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* Nov. 14, 15.
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* May 13.

HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT;

AND

DOMINION BUILDING CORPORATION LIMITED (CLAIMANT) AND JAMES L. FORGIE (ADDED AS A PARTY CLAIMANT BY ORDER MADE BY THE PRESIDENT OF THE EXCHEQUER COURT OF CANADA ON THE 4TH MARCH, 1931). } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Damages—Breach of contract to sell land—Ascertainment of amount of damages—Building project—Factors affecting claimants' successful financing of project—Valuation of possibilities.

There had been referred to the Exchequer Court of Canada a claim by the claimants for damages from the Crown for its refusal to carry

* PRESENT AT THE HEARING:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ. Rinfret J., through illness, took no part in the judgment.

out an alleged contract for sale by the Crown of certain land, on which, combined with certain adjoining land, there was to be erected an office building, certain floors of which were to be leased to the Crown. The Judicial Committee of the Privy Council held ([1933] A.C. 533) that there had been a valid contract binding upon the Crown, and that the judgment of the Exchequer Court of Canada ([1933] Ex.C.R. 164), holding that the claimants were entitled to recover from the Crown damages for breach of contract (reversed by the Supreme Court of Canada, [1932] S.C.R. 511), should be restored. By subsequent judgment in the Exchequer Court the claimants' damages were fixed at $400,000. The Crown appealed.

Held: Having regard to the terms of the claim as made and the form of the reference thereof to the Exchequer Court, and to the evidence, insufficient weight had been given, in fixing the damages, to certain factors (including the absence of a lease to a certain Government department, on which proposed lease, as well as on the lease first above mentioned, the claimants had depended, as indicated in their claim) tending to affect adversely the claimants' successful financing of the project. In fixing damages, the claimants were entitled to a valuation of possibilities or probabilities which, if becoming actualities, might have led to success of their project. On its above views, this Court fixed the damages at $75,000

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada, holding that the claimants (the present respondents) were entitled to recover from the Crown $400,000 damages for breach of contract.

The contract in question was for the purchase by the claimant Forgie from the Crown of a certain property in the city of Toronto, on which property, combined with certain adjoining property, Forgie was to erect a twenty-six storey office building, certain floors of which were to be leased to the Crown. Forgie assigned all his right, title and interest in the contract to the claimant Dominion Building Corporation Limited. The latter claimed from the Crown damages for the Crown's refusal to carry out the alleged contract, which claim was referred by the Acting Minister of Railways and Canals (reserving the right to plead and maintain that the claimant was not entitled to any compensation) to the Exchequer Court of Canada. Forgie was subsequently added as a party claimant by an order in the Exchequer Court of Canada.

The action was tried by Maclean J., President of the Exchequer Court of Canada, who held (1) that the claimants were entiled to recover from the Crown damages for breach of contract, reserving in the meantime the ascertain-

(1) [1933] Ex.C.R. 164.

1935

THE KING
v.
DOMINION BUILDING CORPORATION LTD.

ment of the amount of such damages. On appeal by the Crown to the Supreme Court of Canada, this judgment was reversed and the action dismissed (1). An appeal by the claimants to the Judicial Committee of the Privy Council was allowed and the judgment of the Exchequer Court of Canada was restored (2). The assessment of damages then came before Maclean J., President of the Exchequer Court of Canada, who delivered judgment fixing the damages at $400,000. The present appeal was from the last mentioned judgment.

The material facts and circumstances of the case are sufficiently set out in the said reported judgments and in the judgments (particularly the judgment of Hughes J.) now reported. By the judgment of this Court, now reported, the judgment of the Exchequer Court was varied by reducing the damages to $75,000.

W. N. Tilley K.C. and *C. F. H. Carson* for the appellant.

I. F. Hellmuth K.C., R. S. Robertson K.C., and *W. R. Wadsworth K.C.* for the respondents.

DUFF C.J.—I have come to the conclusion that the learned trial judge has not given sufficient weight to certain material circumstances, to some of which I shall call particular attention; and that it is necessary to examine the evidence as on a re-hearing to ascertain what damages the respondents are entitled to.

I am unable to treat the claim advanced by the respondents, and the form of the reference to the Exchequer Court, as of inconsiderable importance. The reference is in these terms:

> In the matter of Dominion Building Corporation, Limited, Claimants, and His Majesty the King, Respondent.
>
> Reserving the right to plead and maintain that the said Dominion Building Corporation, Limited, is not entitled to any compensation, I hereby refer to the Exchequer Court of Canada the annexed claim of the said Dominion Building Corporation, Limited, for compensation alleged to be due by reason of the allegations therein set forth.
>
> Dated at Ottawa this sixteenth day of September, 1926.
>
> (Sgd.) H. L. DRAYTON,
> Acting Minister of Railways and Canals.
>
> To the Registrar of the Exchequer Court of Canada, Ottawa.

(1) [1932] Can. S.C.R. 511. (2) [1933] A.C. 533.

It will be observed that the claim which is referred to the Exchequer Court is a claim for compensation "alleged to be due by reason of the allegations set forth." The claim itself is in these words:

Claim of Dominion Building Corporation annexed to Reference, September 4, 1926.

TORONTO, ONT., September 4, 1926.

The Honourable the Minister of Railways and Canals,
Department of Railways and Canals,
Ottawa, Ont.

DEAR SIR,—In November of 1924, negotiations were begun for the purchase of the property on the corner of King and Yonge streets, in the city of Toronto, belonging to the Canadian National Railways, and, ultimately, under an order in council which was passed on the 29th of July, 1925, a contract was entered into for the purchase of the lands in question, for the sum of $1,250,000, the purchase to be completed on the 15th of September, 1925. It was a term of the order in council that, on obtaining possession of the premises on or before the 15th September, 1925, a twenty-six storey modern fireproof office building should be erected on the premises and on lands immediately adjoining the premises and formerly known as the Home Bank of Canada, Head Office site, such building to be ready for occupation for the Canadian National Railways, as tenant, on rentals and for the time mentioned in the order in council, the obligation of the Canadian National Railways being to rent, for the time and on the terms mentioned in the order in council, the ground floor and three of the floors of the building.

It was part of the original negotiation that the Customs and Excise Department should also rent five floors of the building on the terms and for a time which was agreed upon, and provision for such renting was to be made by order in council, and an order in council to give effect to such arrangement was actually prepared on the 3rd of September, 1925, but, not having been passed at the request of the Government, an extension of time to complete the purchase up to the 28th of September was asked for and was granted, it being expected that before that date the last-mentioned order in council would be passed. This order in council was not passed during the year 1925, and, from time to time, at the request of the Government, extensions of the time for completing the purchase were applied for and were granted. The last written extension fixed the time for completion at the 30th of December, 1925, because it was intended to have a session of Parliament in the month of November, when the Government expected to be able to pass the necessary order in council to make the contract completely effective.

