

1988

Herman Hertz v. Nordic Limited, Inc. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Keith Biesinger; Attorney for Respondent.

David R. King; Kruse, Landa, and Maycock; Attorney for Appellants.

Recommended Citation

Brief of Appellant, *Herman Hertz v. Nordic Limited, Inc.*, No. 880086.00 (Utah Supreme Court, 1988).
https://digitalcommons.law.byu.edu/byu_sc1/1982

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH
DOCUMENT
KFU

50

.A10

DOCKET NO.

880086-CA

IN THE SUPREME COURT
OF THE STATE OF UTAH

HERMAN HERTZ,	:	
as Trustee for the	:	
SHERRY TRUST,	:	
a California Trust, and	:	District Court No. C-83-7988
CAL FUND, LTD.,	:	
a California unincorporated	:	
association,	:	
	:	13-13
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
NORDIC LIMITED, INC.,	:	Supreme Court No. 860540
a Utah corporation,	:	
	:	
Defendant/Respondent.	:	

88-0086-CA

BRIEF SUBMITTED ON BEHALF OF
THE APPELLANTS

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY
HONORABLE DAVID B. DEE, JUDGE

David R. King
KRUSE, LANDA & MAYCOCK
A Professional Corporation
Sixth Floor, Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Attorney for
Plaintiffs/Appellants

Keith Biesinger
1014 East 900 South
Salt Lake City, Utah 84105
Attorney for Defendant/Respondent

FILED
FEB 24 1987

IN THE SUPREME COURT
OF THE STATE OF UTAH

HERMAN HERTZ, :
as Trustee for the :
SHERRY TRUST, :
a California Trust, and : District Court No. C-83-7988
CAL FUND, LTD., :
a California unincorporated :
association, :
 :
Plaintiffs/Appellants, :
 :
vs. :
 :
NORDIC LIMITED, INC., : Supreme Court No. 860540
a Utah corporation, :
 :
Defendant/Respondent. :
 :

BRIEF SUBMITTED ON BEHALF OF
THE APPELLANTS

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY
HONORABLE DAVID B. DEE, JUDGE

David R. King
KRUSE, LANDA & MAYCOCK
A Professional Corporation
Sixth Floor, Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Attorney for
Plaintiffs/Appellants

Keith Biesinger
1014 East 900 South
Salt Lake City, Utah 84105
Attorney for Defendant/Respondent

TABLE OF CONTENTS

ITEM	PAGE
TABLE OF CONTENTS	-i-
TABLE OF AUTHORITIES	-ii-
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	5
A. The First June 29 Agreement	5
B. The Second June 29 Agreement	10
SUMMARY OF ARGUMENTS	12
A. The First June 29 Agreement	12
B. The Second June 29 Agreement	13
ARGUMENT	14
A. The First June 29 Agreement	14
(1) Doctrine of Estoppel	14
(2) The Doctrine of Waiver	20
B. The Second June 29 Agreement	22
CONCLUSION	24
ADDENDUM	27
Memorandum of Understanding (6/29/82)	28
Agreement (6/29/82)	30
Memorandum Decision (1/15/86)	31
Findings of Fact and Conclusions of Law	34
Judgment	42

TABLE OF AUTHORITIES

<u>AUTHORITIES CITED</u>	<u>PAGE</u>
<u>American Savings & Loan Association v. Blomquist,</u> Utah, 445 P2d 1 (1968)	20
<u>Bjork v. April Industries, Inc.,</u> Utah, 547 P2d 219 (1976)	20
<u>Blackhurst v. Transamerica Insurance Company,</u> Utah, 699 P.2d 688 (1985)	18
<u>Cannon v. Stevens School of Business, Inc.,</u> Utah, 560 P2d 1383 (1977)	22
<u>Corporation Nine v. Taylor,</u> Utah, 513 P.2d 417 (1973)	18
<u>Kahili, Inc. v. Yamamoto,</u> Hawaii, 506 P2d 9 (1973)	23
<u>Morgan v. Board of State Lands,</u> Utah, 549 P.2d 695 (1976)	17
<u>Navajo Freight Lines, Inc. v. Moore,</u> Colorado, 463 P2d 460 (1970)	23
<u>Phoenix Insurance Co. v. Heath,</u> Utah, 61 P2d 308 (1936)	20

IN THE SUPREME COURT
OF THE STATE OF UTAH

HERMAN HERTZ,	:	
as Trustee for the	:	
SHERRY TRUST,	:	
a California Trust, and	:	District Court No. C-83-7988
CAL FUND, LTD.,	:	
a California unincorporated	:	
association,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
NORDIC LIMITED, INC.,	:	Supreme Court No. 860540
a Utah corporation,	:	
	:	
Defendant/Respondent.	:	
	:	

ON APPEAL OF A FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH

BRIEF SUBMITTED ON BEHALF OF
THE APPELLANTS

STATEMENT OF ISSUES

1. Whether the trial court erred in not finding that the acts of respondent Nordic Limited, Inc. (hereinafter referred to as "Nordic"), in sending 200,000 shares of Nordic common stock to Seymore Hertz constituted a waiver by Nordic of the escrow provision of the June 29, 1982, Memorandum of Understanding entered into between appellant Cal Fund, Ltd.

(hereinafter referred to as "Cal Fund"), Nordic, and others (hereinafter referred to as the "First June 29 Agreement").

2. Whether the trial court erred in not finding that Nordic is estopped from denying that Seymore Hertz was its properly appointed escrow agent under the First June 29 Agreement based upon the fact that Nordic delivered the 200,000 shares of Nordic common stock to Seymore Hertz thus causing Cal Fund to believe that Nordic was appointing Seymore Hertz to act as the escrow agent for the parties.

3. Whether the trial court erred in not finding that the abandonment by Nordic of certain oil and gas leases in Casey and Adair Counties, Kentucky, thus making its own performance impossible under the Agreement dated June 29, 1982 between appellant Sherry Trust and Nordic (hereinafter referred to as the "Second June 29 Agreement") constituted a breach of the Second June 29 Agreement with the Sherry Trust.

4. Whether the trial court erred in not finding that Cal Fund is entitled to delivery of 1,228,500 additional shares of Nordic pursuant to the terms of the First June 29 Agreement.

5. Whether the trial court erred in not finding that the Sherry Trust is entitled to full payment of the \$58,500 owed by Nordic to Sherry Trust under the Second June 29 Agreement together with interest at the statutory rate from the date Nordic forfeited the oil and gas leases in Casey and Adair Counties, Kentucky.

STATEMENT OF THE CASE

This case involves the breach by Nordic of two contracts. Both contracts were entered into on June 29, 1982. The first contract (the First June 29 Agreement) was entered into between, among other parties, Nordic and Cal Fund; and the second contract (the Second June 29 Agreement) was entered into between Nordic and Sherry Trust. The First June 29 Agreement provided, among other things, that a portion of the consideration paid by Nordic under the contract, 200,000 shares of Nordic common stock, would be placed in escrow for a period of six months and if at the end of said six-month period the shares of Nordic common stock did not have a market value of at least \$400,000, that additional shares of Nordic common stock would be issued to Cal Fund to equal \$400,000. The First June 29 Agreement further gave Cal Fund the right to remove the 200,000 shares of Nordic common stock from escrow in which event it would waive any right to receive additional shares of Nordic common stock under the agreement. The shares in fact were never placed in escrow but instead were sent to Seymore Hertz, a representative of Cal Fund. Cal Fund's contention is that the facts and circumstances surrounding the delivery of the 200,000 shares of Nordic common stock to Seymore Hertz are such that either Nordic should be estopped from denying that Seymore Hertz was its properly constituted escrow agent or that Nordic waived the escrow requirement under the First June 29 Agreement. Cal Fund's further contention is that Nordic's later refusal to deliver 1,228,571 additional shares of Nordic common stock

(which shares together with the 200,000 shares previously delivered to Seymore Hertz had a market value of \$400,000 as of a date six months after the 200,000 shares were delivered to Seymore Hertz) constituted a breach of contract.

