1955
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THE ATTORNEY GENERAL OF BRITISH COLUMBIA (*Defendant*) APPELLANT;

AND

THE DEEKS SAND & GRAVEL COMPANY LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Crown lands—Lease—Transfer of leased land from Dominion to Province—Whether Province entitled to alter terms of lease on renewal—Whether compromise agreement enforceable—Railway Belt Re-transfer Agreement Act, 1930 (B.C.), c. 60; 1930 (Can.), c. 37; 1930 (Imp.), c. 26.

In 1910, the predecessors in title of the respondent obtained two renewable quarrying leases from the Dominion for 21 years, at a fixed rental, the lessees covenanting to observe regulations made from time to time. There was no mention of royalty. In 1930, the lands subject to the leases were, by statute, vested in the Province of British Columbia, the Province being bound to carry out the leases. When the respondent applied to the Province in 1931 for renewal, the latter claimed the right to vary the rental and to impose a royalty. A compromise agreement was made providing that the leases would be "thereafter subject to adjustment . . . both with regard to rental and to royalty". The rental was subsequently increased and a royalty was demanded. The respondent paid the increased rent only and sued the Province for a declaration that it was not liable for the royalty. The trial judge and the Court of Appeal for British Columbia held the compromise to be *ultra vires* the Province and maintained the action.

Held: The appeal should be allowed. The agreement by way of compromise was not *ultra vires* the Province.

*PRESENT: Kerwin C.J., Rand, Kellock, Estey, Locke, Fauteux and Abbott JJ. Estey J. died before the delivery of the judgment.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment at trial in a declaratory action.

D. N. Hossie, Q.C. for the appellant.

A. Bull, Q.C. for the respondent.

THE CHIEF JUSTICE:—This appeal may be disposed of on a short ground. The parties compromised a dispute which had arisen between them and the terms thereof appear in the following endorsement on each lease:—

> Renewed for a period of twenty-one years from June 20, 1931, at a rental of one dollar per acre per annum, free from royalty, for the first five years and thereafter subject to adjustment for each successive five year period both with regard to rental and royalty.

I agree with the trial Judge that there is no uncertainty about this agreement and that its terms gave the Minister power to vary the rentals and impose a variable royalty in order to have the leases conform with similar leases granted by him. There was a dispute, as to which the Minister believed he was in the right, and, therefore, the easing of the provisions in favour of the respondent constituted good consideration. Under these circumstances there appears to be no doubt as to the law which, for present purposes, is sufficiently stated in para. 203 of Vol. VII of the Second Edition of Halsbury's Laws of England.

The respondent succeeded in the Courts below on the ground that the agreement was *ultra vires* the Province. This, however, is not a case of an attack on legislation enacted by the Legislature. In *Attorney General of Canada* v. *Western Higbie and Albion Investments, Ltd.* (2), it was held that para. 4 of a certain British Columbia Order-in-Council was an admission by the executive authority of the Province that certain harbours were "public harbours" within the meaning of Item 2 of Schedule 3 of *The British North America Act, 1867*. While that was a case of the power of the executive to make an admission, the circumstances, here present, that it might be held if action had then been taken that the Province could not insist upon altered terms, does not affect the matter.

(1) [1955] 2 D.L.R. 17; 15 W.W.R. (N.S.) 114.

(2) [1945] S.C.R. 385.

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Kerwin C.J.

The decision of this Court in *Anthony* v. *Attorney General for Alberta* (1), is quite distinguishable, as Alberta's claim had not been agreed to by the other party. In *Attorney General for Alberta* v. *West Canadian Collieries, Ltd. et al. and Attorney General for Manitoba and another* (2), s. 8 of an Alberta statute of 1948 was "a naked assertion" that the terms of pre-1930 Dominion leases and grants could be wholly disregarded (p. 549). Here there was no such attempt, but a *bona fide* agreement was entered into by two parties, each of which was capable of so contracting.

