44, 1933

In the Privy Council.

No. 107 of 1932.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN :

THE HYDRO ELECTRIC POWER COMMISSION OF ONTARIO (*Defendant*) - - - - - *Appellant*

AND

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

CASE FOR THE APPELLANT.

Record.

1. This is an appeal from a judgment of the Court of Appeal for Ontario (Mulock, C.J.O., Magee, Riddell, Masten and Orde, JJ.) delivered on the 20th April, 1932 (Magee, J., dissenting), affirming a judgment of the Supreme Court of Ontario (Raney, J.) dated the 22nd July, 1931. p. 69. p. 64.

2. The main question involved in the appeal is whether a certain agreement providing for the supply of electric current to the Respondent's works for a period of five years or, unless determined by notice given by the purchaser, for further periods of five years, continues in force at the option of the purchaser for an indefinite number of five-year periods, even though the purchaser has closed down its works, dismantled its plant and stopped using power. A subsidiary question arises as to whether if the Respondent was not entitled in the circumstances to insist that the contract should remain in force indefinitely, it was necessary that the Appellant should give notice of termination and if so, whether the notice given was sufficient.

3. The agreement in question dated the 8th November, 1907, was made between the Falls Power Company, Limited, thereinafter called " the Power Company," the predecessor of the Appellant, of the one part and the Clifton Sand, Gravel and Construction Company, Limited, thereinafter called " the Purchaser," the predecessor of the Respondent, of the other part. pp. 80-90.

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Record. p. 80.

4. The agreement contained the following provisions :—

p. 80, l. 28.

" First. The Power Company hereby agrees to sell, deliver and maintain, at the outside wall of the Transformer House of 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, fifty horsepower or more.

" Said power to be delivered continuously twenty-four hours each day and every day in the year so far as reasonable diligence will enable the Power Company so to do, for a period of five years from the commencement of actual delivery, and this Agreement shall continue in force for further periods of five years each, unless notice in writing is given by the Purchaser to the Company at least six months previous to the expiration of any five-year period.

* * * * * *

p. 81, l. 34.

" Fourth. The Power Company hereby agrees to sell to the Purchaser and the Purchaser hereby agrees to purchase and take from the Power Company any and all electric energy which it may require during the term of this Agreement for the operation of its plant and any and all extensions or additions thereto except as hereinafter provided.

* * * * * *

p. 82, l. 23.

" Seventh. The Purchaser agrees that the electrical and mechanical characteristics of all apparatus connected to or with the circuits of the Power Company, and the installation thereof, will at all times be satisfactory to and subject to the approval of the Electrical Engineer of the Power Company.

* * * * * *

p. 82, l. 38.

" Tenth. If default shall be made at any time by the Purchaser in paying for the electric energy delivered to it by the Power Company under and pursuant to the terms of this Agreement, and if such default shall continue for a period of sixty days after demand, then the Power Company shall have the right at its option to terminate this Agreement ; . . .

* * * * * *

p. 83, l. 11.

" Eleventh. This Agreement shall be binding upon, and shall enure to the benefit of the successors, lessees and assigns of the respective parties hereto."

5. In accordance with an option contained in the agreement the Respondent's predecessor elected to pay for the current supplied at a flat rate per horse-power year pursuant to the terms and conditions specified in Contract Form No. 6 attached to and made a part of the agreement. The effect was that where the power taken was less than 250 horse-power the rate was to be $16.50 per horse-power year and that lower rates were payable where the power taken exceeded 250 horse-power. It was provided that the minimum horse-power to be paid for was not to be less than 150.

Record. p. 102. l. 7. p. 103, l. 10. p. 81, l. 19. p. 85, l. 4. p. 81, l. 28. p. 84, l. 1.

Contract Form No. 6 contained a number of detailed provisions including provisions to the effect that the Purchaser should furnish, keep and maintain transformers and apparatus in good order and should at all times take and use the three-phase power in the manner specified whenever possible.

p. 86, l. 31. p. 87, l. 1.

6. It was admitted for the purpose of the action that the Appellant and Respondent have succeeded to the respective rights and obligations of the original parties to the agreement.

p. 2, l. 20. p. 4, l. 12.

7. Delivery of current commenced on the 18th May, 1908, and was continuously available during four consecutive periods of five years each until the 18th May, 1928.

p. 6, l. 29.

