

BETWEEN:

DAVID ROTHENBERG ..... APPELLANT;

AND

THE MINISTER OF NATIONAL  
REVENUE .....

} RESPONDENT.

1963  
Feb. 22  
1964  
Dec. 30

*Revenue—Income—Income tax—Purchase and subsequent sale of unimproved land—Taxpayer member of partnership or syndicate—Determination of intent of partnership—Previous trading operations of members of partnership—Scheme of profit making—Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e).*

This is an appeal from a reassessment of the income of the appellant for the taxation years 1955 and 1956 by which amounts of \$3,484.14 and \$15,106.14 were added to his taxable income, the said amounts being the profit realized by the appellant, as a member of a partnership or syndicate, on the sale of two parcels of vacant land.

1964  
 }  
 ROTHENBERG  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 ———  
 Kearney J.  
 ———

On November 19, 1953 the appellant, one Rubin Cobrin and one Herbert Ludman purchased the two parcels of land consisting of a fifty or sixty acre part of lot No. 93 and a part of lot No. 88, both in the Parish of Montreal, the purchasers acquiring an undivided interest of 28%, 50% and 22% respectively. No money was paid to the vendor at the time of the sale but the deed provided for payment of \$13,228.66 on November 19, 1954 and the balance of \$88,228.66 on November 19, 1954 and the balance of \$88,228.66 on November 19, 1958.

The appellant is a chartered accountant and Rubin Cobrin, a merchant, was one of his clients. The appellant's 28% interest in the property was divided, 40% being held by the appellant, 20% by each of two nephews, 10% by his accounting partner and 10% by one Rosen. The appellant participated in the purchase of the property in question as a result of an invitation from Rubin Cobrin to join him and his two sons in the transaction.

Over the past several years the appellant and his two nephews had jointly invested in apartment buildings, the value of such buildings owned by them being about \$1,300,000 at the time of trial. Between 1951 and 1955 Cobrin and his sons had purchased ten parcels of land, seven of which were vacant land and all were sold after being held for relatively short periods of time.

The appellant and his associates alleged that they purchased the land in question with the intention of developing it as a shopping centre and the evidence of the appellant was that the management of the project was left to Rubin Cobrin. Later, difficulties arose with respect to the servicing of the property and then the appellant and his associates learned that Steinberg's Ltd. were to build a shopping centre just south of the land in question. At this point the appellant and his associates abandoned their shopping centre plans and eventually sold the lands. However, an extract from the minutes of the meeting of the Council of the Town of Cote St Luc held on January 20, 1955 indicated clearly that Cobrin intended to develop the land in lot 93 as a residential subdivision.

*Held:* That knowledgeable men such as the appellant and Cobrin and their associates, with long experience in the real estate field, cannot have acquired the lands in question with the intention of building a shopping centre and retaining it as an investment to the exclusion of all other possible uses of the property regardless of the many obvious possible developments which would make some other use of the land of greater financial advantage to them.

2. That it is clear that although the Cobrins owned a large number of revenue-producing properties they were, in addition, engaged as traders in real estate.
3. That the *mens rea* of a partnership should be determined by ascertaining the intention of the person or persons who in fact controlled its operations and decisions.
4. That the evidence establishes that, if other more preferred alternatives did not materialize, the partnership intended to take advantage of the boom which prevailed by selling the property in its unimproved state.
5. That the balance of probability is that the partnership was aware from the beginning that there were other ways in which the instant property might be disposed of—and the main concern, particularly of the Cobrins, was the sale of the property at a profit.

6. That the sale of the property at a profit and not its retention as an investment was uppermost in the minds of those in charge of the enterprise and, in disposing of it as they did, they were carrying out the scheme of profit-making pursuant to which the property was acquired.
7. That the appeal is dismissed.

1964  
 ROTHENBERG  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Kearney at Montreal.

*P. F. Vineberg, Q.C.* for appellant.

