1944
*Nov. 20, 21
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*Feb. 6

AGA HEAT (CANADA) LIMITED (DEFENDANT) ..... APPELLANT;

AND

BROCKVILLE HOTEL COMPANY LIMITED (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Alleged negligence in performance—Removal of equipment in kitchen of hotel—Oxy-acetylene torch used to cut ducts—Fire breaking out, damaging the hotel—Liability for the damage—Effect on liability of change made, at wish of hotel manager, in proposed place of cutting the ducts during the work.

Appellant agreed to deliver and erect certain cooking equipment in the kitchen of respondent's hotel and for that purpose to remove a range and canopy. To remove the canopy it was necessary to sever two ducts leading therefrom to a main duct, and appellant's man in charge of the work engaged a workman to do the cutting with an oxy-acetylene torch. It was intended to cut the two ducts near the canopy, but respondent's hotel manager expressed his wish that, for the sake of appearance, they be cut near the main duct (which involved no more labour) and appellant's man in charge agreed that this be done. The hotel manager then left the kitchen. While the workman was using the torch, oil and grease which had accumulated in the main duct caught fire, resulting in a fire which damaged the hotel.

Held, affirming judgment of the Court of Appeal for Ontario, [1944] O.R. 273, that appellant was liable to respondent in damages.

Per the Chief Justice and Kerwin and Rand JJ.: In the circumstances in which the work was carried out, the cutting was done and intended to be done as in performance of the contract; and whether or not it was at a point originally not strictly within the contract, there was sufficient doubt as to what was intended to render the acquiescence in the hotel manager's suggestion a specification of the precise point of severance. But even if the parties had looked upon it as a modification of the bargain, appellant's representative treated the act as performance under the contract, and must be taken to have had the implied authority of appellant to modify such an insignificant detail of performance, while keeping within the general scope of the work, having regard to appellant's interest in a satisfied customer.

Per Taschereau and Estey JJ.: The arrangement that the ducts be cut at the place desired by respondent's hotel manager was not a variation, alteration, or something outside, of the contract. It was rather an item within the terms of the contract which came up necessarily and incidentally during the course of the work. It was an "arrangement as to the mode of performing" the original contract. Those acting for appellant in doing the work must be treated as experts; and while the hotel manager may have been the only one present

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

at the work who knew when the main or any duct had been cleaned, he was not asked about it, and there was no evidence that he had knowledge of the risk, and proof of his having such knowledge was upon appellant. The duty was upon appellant to take reasonable precautions against injury to the premises and respondent was entitled to rely upon appellant doing so. (*The Nautilus Steamship Co. Ltd.* v. *David and William Henderson & Co. Ltd.*, 1919 Sess. Cas. 605, and other cases, cited).

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Plaxton J.) gave judgment for the plaintiff for the sum of $6,149.80 for damage caused by a fire in the plaintiff's hotel, which fire started while certain work was being done in the course of removing certain cooking equipment in the kitchen of the hotel. The defendant had agreed with the plaintiff to remove a range and canopy in the said kitchen and install certain other cooking equipment. The Court of Appeal held that the work being done when the fire started was part of the work undertaken by the defendant and was under its charge, that it did the work negligently and was responsible for the damage. Against these holdings (and also against the amount of damages given) the defendant appealed to this Court.

T. N. Phelan K.C. for the appellant.

F. J. Hughes K.C. for the respondent.

The judgment of the Chief Justice and Kerwin and Rand JJ. was delivered by

RAND J.—As Mr. Phelan fairly and frankly put it, the issue in this appeal is whether the application of the acetylene cutting torch to the pipe or small duct that led from the body of the canopy over the stove to the main duct was or was not the act of the appellant. The contract to install the cooker included the work of removing the canopy but the means were to be of the appellant's choosing. Was the "canopy" merely the overhanging frame designed to collect the fumes and smoke arising from the stove and to lead them to an orifice through which they might be taken away by other means or did it embrace also the small ducts that carried the smoke and fumes to the discharges into the main duct? Mr. Hughes

(1) [1944] O.R. 273; [1944] 2 D.L.R. 698.

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contended that the canopy was, in fact, an inverted funnel with the pipe as a stem, an apparatus not only to gather but to carry to a point of delivery. He suggested that if the appellant had undertaken to move the canopy from one part of the kitchen to the other, obviously the connecting leads would have been a necessary part of the removal. But while this is far from being conclusive, it does emphasize the fact that the question is by no means free from doubt.

