THE CITY OF HALIFAX .....APPELLANT;

AND

VAUGHAN CONSTRUCTION COMPANY LIMITED and HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NOVA SCOTIA ..... RESPONDENTS.

1961

*May 9, 10
Oct. 3

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Expropriation—Land—Covenant to reconvey if grantee of fee simple determined not to build—Equitable interest of grantor—Owners of both interests entitled to share compensation award—Expropriation Act, R.S.N.S. 1954, c. 91, s. 1(f).

Following the expropriation by the Province of Nova Scotia of certain property in the City of Halifax and the subsequent making of an award by an arbitrator, who did not attempt to apportion the award between the conflicting claimants, the city commenced an action against Vaughan Construction Co. Ltd. for the purpose of determining the respective rights of the parties to the compensation. The city had conveyed the property to Maritime Telegraph and Telephone Co. for a cash consideration of $87,520 and certain covenants on the part of that company obliging it to construct a building or buildings on the land or to reconvey for the cash consideration if it determined not to build. With the consent of the city, the telephone company arranged

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

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to transfer the property to Vaughan Construction in exchange for other property and the execution by the transferee company of covenants in favour of the city similar to those already executed.

The trial judge held that the city was entitled to the whole of the compensation with the exception of $87,520. On appeal, it was held that it was for the arbitrator to determine both the amount and the apportionment of the compensation. On appeal from the award which followed, whereby the arbitrator fixed compensation for both claimants, the Supreme Court *in banco* held, with one member dissenting, that Vaughan Construction was entitled to the whole of the compensation on the ground that the city was not an owner of the property as defined by the *Expropriation Act*, R.S.N.S. 1954, c. 91. The city appealed to this Court.

Held: The appeal should be allowed.

When Vaughan acquired the fee simple, it did so subject to an equitable interest in the land held by the city as a result of the covenant to reconvey in certain defined circumstances. This right to reconveyance was not distinguishable from a right of pre-emption, a right which will be specifically enforced and its violation restrained by injunction. The rights of the city were superior to those held by one who has merely a right of pre-emption because the respondent company had no uncontrolled right to determine whether or not it would reconvey. Unless it complied with the building covenants within a reasonable time, the city could have enforced a reconveyance. *Birmingham Canal Co. v. Cartwright* (1879), 11 Ch. D. 421, referred to; *London & South Western Railway Co. v. Gomm* (1882), 20 Ch. D. 562, applied; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37, explained; *Frobisher v. Canadian Pipelines & Petroleums Ltd.*, [1960] S.C.R. 126, followed.

The interests of Vaughan and of the city in the land were destroyed by the expropriation and the owners of these interests were both entitled to share in the compensation. The $87,520, being the equivalent of the land which Vaughan had transferred to the telephone company in order to acquire the property, should first be deducted from the compensation money. The balance should then be divided equally between Vaughan and the city, disallowing any allowance for compulsory taking but allowing interest as proposed.

APPEAL from a judgment of the Supreme Court of Nova Scotia *in banco*[1], denying the appellant's right to share in a compensation award on expropriation of certain land. Appeal allowed.

F. P. Varcoe, Q.C., R. M. Fielding, Q.C., and *I. Goldsmith,* for the appellant.

A. G. Cooper, Q.C., for the respondent, Vaughan Construction Co. Ltd.

[1] (1960), 44 M.P.R. 220, (1961), 25 D.L.R. (2d) 26.

M. C. H. Jones, for the respondent, Her Majesty the Queen.

The judgment of Kerwin C.J. and of Cartwright, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The City of Halifax appeals from the judgment of the Supreme Court of Nova Scotia *in banco*[1], which denied its right to share in a compensation award on the ground that the city had no interest in the property expropriated. In my opinion the city had an interest in the property and the appeal should be allowed.

The city acquired the property in 1947 by grant from the Government of Canada. It was valuable land on which the city wished to see erected a modern tax producing building. Consequently, in 1951, the city conveyed the property to Maritime Telegraph and Telephone Company for a modest cash consideration of $87,520 and certain covenants on the part of the telephone company obligating it to build or to reconvey for the cash consideration paid if it determined not to build.

The telephone company decided that the land was unsuitable for its purposes and it arranged, with the consent of the city, to transfer the property to Vaughan Construction Company Limited in exchange for other property and the execution by the transferee company of covenants in favour of the city similar to those already executed.

