldberg to abandon his claim. The point really is whether he knowingly refrained from electing to claim an interest in the purchase of the stands, for such a time, and under such circumstances, that it would not be fair to the wrong-

doer now to grant relief. The delay which occurred was not at the outside longer than six months. I have consulted a number of English cases in which the question of *laches* has been discussed; but in none that I am aware of has the plaintiff under similar circumstances been debarred from relief owing to the lapse of so short a period (*Clegg* v. *Edmonson*, 26 L.J. 673; *Prendergast* v. *Turton*, 13 L.J. 268; *de Bussche* v *Alt*, 8 Ch. D. 286). Not only so, but before a suitor can be penalised for failure to elect, it must be clear either that he was acquainted with the facts necessary for an exercise of judgment, or that, knowledge of those facts being available, he failed to make himself acquainted with them. I am satisfied that Goldberg did not know all the material facts connected with the transaction in January or in March, 1903, or even up to July, when he caused letters of demand to be written. He knew that Trimble and Bennett had bought the stands for £110,000; but he did not know what terms of payment had been arranged, and that was a point most important to be known. Judging from Trimble's letter of the 20th February, the terms were likely to have been £10,000 in cash, and the balance in quarterly instalments, extending over twelve months; but the point is not clear even now.

Moreover, Trimble when he purchased seems to have had assurances, from some person unknown, that the latter would take over all the stands; in which case the risk would have been very small. I gather that from the following passage in his letter, "And when I sell the lot to the party I bought the mules for in a former transaction with you, I have no doubt you will understand the source of my information." Goldberg did not know that fact. It is also clear that, by some arrangement with the Government, Trimble obtained £10,000 and a number of Government stands, presumably in exchange for some ground or rights of way on the square. The evidence does not show how soon after the purchase this arrangement was come to, or whether Trimble had it in view when he bought. But Goldberg knew nothing about it. These were all matters which would have affected the judgment of a reasonable man in deciding whether or not he should elect to claim a share in this transaction. And I do not see how Goldberg could have obtained information

about them. Neither Trimble nor Bennett volunteered any statement: they were pursuing a policy of reticence. And there was no other quarter to which the plaintiff could apply. The 5500 shares remained registered in the name of Hollard; and Goldberg, not being a registered shareholder, would have applied in vain to the syndicate for information. We know, as a fact, that he was recently obliged to sue Hollard in order to compel transfer of those shares into the names of himself and his co-partners jointly, and that in that action Trimble and Bennett sided with Hollard, and were joined as defendants in the action. It was useless therefore for him to apply either to his partners or to the syndicate for information; indeed, he did make inquiries from the latter, but without success. Under these circumstances I fail to see that a *primâ facie* case of *laches* as against the plaintiff has been made out upon the evidence.

The result is that I am obliged, to my regret, to differ from the conclusion arrived at by the High Court. I think that the plaintiff is entitled to share in the proceeds of the venture entered into by the defendants, but upon terms, of course, that he must undertake an equivalent share of the liabilities. The stands were bought for £110,000, and £100,000 has already been realised in a resale of some of them. So that the obligation of liability is not heavy, but such as it is the plaintiff must undertake his part of it. The appeal should be allowed and judgment entered for the plaintiff (1) declaring him entitled to an account from the defendants jointly and severally of all profits made by them from the acquisition of the twenty-eight stands originally purchased by them from the Sigma Syndicate, and payment over to the plaintiff of one-third share of such profits, if any, with interest *a tempore morae;* (2) declaring that the plaintiff is entitled to one-third interest in the residue or remainder of the said twenty-eight stands which have not been disposed of, and directing the defendants to do all things necessary to place the plaintiff in possession of such interest.

These orders to take effect upon the plaintiff discharging or satisfactorily securing one-third of the liability, if any, remaining upon the defendants in respect of the purchase-price of the said stands. No order at present on the applications for a

receiver and for an interdict. The respondents must pay the costs in the court below and also the costs of appeal.

MASON, J.: The history of the facts which have led to the present case is given in the judgment of the CHIEF JUSTICE, and as I agree in the view which he has taken it is not necessary for me to repeat them

The general principles governing the relations of partners with each other in matters of this kind are substantially the same as those applicable to principal and agent, and these have been very fully dealt with by this Court in the case of the *Transvaal Cold Storage Co.* v. *Palmer* ([1904] T.S. 4). It is the duty of a partner in all matters concerning the partnership affairs to do his best for the partnership, preferring its interests to his own in case of conflict, and accordingly not to enter into any transaction which may place him in such a position that his individual advantage may be opposed to this paramount obligation.

