

The Dominion Building Corporation, Limited, and another - *Appellants*

v.

The King - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 9TH MAY, 1933.

Present at the Hearing:

LORD ATKIN.

LORD TOMLIN.

LORD THANKERTON.

LORD RUSSELL OF KILLOWEN.

LORD MACMILLAN.

[*Delivered by* LORD TOMLIN.]

This appeal arises out of a reference under Section 38 of the Exchequer Court Act by the acting Minister of Railways and Canals to the Exchequer Court of Canada of a claim by the appellants against the Crown for compensation or damages in respect of the refusal of the Crown acting through the Minister of Railways and Canals to carry out an alleged contract entered into by the appellants or one of them with the Crown for the purchase from the Crown of a property (hereinafter called the Corner property) situate on the corner of King and Yonge Streets in the city of Toronto.

The appellants succeeded in the Exchequer Court, but on appeal by the Crown to the Supreme Court of Canada the judgment of the Exchequer Court was reversed and the appellants' claim was dismissed. Against such reversal and dismissal the appellants now appeal to His Majesty in Council.

Before the case was dealt with on its merits by the Exchequer Court, the validity of the reference was challenged by the

respondent, but ultimately, on an appeal to His Majesty in Council, the validity of the reference was upheld.¹

The Corner property had been originally acquired by the Crown under the provisions of the Expropriation Act, Ch. 143 of the Revised Statutes of Canada, 1906, for occupation by the Canadian National Railway Co.

In 1925, another property in King Street (hereinafter called the Home Bank property), which adjoined the Corner property towards the west, was for sale, and the appellant Forgie, either on his own account or acting for the first appellants, conceived the plan of acquiring both properties and erecting upon them a new building of 26 storeys and letting some parts of the new building to the Crown for the use of the Canadian National Railway Co. and other parts thereof to the Department of Customs and Excise which was in need of new offices.

Accordingly, the appellant Forgie acquired an option of purchase over the Home Bank property and entered into negotiations with the Crown through the Minister of Railways and Canals for the purchase of the Corner property on the footing that he would build upon such property and on the Home Bank property the proposed new building, and when the building was completed would lease the ground floor and three other floors to the Crown for the use of the Canadian National Railway Co.

At the same time, the appellant Forgie entered into negotiations with the Minister of Public Works with a view to the grant to the Crown for the use of the Department of Customs and Excise of a lease of five other floors of the proposed new building. It was, of course, obvious that the financing of the proposed scheme would be rendered easier if these last mentioned negotiations could be brought to a successful issue.

The first proposal of the appellant Forgie to the Minister of Railways and Canals was in May, 1925, and came to nothing, but a deposit of \$25,000 made in connection with such proposal was treated afterwards as the deposit made under the offer of the 27th July, 1925, hereinafter mentioned.

In July, 1925, as the result of further negotiations, the following 4 documents came into existence, namely (1) a written offer dated the 27th July, 1925, for the purchase of the Corner property made by the appellant Forgie to His Majesty the King represented by the Minister of Railways and Canals for Canada; (2) a report upon such offer dated the 27th July, 1925, by the same Minister to the Governor-General in Council; (3) draft of a lease to carry out part of the terms of the offer; and (4) an Order in Council dated the 29th July, 1925, authorising a sale of the Corner property in accordance with the terms of the offer.

It is in their Lordships' opinion obvious, having regard to the dates of these documents, that the offer of the 27th July, 1925,

¹ [1930] A.C. 90.

embodied terms which, as the result of the negotiations, were then acceptable both to the appellant Forgie and the Minister of Railways and Canals.

The offer begins by the appellant Forgie offering to purchase the Corner property for \$1,250,000 cash. It then states that a deposit of \$25,000 is made by the purchaser on account of the price, in case of and upon acceptance of the offer, but otherwise to be returned without interest (this being the sum of \$25,000 previously deposited as already explained). It then provides for payment of the balance of the purchase price "at such time as possession of the said premises be given to the undersigned" (*i.e.* the appellant Forgie) "not later than the 15th September, 1925," and for apportionment of outgoings "to date of completion of sale."

