Privy Council Appeal No. 78 *of* 1928.

The Maine and New Brunswick Electrical Power Company, Limited - - - - - - - - - *Appellants*

v.

Alice M. Hart - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW BRUNSWICK (APPEAL DIVISION).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH MAY, 1929.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD CARSON.
LORD BLANESBURGH.
LORD ATKIN.
LORD TOMLIN.

[*Delivered by* LORD TOMLIN.]

In this case the defendants in the action are appealing from a judgment of the Appeal Division of the Supreme Court of New Brunswick, dated the 26th March, 1928. By that judgment the Appeal Division (1) dismissed an appeal of the defendants from a judgment against them for $28,000 without interest, given by the King's Bench Division of the Supreme Court of New Brunswick, on the 20th October, 1927, and (2) allowed a cross appeal of the plaintiff, thereby increasing the amount recoverable against the defendants by $9,083.88 in respect of interest.

Two questions only have been argued on this appeal. First, whether upon the true construction of certain covenants the defendants have become liable for the $28,000 for which judgment has been given against them. Secondly, whether the defendants are chargeable with interest on any sum which they may be held liable to pay under the covenants.

The facts of the case are as follows:—

Prior to the year 1905, the plaintiff's predecessor in title, Havelock McC. Hart, acquired land partly in New Brunswick and

partly in Maine, on both banks of the Aroostook River in the neighbourhood of the Aroostook Falls, together with certain water privileges for the purpose of developing the water power of the Falls.

In 1905, Hart and one Arthur R. Gould (the owner of all the capital stock of the Presque Isle Electric Light Company), entered into an agreement with the defendants whereby Hart was to transfer all his land and water privileges on the Aroostook River to the defendants and Gould was to transfer to the defendants all his capital stock in the Presque Isle Electric Light Company. The consideration to Hart for the transfer by him of the land and water privileges was (1) the allotment or transfer to him of certain stock of the defendants and (2) the defendants' covenants, the true construction of which falls to be determined upon this appeal. The documents relating to the transaction do not contain any reference to the stock to be allotted or transferred to Hart, but it is not disputed that it was part of the bargain that Hart should have the stock and that the stock was, in fact, allotted or transferred to him upon the execution of the indentures of conveyance completing the transaction to which reference will be made hereafter.

The first relevant document is a memorandum of agreement, dated the 3rd January, 1905, and made between Hart, Gould and the defendants. It contained a recital that under arrangements which had been mutually made between them, Gould was to transfer to the defendants all the capital stock of the Presque Isle Electric Light Company, and Hart was to convey or cause to be conveyed to the defendants by deeds in the form thereto annexed as Schedules A and B, the lands and water privileges described in the said schedules, being the lands and water privileges already referred to.

The operative part of the agreement provided that upon the defendants completing the necessary financial arrangements for the development of water power at the Aroostook Falls to the satisfaction of Gould and Hart, Hart should and would convey or cause to be conveyed to the defendants by deeds in the form thereto annexed as Schedules A and B, the lands and water privileges described therein and Gould should and would assign and transfer or cause to be assigned and transferred to the defendants all the capital stock of the Presque Isle Electric Light Company.

The stock of the defendants to be allotted or transferred to Hart was duly allotted or transferred to him.

The conveyance of the lands and water privileges by Hart to the defendants was also in due course effected by means of two indentures of conveyance, dated the 13th January, 1905, one of which related to the lands and water privileges in New Brunswick and the other to the lands and water privileges in Maine. The two indentures were *mutatis mutandis* identical in form. Each

of them contained a covenant by the defendants with Hart in the following words.

> " The said The Maine and New Brunswick Electrical Power Company, Limited, doth hereby for itself, its successors and assigns covenant with the said Havelock McC. Hart, his heirs, executors, administrators and assigns that if water power to a greater extent than two thousand horse power be at any time developed and used at the Aroostook Falls, situate upon the hereinabove described lands and premises, the said The Maine and New Brunswick Electrical Power Company, Limited, its successors and assigns shall pay to the said Havelock McC. Hart, his heirs, executors, administrators and assigns the sum of eight dollars for each horse power in excess of the said two thousand horse power, any power developed and used in excess of two thousand horse power to be treated as divided into units of 500 and each unit to be immediately paid for in entirety when any part thereof has been developed and used."

By deed of assignment, dated the 21st August, 1923, Hart assigned all his rights under the covenants contained in the indentures of conveyance and all moneys payable thereunder to the plaintiff.

After the completion of the sale and transfer of the lands and water privileges the defendants erected works at or near the Aroostook Falls for the purpose of developing the water power of the Falls, and began and have since continued to generate electrical power therefrom for distribution and sale to customers. The defendants have from time to time increased the capacity of their works.

It appears from the power station sheets of the defendants in which is entered an hourly record of the amount of power produced, that the defendants for the first time on the 10th January, 1918, and on several subsequent occasions, developed and used power in excess of 2,000 horse. The action out of which this appeal arises was begun by the plaintiff to recover the sums payable under the covenants in respect of such excess horse power.

The plaintiff contends that upon the true construction of the covenants the defendants are liable to pay for excess horse power immediately upon each occasion where any excess horse power is developed and used, in other words, that the defendants are chargeable from time to time upon the maximum peak load once reached. There is no dispute as to the figures and if the plaintiff's contention is well founded, judgment was rightly given against the defendants for $28,000.