On the 29th of December, 1925, the order in council providing for the leasing of five floors by the Customs and Excise Department not having been passed, and the House not having met, at the suggestion of the Government, a further extension of the time for completion was applied for.

Finally, the order in council providing for the leasing of the floors in question by the Customs and Excise Department, was passed on the first of February, 1926, and, on the 6th of that month, the Right Honourable the Minister of Railways and Canals was notified that the purchase would be completed on or about the 10th of February, 1926.

1935

THE KING
v.
DOMINION BUILDING CORPORATION LTD.

Duff C.J.

On the 9th of February, 1926, the Right Honourable the Minister, by letter, terminated the original contract.

On the 9th of February, 1926, the Executive of the Canadian National Railways, at a meeting held in Montreal, passed a resolution purporting to reduce the number of floors to be rented by the Canadian National Railways from the ground floor and three additional floors, to the ground floor and one additional floor.

After the contract was entered into, the property known as the Home Bank property, was purchased for the purpose of carrying out the contract at the price of $500,000 and subsequently a contract was entered into with Anglin-Norcross, Limited, for the construction of the building.

By the 22nd of January, 1926, $150,000 had been expended including payment on the purchase price of the Home Bank building, and $25,000 had been paid on account of the purchase of the property from the Crown, and a very considerable sum had been expended in examination of titles, preparation of plans, and other necessary expenses.

It was well understood from the inception of the negotiations by the Right Honourable the Prime Minister, by the Right Honourable the Minister of Railways and Canals, the Honourable the Minister of Public Works, and by other members of the Cabinet, as well as by the Canadian National Railways, that the successful financing of this operation depended upon the leasing by the Canadian National Railways of the ground floor and three additional floors of the building, and also by the leasing by the Customs and Excise Department of the five other floors referred to in this letter, and it was well known that, until the passage of the necessary orders in council making it quite certain that the floors in question would be leased, definite arrangements which would enable the completion of the purchase could not be made, and it was because of such knowledge by the Government and the members of the Cabinet, that the Government requested that the applications for the extensions of time to complete the said contract, be made.

The refusal by the Right Honourable the Minister of Railways, on the 9th of February, 1926, to complete the said contract, which refusal was wholly unjustified, in view of the negotiations above detailed, will entail an immense loss upon the undersigned, who are the assignees of the original contractor, and who may be involved in protracted litigation, with the possibility of the recovery of heavy damages.

Notwithstanding the refusal of the Right Honourable the Minister of Railways and Canals to complete the contract, the undersigned have, without prejudice to their rights, offered to and have always been ready and willing to carry out the said contract.

The amount which the undersigned have lost or are liable for, by reason of the cancellation of the contract, is $981,000, which includes the price of the Home Bank property, and which sum is hereby claimed, and the undersigned have the honour to request that this claim be referred to the Exchequer Court of Canada for assessment under the provisions of the Exchequer Court Act.

We have the honour to be, sir,

Faithfully yours

(Sgd.) DOMINION BUILDING CORPORATION LIMITED.
Per J. P. ANGLIN.

The Exchequer Court, by the explicit terms of the reference, was to pass upon the claim "for compensation alleged to be due by reason of the allegations set forth" in this claim. Among the "allegations" there are these: that it was well understood that the successful financing of the project depended upon the "leasing" by the Customs Department of five floors of the building; that it was "well known" that

> the successful financing of this operation depended upon the leasing by the Canadian National Railways of the ground floor and three additional floors of the building, and also by the leasing by the Customs and Excise Department of the five other floors referred to in this letter, and it was well known that, until the passage of the necessary orders in council making it quite certain that the floors in question would be leased, definite arrangements which would enable the completion of the purchase could not be made, and it was because of such knowledge by the Government and the members of the Cabinet, that the Government requested that the applications for the extensions of time to complete the said contract, be made.

It is not established as a fact, and I am satisfied it is not the fact, that the various extensions of time referred to were made "at the request" of the Government. These extensions of time were necessary for the purposes of the respondents, and were granted for their benefit.

It is not necessary to decide whether or not it was open to the respondents to claim before the Exchequer Court compensation upon the footing that the respondents could successfully have financed and carried out the contract with Forgie upon which the petition is based, in the absence of the acceptance of a lease by the Department of Customs, in the terms mentioned in the claim. An exceedingly heavy onus, at least, rested upon the respondents to show that the allegations to the contrary effect were not well founded. I agree that the weight of evidence, and the weight of probability arising from the evidence, is against the respondents upon this issue. It is quite clear, I think, that the Crown is right in its contention that from the moment Anglin became interested in the project he took over the management of the respondents' affairs. He first took up the matter of financing the project with McLeod. Here, he experienced so much difficulty, that he seems to have been obliged to turn his attention to the possibility of making a sale of the respondents' rights, and, so far as one can gather from the evidence, it would appear that, from

1935

THE KING
v.
DOMINION BUILDING CORPORATION LTD.

Duff C J.

the 25th of September, 1925, down to the middle of February, he was relying entirely on his contract with the Wrigleys for the financing of the Forgie contract; and, moreover, that he was never in a position to carry out his arrangement with Wrigleys.

The respondents give evidence of two sets of negotiations with a view to obtaining assistance in carrying out the Forgie contract; the first with McLeod, the second with the Wrigleys. In both cases the persons approached insisted upon the Customs lease as an essential condition of any arrangement. With the Wrigleys, there was an actual contract of which the condition was a term. Forgie's letter of the 23rd of October, 1925, shews that the respondents were relying upon the Wrigleys to provide the moneys for the purchase of the Home Bank property; and the evidence satisfies me that, down to the 19th of February, 1926, Anglin was still relying upon his arrangements with the Wrigleys for the purpose of enabling him to procure the carrying out the enterprise; and that the Wrigleys became satisfied in February that Anglin was not, and never had been, in a position to carry out his contract with them. It seems clear, moreover, that it was well understood by Anglin, as well as by the Wrigleys, that an extension of time for the completion of the building under the Forgie contract would be necessary. This, no doubt, was well known to the Minister of Railways.

My view is that, assuming the Minister of Railways had been correctly advised as to the legal position, and had acted in accordance with such advice, and had been ready to execute the lease in February under the constraint of such advice, notwithstanding his strong desire to refuse to do so, in which he must have been influenced by powerful reasons, it by no means follows that the order in council authorizing the execution of the Customs lease, which the Crown was under no legal obligation to grant, would have been acted upon. Still, of course, there was a possibility of fresh arrangements being made by Anglin for financial assistance on the basis of a completed contract with the Department of Railways, and a possibility, perhaps, that the Customs lease might even have been granted to the respondents, and, even that the time might have been extended for completing the building. The value of these

possibilities, in my judgment, is the measure of the damages to which the respondents are entitled. I think the amount which my colleagues have agreed upon is a reasonable one.

CANNON J.—I have little to add to the very careful and complete study of the facts and law prepared by my brother Hughes. Assuming, as we must after the judgment of the Judicial Committe of the Privy Council (1), that there was a valid and binding contract existing between the parties in the terms of the offer of July 27, 1925, we only have to determine the damages recoverable by respondents as the natural and probable result of the breach of this particular agreement.

