Privy Council Appeals No. 20 of 1944 and No. 16 of 1945

Gooderham and Worts, Limited - - - - - *Appellant*

v.

Canadian Broadcasting Corporation - - - - *Respondent*

Canadian Broadcasting Corporation - - - - *Appellant*

v.

Gooderham and Worts, Limited - - - - - *Respondent*

Consolidated Appeals

FROM

THE COURT OF APPEAL FOR ONTARIO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH OCTOBER, 1946

Present at the Hearing:

VISCOUNT SIMON
LORD MACMILLAN
LORD PORTER
LORD GODDARD
LORD UTHWATT

[*Delivered by* LORD MACMILLAN]

The appellants are the owners of a private radio station, originally designated by the letters CKGW, at Bowmanville, some forty miles from Toronto, which they began to operate in 1928. In 1933 the Canadian Radio Broadcasting Commission, constituted under the Canadian Radio Broadcasting Act, 1932, who were then organizing a basic network of stations across Canada, entered into negotiations with the appellants with a view to acquiring a lease of their undertaking. As a result of these negotiations the appellants and the Commission on 9th and 16th June, 1933, executed an indenture of lease "as of" 15th May, 1933. It is with the chequered fortunes of this lease that the present litigation is concerned. Its validity, its interpretation and its effect are all in issue.

The subjects of the demise are described as consisting of the lands and premises of the appellants at Bowmanville and "all plant and equipment owned by the lessor and used by it in connection with the operation of radio broadcasting station CKGW, the whole of the said property being hereinafter referred to as the 'demised premises.'" The lease in clause 2 is expressed to be "for and during the term of three years to be computed from the 15th day of May, 1933, and thenceforth next ensuing and fully to be complete and ended on the 15th day of May, 1936." The stipulated rent was $12,000 yearly payable in advance in equal quarterly instalments of $3,000 on the 15th days of May, August, November and February.

The lease contains two covenants which figure so largely in the controversy between the parties that it is necessary to quote them textually as follows:—

> "4. And the lessee covenants with the lessor to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition."

" 12. And also that at the expiration of the term hereby granted and of every succeeding term of three years to be granted by the lessor to the lessee as hereinafter provided the lessor will at the costs and charges of the lessee grant a new lease for a further term of three years from the determination of the present or then existing lease at the same rental per annum as provided for by the present lease irrespective of any buildings erections and improvements erected or made thereon or therein by the lessee and the lessee covenants and agrees to accept such new lease and to execute the same and if no such new lease be entered into as aforesaid the present or then existing lease as the case may be and all the terms and conditions thereof shall continue until terminated by the lessor upon one month's notice in writing to the lessee. Provided however that the lessor shall not be under any obligation to grant a new lease unless the lessee shall have fully paid observed and performed all rents covenants and agreements contained in the present or then existing lease as the case may be."

There was also a clause conferring on the lessee an option at any time during the currency of the lease or any renewal thereof to purchase the whole of the demised premises at a price to be agreed or failing agreement to be fixed as therein provided.

The Commission entered into possession of the demised premises and proceeded to utilise the station. On the expiry of the term of three years on 15th May, 1936, no new lease was entered into between the parties, but the Commission remained in occupation and continued to pay the rent quarterly.

On 2nd November, 1936, the Canadian Broadcasting Act, 1936, came into force, whereby the Canadian Broadcasting Corporation, the present respondents, were constituted. This Act repealed the previous statute of 1932 and by section 25 provided that the Corporation should take possession of all property and assets and assume all the obligations and liabilities of the Canadian Radio Broadcasting Commission, the original lessees.

On 26th January, 1938, the Corporation addressed a letter to the appellants stating that because of the completion of their new station at Hornby they would not further require the premises covered by the indenture of lease and giving notice to terminate at 15th May, 1938. The appellants at once challenged the validity of the notice and the right of the Corporation to terminate the lease and on 30th April, 1938, they raised the present action in which they advanced a series of alternative claims dependent on the view which the Court might take of the rights of the parties *inter se*. Their first claim was for a declaration that the lease or an antecedent agreement of lease was valid and subsisting and for specific performance. Alternatively they claimed a declaration that the respondents were tenants of the appellants under a yearly tenancy expiring on 15th May in each year on the terms of the lease or agreement so far as applicable. As a further alternative they claimed payment of $250,000 for the use and occupation of the demised premises from 15th May, 1933, to 15th May, 1938. They also claimed damages in respect of the respondents' failure to keep the demised premises modern and up-to-date and in good repair and operating condition.

