Privy Council Appeal No. 120 *of* 1917.

Canada Foundry Company, Limited - - - *Appellants,*

v.

Edmonton Portland Cement Company - - - *Respondents,*

FROM

THE SUPREME COURT OF ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH OCTOBER, 1918.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BUCKMASTER.
LORD ATKINSON.

[*Delivered by* LORD ATKINSON.]

This is an appeal from the judgment of the Supreme Court of Alberta, Appellate Division (Hyndman, J., dissenting as to the amount and principle of allowance of damages), dismissing an appeal taken by the appellants from the judgment of the trial Judge, Mr. Justice Walsh, given on the 4th November, 1915, who awarded to the respondent the sum of 10,000 dollars damages for breach of contract by the appellants.

The appellants are a Limited Company duly incorporated, having their head office and works in the City of Toronto, in the Province of Ontario, where they carry on the business of founders and manufacturers of steel-work for buildings. The respondents are also a Limited Company duly incorporated, having their head office in the City of Edmonton, in the Province of Alberta. They are engaged on the manufacture of Portland cement on certain lands of which they are the proprietors, situate at Marlborough, about 50 miles distance from the City of Edmonton.

The action out of which the appeal arises, styled "a Mechanics' Lien Action," was brought to recover a sum of 13,196 dol. 52 c., the unpaid balance of a sum of 40,585 dol. 05 c. alleged to be due by the respondents to the appellants for materials consisting of steel-work for buildings and machinery

supplied to them at Marlborough, and for work done in erecting the same under a certain agreement in writing dated the 27th December, 1911, and the document incorporated therewith. In respect of this claim, the appellants recovered judgment against the respondents for the sum of 12,740 dollars with interest at 5 per cent. till paid. No controversy now arises in reference to this claim.

The real matter in controversy is the relief which the respondents by their counter-claim pray for, namely, to recover damages, amounting to the sum of 79,201 dol. 26 c., in respect of the failure of the appellants to supply the aforesaid materials and to erect the same on the respondents' said lands within the time expressly or impliedly provided therefor by this agreement of the 27th December, 1911. The undisputed facts are that the first transmission, or shipment as it is styled, of the steel contracted for was made on the 18th July, 1912. The last carload of which was received at the respondents' lands on the 12th November, 1912 (some single lots being received afterwards), and the work of erection not completed till the 18th March, 1913.

In one of the documents incorporated into, and thus forming part of, the agreement of the 27th December, 1911, is to be found the clause following :—

> "We (*i.e.* the appellants) would expect to make shipments of this material about the 1st April, and to complete erection of the steel work in about two months after the arrival of the same at site."

The formal agreement does not provide for the completion of the work at any specified date.

The learned trial Judge, Mr. Justice Walsh, held that on the true construction of this clause the appellants were (unless excused by other clauses) bound to make shipments of all the material from Toronto on or before the 1st April, 1912, and to complete the erection of them on the specified site in about two months after their arrival there, which, if one month—not an unreasonable time—be allowed for transit, would mean that the work of erection of the buildings should be completed by the 1st July, 1912, about eight months before the date of actual completion.

He further held that the appellants were not protected from the consequences of this delay, by the terms of the clause to be found in the first of the incorporated documents, running as follows :—

> "The Company shall not be held responsible or liable for any direct or indirect damage, loss, stoppage, or delay which the purchaser may sustain, whether the said plant or machinery is specified for any particular purpose or not."

The ground of his decision was that as the law imposed upon a contractor who is guilty of a breach of his contract liability therefor in damages, he, when he desires to be protected against that liability, should so provide in clear and unambiguous

language, especially where, as in the present case, the contract was prepared by himself. The learned Judge was of opinion that this latter clause, which was very ambiguous and difficult to construe, was possibly intended to protect the appellants from liability for loss arising from imperfections in plant or machinery, but not from liability for such a breach of contract as the respondents alleged the appellants had committed.

The tender put in by the appellants now forming part of the contract contained a clause to the following effect :—

"The contractor shall furnish duplicate copies of detail and dimension, drawings on crane and steel within thirty days after signing the contract, which shall be approved by the engineers of the purchaser before any shop work is done, the responsibility for errors in said drawings to remain with the contractor."

The learned trial Judge construed this clause as meaning that as soon as the plans of any particular building were approved of the shop work might be commenced upon it though none of the other plans had been approved, and thought this was the view the parties themselves took of the provision; and founding himself upon the letters which passed between them and the written documents given in evidence in the case, not on the parol evidence, came to the conclusion that neither the tardiness of the respondents in returning approved of the plans furnished in pursuance of this provision, nor the alteration by them of these plans, nor yet the alteration which they required to be made in the works actually executed caused any material delay in the completion of those works. And, finally, found that the appellants were responsible substantially for all the delay in the completion of the works from the 1st July, 1912, to the 8th March, 1913, and assessed the damage on the counter-claim at 10,000 dollars.