*Paul Boivin, Q.C.* and *P.M. Ollivier, Q.C.* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

KEARNEY J. now (December 30, 1964) delivered the following judgment:

We are here concerned with an appeal from a decision of the Income Tax Appeal Board<sup>1</sup>, which dismissed appeals from income tax reassessments for the 1955 and 1956 taxation years, which added to the appellant's otherwise taxable income the sums of \$3,484.14 and \$15,106.14 for the said taxation years respectively.

The issue is whether the aforesaid sums, which the appellant, as a member of a partnership or syndicate, realized on two sales of vacant parcels of land, constitute capital gains or whether they constitute profits from a business, as that word is defined in s. 139(1)(e) of the *Income Tax Act*, R.S.C. 1952.

The land was acquired by the appellant and his partners by a notarial deed of sale (Ex. A-4) executed on November 19, 1953. As that deed shows, the vendor, Victoria Doris Wener-Cummings, wife of a realty consultant, sold to Rubin Cobrin, merchant, of the city of Montreal, David Rothenberg, Chartered Accountant, of the city of Outremont, and Herbert Ludman, merchant, of the city of Calgary, province of Alberta, therein referred to as "the purchasers", two parcels of vacant land located in the Town of Cote St. Luc, which is contiguous to the city of Montreal, each of the purchasers acquiring an undivided share and interest in the proportions of 50%, 28% and 22% respectively. The first parcel, consisting of over 600 lots, each bearing its own

1964  
 ROTHENBERG  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 Kearney J.

separate number, is described as forming part of original lot No. 93 of the Official Plan and Book of Reference of the Parish of Montreal; the second parcel, which lies close to the first, consists of 89 lots and is described as forming part of original lot No. 88 on the Plan and Book of Reference above described. For brevity's sake, these two parcels will be hereinafter referred to as "lot 93" and "lot 88" respectively.

The purchase price of the aforesaid properties is described in the deed as follows:

The present Sale has been thus made for the sum of ONE DOLLAR (\$100) and other good and valuable considerations which the Vendor acknowledges to have received from the Purchasers to her satisfaction, whereof quit for so much.

And for the further consideration of the payment by the Purchasers to the Vendor in the proportion of their respective shares hereinabove mentioned, the sum of ONE HUNDRED AND ONE THOUSAND FOUR HUNDRED AND FIFTY-SEVEN DOLLARS AND THIRTY-THREE CENTS (\$101,457 33) the whole without interest, as follows.

- (a) The sum of THIRTEEN THOUSAND TWO HUNDRED AND TWENTY-EIGHT DOLLARS AND SIXTY-SIX CENTS (\$13,228 66) on the Nineteenth day of November Nineteen hundred and fifty-four; and
- (b) The sum of EIGHTY-EIGHT THOUSAND TWO HUNDRED AND TWENTY-EIGHT DOLLARS AND SIXTY-SIX CENTS (\$88,228 66) on the Nineteenth day of November Nineteen hundred and fifty-eight.

Subsequently, on the same day as the aforesaid deed was executed, as appears by Exhibit A-5, Rubin Cobrin purchased the 28% interest in lot No. 88 that David Rothenberg had just acquired, and the 22% interest in lot No. 88 that Herbert Ludman had just acquired, for the sum of \$10,484.49 paid in cash. As a result of this transaction, Rubin Cobrin became the apparent sole owner of the said parcel.

The original purchase transaction calls for some explanation. Although it would appear from Exhibit A-4 that Rubin Cobrin was the only member of his family who acquired any interest in the properties under the deed, such was not the case, as appears from the testimony of Simon Cobrin, who testified on behalf of the appellant (pp. 52 and 53). Similarly with respect to the Rothenberg group, the appellant testified that Rubin Cobrin, who had been a client of long-standing with the appellant's accounting firm and in whom the appellant had great confidence, asked him if he would be in a position to make an investment in a shopping centre that would be built in Cote St. Luc and would require considerable financing. Not wishing

to assume a too burdensome committment alone, the appellant approached his two nephews, Sam and Joseph Vasilevsky, who were in the butcher business and with whom he had previously purchased many apartment houses, his accounting partner, David Luterman, and Hyman Rosen, who was a pharmacist. These four persons agreed to participate with him in the undertaking and the appellant, when signing the deed, was therefore acting on behalf of himself and these four others, as appears from the following extract from his testimony, which indicates the interest of the aforesaid parties (p. 21):

Q Will you explain the proportion you had in this venture in relation to Mr Rosen, the Vasilevskys and your partner?