In that situation, the manager of the hotel was told that it was the intention to sever the leads within a few inches of the roof of the canopy. This would have left the two disconnected ducts projecting four or five feet each from the main duct. He thereupon intimated to the representative of the appellant that he wanted them severed near the main duct, pointing out, what was obvious, that anything else would greatly mar the appearance of the kitchen. No more labour in the one case than in the other was involved: possibly it would have been more convenient at the main duct than elsewhere. Shortly afterwards, but in the absence of the manager and at the direction of the appellant's representative, the workman using the torch proceeded to cut one of the leads at the point suggested, in the course of which accumulated oil and grease in the main duct and possibly in the smaller one was set on fire.

Admittedly the small ducts had to be severed. This might have been at the one point or the other and to the appellant it was clearly a matter of indifference. In the circumstances in which the work was carried out, I have no doubt that the act was done and intended to be done as in performance of the contract; and whether or not it was at a point originally not strictly within the contract, there was sufficient doubt as to what was intended to render the acquiescence in the manage's suggestion a specification of the precise point of the severance. But even if the parties had looked upon it as a modification of the bargain, the appellant's representative treated the act as performance under the contract, and that he had the implied authority of his principal to modify such an insignificant detail of performance, while keeping within

the general scope of the work, having regard to the interest of the appellant in a satisfied customer, I have no doubt.

Mr. Phelan also contended that the damages proved amounted to considerably less than the sum estimated by the trial judge. While I agree with the latter that the evidence as to damages was in some respects vague, I am not prepared to disagree with his estimate and its confirmation by the Court of Appeal.

The appeal should be dismissed with costs.

The judgment of Taschereau and Estey JJ. was delivered by

ESTEY J.—The appellant, Aga Heat (Canada) Limited, accepted an order dated May 12th, 1941, from the respondent, Brockville Hotel Company Limited, which so far as material to this action reads as follows:

> Aga Cooker delivered and erected and including flue material to connect to chimney duct and removal of range and canopy.

This action is brought by respondents to recover damages caused by a fire which occurred while the appellant was in the course of effecting the "removal of range and canopy." Two ducts lead from the canopy over the kitchen range to a main duct, and to remove the canopy it was necessary to sever these two ducts.

On the evening in question, and about the time these ducts were to be severed, Mr. Duby, the hotel manager, came into the kitchen where the appellants were carrying on their work of removing the range and canopy, when he and Mr. Craig, who was in charge for the appellant, had a conversation as a consequence of which these two ducts were to be severed close to the main duct. At once a workman using an oxy-acetylene torch proceeded to sever the first duct. "It was a boxlike affair, and he cut along the bottom," and as he started making a vertical cut up the side, Mr. Craig deposes, "We heard a roaring in the duct which indicated trouble—fire."

It is contended that this fire was a result of the instructions given by Mr. Duby, manager of the hotel company, as otherwise the ducts would have been severed where Mr. Craig had in mind nearer the canopy.

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Upon this point Mr. Craig deposed:

Q. Then what was the next step that you contemplated in the operation of this work?

A. To disconnect the duct from the canopy.

Q. And where in your judgment was the disconnection going to be made?

A. Right at the canopy.

* * *

Mr. Duby remarked he thought the appearance would not be very good to have that duct hanging down there in that condition and he wished the cut to be made at a point nearer—which he indicated of course with his finger—at a point nearer the main duct.

Q. Yes, and what did you say to that?

A. I said, "That is entirely up to you, Mr. Duby, if you wish to instruct Henry & Company to cut it there, go ahead, sir."

Q. Having told Mr. Duby to go ahead what occurred between him and Henry's men?

A. Well, we were all standing together and it was, I guess, implied—

Mr. HUGHES: I am objecting, my Lord.

Mr. PHELAN: Q. Don't guess what was implied; just tell us what Mr. Duby said when you told him to "go ahead, sir." What was said?

A. He indicated what he wished.

Mr. HUGHES: I object.

WITNESS: He indicated where he wished the cut to be made.

Mr. PHELAN: Q. And that you have already said was in the lead duct adjacent to the main duct?

A. That is right, sir.

Mr. Duby deposed:

Q. Instead of cutting them off at the canopy and leaving these two unsightly ducts projecting into the room you say they were cut off flush with the main duct?

A. Yes, sir.

His LORDSHIP: Q. Under whose instructions?

A. Under my instructions, sir.

Mr. Duby went out of the kitchen at once and was actually in his room in another part of the hotel by the time the fire started.

The learned trial judge has found:

On the evidence, I find that the cutting which caused the fire was directed by the servant of the plaintiff, Mr. Duby, the manager of the hotel, who, in giving such direction, was, in my view, acting within the scope of his authority as manager.