After some provisions as to title not material to be referred to, the offer proceeds as follows:—

It is to be further understood that the undersigned agrees that upon his obtaining possession of the said lands hereinbefore referred to, on or before the Fifteenth day of September, 1925, that he, the undersigned, will immediately proceed with the erection of a twenty-six story modern fire-proof office building on the said lands and on the lands (formerly known as the Home Bank of Canada Head Office site), now owned by the undersigned, and adjoining immediately to the west thereof, on King Street, and complete and have ready the said office building for occupancy by His Majesty as tenant under lease as hereinafter provided, not later than the twenty-fifth day of October, 1926, subject to the usual delays that may happen in the construction of said office building beyond the control of the undersigned, the contractors, builders and architects and as evidence of such undertaking of completion of said office building within the time above specified, the undersigned will furnish His Majesty, represented as aforesaid, with a certified copy of the contractor's (constructing the said office building) bond guaranteeing the completion of the said building within the time specified; the said office building to be constructed in accordance with the plans, details and specifications prepared and to be prepared by Eustace G. Bird, Architect of the City of Toronto, and which said plans shall be subject to the approval, in so far as space in the said office building to be occupied by His Majesty as tenant under lease hereinafter referred to, by a representative or representatives of and to be named by the Canadian National Railways.

Further provided that His Majesty, represented as aforesaid, shall execute a lease for the renting space of the ground floor and of the next three typical floors of the said office building for a term of thirty years from the twenty-fifth day of October, 1926, at a rental of Sixteen (\$16) Dollars per square foot per year for the ground floor and Three (\$3) Dollars per square foot per year for the next three typical floors, for the first twenty years of said term, said rentals to be increased during the next ten years of said term by such amounts, if any, as will bring the rentals during the last period of ten years to the full market value as it will exist at the end of the twenty-year period provided, however, that the rental for the last ten-year period of the said term of thirty years shall not be reduced below rental for the first twenty-year period of the said term, the lease to be executed by His Majesty, represented as aforesaid to be in and to embody the exact terms and provisions as in draft lease hereto annexed,

marked A, set out, it being understood that in the event of any inconsistency between the above set out terms and provisions of the lease to be executed and the terms and provisions of the draft lease hereto annexed marked A, that the terms and provisions of the said draft lease hereto annexed marked A shall prevail and govern in the lease to be executed under the provisions of this offer of purchase.

That notwithstanding anything in this offer of purchase it is understood that in the discretion of His Majesty it may be a condition of the instrument of conveyance from His Majesty to the undersigned of the said lands in the terms of the said instrument that the title in and to the said lands by the said instrument to vest in the undersigned only upon the execution and delivery by the undersigned of the lease, hereinbefore referred to, to His Majesty, represented as aforesaid, and the due furnishing of the bond by the undersigned as under the terms and provisions of said draft lease provided for.

This offer of purchase, if accepted by Order of His Excellency the Governor General in Council, shall constitute a binding contract of purchase and sale, subject to all the terms and provisions thereof and which contract shall enure to the benefit of the undersigned, his heirs, executors, administrators and assigns and to the benefit of His Majesty, His Successors and Assigns.

A draft lease was sent to the Minister with the offer embodying the terms upon which the ground floor and three other floors of the proposed new building were to be let to the Crown. The draft was expressed to be between the first appellants as lessors (to whom the appellant Forgie had assigned or was bound to assign all his interest in the transaction) and "His Majesty the King acting on behalf of the Dominion of Canada and therein represented by the Minister of Railways and Canals and on the authority of an Order in Council dated the day of , 1925, hereinafter called the lessee." The term of the lease was expressed to be 30 years from the 25th October, 1926, the date fixed in the offer for the completion of the new building, and the draft further provided for the payment of the rents therein specified and for all other necessary terms.

The report of the Minister to the Governor-General in Council is recited in full in the Order in Council, though the report itself was not produced in the course of the proceedings. As appears from such recital, the report sets out the title of the Crown to the Corner property, refers to the appellant Forgie's offer of the 27th July, 1925, and intimates that "the Minister accepted said offer of purchase subject to the approval and authority of Your Excellency in Council given on or before the 29th day of July, A.D. 1925." It then states "that in the main the said offer of purchase accepted as aforesaid sets out in effect as follows." The main provisions of the offer follow. The report then calls attention to the fact that the directors of the Canadian National Railway Co. had (as the fact was) approved the proposal and that a draft lease (referring to the draft of which mention has already been made) in accordance with the offer had been prepared and that a copy of it was attached to the report.

The Order in Council recited the Minister's report at length, and stated that the Minister submitted the same, and upon the advice of the Deputy Minister of Railways and Canals recommended that authority be given for the acceptance of the said offer and for the sale and transfer of the premises by His Majesty to the purchaser, the transfer by its own terms only to vest title of the premises in the purchaser upon the execution and delivery of the lease hereinbefore referred to and such transfer to be in form to be approved by the Department of Justice. The foregoing recommendation was then concurred in, and the Order in Council was approved by His Excellency the Governor-General in due course.

