1963

*Feb. 13, 14, 15
Nov. 6

CONWEST EXPLORATION COMPANY LIMITED, CASSIAR ASBESTOS CORPORATION LIMITED, KUTCHO CREEK ASBESTOS COMPANY LIMITED (*Defendants*) .... APPELLANTS;

AND

FELIX LETAIN (*Plaintiff*) ..... RESPONDENT.

AND

CASSIAR ASBESTOS CORPORATION LIMITED, AND KUTCHO CREEK ASBESTOS COMPANY LIMITED (*Defendants*) ..... APPELLANTS;

AND

FELIX LETAIN (*Plaintiff*) ..... RESPONDENT.

CONWEST EXPLORATION COMPANY LIMITED AND CASSIAR ASBESTOS CORPORATION LIMITED (*Plaintiffs*) ..... APPELLANTS;

AND

FELIX LETAIN (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Option agreement—Obligation on part of optionee to cause company to be incorporated by fixed date to hold claims under option—Letters patent sealed and issued after fixed date but bearing earlier date—Whether terms of option complied with—Whether defence of equitable estoppel available to optionee.

Under an option agreement, dated July 26, 1955, the obligations of the optionee, the appellant company Conwest, were (a) to cause to be incorporated a company on or before October 1, 1958, to hold certain mining claims owned by the optionor, the respondent L, and (b) to allot and issue to L not less than 50,000 shares of this company. On September 14, 1955, L executed a transfer of the optioned claims to Conwest to be held subject to the terms of the agreement. L then

*PRESENT: Taschereau, Cartwright, Martland, Judson and Ritchie JJ.

borrowed money from Conwest, and, in satisfaction, under a written loan agreement, Conwest agreed to take 13,000 of L's 50,000 shares in the proposed company. The remaining 37,000 shares were optioned to Conwest in four blocks to be taken up on February 15, in the years 1958, 1959, 1960 and 1961. The first block, consisting of 5,000 shares, was taken up on the specified date.

Conwest filed an application on September 18, 1958, for the incorporation of the company under the *Dominion Companies Act*, and was notified by the Director of Companies that letters patent were being prepared and would bear date September 25, 1958. Conwest then decided to invite L to have his name appear in the proposed company; on September 26, 1958, L agreed to this use of his name. The Director wrote to inquire about the nature of L's interest in the company, and in a declaration signed on October 7, L stated that he would have a substantial interest therein. Two days later L sent a telegram to the Director withdrawing his consent to the use of his name and stating that in his opinion his contract with Conwest was null and void.

The letters patent, bearing date September 25, 1958, were actually sealed and issued on October 20, 1958. The company subsequently issued 32,000 shares to L. Tenders were made for the several blocks of shares, as provided for by the loan agreement, but these tenders were refused.

L sought return of the claims held under option and the transfer of other contiguous claims staked by Conwest on the ground that the latter, not having performed the conditions precedent to the exercise of the option, had lost all its rights. According to the incorporating authority, the company came into being on September 25, 1958. Conwest claimed that this constituted performance of its contract. L maintained that he was entitled to have a company whose letters patent were actually sealed and issued on or before October 1, 1958. Three actions were tried together and the first two, brought by L, were dismissed. In the third action, Conwest was given specific performance of the share option agreement. An appeal from the judgment of the trial judge was allowed by the Court of Appeal, which held that Conwest had failed to comply with the terms of the option.

Held (Martland and Ritchie JJ. dissenting): The appeals should be allowed and the judgment at trial restored.

Per Taschereau C.J. and Cartwright and Judson JJ.: The share option agreement had effected an important modification of the claims option agreement of July 1955. On October 1, 1958, L was no longer in a position to demand a freely-transferable certificate for the shares to which he was entitled under the option. The result of the two agreements was that L had no interest in the incorporation of the company until Conwest failed on February 15, 1959, 1960 and 1961, to take up any of the instalments of shares under option.

Moreover, under the claims option agreement Conwest could choose to incorporate the company under the *Companies Act* of Canada, and rely on s. 133 to show to L that the incorporating authority had conferred a status upon this company from September 25, 1958. The application for incorporation had been completed by that date, the incorporating fees had been paid and the letter sent by the Director of Companies. Nothing more remained for Conwest to do. The rest was departmental routine, and on this basis alone Conwest had performed its contract precisely and exactly.

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Also, L, by his intervention in the incorporation of the company before October 1, 1958, and continuing after that date, provided Conwest with an equitable defence against a claim for the re-transfer of the claims under option and the transfer of the claims staked by Conwest. *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439; *Pierce v. Empey*, [1939] S.C.R. 247, referred to.

Per Cartwright J.: L was not simply resisting an attempt to enforce the option; he was seeking to compel the conveyance to himself not only of the claims which he caused to be transferred to Conwest but also of a number of other claims which were never his. While the appellant was entitled to succeed without the necessity of relying on the defence of equitable estoppel, that defence was available in the circumstances of this case.

