

42, 1933

In the Privy Council.

No. 50 of 1932.

**ON APPEAL FROM THE SUPREME COURT OF
CANADA.**

BETWEEN

DOMINION BUILDING CORPORATION LIMITED

(Claimants) and JAMES L. FORGIE (added as a
Party Claimant by Order made by the President of the
Exchequer Court of Canada, on the 4th day of March,
A.D. 1931) - - - - -

Appellants

AND

HIS MAJESTY THE KING - - -

(Respondent) Respondent.

CASE FOR THE RESPONDENT.

RECORD.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated 15th March, 1932, allowing the Respondent's appeal from a judgment of the learned President of the Exchequer Court of Canada, dated 4th March, 1931, and dismissing, with costs, in reversal of the latter judgment, the claimants' claim to recover damages against the Respondent in respect of the breach of an alleged contract by the Crown, as represented by the Minister of Railways and Canals, to sell to the party claimant, Forgie, a certain parcel of land, situated at the northwest corner of King and Yonge Streets in the City of Toronto, subject to a direction for the repayment to the claimants of the sum of \$25,000 by way of return of deposit and not as an item of damages.

p. 133.

p. 125.

2. The action came before the Exchequer Court of Canada on a reference dated 16th September, 1926, by the Acting Minister of Railways and Canals under the authority of section 38 of the Exchequer Court Act, R.S.C., 1906, cap. 140, of a claim dated 4th September, 1926, addressed to the Honourable the Minister of Railways and Canals by the claimant company, as assignee of the contract alleged to have been made by His Majesty with the party claimant, Forgie.

p. 1.

pp. 1A-1C.

RESPONDENTS CASE.

RECORD.

p. 191,
ll. 15-22.
p. 103,
ll. 10-15;
p. 145,
ll. 22-23.

3. At the time the alleged contract was made, the title to the property in question stood vested in His Majesty the King, as represented by the Minister of Railways and Canals, under a Deed, dated August 17, 1923, from the Imperial Bank of Canada, and the property was occupied by the Canadian National Railway Company for the purposes of a City Ticket Office.

p. 1D,
ll. 16-24;
p. 2, p. 3,
ll. 1-2.
pp. 159-161.
pp. 156-158.

4. The Contract of sale and purchase is alleged to have been constituted by a written offer of purchase by the said James L. Forgie, dated July 27, 1925, addressed to His Majesty the King, represented by the Minister of Railways and Canals, and the acceptance of the said offer by Order in Council, based upon the report of the Minister of Railways and Canals, dated July 29, 1925, (P.C. 973).

p. 174,
ll. 1-14.

On August 5, 1925, Forgie purported to assign all his right, title and interest in the alleged contract to the claimant company.

5. The main terms of the alleged contract were the following:—

p. 159,
ll. 8-32.

A. That Forgie offered to purchase from His Majesty the property above mentioned for the sum of \$1,250,000 cash, and with the offer paid a deposit of \$25,000 to be applied on account of the purchase price in the event of its acceptance; the balance of the said purchase price was to be paid "at such time as possession of the said premises to be given to the undersigned, no later than September 15, 1925."

p. 160,
ll. 16-36.

B. That Forgie agreed, upon his obtaining possession of the property on or before the 15th September, 1925, immediately to proceed with the erection of a twenty-six storey modern fire-proof office building on the said lands, and on certain adjoining lands (formerly known as the Home Bank of Canada Head Office site), of which he represented himself to be the owner, and to complete and have the said office building ready for occupancy by His Majesty, as tenant, not later than the 25th day of October, 1926.

p. 160,
ll. 37-40;
p. 161,
ll. 1-14.

C. That His Majesty agreed to execute a lease of the ground and three next floors of the said building on specified terms, for the use of the Canadian National Railways.

p. 161,
ll. 15-22.

D. That the conveyance from His Majesty to Forgie should, by its own terms, vest title of the said lands in the latter, only upon the execution and delivery of the said lease by him to His Majesty, and the due furnishing of the bond provided for under the terms of the said lease.

