

1988

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

Utah Supreme Court

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

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BRIEF

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DOCKET NO.

880086-CA

THE SUPREME COURT
OF THE STATE OF UTAH

HERMAN HERTZ
as Trustee for the
SHERRY TRUST
a California Trust
and
CAL FUND, LTD.,
a California unincorporated
association,

Plaintiffs/Appellants,

vs.

NORDIC LIMITED, INC.,
a Utah corporation,

Defendant/Respondent.

District Court No. C83-7988

Catagory No. 13b

Supreme Court No. 860540

88-0086-CA

BRIEF SUBMITTED ON BEHALF OF THE RESPONDENT

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

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FILED

MAR 27 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. C83-7988
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 RESPONDENT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
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STATEMENT OF THE ISSUES

Respondent generally agrees with the appellants' statement of the issues on appeal as presented in appellants' brief.

STATEMENT OF THE CASE

This appeal involves the intrepretation of two paragraphs of two interrelated agreements involving the parties. Those agreements have designated as the First June 29 Agreement and the Second June 29 Agreement. Under the First June 29 Agreement, Appellant Cal Fund assigned certain oil and gas leases located in Kentucky to respondent Nordic in exchange for common stock of Nordic restricted under S.E.C. Rule 144. The paragraph in question, in relevant part, reads as follows:

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.

Under the Second June 29 Agreement appellant Sherry Trust was to receive a \$75,000 "finders fee" from Nordic for its role in putting together the First June 29 Agreement. The paragraph in question, in relevant part, reads 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. . . .

The common denominator or tie in between both agreements is Seymore Hertz, who was the appellants primary witness. Hertz is the "general partner and manager" of Cal Fund. The Sherry Trust is a trust for the benifit of Hertz's wife and children. After listening to the testimony of Hertz, the trial court choose to believe the testimony of other witness and ruled against appellants.

Respondent submits that the findings of fact entered by the trial court, which are attached hereto in the Addendum to respondent's brief, accurately set forth the statement of the facts in this case.

There is conflicting testimony which appellants fail to present or address in their brief. For purposes of

respondents brief those areas will be addressed in respondent's argument.

SUMMARY OF ARGUMENTS

Respondant has attempted to follow the format set forth in appellants' brief in this brief for clarification and simplicity.

A. The First June 29 Agreement

Under the terms of paragraph 2 of the First June 29 Agreement, Cal Fund and Nordic agreed, in substance, that 200,000 shares of Nordic common stock would be issued to Cal Fund in consideration of Cal Fund and Seymore Hertz assigning to Nordic certain promissory notes and vendors liens relative to certain oil and gas leases located in Kentucky. The 200,000 Nordic shares were then to be placed in escrow for a period of 6 months. Cal Fund was also given the option to accept the 200,000 shares of Nordic common stock at any time during the 6 month escrow period as full payment of Nordic's obligation under the First June 29 Agreement. It is Nordic's contention that the Trial Court correctly found that the acceptance by Cal Fund of the 200,000 shares of Nordic common stock which was sent to Cal Fund by Nordic 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 for the 200,000 Nordic common shares, constituted full performance by Nordic and payment in full to Cal Fund under the terms of the First June 29 Agreement.

[Exhibit 1]

The facts show that even though paragraph 2 of the First June 29 Agreement 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. Nordic contends that the trial court correctly found:

1. That both Cal Fund and Nordic waived compliance with the escrow provision;

2. That the acts of Nordic in sending the 200,000 Nordic common shares to Seymore Hertz were not such as to have caused Cal Fund to reasonably believe that Nordic was appointing Mr. Hertz to act as the escrow agent for the parties; and

3. That Cal Fund did not rely on such representation to its detriment and therefore Nordic was not estopped from denying that Seymore Hertz was appointed to act as the parties escrow agent.

B. The Second June 29 Agreement

As part of the transaction involving the First June 29 Agreement, the Sherry Trust and Nordic entered into the Second June 29 Agreement wherein Nordic agreed to pay the Sherry Trust \$75,000 as a "finders fee" for the Sherry Trust's role

as a "finder" under the First June 29 Agreement. [Exhibit 3] Nordic paid the Sherry Trust \$25,000 at the time of execution, and the balance of \$50,000 was to be paid by Nordic from 25% of the the net proceeds received by Nordic from the operation of the oil and gas leases located in Kentucky which were transfered from Cal Fund to Nordic under the the First June 29 Agreement. The Second June 29 Agreement was subsequently modified by the parties to increase the amount to be received by the Sherry Trust to \$58,500 [Exhibit 4] After November 1982, Nordic earned approximately \$18,500 from the operation of the Kentucky oil and gas leases, however the proceeds were never paid to Nordic. In 1983 Nordic abandoned all but 2 of the Kentucky oil and gas leases because the leases were either uneconomical to place into operation or unproductive. Nordic contends that the trial court correctly found:

