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Conwest Exploration Company Limited et al. v. Letain, [1964] S.C.R. 20.

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COMPANY LAW — DATE OF INCORPORATION — WHETHER DATE ON LETTERS PATENT GOVERNS FULFILLMENT OF CONTRACTUAL OBLIGATION TO INCORPORATE BY A CERTAIN DATE.

In the present case the Supreme Court of Canada was asked to decide whether, in the circumstances, the incorporation of a company, with letters patent dated September 25, 1958 but which were actually sealed and issued on October 20, 1958, constituted performance of a condition in a Claims Option agreement requiring Conwest to cause such company to be incorporated on or before October 1, 1958. On a previous appeal based on the pleadings[1] the Supreme Court had held that s. 133 of the Companies Act made it clear that in cases involving the status and powers of a company, its date of incorporation was conclusively established by the date of its letters patent (*i.e.* September 25, 1958). But the Court took pains to explain that it had not decided whether such letters patent satisfied the conditions set out in any contract. In the present appeal the Court was faced with exactly this question of construction and, on a 3 to 2 division, the majority concluded that the contract had been performed.

The facts were that Letain had, in 1955, agreed to transfer certain mining claims to Conwest on condition that Conwest cause a new company to be incorporated by October 1, 1958 to hold the claims. Letain was to receive 50,000 shares of the new company. Letain then transferred his claims to Conwest to be held subject to the terms of the Claims Option contract. In 1957 Letain signed a Share Option contract transferring 13,000 of his prospective shares to Conwest in satisfaction of a debt and optioning all the rest to Conwest in different sized blocks exercisable on four successive anniversaries of the signing of this second contract. Conwest exercised its first option to buy 5,000 of Letain's prospective shares on February 15, 1958. In the summer of 1958, Conwest asked Letain for a three year extension of time for the incorporation of the new company but this request was refused. Therefore, Conwest applied for the incorporation of what became Kutcho Creek Asbestos Co. Ltd., and paid the necessary incorporation fees on September 18, 1958. The Director of the Companies Division notified Conwest that the letters patent would be dated September 25, 1958. On September 26, Conwest decided to ask Letain to allow his name to form part of the name of the company and he executed the necessary consent. It was apparently accepted as a fact that, but for the last minute decision to change the name, letters patent would have issued on or before October 1, 1958.

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1 *Sub nom. Letain v. Conwest Exploration Co. Ltd.,* [1961] S.C.R. 98.

Relying on s. 133 of the Companies Act, organizational meetings of the new company were held on September 29. Upon the request of the Companies Division, Letain executed a declaration of substantial interest in the company on October 7, 1958. Then, on October 9, he withdrew consent to the use of his name, alleging that his contracts with Conwest had become null and void. Conwest proceeded to establish Kutcho Creek, whose letters patent were finally issued on October 20, 1958, dated September 25, 1958. Shares were tendered to Letain as were payments in exercise of Conwest's rights under the Share Option contract. All tenders were refused. Letain now sues to recover his mining claims, alleging Conwest's failure to perform the incorporation condition in the Claims Option contract. Conwest replied by suing for specific performance of the Share Option contract. Conwest succeeded at trial but the decision was reversed by the British Columbia Court of Appeal.[2]

In deciding to restore the trial judgment, the members of the Supreme Court have demonstrated a startling facility for varying the interpretation of facts in order to support their equally varying conclusions. Indeed, whatever disparity exists between the judges centres almost entirely on issues of fact and does not turn upon any disagreement as to the content of the law. In some respects, it is surprising to find the facts to be the major matter of contention in so high a tribunal but perhaps this can best be explained as an example of Corbin's comment that a court often

> states hard-bitten traditional rules and doctrines and then attains an instinctively felt justice by an avoidance of them that is only half-conscious, accompanied by an extended exegesis worthy of a medieval theologian.[3]

It may be added that complexity is increased when the judges' instincts do not all lead in the same direction.

The judgment of Taschereau C.J. and Judson J. is indicative of the multiplicity of reasons used to attain the present result. For convenience, it shall form a framework for comparing the alternative grounds advanced by the other judges.

CONSTRUCTION OF THE CONTRACT

Clause 7 of the Claims Option specified that Conwest could only exercise the option fully by

> causing to be incorporated on or before the 1st day of October 1958, under the Companies Act of Canada, . . . a mining company. . . .[4]

In construing this clause, Judson J. held that the interpretation advanced on behalf of Letain, namely that letters patent must have actually issued by October 1st, was "unduly narrow".[5] He noted that by

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2 Unreported.
3 Corbin on Contracts (1960) Vol. 3, p. 279.
4 *Conwest Exploration Co. Ltd. v. Letain,* [1964] S.C.R. 12.
5 *Id.,* at 26.

