

Privy Council Appeal No. 3 of 1938

Northern Ontario Power Company Limited - - *Appellants*

v.

La Roche Mines Limited and another - - - *Respondents*

La Roche Mines Limited and another - - - *Appellants*

v.

Northern Ontario Power Company Limited - - - *Respondents*

(Consolidated Appeals)

FROM

THE COURT OF APPEAL FOR ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1938

Present at the Hearing :

LORD ATKIN

LORD THANKERTON

LORD RUSSELL OF KILLOWEN

LORD MACMILLAN

SIR LYMAN POORE DUFF (Chief Justice of Canada)

[Delivered by LORD RUSSELL OF KILLOWEN.]

These consolidated appeals, from the Court of Appeal for Ontario, relate to the liability, if any, of La Roche Mines, Ltd., under a contract with Northern Ontario Power Co., Ltd., for the supply of electric power. The agreement consists of a printed form containing general and special conditions with blanks filled in to deal with the particular customer, with the result, not uncommon in such cases, that the document presents problems of construction which are not easy of solution.

The contract is dated the 30th December, 1931, at which time the La Roche Company was the owner of two mining claims in the township of Deloro in the Porcupine district viz. H.R. 1001 and H.R. 1002. The form which the contract assumes is, that subject to the general conditions and the schedule of prices the Power Company is authorised and requested by the undersigned consumer (in this case the La Roche Company) to "connect its electric system with the wiring of the consumer at a point on the latter's property convenient to the Power Company's lines and to cause electric current to be there delivered during the period noted or any renewal or continuation thereof as provided and at the rate specified, which current it is hereby agreed shall be

used by the consumer only and only for the purposes hereinafter specified." The document then sets out the "General Conditions." Those which appear to be relevant run thus:—

6. The Consumer agrees not to make any major change in or 10 per cent. addition to installation without having first given the Company reasonable notice of such additions. During the continuance of this contract, no system of electricity other than that furnished by the Company shall be used in said premises, providing Company is able and ready to supply same, except with the written consent of the Company, and, if at any time, during the term of this contract, the Consumer requires additional service in or about the premises over and above the amount herein provided for, it is hereby agreed that the Consumer shall take such additional service from the Company providing Company is able and ready to supply same.

8. The Company does not guarantee a constant supply of electricity, and will not be liable for any damages to the Consumer in consequence of its failure to supply electricity at any time or times nor be considered in default. This Clause shall not be interpreted as giving the Company any right to arbitrarily interrupt or cease supplying service under this contract.

In case the Company shall be prevented from supplying, or the Consumer from taking, the power herein contracted for, by reason of Acts of God, King's enemies, fires, strikes or other acts beyond their respective control, all payments for power shall cease, and the company shall be excused from furnishing power during such prevention, and the Consumer shall be excused from taking it, and both parties shall use all diligence to restore the service.

9. The right is expressly reserved to the Company to supply current for City or Municipal lighting, traction or purposes affecting the general public before the Consumer.

11. The Company reserves the right to discontinue its current on thirty days- notice in writing, or to cancel this contract, at its option, in case the Consumer is in arrears in payment of any of the Company's accounts or fails to take service according to the provisions of this contract, or in case the Consumer violates any condition of this contract whatsoever or becomes insolvent, and in case of the Company violating any such condition, the Consumer shall have the like right to cancel the contract.

13. The benefits and obligations of this contract shall enure to and be binding upon the successors, survivors and executors or administrators, as the case may be, of the original parties hereto respectively for the full period of this contract, but this contract shall not be assignable by the Consumer except with the written consent of the Company, but such consent shall not be unreasonably withheld.

After the general conditions there follow "Special Conditions." These provide for various matters including the point of delivery, the execution of a transmission line agreement, the nature of the supply, the period of the contract, the amount of power covered by that installation, and the price. The special condition as to the period of the contract was in the following terms:—

" Period of Contract:

" This agreement when executed shall extend for the mining life of the properties now or hereafter operated or owned or controlled by the Consumer in the Porcupine district."

The provision as to the amount of power covered ran thus:—

" Amount of power covered by this installation:

" The Consumer's initial installation will be approximately

500 H.P. for which the Company agrees to supply service; and the Consumer agrees to pay for at least a minimum quantity of 50 H.P. for the first year of this agreement. Further power will be supplied in accordance with Clause 6."

