J. D. STERLING COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

A. JANIN COMPANY LIMITED (*Defendant*) ..... RESPONDENT.

1966 *Dec. 14, 15

1967 Feb. 13

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Damages—Construction of sewer—Two contractors having separate contracts from city—Works of one contractor flooded by installations of the other—Liability—Quantum of damages—Civil Code, arts. 1053, 1054.

The two parties to this appeal were engaged in performing contracts with the city of Montreal to build an underground covered collector sewer running parallel to a stream. By erecting certain culverts in the stream, the defendant caused the flooding of the works being executed by the plaintiff, thereby causing damages to the works and also the immobilization for some days of the heavy equipment being used by the plaintiff. The trial judge found for the plaintiff and awarded damages in the sum of $52,000. The Court of Appeal, by a majority judgment, reduced the damages to the sum of $31,916. The plaintiff appealed to this Court and the defendant cross-appealed. The question of liability was not in issue in this Court, where only two questions were raised: (1) the quantum of damages and (2) whether the right of action belonged to a company known as Miron Co. Ltd. and not to the plaintiff. This second submission was rejected unanimously in the Courts below and, at the hearing, this Court expressed the opinion that it had rightly been rejected.

Held: The appeal should be allowed and the cross-appeal dismissed.

The amount of damages awarded by the trial judge and upheld by the reasons of the minority in the Court of Appeal was supported by the evidence and should not have been disturbed.

Dommages—Construction d'un égout—Deux entrepreneurs ayant contracté séparément avec la cité—Travaux d'un des entrepreneurs inondés par les installations faites par l'autre—Responsabilité—Quantum des dommages—Code Civil, arts. 1053, 1054.

Les deux parties dans cet appel étaient à construire pour la cité de Montréal un égout collecteur souterrain le long d'une petite rivière. Certaines installations faites par la défenderesse ont eu pour résultat d'inonder les travaux exécutés par la demanderesse, causant ainsi des dommages à ces travaux et en plus l'immobilisation pendant quelques jours de l'équipement lourd employé par la demanderesse. Le juge au procès se prononça en faveur de la demanderesse et lui accorda des dommages au montant de $52,000. La Cour d'Appel, par un jugement majoritaire a réduit les dommages à la somme de $31,916. La

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*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Abbott and Spence JJ.

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demanderesse en appela devant cette Cour et la défenderesse a produit un contre-appel. La question de responsabilité n'était pas en jeu devant cette Cour, où deux questions seulement ont été soulevées: (1) le quantum des dommages et (2) la question de savoir si le droit d'action appartenait à une compagnie connue sous le nom de Miron Co. Ltd. et non pas à la demanderesse. Cette seconde prétention a été rejetée unanimement par les Cours inférieures et, lors de l'audition, cette Cour s'est déclarée d'accord avec le juge de première instance qui l'avait rejetée.

Arrêt: L'appel doit être maintenu et le contre-appel rejeté.

Le montant des dommages accordé par le juge au procès et confirmé par les juges formant la minorité dans la Cour d'Appel était supporté par la preuve et n'aurait pas dû être changé.

APPEL et CONTRE-APPEL d'un jugement majoritaire de la Cour du banc de la reine, province de Québec[1], réduisant les dommages accordés par le Juge Batshaw. Appel maintenu et contre-appel rejeté.

APPEAL and CROSS-APPEAL from a majority judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reducing the amount of damages awarded by Batshaw J. Appeal allowed and cross-appeal dismissed.

Jacques Leduc, Q.C., for the plaintiff, appellant.

Walter C. Leggat, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side)[1] which, by a majority, allowed an appeal from a judgment of Batshaw J. to the extent of reducing the amount of damages awarded to the appellant from $52,000 to $31,916. Choquette and Badeaux JJ. dissenting would have dismissed the appeal.

In this Court, the appellant asks that the judgment at trial be restored; the respondent asks that the appeal be dismissed and by way of cross-appeal asks that the action be dismissed with costs or, alternatively, that a new trial be ordered to assess the damages, if any, to which the appellant is entitled.

The action arose from the fact that while the parties were engaged in performing contracts with the City of Montreal to build an underground covered collector sewer

[1] [1966] Que. Q.B. 85.

running parallel to a stream known as the "Little Rivière St. Pierre" the respondent, by the erection of certain culverts in the stream, caused the flooding of the works being executed by the appellant damaging the works and causing the immobilization for some days of the heavy equipment being used by the appellant.

At the trial the respondent denied liability, but in this Court only two points were raised, first, the quantum of damages and, second, the submission made by the respondent that if damages had been caused for which the respondent was responsible the right of action for those damages was that of a company known as Miron Company Limited and not of the appellant. This second submission was rejected unanimously in the Courts below and at the conclusion of the argument of counsel for the appellant in this Court, counsel for the respondent was informed that we were all of opinion that it was rightly rejected for the reasons given by Batshaw J. and that he need not deal with it.