The covenants are that Vaughan Construction Company Limited, its successors or assigns

1. Will construct upon the lands hereinbefore described a building or buildings of the type described as "first-class buildings" in the Halifax City Charter;
2. That one at least of such buildings shall be an office building;
3. That the construction of such building or buildings shall commence as soon as practicably may be after delivery of These Presents;
4. That prior to the commencement of the actual construction thereof it will submit to the City of Halifax the general plans of any building proposed to be erected, together with a plan showing the location upon the said lands of such buildings;
5. That a first-class building to be erected on the said lands shall be subject to taxation under the provisions of the Halifax City Charter as real property assessable in the name of the owner thereof;

[1] (1960), 44 M.P.R. 220, (1961), 25 D.L.R. (2d) 26.

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6. That if, after the delivery of These Presents to the City of Halifax, Vaughan Construction Company Limited, its successors or assigns, shall determine not to proceed with the construction of a building or buildings upon the lands hereinbefore described, as hereinbefore provided, Vaughan Construction Company Limited, its successors or assigns, at the request of the City of Halifax will reconvey the said lands to the City of Halifax for the cash consideration of Eighty-seven Thousand Five Hundred and Twenty Dollars ($87,520.00).

The deed further provided:

> It is intended by the parties hereto that the burden of the foregoing covenants shall run with the lands hereinbefore described until such building or buildings shall have been constructed and no longer; and that upon the construction of such building or buildings in compliance with the foregoing covenants the burden of the foregoing covenants shall no longer run with the lands; and this Deed of Covenants is accepted by the City of Halifax and the said consideration paid upon such intent and understanding.

Except for the substitution of the new contracting party, covenants 1, 2, 3, 4 and 6 are the same as those entered into by the telephone company. The fifth covenant is new.

This transaction was completed in November of 1954. Within three months Vaughan Construction, without the knowledge of the city, was negotiating for the sale of the property with the Government of the Province of Nova Scotia and with other possible purchasers. The province expropriated the property on August 4, 1955. The city, on receiving notice of this event, filed a claim for compensation. The arbitrator made an award of $280,000 together with interest from June 18, 1956 at 5 per cent per annum and an allowance of 5 per cent for compulsory taking. He did not, however, attempt to apportion the award between the conflicting claimants.

In January of 1957 the city commenced an action against Vaughan Construction for the purpose of determining the respective rights of the parties to the compensation. In June of that year Mr. Justice Doull held that the city was entitled to the whole of the compensation with the exception of the sum of $87,520, which is the sum stated in the sixth covenant. On appeal from this judgment, the Supreme Court of Nova Scotia *in banco* held that it was for the arbitrator to determine both the amount of the compensation and its apportionment between the conflicting interests. Consequently, in April 1959, the arbitrator decided that of

the total award of $280,000 the city was entitled to $50,000, together with interest on this sum and a 5 per cent allowance for compulsory taking. On appeal from the arbitrator's award, the Supreme Court of Nova Scotia *in banco,* with Doull J. dissenting, held that Vaughan Construction was entitled to the whole of the compensation on the ground that the city was not an owner of the property as defined by the Nova Scotia *Expropriation Act,* R.S.N.S. 1954, c. 91. It is from this judgment that the city appeals and, in my opinion, it is entitled to succeed on the ground that the covenant to reconvey in certain defined circumstances, gave the city an interest in the land.

The first 5 covenants are self-explanatory. The city had valuable vacant land which it was ready to sell to a suitable purchaser in order to produce tax revenue. The first 4 covenants are positive covenants. They could not be the subject-matter of an action for specific performance and their breach would give rise only to an action in damages.

They do, however, impose an obligation on Vaughan Construction to commence construction as soon as it was practicable, which means within a reasonable time. The company could not postpone its determination not to proceed with construction within the terms of covenant 6 for an indefinite time. It acquired the property on November 6, 1954. The province expropriated on August 4, 1955. If the province had not done this, I would have said that the time was approaching when the city, in a properly constituted action, would have been in a position to claim a reconveyance on payment of $87,520 on the ground that the company, after the lapse of a reasonable time, had determined not to build. During a period of 9 months' ownership the company had demolished the old buildings. It had been looking for possible purchasers but it had made no effort to comply with the first five covenants.

I do not, however, rest my judgment on the probability that such a finding of fact might have been made. My opinion is that when Vaughan acquired the fee simple, it did so subject to an equitable interest in the land held by the city as a result of covenant 6. If before expropriation Vaughan had contracted to sell these lands, without the consent of the city, the sale could have been restrained and

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the right to a reconveyance enforced. Why then should it be held that Vaughan is entitled to all the compensation award for a forcible taking?

The majority opinion of the Supreme Court of Nova Scotia *in banco* held that the rights of the city were solely contractual and that covenant No. 6 did not confer an interest in land on the city. In my respectful opinion, there is error in this finding. It is true that the city was not the holder of an option which it could exercise at any time. On the other hand, Vaughan could not prevent the exercise of the city's right under covenant 6 by doing nothing and asserting at the same time that it had made no determination. Vaughan had to build within a reasonable time and only by compliance with covenants 1 to 5 could it defeat the city's right to the reconveyance under covenant 6.