6. The Department of Railways and Canals Act, R.S.C. 1906, chap. 25, provides in part as follows:—

"2. In this Act, unless the context otherwise requires—

(a) 'Minister' means the Minister of Railways and Canals;

(b) 'Department' means the Department of Railways and Canals.

DEPARTMENT OF RAILWAYS AND CANALS.

RECORD.

3. There shall be a department of the Government of Canada which shall be called the Department of Railways and Canals, over which the Minister of Railways and Canals for the time being, appointed by commission under the Great Seal of Canada, shall preside.

(2). The Minister shall have the management and direction of the Department, and shall hold office during pleasure.

POWERS OF THE MINISTER.

10 7. The Minister shall have the management, charge and direction of all Government railways and canals, and of all works and property appertaining or incident to such railways and canals, also of the collection of tolls on the public canals and of matters incident thereto, and of the officers and persons employed in that service.

EXECUTION OF CONTRACTS.

20 15. No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon His Majesty, unless it is signed by the Minister, or unless it is signed by the Deputy Minister, and countersigned by the Secretary of the Department, or unless it is signed by some person specially authorized by the Minister, in writing, for that purpose : Provided that such authority from the Minister, to any person professing to act for him, shall not be called in question except by the Minister, or by some person acting for him or for His Majesty."

30 7. Although not evidenced by the terms of the contract alleged to have been constituted by the documents in writing aforementioned, the claimant, in its claim referred to the Exchequer Court of Canada and in its statement of claim alleges that it was represented and warranted throughout the whole course of the negotiations, that His Majesty would also lease the fifth, sixth, seventh, eighth and ninth floors of the building to be erected on the lands in question, for the use of the Department of Customs and Excise; that it was well understood by the Right Honourable the Prime Minister, the Right Honourable the Minister of Railways and Canals, the Honourable the Minister of Public Works, and other Ministers of the Crown, as well as the Canadian National Railway Company, that the successful financing of the whole transaction depended upon the leasing of these floors; that it was well known that until the passage of the necessary Order in Council, making quite certain that the floors in question would be leased, definite arrangements which would enable the completion of the purchase, could not
40 be made.

pp. 1-1C;
p. 3,
ll. 16-29.

RECORD.
pp. 13-103,
148-221.

8. The case was tried and argued before the President of the Exchequer Court of Canada on the 25th, 26th and 27th days of June, 1930. The material facts, appearing from the evidence, documentary and oral, adduced at the trial and set out in the Record are :—

p. 191,
ll. 10-26;
p. 192.

(a) By letter dated 15th August, 1925, the Secretary, Department of Railways and Canals, notified Forgie His Majesty was taking steps to vacate the premises by the 15th September, 1925, and he was required to be ready finally to close the transaction on or before that date.

p. 103,
ll. 10-25.

(b) The premises were vacated by the Canadian National Railways Company on 19th, instead of 15th September, 1925, the reason for such delay being that Forgie had instructed the Canadian National Railway Passenger Agent on August 13th that he would not require possession until October.

pp. 198-201;
p. 202,
ll. 1-10;
pp. 209-214.

(c) Forgie was not ready to complete the transaction on September 15th, 1925, and requested and was granted, by letters signed by the Deputy Minister of Railways and Canals, and in one instance by the Minister of Railways and Canals, successive extensions of time for completing the alleged contract, (the last of which extensions expired on December 30, 1925), without prejudice to, or waiver of, any of His Majesty's rights, reservations or remedies under the alleged contract. 20

p. 215, ll. 1-13;
p. 39, ll. 11-16;
p. 39, ll. 26-27.

(d) By letter dated December 29, 1925, Forgie requested a further extension of time until January 31st, 1926, but received no reply.

p. 48,
ll. 32-36.