The respondent Corporation stated a preliminary plea to the jurisdiction of the Court alleging that they were an " emanation of the Crown " and as such could not be impleaded in the Supreme Court of Ontario but could be proceeded against only by way of petition of right in the Exchequer Court of Canada. Their Lordships share the difficulty expressed in a previous case by Luxmoore L.J. on behalf of the Board in understanding the precise meaning of this somewhat spectral plea (*International Railway Co.* v. *Niagara Parks Commission,* [1941] A.C. 328 at p. 343) but as it was repelled in the Courts in Ontario and was abandoned at their Lordships' bar no more need be said about it.

The main attack of the respondents in their defence was directed against the validity of the lease, which they maintained was *ab initio* null and void. In order to appreciate this contention it is necessary to enter into some detail. At the time when the parties began their negotiations for the lease the Commission (the respondents' predecessors) were, without prejudice to their general power to carry on the business of broadcasting in Canada, expressly empowered by their constituent Act of 1932, section 9 (*b*), " to acquire existing private stations by lease." This was an unrestricted and unconditional power. But before the lease was signed in June, 1933, there had come into operation on 23rd May, 1933, an Act to amend the Act of 1932. By section 2 of this amending Act section 9 (*b*) of the Act of 1932 was repealed and a new paragraph (*b*) was substituted whereby the power of the Commission to acquire existing private stations by lease was expressly made subject to the approval of the Governor in Council. In point of fact, although the lease makes no mention of any consent, the Commission on 26th May, 1933, addressed a letter to the appropriate Minister stating that they had come to a very favourable agreement with the appellants for the leasing of their station and were extremely anxious to close the contract immediately. With this letter was enclosed " a report to Council covering the leasing of this station " and the letter concluded with a request that the report should be brought before the Council at its next meeting. This report is not produced but it appears that the Commission recommended the sanctioning of a lease for five years at $12,000 per annum. On the report being submitted the next day, 27th May, 1933, with the concurrence of the Minister, to the Governor in Council, authority was granted to the Commission to take on lease the appellants' station " for a period of three years at a price of $12,000 per annum. This expenditure to be made out of monies appropriated by Parliament for the use of the Commission." The draft lease does not appear to have been laid before the Governor in Council and the appellants were not parties to nor do they seem at the time to have been aware of the application for the approval of the Governor in Council. It will be observed that whereas the recommendation laid before the Council was of a lease for five years the approval is of a lease for three years. The use of the word " price " was made the basis of an argument by the respondents that the total authorised expenditure was limited to $12,000, but they ultimately conceded that " price " had no other signification than rent.

The Commission having obtained this approval from the Governor in Council signed the lease on 16th June, 1933. The Corporation now assert that the lease is nevertheless null and void inasmuch as it exceeds in its terms the authority granted. Before discussing this contention it is necessary first to dispose of three matters raised by the appellants to exclude its admissibility.

(1) The appellants in the Courts in Ontario and in their printed case before the Board sought to avoid all questions relating to the approval of the Governor in Council by maintaining that before this approval became a statutory essential on 23rd May, 1933, the parties had already made a binding agreement to enter into a lease on which the appellants could rely apart altogether from the lease itself. This submission was rejected by the Courts in Ontario and as it was abandoned at their Lordships' bar it is unnecessary to consider it.

(2) The appellants next pleaded that the respondents were estopped from maintaining that the lease was null and void. At the time of the granting of the lease the appellants were tenants of certain offices and studios in the King Edward Hotel in Toronto which they used in connection with their broadcasting station under a lease dated 1st December, 1927, and renewal thereof between the King Edward Hotel Co., Ltd., and the appellants. The Commission took possession of and utilised these offices and studios as included in the premises demised by the lease now under challenge, which contained a clause whereby the Commission undertook to indemnify the appellants against all claims and liabilities