The appeal should be allowed and the action dismissed with costs throughout.

The judgment of Rand, Kellock, Locke, Fauteux and Abbott JJ. was delivered by:—

KELLOCK J.:—The liability asserted by the appellant herein to rest upon the respondent depends, in the first place, upon the binding nature or otherwise of an agreement of compromise made at the time of renewal by the province of two quarrying leases made on August 13, 1910 by Canada to predecessors in title of the respondent, and, in the second place, upon the proper construction of that agreement.

Each lease was for a term of twenty-one years from June 20, 1910, at an annual rental of $1 per acre,

renewable for a further term of twenty-one years, provided the lessee can furnish evidence satisfactory to the Minister of the Interior to show that during the term of the lease he has complied fully with the conditions of such lease, and with the provisions of the regulations regarding the disposal and operation of quarrying allocations which may have been made from time to time by the Governor in Council.

The leases were granted pursuant to regulations passed by virtue of s. 4 of the *Dominion Lands Act*, 7-8 Ed. VII, c. 20, which authorized the Governor in Council "from time to time to make such regulations for the survey, administration and disposal" of the lands as "he deemed suited to the conditions thereof." While by the terms of the regulations, as well as by the leases themselves, the lessee was required to keep books showing the quantities of material obtained under the leases, to make returns as to

(1) [1943] S.C.R. 320. (2) [1953] A.C. 453.

its working and operations and to "abide by all the obligations, conditions, provisoes and restrictions in or under the said regulations imposed upon lessees or upon the said lessee", neither in the leases nor in the applicable regulations is there any mention of royalty.

By an agreement between the Dominion and the province under date of the 20th of February, 1930, validated by Imperial, Dominion and provincial legislation, the interest of the Dominion in these and other lands was vested in the province upon terms, *inter alia,* binding the province to carry out, in accordance with the terms thereof, "every contract to purchase or lease any interest in the lands transferred and every arrangement whereby any person had become entitled to any interest therein as against Canada."

Subsequent to the expiry of the original term, negotiations took place between the respondent and the province as to renewal. The province claimed to be entitled to stipulate that the rent should be "subject to adjustment" for each succeeding five-year period after the first five years of the renewal term and that the lessee should pay a royalty of five cents per cubic yard on all material removed, it being contended that such right had pertained to the Dominion upon the proper construction of the regulations as well as the provision as to renewal in the leases themselves, and that the province had succeeded to the rights of Canada under the terms of para. 4 of the Dominion-Provincial agreement, which provides that

> any power or right which, by any agreement or other arrangement relating to any interest in the lands hereby transferred or by any Act of Parliament relating to the said lands, or by any regulation made under any such Act, is reserved to the Governor in Council, or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by the Lieutenant-Governor of the Province in Council or by such officer of the Government of the Province as is authorized to exercise similar powers or rights under the laws of the Province relating to the administration of Crown lands therein.

The respondent's solicitors took the position that neither under the terms of the leases nor the regulations had the Dominion reserved any power to alter the rent or impose any royalty, and they threatened proceedings to compel the issuance of the renewals in accordance with their view of the respondent's rights.

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In the result, a compromise was arrived at and embodied in an endorsement on each lease as follows:

> Renewed for a period of twenty-one years from June 20, 1931, at a rental of one dollar per acre per annum, free from royalty, for the first five years and thereafter subject to adjustment for each successive five year period both with regard to rental and royalty.

While in the correspondence prior to the making of this agreement the province had stated that provincial regulations were in force providing for the payment of royalties, that was not the fact, but the parties have made no point of this in argument before us. That this matter may have been the subject of discussion when the agreement of compromise was entered into, is perhaps indicated by the letter of May 16, 1932, to the respondent from the provincial Superintendent of Lands which does not refer to any provincial regulations but to the understanding arrived at between the parties that the respondent had "no objection to the principle of the conditions attached to all Provincial leases of this nature." These conditions were inserted in provincial leases by the Minister of Lands under the authority of s. 80 of the *Provincial Lands Act;* R.S., 1924, c. 131.

