OF 1938. No 1

IN THE HIGH COURT OF AUSTRALIA.

Carr

v.

Westward Ho
Gold Development
No Liability and anor.

REASONS FOR JUDGMENT.

Judgment delivered at Sydney

on 23rd November 1938

H. J. GREEN, Government Printer, Melbourne.
C.5960.

CARR v. WESTWARD HO GOLD DEVELOPMENT NO LIABILITY AND ANOR.

Order.

Appeal dismissed with costs.

CARR v. WESTWARD HO GOLD DEVELOPMENT NO LIABILITY AND ANOR.

Reasons for Judgment — The Chief Justice.

The plaintiff Carr, the appellant in this Court, sued the defendant Westward Ho Gold Development No Liability claiming rescission of certain agreements, reconveyance of certain gold leases, an injunction to restrain the company from dealing with the gold leases, damages, and rectification of the register of members of the company by striking out the name of the plaintiff therefrom. After the defence had been delivered by the company R.D. Peat was added as a defendant. The writ and statement of claim were amended and a claim was made against Peat for damages for fraudulent misrepresentation.

The plaintiff succeeded upon the trial before Mr. Justice Angas Parsons and obtained judgment for £250 against Peat ~~xxxxx~~ and an order for rectification of the register. Upon appeal by Peat to the Full Court of the Supreme Court of South Australia this judgment was discharged, and an appeal is now brought to this Court by the plaintiff Carr.

The plaintiff, who was a mining man, was entitled to certain gold mining leases which he agreed to sell to a company to be formed for the purpose of exploiting them. The company was to have a capital of three hundred shares of five pounds each, of which one hundred were to be issued as fully paid up to the

vendor or his nominees. Peat provided a large proportion of the money required and the defendant company was formed with capital as set out in the preliminary agreement. Peat, however, was of opinion that more capital was needed, and he proposed that the capital should be increased to one thousand shares of five pounds each. He contended that it was proper to do this and that the plaintiff would still be entitled only to one hundred shares in the increased capital. The plaintiff (who was not yet a shareholder) objected to the increase of capital, and also argued that, if the capital were increased, he should receive one third of the whole of the capital of the company as he would have done if the capital had remained at three hundred shares of five pounds each. Interviews took place between the parties as to which the evidence conflicts. It is, however, clear that Peat maintained his proposition that he was entitled to procure an increase of capital and that such an increase would involve no breach of faith with Carr. Carr had refused to transfer the leases, and until the leases were transferred the company could not safely proceed with its operations. The preliminary agreement (made with one Blake on behalf of a company to be formed) provided that Carr should hand the leases to the company in exchange for the scrip. There were practical difficulties in actually issuing the shares and handing over the scrip before an agreement with the company itself was signed and registered.

In this state of affairs, with Carr and Peat strongly holding

opposite views as to the necessity and propriety of the increase of capital, a letter was written on 6th June 1934 by the then solicitors for the company to Carr's solicitor. Peat admits in his defence that the letter was written upon his express instructions. This letter is the foundation of the plaintiff's claim against Peat for damages for fraud, which is the only claim with which the Court is concerned in this appeal. The letter was in the following terms:-

> " We wish to confirm our telephone conversation with you today to the effect that if Mr. Carr signs the Adoption agreement whereby the abovenamed Company adopts the Preliminary Agreement made between Mr. Carr and Mr. Blake, and Memorandum of Request for the Mines Department to issue the Gold Leases in the name of the Company, the Company will, within twenty four hours thereafter, allot and issue the Vendor's Shares as set out in the Preliminary Agreement.
>
> The documents are now ready for execution and the above statement is made on the definite understanding that settlement will be effected forthwith. "

After receipt of the letter Carr signed the adoption agreement and the memorandum of request. One hundred shares were issued to Carr and he disposed of a number of them. Later Carr discovered that on 5th June the capital of the company had been increased to one thousand shares of five pounds each and alleged that he had been fraudulently induced by the letter to believe that the capital had not been increased, and he instituted these proceedings.