under *inter alia* the King Edward Hotel lease. In 1934 the King Edward Hotel Co., Ltd., brought an action against the appellants for rent and damages for breach of certain covenants of the tenancy. The appellants, founding on the indemnity clause in the lease between them and the Commission, served a third party notice on the Commission which thereupon entered appearance in the action and lodged a statement of defence in which they admitted that by the lease of 15th May, 1933, they leased all plant and equipment owned by the appellants and used by them in connection with the operation of the radio broadcasting station CKGW. The proceedings resulted in judgment for a substantial sum against the appellants for which the Commission were found liable to indemnify the appellants. In the present action the appellants found upon the admission made in the King Edward Hotel action as an estoppel by record precluding the respondents from now maintaining that the lease is null and void. It was, they say, to the interest of the Commission in this previous action to challenge the validity of the present lease and to have done so successfully would have afforded a complete answer to the indemnity claim against them. The plea would have been a competent one and they omitted to take it. Both Greene J., the trial judge, and the Court of Appeal in the present case held that the respondents were by their admission in the King Edward Hotel action estopped from now denying the validity of the lease " in its entirety," although not precluded from maintaining their arguments on clauses 4 and 12. Their Lordships would point out that the issue of the validity of the lease was not raised in the action and that the alleged estoppel is against the pleading of a statute. (See *Griffiths* v. *Davies*, [1943] 1 K.B. 618 and cases there cited.) While the judgment against the Commission no doubt proceeded on their admission of the existence of a valid lease, imposing on them an effective obligation of indemnification, their Lordships are not satisfied that the present respondents are now precluded from challenging the validity of the lease as a whole on the ground of the provisions of clause 12. As will appear, however, in the sequel, their Lordships' opinion on the merits renders it unnecessary to pursue or pronounce upon the point.

(3) The most formidable argument advanced by the appellants was founded on the terms of the legislation affecting the powers of the Commission and their successors the present respondents. The requirement of the consent of the Governor in Council to a lease of a private station became operative for the first time, as has already been stated, on 23rd May, 1933, by virtue of the Act of that year (chapter 35 of the statutes of 1932-33). This Act was a temporary measure and by section 4 was declared to expire on 30th April, 1934. By two successive Acts passed in 1934 and 1935 (chapter 60 of the statutes of 1934 and chapter 24 of the statutes of 1935) the date of expiry of the Act of 1932 was postponed first to 30th April, 1934, and then to 30th June, 1935. Finally on 5th July, 1935, an Act was passed which provided as follows:—

> " 1.—(1) The provisions of sections one two and three of chapter thirty-five of the statutes of 1932-33 shall be deemed always to have been and hereafter they shall be operative and in force only until the thirty-first day of March, 1936.
>
> (2) Section 4 of chapter thirty-five of the statutes of 1932-33 and chapter sixty of the statutes of 1934 and chapter twenty-four of the statutes of 1935 are wholly repealed.
>
> (3) On and after the first day of April, 1936, chapter fifty-one of the statutes of 1932 shall be read as if chapter thirty-five of the statutes of 1932-33 and chapter sixty of the statutes of 1934 and chapter twenty-four of the statutes of 1935 had respectively never been enacted."

Fastening upon the repeal in subsection (2) of the legislation requiring the consent of the Governor in Council to any lease and upon the words in subsection (3) providing that this legislation is to be treated as if it had never been enacted, the appellants maintained that the respondents could not in the present proceedings found any argument against the efficacy in whole or in part of the lease on the requirement of the approval

of the Governor in Council inasmuch as at the date of the raising of the present action the whole legislation imposing this requirement had been not only repealed but directed by Parliament to be treated as if it had never been enacted. A plea, they said, founded on a statute which was to be deemed never to have been enacted could manifestly not be sustained.

This argument, at first sight attractive as a point of pleading, is, in their Lordships' opinion untenable on a sound appreciation of the structure and terms of the Act of 5th July 1935, above quoted. The first temporary amending Act of 1933 repealed certain provisions of the principal Act of 1932 and substituted other provisions in their place. The operation of this amending Act was continued down to 30th June, 1935, by two further Acts. Then by the Act of 5th July, 1935, its operation was further extended to 31st March, 1936, but only till then. The sections of the three temporary Acts prescribing successive dates of expiry of this temporary legislation were repealed. The result is that on 31st March, 1936, the temporary legislation contained in the first Act of 1933 repealing provisions of the principal Act of 1932 and substituting other provisions came to an end not by repeal of the temporary legislation but by the efflux of the prescribed time. No question as to the revival of the temporarily repealed provisions of the principal Act of 1932 by the repeal of repealing legislation arises. The repeal effected by the temporary legislation was only a temporary repeal. When by the fiat of Parliament the temporary repeal expired the original legislation automatically resumed its full force. No re-enactment of it was required. This is what subsection (3) of the Act of 5th July, 1935, was designed to make clear. The principal statute of 1932 is to be read on and after 1st April, 1936, as if the temporary legislation had never been enacted; it is to be in force as if there had been no temporary legislation affecting its provisions. Subsection (3) does not say that the temporary Acts are for all purposes to be treated as if they had never been enacted. It says only that the principal Act is to be read in future as if the temporary Acts had never been enacted. If the temporarily repealed provisions of the principal Act had not on 1st April, 1936, come into operation again, freed of the modifications substituted by the temporary legislation, the Commission would have been left without powers essential for the conduct of their business until 2nd November, 1936, when the Canadian Broadcasting Act of 23rd June, 1936, came into operation incorporating their successors, the present Corporation, and providing them with a complete code of revised powers.