(e) Forgie admitted in evidence he had requested these various extensions of time because the Order-in-Council authorizing the leasing of five floors in the proposed new building for the Department of Customs and Excise had not been passed and he wanted delay until it had been passed. 30

p. 98,
ll. 30-38;
p. 220,
ll. 29-32,
p. 221,
ll. 1-11.

(f) The then Minister of Railways and Canals, Rt. Honourable George P. Graham, in his evidence, emphatically denied that the extensions of time had been granted on any understanding with him that the completion of the contract could await the conclusion of an arrangement for the leasing of space for the Department of Customs and Excise, and further stated that he had informed Forgie time and again that the contract had no connection, directly or indirectly, with any such arrangement; that the two matters were absolutely separate, and that if the claimant company was able to carry out its contract there should be no delay. 40

p. 215,
ll. 17-30;
pp. 216-217.

(g) Order-in-Council, dated February 1st, 1926, (P.C. 148) authorized the Minister of Public Works to lease the fifth, sixth, seventh, eighth and ninth floors of the proposed new building on the terms and conditions therein specified; and Forgie having obtained a copy of this Order, although none was ever officially

communicated to him, (and it was ultimately rescinded by Order-in-Council of June 10, 1926 (P.C. 910)), advised the Minister of Railways and Canals by letter dated February 3rd, 1926, that he would be in a position to complete the purchase on or about the 10th February, 1926. RECORD. p. 218, ll. 5-21.

(h) By letter to Forgie, dated February 8, 1926, the Minister stated that Forgie had failed to implement his original agreement and the various extensions of it; and by a further letter to Forgie, dated February 12, 1926, the Minister stated there would be no more extensions of time. p. 218, ll. 25-30. p. 179, ll. 1-8. p. 219, ll. 12-29.

9. On the 4th March, 1931, the learned Judge delivered judgment, holding that the claimant was entitled to recover from His Majesty the King damages for the alleged breach of contract of sale with costs, but reserving the ascertainment of the amount of such damages. The learned Judge also granted the application of the claimant at the trial for an Order to permit James Forgie to be added as a party to the proceedings, so that the claim for damages under the alleged contract might be made in the name of the assignor as well as in the name of the claimant; and a formal Order adding Forgie as a party claimant was subsequently made. p. 123, ll. 37-38; p. 124, ll. 1-7. p. 124, ll. 12-27.

10. In his reasons for judgment the learned Judge founded his decision upon the following conclusions of law :— pp. 107-124.

(1) That Forgie's offer of purchase and the Order-in-Council of July 29, 1925, (in view of the delivery of a certified copy thereof to Forgie and of the retention of his deposit) constituted and evidenced an enforceable contract between the parties in respect of the sale and purchase of the property in question. p. 113, ll. 36-39; p. 114; p. 115, ll. 1-11.

(2) That compliance with the provisions of sec. 15 of the Department of Railways and Canals Act, R.S.C. 1906, chap. 35, was not necessary to constitute an enforceable contract against the Crown, and that, in any case, the payments made by Forgie in respect of the purchase of the Home Bank Head Office site, constituted part performance sufficient to take the contract out of the requirements of said sec. 15. p. 115, ll. 12-39; p. 116; p. 117, ll. 1-29; p. 121, ll. 19-39; p. 122; p. 123, ll. 1-30.

(3) That time was not, by necessary implication, of the essence of the alleged contract, and that, Forgie having failed to perform the conditions of the alleged agreement on or before the date mentioned therein, or in the several extensions of time for completion, it was necessary for the respondent to give Forgie, or his assignee a distinct notice in writing limiting a time at the expiration of which the respondent would consider the contract at an end. p. 118, ll. 9-38; p. 119; p. 120, ll. 1-14.

(4) That Forgie's rights and liabilities under the alleged contract were assignable to the plaintiff without notice to, or the consent in writing of, the Minister of Railways and Canals. p. 120, ll. 15-40; p. 121, ll. 1-18.