1. That the Sherry Trust is entitled to a judgment against Nordic for 25% of the \$18,500 oil production revenue, or \$4,625; and

2. That the Sherry Trust failed to present sufficient evidence at the trial to support the conclusion that Nordic's forfeiture of the Kentucky oil and gas leases was a result of Nordic's failure to exercise reasonable diligence so as to entitle the 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

The operative paragraph of the First June 29 Agreement is paragraph 2. [Exhibit 1] It reads as follows:

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.

Under paragraph 2 of the First June 29 Agreement, Cal Fund and Nordic agreed, in substance, that 200,000 shares of Nordic's stock would be issued to Cal Fund in consideration of Cal Fund and Hertz assigning certain oil and gas leases located in Kentucky to Nordic. The 200,000 Nordic shares were then to be placed in escrow for a period of 6 months. Cal Fund was given the option to accept the 200,000 shares of Nordic's stock at any time during the 6 month escrow period as full payment of Nordic's obligation under the First June 29 Agreement.

It is important to understand the role of Hertz relative to Cal Fund and the Sherry Trust. Hertz was the "general partner and manager" of Cal Fund and Hertz managed the Sherry Trust "for the benefit of my wife and my children." [Testimony Seymore Hertz, Transcript pg. 150]].

It is also important to realize that while both Nordic and Cal Fund contemplated that the 200,000 Nordic shares would be placed in an escrow, an escrow was never established. The reason that an escrow was never established was because events quickly transpired that negated the need for an escrow.

During August 1982, the market value of Nordic securities according to Hertz was, "A dollar, \$2, \$6, something like that." [Testimony Seymore Hertz, Transcript pg. 175] Because the market value of Nordic's stock was rising, and because Hertz was leaving for Europe, and because Hertz wanted the 2 year holding period under S. E. C. Rule 144 to commence (presumably so that he would be able to sell the Nordic stock as soon as possible), Hertz wanted the transaction closed. For these reasons Hertz directed his attorney Sweet to request that Nordic send the 200,000 Nordic shares to Sweet to be held in trust by Sweet until the Kentucky lawsuit was dismissed. [Testimony Sevmore Hertz, Transcript ppg. 172-174; Investment letter of August 10, 1982, Exhibit 5] When the Kentucky lawsuit was dismissed, Sweet was to deliver the 200,000 Nordic shares to Hertz.

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 [the 200,000 Nordic shares] 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. If you have any problem in complying with this request, please advise me immediately. [Last paragraph Sweet's letter to Nordic, Exhibit 5]

Following the directive of Sweet's letter, Nordic caused the 200,000 Nordic shares to be issued to Cal Fund on August 10, 1982, but, failing to exactly comply with Sweet's letter, mailed the 200,000 Nordic shares directly to Hertz, rather than Sweet. [Testimony Seymore Hertz, ppg. 155-157] This is the sequence of events and reasons which led the trial court to conclude that the escrow originally contemplated by Cal fund, Hertz and Nordic was never implemented.

The fact that Hertz testified that he was unclear as to how the escrow provision would be implemented, which Hertz bases on a conversation with Ross, Nordic's attorney, who informed Hertz that the 200,000 Nordic shares would be delivered to Hertz to hold on behalf of Cal Fund, was insufficient for the trial court to find that Hertz understood the conversation to mean that Hertz was to act as escrow agent. The trial court obviously found that it was contrary to Hertz's actions, Sweet's letter directive to Nordic and the testimony of Ross, who denied the conversation. [Testimony

David Ross, Transcript pg. 233]

The trial court correctly found that the acceptance of the 200,000 Nordic shares on or about August 10, 1982, constituted full performance by Nordic and payment in full to Cal Fund under the terms of the First June 29 Agreement

There is no evidence in the record that would compel the trial court to conclude that Nordic, by its acts, led Hertz or Cal Fund to believe that the escrow provision of the First June 29 Agreement was complied with by Nordic delivering Cal Fund's Nordic shares to Hertz as appellants now argue. There is at best conflicting testimony with the weight of the evidence against Hertz.

