

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Moreton Frewen v. Charles M. Hays and
others, from the Court of Appeal of British
Columbia ; delivered the 20th March 1912.*

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ATKINSON.

LORD SHAW.

LORD ROBSON.

[DELIVERED BY LORD MACNAGHTEN.]

In the action which has given rise to this Appeal, the Appellant, Moreton Frewen, as Plaintiff, claimed specific performance of an agreement made between himself and the Respondents The Grand Trunk Pacific Town and Development Company, Limited, called for sake of brevity the Town Site Company. In the alternative the Plaintiff claimed damages for breach of the agreement.

The agreement relates to the purchase of a number of lots in a town site or projected town named Prince Rupert, on the seaboard of the Pacific Ocean, which was intended to be the western terminus of the Grand Trunk Pacific Railway then in course of construction.

The agreement is contained in a letter signed by Charles M. Hays, who was President both of the Railway Company and the Town Site Company.

The Town Site Company was a company incorporated for the purpose of acquiring, holding, and managing certain lands along the line of the railway.

The case was argued at some length. Many points of interest were discussed. But the real question, and the only question with which their Lordships propose to deal, is a very short one.

The agreement at the time it was made was incomplete, both as to subject matter and price. It was conceded that before action brought the agreement was completed as to subject matter. The question is :—Was it completed as to price, and if not, are the Respondents answerable in damages for breach of the agreement ?

The agreement came about in this way :— Mr. Frewen was a gentleman apparently of some social position, connected with the Press, and on terms of intimacy with capitalists or speculators on both sides of the Atlantic. Some ten-years before the date of the agreement, in company with Sir Charles Rivers Wilson, the president of the Grand Trunk Railway Company, he had visited the country through which the Grand Trunk Pacific Railway was to pass, and on that occasion he stopped for a few days with Mr. Hays. Mr. Hays, according to his account, was anxious to interest him as a promoter in the development of Prince Rupert. Apparently he had impressed Mr. Hays with the notion that he would be useful in making known the capabilities of the projected town. Later on, in the year 1906, he was negotiating with Mr. Hays on the footing that he was to acquire a certain number of lots at \$100 apiece. Mr. Hays entertained the proposal, but in the result nothing came of it. After a time Mr. Frewen thought he was being trifled with, and, as he says, he got disgusted. Then on the 31st of August 1908 he had an interview with Mr. Hays at which the matter was discussed. On the following day he submitted to Mr. Hays a proposal in the form of a letter to be addressed by Mr. Hays to himself. It was based on the discussion that had taken place on the previous

day. Mr. Hays read the letter, introduced the words "with our concurrence" as qualifying the selection of lots by Mr. Frewen, and then without any further alteration he signed the document.

The letter, so far as material to the present question, is in the following terms.

" 1st September 1908.

" Dear Mr. Frewen,

" The agreement with the Government of British
 " Columbia relative to water lots being now practically
 " complete, I am able to supplement my letter to you of
 " 8th May. One important matter I must leave open; I
 " cannot fix the price for the thousand lots you are to select,
 " with our concurrence, in the two-thousand acre Townsite,
 " but the prices will be decided by our officials as soon as
 " the surveys are completed, and at the prices so fixed you
 " are to have the lots and we are to return you as your
 " commission 25 per cent of the purchase money. You
 " will have no fault to find with our prices; they will be
 " at least no higher than the price which the public will be
 " asked to pay. I may say for your protection that should
 " you regard the price of any lot or lots as too high, you are
 " under no obligation to take that lot or those lots, provided
 " you notify us to that effect within sixty days of their
 " assignment to you.

* * * * *

" The terms of payment are as follows:—One-third of
 " the cash to be paid within ninety days of our throwing
 " open the Townsite to the public, the other two-thirds in
 " one and two years at the same rate of interest annually
 " as is charged the public on deferred payments. It
 " remains to assure you that any advice and assistance you
 " require in selecting your lands our officials will afford
 " you.

" Yours truly,

" CHAS. M. HAYS,

" President.

" Moreton Frewen, Esq.,

" Montreal, P.Q."

It was contemplated at the time of the agreement that the Town Site Company would dispose of their lands in the manner in which the Grand Trunk Railway Company had disposed of town sites on the line of their railway. The manner in which that Company had dealt with their town sites was this:—The site was surveyed

and applotted: the prices for the several lots to be offered for sale, were fixed before the town site was thrown open to the public. Then the applotted plan and the prices of the lots for sale were placed on view at the different offices or agencies of the Company, and the lots were sold to the first applicants at the published prices.

It is plain on the face of the agreement what steps were to be taken in order to carry the agreement into execution. In the first place, the town site was to be surveyed and applotted. After that, with the concurrence of the Company, Mr. Frewen was to select a thousand lots. Then the prices of those lots were to be fixed by the officials of the Company, that is to say, by Mr. Hays and his co-directors; and at the prices so fixed the lots selected were to be offered to Mr. Frewen.

Mr. Frewen was protected against exorbitant demands by two provisions: (1) the prices were not to be higher than the prices asked from the public, that is asked from the public for lots of the same class; and (2) Mr. Frewen was to be at liberty to reject any lots which he thought too highly priced. His advantage or profit lay in the commission or discount of 25 per cent.

The intended survey was delayed by an event unforeseen or unexpected. The Government claimed part of the town site on the ground, it was said, that it had been Indian territory. Ultimately it was arranged after a protracted negotiation that the Government should have one-fourth and the Company three-fourths of the town site, which as stated in the agreement of September 1908 comprised two thousand acres.