The Second June 29 Agreement, as amended, provided, among other things, for the payment of certain funds to Sherry Trust. Sherry Trust was to receive a portion of those funds at the closing of the agreement, and the balance was to be paid to Sherry Trust out of 25% of the net proceeds received by Nordic from oil sold in Casey and/or Adair Counties, Kentucky, until such time as Sherry Trust had received a total of \$58,500. Sherry Trust was not paid any funds by Nordic under the Second June 29 Agreement and contends that Nordic's abandonment of certain wells in Casey and Adair Counties, Kentucky, thus making its own performance under the Second June 29 Agreement impossible, constituted a breach of contract. Sherry Trust further contends that due to Nordic's breach of contract, it is entitled to damages of \$58,500 together with pre-judgment interest at the statutory rate of 10%.

On November 14, 1983, Cal Fund and Sherry Trust filed a Complaint against Nordic in the Third Judicial District Court, Salt Lake County, State of Utah. The case came on for trial before the Honorable David B. Dee on November 18 and 21, 1985. A memorandum decision was subsequently entered on January 15, 1986, finding that Sherry Trust was entitled to judgment against Nordic for 25% of the royalty income actually obtained from producing wells in the amount of \$4,625; that Cal Fund was not

entitled to obtain from Nordic the issuance of additional shares of Nordic common stock; and that each party should bear its own attorney's fees and costs. Counsel for Nordic was requested to prepare appropriate findings of fact, conclusions of law, and an order. Findings of Fact and Conclusions of Law and a Judgment were entered by the Court on September 9, 1986. Thereafter, Herman Hertz, as trustee for Sherry Trust and Cal Fund, filed a Joint Notice of Appeal on October 7, 1986.

STATEMENT OF FACTS

A. The First June 29 Agreement

On June 29, 1982, Seymore Hertz and Cal Fund entered into the First June 29 Agreement with Nordic and Jader, Inc. ("Jader"), an affiliate of Nordic. (Ex. 1.)¹ The First June 29 Agreement was one aspect of an overall effort on the part of Nordic to obtain clear title to oil and gas leases in Casey and Adair Counties, Kentucky. The First June 29 Agreement and Second June 29 Agreement were entered into in connection with the settlement of a lawsuit in United States District Court in Kentucky relating to ownership of the Casey and Adair Counties, Kentucky, oil and gas leases. (Exs. 1, 2, and 3; Tr. pp. 207 and 208.) It was the understanding of the parties that the

¹ References to the exhibits entered into evidence in this case are cited as "Ex. ____." References to the transcript of proceedings in this case are cited as "Tr. pp. ____."

transaction reflected in the First June 29 Agreement would be closed upon settlement of the Kentucky federal litigation at which time the agreement of the parties would be effected, including the execution and delivery of documents necessary for the payment of the consideration called for in the agreement. (Exs. 1, 5, and 8; Tr. pp. 207 and 208.)

Pursuant to the First June 29 Agreement, the consideration paid to Cal Fund in exchange for Cal Fund's conveyance of all of its right, title, and interest to the oil and gas leases in Casey and Adair Counties, Kentucky, was 200,000 shares of Nordic common stock. The agreement further provided the following:

The parties hereto agree that the 200,000 shares of Nordic, Inc. to be issued to Cal Fund Ltd. shall be placed in escrow for a period not to exceed six (6) months. In the event the market value of said shares is less than \$400,000 at the expiration of the six month period, Nordic agrees to issue additional shares to Cal Fund Ltd. to equal \$400,000. (Market value defined as the average bid/ask price of the securities during the five trading days prior to the expiration of the six month period.) Cal Fund Ltd. may at its option remove the 200,000 shares of Nordic Limited, Inc. from escrow as full payment herein. (Ex. 1.)

The First June 29 Agreement, including the above-quoted escrow provision, was prepared by Howard Oveson, then secretary of Nordic, on Nordic's behalf. Howard Oveson also executed the First June 29 Agreement on behalf of Nordic in his capacity as secretary of the corporation. (Ex. 1; Tr. pp. 59, 60, and 66.)

On June 29, Seymore Hertz traveled to the offices of Nordic in Salt Lake City, Utah, to execute the First June 29 Agreement. (Ex. 1; Tr. pp. 153 and 154.) Seymore Hertz

executed the Agreement both individually and on behalf of Cal Fund. While Mr. Hertz was at the offices of Nordic, he met David Ross, who identified himself as an attorney for Nordic. Seymore Hertz did not have a clear understanding of how the above-referenced escrow provision of the First June 29 Agreement was to be implemented and therefore took the opportunity to discuss the matter with David Ross. David Ross informed Seymore Hertz that the escrow provision of the First June 29 Agreement would be implemented by sending the 200,000 shares of Nordic common stock issued in the name of Cal Fund to Seymore Hertz. (Tr. pp. 154 and 155.)

Subsequent to the execution of the First June 29 Agreement, negotiations for the dismissal of the federal lawsuit in Kentucky continued. Seymore Hertz had retained Rodney Sweet to represent him in these negotiations. At the point in time when settlement was imminent, Rodney Sweet prepared a July 29, 1982, letter to John Worthen which reviewed the responsibilities of the parties with respect to execution of documents pursuant to the settlement, including documents to be executed and delivered pursuant to the First June 29 Agreement. (Exs. 5, 6, and 8.) It is apparent from Rodney Sweet's letter that he, too, was uncertain as to how Nordic intended to implement the escrow provision of the First June 29 Agreement. His letter states the following:

. . . You[r] are requested to deliver to met by Monday, August 9, 1982, to hold until such time as the papers are filed with the court and the settlement consummated, the following items:

-
6. Certificate for 200,000 shares of Nordic Limited, Inc. investment issued to Cal Fund Limited. (My documents do not indicate whether or not there is still a requirement that these shares be placed in escrow for a period of not to exceed six months, and I would appreciate further instructions from you as to this.)

Although John Worthern does not appear to have made a specific response to the letter from Rodney Sweet, Nordic did in fact respond. Nordic's response was in the form of the issuance of shares certificate No. 2073 in the amount of 200,000 shares to Cal Fund dated August 10, 1982. (Ex. 21.) These shares were mailed by Nordic directly to Seymore Hertz. (Tr. pp. 155-157.) The transfer records for Nordic reflect that this shares certificate was sent to Howard Oveson at Nordic. (Ex. 10.) Seymore Hertz testified that the shares were mailed directly to him in a Nordic envelope. (Tr. pp. 156-157.)

Nordic then confirmed to Seymore Hertz by mailgram dated November 15, 1982, that it had elected to treat Seymore Hertz as the escrow agent to hold the Nordic shares by the following statement: "This is to verify that the Cal Fund shares for their interest in the Jader Kentucky properties were issued on August 10, 1982 and placed in escrow." (Ex. 10.)