The appellant Forgie produced at the trial a certified copy of the Order in Council which he said he had received but he could not say whether he received it on the day on which the Order in Council was made or on a later day, and he could not recollect whether or not he received any covering letter with it. Except to this extent there was no evidence of any formal intimation to the appellant that his offer was accepted.

The Canadian National Railway Co. vacated the Corner property on Saturday the 19th September, 1925, but no tender of possession was ever made to the appellants or either of them.

On the 16th September, 1925, the appellant had applied for and obtained an extension of time for completion. Subsequently, he made six further applications for an extension of time for completion, each one of which was acceded to, the final extension being until the 30th December, 1925.

On the occasion of each extension the Minister or the Deputy Minister wrote to the appellant Forgie a letter referring to the offer of the 27th July, 1925, and "the acceptance thereof," and advising him that a further extension of time to the date specified was given "but without prejudice on the part of His Majesty as to and without waiver on the part of His Majesty of any of His rights reservations or remedies under and as provided for by the said contract should you fail to perform and carry out within the hereby extended period all the covenants and conditions which on your part under and as provided by the said contract were to be performed and carried out within the original period thereunder provided."

An application to extend the time for the completion of the new building had been made on the 30th September, 1925, but had been refused. On the 5th October, 1925, draft Letters Patent embodying the conveyance of the Corner property from the Crown to the appellant Forgie had been sent to the latter. In the meantime also, the negotiations with the Minister of Public Works were continuing but did not reach finality till the 1st February, 1926, when an Order in Council was passed sanctioning on the recommendation of that Minister the grant of a lease of five floors in the proposed new building by the first appellants to the

Crown for 10 years from the date of occupation at an annual rent of \$110,000.

The appellant Forgie gave evidence to the effect that the delay in obtaining the last-mentioned Order in Council was due in part at any rate to the fact that a general election took place in Canada in the autumn of 1925, and that "we were requested to allow the matter to stand until after the election as it was not desired to bring the matter into the political field." His evidence in this respect does not appear to have been cross-examined to or contradicted, and was accepted in the Exchequer Court.

No doubt, as the learned judge of the Exchequer Court thought, in the delay in getting through this matter of the lease to the Department of Customs and Excise is to be found a principal reason for the several applications made for the extension of the time for the completion of the contract for purchase.

On the 29th December, 1925, the day before the expiration of the last extended period for the completion of the purchase, the appellant Forgie applied by letter for a further extension until the 31st January, 1926.

This application received no acknowledgment or answer.

The appellant Forgie stated in the box that he saw Mr. Graham, the Minister for Railways and Canals, in January, 1926. His account of what took place was as follows:—

"I had a conversation with Mr. Graham about this matter. The conversation at the outset was purely personal. I told him I had written for this extension and was very much exercised over the fact that I had not heard about it, and he said: 'I do not see what cause you have to worry, Forgie, I have not cancelled your contract.' I said: 'I am very glad to hear that but I would like to have it in writing.' He said 'There is no necessity to worry- the matter stands as it did.'"

This evidence was not shaken in cross-examination, in the course of which the witness, when asked whether he discussed with Mr. Graham the fact that he had not yet got through the matter of the lease to the Department of Customs and Excise, answered, "We discussed the whole thing from beginning to end."

Mr. Graham admitted that he knew what was taking place with regard to the proposed lease to the other Department, but he also said, "I have no recollection of having a conversation with Mr. Forgie, and if he seriously says that I had I will not dispute it, but "if he makes a suggestion that this contract would be extended I absolutely deny that."

The Courts below do not appear to have expressed any view as to the proper conclusion of fact to be drawn from the evidence as to this interview, but if such an interview did take place, it affords some explanation of the absence of an answer to the application of the 29th December, 1925, which absence is otherwise unexplained.

On the 3rd February, 1926, the appellant Forgie wrote to Mr. Graham that he was prepared to complete on the 10th February, 1926.

On the 8th February, 1926, Mr. Graham replied as follows :—

“ In reply to your letter of February 3rd, permit me to say that you made an agreement to pay for property on the corner of King and Yonge Streets, Toronto, on a certain date. Failing to implement your agreement on that date, several extensions of time were given your clients, but in every instance they failed to make payment on the date mentioned.

“ Negotiations were carried on by the Canadian National Railway Company, and whatever failure there has been has been the fault of those you represent, not the fault of either the Government or the Canadian National Railways.”