What is the juridical nature of this right to reconveyance? I do not think that it is distinguishable from what has been called a right of pre-emption or a right of first refusal. An owner of land contracts that if he decides to sell he will give X the first right to buy at a stated price or at a price to be determined according to a *bona fide* offer made by another. The owner may decide never to sell and X cannot compel him to sell. Nevertheless, X has an equitable interest in the land. The rights of the city in this case are superior to those held by one who has merely a right of pre-emption because Vaughan had no uncontrolled right to determine whether or not it would reconvey. Unless it complied with the building covenants within a reasonable time, the city could have enforced a reconveyance. The rule is that a right of pre-emption will be specifically enforced and its violation restrained by injunction. (Fry, Specific Performance, 6th ed., 24; *Birmingham Canal Co. v. Cartwright*[1].)

The decision in the *Birmingham Canal* case was that the covenant containing the right of pre-emption was not obnoxious to the rule against perpetuities. But I do not take the reasoning to be that the matter sounds in contract and not in property. This is quite clear when Fry J. said:

> I think that wherever a right or interest is presently vested in A or his heirs, although the right may not arise until the happening of some contingency which may not take effect within the period limited by the rule against perpetuities, such right or interest is not obnoxious to that rule and for this reason.

[1] (1879), 11 Ch. D. 421, 48 L.J. Ch. 552.

The reason given is that the total interest in the land is divided between covenantor and covenantee, who together can alienate the land absolutely. It was this theory of destructibility of interest as preventing an infraction of the rule that was rejected in *London & South Western Railway Company v. Gomm*[1], both at the hearing and on appeal.

In *Gomm*, however, where the covenant was to reconvey should the land at any time be required for railway purposes, Kay J. was of the opinion that such a covenant did not create an interest in land. In that finding, he was expressly over-ruled by the Court of Appeal on the ground that the right to call for a conveyance is an equitable interest or equitable estate. It should be noted that in *Gomm* the right was contingent in this sense that it did not arise until the land was required for railway purposes. In the present case the right to the conveyance does not arise until there is default under the building covenants indicating a determination not to proceed or an express declaration to that effect but in my opinion there is no difference between *Gomm* and the present case except that the interest created by the covenant in *Gomm* offended the rule against perpetuities and this one does not.

The Court of Appeal, in *Gomm*, agreed with Kay J. up to and including his consideration of the *Birmingham Canal* case. The rejection of the *Birmingham Canal* case in the reasons of Jessel M.R. was based on his rejection of the theory of Fry J. that a limitation does not offend the rule against perpetuities when it may be terminated by the agreement of all interested parties and not upon any theory that a covenant to reconvey did not create an interest in land.

The law on this subject is stated in 29 Halsbury, 3rd ed., 298, in these terms:

> An option to arise on any intended sale or other particular kind of alienation by the owner, for example, a right of pre-emption or first refusal, is subject to the rule against perpetuities, and to bind the land or property must comply with it, unless the right is conferred by statute.

The case of *Manchester Ship Canal Company v. Manchester Racecourse Company*[2], raises a certain difficulty. The racecourse company agreed with the canal company

[1] (1882), 20 Ch. D. 562, 51 L.J. Ch. 530.
[2] [1900] 2 Ch. 352; affirmed, [1901] 2 Ch. 37.

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that if it should be at any time proposed to use their racecourse for dock purposes, the racecourse company would give the canal company the right of first refusal. Farwell J. held at the trial, on the authority of *Gomm,* that this right of first refusal created an interest in land and could be enforced against an intending purchaser with notice. He also held that even if the right did not create an interest in land, the intending purchaser with notice of the prior contract could be restrained from carrying out the purchase. His ratio on the first point is contained in the following paragraph:

> Now, having regard to the way in which *London and South Western Ry. Co. v. Gomm* (20 Ch. D. 562) was decided, it is plain, I think that the words used in clause 3, although inartistic, may give an interest in the land in the sense that they may be construed so as to limit a use to arise on an event in the future very similar to the use suggested to be raised in *Gomm's Case. Gomm's Case* was also a case of an option of pre-emption, in that case at a price named. In this case the price is ascertainable by the fact that it is to be the same as that offered by any other company or person.

The Court of Appeal affirmed the judgment of Farwell J. but on different grounds. They held that the clause did not create an interest in the land but they did hold that the canal company was entitled to enforce their right as against the racecourse company and the intending purchaser on the ground that the contract to give the canal company the first refusal involved a negative contract not to part with the racecourse to anyone else without giving them that first refusal. The case was held to be within the principle of *Lumley v. Wagner*[1]. The previous decision in *Gomm* was not mentioned in the Court of Appeal.