After the expiration of six months from the issuance of the 200,000 shares of Nordic common stock to Cal Fund, Seymore Hertz began contacting Nordic concerning the issuance of additional shares to Cal Fund pursuant to the escrow provision. (Tr. p. 58.) Robert Stenquist and Howard Oveson calculated the number of additional shares that was due and owing to Cal Fund

based upon the National Association of Securities Dealers, Inc. Automated Quotation System statistics for the month ending February 28, 1983. (Ex. 14; Tr. pp. 188-191.) The correspondence addressed by Nordic to Seymore Hertz reflects the understanding of Robert Stenquist, who at that time was secretary/treasurer of Nordic, that Nordic had an obligation to issue additional shares to Cal Fund under the terms of the First June 29 Agreement. This appears to have been Mr. Stenquist's understanding through March 15, 1983. (Exs. 12 and 13.) Inasmuch as Robert Stenquist and Howard Oveson together made the calculation of the additional shares due and owing to Cal Fund, it appears that Howard Oveson also understood that Nordic had an obligation to issue additional shares of Nordic common stock to Cal Fund pursuant to the terms of the First June 29 Agreement which he had helped to negotiate and had drafted on behalf of Nordic. (Tr. pp. 189-191 and 215-218.) The correspondence addressed by Seymore Hertz to Robert Stenquist, David Ross (who was the president of Nordic in 1983), and Howard Oveson shows that through May 12, 1983, all persons affiliated with Nordic with whom Seymore Hertz had dealt were taking the position that the 200,000 shares were properly held in escrow by Seymore Hertz. (Exs. 15-18; Tr. p. 164.) It was not until David Ross' August 30, 1983, letter to Seymore Hertz that Nordic first took the position that Cal Fund had elected to remove the 200,000 shares from escrow thus relieving Nordic of its obligation to deliver additional shares. (Ex. 19; Tr. p. 164.)

B. The Second June 29 Agreement

The Second June 29 Agreement was also one aspect of Nordic's attempt to obtain full right, title, and interest to the Casey and Adair Counties, Kentucky, oil and gas leases. In the Second June 29 Agreement, Nordic agreed to pay Sherry Trust an amount of \$75,000 for its role as a finder in the transaction between Seymore Hertz, Cal Fund, Nordic, and Jader. (Exs. 1, 2, and 3.) The agreement provided that Nordic would pay Sherry Trust the sum of \$25,000 at the time of closing of the First June 29 Agreement and provided for the payment of the balance as follows:

2. The balance of \$50,000 shall be paid as follows:

- a. Nordic shall instruct South Kentucky Purchasing to pay to Sherry Trust 25% of the net proceeds received by Jader or Nordic from oil sold in Casey and/or Adair County, Kentucky, until such time as Sherry Trust has received a total of \$50,000. Said payments shall commence 60 days from the date of closing of the subject Memorandum of Understanding, which closing is set for July 15, 1982. (Ex. 3.)

The Second June 29 Agreement was later modified to change the above-mentioned balance owing to Sherry Trust from \$50,000 to \$58,500. (Ex. 4; Tr. pp. 307 and 308.) The Second June 29 Agreement further states:

3. In the event Nordic should sale [sell] either or both of the above-mentioned properties, i.e. Casey County-Adair County, Kentucky, then and in that event, Sherry Trust shall receive the entire sum then due and owing from Nordic, and said sum shall be paid directly to Sherry Trust at the time of closing any such sale.

After closing of the First and Second June 29 Agreements and settlement of the Kentucky federal court litigation, Nordic

appears to have obtained full right, title, and interest to the Casey and Adair Counties, Kentucky, oil and gas leases that were the subject of the First and Second June 29 Agreements. (Exs. 1, 2, 3, 5, 8, 9, and 20.) The evidence presented at the trial shows that there were in fact revenues generated by the Casey and Adair Counties, Kentucky, oil wells. (Tr. p. 197.) These revenues appear to have been in the amount of approximately \$18,500. Nordic, however, claims that these oil production revenues were in some manner tied up in litigation concerning the Casey and Adair Counties, Kentucky, oil leases and were never paid to Nordic. (Tr. p. 197.) Nordic therefore claims that it was unable to make payment to Sherry Trust of 25% of the these oil production revenues.

It is clear, however, from the testimony of David Ross (Tr. pp. 247-250) and the Form 10-K annual report of Nordic filed with the United States Securities and Exchange Commission (Ex. 20) that Nordic abandoned and forfeited all of the oil and gas leases in Casey and Adair Counties, Kentucky, sometime in 1983. The forfeiture of the oil and gas leases made its performance under the Second June 29 Agreement impossible. In fact, Nordic never obtained payment of the approximately \$18,500 in oil production proceeds and has never made any payment to Sherry Trust on the \$58,500 balance owing to Sherry Trust under the Second June 29 Agreement. (Tr. p. 197.) There is absolutely no explanation offered by Nordic for the forfeiture of the oil and gas leases, and based upon the revenues from oil

and gas wells located on these leases, it is clear that there were producing oil and gas wells located on the leases.

SUMMARY OF ARGUMENTS

A. The First June 29 Agreement

Pursuant to the First June 29 Agreement, Nordic agreed, in substance, to guarantee the value of the 200,000 shares of Nordic common stock paid to Cal Fund for a period of six months. This guarantee took the form of a provision that the shares be placed in escrow for a period of six months at which time additional shares would be delivered to Cal Fund if the market value for Nordic common stock had gone down. The provision also allowed Cal Fund to remove the shares from escrow if at any point it wished to waive the guarantee provision in which event Nordic would be relieved of any obligation to issue additional shares. It is Cal Fund's contention that it is entitled to enforcement of this provision and is therefore entitled to receive an additional 1,222,222 shares of Nordic common stock.

The 200,000 shares of Nordic common stock were never in fact placed in escrow pursuant to the terms of the First June 29 Agreement. The facts show that Nordic caused Cal Fund to believe that Seymore Hertz was to act as escrow agent to hold the 200,000 shares of Nordic common stock registered in the name of Cal Fund and in fact sent the shares to Seymore Hertz on August 10, 1982. Based upon its actions, Nordic is estopped from denying that Seymore Hertz was a proper escrow agent and

that the 200,000 shares of Nordic common stock registered in the name of Cal Fund were properly deposited into escrow.

In the alternative, Cal Fund contends that Nordic waived compliance with the provision that the 200,000 shares of Nordic common stock be placed in escrow. Nordic prepared the First June 29 Agreement and assumed responsibility for issuing the 200,000 shares of Nordic common stock payable to Cal Fund thereunder. Although counsel for Seymore Hertz made inquiry of John Worthen, a Nordic representative who participated in the negotiations for the First June 29 Agreement as to the method of implementing the escrow provision, Nordic responded by simply mailing the 200,000 shares certificate to Seymore Hertz. The delivery by Nordic of the 200,000 shares to Seymore Hertz was with full awareness of the escrow provision and thus constituted a waiver of that provision.

B. The Second June 29 Agreement

After obtaining full right, title, and interest to the Casey and Adair Counties, Kentucky, oil and gas leases, Nordic subsequently forfeited those leases. By forfeiting the leases, Nordic made its own performance under the Second June 29 Agreement impossible. Sherry Trust contends that a party to a contract cannot escape its obligations under a contract by causing its own performance to become impossible. Therefore, Nordic's forfeiture of the oil and gas leases from which production proceeds were to be derived to make payment to Sherry Trust of the balance due and owing under the contract

constituted a breach of the Second June 29 Agreement entitling Sherry Trust to damages in the amount of \$58,500 together with pre-judgment interest at the statutory rate of 10% per annum.

ARGUMENT

A. The First June 29 Agreement

(1) Doctrine of Estoppel

Pursuant to the First June 29 Agreement, Nordic agreed to pay Cal Fund 200,000 shares of Nordic common stock in exchange for Cal Fund's assignment of all of its right, title, and interest to certain oil and gas leases in Casey and Adair Counties, Kentucky. In addition to issuing 200,000 shares of Nordic in the name of Cal Fund, Nordic, in substance, agreed to guarantee the value of those shares for a period of six months. That guarantee took the form of an escrow provision in the First June 29 Agreement. The escrow provision, in substance, required that the 200,000 shares of Nordic common stock be placed in escrow for a period not to exceed six months; and in the event that the market value of the shares was less than \$400,000 at the expiration of the six-month period, Nordic would issue additional shares to Cal Fund to equal \$400,000. In this manner, Nordic was guaranteeing the value of the 200,000 Nordic shares for a six-month period.