A. The entire percentage for the five of us was twenty-eight percent, in which twenty-eight percent I held forty percent, Sam Vasilevsky twenty percent, Joseph Vasilevsky twenty percent, David Luterman ten percent and Hyman Rosen ten percent . . .

I shall hereinafter sometimes refer to the five above mentioned parties as "the Rothenberg group".

There is no dispute as to the amount of the gains made by the appellant and the other members of his group. The only dispute is whether or not such gains constitute taxable income. Counsel for the parties informed the Court that any judgment rendered in the present case (No. A-388) would be applicable to cases Nos. A-389-90-91 and A-392, in which the appellants are Joseph Vasilevsky, Sam Vasilevsky, David Luterman and Hyman Rosen, respectively.

As already indicated, the appellant testified that he was a chartered accountant by profession and that he was invited, late in 1953, by Rubin Cobrin to join him and his two sons Frank and Simon, who were among the appellant's numerous clients, in acquiring vacant lands in the Town of Cote St. Luc on the Island of Montreal, for the purpose of constructing thereon a shopping centre. According to the appellant, he considered this a favourable opportunity to make a property purchase which would be a safer and sounder investment than acquiring, as had been his custom theretofore, ready-built apartment houses. The appellant testified that he and his two nephews, Joseph and Sam Vasilevsky, had over the years, made joint investments by purchasing revenue-producing properties on a fixed percentage basis (50 per cent being subscribed by the appellant and 25 per cent by each of his nephews) and that, by 1953,

1964  
 }  
 ROTHENBERG  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 ———  
 Kearney J.  
 ———

1964  
 ROTHENBERG  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 ———  
 Kearney J.

the appellant's yearly revenue from such investments exceeded his profits from his accounting business. In the present instance, according to the appellant's evidence, it was estimated that to finance a shopping centre would require \$700,000 to \$800,000 and the appellant therefore decided to include for the first time in the Rothenberg group, in addition to his two nephews, Luterman and Rosen.

The appellant emphasized that this was the first case in which he had ever purchased unimproved lands, the same being true of his two nephews and of his partner Luterman. He said that on all prior occasions his nephews and himself confined their investments to holding apartment buildings and that, at the time of the trial, the appraisal value of such accumulated holdings would amount to perhaps One Million Three Hundred Thousand dollars (\$1,300,000). With the exception of two apartment buildings, one of which he sold at a profit of \$40,650 and the other at a profit of between \$60,000 and \$70,000 (which sums he considered as capital gains and reported as such), he said that he and his associates had retained ownership of all the apartment buildings that they had acquired. He said that he had left the management of the instant undertaking to Rubin Cobrin, who, he knew, was in negotiation with the officials of the Town of Cote St. Luc "in relation to shopping centres, and so on", and that he did not often receive reports of what was going on as he was kept busy with his own practice. He further said that, apart from his financial contribution, the only service he rendered was to interview three or four prospective tenants for the proposed shopping centre and to refer them to Cobrin (see Exhibits A-1, 2 and 3).

Speaking of the difficulties encountered in the working out of the shopping centre plan, the appellant stated that, after a lapse of about a year or two, Cobrin informed him that municipal services were not forthcoming as quickly as he was given to understand by the town officials at the beginning, but that the major blow to the project occurred when the group learned that Steinberg's Ltd. were building a shopping centre south of the site which Cobrin had selected.

The appellant stated that he did not know about the Steinberg project until actual digging operations had commenced. His testimony reads in part (p. 23):

Q. Were you aware at that time that Steinberg's generally were venturing into shopping centres?

A. Yes, we knew they had shopping centres in various parts of the city, but I did not think they would come into Cote St. Luc so quickly. I thought that we would put ours first and that nobody would want to compete.