I can understand the difficulties of construction of the covenant in the *Manchester Ship Canal* case. The clause in question was part of an agreement which had received statutory confirmation. A good part of the reasons of Farwell J. was concerned with the problem of uncertainty—whether he could assign any meaning to the clause at all. At p. 360 he said:

> There is of course a greater difficulty here, because, although the legislature has declared the contract intelligible, that does not necessarily enable me to comprehend it.

He then proceeded to work out the rights and obligations of the parties in a context where the racecourse company was purporting to comply with its obligation to give a right

[1] (1852), 1 DeG. M. & G. 604, 42 E.R. 687.

of first refusal by making an offer to the canal company at a price far in excess of what it was prepared to take from a third party. An injunction was granted restraining the racecourse company from selling the racecourse to any person without first offering it to the canal company at the same cash price which the intending purchaser was offering.

The Court of Appeal in affirming Farwell J. held that an opportunity of exercising the right of first refusal had not in fact been given. But in dealing with the right of action against the intending purchaser they founded their judgment on the principle of *Lumley v. Wagner, supra,* rather than upon the finding of Farwell J. that the right of first refusal created an equitable interest in land which would be binding upon a purchaser with notice. They did not think that the clause in question did create an interest in land and in view of the uncertainties inherent in the clause their finding may be supportable on that ground. But I do not take it that they were enunciating any general principle or that they intended to ignore the principle enunciated in *Gomm.* On this point, which has already been considered in this Court, I wish to adopt the statement of principle of Cartwright J. in *Frobisher v. Canadian Pipelines & Petroleums Ltd.*[1]:

> An expression of opinion by the learned Lords Justices who composed the Court in the *Manchester* case is, of course, entitled to great weight but if they had intended to negative the principle enunciated in *Gomm* it seems to me that they would have stated their reason for so doing. Be this as it may, in so far as the two cases are in conflict I prefer the decision in *Gomm* on the point with which we are concerned and think that we should follow it.

My conclusion is that at the time of expropriation both Vaughan and the city had an interest in this land. Vaughan held the fee simple subject to the equitable interest of the city to enforce a reconveyance in certain defined events. Both these interests were destroyed by the expropriation and the owners of these interests are both entitled to share in the compensation. I do not know how the arbitrator came to award $50,000 as compensation for the city's interest. It appears to be a purely arbitrary figure. If at the moment of expropriation Vaughan had come to the city with an offer to purchase, the completion of that offer would have required the agreement of both Vaughan and the city.

[1] [1960] S.C.R. 126 at 146, 21 D.L.R. (2d) 497.

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Neither could have imposed terms on the other. Vaughan could, however, have destroyed the city's interest by complying with its covenants. In the circumstances, I would first deduct from the compensation money the $87,520, being the equivalent of the land which Vaughan had transferred to the telephone company in order to acquire the property, and then divide the balance equally between Vaughan and the city, disallowing any 5 per cent allowance for compulsory taking but allowing the interest as provided in the judgment of the Court of Appeal.

The appeal should be allowed with costs both here and in the Supreme Court *in banco* against Vaughan Construction Company Limited. There should be no costs to or against Her Majesty the Queen in the right of the Province of Nova Scotia. The order for costs made by Judge Pottier on June 19, 1959 should stand. Out of the compensation award of $280,000 Vaughan Construction Company Limited is entitled to $183,760 and the City of Halifax to $96,240, both sums bearing interest at 5 per cent per annum from June 18, 1956.

LOCKE J.:—I have had the advantage of reading the reasons for judgment to be delivered in this matter by my brother Judson and I agree with his opinion that at the date of the expropriation the City of Halifax had an interest in the land within the meaning of that term in s. 1 of the *Expropriation Act*, R.S.N.S. 1954, c. 91. This appears to me to follow from the decision of this Court in *Frobisher v. Canadian Pipelines & Petroleums Ltd.*[1], which approved the judgment of the Court of Appeal in *London and South Western Railway v. Gomm*[2].

I would allow the appeal and direct that judgment be entered in the terms proposed.

Appeal allowed with costs.

Solicitor for the appellant: T. C. Doyle, Halifax.

Solicitor for the respondent, Vaughan Construction Co. Ltd.: Donald McInnes, Halifax.

Solicitor for the respondent, Her Majesty the Queen in the Right of the Province of Nova Scotia: John A. Y. MacDonald, Halifax.

[1] [1960] S.C.R. 126, 21 D.L.R. (2d) 497.
[2] (1882), 20 Ch. D. 562, 51 L.J. Ch. 530.