1. Although the respondents had represented that they owned the Home Bank property, the fact is that, at the time of the breach, the property was yet to be acquired at a cost of $500,000.

2. They had to pay to the appellant for the corner in question $1,250,000, which was $50,000 more than what had been paid by the Canadian National Railways, peak price ever paid for real estate in Canada.

3. They had, besides, to build a twenty-six storey modern fireproof office building, which would have cost $2,105,000. They had, therefore, to find, to carry out their part of the agreement, at least $3,855,000.

On the other hand, the respondents claim that, on account of the breach, they lost the rentals that they expected to receive from the Canadian National Railways, $186,750 in each year from the 25th day of October, 1926, for the period of thirty years.

The Dominion Building Company was incorporated on or about the 9th of June, 1925, and all the capital stock, except a few qualifying shares, were owned by Forgie, who relied exclusively on the late Mr. Anglin to finance the matter. The latter was a contractor and expected to make, at the expense of the respondents, a profit of $200,000 on the construction work, which, he says, was more than the average profit because, as he puts it, it was partly in compensation for advancing money. So that, at the time of the breach, the respondents, in order to secure, first the improved properties, and, as a probable consequence, the

(1) [1933] A.C. 533.

1935

THE KING v. DOMINION BUILDING CORPORATION LTD.

Cannon J.

possible rentals from the appellant, had to find and spend nearly $4,000,000. The respondents at that time had no assets, no cash in the treasury of the company and depended entirely for finances on advances to be made by Mr. Anglin or his construction company. This service had to be paid for by enhancing what would have been the normal cost of construction and giving to Mr. Anglin shares in the respondent's capital structure. It is in evidence that, at the time of the breach, the William Wrigley Jr. Co. Ltd. were willing to purchase through Anglin the two lots at the north-west corner of Yonge and King streets for $2,000,005, but were insisting for the transfer of the two government leases, of which, at the time, only one had been secured. This company also asked for changes in the conditions which the respondents were not in a position to fulfil.

Forgie says in his evidence that his remuneration for his work as a lobbyist or promoter was in the future consummation of the project. At the time of the breach, his remuneration was, therefore, not secured and, therefore, he could not lose it as a natural result of this first disappointment. The Dominion Building Corporation Ltd., the other claimant, seems to have been incorporated to allow Anglin and Forgie to fix with themselves the price to be paid to the contractor for erecting the proposed skyscraper. The voluminous evidence of damages offered by the respondent is mostly of paper values, possibilities and hopes covering a period of thirty years in the future, and assumes as a basis the completion in a given time and under pressure of a huge undertaking which was only in embryo at the time of the breach complained of. The record reveals a typical example of the kind of so-called business enterprise which was popular before the economic crash of 1929 and depended for success almost entirely upon the gullibility of the public. The so-called investors were expected to purchase bonds guaranteed by mortgage on buildings not yet in existence but to be erected on real estate purchased at the very highest prices. The only hope of such promoters was that the money spent in such extravagant way would eventually come from the pockets of the investing public whose good will and enthusiasm would be properly exploited by one of the numerous self-styled financial bankers who were then competing for projects of this kind. Under those

circumstances, can it be said that the respondents were really deprived of a bargain when the Minister of Railways declined to go any further with the agreement which was, according to the respondents, one of the essential parts of their scheme? It must not be forgotten that, according to the agreement and respondents' offer, the latter were supposed, when they made the offer, to be the owners of the Home Bank property. This was another essential ingredient of the whole scheme. In fact, they did not own the property at the time and never were able or willing to pay the price agreed upon with the liquidators of the Home Bank.

Moreover, another very important element of the project was the second lease to be secured from the Customs Department; which was always lacking.

We must, therefore, eliminate as flowing naturally from the breach of this particular agreement the loss of profit that the respondents hoped to secure over a period of thirty years if they could pay for the Home Bank property, get the Customs lease and find someone to finance the funds required for that purpose and the completion of the building.

This is a case where it is impossible to regard the damages that are alleged to have followed the breach as that for which plaintiff is to be compensated, for the alleged injury to the plaintiff may depend on matters which have nothing to do with the defendant. Damages, in order to be recoverable, must be such as arise out of the contract and are not extraneous to it. *Chaplin* v. *Hicks* (1).

The damages claimed and considered by the learned trial judge were not the direct and natural consequence of this particular breach of contract. I have mentioned above some of the other factors which brought disappointment to the respondents. What was the actual cash value of the contract at the time of the breach, considering the heavy obligations which the agreement entailed for the respondents? The abortive sale to Wrigley does not seem to show that it could have been very advantageous to the respondents as sellers of their conditional right, in view of the helpless condition in which they were financially and

(1) [1911] 2 K.B. 786, at 794.

1935

THE KING v. DOMINION BUILDING CORPORATION LTD.

Cannon J.

otherwise. In order to carry on and perform their obligations to build within a very short delay, they both were practically at the mercy of Anglin and of all others who might be called to their rescue.

Remembering, however, that there has been a breach of agreement, according to the judgment of the Privy Council, and that the respondents are entitled not to nominal but to general damages, I feel that the Court would be generous, as a jury, if a compensation of $75,000 be fixed. This would cover all the specific items mentioned in the claim, except the $25,000 paid on account, which has to be refunded to the respondents under the first judgment of this Court, which order was confirmed by the Privy Council.

I would, therefore, allow the appeal, reduce the recovery to $75,000, each party paying their own costs of this appeal.

The judgment of Crocket and Hughes JJ. was delivered by

HUGHES J.—On September 4, 1926, Dominion Building Corporation Limited, per J. P. Anglin, wrote the Minister of Railways and Canals as follows:—

TORONTO, ONT., September 4, 1926.

The Honourable the Minister of Railways and Canals,
Department of Railways and Canals,
Ottawa, Ont.

DEAR SIR,—In November of 1924, negotiations were begun for the purchase of the property on the corner of King and Yonge streets, in the city of Toronto, belonging to the Canadian National Railways, and, ultimately, under an order in council which was passed on the 29th of July, 1925, a contract was entered into for the purchase of the lands in question, for the sum of $1,250,000, the purchase to be completed on the 15th of September, 1925. It was a term of the order in council that, on obtaining possession of the premises on or before the 15th September, 1925, a twenty-six storey modern fireproof office building should be erected on the premises and on lands immediately adjoining the premises and formerly known as the Home Bank of Canada, Head Office site, such building to be ready for occupation for the Canadian National Railways, as tenant, on rentals and for the time mentioned in the order in council, the obligation of the Canadian National Railways being to rent, for the time and on the terms mentioned in the order in council, the ground floor and three of the floors of the building.

