1965

*May 3, 4
May 25

ROBERT DORSCH (*Plaintiff*) .....APPELLANT;

AND

FREEHOLDERS OIL COMPANY; LIMITED (*Defendant*) .....} RESPONDENT;

AND

SCURRY-RAINBOW OIL (SASK.) LTD. (*Defendant*) .....} RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Assignment of royalty interest under petroleum and natural gas lease and grant of minerals lease—Plea of non est factum—Claim to rescind on ground of innocent misrepresentation.

Companies—Purchase of shares—Failure to deliver prospectus—Waiver of any right to have allotment of shares rescinded—The Companies Act, R.S.S. 1940, c. 113, ss. 116(1) and 129.

In an action against the defendant company F, the plaintiff D sought a declaration that a certain agreement between them, which related to mines and minerals within, upon or under certain land owned by D, should be declared null and void or should be rescinded. Under the contract D assigned to F a 12½ per cent royalty payable to D under a lease to RB. He also granted to F a lease of all mines and minerals within, upon or under the land for a term of 99 years from the date of the contract which would be operative upon the termination, cancellation, avoidance or expiration of the RB lease. In return D was to receive from F 160 shares of its capital stock, of which one-half would be issued and allotted forthwith as consideration for the assignment of royalty, and one-half would be issued and allotted as consideration for the F lease when that lease took effect. It was also provided that F should pay to D 20 per cent of the benefits received by F from its disposition of gross royalty, or of minerals.

*PRESENT: Cartwright, Abbott, Martland, Judson and Hall JJ.

The negotiations with D were conducted, on behalf of F, by one M. They had two short meetings, at the second of which M produced the contract. Although there was every opportunity for D to read the contract he did not do so, nor was it read over to him. Prior to its execution by D an explanation as to some of the contents of the document was given to him by M.

The trial judge, in deciding in favour of D, found that there had been unintentional misrepresentation by M both as to the nature and character of the contract and as to its contents. The misrepresentations as to the contents of the lease were in respect of three matters: (1) that the document signed referred only to petroleum, natural gas and related hydrocarbons, whereas the proposed lease in fact included all mines and minerals; (2) that the plaintiff was assigning only 10 per cent of his royalty rights whereas he was in fact assigning the full (12½ per cent) royalty rights to the defendant; (3) that the lease to be granted was for a term of only 10 years, whereas it was in fact for a term of 99 years. The trial judge also held that the allotment of D's shares by F was void under *The Companies Act*, R.S.S. 1940, c. 113, because of non-compliance by F with s. 129 of that Act. The trial judgment having been reversed on appeal by the Court of Appeal, the plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The Court below was correct in its disagreement with the position taken by the trial judge that a confidential or fiduciary relationship existed between M and D, thus involving not merely a duty not to misrepresent, but a duty of complete disclosure of the contents of the contract. The plea of *non est factum* failed. There was no misrepresentation as to the nature of the document which D was asked to sign. It was admitted that he was aware that he was disposing of his royalty under the RB lease and that he was granting, subject to that lease, a further lease to F.

The claim to rescind on the ground of innocent misrepresentation also failed because, accepting D's own evidence, the three misrepresentations found by the trial judge were not substantiated.

Section 116(1) of *The Companies Act, supra,* required the company *to furnish* every person invited by the prospectus to purchase securities offered by it with a copy when the invitation was issued. Section 129 dealt not with the requirement for delivery of prospectuses to individuals, but with the requirement that upon the *issue* of a form of application or subscription for corporate securities offered to the public a prospectus duly filed under s. 114 or s. 131 be issued with it. The failure of M to furnish a prospectus to D may have been a breach of s. 116(1), but was not a breach of s. 129.

The failure to comply with s. 116(1), at the most, might render a purchase of shares voidable by the purchaser. Even if D had the right to avoid his share purchase, he could not exercise it when he purported to do so because, having entered into the contract on August 3, 1950, and having received his share certificate in the following year, he took no step to repudiate until June 21, 1956, and, in the meantime had been in receipt of communications sent to him as a shareholder by F, and had attended and voted at two annual meetings. This was ample evidence of his election to retain the shares, and of his waiver of any right to have the allotment of shares to him rescinded.