In order to succeed in the action against Peat it was necessary for Carr to establish that Peat had made a fraudulent misrepresentation of fact as well as to establish the other elements required in an action of deceit. In my opinion the plaintiff fails at this first stage. The letter does not contain any representation of fact. It is expressed in promissory terms. It is a statement that if Carr signs the documents the company will allot and issue the vendor's shares as set out in the preliminary agreement. This is a promise and not a representation of any fact. If the promise were broken, and there were consideration (as apparently there was, though the question has not been argued), for it, Carr would have an action for damages for breach of contract. But a letter expressed in the terms stated cannot form the foundation of an action of deceit. I am therefore of opinion that the appeal should be dismissed.

CARR V. WESTWARD HO GOLD DEVELOPMENT NO LIABILITY AND PEAT.

JUDGMENT. MR JUSTICE RICH.

CARR V. WESTWARD HO GOLD DEVELOPMENT NO LIABILITY AND PEAT.

JUDGMENT. RICH J.

I cannot usefully add anything to what has been said in the other judgments of the Court. I agree that the appeal should be dismissed.

C A R R v WESTWARD HO GOLD DEVELOPMENT N.L. & PEAT

JUDGMENT DIXON J.

C A R R v WESTWARD HO GOLD DEVELOPMENT N.L. & PEAT

The substantial question in this appeal is whether the respondent, Peat, is liable in damages to the appellant, Carr, for deceit. The respondent, Westward Ho Gold Development No Liability, has no issued capital that is unpaid, and has no assets.

The remedies sought against the company can have no practical value .

Carr was the vendor of applications for gold leases in the gold mine for the development of which the company was formed. On 9th May 1934 he entered into an agreement with one, Blake, for the sale of the gold leases to a company to be formed under the name now

borne by the respondent company. The respondent company in fact was formed pursuant to the agreement ; it was registered on 12th May 1934. Under the agreement the capital of the company was to consist of 300 shares of £5 each. Of these one hundred were issued to Carr as vendor in consideration for the sale ; 120 were to be offered for subscription at £5 each and 80 were to be kept in reserve. The capital with which the company was registered was that provided by the agreement , namely 300 shares of £5 each. But the Memorandum of Association contained an express object to increase the capital of the company by the issue of preferential or fully paid up or partly paid up shares. Under sec. 68 (1) of the Companies Act 1892 S.A. , then in force, any company limited by shares might by

special resolution so far modify the conditions contained in its memorandum as to effect purposes which included the increase of its capital by the issue of new shares of such amount as might be thought expedient. By its fifth article of association the shares of the company were placed under the control of the directors, except 100 shares, the issue of which to Carr was directed by the Article. Some Articles of Association contained in Table A, which was incorporated by reference, also referred to increase of capital. By one, the directors were empowered with the sanction of a special resolution of the company to increase the company's capital by the issue of new shares. Under this Article the amount of the increase

and the amount of the shares into which the increased capital should be divided were to be directed by the company in general meeting ; but if no such direction was given, they were to be in the discretion of the directors.

On 5th June 1934, pursuant to notice dated 24th May 1934, a general meeting of the company passed a special resolution that the capital of the company be increased to £5,000 divided into 1,000 shares of £5.

To transfer his application for the leases to the company it was necessary for Carr to sign a request addressed to the Minister of Mines for the issue of the leases in the name of the company. The company had been pressing Carr to do this and also to execute an

instrument by which he and the company adopted and confirmed the agreement of 9th May 1934 between him and Blake. His 100 shares as yet had not been issued to him. On 6th June 1934 he cpmplied with the company's demands and executed both documents.

The deceit which he alleges consists in what he says induced him to comply. The company's solicitor with the authority of Peat, who was chairman of directors of the company, wrote to Carr's solicitor undertaking that if Carr settled forthwith the company would immediately afterwards do its part. The letter was written on 6th June 1934 and stated that, if Carr signed the adoption agreement and the request for the issue of the gold leases in the

company's name, the company would within 24 hours allot and issue the vendor's shares as set out in the Preliminary Agreement.

The Preliminary Agreement described the capital of the company as consisting of 300 shares of £5. each and Carr's case is that he and his solicitor were misled by the letter into completing the transaction on the footing that the capital was of this amount, notwithstanding that on the previous day a special resolution for its increase had been passed. Under the Companies Act 1892 S.A. a special resolution requires no confirmation. It must be passed by a three-fourths majority.

