WILLIAM LANDON HARVEY (DEFENDANT) ..... APPELLANT; 1952 *Nov. 5, 6, 7

AND

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ARTHUR CYRIL PERRY (PLAINTIFF) ...RESPONDENT. *Mar. 30

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contracts—Specific performance—Sale of oil leases—Correspondence—Interviews—Whether agreement reached.

In an action taken by the respondent for specific performance of a contract to sell and assign certain oil leases, the trial judge and the Court of Appeal for Alberta found that the parties had come to an agreement and that the *Statute of Frauds* had been complied with.

Held (allowing the appeal and dismissing the action), that the respondent had failed to establish that a contract had been concluded between the parties. The whole of the correspondence, interviews and conduct of the parties showed that they had not agreed upon the terms of a contract and that the respondent, up to the conclusion of the negotiations, was still trying to obtain terms more satisfactory to himself.

*PRESENT: Kerwin, Taschereau, Estey, Locke and Cartwright JJ.

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APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming the judgment at trial and ordering specific performance of a contract to sell oil leases.

J. J. Robinette Q.C. for the appellant.

G. H. Steer Q.C. and *G. A. C. Steer* for the respondent.

The judgment of the Court was delivered by:—

ESTEY, J.:—This is an appeal from a judgment in the Appellate Division of the Supreme Court of Alberta (1), affirming a judgment after trial declaring a contract had been made between the respondent, as purchaser, and the appellant, as vendor, of eight oil leases the latter had obtained from the Government of the Province of Alberta, and directing specific performance thereof.

The appellant (def.) resides at Saginaw, Michigan, and the respondent (pl.) is a member of the firm of Perry & Buchta of Edmonton who "specialize in putting deals together" relative to oil leases and the production of oil. The correspondence commences by a letter of January 31, 1950, from that firm to appellant enclosing a list of royalties and also a few leases they had available at that time. Correspondence follows relative to these and on April 2 the appellant puts a postscript on his letter reading as follows:

> I have 8½ sections between Wetaskiwin & Montrose, which I will take $20 an acre for same or will sell ½ undivided interest in this piece, and I will pay half of drilling well. If you are interested let me hear from you.

On April 5 the firm wrote appellant intimating that they might arrange a drilling agreement with respect to his 8½ sections and concluded the letter: "We will do everything in our power to assist you."

Some correspondence then passed between the parties, in which respondent's firm requested appellant's lowest cash price, as the firm had clients who might be interested. On April 26, 1950, appellant replied, in part:

> I will take $32,000 cash in U.S. funds and 1/8 of the gross oil. Well also must be started within sixty days from date deal is consummated.

(1) [1952] 2 D.L.R. 148; 4 W.W.R. (N.S.) 660.

The learned trial judge stated:

> The basis of the arrangement between the parties was contained in the letters of May 2nd and May 8th and, notwithstanding other previous and subsequent correspondence, the offer and acceptance as contained in those two letters was unequivocally accepted and confirmed by the plaintiff in the letter of August 24th from the plaintiff's solicitor to the defendant's solicitors in Saginaw, and further by the defendant then forwarding his leases to the plaintiff's solicitors. This, I think, disposes of the defendant's plea that there was no sufficient memoranda to satisfy the Statute of Frauds.

Mr. Justice Clinton Ford, on behalf of the learned judges in the Appellate Division, affirming the judgment at trial, stated:

> The contract, as found by the trial judge, is contained in the letters of May 2nd, May 8th, May 15th and the 24th of August, 1950.

The letter of May 2 is written by respondent in the name of his firm and points out that appellant's terms, as submitted on April 26 (above quoted), are so high "we cannot handle it at all," but then continues:

> However, you might consider the following and if you feel that you could accept these terms, I am sure we could put a deal over for you:
>
> $20,000 cash bonus, direct assignment of the lease to lessee, eighteen month drilling commitment if the well is not started within the terms of the drilling commitment, an additional bonus of $2 per acre will be paid to yourself, 2½ per cent gross override to you, making a total gross override of 15 per cent, including the Crown 12½ per cent or 1/8. We feel it is utterly impossible to negotiate a deal on your lease with a 25 per cent gross override as suggested in your letter. It might be possible for us to get an additional consideration for you out of net production, however, this is an item that would have to be held in reservation.