In order for the trial court to have found that Nordic was estopped from denying that Hertz was an appropriate escrow agent under the First June 29 Agreement, or that delivery of the 200,000 shares of Nordic stock to Hertz was in full compliance with the escrow provision of the First June 29 Agreement, there must be evidence that Nordic, through "culpable negligence", induced Cal Fund to believe that the escrow provision of the First June 29 Agreement had been properly complied with by the delivery of the 200,000 shares of Nordic stock to Hertz. Appellants have argued their interpretation of the exhibits in the light most favorable to Hertz's testimony, but, have failed to account for the conflicting testimony, which influenced the trial court.

In support of appellants' argument that Hertz exercised reasonable diligence under the circumstances, appellants rely on Hertz's testimony that Hertz made specific inquiry as to how the escrow provision was to be fulfilled, and was told by Ross that the escrow provision would be implemented by Nordic sending to Hertz the 200,000 Nordic shares registered in the name of Cal Fund. However, appellants fail to state that Ross denied the conversation.

Q Did you have any discussion with Mr. Hertz concerning either of those agreements on or about June 29th, 1982 when they appear to have been executed?

A No, I did not. [Testimony David Ross, Transcript pg. 233 & 251]

In fact Ross was of the opinion that an attorney in Kentucky was to act as the escrow agent for the parties under the First June 29 Agreement. [Transcript pg. 239-245 & 254]

Respondent does not argue with the statement of doctrine of estoppel as outlined by appellants quoting from Morgan v. Board of State Lands, Utah, 549 P.2d 695 at 697 (1976), and Corporation Nine v. Taylor, Utah 513 P.2d 417 (1973). However, respondent feels that the doctrine is not available to appellants if this court considers the testimony of witnesses other than Hertz. Appellants' argument is only one possible interpretation of the testimony and exhibits. The fact of the matter is that the trial court determined that

Nordic did not induce Cal Fund/Hertz to believe that Hertz was to act as the escrow agent through Nordic's "culpable negligence" because the trial court simply did not believe Hertz in light of the testimony of the other witnesses.

The trial court correctly found that the appellants simply did not meet the test for the application of the doctrine of estoppel as set forth by the Supreme Court in Corporation Nine v. Taylor, Ibid. pg. 420.

The determination of such an issue is not dependant 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.

Appellants argue to some length that the facts set forth in Blackhurst v. Transamerica Insurance Company, Utah, 699 P.2d 688 (1985), are "not too dissimilar to those in the instant case", quoting a statement from the case at page 691 [Appellants Brief, ppg. 18-19]:

... 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.' (Citation omitted.)

The Blackhurst case, Ibid., involved an attorney acting

as the personal representative of his mothers estate, suing to enforce a settlement agreement he had reached with the insurance company for compensation for injuries his mother had suffered in an automobile accident prior to his appointment as her guardian. The Supreme Court held, among other things, that the insurance company was estopped to deny that the attorney had authority to enter into a binding agreement, because the insurance company's agent negotiating the settlement agreement had contemplated that the attorney would eventually be appointed the guardian for his mother. Blackhkurst is remotely similar to the facts in this case only if you believe the testimony of Hertz over Ross, and discount the Sweet letter.

(2) The Doctrine of Waiver

Appellants also argue that the doctrine of waiver is equally applicable in this case, citing Phoenix Insurance Co. v. Heath, Utah, 61 P 2d 308 (1936).

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

Appellants argue that the "actions of Nordic with respect to the escrow provision demonstrate a knowing waiver of that

provision" because "[w]hen 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 action. When Nordic's transfer agent issued the 200,000 shares certificate in the name of Cal Fund, Nordic mailed that certificate directly to Seymore Hertz." Why "[t]his action by Nordic constituted a clear waiver of the escrow provision contained in the First June 29 Agreement" is unclear. A more literal reading of the Sweet letter [Exhibit 5], and the one the trial court followed, would be that Hertz had made the election to accept the 200,000 shares of Nordic and had instructed Sweet to inform Nordic to deliver them to Sweet to hold "in trust" only until the Kentucky lawsuit was settled.

Months later, after Nordic's stock fell in value, it is understandable that Hertz wanted to claim that he had not accepted the 200,000 shares in August 1982. The only way to get around the fact that Nordic had fully performed under the First June 29 Agreement is to subsequently claim that Hertz received the 200,000 Nordic shares not as payment in full, but, as the escrow agent for the parties. That claim was made at trial when appellants argued that Nordic was estopped or had waived the right to deny said claim. That same argument

is again made on appeal. Not only does it stretch the bounds of credability to believe that a "business man" [Testimony Seymore Hertz, Transcript 170] could honestly believe that one party to an agreement could also act as the escrow agent for both parties under the agreement, it misconstrues the Sweet letter.