Presented in this bare outline his case may appear plausible. But I agree with the learned Judges who formed the Full Court in

thinking that, upon a closer examination of the facts, his case fails. Indeed I think that most of the constituent elements of his cause of action are wanting, or, at all events, are not established.

Carr was a prospector who had applied for two gold leases of land upon which there was an old gold mine with which he had long been familiar. He and some friends or acquaintances got out a prospectus for a small company to take his applications over from him for the purpose of proving the workings he proposed to open up. The prospectus named himself and two of his friends as directors and Blake as secretary and it specified the same capital and consideration as that afterwards expressed in the Preliminary Agreement. At first no

~~great~~

great success attended their efforts to obtain subscribers. But, towards the latter part of April 1934, Blake brought the proposal under the notice of Peat, a civil engineer. Peat was sufficiently impressed to agree to invest £450. But he raised objections to the proposed directors and said he must have control. On Ist May 1934, Peat signed an application for 90 shares of £5. and gave Blake a cheque for £450 which was banked in the joint names of himself, Carr and two others. Blake seems to have instructed the solicitor who prepared the memorandum and articles of association and registered the company. The provisional directors appointed by the articles included Peat and two subscribers named by him and two others named, probably, by Blake. Carr was not included, a thing which caused

him much dissatisfaction. Upon the formation of the company a dispute arose between Blake and Carr as to the brokerage or commission to which the former was entitled from the latter. On 25th May 1934 this was settled by Carr signing a direction for the allotment to Blake of 18 of the 100 shares to which Carr was entitled under the Preliminary Agreement. In the meantime the directors had allotted shares to the various subscribers, but not to Carr as vendor. By a mistake that was rectified almost at once, the 80 reserve shares were also allotted. Peat had from the beginning expressed the view that more capital was needed and to the notice dated 24th May 1934 of the first general meeting of the company to be held at 5 o'clock

in the afternoon of 5th June, there was appended notice of an extraordinary meeting to be held at the conclusion of the ordinary meeting for the purpose of considering two special resolutions. The first special resolution was for the issue of the 80 ordinary shares to be held in reserve and, the second, for the increase of the capital of the company to £5,000 divided into 1,000 shares of £5. each. A shareholder showed this notice to Carr within a day or two of its date. He made a copy which he took to his solicitor, Mr Kearnan, whose advice he sought on the proposal to increase the capital and thus, as he considered, reduce his interest, on the constitution of the provisional board of directors from which he had been omitted, and

on the demand of the company that he should hand over the moneys banked in the name of himself, Blake and others. The company's solicitor, Mr Waterhouse, prepared an agreement between the company, Blake and Carr for the adoption by the company of the Preliminary agreement between Carr and Blake and for its confirmation by Carr. According to Mr Waterhouse, he asked Carr on 25th May if he would pay over to the company the moneys representing the subscriptions banked in the joint names of himself, Blake and/two others and the execute the adoption agreement, a copy of which Mr Waterhouse handed to him to read. Carr demurred, saying that he would not do so without a letter saying that it was proper for him to hand over the moneys.

According to Peat, he had an interview with Carr on 26th May when he told him, as the fact was, that a working party had left that day for the mine. Peat went on to tell him of the proposal to increase capital. Carr, Peat says, claimed to be entitled to a third of the increase. Peat said that no one would get any of the shares except for money, but that they would not be issued until necessity arose and that Carr would be consulted before the new capital was used.

Carr denies this interview. It was followed however by a meeting on 31st May 1934, of which we have four accounts, Carr's, Peat's, Kearnan's and Waterhouse's. These accounts leave no doubt that the proposal to increase capital was discussed and that Peat insisted

that it should go on. The interview was the result of a letter dated 29th May 1934 from Mr.Waterhouse to Carr demanding the payment of the moneys to the Company and the execution of the adoption agreemant and threatening that, if Carr did not comply with the demands on the following day, a writ would be issued on behalf of the Company.

The four accounts of the meeting on 31st May 1934 have been much discussed in the course of the case. Whatever difficulties may be felt about less material matters I think that there can be no doubt that Waterhouse and Peat insisted upon the demands contained in the letter and that, Kearnan and Carr raised the questions of the constitution of the board of directors and of the increase in capital.