It was part of the original negotiation that the Customs and Excise Department should also rent five floors of the building on the terms and for a time which was agreed upon, and provision for such renting was to be made by order in council, and an order in council to give effect to such arrangement was actually prepared on the 3rd of September, 1925, but, not having been passed at the request of the Government, an

extension of time to complete the purchase up to the 28th of September was asked for and was granted, it being expected that before that date the last-mentioned order in council would be passed. This order in council was not passed during the year 1925, and, from time to time, at the request of the Government, extensions of the time for completing the purchase were applied for and were granted. The last written extension fixed the time for completion at the 30th of December, 1925, because it was intended to have a session of Parliament in the month of November, when the Government expected to be able to pass the necessary order in council to make the contract completely effective.

On the 29th of December, 1925, the order in council providing for the leasing of five floors by the Customs and Excise Department not having been passed, and the House not having met, at the suggestion of the Government, a further extension of the time for completion was applied for.

Finally, the order in council providing for the leasing of the floors in question by the Customs and Excise Department, was passed on the first of February, 1926, and, on the 6th of that month, the Right Honourable the Minister of Railways and Canals was notified that the purchase would be completed on or about the 10th of February, 1926.

On the 9th of February, 1926, the Right Honourable the Minister, by letter, terminated the original contract.

On the 9th of February, 1926, the Executive of the Canadian National Railways, at a meeting held in Montreal, passed a resolution purporting to reduce the number of floors to be rented by the Canadian National Railways from the ground floor and three additional floors, to the ground floor and one additional floor.

After the contract was entered into, the property known as the Home Bank property, was purchased for the purpose of carrying out the contract at the price of $500,000 and subsequently a contract was entered into with Anglin-Norcross, Limited, for the construction of the building.

By the 22nd of January, 1926, $150,000 had been expended including payment on the purchase price of the Home Bank building, and $25,000 had been paid on account of the purchase of the property from the Crown, and a very considerable sum had been expended in examination of titles, preparation of plans, and other necessary expenses.

It was well understood from the inception of the negotiations by the Right Honourable the Prime Minister, by the Right Honourable the Minister of Railways and Canals, the Honourable the Minister of Public Works, and by other members of the Cabinet, as well as by the Canadian National Railways, that the successful financing of this operation depended upon the leasing by the Canadian National Railways of the ground floor and three additional floors of the building, and also by the leasing by the Customs and Excise Department of the five other floors referred to in this letter, and it was well known that, until the passage of the necessary orders in council making it quite certain that the floors in question would be leased, definite arrangements which would enable the completion of the purchase could not be made, and it was because of such knowledge by the Government and the members of the Cabinet, that the Government requested that the applications for the extensions of time to complete the said contract, be made.

The refusal by the Right Honourable the Minister of Railways, on the 9th of February, 1926, to complete the said contract, which refusal was wholly unjustified, in view of the negotiations above detailed, will entail an immense loss upon the undersigned, who are the assignees of

1935

THE KING
v.
DOMINION BUILDING CORPORATION LTD.

Hughes J.

the original contractor, and who may be involved in protracted litigation, with the possibility of recovery of heavy damages.

Notwithstanding the refusal of the Right Honourable the Minister of Railways and Canals to complete the contract, the undersigned have, without prejudice to their rights, offered to and have always been ready and willing to carry out the said contract.

The amount which the undersigned have lost or are liable for, by reason of the cancellation of the contract, is $981,000, which includes the price of the Home Bank property, and which sum is hereby claimed, and the undersigned have the honour to request that this claim be referred to the Exchequer Court of Canada for assessment under the provisions of the Exchequer Court Act.

We have the honour to be, sir,

Faithfully yours,

(Signed) DOMINION BUILDING CORPORATION, LIMITED,
Per J. P. ANGLIN.

On September 16, 1926, Sir Henry L. Drayton, Acting Minister of Railways and Canals, referred this claim to the Exchequer Court of Canada, the reference being as follows:

In the matter of Dominion Building Corporation Limited, Claimants, and His Majesty the King, Respondent.

Reserving the right to plead and maintain that the said Dominion Building Corporation, Limited, is not entitled to any compensation, I hereby refer to the Exchequer Court of Canada the annexed claim of the said Dominion Building Corporation, Limited, for compensation alleged to be due by reason of the allegations therein set forth.

Dated at Ottawa, this sixteenth day of September, 1926.

(Sgd.) H. L. DRAYTON,
Acting Minister of Railways and Canals.

To the Registrar of the Exchequer Court of Canada, Ottawa.
Filed the 23rd September, 1926.

On November 24, 1926, an Order in Council was passed purporting to withdraw the reference. On March 1, 1927, the respondent (the present appellant) moved before the President of the Exchequer Court of Canada for an order granting leave to the respondent to withdraw the reference on the ground that it was irregular, not having been made by the Minister of Customs, or the Minister of Public Works as well as by the Minister of Railways and Canals, upon the further ground that the amount of damages claimed in the letter of September 4, 1926, was substantially smaller than that claimed in the statement of claim, and upon the further ground that the respondent was entitled to withdraw the reference under the Act and particularly under rule 109 of the Exchequer Court Rules. On March 2, 1927, the learned

President dismissed the motion (1). From this decision an appeal was taken to this Court which allowed the appeal in respect of the first ground and held that the Exchequer Court was without jurisdiction (2). An appeal was taken from this decision to the Judicial Committee of the Privy Council and the judgment of the Exchequer Court of Canada was restored (3). On March 4, 1931, the learned President of the Exchequer Court of Canada gave judgment in favour of the claimants for damages to be assessed for breach by the present appellant of a contract in writing made in July, 1925 (4). This judgment was reversed by this Court (5), and subsequently restored by the Judicial Committee of the Privy Council (6). The assessment of damages duly came on for hearing before the learned President, who, on April 6, 1934, awarded the claimants $400,000 and costs.

From the latter judgment, the respondent now appeals to this Court.

The facts are set out very fully in the reports above enumerated and in the judgment appealed from, and it is not advantageous to repeat them in detail again.

It was contended before us by the appellant that the judgment appealed from was in error in the following respects:—

(1) In not finding that the respondents were never in a position to finance the project.

(2) In holding that completion of the building by 25th October, 1926, was not required by the contract.

(3) In finding that the building could have been completed by such date.

(4) In not holding that, even if the project had been carried out, it would have resulted in no profit to the respondents.

(5) In taking into consideration items that should have been disregarded.

(6) In not holding that the respondents were entitled to nominal damages only.

(7) In assessing damages on a wrong principle.

(8) The damages awarded were grossly excessive.

(1) [1927] Ex.C.R. 101.
(2) [1928] Can. S.C.R. 65.
(3) [1930] A.C. 90.
(4) [1933] Ex.C.R. 164.
(5) [1932] Can. S.C.R. 511.
(6) [1933] A.C. 533.

1935

THE KING v. DOMINION BUILDING CORPORATION LTD.

Hughes J.

It will be convenient to take up these various contentions in the above order.