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APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Davis J. Appeal dismissed.

C. R. Davidson, Q.C., for the plaintiff, appellant.

E. J. Moss and *S. J. Cameron*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This case involves a claim made by the appellant (hereinafter referred to as "Dorsch") against the respondent (hereinafter referred to as "Freeholders") seeking a declaration that a certain agreement made between them, dated August 3, 1950, (hereinafter referred to as "the contract"), which related to mines and minerals within, upon or under the South East Quarter of Section 7, Township 7, Range 13, West of the 2nd Meridian, in the Province of Saskatchewan (hereinafter referred to as "the land"), owned by Dorsch, should be declared null and void, or should be rescinded. The learned trial judge granted a declaration that the contract was null and void. This judgment was reversed on appeal by unanimous decision of the Court of Appeal of Saskatchewan[1].

On April 29, 1949, Dorsch entered into a petroleum and natural gas lease with one Bandy Lee in respect of the land. This lease is referred to hereafter as "the Rio Bravo lease". It was for a term of ten years and so long thereafter as the leased substances, or any of them, were produced from the land. Lee assigned his interest under the lease to Rio Bravo Oil Company Limited. The only clause which has particular significance is that dealing with the royalty payable in respect of oil:

> On oil, one-eighth of that produced and saved from the said lands, the same to be delivered at the wells or to the credit of the Lessor into the pipe line to which the wells may be connected; the Lessee may from time to time purchase any royalty oil in its possession, paying the market price therefor prevailing for the field where produced on the date of purchase;

Under the contract Dorsch assigned to Freeholders the royalty payable under the Rio Bravo lease. He also granted to Freeholders a lease of all mines and minerals within, upon or under the land for a term of 99 years from the date of the

[1] (1964), 48 W.W.R. 257, 45 D.L.R. (2d) 44.
[2] (1964), 48 W.W.R. 257, 45 D.L.R. (2d) 44.

contract which would be operative upon the termination, cancellation, avoidance or expiration of the Rio Bravo lease. This lease to Freeholders was renewable by it at its option and was to continue so long as the minerals or any of them were produced from the land. It is hereinafter referred to as "the Freeholders lease".

In consideration for his covenants under the contract Dorsch was to receive from Freeholders 160 shares of its capital stock, with a par value of one dollar each, fully paid and non-assessable, of which one-half would be issued and allotted forthwith as consideration for the assignment of royalty, and one-half would be issued and allotted as consideration for the Freeholders lease when that lease took effect.

The contract also provided, in clause 5, that:

> The GRANTEE shall have the full and absolute right to deal with, or dispose of the gross royalty hereby assigned or any part thereof, and/or the said minerals or any of them, as the case may be, PROVIDED that the GRANTEE shall pay to the GRANTOR twenty percent. (20%) of the benefits received by the GRANTEE from any such disposition whether the same consist of a cash consideration or a royalty interest under a drilling lease, or otherwise.

Dorsch is a farmer who, at the time of the trial, was farming 800 acres of land in Saskatchewan. He had a Grade 9 education. The negotiations with him were conducted, on behalf of Freeholders, by Charles Markle who then, and at the time of the trial, was secretary-treasurer of the Rural Municipality of Weyburn. They had two short meetings at the municipal office. On the occasion of the second meeting Markle produced the contract. Dorsch did not read it, nor was it read over to him. He testified that there was every opportunity for him to read it.

Prior to its execution by Dorsch an explanation as to some of the contents of the document was given to him by Markle. It is contended on behalf of Dorsch that there were misrepresentations made by Markle, but Dorsch conceded in evidence that such misrepresentations as he alleged were not the result of fraud on Markle's part, but were caused by Markle's lack of understanding of the contract. It was contended on behalf of Dorsch that this resulted from the giving of erroneous instructions by Freeholders to Markle.

Both men were found by the learned trial judge to be honest witnesses. In his opinion Dorsch had more reason to remember the events leading up to the execution of the

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contract than Markle, who had handled some eighty like transactions. He found that there was little conflict between them, but did find that there had been unintentional misrepresentation by Markle both as to the nature and character of the contract and as to its contents.