The majority of the Court of Appeal did not adopt the view of the learned trial Judge as to the proper construction of the clause in the type-written document, naming the 1st April as the date for the completion of shipment of the materials. They held that the contract gave the appellants a reasonable time to complete this shipment, and taking into consideration the time necessary to obtain the approval by the respondents of the plans which the appellants were bound to furnish, fixed the 1st July, 1912, as the date when the reasonable time for the completion of the shipment of the material should expire, to which if one month, the time necessary for transit, as shown by the exhibits, be added, the two months of August and September would remain available for the work of erection, quite a reasonable time they thought for the completion of that work. They accordingly held that the appellants were in default from the 1st October, 1912, till the 8th March, 1913, when the work was actually completed.

They concurred with the learned trial Judge in holding that the clause contained in the first of the incorporated

documents designed to absolve the appellants from liability for delay, already referred to, did not apply to delays such as those complained of by the respondents, and approved of the amount of damages award by him as well as the method by which he measured and ascertained it.

They, accordingly, by their Order dated the 14th November, 1916, dismiss the appeal of the present appellants, and the cross appeal of the present respondents against the Order dated the 1st March, 1916, and on the 7th December, 1916, by an order of that date gave leave to the present respondents to appeal to His Majesty in Council from so much of their judgment of the 3rd November, 1916, as dismissed their appeal upon their counter-claim, and also gave leave to the present appellants to appeal to His Majesty in Council against so much of their aforesaid judgment as dismissed their appeal in respect of the respondents' counter-claim.

The present appellants have availed themselves of that Order and lodged the present appeal. The present respondents have not lodged any appeal, so that the question for decision of the Board is, Whether the dismissal of the present appellants' appeal in respect of the respondents' counter-claim was right. That question involves the construction of the contract entered into between the parties, the nature and extent and consequences of the alleged breaches of it by the present appellants, and the amount and method of measurement of the damages awarded on the counter-claim. Mr. Justice Stewart in delivering the judgment of the majority of the Appellate Division of the Supreme Court commented in severe but well deserved terms on the manner in which the parties formed their contract in this case. It is a slovenly ill-constructed puzzling patchwork, knit together by a few ill-made links. It is composed of three documents. The first printed, dated the 18th December, 1911, designed apparently to deal with a subject matter wholly different from that to which it was intended to apply it in the present case. It is addressed to the respondents and signed by the appellants. The second, bearing no date, is partly typed, partly written, addressed apparently to the present respondents but not signed by or on behalf of any person or body; and the third, partly printed, partly typed, purports to be an agreement between the two companies, signed by both and mainly dealing with the terms of payment for the supply to the respondents of the "apparatus and machinery" specified in the sheets attached to it, which are stated to be part of the agreement.

By the attached sheets are presumably meant documents (1) and (2). The only mention in this agreement of the erection of anything is to be found in the provisions (1) that 25 per cent. of the value of each building is to be paid "on completion of erection of such building," and (2) that it is understood in connection with this payment and another payment of 25 per cent. to be paid sixty days after acceptance, "that if through

no fault of the company erection or acceptance is unduly delayed, the balance shall be due and payable in four months after shipment."

Turning to the first of these documents, it commences by a statement that the appellant company proposes to furnish apparatus thereinafter described according to "the following conditions for the sum named in the attached agreement." Well, no apparatus of any kind is described in it. It is further provided that the purchaser, *i.e.*, the respondent company, shall provide a suitable location for the apparatus, also foundations and foundation bolts; that if the installation is to be made by the appellants, the purchaser shall provide all necessary buildings and foundations, &c.; "that should the purchaser require the apparatus or any part of the machinery to be put into operation before the entire completion of the work, the plant as affecting terms of payment shall be considered as having started." This last provision clearly means that if part of the apparatus shall be set to work before the whole is completed it shall for the purpose of payment be treated as if the whole apparatus had been set to work, and that the word "*plant*" is used to describe the entire apparatus. Again, the apparatus is to be installed by and at the expense of the purchaser, the apparatus mentioned is to be delivered by the appellants, and the place of delivery is f.o.b. Edmonton, Alberta, which is 50 miles distant from Marlborough, the site where the steel frame was to be erected. It would be difficult to select language more inapplicable to the steel framework of a factory than the language of those provisions. It would be as rational to speak of the wall of bricks and mortar or cement built in the spaces between the uprights of the frame being "put into operation," as it is to speak of the frame itself or any part of it being put into operation; but whatever was the nature of the apparatus to which the document referred, the important provision remains, that the appellant company undertakes to deliver the plant and machinery with due despatch, entirely composed of first-class material and sound workmanship, and to correct any defects which may appear therein within six months after delivery, which are proved to be due to the use of defective material or workmanship.

