
DOMINION BUILDING CORPORATION LIMITED } CLAIMANT;

1927
 Mar. 1.
 Mar. 2.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Constitutional Law—Reference by the Crown—Practice—Power to withdraw—Jurisdiction

A claim was made by claimant for damages due to a breach of contract by the Crown. The Minister of Railways and Canals referred the claim to the Court, under the provisions of sec. 38 of the Exchequer

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Court Act. Later an Order in Council was passed, withdrawing said reference, and on the following day the claimant filed its statement of claim in the office of the Registrar, which was served on the respondent. The respondent now moves for an order to withdraw the reference as irregularly made and void, because it was not made by the Minister of Customs or Minister of Public Works as well as the Minister of Railways and Canals, and because the amount of the claim as referred was for an amount substantially less than prayed for by the statement of claim.

Held: That, as the claim for damages was primarily for the repudiation of a contract, the negotiations leading up to which had been with the Department of Railways and Canals and as the Order in Council accepting the offer leading to the contract had been approved by the Minister of that Department, the reference signed by him alone was a sufficient compliance with the statute.

2. That as there was nothing suggesting fraud or deception in the description or amount of the claim as made to the Department, the Reference was not vitiated by the fact that the amount of damages therein mentioned was less than that claimed by the pleadings.
3. That the reference of claim to the court was merely to confer on the court the jurisdiction to hear the claim, and the Crown did not in any sense initiate the claim or proceedings by giving of such jurisdiction. That the proceedings are initiated by the filing and serving of a statement of claim and the respondent cannot avail himself of Rule 109 to withdraw the Reference.

MOTION by the respondent for an order giving him leave to withdraw the Reference made to this court under section 38 of the Exchequer Court Act.

Previous to making the application herein the respondent having failed to plead to the statement of claim filed by the claimant, claimant moved for an order that his claim be taken *pro confessis*, when it was contended by the Crown that the Reference had been withdrawn and the statement of claim was improperly filed. This contention was dismissed (1).

THE MOTION was heard by the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

Lucien Cannon, K.C. Solicitor-General, for respondent.

R. V. Sinclair, K.C., for claimant.

The facts are stated in the reasons for judgment.

THE PRESIDENT, this 2nd of March, 1927, delivered judgment (2).

(1) [1927] Ex. C.R. 79.

(2) An appeal has been taken to the Supreme Court of Canada.

This is a motion for an order granting leave to the respondent to withdraw a Reference made to this court the 16th day of September, 1926, or, in the alternative, for an order striking out the statement of claim filed herein. It is desirable that some of the salient facts in the negotiations leading to the controversy between the parties, and antecedent to the making of the Reference, should be stated, and this will particularly assist in an understanding of some of the grounds taken in support of the motion.

One Forgie, of Toronto, offered in writing to purchase from the respondent a certain property owned by it at the corner of Yonge and King streets, Toronto, for a stated sum, and concurrently with this offer he made a deposit of \$25,000 with the respondent on account of the purchase price, in the event of the acceptance of the offer by the respondent. The offer contained the stipulation by Forgie, that upon his obtaining possession of his property on or before a certain mentioned date, that he would proceed with the erection of a twenty-six storey office building upon this property and a property immediately adjoining, and locally known as the Home Bank of Canada Head Office site, the purchase of which he had arranged for conditionally, and upon account of which he apparently paid \$60,000 at different times to the owners. The offer was subject to the provisions that the same should be accepted by Order of the Governor in Council; that such acceptance if made would constitute a binding contract of purchase and sale; and that the respondent should execute a lease for the rental of all the space of the ground floor and of three other floors of the proposed office building, for a term of years, at a rental and upon the terms and conditions set out in the offer. This offer was formally accepted and approved of by an Order of the Governor in Council upon the report and recommendation of the Minister of Railways and Canals, on July 29, 1925. Thereupon Forgie assigned to the claimant all his interest in the agreement. Apparently the negotiations leading to the agreement involved also the rental of five other floors in the proposed building for the use of the Department of Customs, though this was not mentioned in the offer referred to. Negotiations however proceeded further upon this point, and on the 1st of Febru-

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ary, 1926, an Order in Council was passed on the recommendation of the Minister of Public Works granting authority for the leasing of five other floors by the respondent for the use of the Department of Customs and Excise. On February 6 following, the respondent was notified in writing that the claimant was ready and willing to carry out the purchase of the respondent's property. On the 12th of February, the claimant was notified that the respondent had decided not to carry out the agreement. Subsequent events upon this phase of the matter are not presently material, and it is only necessary to say that the agreement was not carried out by the parties. Thereupon, the claimant pleads, it made claim for damages by reason of the failure of the respondent to carry out the agreement.