The 200,000 shares of Nordic registered in the name of Cal Fund were, according to the terms of the investment letter executed by Cal Fund, restricted with respect to Cal Fund's ability to sell those shares. (Ex. 7.) Cal Fund represented in

the investment letter that it understood that it would have a twoyear holding period before it could resell the shares pursuant to Rule 144 under the Securities Act of 1933. This restriction made it improbable that Cal Fund would find an immediate economic use for the shares once they were issued. However, inasmuch as Cal Fund might find a manner in which to dispose of the shares for value or otherwise utilize the shares in an economic fashion, the agreement allowed Cal Fund to withdraw the shares from escrow. If, however, Cal Fund elected to withdraw the shares from escrow, such election would release Nordic from any obligation to deliver additional shares of Nordic common stock to Cal Fund pursuant to the First June 29 Agreement. It is obvious that Cal Fund would not voluntarily elect to release Nordic from its six-month guarantee of the value of the Nordic shares unless it had a specific economic incentive for doing so. There is no evidence in the record that any such opportunity was ever available to Cal Fund.

The facts show that Seymore Hertz was not clear as to how the escrow provision would be implemented at the time that he traveled to Salt Lake City, Utah, to execute the First June 29 Agreement on behalf of himself personally and Cal Fund. He therefore sought specific clarification on that issue while he was in Salt Lake City. Seymore Hertz testified that the clarification provided to him by David Ross, was to the effect that the Cal Fund shares would be delivered to Seymore Hertz to hold on behalf of Cal Fund. Seymore Hertz understood this to mean that he was to act as escrow agent.

Later, on July 29, 1982, just prior to the closing of the transactions reflected in the First June 29 Agreement, Rodney Sweet, acting as counsel for Seymore Hertz, wrote to John Worthen who had represented Nordic in the negotiation of the First June 29 Agreement to specify his (Rodney Sweet's) understanding of the documents that were to be executed and delivered at the closing of the First June 29 Agreement. In that letter, Rodney Sweet inquired on behalf of Seymore Hertz as to the manner in which the escrow provision was to be implemented. John Worthen does not appear to have responded to this letter. However, consistent with the representations made to Seymore Hertz at the June 29 execution of the First June 29 Agreement, the 200,000 shares of Nordic registered in the name of Cal Fund which were delivered by Nordic's transfer agent to Howard Oveson at Nordic, were in turn mailed directly by Nordic to Seymore Hertz. this was confirmation to Seymore Hertz that he was expected by Nordic to act as the escrow agent under the First June 29 Agreement.

By its acts, Nordic led Cal Fund to believe that the escrow provision of the First June 29 Agreement was complied with by delivering Cal Fund's Nordic shares to Seymore Hertz. Based upon these actions, Nordic is estopped from denying that Seymore Hertz was an appropriate escrow agent under the First June 29 Agreement or that delivery of the 200,000 shares of Nordic common stock to Seymore Hertz was in full compliance with the escrow provision of the First June 29 Agreement.

In Morgan v. Board of State Lands, Utah, 549 P.2d 695 at 697 (1976), this Court defined estoppel in the following manner:

Estoppel is a doctrine of equity proposed to rescue from loss a party who has, without fault, been deluded into a course of action by the wrong or neglect of another. The measure we apply to plaintiffs' claim of estoppel is an adaptation to this case of the standard heretofore approved by this Court: estoppel arises when a party (defendant Board) by his acts, representations, or admissions, or by his silence when he ought to speak, intentionally or through culpable negligence, induces another (plaintiffs) to believe certain facts to exist and that such other (plaintiffs) acting with reasonable prudence and diligence, relies and acts thereon so that he will suffer an injustice if the former (Land Board) is permitted to deny the existence of such facts. [Citations omitted.]

In the instant case, it appears that Nordic, through culpable negligence, induced Cal Fund to believe that the escrow provision of the First June 29 Agreement was properly complied with by the delivery of the 200,000 shares of Nordic common stock to Seymore Hertz. Seymore Hertz, Cal Fund's representative, exercised reasonable diligence under the circumstances in that he made specific inquiry as to how the escrow provision was to be fulfilled. Seymore Hertz testified that he was told that the escrow provision would be implemented by Nordic sending to Seymore Hertz the Nordic shares registered in the name of Cal Fund which he, Seymore Hertz, was to then hold on behalf of Cal Fund. At this point, Cal Fund would suffer an injustice if Nordic is permitted to deny that Seymore Hertz was a proper escrow agent, which fact it asserted to Cal Fund both verbally through its representative, David Ross, and by its actions.

The test for application of estoppel was set forth by this Court in Corporation Nine v. Taylor, Utah, 513 P.2d 417 (1973). The Court stated at page 420:

The determination of such an issue is not dependent upon the asserted subjective content of the mind of the person claiming he was misled. The test to be applied is an objective one as to what a reasonable and prudent person in the circumstances might conclude; and the burden of proof and persuasion as to the issue of estoppel is upon him who asserts it (Corporation Nine).

It is clear from the facts of this case that Seymore Hertz was both reasonable and prudent in relying on Nordic's representation that he (Seymore Hertz) would be the properly designated escrow agent under the escrow provision of the First June 29 Agreement. His reliance is justified in part by the fact that the representation was made represented to him by the attorney for Nordic. David Ross, the individual that Seymore Hertz testified represented himself to be the attorney for Nordic and with whom Seymore Hertz testified he discussed implementation of the escrow provision, denies this conversation. However, Seymore Hertz' testimony is borne out by Nordic's later actions in mailing the Nordic shares registered in the name of Cal Fund directly to Seymore Hertz after Seymore Hertz' lawyer, Rodney Sweet, also made specific inquiry as to the implementation of the escrow provision.

In Blackhurst v. Transamerica Insurance Company, Utah, 699 P.2d 688 (1985), this Court applied the doctrine of equitable estoppel to facts not too dissimilar to those in the instant case. In Blackhurst, the representative of Transamerica, Hess, knew that Mrs. Blackhurst, who was making a

claim on the insurance policy, was incompetent to negotiate on her own behalf. He also knew that no general guardian had been appointed for Mrs. Blackhurst. Hess nevertheless expressed no concern about dealing with Robert Blackhurst, Mrs. Blackhurst's son, and later Robert Blackhurst's attorney, Keith Nelson. Transamerica then tried to repudiate the agreement which was entered into on the basis that Robert Blackhurst was not the appointed guardian for his parents at the time of the settlement agreement. The Court, in holding the doctrine of equitable estoppel to be applicable in this case, stated at page 691:

. . . The elements of equitable estoppel are: 'conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct.' [Citations omitted.]

If the doctrine of estoppel is not applicable in this case, the intent of the parties to the First June 29 Agreement will not be effected. In the agreement, Cal Fund obtained a six-month guarantee of the value of the 200,000 shares of Nordic common stock which it received. The only reason for Cal Fund to take delivery of those shares would be if it had an immediate economic use for those shares which would justify relieving Nordic of the guarantee obligation. The evidence shows that Seymore Hertz has held those shares on behalf of Cal Fund up to the date of the trial. There is nothing in the record indicating they were sold, pledged, or otherwise utilized by Cal Fund in a manner to provide economic benefit. This corroborates the testimony of Seymore Hertz to the effect that he took delivery of these shares as Nordic's appointed escrow agent to

hold under the First June 29 Agreement. To allow Nordic to take advantage of such delivery to avoid its six-month guarantee of the value of the 200,000 shares would be completely contrary to the intent of the parties to the First June 29 Agreement.