Then comes a provision which strongly supports the assumption that this document is inapplicable to the work agreed to be done in this case. It runs thus: "Provided the equipment shall not be taxed beyond its normal capacity and shall be operated in accordance with the company's" (*i.e.*, the appellant company's) "instructions." Already in one instance the word plant is used to describe the whole apparatus. And then one finds amongst these singularly inapplicable provisions one clause upon which so much turns to the effect that:—

"The Company shall not be responsible or liable for any direct or indirect damage, loss, stoppage, or delay which the purchaser may

sustain, whether the said plant or machinery is specified for any particular purpose or not."

It is difficult to say what this provision means.

Literally construed it would mean that the appellants might delay the shipment, delivery, or erection of this steel frame as often and as long as it seemed good to them. That would be in itself an irrational result, and besides would be altogether irreconcilable with earlier provision binding them to deliver the plant and machinery with due despatch. The document must be construed as a whole, effect being, as far as possible, given to each part. And the only way in which that can be done is to hold either that the second clause does not at all apply to the plant and machinery mentioned in the earlier clause of the document, or that if it does apply to them it was only intended to protect the appellants from being responsible for consequential damage. Their Lordships are, however, like the learned trial Judge and the Court of Appeal, of opinion that it does not apply to such breaches of contract as the long-delayed shipment, delivery, or erection of the steel frame contracted for. It cannot, therefore, in itself, furnish any defence to the respondents' counter-claim.

The second document commences by the statement that in accordance with the respondents' specification and blue prints Nos. 403 to 417 the appellants will be pleased to supply, erect in place, and pay freight as far as Edmonton on steel work for buildings for the sum of 37,000 dollars, and will also be pleased to furnish a 15-ton hand-operated travelling crane with a span of 33 feet, and pay freight on same as far as Edmonton for the sum of 1,488 dollars. The specifications, in accordance with which the steel work for the building is to be supplied and erected, contains the following provisions amongst others :—

1. A description of the buildings included in the specification, namely, the power-house, the coal storage building, the coal drying and coal grinding building, the kiln building, the clinker storage building, the clinker grinding building, and cement warehouse, all of which, with the exception of the power-house, are described as adjoining, their roofs extending from one to the other or intersecting.
2. A provision that the work shall be entered upon immediately after the signing of the contract, and shall be pushed to the earliest possible completion consistent with good work ; that time is an important factor in the contract, and the guaranteed time of the completion of the contract, which must be specified, will be considered in awarding the contract. The power-house is first in the order of delivery.
3. That the contractor shall furnish duplicate copies of all detailed drawings for the work which shall be

> approved of by the engineer of the purchaser before any shop work is done, the responsibility for error in the drawings to remain with the contractor.

Document No. 2 contains the provision already referred to, differing somewhat from this latter, touching the delivery of detailed drawings, and also contains the provision already referred to expressing the expectation of the appellants that they would be able to make the shipments of all the material by the 1st April, 1912, and complete the erection of the steel work after its arrival at the site. Their Lordships, like the Court of Appeal, differ from the learned trial Judge as to the construction of this latter provision. They do not think it amounts to a contract by the appellants to ship and complete the work at the dates therein mentioned. They concur with the Court of Appeal in thinking that the appellants were only bound to ship the material and complete the work within, in each case, a reasonable time in that behalf, and are of opinion that in fixing the 1st July, 1912, as the limit of that time for the completion of the shipments, and the 1st October, 1912, as its limit for completion of the work of erection, as they have done, they have dealt most considerately with the appellants.

Mr. McCarthy contended, for the appellants, as is set forth in the 16th, 17th, and 18th paragraphs of their case, that the completion of the work was greatly delayed by alterations which the respondents by their order dated the 21st March. 1912, required to be made in the structural steel work (beams, channels, stairs, and connection) for the engine-room floor of the power-house, as shown on a drawing, a print of which was enclosed, same to be erected complete and shipped with the first car load of material for the power-house; that this work, which was not covered by the original contract, involved the preparation of detailed drawings by the appellants, and the approval of them by the respondents, that these drawings were not ready till the 19th and 20th June, 1912, that they were forwarded to the respondents for approval on those dates, and were returned on the 27th June with some further alterations, that the revised drawings were sent to the respondents for final approval on the 5th July, 1912, and returned finally approved on the 13th of the same month, with the result that this altered flooring was not shipped till the 24th September, 1912, and the erection of the power-house was much delayed in consequence.

