

9, 1938

No. 14 of 1937

In the Privy Council.

ON APPEAL FROM THE COURT OF KING'S BENCH
(APPEAL SIDE) FOR THE PROVINCE OF QUEBEC.

BETWEEN

CLIFFORD SIFTON et al.,

*(Plaintiffs in the Superior Court and Respondents
in the Court of King's Bench)*

Appellants,

AND

ROBERT OLIVER SWEEZEY,

*(Defendant in the Superior Court and Appellant
in the Court of King's Bench)*

Respondent.

CASE FOR RESPONDENTS.

1. This is an appeal from a judgment of the Court of King's Bench of the Province of Quebec delivered by Bond, J., Sir Mathias Tellier, C. J., Hall and Galipeault, J.J. concurring, reversing the judgment of the Superior Court, Mackinnon, J. and dismissing the Appellants' action *in toto*. In the Court appealed from St. Germain, J. dissented holding that the judgment of the Superior Court should have been confirmed.

Record.
p. 98
pp. 102-126
p. 85
p. 126, l. 20

The action was taken by the executors of the estate of the late C. Winfield B. Sifton to recover from the Respondent the sum of \$50,000.00 with interest of \$3,972.61 or a total of \$53,972.61.

CASE FOR THE RESPONDENT

Record.
p. 1 2. The declaration begins by alleging that the Appellants appear
ès qualité of executors to the estate of their brother who died on the 13th of
June 1928 and proceeds to say that in September and October, 1927, the
Respondent retained his services in connection with securing the approval
of the Federal Government of Canada to certain plans for the development
of hydro-electric power by means of a canal to be built from Lake St.
Francis to Lake St. Louis in the Province of Quebec and that in con- 10
sideration of these services C. Winfield B. Sifton became entitled to a
retainer of \$5,000.00 (payment of which is acknowledged) and to a fur-
ther sum of \$50,000.00 when the plans referred to had been passed and ap-
proved by the Dominion Government. This agreement is alleged to be set
out and contained in certain letters produced with the action as Exhibits
p. 1, l. 28 P. 2, P. 3, P. 4, P. 5, P. 6 and P. 7. It is then stated that C. Winfield B.
pp. 173, 174, 175, 176, 177, 178. Sifton did render the services he had undertaken to perform before his
death and that the plans were approved by the Dominion Government
Orders in Council 422 and 1081 passed, respectively, on the 8th of March
p. 190 and the 22nd of June, 1929. The declaration then sets out that upon being 20
p. 209 put in default by the executors and Appellants to pay the amount sued for
the Respondent on the 11th of June, 1932, acknowledged that he owed the
money in consideration of being granted a delay of six months to pay and
in support of this allegation there is filed a letter from the Respondent to
one of the Appellants, Exhibit P. 8 with the action. Then the action points
p. 272, l. 1 out that this last mentioned delay has expired and concludes with a prayer
for a condemnation in the total sum first mentioned above with interest
from the date of judgment and costs.

p. 3 3. The Respondent pleaded to the action and denied that he had 30
ever personally assumed any obligation whatever towards C. Winfield B.
Sifton. With respect to the letters, Exhibits P. 2 to P. 7, he said they would
pp. 173 to 178 speak for themselves and denied the effect attributed to them. He ad-
mitted the passing of the Orders in Council but pointed out that they had
subsequently, by Statute, been avoided and set aside. He denied the vali-
p. 178 dity of the so-called "confirmatory letter" and denied any indebtedness
to the Appellants (all of the above constituting formal pleas to the serial
averments of the declaration) and then proceeded to say that at all times
p. 3, l. 44 in his dealings with the late C. Winfield B. Sifton the latter was perfectly
well aware that the Respondent was acting as the representative and as 40
one of the managers of a syndicate called the Beauharnois Syndicate which
had been formed, with the assistance of Sifton himself, for the purpose
of promoting the hydro-electric scheme alluded to in the action. That as
Sifton well knew at all times, a Corporation known as the Marquette
Investment Corporation had acted as Trustee Depository for the Beauhar-
nois Syndicate and that all payments made to him were so made in the
form of cheques of the Marquette Investment Corporation which Sifton
accepted with full knowledge that they were from the funds of the Beau-

harnois Syndicate and that he never, at any time, looked upon the Respondent as personally indebted to him but on the contrary had, throughout, recognized that his rights, if any he had, under his agreement, were exercisable only against the Syndicate or its successors. Record.
p. 4, l. 8, l. 25