1. In not finding that the respondents were never in a position to finance the project.

The learned President thought that it was reasonably safe to hold, and he did in effect hold, that the claimants with the assistance of J. R. Anglin could have financed the whole undertaking upon some plan or other. The latter was a contractor of thirty or forty years' experience. He was President of Anglin-Norcross Limited, an extensive contracting company which had built in recent years in Toronto alone such large structures as Royal York Hotel, Canada Permanent Building, Canadian Bank of Commerce Building and Canada Life Assurance Building. Anglin had been building in Toronto for about twenty years. He had, of course, also built extensively in the city of Montreal, the city of Quebec and elsewhere. Early in 1925, he was approached by the respondent, James L. Forgie, or by the architect, Eustace G. Bird, to verify the cost of the proposed building, and later to ascertain if Anglin-Norcross Limited would be interested in associating itself with the project. On May 2, 1925, Forgie wrote Anglin that, in consideration of his advancing the money necessary to secure an option on the Home Bank property to the west and $25,000 as a part payment on the purchase price of the corner property, he would, on completion of the contract to purchase, assign the option and contract respectively to a company to be incorporated and would cause the company to enter into an agreement with Anglin-Norcross Limited for the construction of the building and would deliver to Anglin " 25 per cent in fully paid shares " of the capital stock of the company. On May 6, 1925, Anglin-Norcross Limited paid $10,000 at the request of Forgie to secure for the latter the option on the Home Bank property. Later, in pursuance of the foregoing, Anglin-Norcross Limited advanced the $25,000 referred to in the offer to purchase the corner property dated July 27, 1925, from Forgie to the appellant which offer was accepted by Order in Council dated July 29, 1925, as found by the Judicial Committee of the Privy Council (1). On August 7, 1925, the contract for the erection of the building was

(1) [1933] A.C. 533, at 547.

completed between Anglin-Norcross Limited and Dominion Building Corporation Limited. Anglin at the trial estimated the profit to his company at over $200,000 had the building contract been carried out and completed. C. D. Harrington, Vice-President and General Manager of Anglin-Norcross Limited, an engineer who had been with Anglin since 1907 and who had built the buildings above enumerated and many others, testified that he considered that Anglin's estimate of the profit in the contract was correct. The date for closing the contract and for delivery of possession of the corner property was, according to Forgie's offer of July 27, 1925, and the Order in Council of July 29, 1925, the 15th day of September, 1925. On September 14, 1925, Forgie or Dominion Building Corporation Limited, to which Forgie had assigned the contract with the present appellant, asked for an extension of time for closing on the ground that delay had been caused by financing arrangements. On September 16, 1925, the time for closing was extended by the appellant to September 28, and on September 19 the appellant vacated the corner property. On September 25, William Wrigley Jr. Company Limited made an offer to Anglin to purchase the corner property and the Home Bank property. This offer is not long and it is simpler to set it out than to attempt to summarize it. The offer is as follows:—

To. JAS. P. ANGLIN, Esq.,
Toronto.

We hereby offer to purchase from you the properties at the north-west corner of Yonge & King streets, Toronto, described in Schedules hereto attached it being understood and agreed that the properties are contiguous for the price or sum of Two Million and Five Thousand Dollars ($2,005,000.00) payable as follows: Six hundred and five thousand dollars ($605,000) in cash on the date of closing, and the balance by giving mortgages on the Government and Home Bank properties for One Million Dollars ($1,000,000) and Four Hundred Thousand Dollars ($400,000.00) respectively payable on the 1st day of January, 1927, with interest half-yearly at five per cent per annum, with right in each to pay off at any time without notice or bonus, and to remove all buildings, the taking of the mortgage by the Government to be duly authorized.

Provided the titles are good and free from encumbrance, except local rates; said titles to be examined by us at our own expense, and we are not to call for the production of any Title Deeds, or Abstract of Title, Proof or Evidence of Title, or to have furnished any copies thereof, other than those in your possession or under your control. We are to be allowed until October 10, 1925, to investigate the title at our own expense, and if within that time we shall furnish you in writing with any valid objection to the title which you shall be unable or unwilling to remove,

1935

THE KING
v.
DOMINION BUILDING CORPORATION LTD.

Hughes J.

and which we will not waive, the agreement between us shall be null and void at our option and the deposit money returned to us without interest.

This offer to be accepted within Ten (10) days otherwise void and the deposit hereinafter mentioned to be returned. Sale to be completed on or before the 12th day of October, 1925, when the said properties are to be conveyed to us free from encumbrance except as aforesaid, and possession is to be given us free from any tenancy.

Adjustments of taxes and local improvement and water rates to be made as of the day of completion of sale.

You are to have delivered to us at time of closing all necessary deeds and two leases duly authorized executed and delivered on behalf of His Majesty the King, one lease in the form of the attached copy covering, 1st the ground floor and next three typical floors, and the other lease as provided for in the report to Council hereto attached for 2nd, the next five typical floors, except that the following changes in them are to be made:—

1. The dates mentioned in the first lease, viz., 25th of October, 1926, 25th of January, 1927, and 25th of February, 1927, are to be changed to the 25th of January, 1927, 25th of April, 1927, and 25th of May, 1927, respectively, and the provisions of the second lease are to accord with this.

2. All signs are to be confined to the windows of the buildings and no signs are to be fixed to the outward walls.

3. The porter service for the Government Portion of the building to be supplied by the Government themselves.

4. The rental value as fixed by the Board of Arbitrators to be accepted by the Government.

5. The appointment of the third arbitrator to be made by any Judge of the Supreme Court of Judicature of the Province.

6. The building need not be known as the Canadian National Building.

7. The rental of the second lease is to be One Hundred and ten thousand Dollars ($110,000) irrespective of what the actual space may be.

If the leases are to be made by us we will execute the same but if the leases are executed by any predecessor in title we will agree to assume all obligations therein imposed upon the lessor.

We agree in case the purchase of the said properties is completed to contract with Anglin-Norcross Limited for the erection of the building generally described in the plans and specifications produced to us at a price of One Million seven hundred thousand dollars ($1,700,000), all extras and additions by reason of substitutions to be paid for on a cost plus ten per cent basis.

We will accept the obligation of Mr. Bird's contract provided that he will be satisfied with Seventy thousand dollars ($70,000) cash commission in full, no matter what the cost of the building may be, we to have the right to appoint a supervising architect of the building contract who shall be the final arbitrator under the contract, also to appoint any engineers we may require, we to pay the cost of such supervising architect and engineers ourselves.

We hereby hand you Thirty thousand dollars ($30,000) as a deposit. The acceptance of the deposit shall not constitute an acceptance of this offer, but in case of acceptance of the offer the deposit is to be applied on the cash payment.

Time shall be of the essence of this offer.
Dated this 25th day of September, 1925.

WM. WRIGLEY JR. CO. LIMITED,
(Signed) J. A. Ross,
President.

Witness:
(Signed) ARCHIBALD FOULDS.

