1961
*Oct. 31
Nov. 1, 2

1962
Jan. 23

THE ATTORNEY GENERAL OF CANADA (*Plaintiff*);

AND

LAMINATED STRUCTURES & HOLDINGS LIMITED (*Defendant*) ..... APPELLANT;

AND

EASTERN WOODWORKERS LIMITED (*Defendant*) ..... RESPONDENT;

AND

TIMBER STRUCTURES OF CANADA LIMITED (*Defendant*).

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Contracts—Contract for supply of materials—Disclosure of purpose for which materials required—Reliance of purchaser on skill and judgment of supplier—Implied condition as to fitness of materials—Liability of supplier.

The defendant E Ltd. entered into a contract with a Crown agency for the construction of a maintenance and storage garage for the Department of National Defence. The original specifications contemplated the use of steel framework, but shortly after they were issued an alternative of laminated wood frame was authorized. L Ltd. offered to supply E Ltd. with laminated wood trusses for the project. The latter company, as the result of instructions from a second Crown agency specifying T Ltd. as the supplier, gave permission to L Ltd. to place an order for structural wood frame components with that firm, for whom L Ltd. were distributors. A few days after the building was completed and accepted by the Crown engineers, a partial collapse of the roof occurred. In an action brought by the Attorney General of Canada, the trial judge held that E Ltd. was liable for damages to government vehicles caused by the collapse, and held further that E Ltd. could recover the cost of these damages and the cost to it of re-erecting the collapsed structure from L Ltd. The latter's appeal to the Supreme Court of Nova Scotia in banco was dismissed, and an appeal was then brought to this Court.

Held: The appeal should be dismissed.

The question of the reliance of E Ltd. on the skill and judgment of the appellant was a question of fact which had been decided by the judges below, who were of the unanimous opinion that E Ltd. had placed such reliance on the appellant and that there were no circumstances such as to exclude the condition as to fitness of the materials which was implied

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Ritchie JJ.

by law. There was a clear preponderance of evidence to support the finding that E Ltd. disclosed to L Ltd. the purpose for which the wooden frame and component parts were required; that it effectively disclosed to L Ltd. the reliance placed upon it; and that the cause of the collapse was within the area of that reliance. Neither the requirement of conformity to the plans and specifications nor the part played by T Ltd. operated to exclude such reliance or furnish proof that the reliance was placed on the latter company and not upon L Ltd. *Hayes, Trustee of Preload Co. of Canada Ltd. v. City of Regina*, [1959] S.C.R. 801, applied; *Manchester Liners, Ltd. v. Rea, Ltd.*, [1922] 2 A.C. 74; *Medway Oil & Storage Co. v. Silica Gel Corporation* (1928), 33 Com. Cas. 195; *Mash and Murrell, Ltd. v. Joseph I. Emanuel, Ltd.*, [1961] 1 All E.R. 485, referred to.

APPEAL from a judgment of the Supreme Court of Nova Scotia in banco[1], dismissing an appeal from a judgment of Ilsley C.J. Appeal dismissed.

Donald McInnes, Q.C., J. H. Dickey, Q.C., and *A. J. Campbell, Q.C.*, for the defendant, appellant.

J. W. E. Mingo and *D. R. Chipman*, for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Supreme Court of Nova Scotia en banc[1] dismissing the appeal of the present appellant from a judgment of Ilsley C.J. which ordered that the Attorney General of Canada recover the sum of $7,539.21 from the respondent in respect of damage to Government vehicles caused by the partial collapse of the roof of a building constructed by the respondent as general contractor, and which ordered further that the respondent have judgment against the appellant, as the supplier of the defective material which caused the collapse of the said roof, for the said sum, and also for the sum of $66,973.02 being the cost to the respondent of re-erecting the collapsed structure under the terms of its contract with the Crown.

Neither the Attorney General of Canada nor Timber Structures of Canada Limited is a party to this appeal, and the issue is confined to the question of whether or not the appellant is liable to the respondent either in contract or in tort for the damage sustained by the respondent as a result of the collapse of this roof which has been found to have been occasioned by the incorporation in its structure of a

[1] (1961), 28 D.L.R. (2d) 92.