Now in this case the special circumstance which requires consideration is the fact that Trimble and Bennett bought no property in which the partnership had any direct interest or the purchase of which came within the scope of the partnership business; they bought property belonging to a company in which the partnership held a considerable number of shares, which formed, moreover, one of the chief assets of the partnership. It is, of course, quite clear that the partnership had no title or legal ownership in the Sigma stands, but it is equally clear that the value of the shares depended to a great extent on the value of the stands. It was Trimble's duty, both as a partner and as having control of the sale of the shares, to adopt any legitimate means which came under his observation for increasing their value, and to communicate to the partners any information which affected their value. Now can it be said that this duty was confined solely and strictly to the shares themselves without any reference to the property which made the shares of value. To adopt this view appears to me to overlook the substance of the transaction. The shares themselves are only pieces of paper, their value is the interest they give in the stands, and therefore the interest of the partnership was not in the mere share certifi-

cates, but in reality in the stands themselves. It seems to me impossible to hold that the shares were within the scope of the partnership business, but that the stands had nothing to do with the partnership. If Trimble, for instance, had found a defect in the title of the stands, would he have been entitled to procure them or some dominant interest in them for himself to the prejudice, if not the ruin, of the partnership? If the value of partnership property "A" is dependent on another property "B," which does not belong to the partnership, could a partner acquire "B" and levy blackmail upon the partnership even supposing that the actual purchase of the property "B" were not within the scope of the partnership business? It appears to me that the rule requiring a partner to exhibit towards his associates in all concerns affecting their joint interests the utmost zeal and good faith would be defeated if these interests could be destroyed or prejudiced under cover of the interposition of another *persona* in the shape of an incorporated company.

In this case Trimble was not only a partner, but also a managing partner on the spot, and the agent of the other partners under a special power of attorney. I do not think that I can use more appropriate words in describing his position than those contained in the American case of *Kimberley* v. *Arms* (129 U.S.S.C. 512): "The law exacts good faith and fair dealing between partners to the exclusion of all arrangements which could possibly affect injuriously the profits of the concern; he . . . stood . . . clothed in some respects with a double trust, both of which imposed upon him the utmost good faith in his dealings, so that he might never sink the interests of the firm into that of himself alone. Whatever he may have obtained in disregard of such a trust, a court of equity will lay hold of and subject to the benefit of the partnership. Neither by open fraud or concealed deception, nor by any contrivance masking his actual relations to the firm, can a member of it or an agent of it be permitted to hold to his own use acquisitions made in disregard of those relations either as partner or agent."

Now what was Trimble's dealing with reference to this property? He had come up armed with a full report as to these stands, a report which was partnership property; he was inspect-

ing these stands on behalf of the partnership when he learns that they are for sale. What actually took place has been very partially disclosed in evidence, but the letter of the 20th February, 1902, contains some remarkable statements. He writes to Bennett a letter, intended to be kept from Goldberg, saying: "I have acquired certain information which is of very great value. I cannot write you what it is, but I can say this—I think you and I can make money out of it." This information clearly has reference to the Sigma stands. He also says that he knows £32,000 was then offered for four of them, and speaks of selling the lot to the party for whom he had bought the mules in a former transaction with Bennett. He also has to pay a friend £1000 when the deal is closed. The judge who decided the matter in the court below came to the conclusion that there was no breach of good faith as regards the plaintiff, and that the purchase of the stands was a perfectly *bonâ fide* one and for what was then considered a good price. That the sellers considered this price fair there seems no reason to doubt, but in face of this letter it appears to me impossible to hold that the transaction was *bonâ fide* and not a breach of faith to the plaintiff. The information which is of such great value as to make it worth Trimble's while to purchase the property, the mysterious person to whom he expects to sell the whole lot, the payment of £1000 to a friend—all these facts point to my mind almost irresistibly to the conclusion that Trimble knew of a probable or intending purchaser of these stands at a figure which would give Bennett and himself a handsome profit if they could secure the property speedily. He does not communicate any of this information to his partner Goldberg. He and Bennett kept the information to themselves in order to get the stands cheap. I cannot but regard this as a serious breach of duty on their part.

By an arrangement with the Government, Trimble, in return for giving a piece of land for a road to their buildings, which lie in the centre of these stands, obtained £10,000 and ten stands. When this arrangement was made there is no direct evidence. Whether the purchase was made by Trimble with a belief that the Government would have to deal with him is not stated in evidence, but it is clear that he had some special reason for

believing that he could make, very soon, a very handsome profit out of these stands, because the letter contemplates that at any rate his share of the money to be found for the purchase-price would not exceed £20 000.

