

1960
 *Nov. 16
 Dec. 19

BOGUE ELECTRIC OF CANADA }
 LIMITED (*Plaintiff*) } APPELLANT;

AND

CROTHERS MANUFACTURING }
 LIMITED (*Defendant*) } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Time of essence—Non-delivery—Extension of time—Further delay—Cancellation—Notice of termination.

The respondent C entered into a contract with a Crown corporation to supply motor-driven generator sets, and sub-let to the appellant B the contract for the supply of the generators. Very little effort was made to commence production of the generators, and as a result of the appellant's inability to begin deliveries at the time promised, the three interested parties agreed to a revised delivery schedule. B failed to adhere to the new schedule and C cancelled the sub-contract, having previously notified B of its intention so to do, if delivery was not made as promised. B sued for damages arising from cancellation of the contract. The action was dismissed by the trial judge, and this judgment was affirmed by a majority in the Court of Appeal. B then appealed to this Court.

Held: The appeal should be dismissed.

Time was of the essence of both the head contract and the sub-contract. The importance of delivery according to schedule had been emphasized, and punctual performance by B went to the whole consideration of the sale.

Time remained of the essence notwithstanding the substitution of new delivery dates. The appellant's two-fold submission that when notice was given time was not of the essence, and that the notice was not a reasonable one was rejected.

The provision for cancellation on 15 days' notice in the general conditions was in conflict with the condition in the agreement between C and B authorizing an immediate right of cancellation without further liability "if delivery is not made within the time promised or specified". Consequently the general conditions, even if assumed to be applicable to the sub-contract, must give way in accordance with clause 1(2) of the interpretation section of the said conditions.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Gale J. Appeal dismissed.

A. S. Pattillo, Q.C., and D. J. Wright, for the plaintiff, appellant.

P. B. C. Pepper, Q.C., Miss Janet Scott and W. Herridge, for the defendant, respondent.

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

The judgment of the Court was delivered by

JUDSON J.:—Bogue Electric of Canada Limited, the appellant, sued the respondent, Crothers Manufacturing Limited, for damages arising from the cancellation of a contract for the supply of 249 electrical generators which Bogue was to manufacture for Crothers. The judgment at trial was that Crothers was justified in cancelling the contract for non-delivery at the stated time. This judgment was affirmed on appeal and Bogue now appeals to this Court.

On October 18, 1956, Crothers entered into a contract with Canadian Commercial Corporation, a Crown corporation, for the supply of a large number of motor-driven generator sets for rural electrification in India. Crothers were suppliers of diesel motors and they sub-let to Bogue the contract for the supply of the generators. On October 19, Crothers wired to Bogue to book the order for the generators. There had been previous discussions between the two companies. Bogue knew that Crothers was tendering for the contract with Canadian Commercial Corporation and that if the tender was successful, it would be asked to supply these generators. Bogue had stated that shipment could begin 16 to 18 weeks from the date of receipt of a firm order. On October 30, 1957, Bogue and Crothers entered into their formal contract, which provided for end of the month deliveries of 40 generators from February to June 1957 and the balance in July and August. The need for regular deliveries was known to both parties. Crothers had first to connect the generators to the diesel units before it could meet its own schedule of deliveries under the head contract commencing in March 1957, and its ability to do this depended upon prompt performance by Bogue.

It became apparent on February 13, 1957, as a result of a visit by an official of Crothers to the Bogue plant in Ottawa, that Bogue had made very little effort to begin to produce the generators and that delivery could not begin by the end of February as promised. This was nearly four months after the placing of the order. The evidence coming from the internal memorandum of the Bogue Company, dated February 22, 1957, makes it clear that the delay was entirely the fault of the Bogue Company, which appears

1960
BOGUE
ELECTRIC
OF CANADA
LTD.
v.
CROTHERS
MANU-
FACTURING
LTD.

1960
 BOGUE
 ELECTRIC
 OF CANADA
 LTD.
 v.
 CROTHERS
 MANU-
 FACTURING
 LTD.
 Judson J.

to have been making little or no effort to complete its contract. The reason was that while the contracting party was Bogue Electric of Canada Limited, the decisions necessary to carry out the contract had to be made at the head office of the parent company in the United States and these decisions were not being made. As a result of the obvious inability of Bogue to begin its deliveries on February 28, 1957, the three interested parties, the Government, Crothers and Bogue, agreed, on March 12, 1957, to accept a new delivery schedule to begin on May 15, 1957. On March 13, 1957, the Canadian company emphasized to its parent company the urgency of preparing to meet this new delivery schedule.