He further contended that the Court of Appeal have not dealt with this matter. The trial Judge, however, dealt with it very effectively. He pointed out that Mr. Klossoski, the respondents' engineer, stated that no more than two weeks' delay, both in the office and shop, could well have been caused by these alterations, and that his evidence on this point was uncontradicted,

that on the 20th February, 1912, the drawing print (A) of the power-house was returned, fully approved of; that on the 28th March, the day on which the new order for alterations was received by the appellants, they wrote acknowledging the receipt of it, and stating the work would be put in hand at once, and drawings be sent for approval as soon as possible; that on the 8th April, 1912, the respondents wrote to the appellants asking to be advised when they expected to ship the steel for the power-house; that this letter was received upon the 13th April; that it appeared from communications passing between the chief draughtsman of the appellants and the bridge department of their works, that the latter department, by letter dated the 24th April, 1912, informed the draughtsman that all the drawings and bills of materials for the power-house were in their shops; that the respondents, having wired the appellants on the 9th July, 1912, complaining that serious delay was caused by their failure to ship the power-house steel, and requesting them to wire when the first shipment of it was made, the latter replied by wire on the 12th July stating that the power-house steel had been loaded that day for immediate shipment; and on the 23rd July, 1912, wired again that the shipment had left upon the 18th of that month.

The comment of the learned Judge on these facts and documents is significant. He says:—

> "In other words, while the plaintiff now says that the defendant delayed it in the matter of the approval of the plans of the power-house until the 19th July, its own records show that these plans were in the shops three months before that, and the steel was actually shipped the day before that to which the plaintiff is said to have been so delayed."

It is quite true that the Court of Appeal did not deal expressly with this matter. But did it need to be further dealt with after the contentions of the appellants have been refuted by letters written, and telegrams sent by their own employees. Their Lordships concur in the conclusion at which the learned trial Judge arrived upon this point. Now the buildings not having been completed, admittedly, till the 8th March, 1913, over five months beyond the expiration of the reasonable time, as fixed by the Court of Appeal, for completion, the appellants were unable to commence the installment of their machinery in these several buildings before that date. Nearly six months were spent in finishing the thorough equipment of the factory, so that they were not able to start the manufacture of the Portland cement, as the learned trial Judge finds, till the 1st September, 1913. Had the building been completed in the month of July or August 1912, or even the 1st November, the respondents assert they could have completed the installation during the winter months, and have been able to commence their manufacture in March or April 1913. The learned trial Judge admits the soundness of this contention, and finds that the respondents by reason of the delays for which

the appellants are responsible lost the use of their factory and works for 153 days, including Sundays and holidays. He endeavoured to fix the damage sustained by this loss in this way. He finds that once the factory commenced to run it continued to do so for 180 days, including Sundays and holidays; that the average output for this time was stated by the respondents' witnesses to be 703 barrels per day; that if the plant had been run at the same average rate during the 153 lost days it would have produced 110,865 barrels; that the cost of production of these barrels would, as was stated, have been 1 dol. 39 c. per barrel, the selling price 2 dol. 10 c., and the profits, the difference between the two, namely, 71 cents, making in all 76,584 dol. 15 c. The learned Judge, however, did not accept those figures. He took much smaller figures, and after several deductions came to the conclusion that the profits which the respondents might have made by the working of their factory for the 153 days of which they lost the use through the appellants' default was 10,000 dollars, less than 7 dollars per day for 153 days and less than one-seventh of the sum claimed. No question arose as to any loss of profit by the respondents on any particular contract or transaction. The profits which they claimed to have lost were merely those which the sale in the open market of what they could have produced would have enabled them to reap.

It is clear upon the evidence that both parties knew the purpose for which this factory was designed, namely, the manufacture of Portland cement for sale. They were both necessarily well aware that the installation of machinery within it was indispensable for this purpose, that the completion of the building was the necessary preliminary of the installation, that delay in the completion of the building necessarily involved the postponement of the latter, and that the loss of the use of the machinery which could not be installed would result in the loss of those ordinary profits which might have been reaped upon what, if worked, it would have produced. So that the loss of this profit was at once what fairly might be considered as arising naturally, that is, according to the ordinary course of things from the breach of the appellants' contract complained of, and was also such a loss as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. If so both the tests laid down in *Hadley* v. *Baxendale*, 9 Ex. 341, and the cases which have followed it would appear to be satisfied. The damages in addition appear to be very moderate in amount. The Court of Appeal approved of the amount.

Their Lordships are therefore of opinion that the judgment appealed from was right and should be affirmed, and the appeal be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

CANADA FOUNDRY COMPANY, LIMITED.

v.

EDMONTON PORTLAND CEMENT COMPANY.

DELIVERED BY LORD ATKINSON.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1918.