
DOMINION ROYALTY CORPORA-
 TION LTD. (INCORPORATED 1930)
 AND DOMINION ROYALTY COR-
 PORATION LTD. (INCORPORATED
 1934) (PLAINTIFFS)

APPELLANTS;

1935
 * June 18,
 19, 20.
 * Oct. 1.

AND

W. C. GOFFATT (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
*Contract—Rescission—Inability to make restitutio in integrum—Whether
 relief not based on rescission could be granted in the action—Form
 of action and conduct of case.*

The judgment of the Court of Appeal for Ontario, [1935] O.R. 169, held
 that, while the facts in connection with the transaction in question

* PRESENT:—Duff C.J. and Lamont, Cannon and Crocket JJ. and
 Dysart J. *ad hoc.*

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gave plaintiff a good cause of action for rescission, yet as, through what had since taken place, the circumstances had changed and become such that plaintiff could not make *restitutio in integrum*, its right of action for rescission had gone, and as it had not framed or pursued the action for any relief except relief on the basis of rescission, its action must be dismissed. Plaintiff appealed to this Court.

Held: The appeal must be dismissed. By reason of said change in circumstances, the objections to granting relief by way of rescission were insurmountable; and a claim for relief by way of damages (as to damages no evidence had been given), or otherwise except on the basis of the setting aside of the impeached transaction, not having been presented either at the trial or in the Court of Appeal, could not properly be entertained by this Court; defendant should not be called upon in this Court to meet an entirely new case unless, at all events, it rested exclusively upon propositions of law, and unless, moreover, it appeared that he could not be prejudiced by its not having been advanced at an earlier stage.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1), which (reversing the judgment of Hope J.) dismissed the plaintiffs' action.

The action was brought to recover from the defendant certain moneys paid by the plaintiff Dominion Royalty Corporation Ltd. (incorporated 1930) (hereinafter called the plaintiff company) as the purchase price of a certain interest in a gas and oil lease covering lands in the State of Oklahoma, U.S.A.

The Court of Appeal, while holding that the defendant was the real vendor to the plaintiff company of said interest; that the defendant stood in such a fiduciary relationship to the plaintiff company as required him to make full and complete disclosure of the material circumstances in connection with the transaction in question; that he failed to make that full and complete disclosure; and that on these facts, taken by themselves, the plaintiff company had had a good cause of action for rescission, yet held that, as, through what had since taken place, the circumstances had changed and had become such that the plaintiff company could not make *restitutio in integrum*, its right of action for rescission had gone, and that, as it had not framed or pursued the action for any relief except relief on the basis of rescission, the action must be dismissed.

The material facts and circumstances of the case are dealt with at length in the reasons for the judgment appealed from (1).

By the judgment now reported the appeal to this Court was dismissed with costs.

R. S. Robertson K.C. for the appellants.

J. S. Denison K.C. and *F. T. Watson* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—I agree with the unanimous view of the Court of Appeal for Ontario that, by reason of the change in circumstances, the objections to granting relief by way of rescission are insurmountable; no purpose would be served in merely repeating the reasons given in the judgments of Mr. Justice Masten and Mr. Justice Davis. On this account, the appeal should be dismissed.

No claim for relief by way of damages or equitable compensation, or to recover the moneys paid to Goffatt as moneys had and received to the use of the appellants, as distinguished from the claim for the restoration of those moneys (with interest), as consequential upon the setting aside of the impeached transaction, was presented either at the trial or in the Court of Appeal. No evidence as to damages was given. The sole title to relief advanced by the appellants was that the transaction with Goffatt was voidable and that Goffatt was bound at their demand to make *restitutio in integrum*.

In these circumstances, no claim for damages, or for equitable compensation, could properly be entertained by this Court. Similar considerations apply to the contention put forward that the appellants are entitled to recover the moneys paid to Goffatt as moneys had and received to their use; but, indeed, it seems too clear for argument that effect could only be given to such a claim if the impeached transaction were set aside. The appellants are bound by the way in which they conducted their case at the trial and in the Court of Appeal, and it would be contrary to well-settled principles to call upon the respondent in this Court to meet an entirely new case unless, at all events, that case

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rested exclusively upon propositions of law, and unless, moreover, it appeared that the respondent could not be prejudiced by the fact that it was not advanced at an earlier stage.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitors for the respondent: *Slaght & Cowan.*
