

Robert Oliver Swezey - - - - - *Appellant*

v.

Beauharnois Power Corporation Limited - - - - - *Respondent*

FROM

THE COURT OF KING'S BENCH, FOR THE PROVINCE OF
QUEBEC (APPEAL SIDE)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE SEVEN JUNE, 1939

Present at the Hearing :

LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD MACMILLAN
LORD ROMER
SIR SIDNEY ROWLATT

[*Delivered by* LORD RUSSELL OF KILLOWEN]

In an action in which the executors of one Winfield Sifton deceased were plaintiffs and the present appellant (hereinafter called the appellant) was defendant, the appellant was by a judgment of the Superior Court of the Province of Quebec (dated the 15th day of January, 1935), adjudged liable to pay to the plaintiffs the sum of \$50,000, referred to in the letters hereinafter mentioned. This judgment was reversed by the Court of King's Bench (Appeal Side), but was restored on appeal to His Majesty in Council by Order in Council of the 24th February, 1938.

When the appellant was sued by the executors, he, by an action in warranty, claimed to be indemnified by the present respondent (hereinafter called the respondent) against his liability (if any) to the executors. The action in warranty was tried together with the executors' action. The Trial Judge, having found that the appellant was liable to the executors, gave judgment in the action in warranty ordering the respondent to indemnify the appellant. This judgment was set aside by the Court of King's Bench as the necessary result of the decision on the appeal in the executors' action. When the executors appealed to His Majesty in Council, no steps were taken by way of appeal in the action in warranty. Now, however, that the appellant's liability has been finally established, he has appealed to His Majesty in Council and asks to have restored the judgment of the Trial Judge in the action in warranty.

The foundation of the appellant's claim to be indemnified by the respondent can be shortly stated. The appellant alleges that he entered into the contract to pay \$50,000 to Winfield Sifton as agent for and on behalf of a syndicate (unincorporated) called the Beauharnois Syndicate, which was under obligation to indemnify him from and against all liability thereunder. He further alleges that all the obligations of that syndicate were undertaken by a second syndicate (also unincorporated) called the Beauharnois Power Syndicate; and that ultimately the obligations of the last-mentioned syndicate (except its liabilities and obligations to its members as such) were undertaken by and became binding on the respondent. In the result, he claims, the respondent became and is liable to indemnify him against his liability to the executors.

It is, their Lordships think, evident that grave difficulties exist in the way of the appellant suing the respondent in the absence of privity of contract between them; but it is unnecessary to dwell upon this objection, which might possibly be overcome, because in their Lordships' opinion this appeal must fail on other grounds. Some relevant matters must be stated to make the position clear.

The Beauharnois Syndicate were desirous of obtaining the services of Winfield Sifton in furtherance of a project for the development of hydro-electric power from a series of rapids in the St. Lawrence River between Lake St. Francis and Lake St. Louis in the Province of Quebec. For the carrying out of the project it would be necessary to construct a ship canal to provide for navigation between the two lakes and the diversion of waters from the river. This rendered it necessary to obtain the approval of the Governor-General of plans under or by virtue of the Navigable Waters Protection Act, R.S.C. 1927, cap. 140. It was considered that in this connection Winfield Sifton's experience and services would be of value, and the appellant approached him accordingly.

The terms of the contract with Winfield Sifton were contained in the following four letters which passed between him and the appellant:—

(1) Appellant to Sifton, dated 15th October, 1927:—

" I apologize to you for the delay in writing you, as I promised I would some time ago.

This letter is to confirm our conversation in which I agreed to pay you Five Thousand Dollars as a retaining fee, in connection with the St. Lawrence and Beauharnois Power situation, which amount has already been sent you.

It is agreed between us that we pay you One Hundred Dollars a day and expenses (when employed away from your home) for such time as we may require your services as our work and efforts proceed.

It is further agreed between us that when our plans have been passed and approved by Dominion Government with the aid of your counsel and efforts, we shall pay you the sum of Fifty Thousand Dollars (\$50,000)."

(2) Sifton to appellant, dated 17th October, 1927:—

" I beg you to acknowledge your letter of Oct. 15th confirming arrangement between us, and agree and approve same as stated by you.

I think your last paragraph is slightly ambiguous. It is of course understood that I shall use my best endeavours on your behalf, and shall act subject to yr. instructions. Having done so, my understanding is that upon the plans being passed and approved by the Dominion Govt. the additional fee of \$50,000 shall become due and payable to me. I don't think it will be possible now or hereafter to produce evidence that such passing of plans will be due to the 'aid of counsel and efforts' from any particular person. I think therefore that it would clarify our understanding if this phrase were eliminated."