At the same time as the execution of this contract the parties executed a transmission line agreement which was to be read and construed as a part of the power contract. It provided for the erection by the La Roche Company of a power transmission line connecting a sub-station to be erected by it with the Power Company's transmission line, and for the grant to the Power Company of a right of way for the transmission line so to be erected for all such time as the Power Company should desire to use it for the purpose of its business. The cost of erecting this transmission line was to be recouped by a rebate of ten per cent. of all monies for power received by the Power Company from the La Roche Company "or any other person, firm or corporation to whom power is transmitted over the said transmission line . . . during the continuance of this agreement and the said Power Contract." Clauses 14 and 16 provided as follows:—

14. Notwithstanding anything herein or in the said Power Contract contained, the Company shall be at liberty at any time to cancel this agreement, and the said Power Contract, if the Customer shall fail during any period of three months after first delivery of power to accept and pay for at least 50 Horsepower of electrical energy delivered over the said transmission line.

16. This agreement shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

From the 17th January, 1932, power was transmitted to and received by the La Roche Company under the contract until 31st May, 1932, when work on the said mining claims was suspended. Power was again supplied during May and June, 1933, while a company called Noranda Mines, Ltd., was making an examination of the said mining claims. No further supply of power took place until August, 1934. In that month the La Roche Company (having given a company called Sylvanite Gold Mines, Ltd., an option on the said mining claims with the right to work on the property during the currency of the option), asked for power to be turned on again. This was done; and power was supplied by the Power Company continuously down to, at all events, the time when the present action was tried. In the meantime the Sylvanite Co. had assigned its interest in the said mining claims to Erie Canadian Mines, Ltd., and on the 31st October, 1934, an agreement (to which the last-mentioned company was a party) was executed under which the La Roche Company sold its said mining claims to a company called Delnite Mines, Ltd. At the same time the Delnite Company acquired from others certain other adjacent mining claims. No assignment was made to the Delnite Company of the power agreement. They did not wish to become bound by it, or entitled to the benefit of it.

On the 30th November, 1934, the La Roche Company wrote to the Power Company stating that they no longer had any ownership in the property, which was owned by Delnite

Mines, Ltd., The letter then proceeded:—

We asked Delnite Mines if it would take over the contract that we had with you, and we are advised that they did not care to do so, though they said they would send you a written acknowledgment of their liability to pay for any power that may be supplied by you in their operation of the property.

If any power is used it will be used by the new Company by reason of its ownership of the property, and you will please take notice that Delnite Mines Limited and not our Company will be responsible.

We are proceeding to distribute our assets and surrender our charter.

A correspondence ensued in the course of which the rival contentions were put forward which their Lordships think may be summarised thus—that the La Roche Company claimed to be no longer bound by the contract while the Power Company claimed that it was. Ultimately the La Roche Company went into voluntary liquidation in the month of November, 1935, and in response to the usual notice for claims, the Power Company sent in a claim for damages for breach of the contract of the 30th December, 1931. The claim was contested and on the 18th January, 1936, the writ in the present action was issued.

The statement of claim claims damages for breach of contract on the footing that by reason of the acts of the La Roche Company in selling its mining properties, going into voluntary liquidation and refusing further to carry out the terms of its agreement, the Power Company has suffered loss and damage and has been deprived of the profits which it would have been entitled to under the contract. The amount of damages claimed was fixed with some nicety of adjustment, at the sum of \$524,163.24. The defendants pleaded that as a result of the sale of the said mining claims the La Roche Company ceased to operate, own or control any mining properties or other properties in the district of Porcupine and thereby the contract had ceased to be operative or binding on the parties thereto. They further pleaded a defence under Part V of the Public Utilities Act (R.S.O. 1927, Chapter 249).

Greene J. dismissed the action with costs being of opinion that the liability of the La Roche Company came to an end with the sale of its mining properties. An appeal to the Court of Appeal was allowed. That Court held that under the contract the La Roche Company was under an obligation to see that during the continuance of the mining life of the properties owned by it at the time of the contract no system of electricity other than that furnished by the Power Company should be used on those properties, and that that obligation was still existent. They held, however, that by virtue of the joint operation of sections 22 and 59 of the Public Utilities Act, the duration of the contract must be limited to ten years from the 30th December, 1931. They accordingly declared (1) that the La Roche Company was under the obligation stated above, but not after the 30th December, 1941, and (2) that it had repudiated that obligation and that the Power Company was entitled to the damages resulting therefrom.

The Power Company has now appealed to His Majesty in Council against this limitation of liability to a period of ten years, and by cross appeal the La Roche Company seeks to have the judgment of the trial judge restored upon the alternative grounds (*a*) that upon its true construction the contract came to an end with the sale of the said two mining claims or (*b*) that in any event the effect of sections 22 and 59 of the Public Utilities Act on the present case is not to limit the operation of the contract to a period of ten years, for that would be to make a new and a different contract between the parties, but to make the contract void *ab initio*.