Accordingly, in their Lordships' opinion, the respondents are not precluded by the terms of the Act of 5th July, 1935, from now maintaining that under the temporary Act of 23rd May, 1933, the approval of the Governor in Council was essential when the lease in question was signed. The appellants are not entitled to say that the Court has been enjoined by Parliament to disregard the temporary Act of 23rd May, 1933, as if it had never been enacted.

These points having been disposed of, the question has now to be considered whether the lease can be said to have had the requisite approval of the Governor in Council. The approval accorded by the Order in Council of 27th May, 1933, was explicitly stated to be of a lease "for a period of three years at a price of $12,000 per annum." Nothing is said about any conditions. The respondents submit that no conditions were thereby approved other than those which in common form are included in a normal lease. In particular they say that no authority was conferred to enter into a lease containing the far-reaching provisions of clause 12, and they maintain that although their predecessors signed the lease they are now entitled to resist its enforcement as being *ultra vires*, either in whole or at least so far as regards clause 12.

Their Lordships agree with the learned judges of the Court of Appeal that clause 12 does not technically convert the lease into a perpetual lease. But one thing is clear, namely, that clause 12 modified the operation of clause 2 which provided that the tenancy should be completely ended on 15th May, 1936. It bound the parties to a continued tenancy

beyond the term of three years. Notwithstanding the expiry of the three years the parties, in the absence of a month's notice by the appellants or the exercise by the respondents of their option to purchase, were to remain indefinitely in the relation of landlord and tenant. This, in their Lordships' opinion, was plainly unauthorised by the Order in Council. Clause 12, inasmuch as it never was approved by the Governor in Council, was ineffectual to extend the relation of tenancy beyond 15th May, 1936. The question whether the unauthorised stipulations in clause 12 rendered the whole lease null and void *ab initio* (assuming this argument to be open to the respondents) or whether clause 12 was severable and could be disregarded, leaving the rest of the lease unaffected, was debated. The three years from 15th May, 1933, to 15th May, 1936, whether years of tenancy under the lease or years of use and occupation without any contract of tenancy, are past and gone and the appellants have received payment of $12,000 in respect of each of those three years.

Both the Courts in Ontario have held that clause 12 is severable and that its elimination leaves an effective three years' lease. With this finding their Lordships agree.

What has next to be determined is the legal position of the parties after 15th May, 1936, and when the present action was raised. Here their Lordships find themselves in agreement with the Courts in Ontario that from and after 15th May, 1936, the relation of the parties was by presumption of law that of landlord and tenant under a year to year tenancy terminable by six months' notice on either side before 15th May in any year. The payment and acceptance of rent and the continuance of the respondents' possession after 15th May, 1936, had in law this result. Further, all of the terms of the original lease so far as consistent with a yearly tenancy were thenceforth by law binding on the respondents. Clause 12 of course disappears but the obligations of clause 4 subsist as not being incompatible with a yearly tenancy. It will be borne in mind that at 15th May, 1936, there was no legislation in force requiring the approval of the Governor in Council to a lease by the Commission of a private radio station and therefore there was then no impediment in the way of the Commission entering upon a yearly tenancy at their own hand and on any terms.