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defective laminated wood truss negligently constructed by Timber Structures of Canada Limited and, therefore, not reasonably fit for the purpose for which it was used or required to be used.

The essence of the dispute insofar as constractual liability is concerned is that the respondent contends, as the courts below have found, that it was entitled to rely and did rely on the skill and judgment of the appellant from whom it ordered the laminated wood trusses and that the appellant was accordingly in breach of an implied condition that these materials would be reasonably fit for the purpose for which they were required.

It is contended on behalf of the appellant on the other hand that the circumstances are such as to exclude the existence of any such condition and that as it was ordered by the respondent to obtain and incorporate in the structure the very trusses which proved to be defective, it was merely carrying out instructions under conditions which gave rise to no warranty or condition except that it would order and obtain the laminated wood products from the makers designated by the respondent and indeed by the Government, namely, Timber Structures of Canada Limited.

On December 4, 1951, Defence Construction Limited, a Crown agency, called for tenders for the construction of a maintenance and storage garage at Shearwater, Nova Scotia, for the Department of National Defence. The original specifications contemplated the use of steel framework, but shortly after they were issued an alternative of laminated wood frame was authorized, and on December 13, before any tender had been made by the respondent, it received a telegram from the appellant which was then called "Laminated Structures Limited" and of which the respondent had never previously heard which read as follows:

RE COMBINED MAINTENANCE AND STORAGE GARAGE HMCS SHEARWATER *OUR* GLUED LAMINATED WOOD TRUSSES HAVE BEEN APPROVED AS ALTERNATE B IN THE SPECIFICATIONS PLEASE ADVISE IF YOU ARE INTERESTED IN QUOTING USING LAMINATED TRUSSES WE WILL LET YOU HAVE PRICE AND OTHER NECESSARY DETAILS (The italics are mine.)

On the following day the appellant wrote to the respondent, enclosing a brochure which bore on it the name of "Timber Structures of Canada Limited", and saying:

> Enclosed herewith, please find *our* illustrated brochure entitled: "ENGINEERED TIMBERS" and *the truss that we propose to supply for the Combined Maintenance and Storage Building* for HMCS Shearwater at Dartmouth, N.S., is shown on the last page of the brochure.
>
> I have also outlined in blue pencil, the arrangement of the trusses where the two buildings are joined together.
>
> We will quote on the supply of suitable Timber Columns Timber Side Wall Girts, *the necessary Glued Laminated Timflat Trusses* and the *necessary* purlins.
>
> For your information we have been in touch with the Navy Engineers at Ottawa, and for their purposes, 2" T & G roofing is classified as a mill roof.
>
> I regret that our quotation is not yet finalized, but I will have the necessary information for you Monday, December 17, and will be in touch with you by telephone.
>
> I will, at that time, also give you an approximate estimate of the number of men hours required to assemble and erect the trusses for your guidance. (The italics are mine.)

On December 19 the appellant forwarded its tender to the respondent quoting a price and containing the assurance that "all materials are precut and prefabricated ready for assembly and erection with the exception of the roof sheeting." On the following day sketch plans showing the design of a *bow string truss* were forwarded by the appellant to the respondent, and it is of some importance to note that these plans also bore the name of "Timber Structures of Canada Limited".

On February 14, 1952, at the request of one of the Crown agencies, Mr. E. C. Mingo of the respondent company came to Ottawa for a discussion with the Engineer-in-Charge of the Navy Defence Research Board concerning various aspects of the contract, but Mr. Mingo was not qualified to talk about the truss himself and he agreed to bring a representative of the subtrade to Ottawa. He tried to get in touch with Mr. Millar of the appellant company who was not available, and he was, accordingly, referred to Mr. DeGrace of Timber Structures of Canada Limited who eventually came to Ottawa to discuss the laminated wood features of the contract and in fact offered to redesign the truss to conform with a suggestion made by the Navy, and when he had done this forwarded his preliminary drawings of the redesigned truss direct to the Government representative.