10 4. The plea then points out that the Beauharnois Syndicate, originally organized about the 12th of May, 1927, was re-organized on the 14th of April, 1928, by the creation of the Beauharnois Power Syndicate which assumed all its rights and obligations and which ultimately were transferred to and taken over by the Beauharnois Power Corporation Limited and that consequently if, by reason of the matters set up in the action, any rights were created in favour of the late C. Winfield B. Sifton (which is denied) such rights never produced any obligation on the part of the Respondent personally but would only have been exercisable against the Beauharnois Syndicate, the Beauharnois Power Syndicate or the Beauharnois Power Corporation Limited.

20 5. Consequently the Respondent denies any right of action by the estate of the late Sifton against him personally. p. 4, l. 44

6. The plea then points out that Sifton's death occurred long before any plans had been approved or the Orders in Council had been passed, denies that Sifton ever contributed any effective help and indeed denies that any definite approval was ever given by the Government of Canada at all. Dealing specifically with Exhibit P. 8 the plea points out that its very context at most constitutes an admission as against the Beauharnois Syndicates or the Beauharnois Power Corporation Limited but, that as at that date, he was powerless to bind them, it is of no effect whatever. The plea concludes by an averment that the delay attendant upon the institution of proceedings tends to characterize the action as an afterthought and ends with the usual prayer for dismissal. p. 5, l. 10
p. 272
p. 5, l. 15

40 7. The Appellants' answer to Respondent's plea reaffirms approval of the promoter's plans independently of the Orders in Council originally relied upon as evidenced by the fact that the canal and hydro-electric works had been put into operation previous to the institution of the action. It maintains that at this death C. Winfield B. Sifton had rendered all the services he could render and was called upon to render under the terms of his agreement with the Respondent and points out that he was not to be called upon to establish that the approval of the Federal Government was obtained through his efforts. It reiterates the validity of the acknowledgement relied upon in Exhibit P. 8, traverses the other allegations of the plea and prays for its dismissal. p. 6, l. 1
p. 7, l. 1

Record.
p. 8, l. 1

8. The Respondent's answer denies that Sifton during his life-time ever rendered any services entitling him to the remuneration claimed, denies the relevancy of the averment that the undertaking had been completed and put into operation and for the rest joins issue with the Appellants.

p. 9, l. 28

9. The issue is formally closed by the Replication.

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p. 10, l. 1

10. The plea was amended by the addition of a specific allegation that any contract for retaining the late Sifton's services was terminated by his death without his having performed or discharged his obligations thereunder and this was denied by the Appellants in an appropriate answer.

p. 10, l. 30

11. In addition to defending the action, the Defendant instituted proceedings in warranty against the Beauharnois Power Corporation Limited in accordance with the provisions of the Code of Civil Procedure of the Province of Quebec, Arts. 183-189. The circumstances gave rise to simple warranty, Art. 186 C. C. P. As provided by law he caused to be served on the Beauharnois Power Corporation Limited a copy of the action instituted against him by Sifton's estate pointing out that if the Plaintiffs are entitled to any recovery the Corporation must ultimately be held responsible because any part he had taken in his dealings with Sifton had been that of an agent or representative of the first Beauharnois Syndicate whose obligations had passed to the second syndicate, the Beauharnois Power Syndicate, and through it to the Beauharnois Power Corporation Limited.