September 25th Conwest had applied for the incorporation of Kutcho Creek, had paid the incorporation fees and had received the assurance of the Director of the Companies Division that letters patent would issue bearing that date. He then concluded:

> Nothing more remained for Conwest to do. The rest was departmental routine and in my opinion on this basis alone Conwest had, within the meaning of clause 7 of the Claims Option agreement, performed its contract precisely and exactly. The contract left it open to Conwest to adopt this mode of performance and what the parties meant by performance of this contract is a question of construction for the Court.[6]

However, such a flexible interpretation of the contract did not find favour with the dissenting judges, particularly Ritchie J. who adopted a very strict construction. He described the incorporation clause in the language of Kindersley V.C. in *Lord Ranelagh v. Melton:*

> . . . as a condition on the performance of which the party who claims the benefit of the performance is entitled to certain privileges but in order to entitle him to them he must perform the condition strictly; and if the time fixed for the performance of the condition passes over by one single day that prevents his having the right.[7]

It is difficult to explain two such different approaches except by reference to notions of instinctive justice. Judson J. commented adversely on Letain's attempt to escape from a contract whereby he received what he came to consider to be "two-bit shares".[8] The majority, in effect, seem to have been motivated by a desire not to allow Letain to avoid a legitimate bargain on technical grounds. The minority, on the other hand, place little emphasis on these facts but rather find whatever iniquity is present to be that of Conwest. The company is cited as the cause of the delay in the incorporation which was only commenced after Letain flatly refused an extension of time for its accomplishment. Conwest seemed to prefer to sleep on its rights. Letain insisted on strict compliance and the minority was prepared to reinforce that insistence with a narrow interpretation of what constituted performance. There is thus a division of emphasis on the facts, the impact of which is felt not only in this, but in the two succeeding grounds for the decision.

Letain's Lack of Interest

Judson J. next proceeded to strengthen his initial conclusion that the contract had been performed by reference to a line of reasoning which the minority completely ignored. He held that the Share Option agreement had so fettered Letain's title to shares in the proposed company that he:

> . . . had no interest in the incorporation of the company until Conwest failed . . . to take up any of the instalments of shares under option.[9]

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6 *Id.*, at 26-7.
7 (1864) 34 L.J. Ch. 227 at 229.
8 *Supra* footnote 4 at 28.
9 *Id.*, at 25.

His Lordship even went so far as to hold that the Share Option removed the need for Conwest to show any incorporation of a company until it was thus in default.[10] The latter view does not seem to be beyond question since a contract to transfer shares in a non-existent company would appear to be a nullity and certainly this second contract did not on its face purport to waive or modify the initial Claims Option agreement. If that was its effect it seems oddly paradoxical since the non-performance of the Claims Option would frustrate the Share Option contract which, in turn, if His Lordship is correct, would excuse the original non-performance. It seems more than passing strange to interpret a contract in a manner which would justify its own frustration. Surely such a curious result could not have been intended. If anything, this line of reasoning demonstrates again the extent of the majority's sympathy for Conwest.

EQUITABLE ESTOPPEL

It remains to consider what is perhaps the most important aspect of the judgment: estoppel. In all, four judges commented on this aspect of the case and, while their treatment was short and subsidiary to the main reasons above, the result is a concise compendium of the relevant law. Once again there is no disagreement on the content of that law. Indeed, Cartwright J., who was with the majority, took great pains to explain that he differed from Martland J., who joined Ritchie J. in dissenting, only in his understanding of the facts at issue.[11] Nor is this the limit of the disagreement on the facts, for within the majority there seems to be two views as to the factual grounds for the estoppel.

The defence itself is historically founded upon the case of *Hughes v. Metropolitan Railway Co.*[12] and may best be explained by reference to the passage quoted by Judson J.:

> It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms, . . . afterwards . . . enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties.[13]

In short, the plaintiff is estopped from denying that he misled the defendant into believing that strict compliance with the terms of the contract would not be required.

Although this approach was cited by Judson J., he did not apply it exactly. Rather than misleading Conwest as to the necessity of strict performance, he felt that Letain, by his conduct, had indicated that he regarded Conwest's procedure for incorporation as proper compliance.

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10 *Id.*, at 27.
11 *Id.*, at 29.
12 (1877) 2 App. Cas. 439 at 448.
13 *Supra*, footnote 4 at 28.