Subsequently, on the 12th February, 1926, Mr. Graham wrote to the appellant Forgie, “ There will be no more extensions, and I will oppose to the limit any application you make for a fiat ” (*i.e.*, a fiat to enable proceedings to be taken against the Crown).

A claim for compensation or damages was thereafter made by the appellants and was referred by the Acting Minister of Railways and Canals to the Exchequer Court.

The learned judge in the Exchequer Court gave judgment for the appellants, holding them entitled to damages but reserving the ascertainment of the amount of such damages. In the learned Judge's opinion there was a valid enforceable contract in respect of which time had not originally been and was not subsequently made of the essence of the contract, so that the Crown had no right in February, 1926, to treat it as at an end.

The Supreme Court unanimously allowed the appeal and dismissed the claim with costs, but ordered the return of the deposit of \$25,000 which had been retained by the Crown.

The judgment of the Court was delivered by Smith J. The learned Judge held that there was no written acceptance of his offer communicated to the appellant Forgie by any one having authority to communicate such acceptance, and that the order in Council was not itself an acceptance of the offer and therefore that there was no contract, and moreover, that the requirements of Section 15 of the Railways and Canals Act, c. 35, R.S.C. 1906, had not been complied with, so that there could be no binding contract. The learned Judge further held that even if there was a contract, time for completion had by the several extensions been made of the essence of the contract and that the Crown was entitled to treat the contract as at an end.

Their Lordships think that if any notification of acceptance of the offer was necessary, the only possible inference upon the evidence is that there was a notification of acceptance by the sending to the appellant Forgie of a certified copy of the Order in Council.

But in fact, in their Lordships' opinion, there was not upon the true construction of the contract any need for a notification of acceptance. The language of the offer is : “ This offer of purchase, if accepted by order of His Excellency the Governor General in Council, shall constitute a binding contract of purchase and

sale subject to all the terms and provisions thereof." This language is not the language of precision, but the meaning which can most naturally be and ought, in their Lordships' opinion, to be attributed to it, is that the offer shall be deemed to have been accepted when the necessary Order in Council has been made.

Upon this view of the matter there was a contract without any intimation of acceptance so soon as the Order in Council was made.

The question remains whether such a contract is binding, having regard to Section 15 of the Railways and Canals Act, c. 35 R.S.C. 1906.

That section is in the following terms :—

" 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 authorised 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."

Now the Corner property was originally acquired by the Crown under the Expropriation Act c. 143, R.S.C. 1906, and therefore under Section 34 of that Act was vested in His Majesty, and when not required might be sold or disposed of under the authority of the Governor-General in Council. Sect. 4 of the Public Lands Act Revised Statutes of Canada 1906, c. 57, does not apply.

Prima facie therefore the matter was not under the control or direction of the Minister of Railways and Canals but the property had since its expropriation been occupied for the purposes of his Department, the offer was addressed to His Majesty as represented by such Minister, and it was one of the terms of the sale that His Majesty represented by such Minister should take a lease of certain floors in the proposed new building. In these circumstances it must, their Lordships think, be taken that, having regard to Sections 3 (2) and 7 of the Department of Railways and Canals Act, c. 35, Revised Statutes of Canada, 1906, and to the decision of their Lordships upon the appeal in respect of the validity of the reference, the matter was under the control or direction of the Minister of Railways and Canals and that his consent was required.

That he did consent cannot be doubted as in his report to the Committee of the Privy Council upon the offer of the 27th July, 1925, he stated that he had accepted such offer subject to the approval and authority of the Governor-General in Council.

In these circumstances did Section 15 apply to the contract in question? Their Lordships are of opinion that it did not. It is to be observed that the section does not say that every contract in order to be binding must be in writing, but only that no deed,

contract, document or writing relating to any matter under the control or direction of the Minister shall be binding unless it is signed and countersigned by certain specified persons. Of the four things mentioned each one except "contract" must necessarily be something in writing. So long ago as in 1898 the Supreme Court of Canada in *The Queen v. Henderson*, 28 S.C.R. 425, held that the section did not apply where the contract was not a written one. Their Lordships think that that conclusion was correct. They think that so far as "contract" is concerned the section has no application except where the contract is embodied in an instrument or instruments in writing intended to be signed by someone on behalf of the Crown. Here there was no such intention. On the construction of the offer, which their Lordships adopt, nothing further in writing signed by any of the parties was required. The making of the Order in Council was of itself sufficient to convert the offer into a binding contract.