The respondent Corporation after their constitution on 2nd November, 1936, continued to occupy " the demised premises " and to pay rent as their predecessors, the Commission, had done. On 21st December, 1937, they sub-leased to Mr. Purdy the manager's house at Bowmanville, part of " the demised premises ", for a term of one year and four months from 31st December, 1937, to 30th April, 1939. Notwithstanding these facts the respondents, as already stated, on 26th January, 1938, gave notice to the appellants to terminate the lease of " the demised premises " as from 15th May, 1938. This notice being dated less than six months before 15th May, 1938, was obviously bad, and so it has been held by the Courts in Ontario. But while ineffectual to terminate the tenancy at 15th May, 1938, the notice has by the Courts in Ontario been held as a good notice to terminate the tenancy at 15th May, 1939. With this view their Lordships are unable to agree. The notice, in their opinion, was ineffective to all intents and purposes.

The ground has now been cleared sufficiently to enable the legal position of the parties at the date of the raising of the present action on 30th April, 1938 to be defined. The Respondents were then tenants under the Appellants of " the demised premises " on a year to year tenancy terminable by six months notice on either side at 15th May, in any year, at a yearly rent of $12,000 and otherwise subject to the terms of the lease of 1933 so far as applicable to a yearly tenancy, clause 12 thereof being in particular excluded. The Appellants are accordingly entitled to a declaration to this effect.

Both the trial Judge and the Court of Appeal hold that the Respondents' tenancy was brought to a termination at 15th May, 1939, by the notice of 26th January, 1938. On this footing the learned trial Judge by his Order gave judgment for the Appellants for $12,000 being a year's rent from

15th May, 1938, to 15th May, 1939, and also found the Respondents liable to the Appellants for damages for breach of the covenant in Clause 4, the damages to be determined as at 15th May, 1939, by a reference to the Master. His Order was affirmed in these respects by the Court of Appeal.

Their Lordships are unable to agree with this manner of disposing of the case. When the action was brought in April, 1938, the yearly tenancy, as the Courts in Ontario and their Lordships agree, was subsisting. It was an action brought by a landlord against his tenant during the currency of the tenancy. No rent was then due and resting owing, the quarterly rent due at 15th May, 1938, having been paid in advance. Their Lordships feel difficulty in understanding how in those circumstances judgment could be given in this action for rent not due when it was raised. The rent subsequent to 15th May, 1938, will appropriately be recoverable under the declaration proposed to be pronounced as to the continued subsistence of the tenancy. It may be that effective steps have now been taken by the Respondents by due notice to terminate the tenancy.

Then as to the claim of damages their Lordships have no hesitation in upholding the concurrent judgments of both Courts in Ontario that the Respondents were at the time of the raising of the action in breach of the covenant contained in Clause 4 of the lease. Where a claim is made by a landlord against his tenant for breach of covenant, during the currency of the tenancy, which is the present case, the measure of damages is the diminution in the value of the reversion resulting from the breach, without prejudice to any further claim which the landlord may have at the termination of the tenancy. Here, however, both Courts, having held that the tenancy had terminated on 15th May, 1939, have ordered the damages to be assessed as at that date. In their printed cases laid before the Board both parties take exception to this date. The Appellants, citing Rule 260 of the Ontario Court, maintain that the damages, being in respect of a continuing cause of action, should be assessed down to the time of the assessment, while the Respondents maintain that the damages should be determined on the basis of the facts as they existed on or before 30th April, 1938, when the writ in the action was issued.

Their Lordships unfortunately did not have a full argument on those procedural topics owing to the concentration of discussion on the numerous other points in controversy, but it would appear that the appropriate course would be to pronounce a declaration finding that as at 30th April, 1938, the Respondents were in breach of their obligation to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition and to refer to the Master of the Court at Toronto to determine the amount of the damages in accordance with the law and practice of the Court.

It now only remains to consider the question of the interpretation of the covenant " to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition ".

The terms of the covenant are unusual and of very wide scope, but having regard to the nature of the premises and the purpose for which they were designed and used their Lordships are of opinion that it is enforceable as a condition of the Respondents' yearly tenancy. It was suggested in the Court of Appeal that if an extreme interpretation were placed on the covenant the result might be to render it inapplicable altogether, first as being originally unauthorised by the approval of the Governor in Council and second as not being such a provision as the law would import into a yearly tenancy. In their Lordships' opinion, however, the covenant is binding upon the Respondents and must receive a fair and reasonable interpretation.