(3) Appellant to Sifton, dated 19th October, 1927:—

" I have your letter of October 17th, which for purpose of clearer understanding I quote herewith:—

' It is, of course, understood that I shall use by best endeavours on your behalf, and shall act subject to your instructions. Having done so, my understanding is that upon the plans being passed and approved by the Dominion Government, the additional fee of \$50,000 shall become due and payable to me. I do not think it will be possible now, or hereafter to produce evidence that such passing of plans will be due to the aid of Counsel and efforts from any particular person. I think therefore it would clarify our understanding if this phrase were eliminated.'

I fully agree with your views as expressed in the above, and for this reason it clarifies my letter to you of the 15th instant."

(4) Sifton to appellant, dated 23rd October, 1927:—

" Many thanks for your letter of October 19th with which I am now in complete agreement."

Winfield Sifton received his retaining fee of \$5,000 and also additional payments under the contract. He died on the 13th June, 1928. It was found, however, in the judgment of the Board, delivered on the appeal in the action by his executors, that the plans had not been passed and approved by the Dominion Government within the meaning of the contract until the 22nd June, 1929, and all parties on the present appeal accepted that finding. It was only upon the happening of that event that the \$50,000 became payable; but it is clear that the liability of the appellant to the executors under the contract was based by the Board in their judgment solely upon an admission contained in the following letter written by the appellant to the executors:—

" June 11th, 1932.

Mr. Clifford Sifton,
Executor Estate Winfield Sifton,

Dear Sir,—

In consideration of the executors' undertaking not to press this matter for six months from to-day, I hereby acknowledge that I owed Winfield Sifton at his death, subject only to approval of Beauharnois plans at Ottawa, the sum of fifty thousand dollars, this being an undertaking I made in connection with Beauharnois Syndicate whose assets and liabilities were assumed by Beauharnois Power Corpn. Ltd.

Yours truly,

' R. O. Swezey. '

The judgment expressly states that the admission contained in this letter "supersedes any suggestion that the obligation for \$50,000 was affected by the death of Winfield Sifton".

Neither the judgment nor the admission binds the respondent, and the question whether the contract and the appellant's liability to pay the \$50,000 was ended by the death of Winfield Sifton is at large on the present appeal. Obviously if the contract came to an end with the death of Winfield Sifton, no claim for indemnity against a liability arising by reason of a subsequent admission to the executors could be sustainable.

The terms of the contract must accordingly be considered.

The agreement is one to secure Winfield Sifton's services "as our work and efforts proceed". He is to be paid a retaining fee, and also a sum *per diem* while rendering services. Further he is to become entitled to an additional fee as stated in the letters, viz. (to use his own words)—"I shall use my best endeavours on your behalf and shall act subject to your instructions. Having done so my understanding is that upon the plans being passed and approved by the Dominion Government the additional fee of \$50,000 shall become due and payable to me". He is to get the additional fee, "having done so", i.e., having throughout the relevant period rendered the required services.

Their Lordships are unable to construe this contract otherwise than as one under which the additional fee only became payable upon the footing that Winfield Sifton's services were available throughout the time that the syndicate's work and efforts proceeded, up to the passing and approval of the plans by the Dominion Government, and that upon his death (which in fact occurred a whole year before that event) the liability to pay the additional fee of \$50,000 came to an end. The position cannot, their Lordships think, be stated in better language than that employed by Bond J. in his judgment when he said:—

"No claim here is made for a *quantum meruit*—payment of the full amount alone is claimed. The respondents [i.e. the executors] invoke the terms of the contract contained in the letters upon which they rely, to show that Winfield Sifton was not obliged to prove that his efforts were the cause of the plans being approved. I think there is no room for doubt on this point. But his personal services to that end were the consideration of the stipulated payments, and this consideration ceased with his death. He was no longer able to carry out his share of the bargain."

For the reasons indicated, their Lordships are of opinion that the appellant cannot claim any indemnity against his liability under the restored judgment of the 15th day of January, 1935.

In the result this appeal from the judgment of the Court of King's Bench dismissing the appellant's action in warranty, must fail and their Lordships will humbly advise His Majesty accordingly.

The appellant will pay the costs of this appeal.

for the P.

In the Privy Council

ROBERT OLIVER SWEZEY

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BEAUHARNOIS POWER CORPORATION
LIMITED

DELIVERED BY LORD RUSSELL OF KILLOWEN

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