Per Martland J., *dissenting:* Conwest was not seeking to raise equitable estoppel as a defence to the strict enforcement by L of his contractual rights. L did not need to take any steps to terminate the option agreement, for it terminated automatically upon expiration of the option period. Conwest was really seeking to use equitable estoppel as a means of establishing that there was an extension of the option period. But such an extension would involve the making of a new contract and for such a contract there was no consideration. Equitable estoppel had no application to this type of case. *Combe v. Combe*, [1951] 2 K.B. 215, referred to.

Per Martland and Ritchie JJ., *dissenting:* Even if it were to be accepted that the phrase "causing to be incorporated" as employed in the claims option was equivalent to "taking all reasonable steps to bring about incorporation", the actions of the appellants still fell short of compliance with that condition. No steps were taken to this end for a period of three years after the date of the agreement. When application for incorporation was made on September 18th, it proved to be too late for the charter to be granted "on or before October 1st, 1958", and the fact that it was made effective, when granted, as of an earlier date could not alter the position which existed on October 2nd, at which time no company had been incorporated and the claims option had lapsed.

If any delay in incorporation was caused by the suggestion that L's name be used, it was caused by the appellants. His consent given on September 26th, could not be regarded as a waiver of the terms of the option. Even if L's "declaration of substantial interest" which was not given until October 7th was to be treated as an acceptance by him of the fact that the company had not been incorporated and an acquiescence in delay, this could not serve to reinstate the lapsed option. The law is well settled that once it has expired an option cannot be revived without a new agreement for valuable consideration. *Dibbins v. Dibbins*, [1896] 2 Ch. 348, referred to.

The contention that the share option agreement was consistent only with L having waived strict compliance with the claims option was also rejected. The share option was concerned with shares in a company to be incorporated on or before October 1, 1958, and Conwest's failure to cause such a company to be incorporated within the stipulated time effectively prevented the shares from coming into existence.

APPEAL from a judgment of the Court of Appeal for British Columbia, allowing an appeal from a judgment of

Wootton J. Appeal allowed, Martland and Ritchie JJ. dissenting.

D. McK. Brown, Q.C., W. S. Walton, Q.C., and *F. U. Collier,* for the appellants.

Hon. J. W. de B. Farris, Q.C., C. F. Murphy, and *P. E. Hogan,* for the respondent.

The judgment of Taschereau C.J. and Judson J. was delivered by

JUDSON J.:—The result of the judgment of the Court of Appeal is that the appellant, Conwest Exploration Company Limited, must hand back to the respondent, Felix Letain, certain claims which it held under option, and also transfer other contiguous claims which it had staked itself. The Court of Appeal has held that Conwest failed to comply with the terms of the option.

The option agreement is dated July 26, 1955, and under it the obligations of Conwest were (*a*) to cause to be incorporated a company on or before October 1, 1958, to hold the claims under option, and, (*b*) to allot and issue to Letain not less than 50,000 shares of this company, the capitalization of which had been previously defined. On September 14, 1955, Letain executed a transfer of the optioned claims to Conwest to be held subject to the terms of the agreement.

Then Letain borrowed money from Conwest. Each borrowing was evidenced by an agreement in writing and the last loan agreement dated February 15, 1957, is really a consolidation of the two previous ones. Under this, Letain acknowledges that he has borrowed $13,000 from Conwest. In satisfaction of this loan Conwest agrees to take 13,000 of Letain's 50,000 shares in the company yet to be incorporated. This left Letain entitled to 37,000 shares in the proposed company, and these 37,000 shares were optioned to Conwest on the following terms:

February 15, 1958	5,000 shares
February 15, 1959	5,000 shares
February 15, 1960	7,000 shares
February 15, 1961	20,000 shares.

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Judson J.

The first block of February 15, 1958, was taken up by Conwest. Therefore, on October 1, 1958, the last date for the incorporation of the proposed company, Letain's interest had become limited to 32,000 shares, all of which were under option to Conwest.

I turn now to the steps taken to incorporate the company. On September 18, 1958, Conwest filed an application under the Dominion *Companies Act*. The suggested name was not satisfactory to the Department and a new name was substituted—Kutcho Creek Asbestos Company Limited. The Director of the Companies Division then notified Conwest that letters patent were being prepared and would bear date September 25, 1958. The Director testified that but for the matters to which I next refer, the letters patent would have been sealed and issued by October 1, 1958.