RECORD. 11. The respondent appealed from the judgment of the learned
pp. 126-127. President of the Exchequer Court of Canada to the Supreme Court of
Canada, and, the damages not having been assessed when this appeal was
instituted, the only question raised on the appeal was whether His Majesty
was liable to pay any damages for breach of the alleged contract.

p. 133. 12. The appeal was argued on the 11th and 12th November, 1931,
before the Supreme Court of Canada composed of Anglin, C.J., Newcombe,
Rinfret, Lamont and Smith, JJ., and on the 15th March, 1932, the Court
(with the exception of Newcombe, J. who had died subsequent to the
hearing of argument) delivered judgment unanimously allowing the appeal 10
and dismissing the claim of the claimants, subject to a direction for the
repayment to the claimants of the deposit of \$25,000. as hereinbefore stated.
The judgment of the Court, delivered by Smith, J. was concurred in by
Anglin, C.J. and Rinfret and Lamont, JJ. The reasons for judgment are
pp. 134-141. reported in (1932) S.C.R. pp. 511-523.

13. Smith, J. was of opinion that there never was a completed contract
binding upon His Majesty, represented by the Minister of Railways and
Canals, or otherwise, for these reasons, namely: (1) that the Order in
Council of 29th July, 1925 did not, in itself, constitute an acceptance of
Forgie's offer of the 27th idem, because, in the first place, the offer was 20
not made to His Excellency the Governor General in Council, and the
Order did not purport to accept the offer, but merely to authorise the
Minister to accept, and in the second place, there was no evidence that
the making of such Order in Council was communicated to Forgie on
behalf of His Majesty by the Minister of Railways and Canals, or anybody
else duly authorized; (2) that the acceptance referred to in the report of
the Minister set out in the said Order in Council, if there was any, was not
in writing signed in compliance with sec. 15 of the Department of Railways
and Canals Act, R.S.C. 1906, chap. 35, and, therefore, was not binding 30
upon His Majesty; and (3) that, if a contract had not in fact been thereto-
fore concluded, the Minister's letter of 17th November, 1925, purporting to
grant Forgie an extension of time to December 30th, 1925 for completion
of the transaction, could not be taken as an acceptance, by the Minister, of
Forgie's offer so as to constitute a contract; the Minister, though no doubt
under the impression that a contract already existed, had no intention, by
that letter, of constituting a contract, and without such intention, the
Minister could not be held to have done so. What was the basis of the
Minister's impression that a contract had been completed was not apparent;
but "Here," said the learned Judge, "we are not, however, dealing with 40
what might be inferred in connection with negotiations between private
parties. Parliament has seen fit, for the protection of His Majesty, to
enact sec. 15 referred to, and we are not entitled to disregard that enactment.
The question is, therefore, whether or not there was in fact an acceptance
that complies with the terms of this sec. 15, and it seems to me impossible
to say that there was".

The learned Judge was further of opinion that there was no such part performance of the proposed contract by the claimants as to constitute a contract binding upon His Majesty, represented by the Minister of Railways and Canals. It seemed to him to be very doubtful if the express terms of sec. 15 of the Department of Railways and Canals Act could be disregarded, especially where, as here, the acts of part performance alleged, took place entirely without the knowledge or assent of the Minister, and the claimants' successive applications for an extension of time were an intimation to the Minister that nothing was being done towards carrying out the contract.

10 In any case, the learned Judge was of opinion that none of the acts of part performance alleged (the entering into a contract by Forgie for the purchase of the Home Bank property; the payment of money on account; the preparation of plans and specifications for the building, and the entering into a contract for its construction) would amount to part performance. All of these things, except some of the payments, having been done prior to the making of the offer of 27th July, 1925, were merely steps taken by Forgie to put himself in a position to make the offer and to carry it out if accepted, and were, in no sense, part performance of anything which Forgie had agreed to do in his offer.