As regards the effect of sections 22 and 59 of the Public Utilities Act their Lordships feel no difficulty. They agree with the view expressed by the Court of Appeal and the grounds upon which that view is based; and they are of opinion, assuming that upon the true construction of the contract some obligation continued to bind the La Roche Company notwithstanding that it had ceased to own the said two mining claims, that the contract and with it the obligation would come to an end with the expiration of ten years from the date of the contract. They see no reason for holding either that the capacity of the Power Company to contract for the supply of a public utility is not by the sections restricted to a period not exceeding ten years, or that a contract which purports to, or which may on its terms, extend beyond that period is not valid and binding during the period.

The question of construction their Lordships find more difficult, the difficulty arising from the structure and language which the Power Company has chosen to employ in framing its standard forms. The contract presents certain features to which attention must be called. There is no definition clause extending the meaning of the word "consumer." It means throughout, and means only, the La Roche Company. General condition 13, has no bearing upon this. That condition has only a very limited operation in such a case as the present, the reference to "survivors and executors or administrators" is in relation to these parties meaningless. The condition can only come into play if and when the La Roche Company had made an effective assignment of the contract, in which case the assignee would become the "consumer." Further while the power company is bound to supply, but with the protection which is afforded to it by general conditions Nos. 6, 8, 9 and 11 and clause 14 of the transmission line agreement, the consumer is under no liability to take, though he is under a liability to pay for 50 H.P. for the first year. The consumer is however bound by the negative provision contained in general condition No. 6, viz., that during the continuance of the contract no system of electricity other than that furnished by the Power Company shall be used "in said premises." Upon the pleadings as they stand it is difficult to see how any damage could have been sustained by the Power Company at the date of the writ, because as already stated, power

was being supplied by the Power Company and was being paid for as required by the contract right up to the time of the trial. The Court of Appeal have, however, treated the real matter in dispute, and their Lordships think rightly, as being whether the negative obligation imposed by general condition No. 6 still existed as an obligation binding upon the La Roche Company. General condition No. 6 and the provision which defines the period of contract are the crucial clauses, and the answer to the question in controversy depends upon what is their joint effect.

On the one hand it is said that so long as the claims H.R. 1001 and H.R. 1002 have mining life in them (and it is not disputed that their mining life still continues) then no matter who operates, owns or controls them the contract continues on foot, and with its continuance the negative obligation remains binding on the La Roche Company. This is the view adopted by the Court of Appeal. On the other hand it is contended that the period of contract clause is so worded that the mining life which it contemplates is in the events which have happened the mining life while the properties are being operated or owned or controlled by the La Roche Company.

The question is not free from difficulty, but after a careful consideration of the arguments presented, their Lordships think that the latter view is the correct view and not the former. The former view attributes to the parties an intention to impose and to assume a most unusual liability, viz., a liability in respect of property which the party liable neither occupies nor owns nor controls. It would require very plain words to establish such an intention. On the other hand there is every indication that the contract is dealing with the supply of power to the La Roche Company while in personal occupation, ownership or control of the property. Thus, as pointed out, there is no extended definition of "consumer"; it means the La Roche Company only. The contract is not assignable except with leave. If an effective assignment were to take place the assignee would then become the consumer for the purposes of the contract. The current is to be used by the consumer only. So read the contract becomes intelligible and imposes no extraordinary obligation. The consumer (whether the La Roche Company or a permitted assign of the contract) is bound while in occupation, ownership or control of the property both to observe the positive provisions in regard to power supplied and the negative provision against getting power elsewhere; but when, as has happened, the La Roche Company ceased to occupy, own or control the property, and no one became by assignment the consumer under the contract, the contract necessarily came to an end.

Their Lordships are of opinion that the appeal should fail, that the cross-appeal should succeed, and that the judgment of the trial judge should be restored. They will humbly advise His Majesty accordingly. The Power Company must pay the costs of the appeals to the Court of Appeal and to His Majesty in Council.

AMOUNT OF
TO LOANER

DATE

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10/10/10

In the Privy Council

NORTHERN ONTARIO POWER
COMPANY LIMITED

^{2.}
LA ROCHE MINES LIMITED
AND ANOTHER

LA ROCHE MINES LIMITED
AND ANOTHER

^{2.}
NORTHERN ONTARIO POWER
COMPANY LIMITED

CONSOLIDATED APPEALS

DELIVERED BY LORD RUSSELL OF KILLOWEN

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