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12. He accordingly called upon the Corporation to intervene and contest the principal action and to save him harmless from any condemnation in capital, interest and costs. Although the action in warranty is not in issue here it is alluded to because of the judgments under consideration.

p. 11

13. With a view to avoiding unnecessary expense and delay the Respondent applied for and secured an order from Archambault, J., that the principal action and the action in warranty be tried at the same time and decided on the same evidence, Articles 292 and 293 Code of Civil Procedure.

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p. 85

14. Thus the principal action and the action in warranty went to trial together in the Superior Court before Mr. Justice Mackinnon who rendered judgment on both issues on the 15th of June, 1935.

He held:

On the principal action:

Record.

p. 86

(a) That the Respondent had made himself personally liable to the late C. Winfield B. Sifton. That this was evidenced by the letters, Exhibits P. 2 to P. 7 and confirmed by the letter, Exhibit P. 8. p. 86, l. 43

10 (b) That Sifton was perfectly well aware that his services were retained for the Syndicate but that he relied upon the personal responsibility of the Respondent. p. 91, l. 19, l. 20
p. 19, l. 30

(c) That though the Respondent should be held personally responsible the obligations incurred, by reason of the terms of the Syndicate Agreement, were in reality those of the Syndicate because incurred for the benefit of the Syndicate with the knowledge of the Syndicate managers. p. 91, l. 27

20 (d) That the letter, Exhibit P. 8, having been written by the Respondent after he had become *functus officio*, was not in any sense binding on the Syndicate but was admissible as the acknowledgement of a liability previously incurred on behalf of the Syndicate and for which the Syndicate become bound. p. 92, l. 48
p. 93

30 (e) That despite the fact the two Orders in Council, Exhibits P. 33 and P. 34, had been annulled by Statute, they together with the Statutes themselves, with, in addition to that, the fact that the project and works had actually been put into operation gave substantive evidence, at least, that the plans in contemplation between the parties had received the approval of the Government. p. 190
p. 209

And he therefore gave judgment against the Respondent according to the conclusions of the action.

On the action in warranty:

40 (a) That the contract made by the Respondent with Sifton was made by him "personally for and on behalf of the Syndicate" and that all the other members of the Syndicate were advised of it and that Sifton was paid out of the funds of the Syndicate. p. 95, l. 27

(b) That in April, 1928, previous to Sifton's death, the obligations of the Beauharnois Syndicate were assumed by the Beauharnois Power Syndicate which proceeded to pay Sifton's per diem remuneration and expenses and that evidence of the transfer of the contract is complete. p. 95, l. 38

(c) The fact is noted that subsequent to Sifton's death Senator Hayden was retained as his successor at the same contingent fee of \$50,000.00 and that \$10,000.00 paid by the Beauharnois Power Corporation Limited to Sifton's widow, while apparently made to the wrong person and p. 96, l. 10

Record.
p. 96, l. 21

ineffective as a set-off *pro tanto*, constituted an acknowledgement of liability by the Corporation to Sifton's estate.

(d) That in any event the Beauharnois Power Corporation Limited had, on the 31st of October, 1929, taken over the entire undertaking and obligations of the Beauharnois Power Syndicate and that shortly afterwards the Beauharnois Power Corporation Limited, on the 17th of December, 1929, gave an unqualified undertaking to pay all the Syndicates' liabilities and obligations. 10

(e) That under the terms of the Syndicate Agreement, the agreement entered into by the Respondent with Sifton having been made with the knowledge and concurrence of the Syndicate managers and on behalf of the Syndicate, the Respondent is entitled to full protection and indemnity in respect thereof from the Beauharnois Syndicate, the Beauharnois Power Syndicate and the Beauharnois Power Corporation Limited. 20

Consequently the action in warranty too was maintained in accordance with its conclusions.

In the result therefore it will be seen, that the Appellants were, by this judgment, awarded the amount of their claim against the Beauharnois Power Corporation Limited while the Respondent was held free from liability.