On March 30, 1951, Freeholders filed a caveat against the land to give notice of its interest in the land. On August 17, 1951, Freeholders issued a share certificate in the name of Dorsch for eighty shares in its capital stock, which was received by Dorsch.

Dorsch attended and voted at the annual general meetings of Freeholders on November 27, 1952, and November 20, 1953. An admission to this effect, as well as to his having nominated a director, was filed at the trial. Dorsch was permitted by the learned trial judge to withdraw the admission as to the nomination, after his own evidence had been given, but the other admissions remained. Dorsch did not deny any of the admissions. He was not recalled in rebuttal.

On April 28, 1956, a well was spudded in on the land, which, on completion, was an oil producing well. A second producing well was drilled on the land the following year.

On May 22, 1956, a notice of repudiation of the contract, signed by Dorsch, was sent by his solicitor to Freeholders, along with his share certificate. Freeholders, by letter to Dorsch's solicitor, dated June 21, 1956, returned the certificate and advised that the company had no intention of accepting the repudiation.

Dorsch testified that he had never received a prospectus from Freeholders in respect of the shares in that company, for which, in the contract, he had applied as consideration for the assignment of royalties and for the lease of the land to Freeholders. The contract, which he had executed under seal, contained an acknowledgement of receipt of a prospectus by him. Markle's evidence was that he was instructed to issue a prospectus with the document, *i.e.*, the form of contract. He did so in some instances, as often as he had a supply of them. He could not say whether or not Dorsch received one.

Subsequent to the production of oil being obtained from the land, Dorsch received payments representing one-fifth

of the royalty payable in respect of production by the lessee to the lessor under the terms of the Rio Bravo lease.

Before dealing with the misrepresentations which the learned trial judge found to have been made by Markle to Dorsch, it would be desirable to consider the meaning and effect of clause 5 of the contract, previously quoted.

That clause gave to Freeholders the right to deal with or dispose of the gross royalty assigned to it, and also to deal with or dispose of "the said minerals", which must refer back to the Freeholders lease, which would only take effect after the Rio Bravo lease terminated.

In so far as the gross royalty under the Rio Bravo lease is concerned, it has already been noted that, as to oil, the royalty was due in kind, but with an option to the lessee to purchase the lessor's share of the oil produced. The sale of that oil to the lessee was a disposition of gross royalty by Freeholders.

Clause 5 of the contract provides that Freeholders should pay to Dorsch 20 per cent of the benefits received by Freeholders from its disposition of gross royalty, or of minerals. In my opinion Freeholders was obligated to pay Dorsch 20 per cent of the gross royalties received by it, and that obligation it recognized and performed. Furthermore, if Freeholders' lease came into operation, whether it undertook drilling and production itself, or assigned its rights to another, it would be compelled to account to Dorsch for 20 per cent of the benefits which it received from the disposition of the minerals from the land, whether those benefits took the form of net proceeds from the sale of production from its own wells, a stipulated royalty reserved on the assignment of its rights, or a cash consideration for such assignment.

The learned trial judge found that there had been misrepresentation by Markle to Dorsch in respect of the contents of the lease in respect of three matters, which are summarized by Hall J. A., who delivered the judgment of the Court of Appeal, as follows:

> (1) that the document signed referred only to petroleum, natural gas and related hydrocarbons, whereas the proposed lease in fact included all mines and minerals;

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(2) that the respondent was assigning only ten percent of his royalty rights whereas he was in fact assigning the full [12½ per cent] royalty rights to the appellant;

(3) that the lease to be granted was for a term of only ten years, whereas it was in fact for a term of ninety-nine years.

In view of the opinion I have formed as to the meaning of clause 5 of the contract, there can be no basis for finding that there was misrepresentation in respect of the second item. It is true that under the contract Dorsch assigned to Freeholders his 12½ per cent royalty under the Rio Bravo lease, but Freeholders had to account to him for one-fifth of that. In the net result Freeholders only received for its own use a 10 per cent gross royalty.