(2) The Doctrine of Waiver

As an alternative to the doctrine of equitable estoppel, Cal Fund contends that the doctrine of waiver is equally applicable in this case. In American Savings & Loan Association v. Blomquist, Utah, 445 P.2d 1 (1968), this Court, citing Phoenix Insurance Co. v. Heath, Utah, 61 P.2d 308 (1936), defined the doctrine of waiver as follows:

. . . A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made although it may be express or implied.

(See also Bjork v. April Industries, Inc., Utah, 547 P.2d 219 (1976).) The escrow provision, being one of the terms of the First June 29 Agreement, constituted an aspect of the rights, benefits, and advantages obtained by Nordic pursuant to the escrow provision. The escrow provision was a method pursuant to which Nordic could be relieved of its six-month guarantee obligation. Relief from such guarantee under the provision depended upon the election of Cal Fund, but nonetheless, it was the mechanism pursuant to which Nordic could obtain the benefit of the six-month guarantee being excused. An alternative to such mechanism, of course, would be an unequivocal six-month guarantee. Nordic was fully aware of the escrow provision and

the benefit to be derived therefrom inasmuch as the agreement was prepared by its own representative, Howard Oveson.

The actions of Nordic with respect to the escrow provision demonstrate a knowing waiver of that provision. When Rodney Sweet contacted John Worthen, one of the individuals who negotiated the First June 29 Agreement on behalf of Nordic, to seek clarification concerning the implementation of the provision, neither John Worthen nor Nordic made any written response. On August 10, 1982, however, Nordic did respond to Rodney Sweet's inquiry by its actions. When Nordic's transfer agent issued the 200,000 shares certificate registered in the name of Cal Fund, Nordic mailed that certificate directly to Seymore Hertz. This action by Nordic constituted a clear waiver of the escrow provision contained in the First June 29 Agreement.

Application of the doctrine of waiver has the additional benefit of fostering the intent of the parties to the First June 29 Agreement. As previously stated, it is clear from the First June 29 Agreement that Nordic provided a six-month guarantee of the value of the 200,000 shares of Nordic common stock in the event that Cal Fund did not during that period take possession of the shares for a specific business purpose. It is equally clear that no such specific business purpose presented itself after Seymore Hertz took possession of the shares. Therefore, Nordic should not be relieved of its obligation to fulfill the six-month guarantee of the value of the Nordic

shares by delivering an additional 1,222,222 shares of Nordic common stock to Cal Fund.

B. The Second June 29 Agreement

The objective that Nordic was attempting to accomplish when it entered into the First and Second June 29 Agreements was to obtain full right, title, and interest to certain oil and gas leases in Casey and Adair Counties, Kentucky. The First and Second June 29 Agreements were part of a plan to settle a federal lawsuit in the state of Kentucky concerning title to the oil and gas leases, which settlement was accomplished in approximately September, 1982. Upon tentative settlement of the lawsuit in federal court in Kentucky, the appropriate documents called for under the First June 29 Agreement were executed and delivered, and subsequently Nordic controlled the Casey and Adair Counties, Kentucky, oil and gas leases.

The oil and gas leases did in fact contain productive oil wells from which production was obtained and sold. Approximately \$18,500 was obtained from the sale of production from the wells. Despite the fact that production was obtained, Nordic never did obtain delivery of the funds derived from production from the wells. In addition, Nordic eventually abandoned and forfeited all of the leases, including those from which production had been obtained. Nordic has offered no explanation whatsoever for this forfeiture.

Cannon v. Stevens School of Business, Inc., Utah, 560 P.2d 1383 (1977), involved a contract that provided for the

payment of funds to a party to the contract from a specific source, being the tuitions obtained from the operation of a school. The defendant later discontinued the operations of the school and was therefore not able to collect tuitions from which to pay the plaintiff. The Court held at page 1385:

Defendant would not be entitled to prevail even if its assertion of an implied condition precedent were accepted.

. . . 'Where, as here, the compensation agreed to be paid for services rendered is to be paid out of a fund to be collected by the party for whom such services were rendered, there is an implied obligation on the part of the promissor to exercise reasonable diligence to collect the fund from which the promisee may be compensated for such services; and, in default of the exercise of such diligence, payment may become due without the performance of the condition. [Citations] As stated by Professor Williston, it is principle of fundamental justice that if a promissor is himself the cause of the failure of performance of a condition upon which his own liability depends, he cannot take advantage of that failure. [citations]'

By its voluntary act, defendant placed performance of its obligations beyond its control, i.e. discontinuing the schools so it could not collect the tuitions, and pay the percentages to which plaintiffs were entitled.

The facts in Cannon are the same as those in the instant case except that Sherry Trust was to be paid a percentage of oil revenues as opposed to a percentage of tuitions collected. In the instant case as in Cannon, by forfeiting the oil and gas leases, Nordic discontinued the business which was to generate the revenues from which Sherry Trust was to be paid. (See also Kahili, Inc. v. Yamamoto, Hawaii, 506 P.2d 9 (1973); and Navajo Freight Lines, Inc. v. Moore, Colorado, 463 P.2d 460 (1970).)

The Second June 29 Agreement had a specific provision which required full payment to Sherry Trust in the event Nordic sold the oil and gas leases which were the source of revenue from which payment to Sherry Trust was to be made. Nordic had the ability to satisfy its obligation to Sherry Trust under the Second June 29 Agreement in either of two ways. It could either operate the properties, collect the revenues, and pay Sherry Trust its percentage of those revenues, or sell the properties and make payment to Sherry Trust from the proceeds of that sale. Instead, Nordic, for no apparent reason, forfeited the oil and gas leases. If payment to Sherry Trust was only to come from either one of those two sources, Nordic has an implied obligation to either proceed with the operation of properties or to sell those properties. By simply forfeiting the wells, thus making its own performance impossible, Nordic has breached its agreement with Sherry Trust. Sherry Trust is therefore entitled to damages in the amount of \$58,500 together with pre-judgment interest at the statutory rate of 10%.

CONCLUSION

Based upon the foregoing, the decision of the District Court should be reversed. Accordingly, Cal Fund is entitled to receive 1,222,222 additional shares of Nordic common stock pursuant to the First June 29 Agreement. In addition, Sherry Trust is entitled to payment of the balance of \$58,500 together

with pre-judgment interest at the statutory rate of 10% based upon Nordic's breach of the Second June 29 Agreement.

DATED this 20th day of February, 1987.

Respectfully submitted,

KRUSE, LANDA & MAYCOCK
A Professional Corporation
Attorneys for Plaintiffs/
Appellants

By: /s/ David R. King
David R. King

Sixth Floor, Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
Telephone: (801) 531-7090

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four (4) true and correct copies of the foregoing APPELLANT'S BRIEF to the following person, respondent's attorney, postage prepaid, this 20th day of February, 1987:

Keith Biesinger
1014 East 900 South
Salt Lake City, Utah 84105

/s/ David R. King
David R. King

(THIS PAGE INTENTIONALLY LEFT BLANK)

A D D E N D U M

THIS MEMORANDUM OF UNDERSTANDING entered into this ___ day of June, 1982, by and between Seymour L. Hertz, an individual of Lafayette, California, Cal Fund LTD., a Limited Partnership, (hereafter collectively referred to as "HERTZ") and Jader Incorporated and Nordic Limited, Inc., a Utah Corporation, (hereafter collectively referred to as "NORDIC").