It is also clear from the letter that Trimble was prepared to give £126,000 for the whole twenty-eight stands. He closed his bargain with the company at £110,000. Thus he procured the stands for £16,000 cheaper than his limit of price, and the partnership received £3520 less than they would have done if Trimble had given the full price which he was prepared to give. Now if Trimble had known of some purchaser prepared to give £126,000 for these stands, would it have been consistent with his duty as a partner to try and get the stands for himself at the lower price of £110,000, suppressing the information of a higher offer. It seems to me that that would have been an act in violation of his duty to the partnership; his position is not changed because he himself was the person prepared to give the higher price. I think it therefore clear that Trimble placed himself in a position in which his interest and his duty conflicted in a matter directly concerning the partnership, and that therefore he is liable to account to the plaintiff for the profit which he has made.

In the case of *Aas* v. *Benham* ([1891] 2 Ch. 244) it was laid down that a partner was not liable to account for profits made in a transaction which was beyond the scope of the partnership business, though it was in the course of the partnership business that he procured the information leading to the transaction, and this decision has been followed in America (*Latta* v. *Kilbourn*, 150 U.S.S.C. 524; see also *Dean* v. *MacDowell*, 8 Ch. D. 345). But in that and the kindred cases the partnership had no interest, direct or indirect, in the transaction which was challenged. The information which was used did not affect directly the partnership business, and there was no concealment of facts which it was the duty of the partner sued to have laid before his copartners. Here the partnership is vitally interested in the sale of the stands. The information as to their value and as to probable purchasers was information which Trimble ought to have communicated to his copartner, and this circumstance there-

fore constitutes a fundamental difference between the cases. But it is not necessary, in my opinion, to found the plaintiff's remedy on the defendants' mere use of information which belonged to the partnership generally.

One question which has not been raised upon the pleadings, and which was not argued either in the court below or before us, has caused me some difficulty. The partnership was only interested to the extent of 22 per cent. in the stands. Ought the defendants to account for the whole profit on the stands or only for the profit made in respect of the interest which the partnership substantially had in them. The case of *Tyrell* v. *Bank of London* (31 L.J., Ch. 369) has some bearing upon this point. There a solicitor of a company in course of formation, having received instructions with reference to the purchase of a site for the bank, procured an interest in the property a portion of which was afterwards offered to and purchased by his clients for a sum exceeding the cost of the whole. The House of Lords held that he was not a trustee for the bank in respect of that portion of the property which they had not and never intended to buy, but they adjudged the bank entitled to the land which they had bought at the price which the solicitor had given for the whole after deducting the value of the unsold portion. Now that case has some resemblance to the present one, but it seems to me impossible to separate this transaction into portions as was done in that case. The partnership was, moreover, interested in each one of the stands, and in addition to that it was Trimble's use and suppression of information which should have been communicated to Goldberg which enabled him to make the purchase as a whole.

There is one other question which has attracted our attention during the consideration of this case, viz., whether the relief to which we believe the plaintiff to be entitled should be refused because of his *laches* in prosecuting his claim. This point was neither raised in the pleadings nor apparently argued in the court below; it was not mentioned by either side at the hearing before us. If unchallenged facts appearing upon the record showed clearly such *laches* as would have apparently disentitled the plaintiff to any relief, and have rendered it unjust for the

Court to exercise its equitable jurisdiction against the defendants, then I should have seriously considered whether it would not have been right to send the case back, so that *laches* might be specifically raised and the plaintiff directed to meet the case on that point. There is very strong authority against the adoption of such a course (*Lindsay Petroleum Co.* v. *Hurd*, 5 L.R., P.C. 221; *Garden Gully Co.* v. *McLister*, 1 App. Cas. 57), though there is authority also upon the other side (*Willard* v. *Wood*, 164 U.S.S.C. 502).

The plaintiff in this case knew some time early in 1903, and not later than March, that Trimble and Bennett had bought the stands for £110,000 and were advertising them for sale. He never communicated to them his objection to the purchase. It is true that this advertised sale was postponed, but apparently he lay by waiting until there had been a sale, and when it was clear the venture would be profitable asserted his claim. The principle that such a course will disentitle a plaintiff to relief has been laid down in several cases, but only so far as I can judge with reference to transactions where the property was of a highly speculative character, and required great labour or expense for its development and profitable use (*Norway* v. *Rowe*, 19 Ves. 144; *Prendergast* v. *Turton*, 11 L.J. Ch., N.S. 22; *Ernest* v. *Vivian*, 33 L.J. Ch. 513; *Rule* v. *Jewell*, 12 Ch. D. 660; *Clegg* v. *Edmondson*, 26 L.J. Ch., N.S. 673; *Vigers* v. *Pike*, C & F 652). This property, however, situated in the centre of Johannesburg, can hardly be brought within the category of highly speculative investments, and though the purchase-price was indeed a very large sum, there is no evidence that beyond that any extraordinary expenditure was required.