On May 8 appellant wrote:

> I will accept your proposition of Twenty Thousand and No/100 Dollars ($20,000) cash and 2½ per cent Gross Over-riding Royalty. The $20,000 has to be in American funds.

The respondent, in his letter of May 2, submits terms upon which "I am sure we can put a deal over for you." The appellant's reply of May 8, when read and construed in relation thereto, discloses that the terms are submitted as a basis for respondent's negotiating a deal. In fact respondent's letter of May 15 makes it clear that the terms were so regarded:

> We will proceed immediately to try and consummate a deal for you at the earliest possible moment. There will, in all probability, be a counter proposal or two from our clients, and if such is the case, we will submit them to you at once.

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In the correspondence that follows respondent continues to write in the name of the firm, explaining delays but always hopeful of concluding an agreement.

Up to about August 24 there does not appear to be any doubt but that the firm of Perry & Buchta were acting as agents on behalf of the appellant in an endeavour to effect a sale of the eight leases here in question.

On August 24 the respondent's solicitors enter into the correspondence and write the letter which the learned trial judge and their Lordships in the Appellate Division particularly refer to as constituting an acceptance of an offer made by the appellant. The material part of the solicitors' letter of August 24 reads as follows:

> Re: P. & N.G. Leases Nos. 76411 to 76418 both inclusive in Alberta.
>
> This letter is written at the request of and under the instructions of Mr. A. G. Perry of this city, who advises that he is in a position to take these leases under the terms and conditions contained in his letter to you of the 2nd May last and your letter to his firm dated May 8, 1950.
>
> Mr. Perry has asked us to prepare the Assignment and other necessary papers, but in order to do that it will be necessary that we have access to the above leases now in your possession.
>
> If you will forward these leases to us we hereby give our undertaking to hold them under our control until we are in a position to remit to you the compensation you are entitled to receive.

This, with great respect, is not the language of an acceptance, but rather that of an agent informing his principal that he himself "is in a position to take these leases under the terms and conditions contained in his letter to you of the 2nd May last and your letter to his firm dated May 8, 1950." That it was not intended to conclude a contract appears from respondent's solicitors' further letter of August 26, in which they state "some discussion between you will be necessary before adequate instructions can be given to draw such an Agreement." On the same date, August 26, respondent indicates that he is not accepting an offer and thereby making a contract when he writes to the appellant, in part, as follows:

> Mr. Howatt of Howatt and Howatt, my solicitor, is sending through a copy of the proposed agreement. However you and I will get together and complete the terms.

While the letters of May 2 and 8 were intended as a basis for negotiations, as already stated, it is fair to conclude that a sale upon the terms thereof would have been agreeable to appellant. Even if, however, they be construed to

be an offer, the letter of August 24 is not an acceptance because of both its own language and that of the letters of August 26, which discloses that the respondent was not accepting an offer, as he contemplated "you and I will get together and complete the terms."

The respondent, however, contends that the appellant's conduct in forwarding the leases, as requested in the letter of August 24, discloses an intention on his part that the letter was an acceptance. It must be observed that these leases were sent in order that an assignment might be prepared as requested by the respondent. That such an assignment could only be and was intended by the respondent to be but a proposed assignment is clear upon a reading of the above quotations from the letter of August 24 and the two of August 26. There were then, as respondent himself stated, terms to be completed. In these circumstances the sending of the leases goes no further than to indicate a willingness that negotiations might continue, rather than that an agreement had been concluded. The position is quite distinguishable from that in *Canadian Dyers Association Limited* v. *Burton* (1), cited on behalf of respondent. There the defendant-vendor contended no contract had been made. His solicitor, however, after the offer and acceptance had been made, sent a draft deed and said he would be ready to close on the first. It was held: "His actions show that he regarded his letter as an offer and the letter of the 23rd as making a contract." The sending of the leases falls far short of any such conduct pointing specifically to the existence of a concluded contract.