The claim for damages was itemized in the Declaration and totalled $110,600. This was slightly amended at the trial and, as amended was as follows:

(1) Travaux d'assèchement, de pompage et de protection de l'équipement et de la machinerie se trouvant sur les chantiers	$30,254.00
(2) Installation et enlèvement de barrages temporaires	4,104.00
(3) Construction d'un talus étanche et nettoyage et assèchement des tranchées d'excavation	6,208.00
(4) Pour immobilisation d'équipement et retards dans l'exécution des travaux	52,634.00
(5) Déboursés divers pour travaux spéciaux requis ..	5,676.00
(6) Augmentation de frais généraux et perte de bénéfices	11,800.00
	$110,676.00

After setting out the itemized claim as above the learned trial judge continued:

> The interruption of the Plaintiff's work caused by the flood lasted for a period which it was difficult to determine precisely since resumption of the operations could only be effected on a gradual basis. The estimates varied from 7 to 15 days; R. F. Bird, the Executive Vice-President for Sterling, who was its principal witness as to the damages, affirmed that it lasted for about 8 days. To be conservative however, the Plaintiff based its claim on a period of 5.2 days which seems to the Court not to be unwarranted.

This finding was not challenged.

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The learned trial judge disallowed item 6 and in this Court no argument was advanced against his having done so.

The learned trial judge then pointed out that of the remaining amount of $98,876 a sum of $84,812 represented the daily rental value of the equipment claimed on the basis of the calculation explained by the appellant's witness Bird, and the balance of $14,064 represented the total of items 1, 2, 3 and 5 excluding therefrom the portions of those items made up of rental value of equipment. That this is so appears clearly from Exhibit P-14. The amount of damages to be assessed for the claims totalling this $14,064 was fixed by the learned trial judge at $12,000 and no ground has been shewn from disturbing this figure.

There remains the item of $84,812 for which the learned trial judge allowed $40,000. As to this item the evidence of the witness Bird supported the claim of $84,812 while that of the respondent's witness Rousseau was to the effect that the amount should be $19,916. The learned trial judge did not accept either of these figures and gave reasons for his refusal to do so. His reasons for not accepting Rousseau's figure were concurred in by Badeaux J. with whom, as already mentioned, Choquette J. agreed.

With respect, I am unable to discern any sufficient reason for reversing the conclusion of the learned trial judge that he should not accept Rousseau's evidence in toto, nor am I able to say from a perusal of the record that his estimate of $40,000 for this item was erroneous. While always hesitant to differ from the judgment of a majority in the Court of Appeal in fixing damages the amount of which is not susceptible of precise arithmetical calculation, it does appear that in the reasons of the majority there was a misapprehension of the basis on which the learned trial judge had proceeded.

As already pointed out, the award of the learned trial judge was made up of two items: (i) $12,000 allowed in respect of a claim of $14,064 (being the total of items 1, 2, 3 and 5 excluding the sum of $32,178 charged in those items for the rental value of equipment) and (ii) $40,000 allowed in respect of a claim of $84,812 (being the total of item 4 and the above sum of $32,178). That this is so is

made clear in the reasons of the learned trial judge when, after dealing with the claim for $84,812 and giving his reasons for allowing $40,000 in respect thereof, he says:

> Having dealt with the $84,812.00, part of Plaintiff's claim of $98,876.00 referred to above, there remains the difference of $14,064.00 which represents miscellaneous items of damages other than for rental value of equipment contained in paragraph 29 sub-paragraphs 1, 2, 3 and 5 of the declaration. It was conceded that this figure could not be ascertained with mathematical accuracy and represented a rough estimate of the damages involved. In the opinion of the Court this part of the claim could reasonably be assessed at $12,000.00.

Casey J., however, says at the opening of his reasons:

> This claim was for $110,600.00 divided into six items. The trial judge disallowed No. 6 ($11,800.00) and allowed $40,000.00 for No. 4 ($56,400.00 claimed) and $12,000.00 for nos. 1, 2, 3 and 5 ($42,400 claimed).

No doubt Rousseau's figure of $19,916 was intended by that witness to represent the amount which in his opinion should have been allowed in respect of the total of $84,812 claimed for rental value of equipment; but I think it probable that Casey J. might not have adopted that figure if he had realized that the appellant's claim in regard to this item, supported as it was by Bird's evidence, was not for $56,400 but for the much larger sum of $84,812. Be that as it may, I have reached the conclusion that the figure arrived at by the learned trial judge and upheld by the reasons of the minority in the Court of Queen's Bench was supported by the evidence and should not have been disturbed.

I would allow the appeal with costs in this Court and in the Court of Queen's Bench (Appeal Side) and restore the judgment of the learned trial judge. I would dismiss the cross-appeal with costs.

Appeal allowed with costs; cross-appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Birtz & Leduc, Montreal.

Attorneys for the defendant, respondent: Foster, Watt, Leggat & Colby, Montreal.