* * *

In the present instance, on the evidence, Mr. Duby, the general manager of the plaintiff company's hotel, undertook to interfere, with the acquiescence of Mr. Craig, the defendant's employee, and did interfere, in the work of severing the lead ducts by the use of oxy-acetylene torch. He directed that the ducts should be severed flush with the main duct and not at the point where Mr. Craig intended to sever them, viz. immediately at the point where they were connected with the canopy.

Duby admitted he knew the main duct had not been cleaned out since its installation fourteen years before; and he, alone of those present, knew, or ought to have known, that the point where he directed the cut to be made was, in the circumstances of the case, a dangerous point at which to use an oxy-acetylene torch. His negligence, and his alone, was, in my view, the cause of the casualty which occurred.

With deference to the learned trial judge, I do not think Mr. Duby "undertook to interfere." The duct had to be severed, and the agreement did not specify at what point. These lead ducts were of the same material and dimensions throughout and there is no suggestion that the cutting at one point involved more labour or inconvenience than at any other point. Mr. Craig had in mind cutting these ducts near the canopy, but Mr. Duby suggested the cutting near the main duct. Mr. Craig immediately acquiesced, and gave Mr. Duby permission to instruct Mr. Henry, who was actually doing the cutting, and Mr. Duby gave his instructions there in the presence of Mr. Craig, and immediately went out.

This is neither a variation, alteration nor something outside of the contract. It is rather an item within the terms of the contract which came up necessarily and incidentally during the course of the work. It had not been specifically dealt with and when now mentioned the parties, in the language of Brett J. (as he then was) in *Plevins* v. *Downing* (1), made an "arrangement as to the mode of performing" the original contract.

Under the terms of the contract the Aga Heat (Canada) Limited had expressly agreed to complete the removal of "range and canopy" and to install the equipment they had sold. In all this they were pursuing their usual course of business. Mr. Craig on behalf of the appellants inspected the premises, examining particularly the canopy as to the presence of grease because he appreciated the possibility of fire. Mr. Craig employed Henry & Company who in their business use oxy-acetylene torches. Mr. Henry discussed the fire hazard, and as a result fire extinguishers were obtained. Moreover the company, in its letter of January 6th, 1939, described the canopy as "a harbour for dirt and grease", and referred to the ventilator fan. The evidence refers to the cleaning of the ducts from time to time. Here and there

(1) (1876) L.R. 1 C.P.D. 220.

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throughout the ducts dirt and grease would be expected particularly by those familiar with the equipment. Notwithstanding all this, when it was decided to cut the lead ducts close to the main duct, no questions were asked and no precautions were taken and they proceeded forthwith to use the oxy-acetylene torch.

It was for the experts in work of this kind to satisfy themselves that the work could be carried on with reasonable safety, taking precautions such as the course of the work admitted of.

Viscount Finlay in *H. & C. Grayson Ltd.* v. *Ellerman Line Ltd.* (1). In the doing of this work the appellants must be treated as experts, and while it is true that Mr. Duby may have been the only one present at this work who knew when the main or any duct had been cleaned, there is no evidence that he had knowledge of the risk, and it was for the appellants to prove that the respondents "knew the dangers attending the use of their machines." *The Nautilus Steamship Co. Ltd.* v. *David and William Henderson & Co. Ltd.* (2).

The appellant, as was its right under the contract, had selected this oxy-acetylene torch, which in operation generates a heat of over 6,000 degrees and sends out quantities of sparks. The operation of this torch in such circumstances as we have in this case creates a possibility of fire and requires on the part of those operating it that reasonable precautions should be taken to avoid fire. In this case there were no precautions taken at or near the point of severance and, in my opinion, the duty to do so rested upon the appellants who had undertaken the work, provided the equipment, and employed the men. The respondents on their part had a right to regard the appellants as competent both to do their work and to take reasonable precautions that the premises would not be injured as a consequence of their failure to do so. *The Nautilus Steamship Co. Ltd.* v. *David and William Henderson & Co. Ltd.* (2); *H. & C. Grayson Ltd.* v. *Ellerman Line Ltd.* (3); *The Pass of Ballater* (4); *Honeywill & Stein Ltd.* v. *Larkin Bros. Ltd.* (5).

Counsel for the appellant pressed that the finding of damages should be reduced. The learned trial judge found the

(1) [1920] A.C. 466, at 476.
(2) 1919 Sess. Cas. 605.
(3) [1920] A.C. 466.
(4) [1942] P. 112.
(5) [1934] 1 K.B. 191.

evidence with respect to damages "vague in some respects," and in view of all the circumstances I agree with the disposition of the damages made by the Court of Appeal.

In my opinion this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Phelan, Richardson, O'Brien & Phelan.*

Solicitors for the respondent: *Hughes, Agar, Thompson & Amys.*