Conwest then decided to invite Letain to have his name appear in the proposed company. On September 26, 1958, Letain signed a consent to the incorporation of the company under the name of Letain Asbestos Company Limited. This was addressed to the Secretary of State and delivered. On September 29, 1958, the Bank of Montreal as assignee of the payments due under the share-option agreement, and therefore the assignee of Letain's total claim unless he was entitled to a reassignment of the claims, wrote to Conwest pointing out that its assignment was still subsisting and that the next payment was due on February 15, 1959. On September 29, 1958, the proposed company, relying on s. 133 of the *Companies Act*, held two organizational meetings. On October 1, 1958, the Director of the Companies Division following departmental practice, wrote to inquire about the nature of Letain's interest in the proposed new company. On October 7, 1958, Letain signed a declaration addressed to the Secretary of State stating that "on the incorporation and organization of the above company I will have a substantial interest therein". Two days later, on October 9, 1958, Letain sent a telegram to the Director withdrawing his consent to the use of his name and stating that in his opinion his contract with Conwest was null and void.

The letters patent of Kutcho Creek bear date September 25, 1958, in accordance with the advice officially given by the Director of the Companies Division on that date. The

letters patent were actually sealed and issued on October 20, 1958. Conwest proceeded with the organization of Kutcho Creek. This company, on November 7, 1958, issued 32,000 shares to Letain. On February 15, 1959, the Bank of Montreal refused the tender of $5,000 for the 5,000 shares due on that date. On March 2, 1959, 32,000 shares were tendered to Letain and refused. On February 16, 1960, the tender for the shares due on that date was refused, and on February 15, 1961, the tender of $40,000 for the remaining block of 20,000 shares was refused.

On these facts, in my respectful opinion, there is error in holding that Conwest, not having performed the conditions precedent to the exercise of the option, had lost all its rights. The share-option agreement of February 15, 1957, had effected an important modification of the claims-option agreement of July 1955. Under the claims-option agreement, if that alone is looked at, Letain on October 1, 1958, would have been entitled to demand 50,000 shares. Having received an incorporation date of September 25, 1958, and having held its organizational meetings on September 29, 1958, I think the company would have been in a position to deliver these shares, although Letain, I can well understand, might have had some difficulty in selling them merely on the strength of the departmental letter and s. 133 of the Act. But under the loan agreement of February 15, 1957, Letain was not entitled to the unconditional delivery of 50,000 shares or any shares. He had already sold 13,000 shares and the first option for another 5,000 shares had been taken up. He had therefore sold, in anticipation of incorporation, 18,000 shares, and the remaining 32,000 shares to which he was entitled were also under option. On October 1, 1958, therefore, he was in no position to demand a freely-transferrable certificate for these shares. The result of the two agreements is that Letain had no interest in the incorporation of the company until Conwest failed, on February 15, 1959, 1960 and 1961, to take up any of the instalments of shares under option.

This litigation has already been before this Court on a point of law arising under the pleadings. Conwest took the position that because of the provisions of s. 133 of the *Companies Act*, the date of incorporation was conclusively established against everybody by the date of the letters patent. This view was adopted by the Courts in British

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Judson J.

Columbia, but this Court held in *Letain v. Conwest Exploration Co. Ltd.*[1], that the application of the section was to matters which involved the status and powers of the company and that the section did not preclude a person from questioning the date of incorporation appearing in the letters patent in a civil action in which the status and powers of the company were not involved. The question of what constituted performance of this particular contract was therefore left untouched by this decision. The incorporating authority has said that this company came into being on September 25, 1958. Conwest now says that this is performance of its contract. On the other hand, Letain says that under the terms of his agreements with Conwest, he was entitled to have a company whose letters patent were actually sealed and issued on or before October 1, 1958.

Two conflicting views are therefore put forward on what constituted "causing a company to be incorporated" before a certain date. Of the two I think that Conwest's submission is to be preferred, and that Letain's interpretation of the contract is unduly narrow. From the point of view of performance of a contract, what constitutes "causing a company to be incorporated" lacks the definition of a single precise act, for example the payment of money on or before a certain date.

By the terms of clause 7 of the claims-option agreement, Conwest was given a complete choice of jurisdiction under which it might incorporate the company. There is no uniformity of practice throughout Canada in company incorporation. It was open to Conwest under this agreement to choose incorporation under the *Companies Act* of Canada, and to rely on s. 133 to show to Letain that the incorporating authority had conferred a status upon this company from September 25, 1958. The application had been completed by that date for a company under the name of Kutcho Creek, the incorporating fees had been paid and the letter sent by the Director of the Companies Branch. 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

[1] [1961] S.C.R. 98, 33 W.W.R. 635, 26 D.L.R. (2d) 266.

this mode of performance and what the parties meant by performance of this contract is a question of construction for the Court.

I am strengthened in my opinion of what performance meant under these two agreements—the claims-option agreement and the share-option agreement, by the nature of the interest which was outstanding in Letain on October 1, 1958. I think the nature of the interest is strongly against Letain's interpretation of the performance to which he was entitled. Even if his interest had remained at 50,000 shares clear of encumbrance, Conwest could have delivered them on October 1, 1958, and they would have been validly issued on the strength of s. 133; but long before October 1, 1958, Letain's interest in 50,000 shares clear of encumbrance had disappeared. I have already defined the interest that remained in him and it is at least arguable that he could have no possible cause for complaint about anything until there was default in the exercise of the option on any instalment of the shares. The share-option agreement modified the need on the part of Conwest to show any incorporation of a company until it was in default in the exercise of the shares optioned to it.