In all these cases, however, where the doctrine of *laches* is applied, there has been on the part of the plaintiff full knowledge of the circumstances of the transaction which he could have challenged but has refrained from challenging, and there has also been some alteration in the position of the parties which would render it inequitable to enforce the remedy. Where no such alteration in the rights of the parties has taken place, and where there was no such full information or means of information as would enable the injured person to determine on

the same footing as the defendant whether the transaction was one of which he should claim the benefit or not, the courts have refused to deprive him of his relief because of mere delay (*Lindley Petroleum Co.* v. *Hurd*; *Clough* v. *London and N. W. Rail. Co.*, 7 L.R. Ex. 34; *de Bussche* v. *Alt*, 8 Ch. D. 286; *Bullock* v. *Downes*, 9 H.L.C. 1; *Ex parte Ford*, 1 L.R., C.D. 521; *Wall* v. *Cockerell*, 10 H.L.C. 229; *Archbold* v. *Scully*, 9 H.L.C. 360; *Clements* v. *Hall*, 2 de Gex & J. 186; *King* v. *Hamlet*, 2 M. & K. 456).

In the present case I have very grave doubts whether the position of Bennett and Trimble can be said to have been altered, and it certainly cannot be said to have been altered to their prejudice by the sale of the eight stands which took place in June; but apart from that there is nothing on the record which would justify the Court in believing that Goldberg was in possession of that full information which Bennett and Trimble had, and which would have enabled him to judge conclusively whether the transaction was one in which he should claim a share. The arrangement with the Government by which ten stands and £10,000 were procured by Trimble and Bennett was certainly a very material element in the matter, and the probabilities point, though there is no direct evidence on the question, to this arrangement having been made prior to the first advertisement of the stands. No information was given to Goldberg as to the terms on which Bennett and Trimble acquired this property, and beyond the letter of the 20th February, 1902, there is no evidence even now as to what these terms are. I have already animadverted on the concealment of the information which is referred to in the letter of the 20th February as being of very great value in this matter. It appears to me, therefore, that we should not be justified in allowing the defendants a new defence upon a question which they have not raised, and in respect of which the evidence at present recorded appears to me to show that probably they are not entitled to succeed.

I think, therefore, that this appeal should be allowed, and that Bennett and Trimble should account to Goldberg for their transaction in this matter. If upon that account nothing is shown to be due to them, then the plaintiff is entitled to transfer

of a third undivided share in the remaining stands together with payment of whatever profit has been made. If the account should show after making all proper allowances for interest and expenses that money is due to Bennett and Trimble, then Goldberg must pay his proper proportion, and only upon that payment is he entitled to transfer.

CURLEWIS, J., concurred.

Appellant's Attorneys: *Findlay, MacRobert & Niemeyer;* Respondents' Attorneys: *Hutchinson, Sons & Russell.*

EVANS v. RICHMOND.

1905. *May* 16. INNES, C.J., and MASON and BRISTOWE, J.J.

Cheque.—Notice of dishonour to drawer.—When dispensed with.—Irregularity of drawer's signature.—Bills of Exchange Act, sec. 48.

E sued R in the magistrate's court on a dishonoured cheque. The cheque had twice been presented to the bank, and had each time been returned unpaid to the holder, who was also the drawee. On the face of the cheque appeared the words "No account," but there was no evidence to show by whom they had been written. R pleaded want of notice of dishonour; E relied upon Proclamation 11 of 1902, sec. 48, sub-sec. 2 (*c*) (4). *Held*, that since E had failed to prove that the words "No account" had been written by the bank, the fact of this indorsement did not show that the bank was under no obligation to pay the cheque.

The name of the drawer was Richmond, but the signature on the cheque was "Richmonond." *Held*, that the variance of signature was sufficient to relieve the bank of any obligation to pay the cheque, and therefore that notice of dishonour was dispensed with.

Appeal from the Second Civil Magistrate of Johannesburg.

On the 27th June, 1904, Richmond gave Evans a cheque payable to bearer for £222, 0s. 9d. Within a few days Evans