

44, 1933

No. 107 of 1932.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

10

BETWEEN—

THE HYDRO - ELECTRIC POWER
COMMISSION OF ONTARIO

(Defendant) *Appellant*

— AND —

20

THE CONIAGAS REDUCTION
COMPANY LIMITED

(Plaintiff) *Respondent.*

CASE FOR THE RESPONDENT.

RECORD

30

1. This is an appeal from the judgment of the Court of Appeal for Ontario, dated the 20th day of April, 1932, dismissing an appeal by the Appellant from the judgment of The Honourable Mr. Justice Raney of the Supreme Court of Ontario dated the 22nd day of July, 1931. p. 69. p. 64.

40

2. The action was brought by the Respondent against the Appellant for a declaration that a notice dated May 14th, 1928, directed by the Appellant to the Respondent was invalid and ineffectual to terminate a contract dated November 8th, 1907, made between The Falls Power Company Limited and The Clifton Sand Gravel and Construction Company Limited and by them respectively assigned to the Appellant and the Respondent; and for a p. 3, l. 17.

RESPONDENTS CASE.

further declaration that said contract is valid and binding upon the Appellant and the Respondent respectively, upon and subject to the terms thereof, and is a perpetual contract subject to be terminated by notice to be given by the Respondent to the Appellant in accordance with the terms of the said contract; and for damages for breach thereof.

p. 4. **3.** The Appellant, by its amended Statement of Defence, pleaded that the Respondent had abandoned said contract; that the contract was determinable by the Appellant by reasonable notice and that the notice given by it to the Respondent dated May 14th, 1928, was reasonable under the circumstances, and that the right of the Respondent to receive electric energy from the Appellant had come to an end. It is admitted that the parties to the action succeeded to the respective rights of the original parties to the agreement and are bound by the covenants and obligations of the original parties thereto.

p. 67. l. 14.

4. By a Contract in writing dated November 8th, 1907, The Falls Power Company Limited, therein called the "Power Company", agreed to sell, deliver and maintain at the outside wall of the transformer house of The Clifton Sand Gravel and Construction Company Limited, therein called the "Purchaser", at Thorold, Ontario, for power, lighting and electro-chemical purposes only, electric energy in the form of three-phase alternating current at approximately twenty-five cycles per second periodicity and at approximately 12,000 volts to the amount of one hundred and fifty horse power or more, said power to be delivered continuously twenty-four hours each day and every day in the year so far as reasonable diligence would enable the Power Company so to do, for a period of five years from the commencement of actual delivery; and the contract to continue in force for further periods of five years each unless notice in writing should be given by the Purchaser to the Power Company at least six months previous to the expiration of any five year period.

Exhibit 1
p. 80.

p. 81. l. 35. **5.** By the said contract, the Power Company agreed to sell to the Purchaser and the Purchaser agreed to take from the Power Company any and all electric energy which it might require during the term thereof for the operation of its plant and any and all extensions or additions thereto, except as hereinafter provided. It was further provided that the Purchaser should give the Power Company six months' notice in writing when electrical energy in excess of

seven hundred and fifty horse power was required and the Power Company reserved the right to limit the amount of electrical energy to be furnished under the agreement to any amount in excess of seven hundred and fifty horse power in case at the time when the Purchaser made demand for more than that amount the Power Company should not then have available electrical energy unsold sufficient to furnish the Purchaser all it required.

- 10 **6.** The contract further provides that whenever the word “deliver” is used therein with reference to power, it means readiness and ability on the part of the Power Company to deliver power and that one hundred and fifty firm electric horse power shall be the amount of electric power which the Purchaser thereby agrees to pay for whether it takes the same or not. p. 86. l. 11.
p. 86. l. 20.
- 7.** The contract further provides that in case of a disagreement between the parties as to any question arising thereunder, such question shall be submitted to arbitration in the manner therein provided. p. 89. l. 34.
- 20 **8.** The contract expressly provides that it shall be binding upon and shall enure to the benefit of the successors, lessees and assigns of the respective parties thereto. p. 83. l. 11.
- 9.** There is no provision in the contract under which it may be terminated by the Power Company except in case of default being made by the Purchaser in payment for power delivered thereunder, and such default continuing for a period of sixty days after demand, in which case it is provided that the Power Company shall have the right at its option to terminate the contract, or without terminating it to discontinue the delivery of power thereunder until all money due to it shall have been paid. p. 82. l. 38.
- 30 **10.** Actual delivery of electrical energy under the said agreement was commenced on May 18th, 1908. p. 59. ll. 5-12.
- 11.** In December, 1908, the Respondent acquired from The Clifton Sand, Gravel and Construction Company Limited its property at Thorold and all its right, title and interest in and to the aforementioned contract, and all benefits and advantages to be derived therefrom, and thereafter at all times material to this action, and until the happening of the events hereinafter referred to, monthly accounts for amounts payable under the contract were rendered to the Respondent and paid by the Respondent. Exhibit 16.
p. 97.