I am also of the opinion that Letain, by his intervention in the incorporation of the company before October 1, 1958, and continuing after that date, provided Conwest with an equitable defence against a claim for the re-transfer of the claims under option and the transfer of the claims staked by Conwest. By acting as he did in signing the consent to the use of his name and the declaration of substantial interest on October 7th, together with his retention of the $18,000 paid for the shares in this proposed company, Letain represented to Conwest 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. I think that this brings the case within the principle which appears to have originated in the judgment of Lord Cairns in *Hughes v. Metropolitan Railway Co.*[1] There was an unambiguous representation of intention made by Letain which was intended to be acted upon and was acted upon by Conwest, with the result that Conwest's

[1] (1877), 2 App. Cas. 439.

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Judson J.

position in relation to Letain was prejudiced if Letain's interpretation of what constituted performance under this contract is correct. The principle is stated in the following terms:

> It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms, involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent, 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.

There was a recognition of this type of equitable defence in the judgment of Duff C.J. in *Pierce v. Empey*[1], and without going into detail, it does not seem to me that the recent interest in England in this subject-matter, beginning with *Central London Property Trust Ltd. v. High Trees House Ltd.*[2], has done anything more than to restate the principle.

Letain says in answer to this that his intervention should go for nothing because Conwest represented to him when he signed the documents addressed to the Companies Department that the company was in fact incorporated. The documents themselves indicate to the contrary, particularly the declaration of interest of October 7, 1958, but in addition there is a finding of fact against Letain on this point made by the trial judge which could not be put in stronger terms. It reads as follows:

> The plaintiff knowing the situation between himself and the defendants but thinking that he should have made a better deal, as he says instead of taking "two-bit shares", he should have had more, testified that he said to himself before his telegram interfering with the use of his name was sent to the Department of State "By golly, it is not incorporated". No suggestion was made by anyone to him that the company had in fact been incorporated. In this respect I believe the witnesses for the defendants, and I disbelieve the plaintiff when he suggested in his evidence that one or more of the three gentlemen with whom he had dealings on behalf of Conwest represented to him that the company was in fact incorporated when he was communicated with before and after the 1st day of October, 1958. I saw the persons under oath and had good opportunity to estimate their credibility.

The inference to be drawn from Letain's conduct until October 9, 1958, when he revoked his consent to the use

[1] [1939] S.C.R. 247 at 252, 4 D.L.R. 672.
[2] [1947] K.B. 130.

of his name, was that he was participating in the incorporation of this company with full knowledge of what was being done, and was accepting Conwest's steps towards incorporation of this company as performance of Conwest's obligations under the two agreements. He knew what the position was. He chose to treat his contracts with Conwest as subsisting. He continued these contracts although he now says they were not fully performed at the due date. He cannot now assert his construction of the contract that the letters patent should have been sealed and issued on or before October 1.

I would therefore allow the appeals and restore the judgments at trial. The two actions brought by Letain in connection with the claims were dismissed with costs. I would also restore the judgment at trial which gave Conwest specific performance of the share-option agreement. The appellants are also entitled to their costs in the Court of Appeal and in this Court.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Judson and wish to add only a few words as to the availability of the defence of equitable estoppel in the circumstances of this case.

If I were able to share the view of my brother Martland that in substance the only question before us is whether Conwest can enforce an agreement made by Letain without consideration to extend the time within which Conwest was entitled to exercise the option previously granted to it I would not disagree with his statement of the applicable law.

In my view, however, Letain is the plaintiff in substance as well as in form. He is not simply resisting an attempt to enforce the option; he is seeking to compel the conveyance to himself not only of the eight claims which he caused to be transferred to Conwest but also of a number of other claims which were never his. The foundation of his asserted right to a conveyance of these claims is the failure by Conwest to perform strictly the term in the agreement of July 26, 1955, as to causing a company to be incorporated on or before October 1, 1958. Assuming that this condition had not been varied by the acts of the parties and that it was not complied with until October 20, 1958, it is my opinion that by the dealings between the parties recited in the reasons of my brother Judson Letain led

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Cartwright J.

Conwest to suppose that he would not exercise his right to insist on performance of the condition by the date mentioned; in my view it would be inequitable having regard to those dealings to allow Letain to take advantage of the delay which occurred. While, in my opinion, the other grounds upon which the judgment of my brother Judson is based are sufficient to entitle the appellant to succeed without the necessity of relying on the defence of equitable estoppel, that defence appears to me to be available in the circumstances of this case.

I would dispose of the appeal as proposed by my brother Judson.