Upon the expiry of the first five years of the renewal period, the province advised the respondent that thereafter the leases would be subject to royalty, but this claim was waived for a further five year period when the province increased the rental and demanded payment of royalty. The increased rental has been in fact paid so that no question arises with regard to it. The royalty, however, has not been paid.

The respondent contends that the agreement of compromise was without consideration in that the leases themselves and the Dominion regulations properly construed conferred no right upon the Dominion and therefore none on the province, to insist upon the inclusion of a term as to royalty. The respondent thus seeks to revert to the position taken by it when the discussion arose which eventuated in the compromise. It is further contended that the compromise itself did not, properly construed, impose liability for royalty upon the respondent but amounted to no more than an agreement to discuss.

The learned trial judge was of opinion as a matter of construction that the agreement did obligate the respondent to pay, with which opinion I agree, and that the province, at the time the agreement was negotiated, entertained a reasonable hope that its contention would be maintained if litigated and that it had an honest belief in its chances of success. He therefore concluded that the endorsement on the leases constituted a binding compromise, and authorized the increase in rental and imposition of the royalty "unless it was *ultra vires* the Province."

As to this, the learned judge was of opinion that, upon the proper construction of the terms of the leases and the regulations, the position taken by the province in 1931 as to its rights was, in reality, untenable in law, and that because the obligation of the province toward the respondent under the Dominion-Provincial agreement of 1930 had been constituted by statute, "the compromise, if not illegal, was at least beyond the powers of the Minister and the Province, and was therefore invalid." The learned judge saw no distinction in principle between unilateral action on the part of a province by way of legislation which proved ultimately to be *ultra vires* as in opposition to the terms of the statutory agreement between the Dominion and the province and an agreement between a province and a lessee arrived at by way of composition of conflicting views as to the proper construction of that agreement and the rights thereby accruing to each.

The learned judge said:

> The present case is one of the Province of British Columbia asserting and thereby exacting by compromise rights which it did not enjoy under the original lease, or the Railway Belt Agreement, by which it nullified in part its obligation under clause 3 of the latter agreement to carry out the lease granted by the Dominion according to its terms, and the Plaintiff's rights under those contracts.
>
> There is no distinction in principle. The Imperial Act and the Statute of Canada confirming the Railway Belt Agreement imposed the same constitutional limitation on the prerogative of the Crown, in the right of the Province of British Columbia, that Natural Resources Agreement and the confirming Statutes imposed on the authority of the Alberta Legislature; in neither case would the consent of the contracting parties allow the Province to break the bounds imposed by that limitation.

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In this view, for which he found support in the decision of this court in *Mark Anthony* v. *Attorney General of Alberta* (1), the learned judge decided:

> It is unnecessary to consider whether the Province and the lessee could amend the leases without the authority of Dominion and Provincial legislation by an agreement fairly and freely made to meet their mutual requirements under circumstances which did not involve a compromise of untenable claims made by the Province in conflict with the Railway Belt Agreement.

This judgment was upheld on appeal (2), O'Halloran J.A., who wrote the judgment of the court, stating:

> Once it appears, therefore, that the Province has no power to impose a royalty on the leased lands, it is beyond the capability of the Province, or of any official on its behalf, to enter into an agreement in virtual effect forcing the Respondent to subscribe to payment of a royalty which there was no power in the Province to demand.
>
> If, therefore, it is argued that a compromise agreement came out of such conditions it becomes apparent that such compromise agreement must be invalid and not binding on the Respondent, because the subject-matter of such attempted agreement was *ultra vires* the Province to bring into being. Since the subject-matter never could have had a legal existence, there remains no foundation for an agreement; in short, there could not be an agreement.

