

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Natal Land and Colonization Company, Limited, v. The Pauline Colliery and Development Syndicate, Limited, from the Supreme Court of the Colony of Natal; delivered the 2nd December 1903.*

---

Present at the Hearing:

LORD MACNAGHTEN.

LORD DAVEY.

LORD LINDLEY.

SIR ARTHUR WILSON.

SIR JOHN BONSER.

[*Delivered by Lord Davey.*]

The Appellants are an incorporated joint stock company, having their head office in London. Prior to and in the month of December 1897 a Mr. Rycroft was their General Manager in Natal under a power of attorney dated the 26th October 1888, by the terms of which he was empowered to sell and lease the Company's lands in the Colony and to make contracts for these purposes. On the 9th December 1897 Rycroft, on behalf of the Appellants, made a contract with a Mrs. de Carrey respecting the coal mining rights in 3,000 odd acres of land belonging to the Appellants and known as the Coal Company's Lots. The terms of this agreement are contained in seven letters extending from the 30th November to the 9th December 1897 between Rycroft and Messrs. Shepstone, Wylie & Binns, then acting as solicitors for Mrs. de Carrey. The material terms are as follows: (1) Mrs. de Carrey was to have an option, *i.e.*, a right of prospecting for coal, for

six months from the 20th December 1897, with power to extend the option for a further period of three months; (2) the option was not assignable; (3) that Mrs. de Carrey should have the right, during the continuance of the option, to call for a lease of the coal mining rights for a term of three years, subject to payment of certain rents and royalties, with power to extend the term to 31 years; (4) Mrs. de Carrey was to have the right to sell the lease to a joint stock company fulfilling certain specified conditions; (5) Mrs. de Carrey was to pay or hand over to the Appellants 25 per cent. of the value received from the sale of the lease, in shares or cash, or both, at the option of the Appellants; (6) Mrs. de Carrey was to pay the Appellants 100*l.*, to be forfeited in case the lease was not taken up, but to be repaid on compliance with certain conditions.

By an Agreement dated the 22nd December 1897 and expressed to be made between William Louch, "in his capacity as a provisional Director of the Pauline Colliery and Developing Syndicate about to be registered \* \* \* under the laws of the" South African "Republic," of the one part and Mrs. de Carrey of the other part, Mrs. de Carrey sold and purported to assign to Louch all her interest in (*inter alia*) the above option in consideration of 300*l.* cash and 10,000 shares in the Syndicate. Mr. Rycroft was not informed of this Agreement or of the assignment purported to be made by Mrs. de Carrey, and did not in fact know of it until the 17th December 1898.

On the 29th December 1897 the solicitors acting for Mrs. de Carrey wrote to Rycroft requesting him, as (it was stated) Mrs. de Carrey was really acting as the nominee of the Syndicate, to insert a new clause in the Agreement giving her the right to cede and transfer

all her rights in the option to the Pauline Syndicate on the condition that the Syndicate should assume all the rights and obligations to the Appellants under the Agreement. And, on the following day, Rycroft wrote to the solicitors a letter containing the following passage, "I beg to say that it was understood at the time of making the agreement with Mrs. de Carrey that she and the original (or parent) Syndicate were one and the same, therefore I could not have any objection to the Pauline Colliery and Developing Syndicate being substituted under Section 4 of your letter of the 8th instant (Mrs. de Carrey's consent to the alteration, you assure me, has been obtained) for Mrs. de Carrey."

At this time, Rycroft was not aware of the assignment to Louch which had already been made by Mrs. de Carrey by the Agreement of the 22nd December 1897, and he did not know what was the constitution of the so-called Syndicate, or who were the persons who composed it, or what person he had agreed to substitute for Mrs. de Carrey. Their Lordships, however, will assume that the substitution was within his powers. The Respondent Company was not incorporated until the 22nd January 1898 on which date it was registered as a joint stock company with limited liability, at Pretoria, under the laws of the late South African Republic. The 100*l.* payable under the agreement was paid to Rycroft by the unincorporated syndicate before the incorporation of the Respondent Company. This sum was subsequently (on the 25th November 1898) repaid by Rycroft to one Thurston by the order of Mrs. de Carrey.

On the 31st January 1898, Rycroft wrote to the solicitors of Mrs. de Carrey and the Syndicate a letter containing a copy of a telegram which (he says) he had that morning received

from the Appellants' London office. The telegram was as follows :—

“Umhlali matter was not in accordance with instructions. Do nothing further. Inform Binns must wait Board's orders.”