By an order in Council confirmed by Act of Parliament it was provided that the time for making the survey of the town site should be extended to the first of May 1909. In the meantime it was arranged with the Government that a survey and valuation should be made by

two surveyors, one acting on behalf of the Government and one on behalf of the Company, and that out of the lots so surveyed and valued a sufficient number should be offered for sale by auction at the reserve prices put on them by the two surveyors.

The proposed auction was commenced on the 25th of May 1909. It was held, as the Appellant states in his Printed Case, "with great success." "None," he says, "or hardly any of the lots offered by auction failed to reach the reserve prices."

In the meantime Mr. Frewen's lots had been selected. On the 8th of May 1909 Mr. Frewen made a selection without the concurrence of the Company. On the 17th he went to Montreal to get Mr. Hays to approve his list and to appraise the lots he had chosen. Before meeting Mr. Hays he met Mr. Phillips, the secretary of the Company. Mr. Phillips handed him a list which the Company proposed for acceptance by him. Mr. Frewen objected to it in several particulars. Then he saw Mr. Hays and pointed out his objections. On the following day, the 18th of May, a revised list was submitted to Mr. Frewen which Mr. Frewen reluctantly accepted as a compromise. This list is referred to as the "compromise list." Mr. Hays, however, refused point blank to put prices on the lots, saying he could not do so "until after he knew the results of the auction sale."

On the 9th of June 1909 the secretary sent Mr. Frewen a schedule of the lots in the "compromise list" with the Company's prices thereon, noting that the lots had been assigned to him as of that date in accordance with the President's letter of the 1st September 1908.

On the 11th June Mr. Hays wrote to Mr. Frewen confirming the assignment.

On the 13th of June Mr. Frewen wrote to Mr. Hays from New York expressing his

disappointment, and stating that one of his friends thought the prices "absurd," and meant to "stand on his legal rights."

On the 7th of August 1909 Mr. Frewen, who was then in London, sent to Mr. Hays the following telegram.

" Charles Hays, Grand Trunk, Montreal.

" 7/8/09.

" Neither selection nor price of town site lots offered accord with agreements. I decline accept same as such. I require lots in accordance with your engagements and in default hold you responsible for damages.

" FREWEN."

On the refusal of Mr. Frewen to take the lots specified in the "compromise list" at the prices fixed by the Company, and on the expiration of the period of 60 days from the date of the Company's offer of those lots to Mr. Frewen, the lots in question were placed on the Company's sale list and they were all sold to the public before the 1st of October 1909.

The writ of summons in this action was issued on the 30th of August 1909. The action came on to be heard before Hunter, C.J. On the 2nd of July 1910 it was dismissed with costs. On the 10th of January 1911 the judgment of the learned Chief Justice was affirmed by the Court of Appeal for British Columbia.

Before this Board the Plaintiff's contention was that the lots in question were duly ascertained by the "compromise list," but that the prices which the Plaintiff was asked to pay were not duly determined by the officials of the Company as alleged or suggested in the Secretary's letter of the 9th of June 1909. It was contended that the prices payable by the Plaintiff for the lots ascertained in and by the "compromise list" were the prices put on those lots by the two surveyors employed by the Government and the Company, and that those surveyors were the "officials" of the Company within the meaning of the agreement or that the

Directors were at any rate bound to adopt their prices. It was further contended that the reserve prices at the auction were the prices which the public were asked to pay for the lots offered for sale, and that whether that be so or not the Company broke their agreement by demanding prices in excess of the reserve prices placed on lots of the same class as those in the "compromise list" or else by not fixing prices immediately the survey was completed without resorting to any other method.

In their Lordships' opinion there is no substance in any one of the Plaintiff's contentions. The delay in completing the survey was not owing to any fault on the part of the Company. It was due to the intervention of the Government, and the extension of time was sanctioned by an Order in Council confirmed by Act of Parliament. The surveyors were not the "officials" of the Company within the meaning of the agreement, as indeed the Plaintiff admitted in his cross-examination. I "assumed," he says, "Mr. Hays would be the official."

Although no doubt a sale by auction was not contemplated at the date of the agreement there is nothing in that document to prevent the Company from resorting to an auction or to any other reasonable method of testing the value of their property. Some months before the date of the auction the Plaintiff was informed that the Government had proposed that an auction should be held. He made no objection. Indeed he suggested that his lots should be included in the auction sale. The prices which the Plaintiff was asked to pay were practically the same as those which were obtained at the auction, and it seems that when the lots assigned to the Plaintiff in the "compromise list" were put on the Company's sale list they were at once taken up by the public at those prices. At any rate the

Plaintiff has not proved, or attempted to prove, that the prices fixed on his lots were in excess of the prices which the public were asked to pay for them, or in excess of the prices which were paid at the auction for lots of the same class. It seems almost absurd to contend that in the case of an auction reserve prices are the prices which the public are asked to pay. As a rule reserve prices or upset prices are not published before an auction. The prices which the public are asked to pay are the highest prices which those who bid can be tempted to offer by the skill and tact of the auctioneer under the excitement of open competition.

As the Plaintiff rejected the prices fixed by the Company, and the parties are not agreed as to price, specific performance is impossible. As regards damages, the Company seems to have followed duly the course prescribed by the agreement, and there has not been in their Lordships' opinion any breach of contract on their part.

It was stated without contradiction that if the Plaintiff had accepted the prices fixed by the Company he would have made a profit of something like \$100,000. The loss of that profit appears to be due entirely to his own conduct.

Their Lordships will therefore humbly advise His Majesty that the Appeal should be dismissed with costs.



In the Privy Council.

MORETON FREWEN

v.

CHARLES M. HAYS AND OTHERS.

DELIVERED BY LORD MACNAGHTEN.

LONDON :

PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1912.