8. By 1924 the supply of cobalt silver ore suitable for the Respondent's smelting process became exhausted and the Respondent decided to smelt the ore on hand and close down the plant. This having been done the Respondent on 16th and 30th September, 1926, requested the Appellant to discontinue the supply of power for an indefinite time alleging that it was considering the reconstruction of its works. The supply was accordingly cut off on 7th October, 1926, and from that date until May, 1928, when the fourth five-year period came to an end no power was used, but the Respondent continued to pay for the minimum supply of 150 horse-power. Meantime the plant had been dismantled; half of the buildings which occupied about eleven acres were taken down; and unsuccessful efforts were made to sell the property and power contract. Matters remained in this position until the trial on 26th May, 1931.

p. 117, l. 26. p. 121, l. 10. p. 123, l. 9. p. 37, l. 24.

9. On the 14th May, 1928, the Appellant delivered the following notice to the Respondent:—

> "The Hydro Electric Power Commission of Ontario hereby gives notice to the Coniagas Reduction Company of Thorold, Ontario, that the agreement for power supply between the Coniagas Reduction Company and the Ontario Power Company dated November 8th, 1907, is to cease and terminate on and after May 18, 1928 . . ."

p. 127, l. 30.

The 18th May, 1928, was the end of the fourth five-year period.

Record. p. 133, l. 16. **10.** The Respondent subsequently sent to the Appellant cheques for the minimum amount payable under the contract, but these cheques were returned.

p. 3, l. 14. **11.** The parties agreed that the question whether the contract is in the circumstances perpetual at the option of the Respondent should be submitted to the Court for decision and on 30th June, 1928, the Respondent brought the action out of which this appeal arises, claiming declarations pp. 1-3. that the Appellant's notice dated 14th May, 1928, was invalid and ineffectual, and that the agreement is perpetual unless terminated by notice given by the Respondent to the Appellant.

p. 9. **12.** The action came on for hearing in the Supreme Court of Ontario before Mr. Justice Wright, who, on the 22nd October, 1928, delivered judgment declaring that the agreement of 8th November, 1907, is perpetual as against the Appellant and that the Appellant's notice to terminate dated the 14th May, 1928, was invalid and ineffectual.

pp. 5-8. The learned Judge considered that the case of *Llanelly Railway & Dock Company* v. *London & North Western Railway Company*, 7 Eng. & Ir. Appeals 550, was authority for the proposition that a contract on its face indefinite and unlimited as to time is *prima facie* perpetual and that the burden of proving the contrary lies on the party disputing such construction. He also referred to *Crediton Gas Company* vs. *Crediton Urban Council*, 1928, 1 Ch. 447, but considered the circumstances of the present case more nearly parallel to the Llanelly case. Although the learned Judge found it difficult to conceive that, at the time the contract was made, the parties intended it should be perpetual as against the suppliers of the electric current, he was unable to find any term or provision in the contract indicating an intention that those parties should have the right to determine it. He was unable to say that the nature of the subject matter raised an implication to the effect that the contract was not intended to be perpetual and he was not aware of any rule of law which would prevent the contract from being perpetual.

p. 11. **13.** The Appellant having appealed to the Court of Appeal for Ontario that Court (Mulock, C.J., Magee, Hodgins, Middleton and Grant, JJ.) gave judgment on the 23rd November, 1928, setting aside the judgment dated the 22nd October, 1928, ordering a new trial of the action and giving the parties leave to amend their pleadings. No Reasons for Judgment were delivered.

p. 64. **14.** The second trial of the action came on for hearing in the Supreme Court of Ontario on the 26th May, 1931, and the Court (Raney, J.) on the 22nd July, 1931, gave judgment declaring that the Appellant's

notice to terminate was invalid and ineffectual to terminate the agreement of 8th November, 1907, and that the said agreement was a perpetual contract subject to be terminated by notice given by the Respondent. Record.