With respect to the first item mentioned it is clear that there was no active representation by Markle in relation to the Freeholders lease as covering only petroleum, natural gas and related hydrocarbons. Dorsch himself, on examination for discovery, said:

Q. You say that you understood that the lease which would arise after the expiration of the Rio Bravo lease would be a lease of oil and gas only and not of all minerals? A. Yes.

Q. Did Mr. Markle tell you that? A. He didn't tell me anything in that respect.

Q. You just assumed that? A. I assumed it because that is what we were talking about, we were talking about oil.

The case for Dorsch, on this point, was based solely upon non-disclosure.

The same applies to item 3. There was no representation by Markle as to the term of the lease to Freeholders. Dorsch assumed that it would be for ten years. In answer to a question by the learned trial judge, referring to the discussions between Markle and himself, Dorsch said:

No, he didn't say anything about the—I took it for granted it was a ten year lease because I never heard of a 99 year lease.

The position taken by the learned trial judge was that a confidential or fiduciary relationship existed between Markle and Dorsch, thus involving not merely a duty not to misrepresent, but a duty of complete disclosure of the contents of the contract. With respect to this, I agree with what is said by Hall J.A. in the Court below:

The respondent had gone as far as Grade Nine in school and was able to read. He said that he did not read the document before signing it, although he had every opportunity to do so. He glanced at it but did not read it because he did not think he would be capable of understanding it. He says that he relied on Markle to explain to him what was in the

document. The learned trial judge found that Markle undertook to explain the document to the respondent. It would appear from the respondent's evidence, however, that it was only the general outline of the scheme or proposal rather than the details of the document which Markle undertook to explain. The document was not produced until the second discussion and then only after the respondent had consented to sign. It was then presented to the respondent who did not ask for it to be read over to him. At no time was it suggested that the respondent informed Markle that he did not think he would understand the document, or that he was not going to read it, or that he relied upon Markle to explain it to him. There is nothing to indicate that Markle was ever aware that the respondent did not read the document or did not understand. There was no conduct on the part of Markle which would prevent or discourage the respondent from reading it. I therefore cannot agree with the trial judge when he holds that Markle placed himself in a position of trust or that a confidential or fiduciary relationship existed between Markle and the respondent.

In view of the foregoing, it is clear that the plea of *non est factum* must fail. There was clearly no misrepresentation as to the nature of the document which Dorsch was asked to sign. It is admitted that he was aware that he was disposing of his royalty under the Rio Bravo lease and that he was granting, subject to that lease, a further lease to Freeholders.

The claim to rescind on the ground of innocent misrepresentation must also fail because, in my opinion, accepting Dorsch's own evidence, the three misrepresentations found by the learned trial judge are not substantiated.

The other ground upon which the learned trial judge decided in favour of Dorsch was that the allotment of his shares by Freeholders was void under *The Companies Act*, R.S.S. 1940, c. 113 (the statute applicable at the relevant time), because of non-compliance by Freeholders with s. 129 of that Act.

The relevant provisions of that statute are as follows:

3.—(1) In this Act, unless the context otherwise requires, the expression:

15. "Prospectus" means any prospectus, notice, circular, advertisement or other document inviting the public to subscribe for or purchase, or offering to the public for subscription or purchase, any shares or debentures of a company or an intended company;

* * *

116.—(1) The company shall furnish every person who is invited to subscribe for any shares or debentures offered by the prospectus with a copy of the prospectus at the time when the invitation is made.

* * *

125. An allotment made by a company:

(a) to an applicant or allottee in contravention of the provisions of

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section 34 or 35 shall be voidable at the instance of the applicant within two months after the holding of the statutory meeting of the company and not later;

(b) in contravention of section 122 or 124 shall be void;

(c) upon an application in contravention of section 129 shall be void;

and every such allotment as is mentioned in clauses (a) and (c) shall be voidable or void, as the case may be, notwithstanding that the company is in course of being wound up.