15. From this judgment an appeal was taken to the Court of King's Bench by the Beauharnois Power Corporation Limited and this, in turn, compelled the Respondent to appeal because if the judgment in the action in warranty had been reversed (as in fact it was) and the judgment in the principal action had been allowed to become *res judicata* and final the Respondent would have found himself in the position of having to discharge the entire liability. 30

p. 98

p. 126, l. 20

16. The judgment of the Court of King's Bench in appeal was rendered on the 9th June, 1936, by Mr. Justice Hall and was concurred in by the Chief Justice, Sir Mathias Tellier, Bond and Galipeault, JJ. St. Germain, J. dissented and would have confirmed the judgments appealed from, both in the principal action and in warranty. 40

p. 99
p. 100

The judgment of the Court of King's Bench, which maintains both appeals and dismisses the principal action *in toto* and, as a necessary consequence, the action in warranty as well, proceeds upon the following grounds:

A. As to the principal action,

Record.

(a) That the late C. Winfield B. Sifton's right to the sum sued for was predicated upon the approval of the promoter's plans by the Dominion Government and that Sifton died before any appreciable progress had been made towards securing that approval.

10 (b) That the Orders in Council offered as evidence of approval were merely tentative and conditional, that the conditions which they stipulated had never been complied with, that the plans to which they refer were not submitted for more than two years after Sifton's death and were later withdrawn without having been approved at all and that by the very terms of the Statutes of annulment it is declared that the terms and conditions provided were not complied with.

20 (c) That the Respondent had severed his connection with the project on the 19th of November, 1931, and that even then no approval had been obtained from the Government and that applying to the facts of the case the provisions of Articles 1628 and 1202 of the Civil Code of the Province of Quebec the contract had come to an end purely and simply.

The decision of the Court below is accordingly reversed and the principal action is dismissed with costs. p. 101

B. As to the action in warranty.

30 We have already pointed out that this, as a corollary of the principal action, was, as it had to be, also dismissed.

17. The grounds upon which the four concurring Judges of the Court of King's Bench reached their conclusions are further elaborated in the reasons for judgment of Mr. Justice Bond. He reviews the pleadings in substance and defines the respective positions of the parties to the litigation. p. 108
He notes the creation of the first Syndicate formed to promote the hydro-electric power project at Beauharnois and the personnel of the managers appointed to conduct its affairs. He also refers to the creation of the Marquette Invest Corporation as the Syndicate's financial trustee and the necessity under the law of securing from the Federal Government its approval of the enterprise. Then he reviews the correspondence, Exhibits P.2 to P.8 evidencing Sifton's retainer and the circumstances under which Sifton was first interviewed by Mr. Griffiths on behalf of the Syndicate. p. 115
He notes that while Sifton seems to have gone to work there is no evidence as to precisely what he did but he finds that there can be no possible doubt that Sifton undertook to hire himself not to the Respondent but to the Beauharnois Syndicate, that he rendered all his accounts to the Syndicate and accepted from the Syndicate out of its monies all the payments by which they were settled. He points out that the action is directed against p. 115, l. 45
p. 116

Record. the Respondent personally and not as a member of the Syndicate. He alludes to the fact that during the period between the date of his retainer and his death, some eight months later, Sifton had been paid over \$19,000.00, that his executors, after his death, obtained a further sum of \$10,000.00 and that subsequently again his widow was paid by the Beauharnois Power Corporation Limited \$10,000.00 more, Then he proceeds to consider the evidence with regard to the progress that had been made at the date of Sifton's death, refers to Articles 1628 and 1202 of the Civil Code and notes that the action makes no claim for a *quantum meruit* but for the payment of the entire lump sum fee of \$50,000.00. He agrees that the bargain with Sifton did not involve his having to establish that the approval of the plans was due to his co-operation but he holds that his personal services to that end were the consideration of the stipulated fee and that this consideration ceased with his death. That the approval of the plans was the condition upon which Sifton's right depended and that neither during his lifetime nor subsequently were the plans approved. He turns next to the provisions of the Orders in Council, to the report of the Special Committee of the House of Commons which found that the plans never complied with the conditions laid down, refers to the evidence of the Deputy Minister of Public Works, Mr. James B. Hunter, as showing that the plans never were approved at all and to the Act of Parliament annulling the Orders in Council as being to the same effect, notes that this Statute was not adopted till nearly four years after Sifton's death and concludes that it is impossible to maintain, in these circumstances, that the plans had ever been approved by the Dominion Government or that the condition *sine qua non* of Sifton's recovery had ever been fulfilled.