What is, in effect, being said by both these learned judges is that, having construed the terms of the leases and the regulations and come to the conclusion that the province was wrong in law in the view taken by it in 1931 when the compromise was entered into, the province lacked the capacity which an ordinary individual, entertaining an honest opinion as to the construction of an instrument or a statute and his rights arising thereunder, would have had to compromise a dispute with a person holding a conflicting view of such rights. In forming his own opinion on the question of construction in the case at bar, the learned judge himself had "not found it easy to decide whether the terms of the original lease authorized a subsequent imposition of royalty or increase in rent."

I find it impossible to agree with the view upon which the courts below have proceeded. It clearly cannot be said that the province was without capacity to accept a surrender of even the entire interest of the respondent in the leases nor of something less than the entire interest had such been proferred. Nor can it be said that the province

(1) [1943] S.C.R. 320.

(2) [1955] 2 D.L.R. 17; 15 W.W.R. (N.S.) 114.

was without capacity *bona fide* to place its interpretation on the terms of the leases and the regulations even though such interpretation might subsequently be found to be in error. In my opinion, this is self-evident and any question of constitutional limitation on the part of the province does not arise. The question involved is merely as to whether or not the agreement of compromise was validly arrived at, the test not differing in the case at bar from that which applies as between individuals. What is really being said by the learned judges below is that a claim which may subsequently be determined to be unfounded in law, cannot validly form the basis of an agreement of compromise. That was undoubtedly the law formerly, as the earlier authorities show. But it has not been the law for a considerable period.

In *Cook* v. *Wright* (1), the plaintiffs, trustees under a local Act, had called upon the defendant, who was not the owner but the agent of the owner, of certain houses, to pay expenses chargeable under the statute to the owner. The defendant attended a meeting of the trustees at which he advised them that he was not the owner and gave them the name of his principal. The trustees, however, took the position that the defendant was the owner within the statutory definition of that term and advised him that unless he paid he would be proceeded against. As a result, a compromise was entered into under which the defendant agreed to pay.

It was held that although the defendant was not personally liable under the statute, the plaintiffs honestly believed that he was and that was sufficient even although the defendant himself never did so believe but entered into the agreement in order to avoid being sued. Blackburn J., who delivered the judgment of the Court, said, at p. 324:

> The real consideration, therefore, depends not on the actual commencement of a suit, but on the reality of the claim made, and the bona fides of the compromise.

It will be observed that in this case the dispute between the parties was, as in the case at bar, namely, the construction of a statute.

Again, in *Callisher* v. *Bischoffsheim* (2), the plaintiff, alleging that certain monies were due and owing to him from the Government of Honduras, threatened legal pro-

(1) 30 L.J., Q.B., 321. (2) L.R., *V*, Q.B., 449.

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ceedings to enforce payment, whereupon the defendant promised to deliver to him certain securities provided he would forbear taking proceedings for an agreed time. It turned out that in fact there were no monies owing by the Honduras Government but that the plaintiff honestly believed there were. The defendant was held liable. Cockburn C.J., said, at p. 452:

> Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. . . .
>
> It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent.

Blackburn J., said also, on the same page:

> If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated.

In *Miles* v. *New Zealand Alford Estate Company* (1), Cotton L.J., at p. 283, put the matter thus:

> Now, what I understand to be the law is this, that if there is in fact a serious claim honestly made, the abandonment of the claim is a good "consideration" for a contract; . . . Now, by "honest claim", I think is meant this, that a claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which shew that his claim is a bad one. Of course, if both parties know all the facts, and with knowledge of those facts obtain a compromise, it cannot be said that that is dishonest. That is, I think, the correct law, and it is in accordance with what is laid down in *Cook* v. *Wright* and *Callisher* v. *Bischoffsheim* and *Ockford* v. *Barelli* (20 W.R. 116).

Bowen L.J., in the same case said at p. 291:

> I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession.

