

1921  
 May 16.  
 June 27.

THE HALIFAX GRAVING DOCK. } APPELLANT;  
 COMPANY (SUPPLIANT)..... }

AND

HIS MAJESTY THE KING } RESPONDENT.  
 (RESPONDENT)..... }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Contract—Offer—Acceptance—Consensus ad idem.*

The Halifax Graving Dock and plant were wrecked by the explosion in the harbour in 1917 and in Jan. 1918 the Government of Canada passed an order in council providing that the work of repair and reconstruction should be entrusted to the appellant company on the condition, *inter alia*, that the latter should contribute \$111,000 (the amount of the insurance it carried) and the Government pay the balance. A letter was sent to the company enclosing a copy of the order and stating that "an agreement is being prepared and will be submitted to you shortly for your signature," but no agreement was ever executed. Two days later the company wrote the Minister of Public Works saying that the terms of the order were satisfactory and adding "but in order that all will be quite clear our understanding is that we are to assign our insurance policies to the Government and that the temporary buildings now being constructed are to be replaced by permanent buildings of the same kind as the original." The company did some of the work on the dock but the Minister was not satisfied with its progress and the Government took it over, practically completed it and eventually expropriated the property. In proceedings by the company to recover the amount expended on the work.—

*Held*, affirming the judgment of the Exchequer Court (20 Ex.C.R. 67), Duff J. dissenting, that the letter of the company to the Minister did not contain an unqualified acceptance of the terms set out in the order in council; that there never was a *consensus ad idem* between the parties; and the company could not recover.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

APPEAL from the judgment of the Exchequer Court of Canada, dismissing the suppliant's petition of right. 1921  
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The facts, so far as material, are set out sufficiently in the above head-note.

*Jenks K.C.* and *Roper* for the appellant.

*Tilley K.C.* and *W. L. Hall K.C.*, for the respondent.

THE CHIEF JUSTICE.—This was an appeal from the Court of Exchequer in an action brought by the suppliants, appellants, to recover the sum of \$195,638 under the provisions of an order in council dated 15th January, 1918, for the expenditure upon the work of repair and reconstruction of the dock and shops, etc., at Halifax, damaged by the explosion of December, 1917.

The learned trial judge, Mr. Justice Audette, dismissed the suppliant's petition having come to the conclusion that there existed no legal contract between the parties on which a recovery could be maintained.

In his reasons for judgment the learned judge has set out the order in council above referred to and all the correspondence and documents which followed which renders it unnecessary for me to repeat them now.

After hearing the lengthy argument at Bar I have given this order in council and all the correspondence and documents my most careful attention and consideration and have had no difficulty in reaching the conclusion that there never was any unqualified acceptance by the appellant of the only terms upon which the Government agreed to reconstruct the graving dock. The parties never were *ad idem* as to the amount the appellant was to contribute to the cost of reconstruction. In order that the suppliant's action should be sustained, it was essential that such a contract should exist.

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Some reference was made by the trial judge as to the suppliant having been paid already, in the expropriation proceedings of the dock already taken by the Government, for whatever outlay they incurred. Mr. Tilley, however, at the argument did not press this point, the two proceedings, as he said, being quite distinct.

I would dismiss the appeal with costs.

INDINGTON J.—The appellant was the owner of a dock in Halifax Harbour which was materially injured by the explosion which took place there during the war.

The respondent was deeply interested by reason of the war in having the said dock restored.

In consequence thereof there ensued some negotiations between the Dominion Government's Department of Public Works and the appellant.

These resulted in the passing of an order in council resting solely upon the powers conferred upon the said government relative to war emergencies, whereby, after writing that and other facts, the appellant was offered as follows:—

1. The Halifax Graving Dock Company, Limited, the owners of the dock damaged, to contribute towards the cost thereof the sum of \$111,000.

2. The balance of the outlay required to be defrayed by the Government from the War Appropriation.

3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant as well as the actual work of reconstruction and purchase of material therefor, to be under the inspection, supervision and control of the representative of the Minister of Public Works.

The only acceptance, so called, of this offer, which was presented in reply thereto, was the following letter:—

Jan. 19th, 1918.

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Hon. F. B. Carvell,  
Minister of Public Works,  
Ottawa.

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Dear Sir:

We beg to acknowledge receipt of yours of the 17th enclosing a copy of the order in council with reference to the reconstruction of the Halifax Dry Dock, which is satisfactory; but in order that all will be quite clear our understanding is that we are to assign our insurance policies to the Government and that the temporary buildings now being constructed are to be replaced by permanent buildings of the same kind as the original.

Yours very truly,

Halifax Graving Dock Co., Ltd.,  
(Sgd.) Saml. M. Brookfield, Chairman.

I am unable to hold that the said letter was a clear and unconditional acceptance of the offer made by said order in council. It was clearly a substitution of the assignment of some policies of insurance for an absolute contribution of \$111,000 in cash. And that cannot be amended by anything passing afterwards going beyond the limitations set forth in said order in council.