MARTLAND J. (*dissenting*):—I agree with the reasons of my brother Ritchie and wish to deal only with the matter of equitable estoppel. In my opinion it has no application to the circumstances of the present case.

The agreement which gives rise to the issues in this appeal is an option agreement. It is true that it contains, in addition to the option granted by the respondent to the appellant, Conwest Exploration Company Limited (hereinafter referred to as "Conwest"), to purchase the respondent's claims, provision for the transfer of those claims to Conwest during the option period; for the right of Conwest to work them during that time; and for the addition to those claims of any fractional mineral claims, lying within the exterior boundaries of the respondent's claims, or any mineral claims, or fractional mineral claims adjoining any of the said claims, staked and recorded by Conwest. Essentially, however, it is an option to purchase and the question in issue in these proccedings is whether Conwest did actually purchase the respondent's claims, for it had no right to retain them or any added claims unless it had done so. That question depends entirely upon whether or not Conwest accepted the option. Conwest asserts that it did and this the respondent denies.

In so far as its claim depends upon the application of the doctrine of equitable estoppel, Conwest contends that, while it did not accept the respondent's offer within the period limited by the option agreement, it was induced by his conduct to believe that he had agreed to extend the time for acceptance and that it acted upon that representation. In taking this point, however, Conwest is not seeking

to raise equitable estoppel as a defence to the strict enforcement by the respondent of his contractual rights. The respondent did not need to take any steps to terminate the option agreement, for it terminated automatically upon the expiration of the option period. What Conwest really seeks to do is to use equitable estoppel as a means of establishing that there was an extension of the option period. But such an extension would involve the making of a new contract and for such a contract there was no consideration.

The doctrine has never been extended this far and its application in similar circumstances was denied by the Court of Appeal in England in *Combe v. Combe*[1]. While it is true that in that case the party seeking to apply the principle was the plaintiff in the action, in my opinion its application is not dependent upon which party sues the other. The basic question is as to whether, in the circumstances of the particular case, it is being used as a defence to the strict enforcement of contractual rights, or as a means of proving the existence of a contract made without consideration. It has no application to the latter type of case and consequently, in my view, should not be applied here.

I would dispose of the appeal in the manner proposed by my brother Ritchie.

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for British Columbia allowing an appeal by the present respondent from a judgment of Wootton J. rendered with respect to three actions which were consolidated and tried together before him.

Two of these actions were brought by Letain for the retransfer to him of certain mining claims which he had transferred to Conwest Exploration Company Limited (hereinafter called Conwest) pursuant to the provisions of a claims option agreement dated July 26, 1955 (hereinafter referred to as the CLAIMS OPTION) which was to be exercised by Conwest causing a mining company to be incorporated on or before October 1, 1958, and which the respondent claims was not so exercised.

The third of these consolidated actions was brought by the appellants Conwest and Cassiar Asbestos Corporation

[1] [1951] 2 K.B. 215.

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Ritchie J.

Limited (hereinafter called Cassiar), for specific performance of a SHARE OPTION agreement dated February 15, 1957 (hereinafter referred to as the SHARE OPTION) for the purchase of the shares to which the respondent would have become entitled in the proposed mining company in the event of that company being incorporated in accordance with the terms of the CLAIMS OPTION.

The disposition of these actions must, in my opinion, depend upon whether or not Conwest exercised or was excused from exercising its option to purchase the said mining claims by causing a mining company to be incorporated on or before October 1, 1958, in accordance with the said CLAIMS OPTION, the relevant clauses of which read as follows:

> 7. *In the* event of Conwest electing to exercise fully the *option* hereby granted, it may do so by causing to be incorporated on or before the 1st day of October 1958, under the Companies Act of Canada, or under the laws of such other jurisdiction in Canada as Conwest shall choose, a mining company to which reference is herein made as the proposed company, with an authorized capital comprising three million shares, either without nominal or par value, or of the par value of $1.00 each, as Conwest shall decide. The proposed company, *if* incorporated, shall, in due course, be organized by Conwest, whereupon the said claims and such other mineral claims, if any, as Conwest shall elect, shall be transferred to the proposed company free of encumbrances.
>
> 8. The considerations to be paid or otherwise satisfied by the proposed company for the transfer to it of the said claims shall be such as shall be arranged between Conwest and the proposed company, *including* the allotment and issue by the proposed company, as fully paid and non-assessable, of such number of shares in its authorized capital, being not less than Fifty Thousand (50,000) shares in its authorized capital, as shall be agreed between Conwest and the proposed company, to which shares reference is hereinafter made as "THE VENDOR'S SHARES". Of the vendor's shares, fifty thousand (50,000) shall be allotted and issued to, and shall be the property of the Optionor.
>
> * * *
>
> 11. The Optionor will deliver forthwith to Conwest a good and sufficient bill of sale, or good and sufficient bills of sale, each in triplicate, of the said claims, to Conwest duly executed and attested and capable of due registration, which bills of sale Conwest may register in due course. *In the event that Conwest shall not duly exercise the option hereby granted, Conwest will, at the request of the Optionor, retransfer the said claims, or such of them as shall be retained in good standing, to the Optionor.*
>
> * * *
>
> 13. In the event that Conwest shall stake and record, or cause to be staked and recorded on its behalf, any fractional mineral claim or claims lying within the exterior boundaries of the said claims, or any mineral claim or claims, or fractional mineral claim or claims which adjoin any of the said claims, the same shall, for the purposes of this indenture, be treated as though they were comprised in the said claims.