The learned Lord Justice went on to say:

> Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all.

(1) 32 Ch.D., 266.

Again, in *Jayawickreme* v. *Amarasuriya* (1), Lord Atkinson, speaking on behalf of the Judicial Committee said, at p. 873:

> The legal validity or invalidity of the claim the female plaintiff threatened to enforce by action is entirely beside the point if she, however mistakenly bona fide, believed in its validity.

The effect of the authorities was thus expressed by Lord Westbury in *Dixon* v. *Evans* (2), as follows:

> In dealing with a compromise, always supposing it to be a thing that is within the power of each party, if honestly done, all that a Court of Justice has to do is to ascertain that the claim or the representation on the one side is *bonâ fide* and truly made, and that on the other side, the answer, or defence, or counter claim, is also *bonâ fide* and truly made. I mean by *bona fides*, the truth of parties, and above all this, that the compromise is not a sham, or an instrument to accomplish or to carry into effect any ulterior or collateral purpose, but that the thing sought to be done is within the very terms of the compromise—that all that the parties contemplate and desire to effect and to deal with is, whether the claim on the one side or the defence on the other side shall be admitted or not; or whether, if both things are *bonâ fide* brought forward, there may not be some concession on the one side, and some concession on the other side, so as to arrive at terms of agreement, which, if honestly made, is an honest settlement of an existing dispute. That is the characteristic of a compromise, and if it be not manifestly *ultrà vires* of the parties, it is one that a Court of Justice ought to respect, and ought not to permit to be questioned.

The last mentioned case affords an illustration of a situation in which one of the parties to a compromise (there the directors of a corporation), may lack capacity to enter into a particular agreement. Reference may also be made to *Holsworthy Urban District Council* v. *Rural District Council of Holsworthy* (3). In the present case no such question arises.

In my opinion, therefore, the compromise here in question fully meets the requirements of the authorities. There was, as the learned trial judge found, an honest difference of opinion as to the construction of the leases and the regulations to which they were subject. Although the respondent was at the time acting under the advice of solicitors and had been advised that it was entitled to receive renewals free from the claims being put forward by the province, it saw fit to enter into the compromise which involved concessions on both sides. In these circumstances, as it cannot be said, in my opinion, that the provincial

(1) 1918, A.C., 869.
(2) L.R., *V* House of Lords, 606 at 618.
(3) (1907) 2 Ch., 62.

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claims were either frivolous or vexatious or other than "real" within the meaning of the authorities, the compromise was a binding one.

In my opinion also, the decision of this court in *Anthony* v. *Attorney General for Alberta* affords no support for the judgments below. The licensee in that case, while he had accepted renewals from the province in which a reference to the *Provincial Lands Act* was substituted for the *Dominion Lands Act,* and regulations passed by the Lieutenant Governor in Council for the former Dominion regulations, was held not to have consented by such acceptance to any alteration in the agreement with the Dominion which would vest in the province a right to destroy or nullify indirectly the contract which he had with the Dominion Government. The consent, therefore, which was in question in that case did not, in the view of the court, involve a consent to the claim which the province was there putting forward, namely, a claim to exact fees which, as the court found, amounted to a destruction of the grants themselves. The decision, therefore, has no application in the case at bar where the claim which the province is asserting was covered by an express term of the agreement of compromise.

I would therefore allow the appeal and dismiss the action with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *D. N. Hossie.*

Solicitor for the respondent: *G. E. Housser.*

REPORTER'S NOTE: Following the handing down of the judgment on March 2, 1956, Mr. R. G. McClenahan, appearing for both parties, moved on March 15, 1956, to vary the judgment as to the disposition of costs in view of the provisions of the Crown Costs Act, R.S.B.C. 1948, c. 85. The motion was granted and the Court ordered that the judgment be amended to read as follows: "The appeal is allowed and the action dismissed. The appellant is entitled to his costs in this Court".