With great respect to the learned judges who hold a contrary opinion, there does not appear to be here present either in the letter of August 24 or in the conduct of the appellant that absolute and unequivocal acceptance of terms required by the authorities to conclude a contract. *McIntyre* v. *Hood* (2); *District of North Vancouver* v. *Tracy* (3); *Harvey* v. *Facey* (4); *Fulton Bros.* v. *Upper Canada Furniture Company* (5). Moreover, when the whole of the correspondence and conversations are considered it is clear that the parties had not agreed upon the terms of a contract.

(1) (1920) 47 O.L.R. 259.
(2) (1884) 9 Can. S.C.R. 556.
(3) (1903) 34 Can. S.C.R. 132.
(4) [1893] A.C. 552.
(5) (1883) 9 O.A.R. 211.

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However, negotiations continued. The "get together" contemplated by respondent's letter of August 26 (above quoted) took place at Saginaw on September 1. Respondent says that the parties hereto did there "complete the terms" of the contract and then went to the appellant's solicitor's office where they were detailed to him. It is common ground that these terms were not reduced to writing upon that date and, therefore, at that time there was no compliance with the requirements of the *Statute of Frauds*.

Inasmuch as the learned trial judge accepted the respondent's evidence "where there is any conflict" between his and that of the appellant, the foregoing, as to what took place at Saginaw, must be accepted, even though the appellant's evidence may be somewhat to the contrary.

The respondent deposes that just before leaving appellant at Saginaw "I then said to Mr. Harvey, we had made a deal and we will rush it through as quickly as we can; and we shook hands on that deal right there and then in front of the hotel: and I went to my hotel room and immediately phoned Mr. Howatt's office." In that telephone conversation he gave instructions relative to the contents of the agreement. As a result, when he arrived at Edmonton and went straight to Mr. Howatt's office, the agreement which was enclosed in the letter of September 2 to appellant was in the course of preparation. The parties hereto had agreed at Saginaw that the assignment of leases, properly executed, would be deposited in the Royal Bank of Canada, Main Branch, Edmonton, and surrendered to respondent upon payment of $20,000 within a period of fifteen days. Notwithstanding that agreement, the proposed agreement, as prepared at Edmonton, signed by the respondent and enclosed with the letter of September 2, included no such provision. On the contrary, it provided:

> The Assignee shall pay to the Assignor in cash the sum of Twenty Thousand American ($20,000) Dollars or its equivalent in Canadian dollars forthwith after the assignments of the said leases have been filed with and accepted by the Department of Mines and Minerals of the Province of Alberta.

The appellant's solicitors replied under date of September 7, acknowledging the "purported agreement of sale" and "purported assignment" and, after pointing out that he would require the drilling obligation and the overriding

royalty to be set forth in both the agreement for sale and the assignment, continued:

> Be that as it may, the arrangement which we discussed with Mr. Perry during his recent visit to Saginaw was as follows:
>
> (*a*) Mr. Perry would engage you as his attorneys to prepare the assignment or assignments necessary to effect transfer of the leases from Mr. Harvey to Mr. Perry, or his nominee; and
>
> (*b*) Such assignments would be executed by Mr. Harvey, and thereupon forwarded to any Canadian bank designated by Mr. Perry, said bank to be authorized by Mr. Harvey to deliver said assignments to Mr. Perry, or his nominee, at any time within the period of fifteen (15) days upon payment to said bank as the agent for Mr. Harvey of the agreed consideration of Twenty Thousand ($20,000) Dollars in American currency or the equivalent thereof.
>
> The procedure contemplated by your letter is considerably at variance with that discussed with Mr. Perry. We have no objection to the agreement of sale, but it and the assignments must all be escrowed and delivered together upon payment of the consideration, and each assignment should expressly reserve to Mr. Harvey the overriding royalty that has been agreed upon, although it will suffice if the drilling obligation is embodied solely in the agreement of sale.
>
> If Mr. Perry is unwilling to consummate the transaction in the manner above outlined then we assume there is no cause for further negotiations, unless you can suggest a substituted procedure which will afford Mr. Harvey the same protection.
>
> In the interim, the documents enclosed with your said letter dated the 2nd instant are herewith returned.

On September 9 respondent's solicitor replied, in part: "We have your favour of the 7th instant and the terms are acceptable." He therein submitted a redraft of the consideration in the assignment with respect to which the letter stated: "We trust this will meet with your approval."