1964  
 ROTHENBERG  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 ———  
 Kearney J.  
 ———

The appellant stated that he and his associates did not think the area was large enough to support two shopping centres and that they therefore abandoned their idea of building their intended shopping centre.

The appellant described Frank Cobrin and his sons Rubin and Simon as old clients who, he knew, were heavily engaged in various kinds of real estate transactions, as well as having, like himself, extensive apartment building holdings in the province. He said that he had audited their books for many years and that he believed that one or more of them were owners of a corporation engaged in the real estate business known as Frank Cobrin & Sons. He also stated he himself had a nominal interest in that company, consisting of a director's qualifying share, and that he held a similar qualifying share in others of the Cobrin enterprises.

The appellant declared that, at the time he put his money into the proposed shopping centre project, he did not foresee that it might not go ahead and that he had no purpose in mind other than to invest in the proposed shopping centre. He added that, if it had proved successful, he and Cobrin might have built a few apartments as an investment.

In cross-examination, the appellant was unable to identify the precise part of lot 93 on which the intended shopping centre was to be built but he knew that the entire parcel was located north of the C.P.R. tracks, that direct access to the lot from the south was blocked by the C.P.R. tracks (hereinafter referred to as "the tracks"), that the only way to reach the property was by Westminster Avenue, which was about half a mile from lot 93, and that, at the time of purchase, there were no roads or streets north of the tracks. The appellant was not sure how many

1964  
 ROTHENBERG  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 ———  
 Kearney J.  
 ———

stores the group intended to build, but said that it probably would have been 25 or 35. Asked why they bought so much land, he stated that he had been informed by Cobrin that they could not buy less because the vendor would only sell the entire parcel. The appellant said that they never advertised the property for sale nor listed it with an agent and that insofar as securing water and sewage on lot 93 was concerned the town officials had told Cobrin that "in the near future we would be getting services". Asked: "What do you mean by near future", the appellant said: "A year or two, or at the most, three, not a 10-year period".

Rubin Cobrin, who said he was a wholesaler, was called as a witness by the appellant. He described his extensive real estate holdings in the city of Montreal and surrounding area and stated that the Cobrin interests own 240 dwellings or apartments in Quebec city, in the Ste. Foy area. He described how he was approached by a real estate agent who had the property in question for sale and said that he brought in the Rothenberg group to help finance and procure tenants. The property having been purchased in November, 1953, he said that, on October 12, 1954, he had a prospectus prepared for the shopping centre by Fred Lebensold, an architect. He said that he discussed the building of it for at least two years and that he called frequently on the mayor to try to procure services because there was no sewage or other facilities north of the C.P.R. tracks. Cobrin testified that originally he was told that services would be forthcoming perhaps in a year or a year and a half. He said that he would call upon the town authorities every month or two and that, although they were anxious to give services, they "always seem to be stymied in some way".

Cobrin said that he did not know that Steinberg's had intended to build a shopping centre. He said that Steinberg's had first purchased a smaller lot on the main highway, Cote St. Luc Road, which is south of the railway tracks, and had later purchased a larger one further west on the same road (See Ex. R-8). He said that Mr. Charles-Edouard Campeau, whom he consulted, thought that the area shown on the aforesaid exhibit for an intended shopping center on lot 93 was all right, and that he believed



that Mr. Campeau had recommended it. He said that he did not believe that they advertised the property for sale and that he was first approached by Louis Bloom and later by Alcona Investments, and, after negotiating with them, the partnership, by two separate transactions, disposed of lot 93. The reason for so doing was because taxes were high and that, by the way the town officials were then speaking they did not think that services would be forthcoming for several years.