Their Lordships are therefore of opinion that there was constituted in the events which happened a valid contract in the terms of the offer of the 27th July, 1925, binding upon the Crown.

The time fixed by the contract for the completion of the purchase was not expressly made of the essence of the contract, and in their Lordships' opinion neither the language of the contract, the nature of the property, nor the circumstances of the case justify the implication of any such condition as one of the original terms of the contract.

The extensions of time for completion given from time to time are not consistent with the parties regarding the time fixed for completion as of the essence of the contract, nor can such extensions be treated as having the effect of a notice making time of the essence of the contract. The effect of each extension was merely to substitute the altered date for the original date. Now the Crown, apart from the extensions given, did not in any way call upon the appellants to complete within a fixed time, so as to give rise to a right on the part of the Crown to treat time as of the essence and the contract as at an end.

To meet this difficulty an argument was addressed to their Lordships on behalf of the Crown which was not developed in either of the Courts below and upon which therefore their Lordships have not had the assistance of the learned judges in the Courts below.

It was said that the rule with regard to time not being of the essence of the contract was an equitable rule applied originally by a Court of Equity only where it had jurisdiction to enforce and where the case was but for the time element a proper one for enforcing specific performance and that the statutory extension of the rule to all Courts in Ontario (it being Ontario law which governs the present case) by Section 17 (7) of the Ontario Judicature Act, 1881, subsequently reproduced in Section 14 of the Mercantile Law Amendment Act, c. 161, Revised Statutes of Ontario,

1927, is an extension which makes the rule applicable only in circumstances where specific performance would have been enforced in equity.

Further, it was urged (1) that specific performance could never have been ordered against the Crown and that, therefore, apart from the statute, the rule could never have been made applicable against the Crown, and (2) that in any case the statutory provisions extending the operation of the rule do not bind the Crown, which is not expressly named therein.

The circumstances in which the rule was applied in equity were the circumstances in which equity had jurisdiction to grant and would grant specific performance, but to state this is only to state that equity could apply its own rule only where it had jurisdiction. The rule itself, however, is a rule of substance which ought to be applied wherever the circumstances (apart from the status of the parties) are such that a Court of Equity would have applied it.

It is no doubt true that an operative order for specific performance cannot be made against the Crown. In fact, no order can be made against the Crown in the sense in which it can be made against the subject, but under the Petition of Right Act, Revised Statutes of Canada 1906, c. 142, section 8, there is jurisdiction in respect of claims of the subject against the Crown to consider and determine what is right to be done and, as their Lordships do not doubt, to make a declaration as to the right of the subject to specific performance if the circumstances justify it.

It is, in their Lordships' opinion, too narrow a view to treat the applicability of the rule as limited by reason of the status of the Crown. In the present case their Lordships think that the circumstances are such as would have justified an order for specific performance by a Court of Equity, had the contest been one between two subjects.

What, then, is the effect of the statutory provision, first as between subject and subject, and secondly as between subject and the Crown?

Section 14 of the Mercantile Law Amendment Act Revised Statutes of Ontario 1927, c. 161, the provisions of which have been operative at all times material to this case, provides that—

“Stipulations in contracts as to time or otherwise which would not before the passing of the Ontario Judicature Act, 1881, have been deemed to be or to have become of the essence of such contract in a Court of Equity shall receive in all Courts the same construction and effect as they would prior to the passing of that Act have received in equity.”

Whatever be the proper construction to be applied to this enactment, their Lordships are satisfied it would have applied to the present case had the contract here been between subject and subject.

Is the Crown bound by the enactment? Their Lordships are of opinion that it is. Under the provisions of the Interpretation Act of Ontario Revised Statutes of Ontario 1927, c. 1, section

10, no Act shall affect the rights of His Majesty, his heirs or successors unless it is expressly stated therein that His Majesty shall be bound thereby.

The expression "the rights of His Majesty" in this context means, in their Lordships' view, the accrued rights of His Majesty, and does not cover mere possibilities such as rights which, but for the alteration made in the general law by the enactment under consideration, might have thereafter accrued to His Majesty under some future contract.

Upon this view of the matter the statutory provision operates in the present case.

The arguments of the respondent as to the special position of the Crown therefore fail on all points.

It follows that in their Lordships' opinion the appeal should be allowed and the judgment of the Supreme Court, except so far as it orders a return of the deposit, should be reversed, and the judgment of the Exchequer Court should be restored, and their Lordships will humbly advise His Majesty accordingly. The appellants will have their costs here and below.

In the Privy Council.

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v.

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DELIVERED BY LORD TOMLIN.

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