It is established that Conwest caused Kutcho Creek Asbestos Company Limited (hereinafter referred to as Kutcho Creek), a mining company, "to be incorporated under the Companies Act of Canada" with letters patent bearing date September 25, 1958, and in the first of these actions Conwest pleaded, by way of defence,

> that under s. 133 of the said Companies Act except in a proceeding for the purpose of rescinding or annulling said letters patent, said letters patent are conclusive proof of the fact that such a mining company was incorporated prior to the said 1st day of October 1958.

The point of law so raised was the subject of an appeal to this Court at the instance of Letain (see *Letain v. Conwest Exploration Company Limited*[1]), and it was then determined that the mere production of the letters patent of Kutcho Creek bearing date September 25, 1958, in no way precluded the appellant (*i.e.* Letain) "from showing at the trial that Conwest did not exercise its option according to its terms".

Accordingly, when these actions came to trial, Mr. A. A. Cattanach, who was the Director of the Companies Division in the Department of the Secretary of State in September and October 1958, was called as a witness on behalf of Letain to prove that the letters patent of Kutcho Creek were not signed and the seal of the Secretary of State was not affixed until October 20, 1958.

The CLAIMS OPTION was required to be exercised by "causing" a mining company "to be incorporated . . . *under the Companies Act of Canada* or under the laws of such other jurisdiction in Canada as Conwest shall choose . . .", but Conwest did not choose "any other jurisdiction in Canada" and the method of incorporating a company under Part 1 of the *Companies Act* of Canada which is specified in s. 5(1) of that Act was the subject of comment in this Court in *Letain v. Conwest, supra,* at p. 107, where it is said:

> The only method of creating a body corporate under Part 1 of the Dominion Companies Act is for the Secretary of State to grant a charter by letters patent under his seal of office (see s. 5(1)). If the charter so granted bears a date earlier than that upon which the seal was affixed then by virtue of s. 133 the company acquires status with effect from the earlier date. The question here, however, is not whether or not Kutcho Creek Asbestos Company Limited is to be conclusively taken as having the status of a company incorporated on the 25th of September but rather

[1] [1961] S.C.R. 98, 33 W.W.R. 635, 26 D.L.R. (2d) 266.

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Ritchie J.

whether or not the respondent caused it to be "incorporated on or before the 1st day of October 1958", within the meaning of those words as they are used in para. 7 of the agreement pursuant to which this action was brought.

It is suggested that those representing Conwest actually complied with the terms of clause 7 by causing all reasonable steps to be taken towards the incorporation of a mining company on or before October 1, 1958. In support of this suggestion, it is pointed out that the application was first made on September 18th, that the draft letters patent were prepared on September 25th bearing that date, and that they were completed on or before October 1st, so that the seal of the Secretary of State *could* have been affixed by the close of business on that date.

It is evident also that the first organization meetings of the new company were held on September 29th and that those responsible, apparently relying on their interpretation of s. 133 of the *Companies Act,* treated the matter as if the company had in fact been incorporated on September 25th.

I agree with Bird J.A., who delivered the reasons for judgment on behalf of the Court of Appeal, that "the CLAIMS OPTION is an option simpliciter to purchase mineral claims . . ." and that the requirement for incorporation of a mining company contained in clause 7 is to be treated, to use the words of Kindersley V.C. in *Lord Ranelagh v. Melton*[1]:

> . . . 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.

The word "causing" may be capable of different shades of meaning dependent upon the context in which it is used, but in my opinion as it is employed in the phrase "causing to be incorporated" in clause 7 of the CLAIMS OPTION, it necessarily implies the achievement of an objective which in this case was the incorporation of a mining company on or before October 1, 1958.

Even if it were to be accepted that the phrase "causing to be incorporated" as so employed was equivalent to "taking all reasonable steps to bring about incorporation",

[1] (1864), 34 L.J. Ch. 227 at 229.