The defendants, however, contend that " water power " of a stream means the average power produced over a reasonable period of time, and that in view of the fluctuations of the seasons, the most reasonable period of time is a year, and that, therefore, on the true construction of the covenants they ought to be charged upon the average load of the year and not upon the individual maximum peak loads.

Both Courts below have decided this point against the defendants.

In their Lordships' judgment the contention of the defendants cannot be reconciled with the language of the covenants. The words "at any time" and "immediately" contained in the covenants seem to their Lordships to indicate recurring points of time and not any system of averaging. Further, the similarity between the language under consideration in the present case, and that considered by their Lordships' Board in the case of the *Attorney General of Ontario* v. *Canadian Niagara Power Company*, 1912, *A.C.* 852, is such that a decision in favour of the defendants here would, in their Lordships' view, be inconsistent with the earlier decision of the Board.

Upon the point of construction, therefore, in their Lordships' opinion, the defendants fail.

The question of interest next falls for consideration. On this head of the case the Appeal Division of the Supreme Court, differing from the Trial Judge, have allowed interest against the defendants.

There is no agreement to pay interest, either in express terms or implicit in the language of the covenants. The plaintiff, however, contends that interest is payable either under Section 24 (1) of the New Brunswick Judicature Act, or under the rule by virtue of which a Court of Equity compels a purchaser who takes possession to pay interest. The Appeal Division in deciding in the plaintiff's favour, have founded themselves upon Section 24 (1) of the New Brunswick Judicature Act.

The language of Section 24 (1) of the New Brunswick Judicature Act 1909 is as follows :—

> "On the trial of any issue or any assessment of damages upon any debt or sum certain, payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable."

The language of this section cannot be distinguished from that of Section 28 of Lord Tenterden's Act (3 & 4 Will. IV, c. 42). The English decisions on that section are, therefore, relevant for guidance. In their Lordships' judgment, the decision of the Exchequer Chamber in *Merchant Shipping Company* v. *Armitage*, *L.R.* 9, *Q.B.* 99, is an authority binding the English Courts up to and including the Court of Appeal to hold under Lord Tenterden's Act that if the sum becomes payable at a time fixed by reference to a contingent event which may or may not happen, it is not payable by the written instrument at a time certain. This decision was treated as authoritative by the Court of Appeal in *London Chatham and Dover Railway Company* v. *S.E. Railway Company*, 1892, 1 Ch. 121, and was viewed with benevolence by Lord Herschell in the House of Lords (see *London Chatham* and *Dover Railway Company* v. *S.E. Railway Company*, 1893, *A.C.* 429, at p. 435).

It is further to be observed that in *Juggomohun Ghose* v. *Manickchund* 7 *Moo. Ind. App.* 263, their Lordships' Board held under an Indian statute (Act No. XXXII of 1839) identical in terms with the relevant section of Lord Tenterden's Act that a sum certain is not payable by the written instrument at a time certain if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for the happening of those events, if they ever do happen, may be indefinitely postponed.

In view of the last-mentioned decision, which is binding on their Lordships' Board, it would not, in their Lordships' judgment, be open to them to hold that the effect of Section 24 (1) of the New Brunswick Judicature Act is different from that of the section of the Indian Statute under consideration in *Juggomohun Ghose* v. *Manickchund* (*ubi supra*). The defendants' contention that Section 24 (1) of the New Brunswick Judicature Act has no application to the present case must, therefore, prevail.

It remains to consider whether any rule of equity entitles the plaintiff to interest.

In order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as for example, the non-performance of a contract of which equity can give specific performance.

It must, however, be borne in mind that when once such a contract has been executed, then, apart from cases where rescission on the ground of fraud is sought, there remains nothing to attract the equitable jurisdiction and the parties are left to their remedies at law.

In the case under consideration the contract for the sale of the lands and water privileges has been fully executed. Hart conveyed the property purchased to the defendants. He received from the defendants the stock to be transferred to him, and he accepted from the defendants, as under the contract he was bound to do, covenants under seal to perform certain obligations of a continuing character involving the payment from time to time of sums of money. Upon the stock having been allotted or transferred to Hart and the covenants having been executed, Hart had received all the consideration moving from the defendants to him under the contract. The plaintiff, as Hart's successor in title, cannot, and as appears from her statement of claim, does not sue upon the contract, which is fully executed: she sues upon the covenants. Those covenants must be construed according to the ordinary rules of construction; and if, so construed, they do not give the plaintiff interest, she cannot claim interest unless it is given to her at common law or under statute. There is no place in the matter for the exercise of equitable jurisdiction and,

therefore, no rule of equity in regard to interest can have any application.

In their Lordships' judgment, the plaintiff's cross appeal for interest to the Appeal Division of the Supreme Court of New Brunswick ought to have failed and to have been dismissed with costs.

In the result, therefore, the defendants succeed on the present appeal to the extent of the judgment against them for interest, but otherwise the appeal fails and their Lordships will humbly advise His Majesty accordingly.

There will be be no costs of this appeal.

In the Privy Council.

THE MAINE AND NEW BRUNSWICK ELECTRICAL POWER COMPANY, LIMITED,

v.

ALICE M. HART.

DELIVERED BY LORD TOMLIN.

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