p. 116, l. 15

p. 119, l. 15

p. 229, l. 23

p. 238, 239

p. 79, l. 22

p. 84, l. 28

21-22 Geo. V
Cap. 19

p. 124, l. 48

p. 125, l. 10

Turning next to Exhibit P.8 and the contention of the Appellants that it constitutes on the part of Sweezy an admission of this indebtedness to Sifton's estate he declares that he is far from sharing that view. On the contrary he holds it to be merely a re-statement of the original undertaking entered into by Sweezy, he reiterates that at the bottom of the whole matter lies the essential proviso of Government approval, that Sweezy's plans were never approved and that the letter in question cannot even be construed as laying any responsibility on the Beauharnois Power Corporation Limited because Sweezy had severed his connection with that concern some months before.

He concludes by finding that for lack of approval either with or without Sifton's assistance, Sifton never became entitled to the \$50,000.00 in question. While the completion of the works may show that somebody's plans were subsequently approved that fact, he holds, has no bearing on the contract between Sifton and Sweezy and therefore in assuming the liabilities of the Beauharnois Power Syndicate the Beauharnois Power Corporation Limited assumed no responsibility to Sifton's estate as such a liability did not exist and this of course, disposes of the principal action.

18. The notes of Mr. Justice Hall show that in the main his reasoning proceeds along the same lines as Mr. Justice Bond's with whom he agrees in substance. More particularly with regard to Exhibit P. 8, the letter which is tendered by the Appellants as an admission of liability on the Respondent's part, the learned Judge quotes authority to show that it cannot be given any effect.

Record.
p. 102
p. 107

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19. It is submitted that the judgment of the Court of King's Bench sitting in Appeal is right and should be confirmed for the reasons stated therein and the following amongst other

REASONS

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- (1) Because Sifton was retained on behalf of the Beauharnois Syndicate; was expressly advised of that fact and the contract having been entered into by him with an agent who disclosed his principal, no obligation or obligations were ever created in his favour against the Respondent personally.
- (2) Because the very consideration for the payment of the contingent fee demanded was value to be received in the form of services leading to the approval of the plans.
- (3) Because on the evidence no such services were rendered and because the proviso or stipulation made by Sifton in his letter, Exhibit P. 6, only goes to the matter of proof.
- (4) Because the Orders in Council in no sense constitute or establish such approval of the Syndicate's plans as was within contemplation by the parties to the agreement.
- (5) Because the Federal's Government approval of the Syndicate's plans was never obtained at all.
- (6) Because even if it were held that some services were rendered the action is not taken on a *quantum meruit* basis and cannot be maintained in part.
- (7) Because any work performed by Sifton, whatever its extent or nature, has been amply paid for.
- (8) Because the Appellants' claim cannot be supported unless it were held that even though Sifton died immediately after the formation of the contract, his Estate upon completion of the

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contract, at whatever date thereafter, would have become entitled to the entire contingent fee.

- (9) Because in the circumstances disclosed by the evidence Sifton's death avoided the contract simpliciter.
- (10) Because in any event, at the date of the institution of the proceedings, any right of action that Sifton's estate might conceivably have had was outlawed and prescribed. 10

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Respondent.

CASE FOR RESPONDENTS

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