1964  
 ROTHEMBERG  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 ———  
 Kearney J.  
 ———

In addition to the evidence of the appellant and Cobrin, there was some corroborative evidence from non-interested parties. Thus Silvatore Carbone, Manager of the City of St. Laurent Branch of the Provincial Bank of Canada, stated that, in 1954, the appellant asked him if it were possible to secure loans up to \$75,000 for a shopping centre project and that he informed him that it would be forthcoming upon the usual security being furnished. Produced as Exhibit 6 were two drawings, numbered 1 and 3 respectively, of a shopping centre prepared by D. F. Lebensold, architect, for Rubin Cobrin, dated October 1, 1954. Three letters, signed in 1958 by Berke's Pharmacy, Kitty Kelly, Shoe and Handbag Stylists, and Miller Clothing Mfg. Co. Ltd., were filed as Exhibits A-1, A-2 and A-3, stating that, in late 1953 or some time in 1954, the signatories of the letters had held discussion with R. Cobrin in respect of renting space in his proposed shopping centre in Cote St. Luc and that subsequently they were informed by Mr. Cobrin that, due to unforeseen difficulties, he had to abandon its project.

The appellant was able to establish to the satisfaction of the Court that his previous investments had been confined to the purchase of a large number of already-erected apartments in all of which, with two exceptions, he has retained his original interest. It should be noted, however, that it is the first time that he had gone into a real estate transaction with partners other than the Vasilevskys and never before did it occur that he did not hold the largest share in any partnership or syndicate in which he entered. More important still, the appellant testified that he left the direction and management of the undertaking to the Cobrins.

1964  
 ROTHENBERG not act as a group which was solely interested in a shopping  
 v. centre alone.  
 MINISTER OF

NATIONAL  
 REVENUE

Kearney J.

The main artery in the Town of Cote St. Luc district is Cote St. Luc Road and for a considerable distance it constitutes the north-south boundary line between it and the city of Montreal. Exhibit R-8 shows that Steinberg's first purchased a smaller property lying on the north side of Cote St. Luc Road and later, on December 23, 1953, purchased a larger piece of property (lot 95) on the same Road for a proposed shopping centre; and, in 1955, they announced by advertisements that they were about to commence construction thereof.

In answer to the question "why the partnership purchased such large tracts of land when so little was required for a shopping centre", Cobrin stated that the owner would not sell lot 93 unless at the same time the purchaser was willing to buy lot 88. This answer omits to take into account the dimensions of lot 93.

It is somewhat difficult to make even a rough estimate of the size of lot 93, because the deed of sale Exhibit A-4 does not give its dimensions in terms of acres or square feet. The boundaries of lot 93, however, are clearly reproduced on Exhibit R-8, but, unfortunately, the scale of this map is missing; however, by transposing the said boundaries to Exhibit 3 and making use of the scale which this last mentioned map provides, reckoned very roughly, the area of lot 93 would be somewhere between 50 and 60 acres. Exhibit R-8 plainly indicates that the part of lot 93 chosen by the Cobrins for a shopping centre consisted of a lot bounded by three projected streets, located in the sector zoned for commercial purposes, measuring  $200 \times 150'$ , and that lot 93 contains two and a half other lots of equal size located in the said commercial sector, making the equivalent of four lots in all collectively measuring about  $2\frac{3}{4}$  acres out of a total area of some 50 to 60 acres. As also appears by Exhibit R-8, the balance of lot 93 has been set aside and zoned for multi-family dwellings, duplexes, cottages and bungalows.

I might add that Exhibit R-1 indicates that the total purchase price paid for lot 93 was \$176,457.33 and that Frank Cobrin had made an original payment of \$2,000

on account thereof on September 17, 1953 which antedated by three months the purchase made by Steinberg's Ltd. previously referred to. Neither the appellant nor his associates brought forward any evidence that equally advantageous locations for a shopping centre were not available when they purchased lot 93.

1964  
ROTHENBERG  
v.  
MINISTER OF  
NATIONAL  
REVENUE  
Kearney J

In my opinion, knowledgeable men such as the Cobrin and Rothenberg groups, who have had long experience in the real estate field, cannot have acquired lot 93 with the intention of building a shopping centre and retaining it as an investment to the exclusion of all other possible uses of the property regardless of the many obvious possible developments which would make the carrying out of such a plan uneconomic and regardless of the many obvious possible developments which would make some other use of the land of greater financial advantage to them.