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Ritchie J.

the actions of Conwest and Cassair would still, in my view, fall short of compliance with this condition of the option. It is to be remembered that the option was signed on July 26, 1955, and that there was therefore a period of three years and two months in which to cause the company to be incorporated. No steps whatever appear to have been taken to this end for three years after the agreement was made and in July, 1958, for some unexplained reason, representatives of Conwest and Cassair approached Letain with a view to having the date for compliance with the option by incorporating a company, extended for a further three years until October 1, 1961; it was only after it had become apparent that Letain would not agree to this that last-minute steps were taken to comply with the terms of the option by the making of an application for incorporation on September 18, 1958. Under the circumstances this proved to be too late for the charter to be granted "on or before October 1st 1958", and the fact that it was made effective, when granted, as of an earlier date cannot, in my opinion, alter the position which existed on October 2nd, at which time no company had been incorporated and the CLAIMS OPTION had lapsed. By the time that the Secretary of State signed and affixed his seal to the charter the time fixed for the performance of the condition had, to adopt the language of Kindersley V.C., "passed over" not only "by one single day" but by eighteen days and the right to exercise the option was gone.

It is no doubt true that the retroactive effect of the antedating of the charter as of September 25th might, after the company had been duly incorporated, have the effect of validating acts done by the embryo company, but in my view no such acts can have had any validity as corporate acts until after the incorporation of the company on October 20th.

This does not, however, dispose of the ground upon which the learned trial judge based his decision and which was urged upon us by counsel for the appellants, namely, that Letain waived strict compliance with the CLAIMS OPTION and so conducted himself

> that the defendants were led into the position of believing . . . that everything was to be satisfactory regardless of the date of October 1st, 1958, and that they acted to their detriment in reliance on that belief and were, therefore, "estopped from claiming default against the defendant Conwest".

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Ritchie J.

It was contended on behalf of the appellants that the delay in incorporation of this company after September 26th was occasioned, or at least acquiesced in, by the respondent because on that date, when the name of Kutcho Creek had been accepted by the Companies Division, representatives of the appellants requested Letain to let his name be used as part of the company's title and as a result of his having consented to this request, Mr. Cattanach wrote to him on October 1st asking for a "declaration of substantial interest in the company" which Letain did not send forward until October 7th and in which he said

> that on incorporation or organization of the said company I will have a substantial interest therein.

If any delay in the incorporation was caused by the suggestion that Letain's name should be used, I am satisfied that it was caused by the representatives of the appellants rather than by the respondent. 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.

It is suggested, however, that the respondent's "declaration of substantial interest" which was not given until October 7th is to be treated as an acceptance by Letain of the fact that the company had not then been incorporated and an acquiescence in the delay, but even if this were so it 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 (see *Dibbins v. Dibbins*[1]).

A substantial portion of the appellants' argument was devoted to the contention that the SHARE OPTION of February 15, 1957, read in the light of the relationship then existing between Letain and Conwest both before and after that date, is consistent only with Letain having waived strict compliance with the CLAIMS OPTION.

It is true that the respondent was employed by Conwest before the CLAIMS OPTION was granted and that for

[1] [1896] 2 Ch. 348, *per* Chitty J. at 351 and 352.

three years thereafter he worked for that company during the prospecting seasons and, indeed, was continuously in its employ from August 1, 1957, to October 1, 1958, but none of his contracts of employment has any bearing on the terms of the CLAIMS OPTION and I am unable to see that the relationship of employer and employee which existed between the parties during these years placed Letain under any obligation to notify Conwest that he intended to hold it to the letter of its bargain. Nor do I think that the provisions of the loan agreements and the SHARE OPTION executed by the respondent in the years 1956 and 1957 gave rise to any such obligation.

The loan agreements of December 7, 1955, and December 3, 1956, were given by Letain as collateral security for repayment of advances totalling $5,500 made to him by Conwest and had the effect of releasing Conwest from its obligation to issue shares to Letain in the company to be incorporated under the CLAIMS OPTION if the loans were not repaid before June 7, 1957. These loan agreements were abrogated by the SHARE OPTION agreement of February 15, 1957, under which Conwest agreed to cancel Letain's existing indebtedness and to advance a further sum of $7,500 in return for the transfer to it of all the respondent's right, title and interest in the first 13,000 of the 50,000 shares to which he might become entitled under the CLAIMS OPTION in the event of a mining company being incorporated in the manner thereby provided.

By para. 8 of this agreement it was provided:

> *In the event of the incorporation and organization of the said mining company,* Letain hereby gives and grants to Conwest the sole and exclusive options, which are herein referred to as "THE SHARE OPTIONS", to purchase the whole or any part or parts of the remaining Thirty-seven Thousand (37,000) shares of the said mining company to which Letain shall then be entitled, and which shall be issuable to Letain as fully paid and non-assessable, at the prices, on or before the dates and in the quantities hereunder mentioned, that is to say:
>
> FIRST. The whole or any part or parts of Five Thousand (5,000) shares, at the price of One Dollar ($1.00) per share, on or before the 15th day of February 1958.
>
> SECOND. The whole or any part or parts of Five Thousand (5,000) shares, at the price of One Dollar ($1.00) per share, on or before the 15th day of February 1959.
>
> THIRD. The whole or any part or parts of Seven Thousand (7,000) shares, at the price of One Dollar ($1.00) per share, on or before the 15th day of February 1960.