Letain's representation was not that performance need not be exact but that:

> . . . he was satisfied with what was being done as performance of the contract and he knew that Conwest would act and was acting upon his representation. But for this representation, Conwest could have given him the kind of performance to which he now says he is entitled.[14]

Thus His Lordship bases estoppel on a representation by Letain as to his construction of the contract and, since the contract left this mode of performance open to Conwest, Letain could not be heard to object to such an interpretation.

Only Cartwright J. found the facts to be suitable for the orthodox use of the *Hughes* principle. He held that:

> It is my opinion that by the dealings between the parties . . . Letain led Conwest to suppose that he would not exercise his right to insist on performance of the condition by the date mentioned.[15]

That is, there was a representation that strict performance would not be required. This view hardly seems consistent with His Lordship's concurrence with the opinion of Judson J. that the contract had been fully performed. If this was true, his Lordship's view of the grounds for estoppel are irrelevant. For there can be no estoppel without detrimental reliance by Conwest and there was no detriment if the contract was fully performed. This same criticism cannot be levelled at Judson J., since in his hands estoppel became an instrument in the construction of the contract and therefore was relevant to the primary consideration of whether full performance had been given.

Ritchie J. shared the view of Cartwright J. that the estoppel was based upon an alleged waiver of strict compliance with the terms of the contract but he felt that the facts did not warrant the conclusion that any waiver had occurred. He rejected the impact which the majority ascribed to Letain's agreement of September 26th to allow the use of his name by the proposed company. Rather he held that:

> Whatever their motives may have been, it was the Appellants who approached Letain in the last days of September, 1958 to obtain his consent to the use of his name and although this may have been a friendly gesture which Letain appreciated at the time, his consent given on September 26th cannot, in my opinion, be regarded as a waiver of the terms of the option.[16]

He then went on to hold that the declaration of substantial interest executed on October 7th could not assist the company's estoppel argument because the Claims Option had already lapsed when the incorporation failed to be completed on October 1st, and the declaration:

> . . . could not serve to reinstate the lapsed option as the law is well settled that once it has expired an option cannot be revived without a new agreement for valuable consideration.[17]

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[14] *Id.*, at 27.
[15] *Id.*, at 29-30.
[16] *Id.*, at 36.
[17] *Id.*, at 36.

He then added that, on his view of the facts, Conwest knew that the deadline had to be met and that the company was not misled because, in fact, it thought it had given due performance. On the latter point his Lordship, in effect, subscribed to the criticism above of the estoppel reasoning of Cartwright J. However, it is submitted that his Lordship has failed to deal decisively with the reasoning of Judson J. that the estoppel worked to prevent the withdrawal of Letain's representation as to the construction of the contract.

One further line of estoppel reasoning remains: that of Martland J.. Once again it is the view of the facts which leads to the difference. His Lordship thought that an estoppel was claimed because Conwest was induced by Letain's conduct:

> . . . to believe that he had agreed to extend the time for acceptance and that [Conwest] acted upon that representation.[18]

Such an argument he rightly rejected as untenable. He pointed out that:

> . . . such an extension would involve making a new contract and for such a contract there was no consideration.[19]

In support of this conclusion he cited the English case of *Combe v. Combe*[20] which modified the earlier case of *Central London Property Trust Ltd. v. High Trees House Ltd.*[21] by making it clear that estoppel could be used only as a shield and not as a sword and certainly constituted no substitute for common law consideration. In overruling a trial judge who had held to the contrary, Denning L. J. declared that:

> The principle stated in the *High Trees* case does not create new causes of action where none existed before . . . it can never do away with the necessity of consideration when that is an essential part of the cause of action.

Such a conclusion in law is now well established and Cartwright J. was careful to declare that he would agree with Martland's view if he could view the facts as did the latter judge. But in fact no other judge suggested that there had been any agreement to extend the time limit. Certainly there was no deliberate consensus to that end.

On balance, it may be wondered whether the manner in which the present five judges reached different views of the facts and hence different legal results, does not constitute a threat to the developing rule expressed in *Combe v. Combe* against using equitable estoppel as a sword. For, if the rule can be eluded by varying the facts, however subconsciously, there seems to be no limit to the new legal horizons to which estoppel may lead. It may in the end become a rule honoured in the breach.

In conclusion it may be said of the judge's disparity on all three grounds for the decision that the case shows one thing that is fre-

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18 *Id.*, at 30.
19 *Id.*, at 31.
20 [1951] 2 K.B. 215.
21 [1947] K.B. 130.

quently overlooked or even denied by orthodox jurisprudence. The facts are the variables upon which success and failure depend. Judges will say that facts are not open to dispute on appeal, but when regard is had to the judicial ingenuity in ascribing different legal effects to rigid facts, this immutable principle serves as no fetter on their continuing search for instinctive justice.