After this had been arranged, Crothers, with the approval of the Government, revised its own delivery schedule of the completed units to begin on June 30, 1957, instead of March, as previously agreed. On March 29, 1957, Bogue assured Crothers that "delivery was progressing satisfactorily according to the revised schedule." This assurance was given notwithstanding the fact that on March 22, 1957, a Government inspector who had visited the Bogue plant in Ottawa had made a report which showed that little was being done to fill the order and that there was little likelihood of the delivery of 40 generators by May 15, 1957. Crothers complained to the Government about this but was informed on April 18 that it would be held to its own revised delivery schedule under the head contract. After receiving this information, Crothers made another visit to the Bogue plant and found that conditions were as bad as had been reported by the Government inspector one month before. In spite of the assurances of Bogue that the delivery schedule would be met, Crothers was satisfied that this was impossible because of the inactivity in the plant. Crothers then began to make plans for an alternative source of supply of generators.

On May 6, 1957, Crothers notified Bogue that if deliveries were not made on May 15 as promised, it would cancel the sub-contract. Bogue, on May 7, 1957, stated that it was exerting its best efforts to meet its commitments under the contract. Crothers made tentative arrangements to obtain generators from an alternative supplier if Bogue

generators should not be delivered on May 15. Bogue did not deliver on May 15 and Crothers cancelled the sub-contract on May 16.

At the trial no attempt was made to explain Bogue's lack of preparedness and dilatory conduct. The learned trial judge said that there was no evidence to lead to any conclusion about the date when Bogue might have delivered its first 40 units had it been allowed to do so. The generators called for under the contract were un-complicated, run-of-the-mill units. At no time did Bogue have a first-production unit available for inspection as required by the contract. It failed to take on labour. It was late in ordering supplies. By May 15, 1957, it had been supposedly working on this sub-contract from October 19, 1956, a period of 7 months. Both the trial judge and the majority opinion in the Court of Appeal held that Crothers was justified in terminating the contract in these circumstances. The only point of the dissent in the Court of Appeal was that certain general conditions, which Laidlaw J.A. said formed part of the sub-contract, required the giving of 15 days' notice of termination on default by Bogue.

The sub-contract between Crothers and Bogue contained the following condition:

The purchaser reserves the right to cancel all or any part of this order if delivery is not made within the time promised or specified, without any liability whatsoever.

This was the condition under which Crothers exercised its right of cancellation. The learned trial judge's finding was that time was of the essence of the head contract between the Government and Crothers. He was also of the same opinion concerning the sub-contract between Crothers and Bogue. In the circumstances of this case no other conclusion is possible. This was a mercantile contract. The importance of delivery according to schedule is emphasized by the whole of this record. Crothers was depending upon Bogue to make and deliver a component part of a complete unit. After delivery of the generator, Crothers had to connect it with its motive power and meet a delivery schedule of its own. The supply of these complete units was part of a wider Government plan which was recognized to be

1960
 BOGUE
 ELECTRIC
 OF CANADA
 LTD.
 v.
 CROTHERS
 MANU-
 FACTURING
 LTD.
 Judson J.

1960
 Bogue
 Electric
 of Canada
 Ltd.
 v.
 Crothers
 Manu-
 facturing
 Ltd.
 Judson J.

an urgent one. It was part of a chain of transactions, and punctual performance by Bogue went to the whole consideration of the sale. (22 Hals., 2nd ed., 57)

The next question is whether time ceased to be of the essence because of the alteration of the delivery dates by mutual consent. The dates of all the deliveries were precisely stated in both the original and the amended schedule. No other change was made in the sub-contract. All that happened was that one schedule of deliveries was substituted for another. Bogue's new delivery schedule was acted upon by Crothers in re-scheduling its own deliveries despite the problem of storage space, and at no time between March 1957 and May 15, 1957, did Crothers do anything to indicate to Bogue that May 15 was not the deadline. As late as April 25 Bogue was insisting that it could make delivery on May 15 although it is quite apparent from the evidence that there was no basis of fact for this insistence.