The record does not suggest that the insertion of a provision as to the payment of $20,000 so completely different from that agreed upon at Saginaw was an error, but rather that respondent did so in order that he might obtain terms more satisfactory to himself. This view is supported, not only by his conduct throughout, but by his statement, when referring to the twenty-four-month drilling period, "I never give up until the contract is signed."

Notwithstanding the express admission in the letter of September 9 that the provision relative to the payment of the $20,000 ought to have been as stated in appellant's solicitors' letter of September 7, the respondent, under date of September 13, forwarded a second agreement

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executed by himself, in which he retained the provision relative to the $20,000 in identical terms to that enclosed in his letter of September 2.

This agreement enclosed in the letter of September 13 contained another important variation. Throughout, respondent had sought a twenty-four-month period for the commencement of drilling. Appellant had insisted upon eighteen and, in fact, as respondent deposes, they had agreed at Saginaw upon an eighteen-month period and a provision to that effect was included in the proposed agreement enclosed in the letter of September 2. Some time between the 4th and 7th of September respondent deposes that he had a long-distance telephone conversation with appellant, in the course of which he again urged that the period be extended to twenty-four months. Upon his own evidence, the appellant did not agree. Because, however, he did not again specifically refuse, respondent, with the hope that it would not be struck out, included a proviso to the effect that if the Department of Mines and Minerals of the Province of Alberta would consent and approve a postponement of six months for the commencement of drilling then the respondent would commence drilling operations within twenty-four months from the aforesaid date, that is from the date of the acceptance by the Department of Mines and Minerals of the assignment of the leases.

Neither the appellant nor his solicitors made any further communication after the letter of September 7. The respondent's correspondence received thereafter remained unanswered. The position of the parties, therefore, remained as above described until about the middle of September, when appellant went to Edmonton and advised the respondent that he would himself undertake the drilling operations which, of course, concluded the negotiations.

The learned trial judge found a contract in the letters of May 2, May 8, May 15 and August 24, and the conduct of the appellant in immediately thereafter sending the leases. Portions of these letters have been quoted and already dealt with. In the formal judgment after trial it was stated:

> 1. THIS COURT DOTH DECLARE that the agreement referred to in paragraph 3 of the Statement of Claim, as more particularly set out in the document entered as Exhibit 4 at the trial of this action, ought to be specifically performed and carried into execution and doth order and adjudge the same accordingly.

The document described as Exhibit 4 in that judgment is that enclosed in the respondent's solicitors' letter dated September 2. That agreement, though executed by the respondent, did not embody the terms agreed upon at Saginaw. The appellant rejected it and the respondent himself expressly admitted by his solicitors' letter of September 9 that it did not express the terms agreed upon, in particular in relation to the $20,000.

Counsel for the respondent contended that the words "We have no objection to the agreement of sale," which appear in appellant's solicitors' letter of September 7, supported a view that the appellant was accepting the terms in the agreement enclosed in the letter of September 2. The letter of September 7 refers to the conversation at Saginaw, where respondent admits that only the assignment of the leases and the necessary documents, as required by law, were discussed. The preparation of such a proposed agreement as that contained in respondent's solicitors' letter of May 2 was in that letter mentioned for the first time. These words "We have no objection to the agreement of sale," when read and construed in the light of the context and the surrounding circumstances, make it clear that all the appellant's solicitors were saying was that they did not object to the preparation of the written agreement rather than to the terms thereof. Indeed this is abundantly clear from the letter of September 7 itself in which they are taking exception to the terms relative to the paying of the $20,000. It would, therefore, appear that a conclusion favourable to the contention of the respondent cannot be drawn from this sentence.

In cases of this type the respondent (pl.) must establish a contract concluded between the parties and a note or memorandum sufficient to satisfy the requirements of the *Statute of Frauds*. *Hussey* v. *Horne-Payne* (1). The parties here negotiated, in part, at Saginaw, but mainly through correspondence. It is, therefore, essential to examine the evidence and the entire correspondence, both to ascertain whether the parties had agreed and, if so, whether there is a sufficient memorandum to meet the *Statute of Frauds*.

(1) (1879) 4 App. Cas. 311 at 316.