WITNESSETH:

WHEREAS, HERTZ has heretofore executed an Assignment of Interest in favor of NORDIC, which Assignment grants to NORDIC all right, title and interest of HERTZ in and to certain Promissory Notes and Vendor's Liens, a copy of which Assignment is attached hereto, marked Exhibit "A" and by this reference is incorporated herein, and

WHEREAS, HERTZ is the owner of a 20% interest in and to McMurray Petroleum, Inc., and

WHEREAS, NORDIC is desirous of acquiring the 20% interest in and to McMurray Petroleum, Inc.,

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein, the parties hereto represent, warrant and agree as follows:

1. For and in consideration of HERTZ executing the above described Assignment of Interest (Exhibit "A"), NORDIC agrees to issue to Cal Fund LTD. Two Hundred Thousand (200,000) shares of Nordic Limited, Inc., investment stock, which shares shall be issued from the authorized, but unissued capital of Nordic Limited, Inc.; NORDIC further agrees to transfer to Seymour L. Hertz the sum of Two Hundred Seventeen Thousand (217,000) shares of Nordic Limited, Inc. investment stock, which sum includes 75,000 shares presently held in escrow by William Downes, Esq.

2. The parties hereto agree that the 200,000 shares of Nordic Limited, Inc. to be issued to Cal Fund LTD. shall be placed in escrow for a period not to exceed Six (6) months. In the event the market value of said shares is less than \$400,000.00 at the expiration of the six month period, NORDIC agrees to issue additional shares to Cal Fund LTD. to equal \$400,000.00. (market value defined as the average bid/ask price of the securities during the five trading days prior to the expiration of the six month period. Cal Fund Ltd. may at its option remove the 200,000 shares of Nordic Limited, Inc. from escrow as full payment hereon.

EXHIBIT "A"

3. HERTZ hereby agrees that at such time as NORDIC transfers the above described shares, which transfer shall be at the time of closing, HERTZ shall execute an assignment in favor of NORDIC, of all right, title and interest in and to McMurray Petroleum, Inc., which interest is 20%.

4. The parties hereto agree that closing herein shall take place on or before July 15, 1982, however, in no event shall the closing take place before the occurrence of:

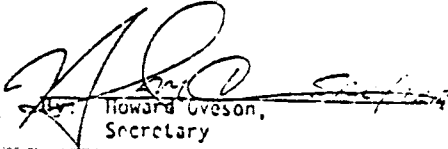
- a. Settlement of Civil Action Number C81-0139 BG(S) United States District Court, Western District of Kentucky, Bowling Green, by the Court, or
- b. The parties hereto mutually agree that a pending decision is acceptable.


5. The parties hereto agree that this Memorandum of Understanding shall be binding upon the parties hereto, their successors, heirs, devisees, assigns, and legal representatives, executors and administrators.

6. The parties hereto agree that this Memorandum of Understanding is only a preliminary document, and they agree to enter into any and all other documents or instruments necessary to effect the intent contained herein.

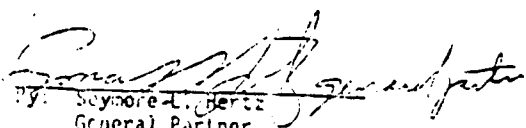
IN WITNESS WHEREOF, the parties hereto have placed their hands the day and year first above written.

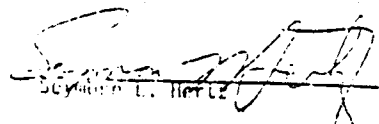
NORDIC LIMITED, INC.


By: Howard Oveson,
Secretary


NORDIC INCORPORATED
By: Howard Oveson,
Secretary

CAL FUND LTD.


By: Seymour L. Hertz
General Partner


Seymour L. Hertz

AGREEMENT

THIS AGREEMENT made and entered into this 29th day of June, 1982, by and between the Sherry Trust, a California DBA, hereafter referred to as TRUST, and Nordic Limited, Inc., a Utah Corporation, hereafter referred to as NORDIC.

WITNESSETH:

WHEREAS, The Sherry Trust was involved, as a finder, in the transaction between Seymore L. Hertz, Cal Fund LTD, Nordic Limited, Inc., and Jader Incorporated, and

WHEREAS, NORDIC previously agreed to pay to the TRUST a finder's fee of Seventy Five Thousand (\$75,000) Dollars,

NOW THEREFORE, the parties hereto agree as follows:

1. NORDIC shall pay to Sherry Trust, the sum of Twenty Five Thousand (\$25,000) Dollars, said sum to be paid at the time of closing of that certain Memorandum of Understanding, dated June 29, 1982, by and between the parties heretobefore mentioned.

2. The balance of \$50,000 shall be paid as follows:

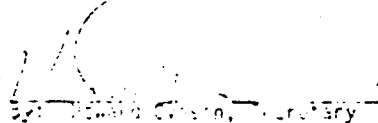
- a. Nordic shall instruct South Kentucky Purchasing to pay to Sherry Trust 25% of the net proceeds received by Jader or Nordic from oil sold in Casey and/or Adair County, Kentucky, until such time as Sherry Trust has received a total of \$50,000.00. Said payments shall commence 60 days from the date of closing of the subject Memorandum of Understanding, which closing is set for July 15, 1982.

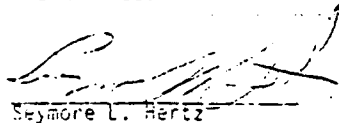
3. In the event NORDIC should sale either or both of the above mentioned properties, i.e. Casey County - Adair County, Kentucky, then and in that event, Sherry Trust shall receive the entire sum then due and owing from NORDIC, and said sum shall be paid directly to Sherry Trust at the time of closing any such sale.

IN WITNESS WHEREOF the parties hereto have executed this Agreement the day and year first above written.

NORDIC LIMITED, INC.

SHERRY TRUST


Edward Olson, Secretary


Seymore L. Hertz

WITNESSED and SIGNED to before me this 29th day of June, 1982.

EXHIBIT "B"

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HERMAN HERTZ, as Trustee for	:	MEMORANDUM DECISION
the SHERRY TRUST, a California	:	
Trust, and CAL FUND, LTD.,	:	CIVIL NO. C-83-7988
a California unincorporated	:	
association,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
NORDIC LIMITED, INC., a Utah	:	
corporation,	:	
	:	
Defendant.	:	
	:	

The above-captioned matter came on before this Court for trial with the plaintiff being represented by David R. King, Esq., and defendant being represented by Keith Biesinger, Esq. The Court after hearing testimony of witnesses, examining the physical evidence produced, and reviewing closing arguments which the Court requested be submitted in writing rather than orally, now makes and enters its Memorandum Decision as follows.

The Court finds that the plaintiff is entitled to a Judgment against the defendant for 25% of the royalty income actually obtained from the producing wells for the sum of \$4,625.00.


The Court finds further that the plaintiff accepted the 200,000 shares of Nordic, Ltd., and that no escrow was in fact set up, though it had been discussed but not actually implemented,

and therefore on plaintiffs' request for the issuance of additional shares from defendant, this Court finds he has no cause for action, and this claim is denied.

Each party to bear their own attorney's fees and costs.

Mr. Biesinger is requested to prepare the appropriate Findings of Fact, Conclusions of Law and Decree, not inconsistent with this Memorandum Decision.

Dated this 15 day of January, 1986.