He probably received a temporizing answer to his desire to be included as a director. But to his inquiries about the increase of capital there cannot be any doubt that an uncompromising reply was given and that both he and Kearnan left the conference clearly understanding that Peat meant to go on with the proposal and to increase the capital of the company to £5,000. It seems probable that Carr's concern was that he should receive a proportion of the increase as vendor's shares and that his objection was not to increasing the capital. Both Waterhouse and Peat say that Peat referred to his previous assurance to Carr, namely that said to have been given on 29th May, and reassured him that none of the new shares would be issued without his consent. There is no reason to doubt Waterhouse's

evidence and there is some ground for supposing that Angas Parsons J. who tried the action, although he took a very adverse view of Peat, con_sidered that such an assurance was given. The conference ended somewhat inconclusively, but next day Mr Kearnan telephoned to Mr Waterhouse, saying that during the day Carr would transfer the monies to the company and this he did. Either on 5th or 6th June Mr Kiernan telpphoned again to Mr Waterhouse. The latter's diary entries give two telephone conversations on 6th June, at the first of which Mr Kearnan said that Carr would execute the agreement provided that his shares were allotted without delay and, at the second, that Carr would execute the agreement that day provided that Waterhouse gave him a

letter undertaking to allot the shares.

Mr Kearnan's diary narrates under date 5th June that he conferred with Waterhouse by telephone and reported that in all probability he thought the matter would be settled and that he desired a letter setting out Waterhouse's requirements.

It is not of much importance which account is right, but it may be conjectured that Mr Kearnan has made one entry of ~~his~~ two telephone conversations.

The result was that Waterhouse, after consulting Peat over the telephone, wrote the letter which is said to contain the false and fraudulent representation.

None of the increased capital was ever issued. But the complaint of Carr is that he was induced to execute the adoption agreement and the request to issue the gold leases in the name of the company by the representation that the hundred shares to be issued to him were such as the preliminary agreement set out, namely shares in a capital of £1,500.

Neither he nor Mr Kearnan made any inquiry as to the fate of the resolution which, as they were aware, was to be proposed on the afternoon of 5th June and this notwithstanding that on 31st May Peat had expressed his determination to go on with the increase of capital. If some sort of assurance was given to Carr, as I think it was, that no further shares would be issued without his assent, the

failure on the part of Carr to inquire whether the resolution was passed is not difficult to understand. But,in any case, I do not think that,having regard to what had taken place,Waterhouse's letter of 6th June could reasonably have conveyed either to Kearnan or to Carr that the capital had not been increased or that the resolution had not been passed. It is,I think, quite clear that the letter was not written with the intention of leading either of them to believe that no increase of capital had been made or was in process of being made. The writer,Waterhouse,says that he did not ask Peat whether the resolution had been passed,but he knew that it had been pending. Peat admits the letter was written on his express

instructions. As it was written on his or his company's behalf and with his authority,his vicarious responsibility for any wrong thereby done is clear. But,as Mr Waterhouse's evidence proves,the authority was given by telephone and Peat did not see the terms of the letter. Waterhouse told Peat over the telephone that Kiernan had said that Carr was now prepared to sign the agreement,provided he got his shares immediately and asked when a directors' meeting could be held. Upon Peat replying - "at any time", Waterhouse said that the document must first be signed and lodged. Peat then said that he might tell Kearnan that Carr would have his shares within 24 hours of signing the agreement. Waterhouse says that he rang up Kearnan and told him that this was what Peat said and that Kearnan

replied " that if he would give a letter to that effect Carr would " sign the agreement that day. "

Everything points to the correctness of this version of the transaction; at all events, it is certainly not negatived. It would, I think, be going a very long way indeed to hold that Peat entertained any fraudulent intention, or indeed that he was ever conscious that any statement might be made susceptible of a construction inconsistent with the fact that the resolution had been passed on the previous day. No one suggests that Waterhouse, who wrote the letter, had any intention to deceive. Even if it be supposed that the letter contained a statement which, although made innocently by Waterhouse, was contrary to facts known to Peat, it is impossible to

make against Peat a case of deceit on the artificial grounds illustrated by London County Freehold & Leasehold Co. v Berkeley Property & Investment Co. 1936 155 L.T. 190 ; 1936 2 All E. 1039. For the principal on behalf of which Waterhouse wrote the letter as solicitor was not Peat but the company.