The Appellants furnished detailed particulars of the breaches which they alleged and a considerable amount of evidence was led on the subject, with the result, as already stated, that both Courts in Ontario held that the Respondents had committed a breach of the covenant and were liable

in damages. The trial Judge assessed the damages at $25,000 subject to the right of either party to have the damages ascertained by a reference. The Appellants elected to have the matter referred and the learned Judge accordingly, as already set out, referred to the Master of the Supreme Court the determination of the amount of the damages which he directed to be ascertained as at 15th May, 1939. He further ordered that the Appellants should have the costs of the reference if the sum awarded exceeded $25,000, but should be liable in the costs of the reference if $25,000 or less were awarded. The Court of Appeal varied this part of the trial Judge's order and directed that the Appellants should have the costs of the reference in any event. On this question their Lordships are of opinion that liability for the costs of the reference should be left to the determination of the Court in their discretion after the damages have been assessed.

The interpretation and application of the covenant to keep the whole of the demised premises modern and up-to-date was the subject of much debate before their Lordships, as it had been in the Courts in Ontario. The Appellants complained that too narrow a construction had been placed upon it, while the Respondents sought to restrict its scope. In their Lordships' view it is not possible to devise a precise formula for the instruction of the referee and they think it undesirable by anticipation to fetter unduly the business judgment which it will be his province to exercise. They agree, however, with many of the general observations made by Greene, J. and the learned Judges of the Court of Appeal in so far as they emphasise that it is the demised premises, that is, the station, studio and offices as let that are to be kept modern and up-to-date, and that if the existing site of the station is inadequate for the accommodation of the plant necessary for a modern station the Respondents are under no obligation to acquire additional land. Again, Henderson, J. well expresses it when he says—"The obligations of the lessee are to be construed as being obligations to keep the whole of the demised premises modern and up-to-date in so far as the thing demised is capable of being kept modern and up-to-date". Applying this, their Lordships note that the station demised is a 5 kilowatt station and the duty imposed on the Respondents by the covenant does not extend to the substitution of an installation involving the use of higher power. The damages for breach must of course depend on the loss suffered by the Appellants from the Respondents' failure to fulfil the covenant. The covenant must be construed in a business sense. The referee will have before him the Appellants' detailed particulars of claim. It will be for him to determine which items are admissible and practicable and what sums he should assess as representing the damages for failure on the part of the Respondents to do what he finds they ought to have done.

While their Lordships have found themselves largely though not entirely in agreement with the judgment under review they are of opinion that the most convenient course will be to recall the Orders of Greene, J., and the Court of Appeal of 15th October, 1942 and 9th July, 1943 and in lieu thereof to remit to the Court of Ontario:—

1. To declare that Clause 12 of the lease of 15th May, 1933, was invalid *ab initio* but that otherwise the said lease was valid and binding upon the parties thereto in all its terms.

2. To declare that as from and after 15th May, 1936, the Commission and the Defendants as their successors became and that at the date of raising the present action they still were the tenants of the Plaintiffs in the premises described as the demised premises in the lease of 15th May, 1933, under a yearly tenancy terminable on six months notice on the 15th day of May in any year on the terms contained in the said lease so far as applicable to a yearly tenancy including the covenant contained in Clause 4 but excluding the covenant contained in Clause 12.

3. To declare that the Defendants are liable to pay to the Plaintiffs the yearly rent of $12,000 as stipulated in the said lease as from 15th May, 1936, until the Defendants' yearly tenancy of the demised premises is duly terminated.

4. To declare that the Defendants were at 30th April, 1938, in breach of the covenant contained in the said lease to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition and that the Plaintiffs are entitled to recover in the present action damages from the Defendants for such breach.

5. To order that it be referred to the Master of the Supreme Court at Toronto to determine the amount of the said damages in accordance with the law and practice of the Court.

6. To adjudge the Defendants to make payment to the Plaintiffs of the sum so determined.

7. To order that liability for the costs of the said reference be determined by the Court in their discretion after the damages have been assessed.

Their Lordships are further of opinion that the judgment of Greene, J. and the Court of Appeal as to the costs of the parties in the Courts of Ontario should otherwise be affirmed.

As regards the costs of the present Appeal and Cross Appeal to this Board, both parties have to a large extent failed to make good their contentions and each party will bear their own costs.

Their Lordships would not think it right to give more precise directions as to procedural matters on which their Lordships have heard no argument and are not adequately informed.

Their Lordships will humbly advise His Majesty that the Appeal and the Cross Appeal be disposed of in the manner above indicated and that the Judgments of Greene J. and of the Court of Appeal be varied accordingly.

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In the Privy Council

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v.

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DELIVERED BY LORD MACMILLAN

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