DAVID B. DEE
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 15th day of January, 1986:

David R. King
Keith L. Pope
Attorneys for Plaintiffs
136 S. Main, Sixth Floor
Salt Lake City, Utah 84101

Keith Biesinger
Attorney for Defendant
1014 East 900 South
Salt Lake City, Utah 84105

Hefer W. Hunter

KEITH BIESINGER [AO318]
Attorney for the Defendant
1014 East 900 South
Salt Lake City, Utah 84105
Telephone: 355-9915

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

HERMAN HERTZ, as Trustee for the SHERRY TRUST, a California Trust, and CAL FUND, LTD., a California unincorporated association,	:	
Plantiffs,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	:	Civil No. C83-7988
NORDIC LIMITED, INC., a Utah corporation	:	Judge David B. Dee
Defendant.	:	

The above-captioned matter came on before this Court for trial on November 18th and 21st, 1985, with the Honorable David B. Dee, Judge presiding. The plaintiff was represented by David R. King, Esq., and the defendant was represented by Keith Biesinger, Esq. The Court after hearing testimony of witnesses, examining the physical evidence produced, and reviewing the written closing arguments prepared by counsel entered its Memorandum Decision on January 15, 1986. The Court, being fully advised in the premises, now makes and enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

[As to Count 1 of Plaintiffs' Complaint]

1. On June 29, 1982, plaintiff, Cal Fund, Ltd. (hereinafter called "Cal Fund"), entered into an agreement with defendant Nordic Limited, Inc. (hereinafter called "Nordic Limited"), entitled "Memorandum of Understanding" (Plaintiff's Exhibit 1). Said agreement was negotiated by Seymore Hertz, on behalf of Cal Fund, and John E. Worthen, on behalf of Nordic Limited.

2. Pursuant to said "Memorandum of Understanding" [referred to

during the trial as the "First June 29th Agreement"], Cal Fund executed an "Assignment of Interest" in favor of Nordic Limited which assignment granted to Nordic Limited all the right, title, and interest of Cal Fund and Seymore Hertz in and to certain promissory notes and vendors liens relative to certain oil and gas leases located in Casey and Adair Counties in Kentucky (Plaintiffs' Exhibit 2).

3. In consideration of Cal Fund executing said "Assignment of Interest", Nordic Limited agreed to issue to Cal Fund 200,000 shares of Nordic Limited's common stock, which shares of common stock were to bear a restrictive legend reflecting that they had been acquired for investment purposes and were therefore shares of "investment stock".

4. The "Memorandum of Understanding" provided, in relevant part, the following:

1. . . . Nordic agrees to issue to Cal Fund, LTD. Two Hundred Thousand (200,000) shares of Nordic Limited, Inc., investment stock, which shares shall be issued from the authorized, but unissued capital of Nordic Limited, Inc.;

2. The parties hereto agree that the 200,000 shares of Nordic Limited, Inc. to be issued to Cal Fund, LTD. shall be placed in escrow for a period not to exceed six (6) months. In the event the market value of said shares is less than \$400,000 at the expiration of the six month period, NORDIC agrees to issue additional shares to Cal Fund, LTD. to equal \$400,000. (market value defined as the average bid/ask price of the securities during the five trading days prior to the expiration of the Six month period. Cal Fund, Ltd. may at its option remove the 200,000 shares of Nordic Limited, Inc. from escrow as full payment herein.

5. Under paragraph 2 said "Memorandum of Understanding" as hereinabove set forth, the parties agreed that said 200,000 shares of Nordic Limited's common restricted stock were to have been issued to Cal Fund, and placed in escrow for a period not to exceed six months. Cal Fund was also given the option to accept said 200,000 shares of Nordic Limited's common restricted stock at any time during the six month escrow period as full payment of Nordic Limited's obligation under said "Memorandum of Understanding".

6. Even though paragraph 2 of said "Memorandum of Understanding"

contained an escrow provision, and the creation of an escrow was discussed by the parties, no escrow was in fact set up or implemented by either of the parties.

7. By letter dated July 29, 1982, Cal Fund's attorney, Rodney M. Sweet wrote to John E. Worthen, a shareholder of Nordic Limited, and requested that Nordic Limited deliver said 200,000 shares of Nordic Limited's common restricted stock to Mr. Sweet, to be held in trust by Mr. Sweet and later distributed to Cal Fund upon the dismissal of a lawsuit pending in the United States District Court for the Western District of Kentucky (Plaintiffs' Exhibit 5).

8 Mr. Sweet's letter of July 29, 1982, stated, in relevant part, the following:

Your are requested to deliver to me by monday, August 9, 1982, to hold until such time as the papers are filed with the court and the settlement consummated, the following items: . . .

6. Certificate for 200,000 shares of Nordic Limited, Inc. Investment issued to Cal Fund Limited. (My documents do not indicate whether or not there is still a requirement that these shares be placed in escrow for a period of not to exceed six months, and I would appreciate instructions from you as to this.)

. . . . Mr. Hertz will be leaving the State of California for an extended period on Tuesday, August 10, 1982 and he requires that you deliver the above items to me to be held in trust so that I can distribute them immediately upon receipt of notice that the order has been entered in Kentucky. . . .

The record reflects no response from either Nordic Limited nor Worthen to the request in the letter for instructions regarding the essecrow.

9. On August 10, 1982, Nordic Limited issued 200,000 shares of Nordic Limited's common stock in the name of plaintiff Cal Find in partial compliance with Mr. Sweet's instructions, which shares were delivered by Nordic Limited directly to Seymore Hertz on behalf of plaintiff Cal Fund. In connection with the delivery of the 200,000 shares of Nordic Limited's common restricted stock to Seymore Hertz, no arrangement was made by either party to place the 200,000 shares in the "escrow" contemplated by the parties in the "Memorandum of Understanding".

10. On or about September 2, 1982, Cal Fund's attorney received a mailgram from an attorney in Kentucky notifying him that the settlement in the case pending in Kentucky referred to in the "Memorandum of Understanding" had been filed (Plaintiffs' Exhibit 9).

11. On February 25, 1983, an officer of Nordic Limited, Robert Stenquist, sent, without having first consulted with or obtained the approval of Nordic Limited's board of directors, to Cal Fund a TWIX message acknowledging that Nordic Limited would forward to Cal fund additional shares of Nordic Limited's common stock as requested by Seymore Hertz (Plaintiff's Exhibit 12). Mr. Stenquist relied on a conversation with Seymore Hertz in which Mr. Hertz represented that other officers of Nordic Limited had approved the issuance of the additional shares.

12. The TWIX message provided, in relevant part, the following:

THIS WILL CONFIRM CONVERSATIONS YOU'VE HAD WITH NORDIC CONCERNING THE NUMBER OF SHARES TO BE ISSUED TO THE CAL FUND UNDER THE TERMS OF THE AGREEMENT. 200,000 SHARES HAVE BEEN ISSUED AS OF THIS DATE + IF THE SETTLEMENT PRICE IS 28 CENTS PER SHARE AN ADDITIONAL 1,228,571 SHARES WILL BE ISSUED TO THE CAL FUND. THE FINAL SETTLEMENT PRICE WILL BE DETERMINED BY THE NASDAQ PRINTOUT SHEET WHICH WILL BE RECEIVED THE FIRST PART OF MARCH. THE NUMBER OF SHARES SHOULD NOT VARY BY MUCH.

13. On August 30, 1983, Nordic Limited informed Seymore Hertz that Nordic Limited would not issue additional shares of Nordic Limited's common stock to plaintiff Cal Fund because Cal Fund had elected within the six month escrow period to accept the subject 200,000 shares of Nordic Limited's common stock as full payment under the "Memorandum of Understanding" agreement (Plaintiffs' Exhibit 19).

[As to Count II of Plaintiffs' Complaint]

14. On June 29, 1982, as part of the transaction involving said "Memorandum of Understanding", plaintiff Sherry Trust and Nordic Limited entered into an "Agreement" [referred to during the trial as the "Second June 29th Agreement"] wherein Nordic Limited agreed to pay the Sherry Trust the sum of \$75,000 as a "finders fee" for the Sherry Trust's role as a "finder" under the "Memorandum of Understanding" agreement (Plaintiffs' Exhibit 3).