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Ritchie J.

FOURTH. The whole or any part or parts of Twenty Thousand (20,000) shares, at the price of Two Dollars ($2.00) per share, on or before the 15th day of February 1961.

Counsel for the appellants attached great importance to the fact that on November 17, 1957, the respondent assigned all moneys which might be paid to him under this agreement to the Bank of Montreal giving notice of this assignment to Conwest, and that prior to February 15, 1958, the Bank was paid and accepted $5,000 in respect of the first block of the 37,000 shares in the proposed company.

It is also pointed out on behalf of the appellants that as late as September 29, 1958, the Bank of Montreal in its capacity as Letain's assignee wrote to Conwest stating:

> The assignment is still in effect and we trust that the payment due in February 1959 will be forwarded direct to us for account of Mr. Letain.

It is to be remembered that the SHARE OPTION, like the loan agreements which preceded it, was concerned with shares which were to be issued in the "proposed company referred to in the said agreement of July 26th, 1955, to be incorporated within the time set forth in that agreement . . .". By its failure to cause such a company to be incorporated within the time set forth, Conwest effectively prevented the shares which were the subject-matter of this option from ever coming into existence and this appears to me to afford a complete answer to the action for specific performance of the SHARE OPTION which action was brought to enforce a right that Conwest itself had destroyed.

The fact that Conwest appears to have been ready to pay for the optioned shares both before the CLAIMS OPTION was due to be exercised and after it had lapsed cannot, in my opinion, be treated as a substitute for the incorporation of a mining company in accordance with the terms of that option any more than the acceptance of the first $5,000 payment under the SHARE OPTION in February 1958, or the anticipation of the February 1959 payment by the Bank of Montreal, can be treated as evidence of Letain's agreement to waive strict compliance with the specified date for the incorporation of the proposed mining company.

The suggestion that the respondent's conduct over the years was such as to justify the appellants in believing that

he had relieved Conwest from the obligation to exercise the CLAIMS OPTION on or before October 1st is, in my view, entirely inconsistent with the draft agreement sent to Letain by the representatives of the appellants Conwest and Cassiar in July 1958 which recited the fact that the CLAIMS OPTION provided for the incorporation of the proposed company on or before October 1st. By this draft agreement, as has been indicated, Letain was asked to extend the time for the incorporation "from on or before the 1st day of October 1958 to on or before the 1st day of October 1961", and it appears to me that his refusal to agree to this extension must have alerted the appellants to the importance of complying with the deadline of October 1st for the incorporation of the proposed company.

I am satisfied that, at least from the date of this refusal in July or August 1958, the appellants were fully aware of the importance of adhering to the October 1st limit for the incorporation of the proposed company, and I am satisfied also that far from believing that "everything was to be satisfactory regardless of the date of October 1st . . .", the appellants were seeking to have that date extended, and that having failed to do this they took all the steps which they thought to be necessary to comply with the letter of the CLAIMS OPTION by obtaining the assurance of the Companies Division that a mining company would be incorporated with letters patent bearing date of September 25, 1958. The fact of the matter was that between October 1 and October 20, 1958, no such company was in existence but this does not mean that the representatives of the appellants had been misled into thinking that they did not have to meet the October 1st deadline. On the contrary, those who were responsible wrongly thought that the deadline had been met, relying as they did on their own view of the effect of the said s. 133 of the *Companies Act*.

In view of the above, I am unable to conclude that Letain waived any of his rights under the CLAIMS OPTION and with all respect I can find no evidence to justify the learned trial judge's conclusion that he was estopped from claiming default against the appellant Conwest.

I agree with Bird J.A. that the effect of Conwest's failure to exercise the CLAIMS OPTION is that a resulting trust was created in favour of Letain with respect to the mining

1963

CONWEST EXPLORATION CO. LTD. *et al.* *v.* LETAIN

Ritchie J.

claims in question and that he is entitled to have them retransferred to him in accordance with the terms of that option.

I agree also with Mr. Justice Bird that the claims and fractional claims shown hatched in blue on exhibit 47, like those which are hatched in red, are all "fractional mineral . . . claims which adjoin" the claims transferred to Conwest pursuant to the CLAIMS OPTION and that they are therefore "to be treated" as though they were comprised in the said claims, and to be transferred to the respondent in accordance with the terms of that option.

For these reasons as well as for those contained in the decision rendered by Bird J.A. on behalf of the Court of Appeal, I would dismiss this appeal with costs.

Appeal allowed with costs, Martland *and* Ritchie JJ. *dissenting.*

Solicitors for the appellants: Guild, Yule, Schmidtt, Lane, Collier & Hinkson, Vancouver.

Solicitors for the respondent: Hogan, Webber & Woodliffe, Vancouver.