Exhibit 5.
p. 99.
- 40

12. Pursuant to a provision contained in the said contract, the Respondent duly exercised the option given to it thereby, to change the form and method of payment to a flat rate per horse power year under the terms specified in the contract form attached thereto, and made a part of the contract, and thereupon became obligated to pay monthly for at least one hundred and fifty firm electric horse power at the rate fixed by the contract, whether they used such power or not. The contract price for the minimum quantity to be taken thereunder is \$16.50 per horse power per annum. 10

p. 86. l. 20.

p. 85. ll. 4-12.

p. 44. ll. 12-34.

p. 22. l. 13.
p. 23. l. 8.

p. 47. ll. 11-17.
p. 16. ll. 14-19.

Part Exhibit 7.
p. 123. l. 1.

Part Exhibit 7.
p. 125. l. 1.

p. 23. l. 6.

Exhibit 19.
p. 135.

Exhibit 19.
p. 135.

13. In 1926, smelting operations at the Respondent's plant were not being carried on due to a falling off of the ore supply from the Cobalt district. Certain of the buildings were in a bad state of repair as a result of continued operation of the plant and the action of the chemicals used and produced in the process of reducing and smelting ores and would have to be replaced before operations were continued. Some parts of the plant and machinery had become obsolete. Coniagas Mines Limited, the parent Company of Respondent, was endeavouring to acquire a property from which a suitable supply of ore might be obtained, and pending the acquisition of such a property, it was decided to remove those parts of the plant that were in bad repair or obsolete and for the purpose of so doing, the Respondent, in September, 1926, requested the Appellant to cut off the power. When making the request the Respondent notified the Appellant that the request was made without prejudice to the Respondent's rights under the contract, and that the Respondent would continue as theretofore, complying in all respects with the contract, although they would not be for some indefinite time actually using power. The Appellant, on October 7th, 1926, opened the switches on the lines to the Respondent's property, as requested, and the current was cut off, but the wires from the Appellant's main line to the Respondent's property were not removed. Those buildings which were in a bad state of repair were torn down and some parts of the plant were removed. Certain parts of the plant, including the transformer house, the outside wall of which is the point of delivery of power under the contract, and all the electrical machinery were left intact. After this action had been commenced the Appellant advised the Respondent that a portion of the wires leading to the Respondent's property had been stolen, and requested permission to salvage that part of the line not removed, without prejudice to the rights of either party in the present action. The Respondent acquiesced in the Appellant's request, and these lines were then removed. 20 30 40

14. From October 7th, 1926, until the notice of May 14th, 1928, was given, the Appellant continued to render monthly accounts to the Respondent for the minimum amount, payable monthly under the contract, and these accounts were paid by the Respondent. p. 23. ll. 9-27

10 15. On May 14th, 1928, the Appellant wrote the Respondent that the contract dated November 8th, 1907, was to cease and terminate on and after May 18th, 1928, and that if the power supply was to be continued, the rate and terms in connection therewith were to be as determined by the Appellant. This letter was received by the Respondent on May 16th, 1928. Exhibit 9. p. 127. p. 23. ll. 28-35.

16. Subsequent to May 14th, 1928, the Respondent monthly tendered to the Appellant the minimum amount payable monthly under the contract until March, 1929, when the Appellant suggested that the Respondent should not continue to make tender of these amounts, and agreed that the Respondent would not be in default in not continuing to tender such payments. p. 23. l. 36. p. 24. l. 32. Exhibit 18. p. 134.

20 17. The price now demanded by the Appellant is \$25 per horse power per annum with a maximum amount of power to be supplied of approximately two hundred and fifty horse power. Having regard to the present price of power, the terms of the contract as to price and otherwise are such as to make the contract a valuable asset of the Respondent. Exhibit 12. p. 132. l. 10. p. 60. ll. 21-24.

30 18. The action was first tried before the Honourable Mr. Justice Wright on October 11th, 1928. The learned Judge held that there was no term or provision in the agreement indicating an intention that the Appellant should have a right to determine it, and that the subject matter of the contract did not raise any implication that the contract was not intended to be perpetual. He pointed out that the fact that there was express provision for termination by the Purchasers but none by the Power Company lent considerable weight to the Respondent's contention, and held that the agreement in its terms was a perpetual one and not determinable by notice on the part of the Appellant, and that in any event the notice given by the Appellant was invalid as not having been given within a reasonable time before the date specified in it for determination of the contract. From this judgment the Appellant appealed to the Appellate Division of the Supreme Court of Ontario, which directed a new trial on the apparent ground that all of the evidence material to the issue had not been brought out at the trial. p. 8. l. 1. p. 8. l. 3. p. 8. l. 12. p. 8. l. 23. p. 8. l. 24. p. 11. p. 61. l. 29.

40

19. The action was again tried before the Honourable Mr. Justice Raney on May 26th, 1931. The learned Trial Judge in his judgment dated July 22nd, 1931, held that no evidence was adduced before him which changed the material facts as found by Mr. Justice Wright. He held that, as the judgment of Mr. Justice Wright was not reversed by the Appellate Division on the ground that it was wrong on the facts which had been in evidence before him, the Respondent was entitled to judgment in the form directed by Mr. Justice Wright, although he stated that his inclination would have been to hold that the construction of the contract, for which the Respondent contends, was inconsistent with the nature of the subject matter of the contract.