The learned Judge was satisfied, although in his view it had no relevancy to the matter in controversy, that the operations of the Respondent, as carried on for some years prior to 1926, came to an end in that year, because of the exhaustion of the ore supply from Cobalt: that there was no reasonable expectation in prospect of a renewal of those operations and that the Respondent desired to maintain the contract because of its highly favourable character and of the added value it gave to the real property at Thorold if the Respondent was able to negotiate for the sale of the property and the power contract to the same purchaser. He concurred in the view of Mr. Justice Wright that it was difficult to conceive that the Appellant could have intended that it should be bound to supply power at the price named in the contract as long as water flows in the Niagara River. That conception appeared to him to be impossible, and he thought it could not have been the intention of either party to the contract that it should be binding on one of the parties through all time. His inclination would have been to hold that the contract came within the class of cases mentioned by Lord Selborne in *Llanelly Railway and Dock Company* v. *London & North Western Railway Company* in that perpetuity was inconsistent with the subject-matter of the contract. But, in view of the fact that the judgment of Mr. Justice Wright had not been reversed by the Appellate Division on the ground that he was wrong on the facts in evidence before him, he considered he ought not to record a different judgment. pp. 61-63. p. 63, l. 1. p. 63, l. 24.

15. The Appellant having appealed to the Court of Appeal for Ontario that Court (Mulock, C.J.O., Magee, Riddell, Masten and Orde, JJ.) delivered judgment (Magee, J., dissenting) on the 20th April, 1932, dismissing the appeal with costs. p. 69.

16. Mr. Justice Riddell, who delivered the Judgment of the majority of the Court, said that reading the contract as a business document and on business principles it seemed clear that the contract was for a series of five-year periods each automatically renewing itself for a new period of five years at the termination of any such period, unless the Respondent gave notice in writing to the Appellant at least six months previous to the expiration of the then current period; that the Respondent was bound to take electric energy which it might require for the operation of its plant; that it was recognised and agreed that the contract to deliver could not be carried out except when the purchaser takes the same and a provision was made for the contingency occurring that the Respondent did not take the same showing clearly that the non-acceptance of the energy was not to be a breach of the contract by the Respondent; that if the Respondent pp. 66-67.

Record. did not take the energy it was to pay for the specified number of firm electric horse-power and that the conduct of the parties indicated that this was the import of the contract. He was wholly unable to see how the Appellant, there being no provision to that effect in the contract, could claim to cancel the contract.

pp. 67-69. **17.** Mr. Justice Magee (dissenting) considered it inconceivable, that if the Clifton Company had suggested putting in the agreement the words " renewable for ever " or " perpetually renewable " or even for " one hundred years " or " fifty years," that the Falls Power Company would in 1907 have tied its hands in that way when the other party was only bound for five years. The original parties to the agreement expressly agreed to an original five-year period and additional such " periods." By carrying out the agreement for three additional periods the contract had been literally complied with and the Appellant was not in his opinion bound to enter upon any further period which had not been stipulated for or agreed to. He held that the Appellant, having completed the fourth period of five years was not bound to give any notice that a fifth period would not be entered upon. Another possible view was that although the number of renewal periods was not specified that meant a reasonable number of them and three additional periods was a reasonable number. In his view the declaration asked for should not be granted and the appeal should be allowed and the action dismissed with costs against the Respondent.

18. The Appellant submits that the judgment of the Court of Appeal for Ontario dated the 20th April, 1932, and the judgment of the Supreme Court of Ontario dated the 22nd July, 1931, should be reversed and set aside ; that the declarations asked for by the Respondent should not be made and that the action should be dismissed for the following among other

REASONS.

(1) BECAUSE the agreement dated the 8th November, 1907, does not bind the Appellant to supply electric current in perpetuity.

(2) BECAUSE the continuation of the agreement for three " further periods of five years each " satisfied the Appellant's obligation in regard to renewal.

(3) BECAUSE the nature of the subject-matter of the agreement indicates that the said agreement was not intended to be perpetual.

(4) BECAUSE the Respondent is not entitled by paying the minimum to insist that the contract should remain in force indefinitely.

(5) BECAUSE the Respondent's works have ceased to operate.

(6) BECAUSE the Appellant's notice was sufficient in the circumstances.

(7) FOR the reasons given by Mr. Justice Magee.

W. N. TILLEY.

F. C. S. EVANS.

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No. 107 of 1932.

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BETWEEN

THE HYDRO ELECTIC POWER COMMISSION OF ONTARIO (Defendant) - - - *Appellant*

AND

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

CASE FOR THE APPELLANT.

BLAKE & REDDEN,

17 Victoria Street, S.W.1.