B. The Second June 29 Agreement

Apart from what appellants argue was the objective of the Second June 29 Agreement, a carefull reading of the agreement [Exhibit 3] clearly shows that the Sherry Trust, a trust for Hertz's wife and children, was to get \$25,000 as a finders fee (which was paid), and in addition thereto, receive a 25% interest in production from the Kentucky oil and gas leases assigned by Hertz on behalf of Cal Fund to Nordic under the First June 29 Agreement, up to \$50,000. That amount was later increased by mutual agreement to \$58,500. [Worthen letter of October 12, 1982, Exhibit 4]

After execution of the two June 29 Agreements, Nordic placed two of the wells into production, and earned approximately \$18,500 from the operation of the Kentucky oil and gas leases. However, the proceeds were never paid to Nordic. In 1983 Nordic had to abandon all but 2 of the Kentucky oil and gas leases because the leases were either uneconomical to place into operation or unproductive.

[Testimony David Ross, Transcript pg. 247]

At the trial, Nordic admitted that the Sherry Trust was entitled to a judgment against Nordic for 25% of the \$18,500 oil production revenue, or \$4,625, and the trial court so found.

Appellants on appeal argue that Nordic has offered no explanation whatsoever for the forfeiture or abandonment of the Kentucky oil and gas leases. [Appellants' Brief pg. 22] However, again the appellants' overlook the testimony of Ross who in fact offered the only explanation of why Nordic abandoned or forfeited the Kentucky oil and gas leases. The reason for the abandonment was because operation of the leases was not "economically feasible" for Nordic. [Testimony David Ross, Transcript pg. 247]. The trial court probably felt that Hertz sold Nordic essentially unproductive oil and gas leases.

Appellants argument that Nordic breached its agreement with the Sherry Trust by simply forfeiting the Kentucky wells, thus making its own performance impossible, was correctly rejected by the trial court.

The law as stated in Cannon v. Stevens School of Business, Inc., Utah, 560 P.2d 1383 (1977), requires more than a simple abandonment. The abandonment of the Kentucky oil and gas leases came as a result of economic necessity, not the failure of Nordic to exercise reasonable diligence. The economic reasons cited by Ross, no matter how brief, are the

only evidence before the court.

In Cannon several employees brought an action against their employer to recover under a contract where the employer agreed to pay the employees specified commissions on tuitions received by the employer. When the employer voluntarily discontinued business, the Supreme Court held that the employer placed performance of its obligation under employment contract beyond its control, the employees were entitled to compensation.

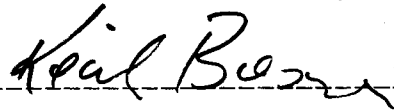
Such is not the situation in this case. Respondent submits that the evidence presented at trial indicates that Nordic did exercise reasonable diligence to place two of the Kentucky leases into production, and were it not for the fact that the Kentucky leases assigned to Nordic by Cal Fund were incapable of being operated profitably, and were it not for the fact a third-party retained Nordic's production proceeds, the Sherry Trust would have received its finders fee. It only stands to reason that if the Kentucky leases made money, Nordic would not have made the decision to abandon or forfeit the leases.

CONCLUSION

Admittedly there are numerous inferences that could be drawn from the testimony and documents presented at trial. The appellants argued one point of view that was rejected by

the trial court. Even though the Supreme Court may review facts in equity cases, the court must make allowances for the advantaged position of the trial judge. The Supreme Court may not disturb the trial court's findings and judgments merely because the Supreme Court might view the matters differently. The Supreme Court must review the trial court's findings and judgments with considerable indulgence and cannot upset them unless the evidence clearly preponderates against them, or unless the trial court abused its discretion, or unless the trial court misapplied the law. [See: Pangano v. Walker, Utah , 539 Utah 452 (1975), and related cases holding the same]. The record is replete with ample evidence to support the trial court findings and judgments. Accordingly, the decision of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 27 day of March, 1987.



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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four true and correct copies of the foregoing Respondent's Brief to the following attorneys of record, postage prepaid, this 27 day of March, 1987.

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ADDENDUM

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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	:	FINDINGS OF FACT AND
unincorporated association,	:	CONCLUSIONS OF LAW
	:	
Plantiffs,	:	
	:	
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 Undrstanding" 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 Understnading" 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. Judgemnt 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

S/David B. Dee

David B. Dee
District Court Judge

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

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