There are in addition other circumstances that cannot be overlooked.

The appellant and his associates declared that they were guided, a good deal, by the advice of Charles-Edouard Campeau in selecting a site for a shopping centre; but Campeau stated that when Cobrin first consulted him it was with reference to a contemplated purchase of two or three farms and he desired advice as to which among them would be most suitable for re-sale. Exhibit R-1 indicates that the Cobrins, apart from their interests in lots 93 and 88, had also purchased, as members of an entirely different syndicate, another undeveloped lot (lot 86) located north of the tracks and which they also sold, in whole or in part, as vacant land.

Exhibit R-1 includes statements of real estate transactions entered into by the Cobrins prior to, during and after the transactions described in Exhibits A-4 and A-5, which were prepared by Rothenberg, Luterman & Co., Chartered Accountants, under date of June 25, 1956. These statements disclose that during the period of July 18, 1951 to December 27, 1955, ten purchases of real estate were effected by the Cobrins, seven of which were concerned with vacant lands and three with land and buildings, all having been sold after being held for relatively short

1964  
 ROTHENBERG  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 ———  
 Kearney J.

periods. The average net profits thus realized by the Cobrins amounted to about \$5,000 per transaction.

From the above evidence, I think it is clear that although the Cobrins owned in Montreal and Quebec districts a large number of revenue-producing properties they were, in addition, engaged as traders in real estate. Indeed counsel for the appellant, after making it clear that he was not the legal representative of any of the Cobrin group, conceded that the aforesaid purchases and sales can be regarded as trading transactions and endeavoured to dissociate the appellant from the Cobrin group. He submitted, in effect, that the Court should analyse individually the intention of each of the members of the partnership and determine their liability to tax or otherwise separately. In my opinion, the *mens rea* of a partnership should be determined by ascertaining the intention of the person or persons who in fact controlled its operations and decisions and I have not the slightest doubt that the operations and decisions of the partnership in question were controlled by the Cobrin group.

In respect of the responsibility of a silent partner in a partnership or syndicate, I think the following quotation from a judgment of Noël J. in *Minister of National Revenue v. Lane*<sup>1</sup> is apposite:

It would appear from this that the Syndicate's non-active members were quite content to leave the handling of the Syndicate's activities to the executive committee who had *carte blanche* to handle the business of the Syndicate as they thought best and because of this situation, the passive members here would be in no different position than that of the active members. Indeed, if the transactions are business transactions, any profit derived therefrom from any of the members would be taxable.

If the record did not disclose any contradictory evidence, more reliance could have been placed on the repeated assertions of the appellant and Simon Cobrin that at no time did they have any intention except to build and retain for investment a shopping centre and later, perhaps, if things went well, to build a few apartments for revenue. The record does, however, disclose contradictory evidence.

In my opinion, the most conclusive and uncontradicted piece of evidence of alternative intentions is to be found in a document produced by Mrs. Irene Jean Wilcken, city clerk of the Town of Cote St. Luc, as Exhibit R-6, which reads as follows:

<sup>1</sup> [1964] C.T.C. 81 at 91.

City of Côte Saint-Luc  
Province of Quebec

1964  
ROTHENBERG  
v.  
MINISTER OF  
NATIONAL  
REVENUE  
Kearney J.

EXTRACT FROM THE MINUTES OF AN ADJOURNED  
REGULAR MEETING OF COUNCIL OF THE TOWN OF COTE  
ST. LUC HELD AT THE TOWN HALL, 8100 COTE ST. LUC  
ROAD, ON JANUARY 20th, 1955

MINUTES BOOK No. 9—PAGE 208  
COBRINS LIMITED RE DEVELOPMENT OF CADASTRE 93

Mayor Paris submitted letter of date January 17th from Messrs. F. S. & R. Cobrin making application for the building of 300 houses on Cadastre 93, the proposal being to build split-level bungalows to sell at \$16,000.00 each, the total cost of the project being approximately \$5,000,000.00. They request that services for this development should be provided immediately.