On September 28, 1925, the appellant granted the request of the respondents for an extension of time for closing until October 12, 1925. On September 30, 1925, Forgie wrote the Deputy Minister of Railways and Canals that he had agreed with J. Allen Ross, President of Wm. Wrigley Jr. Company Limited, to assign to him the property and the benefits of the lease and asked for changes in the lease as requested by Ross. On October 1, 1925, Anglin accepted the offer of Wm. Wrigley Jr. Company Limited subject to a variation that the mortgage on the Home Bank property should be $300,000 instead of $400,000 and the cash payment increased $100,000 accordingly. Wm. Wrigley Jr. Company Limited confirmed the variation on the same day. On October 2, 1925, the Deputy Minister wrote Forgie that his Department could not consent to any changes in the lease. On October 9, 1925, Forgie asked an extension until October 19 on the ground that Wrigley's solicitors had served him with requisitions on title requiring considerable work. On October 10, 1925, the Deputy Minister granted this extension. On October 17, Forgie wired the Deputy Minister of Railways and Canals for an extension to October 26, 1925, and the latter granted the extension. On October 23, 1925, Forgie wrote Wm. Wrigley Jr. Company Limited, that the purchase price of the properties payable to the appellant and to the National Trust Company (for the Home Bank property) was to be provided by Wm. Wrigley Jr. Company Limited and that the latter company must make good any loss sustained by reason of delay in closing. On October 23, Forgie wired the Deputy Minister for an extension until November 9, and on the next day the Deputy Minister granted an extension to November 3. On November 3, Forgie wired the Deputy Minister for an extension to November 17 which was granted. On November 10, Forgie wrote Mr. Gerard Ruel, K.C., Vice-president and General Counsel of the Canadian National Railways, for the desired changes in the draft lease. On November 13, Mr. Ruel replied

1935

THE KING
v.
DOMINION BUILDING CORPORATION LTD.

Hughes J.

that no changes could be made in the draft lease without submission to the Board. On November 16, Forgie wrote the Deputy Minister for an extension until December 30, which was granted next day. On December 29, Forgie wrote the Deputy Minister for an extension to January 31, 1926, to which there is no reply in the record. On January 12, 1926, Anglin wrote Ross that he had information that the railway president desired to reduce the amount of space to be taken and that such a reduction might involve raising the price of the ground floor to $19 or more to offset the reduction, that he would follow up the matter and that plans on steel work were proceeding. On January 29, 1926, Anglin-Norcross Limited per J. P. Anglin wrote Ross that "all of the required changes in connection with the second order" had been approved, and that, should they be able to negotiate adjustment of the "railway portion" on Monday, everything would be in readiness to proceed immediately. It is here helpful to quote from the judgment of the Judicial Committee (1), as to what took place between Forgie and the Minister of Railways about this time:—

> The appellant Forgie stated in the box that he saw Mr. Graham, the Minister of 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 December 29, 1925, which absence is otherwise unexplained.

On February 1, 1926, an Order in Council was passed on the recommendation of the Minister of Public Works

(1) [1933] A.C. 533, at 542-543.

granting authority for the leasing of the fifth to the ninth floors, both inclusive, of the building in question at $110,000 per annum, for ten years from October 1, 1926, with option of renewal for a further period of ten years at the same rate. On February 3, 1926, Forgie wrote the Minister of Railways that he would be ready to close the purchase on February 10. On February 8, 1926, the Minister wrote Forgie that he had failed to close on the contract date and on the date of each extension and that the failure was not that of the Government or the Canadian National Railways. On February 10, 1926, Forgie wrote the Minister that he was ready to close, that Wrigleys were insisting upon Anglin and Dominion Building Corporation Limited completing their contract with them and that they were threatening action, and that Forgie would have to apply for a fiat. On February 12, 1926, the Minister wrote Forgie that there would be no more extensions and that he would oppose the issue of a fiat. The letter concluded with the following:—

> If you and your friends are wise you will not "delay in closing with the Canadian National Railways for whatever space they may wish to contract for" because at the termination of the period named by the executive of the Canadian National Railways, the property will either be sold to other parties who are negotiating for it or will be reoccupied by the Company.

On February 15, 1926, Forgie wrote the Minister of Railways urging that failure to close on the last extended date was not due to any default on his part or on the part of those he represented. He went on to state that the Government in 1925 had decided to lease five floors for other departments, that this was one of the factors in financing and that the Order in Council was not passed until February 1, 1926. On February 20, 1926, the Minister of Railways wrote Forgie that the latter could not be allowed to mix up the contract with the proposed lease of five floors for the Public Works Department. Further correspondence also took place between Anglin and Ross, the result of which was that the Wrigley contract was cancelled, Anglin returning or agreeing to return the deposit.

The learned President gave credit to the evidence of the claimants' witnesses, J. A. Gibson and Frank McLaughlin. Gibson testified that the autumn of 1926 and the spring of 1927 were good times for the landlords in leasing office space in downtown Toronto. This building was to have been

1935

THE KING v. DOMINION BUILDING CORPORATION LTD.

Hughes J.

erected at the corner of the better side of Yonge Street and the better side of King Street, in Gibson's opinion, then the best retail and financial streets respectively in Toronto. At that time, he said, the financial centre of Toronto was at Yonge and King Streets. It was later that the Imperial Bank and the Bank of Nova Scotia bought at Bay and King Streets and that such important buildings as the Canada Permanent Building, Canadian Bank of Commerce Building, Sterling Tower, Star Building and Concourse Building were erected west of Yonge Street. If this building had been erected, it would, in his opinion, have kept the financial centre at King and Yonge Streets much longer and some of the other buildings would probably not have been erected. The project, in his opinion, would have been almost as good without the Customs lease as with it because there would not have been difficulty in renting the space at similarly favourable figures. Gibson prepared a statement of his estimate of the gross rental revenue of the building with the government lease of the main floor and three upper floors but without the customs lease as follows:

Main floor at $16 per sq. foot and three upper floors at $3 per sq. ft.	$186,750
22 upper floors at $2.50 per sq. ft.	385,000
Basement at $2 per sq. ft.	11,500
Concessions.	1,200
Gross Annual Revenue.	$584,450
From which would be deducted—	
10 per cent for vacancies, failures, on all space not leased to the Government ($397,700) . .	39,770
	$544,680
Taxes, insurance, and operating charges. . . .	181,980
Leaving as a net annual operating surplus. . . .	$362,700

The learned President found that the sum of $181,980 was a fair approximation for taxes, insurance and operating charges. Gibson considered that the above approximate returns could be had during the life of the building. McLaughlin estimated the net annual surplus at $362,050 for thirty years. W. H. Bosley, an experienced real estate man but not as experienced as Gibson in such buildings

as the one contemplated, placed the rental for the upper floors at $2.25 per square foot. The difference in the gross annual rentals as estimated by Gibson and McLaughlin for the respondents and Bosley for the appellant was only about $40,000. All three agreed that in a project of this kind it is in practice required to have a net operating revenue sufficient to pay annually six per cent on the cost of the land and nine per cent on the cost of the building and Gibson said that the latter includes enough to amortise the cost of the building at the end of its estimated life, namely, thirty-three years. The purchase price of the corner property was $1,250,000 and the option price of the Home Bank property, $500,000, making a total of $1,750,000 for the land. The cost of the building as estimated by the respondents' witnesses was $2,050,000 made up as follows:—