20. The appeal by the Appellant from the judgment of Mr. Justice Raney to the Court of Appeal for Ontario was dismissed. The Honourable Mr. Justice Riddell, in whose judgment the Right Honourable The Chief Justice of Ontario, the Honourable Mr. Justice Masten and the Honourable Mr. Justice Orde concurred, held that the contract is for a series of periods of five years each, automatically renewing itself for a new period of five years at the termination of any such period unless the Respondent gives notice determining the contract in accordance with its terms. He further held that, by the terms of the contract, non-acceptance by the Respondent of energy is not to be a breach thereof by the Respondent and that the parties by their conduct had shown that this was the import of the contract as understood by them. He further held that there being no provision in the contract enabling the Appellant to cancel the contract, the Appellant was not entitled so to do, and that the appeal should be dismissed.

21. The Honourable Mr. Justice Magee dissented from the judgment of the majority of the Court and held that the Power Company by carrying out the agreement for two or more periods after the first five-year period, had complied literally with the contract and were not bound to enter into any further period. He further held that if under the terms of the contract reasonable notice to terminate it was required, the Respondent was not entitled to damages and that the appeal should be allowed and the action dismissed.

22. The Respondent respectfully contends :—

(1) That the judgment of the Court of Appeal is correct and should be affirmed.

(2) That the notice given by the Appellant to the Respondent was wholly invalid and ineffectual, and that the contract remains in full force and effect. Exhibit 9.
p. 127.

10 (3) That the contract on its face is a perpetual contract subject only to be terminated by notice to be given by the Respondent or its successors or assigns to the Appellant or its successors or assigns at least six months prior to the expiration of any five year period, and no such notice was given. Exhibit 1.
p. 80.

(4) That there is no provision in the contract entitling the Appellant to terminate it except in the case of default in payment of moneys payable thereunder, and no such default has occurred.

20 (5) That the provision in the contract for termination thereof by the Purchasers, and the absence of any provision for termination thereof by the Power Company is a clear indication that the contract was not intended to be determinable by the Power Company.

(6) That the provision in the contract that it shall be binding upon and shall enure to the benefit of the successors, lessees and assigns of the respective parties thereto is a clear indication that the contract was intended to be a perpetual contract subject to the right of the Purchaser to determine it by notice as aforesaid.

30 (7) That there is nothing in the nature of the subject matter of the contract that raises any implication that the contract was not intended to be perpetual, but, on the contrary, there is a clear indication from the contract as a whole that it is to continue in force until such time as the Purchaser gives the notice provided for in the contract.

(8) That there is no rule of law applicable to the contract in question against such contract being perpetual, and in the absence of any provision in the contract entitling the Appellant to terminate it, the contract continues in force until terminated by the Respondent or its successors or assigns.

40 (9) That the Respondent has not abandoned the contract, nor has it abandoned its works, plant or business, as contended by the Appellant.

(10) That the Appellant at all times up to the giving of the notice of May 14th, 1928, and in and by the said notice recognized the contract as being a valid and subsisting contract and subsequent to the giving of said notice rendered an account to the Respondent for power thereunder, and it is not now open to the Appellant to contend that the contract has been abandoned by the Respondent.

(11) That if the contract is determinable by notice to the Appellant, such notice must be a reasonable notice, and the notice that was given by the Appellant to the Respondent, dated May 14th, 1928, was not a reasonable notice and was wholly invalid and ineffectual, and the contract remains in full force. 10

The Respondent respectfully submits that the appeal from the judgment of the Court of Appeal for Ontario should be dismissed for the following, among other

20

REASONS.

1. Because the contract on its face is indefinite and unlimited as to time, and there is nothing in the nature of the subject thereof inconsistent with it being a perpetual contract.
2. Because the contract expressly provides that it shall continue in force for five years and for further periods of five years each unless notice is given by the Respondent at least six months previous to the expiration of any five-year period, and the Respondent has given no notice. 30
3. Because there is no provision in the contract under which the Appellant can terminate it so long as no default is made in payment thereunder, and no default has been made.
4. Because at the time the notice of May 14th, 1928, was given by the Appellant to the Respondent, the contract was a valid contract binding on the Appellant and the Respondent and their respective successors, lessees and assigns, and was so understood by both parties. 40

5. Because the notice given by the Appellant to the Respondent on May 14th, 1928, was invalid and ineffectual to terminate the contract.
6. Because the judgments of the Trial Judge and of the Court of Appeal for Ontario are correct and should be affirmed.

10

N. W. ROWELL.

J. G. SCHILLER.

No. 107 of 1932.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR ONTARIO.

**THE HYDRO-ELECTRIC POWER
COMMISSION OF ONTARIO**

(Defendant) *Appellant*

— AND —

**THE CONIAGAS REDUCTION COMPANY
LIMITED - - (Plaintiff) *Respondent*.**

CASE FOR THE RESPONDENT.

LAWRENCE JONES & Co.,
Lloyd's Building,
Leadenhall Street,
London, E.C.3.