A contention has been made on the part of the defendants that an increase of nominal capital,and even its issue,involved no breach of the terms of the preliminary agreement. But this contention need not be considered. We are concerned with the making of a representation and its consequences.

In the circumstances in which the letter containing the alleged misrepresentation was written,I find it difficult to

believe that it was either intended or understood to mean that no increase of capital had been made or embarked upon by the passing of a resolution. Independently of the interpretation I have adopted of the letter,I think that the plaintiff's proof of the element of inducement entirely fails. Before ever the letter was received he had capitulated to the demands of Waterhouse and Peat and through Kearnan had communicated to them his intention of signing the document. He had stipulated only for an undertaking that his shares would be allotted. As Carr knew, the meeting was to have been held late in the afternoon of 5th June and,unless some unforeseen event occurred,the resolution would have been

passed. I am inclined to think that the real cause of Carr's making the allegation that he had been misled into the belief that the company's nominal capital remained the same is to be found in the form of scrip certificate which he received for his shares. This certificate, which was dated 8th June, was upon a printed form bearing the statement " Capital £1,500 in 300 shares of £5. each ". It was signed by Peat as director and by the secretary.

The plaintiff's counsel not unnaturally relied strongly upon this document as confirming the general view that it was Peat's intention to deceive Carr in relation to the increase of capital. The resolution had not at that date been registered and the explanation of Peat and of the secretary is that they believed that

the increase of capital had not become effective. A new scrip book showing the increase was printed,but when exactly does not appear. Carr transferred one share to a relative with whom he lived and on 27th June 1934 a scrip certificate in the new form was sent to the transferee. The latter then wrote to the secretary stating that it was not in accordance with the certificate expected. He referred to Carr's certificate and said :- " If you will look up that certificat " you will see that it is issued in a company of 300 shares at £5 " a share. Trusting you will adjust this matter at your earliest. " Am enclosing the certificate you sent for correction. " There is strong reason for supposing that Carr wrote this letter and it is not denied that he was cognisant of it. According to Carr,it was

at this time that he first discovered that the capital had been increased. The letter suggests to me that he was taking advantage of the form of scrip certificate ; not that he was the indignant victim of a fraud which he had just discovered. At a later stage he put his case on the ground that he had been misled by the scrip certificate into signing the documents, overlooking the order of events.

In my opinion a Court would not be justified in finding that any of the elements of representation, intention to induce, inducement, or fraudulent intention or knowledge was established.

I am further of opinion that the plaintiff fails on the issue of damages. The contention that the allotment to him of the shares was a nullity

appears to me to be ill founded. The case is not one of essential error on his part rendering his apparent assent to becoming a shareholder unreal. The identity of the company remained unchanged and,even if he were under a mistake induced by misrepresentation as to the nominal amount of its capital,this at best made his agreement of membership voidable,not void. The number of shares for which he stipulated of £5. each was allotted to or at the direction of the plaintiff Carr in exchange for his interest in the gold leases. The measure of damages in deceit is the difference between the value of that with which the plaintiff parted,on the one hand,and,on the other hand, the value of that which he received in exchange. There

is nothing to show that the value of the shares was below the value of his interest in the mine. When he entered into the Preliminary Agreement,he thought the consideration adequate. The mere passing of the resolution could not diminish the value of the shares. No greater number of shares was ever issued than was originally contemplated. His actual proportionate interest in the company was not reduced. It was suggested that his object was to maintain a present and future control of the company. It was not shown how that object was reflected in present money values. But,in any case, by immediately transferring shares he acted in a way inconsistent with the alleged purpose. Moreover,as none of the new capital was issued,it is difficult to see how his control was affected by the

resolution for increasing capital.

As against the company,the plaintiff sought rescission. But, owing to his parting with his shares,this remedy seems in any case out of the question. Further,the gold leases have been forfeited and no remedy against the company has any practical value.

In my opinion the appeal should be dismissed with costs.

CARR -V- WESTWARD HO GOLD DEVELOPMENT NO LIABILITY

and

PEAT

Judgment McTiernan J.

In my opinion, the appeal should be dismissed.