* * *

129.—(1) It shall not be lawful to *issue* any *form* of application or subscription for shares in or debentures of a company offered to the public unless the *form* is issued with a prospectus filed under section 114 or 131:

Provided that this section shall not apply if it is shown that the form of application was issued either:

(a) in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or

(b) in relation to the shares in or debentures of a company where there is no offer to the public; or

(c) to existing members or debenture holders of a company, whether an applicant for shares or debentures had or had not the right to renounce in favour of other persons.

(2) Every person who acts in contravention of this section shall, without prejudice to any other liability, be guilty of an offence.

(The italics in subs. (1) are my own.)

Both the Courts below held that there had been a breach of s. 129. The Court of Appeal held, however, that, notwithstanding this, subsequent to the allotment, on the basis of Dorsch's subsequent conduct, a new independent contract to accept the shares could be presumed.

The sections which I have quoted (other than s. 3) appear in that portion of the Act which is entitled "Prospectuses". Section 114, the first of the sections under that heading, requires that every prospectus shall be dated and such date, in the absence of proof to the contrary, shall be taken as the date of *issue* of the prospectus. A signed copy is required to be filed with the registrar.

Section 115 contains the requirements as to what is to be stated in a prospectus.

Section 116(1), quoted above, requires the company *to furnish* every person invited by the prospectus to purchase securities offered by it with a copy when the invitation is made.

Section 116 was introduced into *The Companies Act* as a new provision, in 1933, and s. 129 was similarly introduced at the same time (1933 (Sask.), c. 21). Obviously, they were

not intended to cover identical ground. The difference in their wording, in my opinion, indicates the difference of application of each of them.

Section 116(1) requires that each person invited to subscribe for corporate securities offered by a prospectus should receive a copy of it.

Section 129 is dealing, not with the requirement for delivery of prospectuses to individuals, but with the requirement that upon the *issue* of a form of application or subscription for corporate securities offered to the public a prospectus duly filed under s. 114 or s. 131 be *issued* with it. The situation which this section contemplates is, on an offer to the public of corporate securities, the publication and putting into circulation by the company, or by an underwriter, of application or subscription forms. If this is done, then the required form of prospectus, duly filed, must also be published and put into circulation with it. Otherwise, under s. 125(c), an allotment made pursuant to such an application would be void.

In my opinion, what is declared to be unlawful in this section is the issue by or on behalf of a company of any application or subscription form for its shares, unless there is issued at the same time a prospectus filed in conformity with the provision of the Act. Section 116 then applies so as to require that a copy of such prospectus be furnished to each individual who is invited to subscribe for such securities.

In the present case Freeholders complied with s. 129, as it did file and issue the required form of prospectus. Copies were supplied to Markle, who was instructed by Freeholders to give a copy to each person who agreed to take Freeholders' shares, as is shown by the receipt embodied in the contract. His failure to furnish one to Dorsch may have been a breach of s. 116(1), but was not a breach of s. 129.

What is the consequence of a failure to comply with s. 116(1)? Section 125, which deals with the effect of the contravention of certain sections of the Act in rendering an allotment of shares void or voidable, makes no reference to s. 116. In my opinion, at the most, it might render a purchase of shares voidable by the purchaser. Even if Dorsch had the right to avoid his share purchase, he could not exercise it when he purported to do so because, having

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entered into the contract on August 3, 1950, and having received his share certificate in the following year, he took no step to repudiate until June 21, 1956, and, in the meantime, had been in receipt of communications sent to him as a shareholder by Freeholders, and had attended and voted at two annual meetings. This, in my opinion, is ample evidence of his election to retain the shares, and of his waiver of any right to have the allotment of shares to him rescinded.

In view of my conclusion as to the meaning of s. 129 of *The Companies Act*, it is unnecessary for me to express an opinion with respect to the respondent's submission that, for the reasons set forth in the judgment of Wynn-Parry J., in *Government Stock and Other Securities Investment Co. Ltd. v. Christopher*[1], s. 129 is inapplicable in relation to an issue of shares to be allotted for a consideration other than money, and to the members of a restricted class, *i.e.*, owners of mineral rights, and not to the public at large.

For the foregoing reasons, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Davidson, Davidson & Neill, Regina.

Solicitors for the defendant, respondent: Moss & Wimmer, Regina.

[1] [1956] 1 All E.R. 490.