Both the learned trial judge and the Court of Appeal, without any dissent on this point, have held that time remained of the essence of the contract notwithstanding the substitution of new delivery dates, and in my opinion this is clearly correct. The principle is stated in 8 Hals., 3rd ed., 165:

Where time is of the essence of the contract, and is extended by agreement between the parties, the extension does not operate as an entire waiver of the condition, but merely has the effect of substituting the extended time for that originally fixed.

Even if this were not so, there is also a unanimous finding of the learned trial judge and the whole Court of Appeal that the notice given by Crothers to Bogue on May 6th requiring Bogue to deliver on the date promised was reasonable. These are concurrent findings on a question of fact, fully supported by the evidence and obviously correct. I have therefore no difficulty in rejecting the appellant's twofold submission that on May 6, the date of the notice, time was not of the essence and that the notice given was not a reasonable one.

This leaves only the appellant's submission that there was no right of cancellation until 15 days following May 15, 1957. This proposition is the sole foundation for the dissenting opinion of Laidlaw J.A. in the Court of Appeal.

In order to succeed the appellant must show that General Conditions CCC 50 form part of the contract and that the provision for 15 days' notice of cancellation contained in clause 22 of these Conditions overrides the specific provision for cancellation contained in the contract itself which I have already quoted.

The learned trial judge dealt with this aspect of the case on the assumption that these general conditions did form part of the sub-contract. They expressly form part of the head contract and they were drawn to be of general application to contracts between the Crown and a contractor. There are many clauses which can have no possible application to a contract to which the Government is not a party. The sub-contract between Crothers and Bogue states that it is understood that General Conditions, Form CCC 50, will apply for the duration of the contract, which could be interpreted to mean that Bogue was contracting on the understanding that Crothers was subject to these conditions. It is not, however, necessary to decide this point. I will proceed on the same assumption as the trial judge. Clause 22 of these general conditions provides:

If the Contractor is in default for a period of fifteen days in carrying out the terms of the contract as a result of events or occurrences for which it is responsible or which are within its control . . . the Corporation may at his option, upon giving notice in writing to the Contractor, (i) terminate the contract as to work not theretofore completed or (ii) take the work out of the Contractor's hands and employ such means as the Corporation may see fit to complete the work in whole or in part.

But along with this, one must read Clause 1(2) of the interpretation section of these general conditions. It reads:

In the event of any inconsistencies, the provisions of the agreement and/or of these general conditions shall prevail over the specifications (if any) and the provisions of the agreement and of the supplemental conditions (if any) shall prevail over these general conditions.

I agree entirely with the finding of the learned trial judge that the provision for cancellation on 15 days' notice in the general conditions is in conflict with the condition in the agreement between Crothers and Bogue authorizing an immediate right of cancellation without further liability "if delivery is not made within the time promised or specified", and that consequently, the general conditions, even if assumed to be applicable, must give way.

1960
 BOGUE
 ELECTRIC
 OF CANADA
 LTD.
 v.
 CROTHERS
 MANU-
 FACTURING
 LTD.
 Judson J.

1960

I would dismiss the appeal with costs.

BOGUE
ELECTRIC
OF CANADA
LTD.

Appeal dismissed with costs.

v.
CROTHERS
MANU-
FACTURING
LTD.

*Solicitors for the plaintiff, appellant: McIlraith and
McIlraith, Ottawa.*

Judson J.

*Solicitors for the defendant, respondent: McMillan,
Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.*

*PRESENT: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.

¹ [1959] Que. Q.B. 61.