

CANADA / JUDGMENT

Elk Lumber Co. v. Crow's Nest Pass Coal Co.

(1907) 39 SCR 169

COURT

Supreme Court of Canada

DECIDED

24 June 1907

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Elk Lumber Co. v. Crow's Nest Pass Coal Co. Collection Supreme Court Judgments Date 1907-06-24 Report

(1907) 39 SCR 169 Judges Fitzpatrick, Charles; Davies, Louis Henry; Idington, John; Maclellan, James; Duff, Lyman Poore On appeal from British Columbia Subjects Sale Decision Content Supreme Court of Canada Elk Lumber Co. v. Crow's Nest Pass Coal Co., (1907) 39 S.C.R. 169 Date: 1907-06-24 The Elk Lumber Co. (Plaintiffs) Appellants; and The Crow's Nest Pass Coal Co. and Others (Defendants) Respondents. 1907: May 21; 1907 June 24 Present: Fitzpatrick C.J. and Davies, Idington, Maclellan and Duff JJ. ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA. Agreement for sale of land—Principal and agent—Estoppel—"Land Commissioner"—Specific performance. The plaintiffs, as assignees, claimed specific performance of an alleged agreement for the sale of lands based upon the following letter:—"Ferne, B.C., June 5th, 1900.—D. V. Mott, Esq., Ferne, B.C.:— Re sale to you of mill site.—Dear Sir:—The Crow's Nest Pass Coal Company hereby agree to sell to you a piece of land at or near Hosmer Station, on the Crow's Nest line, to contain at least one hundred acres of land, at the price of \$5.00 per acre; payable as follows: When title issued to purchaser, title to be given as soon as the company is in a position to do so. Purchaser to have possession at once. The land to be as near as possible as shewn on the annexed sketch plan. Yours truly, W. Ferne, "Land Commissioner."—The lands claimed were not those shewn on the sketch plan but other lands alleged to have been substituted therefor by verbal agreement with another employee of the defendant company, at the time of survey. Held, affirming the judgment appealed from (12 B.C. Rep. 433) but on different grounds, that specific performance could not be decreed in the absence of any proof of authority of the agent to sell the lands of the defendant company, and that the mere fact of investing their employee with the title of "Land Commissioner" did not estop the defendants from denying his power to sell lands. APPEAL from the judgment of the Supreme Court of British Columbia[1] affirming the judgment of Morrison J. by which the plaintiffs' action was dismissed with costs. The facts of the case and questions at issue on this appeal sufficiently appear from the head-note and the judgments

now reported. Nesbitt K.C. and Deacon for the appellants. Marsh K.C. and J.A. Macdonald K.C. for the respondents. THE CHIEF JUSTICE.—This appeal is dismissed with costs. I concur for the reasons given in the court below. DAVIES J.—At the conclusion of the argument I was of the opinion that this appeal was a hopeless one. The action was one for specific performance and the contract relied upon to bind the company was a letter written to one Mott, plaintiff's assignor, by an official of the company who signed himself "W. Fernie, Land Commissioner." The letter purported to agree to sell to Mott a piece of land at or near Hosmer Station on the Crow's Nest line to contain at least 100 acres of land at the price of \$5 per acre, and contained the following: The land to be as near as possible as shewn on annexed sketched plan. Now as a fact the plan of the piece of land as surveyed by plaintiffs produced in evidence and a conveyance of which was sought to be enforced shewed a plot of land, alike it is true in acreage, but altogether different in its boundaries from the land shewn on the sketch plan attached to Fernie's letter. It was contended on the appellants' part that Tonkin, a general manager of the company, had subsequently orally authorized a survey to be made of the lands for which specific performance was sought to be enforced under the alleged agreement made by the land commissioner, Fernie. I am quite unable to put any construction upon the evidence with respect to Tonkin's position or powers, or as to what he told the surveyor when he was going to make the survey which would justify the court in assuming or concluding that Tonkin had made or intended to make or had authority for making a new agreement entirely altering the boundaries of the lands referred to in Fernie's letter relied upon as a binding agreement. I do not see how it is possible to construct a binding agreement against the company by combining Tonkin's statement with Fernie's letter and substituting for the lands described in the letter other quite different lands. On this ground alone the action would fail. But I fully agree with respondents' contention that there was no evidence shewing any authority in Fernie to bind the company to any agreement for the sale of their lands or of any other lands excepting perhaps it might be in the town-site of Fernie, or any evidence by which the company held him out to the person to whom the letter was written or to the public as one who possessed such authority. The respondents were not a land company and had not authorized any one to sell the lands which they were acquiring from the railway company and they had never offered so far as appeared any lands for sale outside of their town-site lots. Whatever authority to sell lands Fernie may have had on the date of the writing by him of the letter relied upon was confined to the town site and it is not contended that these lands in question were within these confines. Fernie it is alleged did make a sale of a lot within the town site to one Mott but that was not until some months after the alleged agreement in this case. Then is there anything in the agreement that the company by investing him with the title of "Land Commissioner" necessarily and in absence of other evidence estopped themselves from denying his power to sell their lands? I do not think so. I do not think the title necessarily implies any such power and under the facts of this case I cannot find any good grounds for supporting the agreement arising out of estoppel. I agree with respondents' counsel that in itself and apart from other evidence the title has no legal significance and that at any rate it does not per se imply an authority to sell lands.

No such extrinsic. evidence was given. See *Hobbs v. Esquimault and Nanaimo Ry. Co.*[2]. For these reasons and without expressing any opinion on the point as to its having been a condition of the agreement for sale that Mott should build a mill upon the property at any early date and that he abandoned all idea of doing so, I think the appeal must be dismissed with costs. IDINGTON J.—I think this appeal should be dismissed with costs. I do not find any authority for Mr. Fernie to bind the company to such an agreement. Not do I find any evidence of his having been so held out by the company as their agent to sell the lands in question as to entitle the appellants to claim relief as the result thereof. The uncertainty of the land in respect of which the negotiations were had, the want of identity of the lands referred to in the memorandum (even if it be otherwise sufficient to comply with the Statute of Frauds,) with those claimed, the want of authority in Tonkin to make a new agreement, and the legal impossibility, as it seems to me, to construct, as submitted to us, a case from what Tonkin said, coupled on to what Fernie wrote and did, and refer the acts of possession thereto so as to entitle the plaintiffs, if that case had been made on the pleadings, to relief on the ground of part performance of an oral contract, render the appeal hopeless. MACLENNAN J.—I agree that the appeal should be dismissed with costs. DUFF J.—I concur in the judgment dismissing the appeal with costs for the reasons stated by my brother Davies. Appeal dismissed with costs. Solicitor for the appellants: W. R. Ross. Solicitors for the respondents: Herchmer & Herchmer.

[1] 12 B.C. Rep. 433.

[2] 29 Can. S.C.R. 450.

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