They also refer to a large tract of land, Cadastre 86, which they own and enclose a letter from the Dominion Bank of Canada introducing Mr. Frank Cobrin.

The Secretary-Treasurer was directed to advise the applicants that the Mayor and Aldermen are interested in their proposal to build and will give the matter their careful consideration and that in the meantime the Town's Consulting Engineer has been instructed to prepare estimates of the probable cost of extending the sewer on Guelph Road with a view to providing services in the part of Lot 93 referred to.

Carried Unanimously.

CERTIFIED A TRUE EXTRACT,  
(signature) I. G. WILCKEN  
I. G. Wileken, Mrs.  
City Clerk.

This evidence tends to discredit statements made by the appellant and Cobrin to the effect that they never gave a thought to the possibility of further alternatives to the project of a shopping centre. Simon Cobrin's testimony is not such as to inspire confidence in his candour. For example, as the man in charge of the undertaking, he testified:

- Q. Did you at any time advertize this property for sale?
- A. No, I don't believe we did.
- Q. Did you list it with any agent or broker?
- A. No, I don't believe we did.
- Q. Did you put up a sign that it was for sale or anything of that nature?
- A. To the best of my knowledge, no.

It is worth noting that the same witness stated that he did not "think" that he held any shares in Cobrin Realty Co. Limited but, as appears at page 6 of Schedule A of Exhibit R-1 *supra*—which is an analysis of income of the Cobrin group, prepared by Rothenberg & Luterman, for the years

1964  
 ROTHENBERG  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 Kearney J.

1953, 1954 and 1955—, his withdrawals from Cobrin Realty Co. Ltd. amounted to \$12,540.88. The above observations also apply to Simon Cobrin's declaration that it never occurred to him that lot 93 might be disposed of at a profit without further development. This statement is almost unbelievable when Cobrin's experience in real estate matters is borne in mind and the situation in Cote St. Luc is appreciated. Testifying as to the rapid growth of Cote St. Luc, during this period, Mrs. Wilcken, at page 112 of the transcript, stated:

A. . . . The growth started booming in 1952 with purchasing of land.

Q. You use the expression "booming". So you consider that from 1952 onwards Cote St. Luc has been a booming town?

A. Yes.

Q. Would you say it has attracted investors and people interested in construction and development from 1952 onwards?

A. Yes.

Q. What is the present size of the municipality of Cote St. Luc?

A. A little over 12,000.

Q. So in this period from 1953 to date it has grown 6-fold?

A. Yes.

Q. And those who prognosticated an increase were correct in their prognostication?

A. Yes.

Mr. Campeau, as appears at pp. 18 and 53 of the transcript, stated that "in 1953 there were many promoters and speculators in the area." All this was well known, particularly to the Cobrins.

I consider that the immediately preceding evidence furnishes fertile ground for the assumption that, if other more preferred alternatives did not materialize, the partnership intended to take advantage of the boom which prevailed by selling the property in its unimproved state. By so doing, the appellant was able to make a nice profit of \$18,590.20, representing 135% on his outlay, which, as indicated in Exhibit 1 at trial, amounted to \$13,557.68.

In my opinion, the balance of probability on the foregoing evidence, is that the partnership was aware from the beginning that there were other ways in which the instant property might be disposed of—and the main concern, particularly of the Cobrins, was the sale of the property at a profit. I find it hard to resist the conclusion that the sale

of the property for a profit, and not its retention as an investment, was uppermost in the mind of those in charge of the enterprise, and, in disposing of it as they did, they were carrying out the scheme of profit-making pursuant to which the property was acquired.

1964  
ROTHENBERG  
v.  
MINISTER OF  
NATIONAL  
REVENUE  
Kearney J

For the above reasons the appeal is dismissed with costs.

*Judgment accordingly.*