The writer of the said letter, persistently, throughout the later correspondence and the litigation which has ensued, seemed determined to have his own way and to be taken as absolute interpreter of the language used and the law bearing thereon.

I cannot agree with him and hence conclude that there never was, as appellant claims, any binding contract.

Another incident is significant that there was to have been drawn up a formal contract which, if drawn, never was executed.

I cannot see any useful purpose to be served by following the history of what ensued.

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I may be permitted, however, to express the hope that the work done by the appellant, though not recoverable on the basis of a *quantum meruit* as it might have been in a case of a like history transpiring between private individuals, was amply covered by the amount awarded appellant in the expropriation proceedings.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—I am unable to agree in the view of the trial judge that there was no acceptance. I think there was an acceptance.

ANGLIN J.—I would dismiss this appeal. I am satisfied that there never was an acceptance by the appellant of the only terms on which the Government agreed to reconstruct the graving dock. The parties appear never to have been *ad idem* as to the amount to be contributed by the appellant to the cost of reconstruction. The existence of such a contract is admittedly a *sine qua non* of the suppliant's right to recover.

MIGNAULT J.—In so far as it could be contended that the order in council of the 15th of January, 1918, constituted a contract between the Crown and the appellant, the latter admittedly did not contribute in money the sum of \$111,000, said to be the amount of the insurance on the dry dock, which contribution, according to the order in council, was the condition on which the Government decided to furnish the balance required for the reconstruction. It is indeed as to this contribution that the chief difficulty arose from the very beginning, and this difficulty shews that between the appellant and the Crown there was never that *consensus ad idem* which is essential for the existence of a valid contract.

The order in council referred to two proposals, a main one and an alternative one, which the appellant had made to the Government. The alternative proposal, which was the one given effect to, is stated in the following terms:

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That an alternative proposal has, however, been made by the owners in which they offer to proceed with the reconstruction of the dock and to furnish the sum of \$111,000, which is the amount of the insurance, towards the cost, provided the Government supply the balance of the cost of reconstruction by way of a subsidy, relieving the Government of any further liability, as well as responsibility for the operation and maintenance of the dock. It is understood that the work of repair and reconstruction shall not consist of anything beyond the replacement of the dock and shops, etc., in the same condition in which they existed at the time of the disaster. The final decision as to the exact nature and extent of such repair, reconstruction and re-equipment, of the dock and plant to rest entirely with the Minister of Public Works or his delegated representative on the work; the actual work of reconstruction and purchase of material therefor to be under the inspection, supervision and control of the representative of the Department of Public Works.

The order in council concluded as follows:—

The Minister, in view of the foregoing and of the imperative necessity that docking and repairing facilities at Halifax be forthwith re-established and made available at once for ships awaiting repairs in that port, recommends that authority be given, under the War Measures Act, to proceed with the repairing, reconstruction and re-equipment of the dock and plant at that place under the following conditions:—

1. The Halifax Graving Dock Company, Limited, the owners of the dock damaged, to contribute towards the cost thereof the sum of \$111,000.
2. The balance of the outlay required to be defrayed by the Government from the war appropriation.
3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant as well as the actual work of reconstruction and purchase of material therefor to be under the inspection, supervision and control of the representative of the Minister of Public Works.

The Committee submit the same for approval.

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A copy of this order in council was in due course sent to the appellant, but the latter took exception to the clause concerning the contribution of \$111,000, and in a letter of January 19th, 1918, to the Honourable Mr. F. B. Carvel, Minister of Public Works, stated that

our understanding is that we are to assign out insurance policies to the Government.

Mr. Hunter, Deputy Minister of Public Works, on January 30th, answered that this was not the arrangement at all, adding:—

You are to collect your own insurance policies and hand over the cash results to the Government.

On February 2nd, the appellant's chairman answered Mr. Hunter:

I have just received your letter of the 30th of January with reference to the insurance policies and temporary and permanent buildings. Both clauses in your letter are quite satisfactory.

The appellant relies on this correspondence as constituting the contract whereby it was merely to collect what insurance it could and hand over the cash results to the Government. But obviously the deputy minister could not change the order in council which imposed on the appellant a contribution of \$111,000 in money and not of the cash results of its collection of the insurance policies. On the other hand, the appellant did not accept purely and simply the order in council, but qualified its acceptance by insisting on a modification which could only be made by another order in council, and not by the mere acquiescence of the Minister of Public Works.

I think this shews that the parties were never *ad idem*, and therefore that no contract existed between them for the reconstruction of the dry dock. What the Government did was not for the purpose of carrying out any binding contract, but solely to further public interests. And if there was no contract, the appellant's action fails.

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The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *J. S. Roper.*

Solicitor for the respondent: *W. L. Hall.*

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