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The letter of September 2, the proposed agreement enclosed therewith and respondent's solicitors' letter of September 9, might support a conclusion that the parties had agreed, but, when read, as they must be, with respondent's solicitors' letter of September 13 and the proposed agreement enclosed therewith, it is clear that the respondent had not agreed. The minds of the parties had not met. There was no consensus ad idem because the respondent was still negotiating for better terms.

The position of the respondent is analogous to that of the plaintiff in *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs* (1). There, after an agreement, as evidenced by two letters, had been arrived at, the vendor's (defendant's) solicitors submitted an agreement for approval and the purchaser's (plaintiff's) solicitors inserted a new clause which the vendor refused to agree to. Thereafter the purchaser sought to accept the original offer and to enforce the contract. Kay J. stated at p. 624:

> Their position, therefore, is, that they were not satisfied with the terms of the two letters, but themselves reopened the matter by negotiating for another most important advantage; and having thus treated the two letters as part of an incomplete bargain, it would be most inequitable to allow them to say, "Although we thus treated the matter as incomplete and a negotiation only, yet the Defendant had no right to do so, but was bound by a completed contract."
>
> In my opinion, the decision of *Hussey* v. *Horne-Payne* (*supra*) completely covers this case. I understand it to mean, that if two letters standing alone would be evidence of a sufficient contract, yet a negotiation for an important term of the purchase and sale carried on afterwards is enough to shew that the contract was not complete; and, so far as my own judgment is concerned, I entirely agree in the justice and equity of such a rule.

Re Cowan and Boyd (2), is quite distinguishable. There the landlord, on March 24, offered to renew his tenant's lease at $75 per month. On March 31 the tenant replied, stating that he would renew at the former rent. On April 5 the landlord wrote that he would call upon the tenant between April 26 and May 1. This letter, written after the tenant's letter of March 31, the Court construed as leaving open the offer of March 24. On April 19 the tenant accepted the terms of $75 per month. In that case there was an unequivocal acceptance of an offer that remained

(1) (1890) 44 Ch. Div. 616. (2) (1921) 49 O.L.R. 335.

open, whereas in the present case there never has been an unequivocal acceptance on the part of the respondent that could be enforced in law.

This case is distinguishable upon its facts from that of *Perry* v. *Suffields, Limited* (1). There the vendor was granted specific performance of a contract contained in two letters of February 23 and March 3, 1915. The defendant's solicitors sent a draft agreement in a letter in which they stated, in part: "We do not know whether it incorporates quite all the terms agreed, as Mr. Perry has not seen it and we have not had very full instructions from him." The draft contract contained clauses at variance with that agreed upon and when it was contended that this amounted to a reopening of the arrangement between the parties Lord Cozens-Hardy dismissed that contention and stated at p. 193:

> The solicitor frankly said he was not sure that he was fully instructed, and his attempt to alter the contract contained in those letters by making a new contract containing different terms as to price, as to fixing a date for completion, and as to the postponement of completion until after the completion of another contract for the purchase of a portion of the property by the Rugby Urban District Council seems to me to be entirely outside the question.

The letter of September 2 and the agreement enclosed therewith, signed by the respondent, were admittedly prepared upon his instructions. The position is, therefore, quite different from that in *Perry* v. *Suffields, Limited,* in that here the respondent is not submitting a proposed contract, with a request that errors and omissions be corrected, but rather does so for the purpose of obtaining terms more satisfactory from his point of view than those already agreed upon.

The correspondence and the conversations, when considered as a whole, do not establish a contract between the parties. The appeal should, therefore, be allowed and the action dismissed. On his counter-claim the appellant is entitled to an order (*a*) directing the respondent to forthwith deliver up to him copies of the leases here in question and referred to in the statement of claim; (*b*) directing the Registrar of the North Alberta Land Registration District to discharge the caveats filed by respondent against the titles to the lands here in question.

(1) [1916] 2 Ch. 187.

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The appellant is entitled to his costs throughout, both in respect to the action and the counter-claim.

Appeal allowed with costs.

Solicitors for the Appellant: *Lindsay, Emery, Ford, Massie & Jamieson.*

Solicitors for the Respondent: *Howatt & Howatt.*