The action was brought for recission of the transfer by the appellant to the respondent Company of the gold leases which it had been formed to work and for damages for deceit. At first the action was limited to the claim against the Company for recission, but afterwards the respondent Peat was joined as a defendant, as it appeared that a judgment against him for damages would be likely to be more fruitful than a judgment against the Company. The action was the result of a clash between the appellant's interests as prospector and the respondent' Peat's interest as principal shareholder in the Company. The mining venture which the Company was formed to undertake failed and its shares became valueless. The appellant succeeded against both respondents, but the judgment was reversed on appeal to the Full Court. The principal object of this appeal is to restore the judgment for £260 against the respondent Peat.

The appellant founded his claim against each respondent on the same allegation. He alleged that the letter to his solicitor dated June 6, 1934, from the Company's solicitors, which was sent on the express instructions of the respondent Peat, its chairman of directors, contained a false and fraudulent representation which, as pleaded in the amended statement of claim, was that the respondent could and would allot and issue to the appellant the vendor's shares "as set out in the preliminary agreement". The first step in the proof of the appellant's case against each respondent was to establish either the substantial falsity of the

representation alleged or that a false representation substantially to the same effect was contained in the letter. The appellant stresses the phrase in the letter, "as set out in the preliminary agreement", as a wholly false suggestion that the capital of the Company then consisted of 300 shares of five pounds each and that the consideration which the appellant would receive for his gold leases was 100 of those shares.

The question arises whether the letter does, according to its natural and reasonable meaning, make such a representation. The court will not say that a false representation is made when the representee is deceived, not by the words of the alleged representation, but really by his construction of them. The whole of the letter must be considered in the light of the circumstances. The circumstances are explicitly referred to in the letter itself. The letter begins with the expression of a wish by the writers to confirm their telephone conversation with the appellant's solicitor that, if the appellant signed the adoption agreement whereby the respondent Company adopted the preliminary agreement between the appellant and Blake and the memorandum of request for the Mines Department to issue gold leases in the name of the respondent Company, "the Company", to quote the language of the letter, "will within twenty-four hours thereafter accept and issue the vendor's shares as set out in the preliminary agreement". It is clear upon the language of the letter that the solicitors were intending to confirm a promise which they made verbally in the course of the conversation referred to. That conversation was held after a violent disagreement between the appellant and the respondent Peat about the proposal to increase the capital of the Company, and it was well known to the appellant, his solicitor and all parties that Peat was determined to disregard the appellant's objection to the proposal of increasing the capital. Nobody suggests that at the con-

versation referred to any representation was made to the appellant that the capital of the Company would not be increased. The promise which the letter confirms was clearly a promise to allot and issue the vendor's shares mentioned in the agreement in a Company in respect of which there was a proposal on foot th increase its capital. It is only the last sentence of the letter which states any fact that was not the subject of the conversation which the letter is expressed to confirm. The last sentence is in these terms: "The documents are now ready for execution and the above statement is made on the definite understanding that settlement will be effected forthwith." That statement is the promise, already made in the telephone conversation, to allot and issue the vendor's shares "as set out in the preliminary agreement" within twenty-four hours after the appellant had executed the documents.

These being the circumstances, it is a strained and unnatural construction to read the words, "as set out on the preliminary agreement", as a representation that the capital of the Company had not been increased. When the solicitor read those words in the letter he could not reasonably understand that they expressed or implied anything more than they would have done if used in the course of the telephone conversation. It is certain that in that context they could not express or imply that the capital of the Company would not be increased. The necessity for holding the conversation about settlement was not to reach a compromise on the proposal to increase the capital, but to settle the matter with full acknowledgment of the fact that the respondent Peat would not surrender to the appellant's opposition to the proposed increase. The preliminary agreement provided that the appellant would "on receiving the scrip for the said one hundred shares" execute the documents mentioned in the letter. The intention of the letter was to confirm in writing the verbal agreement to substitute

for this condition one that the respondent Company would allot and issue the vendor's shares as set out in the preliminary agreementwithin twenty-four hours after the execution of the documents. There is no foundation for the accusation upon which the appellant's case rests that the sending of the letter was a trick to deceive the appellant into believing that the proposal to increase the capital had been abandoned or defeated.