Building—	
Contract price for building	$1,725,000
Architect's fees	103,500
Taxes on land during construction	18,000
Interest during construction	90,000
Cost securing first mortgage loan	26,850
Legal fees and extras	86,650
	$2,050,000

Six per cent on the cost of the land amounts to $105,000. If this sum is deducted from the estimated net revenue of $362,700, there is a balance of $257,700. Gibson capitalized the latter sum at nine per centum, making $2,863,333, and making the value of the project slightly more than $4,600,000. Gibson, McLaughlin and Bosley all agreed that revenues were the best test of value. The six per centum on the cost of the land and nine per centum on the cost of the building amounted, according to Gibson's figures with which McLaughlin substantially agreed, to $289,500 per year. This deducted from the estimated net annual operating surplus of $362,700 left a net surplus annually of about $73,000 during the anticipated life of the building, the present value of which at five per centum is more than $1,000,000 and at six per centum more than $900,000. Bosley, for the appellant, arrived at a net annual surplus of $2,635 but the learned President was not satisfied with

1935

THE KING v. DOMINION BUILDING CORPORATION LTD.

Hughes J.

his treatment of certain costs. Bosley also allowed for an annual sum for depreciation of the building of $26,470. If Bosley's depreciation allowance of $26,470 had not been deducted, his annual surplus would have been $29,105, the present value of which for thirty years is upwards of $400,000.

D. I. McLeod, of McLeod, Young and Weir, testified in behalf of the respondents before the learned President that his firm had handled the major financing of many large buildings. He said it would be safe to underwrite a bond issue on the project up to sixty per centum of a valuation of $4,600,000 made by the firms represented by Gibson and McLaughlin respectively or either of them. To take up the first mortgage bonds and the second mortgage bonds, both the railway lease and the customs lease would have been essential; but he would have been prepared to purchase the first mortgage bonds without the customs lease. The price was not settled. If Anglin-Norcross Limited had taken up the junior securities, there would not have been, he said, the slightest difficulty in financing. However, the negotiations never reached an agreement.

J. P. Anglin testified before the learned President that in February, 1926, he or Anglin-Norcross Limited was in a position to pay over the $1,225,000 to the appellant to close the transaction. He had a "set-up" of the proposed financing, which was as follows:—

DOMINION BUILDING CORPORATION LIMITED

Financial Statement

Canadian National Railways Lease		$186,750
Basement		15,000
Commissions		2,750
22 floors, 7,000 ft. each, at $2.75	$423,500	
5 per cent vacancies	21,175	
		402,325
Income total		$606,825
1st M. Bonds $3,250,000 at 6 per cent	195,000	
Genl. M. 1,150,000 at 7 per cent	80,500	
Operation	175,000	
	$450,500	
		$450,500
Net Income		$156,325

He said the location was the best and the project the finest that was ever contemplated. There does not appear to be evidence other than the foregoing as to the source of the money to pay the balance due for the Home Bank property or to take up the junior securities. The learned President said that it was reasonably safe to hold, and he did in effect hold, that the respondents with the assistance of Anglin could have financed the whole undertaking upon some plan or other. The learned President said that it was not clear whether Anglin's firm was willing to take up the junior securities, but that D. I. McLeod had stated that there would have been no difficulty in marketing senior securities to the amount of $2,760,000. The learned President said he assumed that Anglin or his firm would also furnish the money to take over the Home Bank property although, as he said, no mention of it was made in the evidence. It is not clear how Anglin proposed to market the $650,000 first mortgage bonds proposed in his "set-up" over and above the amount of $2,760,000 which D. I. McLeod said he could finance. Nor does Anglin explain the inconsistency between his proposed "set-up" and the Wrigley contract, in reference to which he wrote, on the very eve of the breach, namely, on January 29, 1926, to Ross reporting progress towards closing with the appellant. It was possibly not called to the attention of the learned President that, as above set out, Anglin on September 4, 1926, wrote the Minister of Railways and Canals on behalf of the Dominion Building Corporation Limited and set out, with the care which must have been given to a claim of that magnitude, a summary of the salient facts; a claim for $981,000 for breach of contract and a request that the claim be referred to the Exchequer Court of Canada. In that letter, as above stated, above the signature of Anglin appeared the following statements:—

> It was well understood from the inception of the negotiations by the Right Honourable the Prime Minister, by the Right Honourable the Minister of Railways and Canals, the Honourable the Minister of Public Works, and by other members of the Cabinet, as well as by the Canadian National Railways, that the successful financing of this operation depended upon the leasing by the Canadian National Railways of the ground floor and three additional floors of the building, and also by the leasing by the Customs and Excise Department of the five other floors referred to in this letter, and it was well known that, until the passage of the necessary orders in council making it quite certain that

1935

THE KING
v.
DOMINION BUILDING CORPORATION LTD.

Hughes J.

the floors in question would be leased, definite arrangements which would enable the completion of the purchase could not be made, and it was because of such knowledge by the Government and the members of the Cabinet, that the Government requested that the applications for the extensions of time to complete the said contract, be made.

As already stated, on September 16, 1926, the Acting Minister of Railways and Canals referred to the Exchequer Court of Canada "the annexed claim of the said Dominion Building Corporation, Limited, for compensation alleged to be due by reason of the allegations therein set forth." The claim and reference were of the very foundation of the present litigation. It follows that the proposed Customs lease must be taken into consideration as, in the words of the Dominion Building Corporation Limited per J. P. Anglin on September 4, 1926, the successful financing of the project depended upon both leases. Both leases were required by Wm. Wrigley Jr. Company Limited. It is quite possible that the Minister of Public Works might have utilized the authority given to him in the Order in Council of February 1, 1926, to lease the five floors; but that was not more than a possibility or a probability.

2. In holding that the completion of the building by October 25, 1926, was not required by the contract.

This contention of the appellant is not important in this appeal because of the finding of the learned President on reasonable evidence that Anglin-Norcross Limited could have completed the building by October 25, 1926, in the absence of strikes, riots or unforeseen circumstances of that kind. The witness C. D. Harrington has already been referred to. His experience in erecting large structures of this kind was so great that the finding of the learned President that Anglin-Norcross Limited was probably so efficiently organized and of such financial strength that it could have completed a rush job of that kind more quickly than most building concerns in Canada, cannot lightly be interfered with by an appellate tribunal. Harrington swore emphatically that his company was ready at the time of the breach to undertake to do the job by October 25, 1926, and to furnish a performance bond. There was, of course, much evidence that the building could not be completed by that time. The record shews, as above indicated, that at the time of the breach, negotiations for sale were still proceeding between Anglin and Wm. Wrigley Jr. Company Limited, that building permits still had to be secured and

arrangements made for light over the Bank of Montreal building at the west. It is not easy to believe that Harrington could have completed the building, after the above preliminary arrangements had been made, by October 25, 1926, but the learned President on conflicting evidence believed Harrington and found that he could have so done and that, it seems to me, is conclusive on this point, subject, of course, to what has been said on the necessity for both leases.