On September 16, 1926, the Acting Minister of Railways and Canals ordered a Reference of this claim for damages to the Exchequer Court of Canada. On November 24, 1926, an Order in Council was passed, upon the recommendation of the Acting Minister of Justice, withdrawing the Reference. On the 25th day of November, the day following, the claimant filed in the office of the Registrar of this court a Statement of Claim, and which was also served upon the respondent. Recently the plaintiff moved for judgment upon the ground that the respondent was in default in filing a statement of defence, which was refused, and the respondent was given further time to file his defence. Upon the hearing of that motion before me the respondent contended that the Reference had been revoked by the Order in Council referred to, and I decided against this contention.

The Solicitor General, appearing upon the present motion on behalf of the respondent, urged that the Order of Reference was irregularly made inasmuch as it was not made by the Minister of Customs, or the Minister of Public Works as well as by the Minister of Railways and Canals; that the Reference was also void because the amount of damages claimed in a statement deposited with the Acting Minister of Railways and Canals prior to the making of the Reference, was substantially smaller than that claimed in the statement of claim; and that the respond-

ent having initiated these proceedings by granting the Reference should have the right of withdrawing the same if he so desired, and he relies on rule 109 of the Exchequer Court Rules.

In respect of the first mentioned point it appears to me that the claim for damages is primarily for a repudiation of the contract to sell to the claimant, the respondent's property which I have referred to, and as the negotiations leading up to this contract were with the Department of Railways and Canals, and the offer referred to having been approved of by the Governor in Council upon the recommendation and report of the Minister of Railways and Canals, it would appear to me that there has been a sufficient compliance with the statute which states that any claim against the Crown may be prosecuted by Petition of Right, or may be referred to the court by the head of the department in connection with the administration of which the claim arises. The particulars of the plaintiff's claim make no reference to damages in connection with the contemplated lease of certain space in the projected building for the use of the Department of Customs. There is no suggestion that the Department of Customs had in mind the idea of refusing to lease space in the building, if it were built. If there was an agreement to lease there has been no repudiation of that agreement so far as I know. In fact it has not been made clear to me that any agreement was ever entered into by the Crown agreeing to lease any space in the proposed building for the use of that department. The statement of claim alleges that authority to enter into such a lease was granted by Order in Council, but that does not mean that an agreement to lease was ever entered into. I can not presently see how the plaintiff would have any right of action against the Crown in this connection, or why the Minister of Customs, or the Minister of Public Works should be a party to the Reference. The claim arises, I think, in connection with a matter entirely connected with the Department of Railways and Canals and none other. I am of the opinion therefore, that the failure of the Minister of Customs, or any other Minister of the Crown, to join with the Acting Minister of Railways and Canals in making the reference, does not void the same.

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It is also contended by the respondent that the amount claimed in the statement of claim as damages is considerably greater in amount than that mentioned in a letter, dated September 4, 1926, and addressed to the Minister of Railways and Canals by the claimant and which letter sets forth the grounds of the claimant's demand for damages, and a request for a Reference to this court of such claim for adjudication. The letter in question fully sets out the origin and nature of the claim for damages, and I do not think the respondent can fairly claim to have been surprised or misled by the fact that the statement of claim, claims greater damages than that set forth in the letter referred to. There is nothing suggesting fraud or deception in the description or amount of the claim as set forth in the letter. It was quite natural and to be expected that the letter in question would deal generally only with the nature and amount of the damages claimed, while the statement of claim when filed would deal with the matter with preciseness and particularity. Sec. 38 of the Exchequer Court Act states that a "claim" may be referred to this court, and there was no particular reason why any amount of damages should have been mentioned in the letter unless requested by the Minister. I do not think the Reference is vitiated by the fact that the amount of damages therein mentioned is less than that mentioned in the statement of claim. The nature of the claim is still the same. I am of the opinion, therefore, that this point fails also.

The remaining point urged in support of the motion is that the respondent initiated this action or proceeding by granting the Reference and is entitled to withdraw it as might any plaintiff, under rule 109. I fail to appreciate the force of this contention. The claimant is the party prosecuting the claim, and while the Crown gave this court jurisdiction to hear the claim, yet in fact it must be the respondent who will defend the claim if it is to be defended. The respondent did not in any sense initiate the claim or proceeding by giving jurisdiction to the court, the proceedings were initiated by the plaintiff by filing and serving a statement of claim. A Fiat or Reference merely gives

jurisdiction to the court, and any action or proceeding taken thereunder is similar to any other action at law commenced by a plaintiff.

I do not think that Rule 109 is here applicable.

I therefore dismiss the motion with costs.

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Judgment accordingly.