20 The learned Judge was further of opinion that when Forgie made his various applications for an extension of time, and received them in the terms of the various letters of extension, time was made by these extensions of the essence of the contract, and that the claim could not be asserted even if there were a contract. It seemed clear from the evidence of Forgie that the reason for all the applications for extension of time was the expectation of obtaining from the Minister of Public Works an agreement for the leasing of five storeys of the proposed building for the use of the Department of Customs and Excise, and the learned Judge stated that he entertained no doubt that the claimants never intended to go on with the contract unless the lease to the Customs and Excise Department should be secured, and that without that lease, they never were in a position to go on with the contract. The Order in Council of February 1, 1926, authorizing that lease was never acted on, but was repealed shortly afterwards, so that the claimants did not, in fact, get themselves into the position to go on with the alleged contract.

30 The learned Judge added that counsel for the claimants had further contended that sec. 15 of the Department of Railways and Canals Act was not applicable because the transaction was a sale of public lands governed by the provisions of the Public Lands Grants Act, R.S.C. 1906, chap. 57, whereby the Governor in Council was authorized to sell or lease any public lands which are not required for public purposes; but this point seemed to the learned Judge to have been disposed of by the judgment of the Judicial Committee in *Dominion Building Corporation, Limited v. The King* (1930), A.C. 90, where it was stated that even if the matter were originally not a departmental but a Government one, their Lordships would be of opinion that it was appropriated to the Department of Railways and Canals by the Order in Council, and was thereby made part of the Minister's administration

RECORD. for the purposes of s. 38 of the Exchequer Court Act. The learned Judge further observed that the acceptance of the offer involved not only a sale of public lands, but a contract by His Majesty for the payment of a large sum of money annually for a period of thirty years.

There being no contract, the learned Judge held that the claimants were entitled to repayment of \$25,000. as a return of the deposit, but not as an item of damages as claimed.

14. It is submitted on behalf of the Attorney-General of Canada that the judgment of the Supreme Court of Canada is right and ought to be affirmed, and that the appeal therefrom ought to be dismissed for the reasons stated in the Reasons for Judgment delivered by Smith, J. on behalf of the Court and for the following, among other 10

REASONS.

1. Because there was no contract of sale binding on the respondent.
2. Because no acceptance of Forgie's offer was communicated to him on behalf of the respondent by the Minister of Railways and Canals, or by any one duly authorized in that behalf.
3. Because the requirements of sec. 15 of the Department of Railways and Canals Act were not complied with.
4. Because the respondent is not estopped or precluded from setting up the invalidity of the alleged contract. 20
5. Because the alleged contract would have involved the expenditure of a large sum of public funds over a period of years, and no such expenditure was authorized by Parliament.
6. Because no acts which may properly be considered acts of part performance of the alleged contract were alleged or proved, and part performance would in any case be insufficient to take the alleged contract out of the operation of said sec. 15.
7. Because time was by necessary implication of the essence of the alleged contract, or was made so when extensions were granted. 30
8. Because neither Forgie nor his assignee was ready or willing on the date fixed by the alleged contract, or on any extended date, to complete the transaction.
9. Because the assignment by Forgie of his rights to the claimant was not notified to the Minister, and was not consented to by

him, or consented to in accordance with the provisions of said sec. 15 and is not binding on His Majesty, and was ineffectual to establish privity between His Majesty and the claimant.

10. Because the judgment of the Supreme Court of Canada is right for the reasons assigned by the Honourable Mr. Justice Smith.

W. N. TILLEY.

C. P. PLAXTON.

In the Privy Council.

No. 50 of 193

On Appeal from the Supreme Court of Canada

BETWEEN

DOMINION BUILDING CORPORATION
LIMITED (Claimants) and JAMES I
FORGIE (added as a Party Claimant by Order
made by the President of the Exchequer Court
of Canada on the 4th day of March, A.D. 1931)
Appellants

AND

HIS MAJESTY THE KING -
(Respondent) Respondent

CASE FOR THE RESPONDENT.

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