Binns was a member of the firm of Shepstone, Wylie and Binns, the solicitors for Mrs. de Carrey, the unincorporated Syndicate and the Respondent Company. Rycroft's comment on this telegram in his letter was: “I do not know what particular part of our negotiations this may refer to, but if anything more is required of me by the Pauline Syndicate or Mrs. de Carrey I am bound by these instructions to await orders from the Board.”

Their Lordships are of opinion that after this date Rycroft had no authority to make a new agreement or to vary the existing agreement or in any other way to bind the Appellants in the matter.

The term was extended to the 30th September 1893, as provided in the agreement. The Respondents had been engaged in boring for coal on an adjoining property and did not prospect or bore for coal on the property of the Appellants till shortly before the expiration of the extended term, and very little work appears to have been done. But on the 15th September 1898 the Secretary of the Respondents, by a letter of that date, informed Rycroft that his Board was given to understand that his syndicate had struck a 3-ft. 8-in. seam of coal on the Appellants' property at a depth of 293 feet, and claimed a lease to the Respondents on terms of the correspondence between Rycroft and Messrs. Shepstone, Wylie, and Binns, which they alleged constituted an agreement between the Appellants and the Respondents. Rycroft, on the same day, answered the letter, stating that he should send a copy of it to the London Secretary of his

Company to be laid before the Board for their instructions. On the 12th December 1898, Rycroft, acting under the instructions of the Appellants' Board, declined to entertain the claim, but offered to consider an application for a lease at the same rent and royalties, but subject to certain conditions. This offer was not accepted.

On the 30th May 1899 the Respondents commenced the present action against the Appellants for specific performance of the agreement contained in the seven letters dated 30th November to 9th December 1897, or in the alternative for damages. In their declaration the Respondents alleged that on the 22nd of December 1897 they acquired all the interest of Mrs. de Carrey in the Agreement, but did not allege any other assignment to them or title to the benefit of the Agreement.

The Appellants in their plea to the declaration averred that there was no contract between the Respondents and themselves, and alleged that the agreement to substitute the Syndicate for Mrs. de Carrey was obtained from Rycroft by misrepresentation, the misrepresentation charged being that Mr. Binns and Louch had represented that Mrs. de Carrey had been acting for the Syndicate all through the negotiations, whereas the Syndicate or Louch had purchased the benefit of the agreement from her for a large sum.

The Court, consisting of Mr. Justice Finmore and Mr. Acting Justice Beaumont, decided in favour of the Respondents on both points, and by their Judgment of the 29th May 1902 decreed specific performance of the agreement with costs. On the question of privity of contract, they seem to have held that a new contract on the terms the old one had been made between the Appellants and the Respondents. The acts of part

performance which were relied on by the learned Judges as evidence of such new contract were the occupation and working of the land in question by the Respondents, the expenditure of money on the faith of the agreement, and the acceptance by the Appellants of the payment of 100*l.* as a guarantee for prospecting operations. This sum, however (as already stated), was in fact paid before the incorporation of the Respondents.

Their Lordships do not think it necessary to say whether the agreement was or was not voidable on the grounds alleged or on other grounds appearing in the correspondence, because they are clearly of opinion that there was no contract between the Appellants and the Respondents. The contract was made with Mrs. de Carrey, and even if she can be treated as having made it on behalf either of the unincorporated Syndicate, who were the promoters of the Respondent Company, or on behalf of the Company itself when incorporated, it is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. It is unnecessary to cite all the cases in which this has been decided from *Kelner v. Baxter* (L. R. 2 C. P. 174) downwards. But the facts may show that a new contract was made with the Company after its incorporation on the terms of the old contract. The circumstances relied on for that purpose in the present case are not, in the opinion of their Lordships, necessarily referable to, and do not necessarily imply, a new contract with the Respondents. But a conclusive reason which negatives any new contract is that Rycroft, by whose agency the new contract must be supposed to have been made, had no power or authority after the 31st January 1898 to

make such a contract on behalf of the Appellants, and his want of authority was known to the Solicitors acting for the Respondents. He was not either the actual or the ostensible agent for that purpose of the Appellants.

Their Lordships will therefore humbly advise His Majesty that the judgment of the 29th May 1902 ought to be reversed and that instead thereof judgment ought to be given for the Defendants in the action with costs. The Respondents will also pay the costs of this Appeal.

---