15. The "Agreement" provided, in pertinent part, the following:

2. The balance of \$50,000 shall be paid as follows:

a. Nordic shall instruct South Kentucky Purchasing to pay to Sherry Trust 25% of the net proceeds received by Jader or Nordic from oil sold in Casey and/or Adair County, Kentucky, until such time as Sherry Trust has received a total of \$50,000. Said payments shall commence 60 days from the date of closing of the subject Memorandum of Understanding, which closing is set for July 15, 1982.

3. In the event Nordic should sale either or both of the above mentioned properties, i.e. Casey County - Adair County, Kentucky, then and in that event, Sherry Trust shall receive the entire sum then due and owing from NORDIC, and said sum shall be paid directly to Sherry Trust at the time of closing any such sale.

16. Paragraph 2 of said "Agreement" provided that the contract balance of \$50,000.00 to be paid by Nordic Limited was to be paid from 25% of the net proceeds received by Nordic Limited from the oil and gas production from the operation of the subject oil leases transferred to Nordic Limited from Cal Fund under the "Memorandum of Understanding" and "Assignment of Interest" agreements (Plaintiffs' Exhibits 2 & 3).

17. Said "Agreement" was subsequently modified by the parties thereto on October 12, 1982, to increase the amount to be received by the Sherry Trust from the oil and gas production proceeds from \$50,000 to \$58,500 (Plaintiff's Exhibit 4).

18. On or about September 2, 1982, Nordic Limited entered into an arrangement whereby Nordic Limited began selling oil and gas production from the Casey and Adair County properties to Oil Purchasing, Inc., rather than to South Kentucky Purchasing, which firm was referred to in the "Agreement" of June 29, 1982 (Plaintiffs' Exhibit 3).

19. After November 1, 1982, (the period during which the Sherry Trust was to receive a portion of the production proceeds), Nordic Limited earned approximately \$18,500 in production proceeds from the Casey and Adair County, Kentucky, properties. However, said production proceeds were held by Oil Purchasing, Inc., and were not paid to Nordic Limited.

20. In 1983 Nordic Limited abandoned all but 2 of the subject oil and gas leases [The Billy Neat and Hunter claims] that were assigned to

Nordic Limited by Cal Fund and Seymore Hertz because said leases were either uneconomical to place into production or unproductive.

21. Nordic Limited has not paid any monies to Sherry Trust other than the initial \$25,000 dollars that was paid at the time of the closing of the "Memorandum of Understanding" agreement.

22. Neither the "Memorandum of Understanding" or the "Agreement" executed by the parties on June 29, 1982 provide for an award of attorney's fees and no evidence of attorney's fees was introduced.

CONCLUSIONS OF LAW

1. The acceptance by Cal Fund of the subject 200,000 shares of Nordic Limited common stock which was sent to Cal Fund by Nordic Limited in partial compliance with a letter received from Cal fund's attorney, and the failure on the part of either party to actually establish an escrow to hold said shares, constituted full performance by Nordic Limited and payment in full to Cal Fund under the terms of the "Memorandum of Understanding" agreement executed on June 29, 1982.

2. The acts of Nordic Limited in sending the subject 200,000 shares of Nordic Limited common stock to Seymore Hertz were not such as to have caused Cal Fund to believe that Nordic Limited was appointing Mr. Hertz to act as the escrow agent for the parties. Therefore, the Court holds that Cal Fund did not rely on such representations to its detriment and will thus not employ the doctrine of estoppel to prevent Nordic Limited from denying that its acts constituted the appointment of Seymore Hertz as escrow agent for the parties.

3. Cal Fund is not entitled to any additional shares of Nordic Limited's common stock under the terms of the "Memorandum of Understanding".

4. Cal Fund has failed to state a claim against Nordic Limited, and therefore Cause 1 of the plaintiffs' Complaint should be dismissed with prejudice.

5. With respect to the "Agreement" executed on June 29, 1982, the failure of Nordic Limited to deliver 25% of the oil production revenues earned from the Casey and Adair County oil and gas leases to the Sherry Trust constituted a breach of contract entitling the Sherry Trust to a judgment against Nordic Limited for 25% of the \$18,500 production revenue, or an amount of \$4,625.

6. The abandonment by Nordic Limited of certain of the oil and gas leases in Casey and Adair Counties, Kentucky, because said leases were unproductive was not such that it should be viewed as being the cause of its failure of performance, and therefore Nordic Limited is not liable to the Sherry Trust for payment of the full \$58,500 due under the "Agreement" of June 29, 1982.

7. Judgment should be entered against Nordic Limited in favor of the plaintiff Sherry Trust in the amount of \$4,625 under Cause II of the plaintiffs' Complaint.

8. Each party should be ordered to bear their own attorney's fees and costs.

DATED this ____ day of August, 1986.

BY THE COURT


David B. Dee
District Court Judge

Approved as to form and content
this 28TH day of August, 1986.



DAVID R. KING
Attorney for Plaintiffs

Approved as to form and content
this 26 day of August, 1986.

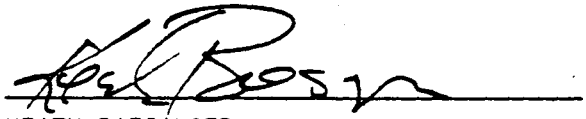


KEITH BIESINGER
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on August 26, 1986, I ^{delivered} mailed, postage prepaid, a copy of the foregoing document to the following attorney:

David R. King. Esq.
KRUSE, LANDA & MAYCOCK
6th Floor Kearns Building
136 South Main Street
Salt Lake City, Utah 84101



KEITH BIESINGER
Attorney for Defendant

KEITH BIESINGER [A0318]
Attorney for Defendant
1014 East 900 South
Salt Lake City, Utah 84105
Telephone: 355-9915

IN THE THIRD JUDICIAL DISTRICT OF SALT LAKE COUNTY

STATE OF UTAH

HERMAN HERTZ, as Trustee for the	:	
SHERRY TRUST, a California Trust,	:	
and CAL FUND, LTD., a California	:	J U D G M E N T
unincorporated association,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	Civil No. C83-7988
	:	
NORDIC LIMITED, INC., a Utah	:	
corporation,	:	Judge: David B. Dee
	:	
Defendant.	:	

The above-captioned matter came on before this Court for trial on November 18th and 21st, 1985, with the Honorable David B. Dee, Judge presiding. The plaintiff was represented by David R. King, Esq., and the defendant was represented by Keith Biesinger, Esq. The Court after hearing testimony of witnesses, examining the physical evidence produced, and reviewing the written closing arguments prepared by counsel entered its Memorandum Decision on January 15, 1986. The Court, having entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises, now makes and enters the following :

JUDGMENT

1. Count I of the plaintiff, Cal Fund, Ltd.'s, Complaint against defendant, Nordic Limited, Inc., is hereby dismissed.
2. The plaintiff, Sherry Trust, is hereby granted a judgment against the defendant, Nordic Limited, Inc., in the amount of \$4,625.00 under Count II of the plaintiffs' Complaint, together with interest at the legal rate of 12% per annum.
3. Each party is hereby ordered to bear their own attorney's fees and costs.

DATED this 9th day of ~~August~~ ^{September}, 1986.

BY THE COURT

/s/ David B. Dee

DAVID B. DEE
District Court Judge

Approved as to form and content
this 26th day of August, 1986.

/s/ David R. King

DAVID R. KING
Attorney for Plaintiffs

Approved as to form and content
this 26 day of August, 1986.

Keith Biesinger
KEITH BIESINGER
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on August 26, 1986, I ^{delivered} mailed postage prepaid, a copy of the foregoing document to the following attorney:

David R. King, Esq.
KRRUSE, LANDA & MAYCOCK
6th Floor Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Keith Biesinger
KEITH BIESINGER, Esq.