The remaining contentions of the appellant concern directly or indirectly the quantum of damages.

In *Robinson* v. *Harman* (1), the defendant with knowledge that he had no title agreed to deliver to the plaintiff a valid lease. At the trial Lord Denman, C.J., allowed the plaintiff the expenses he had been put to and also damages for loss of his bargain. An appeal from the decision was dismissed. In the judgment on appeal, the often quoted words of Parke B. on this subject are found:—

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

Shortly afterwards was decided the very important case of *Hadley* v. *Baxendale* (2). The plaintiffs in that case were millers and mealmen and proprietors and occupiers of a mill run by a steam engine. The crank shaft of the engine broke and the plaintiffs, having ordered a new one, gave the broken shaft to the defendants, who were common carriers, to be delivered at once to the machinery firm. The defendants' clerk was told that the mill was stopped and that delivery must be specially hastened. Delivery was delayed and a loss of profit arose from the enforced idleness of the mill. It was held that such loss could not be recovered. The judgment of the court was delivered by Alderson B., who said the damages for breach of contract ought to be such as might fairly and reasonably be considered as arising either naturally, i.e., according to the usual course of things from such breach of contract itself; or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it. If the special circumstances under which the contract was

(1) (1848) 1 Ex. 850.
(2) (1854) 9 Ex. 341.

1935

THE KING
v.
DOMINION BUILDING CORPORATION LTD.

Hughes J.

made were communicated by the plaintiff to the defendant, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily flow from the breach under the special circumstances so communicated and known. If, on the other hand, the special circumstances were unknown to the defendant, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great majority of cases not affected by any special circumstances from such breach of contract. In *Engell* v. *Fitch* (1), Channell and Cleasby, BB., Byles, Montague Smith and Brett, JJ., concurred in the judgment of Kelly C.B. in the Exchequer Chamber. In this case, the defendants, mortgagees with a power of sale of a house, sold it by auction to the plaintiff, possession to be given on completion of the purchase. The title was satisfactory but the defendants refused to oust the mortgagor and the plaintiff brought an action for breach of the contract of sale. It was held, affirming the judgment of the Court of King's Bench, that the plaintiff was entitled to recover not only his deposit and the expense of investigating the title but also damages for the loss of his bargain; and that the measure of damages was the difference between the contract price and the value at the time of the breach and that the profit which the plaintiff could have made on a resale was evidence of this enhanced value. In the course of his judgment Kelly C.B. adopts the general rule as enunciated by Parke B. in *Robinson* v. *Harman* (2), and adds that *Flureau* v. *Thornhill* (3), qualified the rule of the common law to this extent that a vendor shall not be liable for any damages beyond the deposit and costs of investigating the title when he is unable to perform his contract by reason of his inability to make out a good title. The learned judge proceeds to say, page 667, that there is no authority to shew that when a breach of contract for the sale of real property has been on any other ground than that in *Flureau* v. *Thornhill* (3) any other rule as to damages applies than that which prevails in the ordinary case of breach of contract. The learned judge then asks what damages would place the plaintiff

(1) (1869) L.R. 4 Q.B. 659. (2) (1848) 1 Ex. 850.
(3) 2 W. Bl. 1078.

in the same position as if the defendant's contract had been performed; and he points out that if the contract had been carried out, the plaintiff would have been possessed of property with an increased value of £105 and that it follows that he is entitled to damages for that amount. He adds that it may be suggested that such a view is contrary to *Hadley* v. *Baxendale* (1), but that, without saying that in all cases parties to the sale of real estate must be taken to have contemplated a re-sale, he thinks that if an increase in value takes place between the contract and the breach, such an increase may be taken to have been within the contemplation of the parties within the meaning of *Hadley* v. *Baxendale* (1). In *McMahon* v. *Field* (2), Brett L.J. says that the remoteness of damage has become a difficult one since, according to the case of *Hadley* v. *Baxendale* (1), it is for the court and not for the jury to determine whether the case comes within any of the following rules, namely, first, whether the damage is the necessary consequence of the breach; secondly, whether it is the probable consequence of the breach; and thirdly, whether it was in the contemplation of the parties when the contract was made. He then states that the question in the case is whether the fact of some of the horses taking cold after being turned out of stable by the defendant in breach of contract with the plaintiff, is within any of the rules. He adds that it was not the necessary consequence of the breach of contract, but that he had no doubt that it was a probable consequence, and, if so, it follows that it was in the contemplation of the parties within the meaning of the third rule. Cotton L.J. was of the same opinion. He adds in his judgment that parties never contemplate a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract.

In *Cunard* v. *The King* (3), this Court considered, on an appeal from the Exchequer Court, the amount of compensation to be allowed an owner of land in Halifax, including a lot extending into the harbour. The lot could have been made much more valuable by the erection of wharves and piers for which, however, authority had to

(1) (1854) 9 Ex. 341. (2) (1881) 7 Q.B.D. 591.
(3) (1910) 43 Can. S.C.R. 88.

1935

THE KING v. DOMINION BUILDING CORPORATION LTD.

Hughes J.

be obtained from the Dominion Government, and the question of the value of the chance or possibility of obtaining leave was considered at length.

In *Chaplin* v. *Hicks* (1), the Court of Appeal considered an appeal from a judgment in favour of the plaintiff. The respondent, an actress, secured a right by contract to belong to a limited class of competitors for a prize. It was held by the Court of Appeal, affirming the judgment, that a breach of the contract by reason of which the respondent was prevented from continuing as a member of the class and was thereby deprived of all chance of obtaining the prize was a breach in respect of which the respondent was entitled to recover substantial, and not merely nominal, damages; and that the existence of a contingency which was dependent on the volition of a third person did not necessarily render the damages incapable of assessment.

Whether, in the case at bar, the Minister of Public Works would or would not have utilized the authority granted to him to lease the five floors for the Department of Customs is unknown. Successful financing depended on both leases, as is evident from the claim over Anglin's signature of September 4, 1926, and from the contract made by Anglin with Wm. Wrigley Jr. Company Limited (about which Forgie corresponded at length), which not only required both leases, but required certain changes in the Railway lease, to which the appellant never at any time agreed. For the Customs lease the respondents never had a contract but only a possibility or a probability. It follows that the award of the learned President must be set aside.

After very lengthy consideration of all the circumstances, I am of opinion that $75,000 would be a generous amount and I would fix the damages at that figure.

As success is divided, there will be no costs of the appeal.

Judgment of the Exchequer Court varied by reducing the damages to $75,000. No costs of the appeal.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondents: *R. V. Sinclair.*

(1) [1911] 2 K.B. 786.