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It was not until March 18 that the respondent's tender was accepted, and almost immediately thereafter the respondent wrote to the appellant in part as follows:

> As there has been a redesign of the type of truss to be used on the above building and we had started negotiations with yourself on prices, etc. on the building, and along the line Timber Structures of Canada have entered the picture submitting a design on a truss for approval by the Navy, would you kindly advise what relation, if any, is there between the above mentioned Companies; namely, Laminated Structures Limited and Timber Structures of Canada Ltd.

to which the appellant replied:

> You ask in your letter what is the connection between Timber Structures and ourselves, and I would like to point out that we are the distributors in Eastern Canada for Timber Structures of Canada Limited.

Within a few days of writing this letter, Mr. Millar of the appellant company telephoned to the Engineer-in-Charge of the Navy Defence Research Board and it is apparent that as a result of this call the Engineer-in-Charge despatched the following telegram to Central Mortgage and Housing Corporation at Halifax:

> RE GARAGE SHEARWATER JOB 1700 PLEASE REQUEST EASTERN WOODWORKERS TO PLACE ORDER WITH TIMBER STRUCTURES FOR STRUCTURAL WOOD FRAME COMPONENTS STOP ORDER TO BE CONTINGENT ON APPROVAL OF SHOP DRAWINGS BY DND STOP TIMBER STRUCTURES PREPARED TO PROCEED ON THIS BASIS

Instead of placing the order direct with Timber Structures of Canada Limited, the respondent telegraphed to the appellant as follows:

> INSTRUCTIONS RECEIVED TODAY FROM CM & HC HALIFAX RE MAINTENANCE AND STORAGE GARAGE SHEARWATER N.S. STOP THIS IS YOUR PERMISSION TO PLACE ORDER WITH TIMBER STRUCTURES FOR STRUCTURAL WOOD FRAME COMPONENTS ORDER TO BE CONTINGENT ON APPROVAL OF SHOP DRAWING BY DND STOP OUR FIRM ORDER FOLLOWING.

The firm order followed on March 29 and it was acknowledged by the appellant on March 31. The Timber Structures of Canada Limited plans for the frame building were finally approved by the Navy in December 1952, but the building was not completed and accepted by the Crown engineers until January 20, 1954, and eleven days later the collapse occurred.

As Doull J. has said in the course of his reasons for judgment in this case:

> There is ample authority for the proposition that the liability of a contractor for the supplying of material and the erection of a structure is no less than that of a vendor under the Sale of Goods Act.

The relevant provision of the Nova Scotia *Sale of Goods Act*, R.S.N.S. 1954, c. 256, s. 16(*a*) reads as follows:

> 16. Subject to this Act, and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:
>
> (*a*) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for such purpose; . . . .

The leading sale of goods cases dealing with the topic of reliance by buyers upon the skill and judgment of the sellers have recently been the subject of a comprehensive review by Martland J., speaking on behalf of this Court in *Hayes, Trustee of Preload Co. of Canada Ltd. v. City of Regina*[1], where the decisions in *Manchester Liners, Ltd. v. Rea, Ltd.*[2], *Medway Oil & Storage Co. v. Silica Gel Corporation*[3], and *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.*[4] are all fully discussed.

In *Medway Oil & Storage Co. v. Silica Gel Corporation, supra,* Lord Sumner pointed out at p. 196 that although the warranty of fitness is an implied one, it is still contractual, and he went on to say:

> . . . just as a seller may refuse to contract except on the terms of an express exclusion of it, so he cannot be supposed to assent to the liability, which it involves, unless the buyer's reliance on him, on which it rests, is shewn and shewn to him. The Tribunal must decide whether the circumstances brought to his knowledge shewed this to him as a reasonable man or not, but there must be evidence to bring it home to his mind, before the case for the warranty can be launched against him.

It is, however, now established that if the special purpose for which the goods are required is disclosed to the seller, this circumstance alone may raise the presumption that the

[1] [1959] S.C.R. 801 at 820 *et seq.*, 20 D.L.R. (2d) 586.
[2] [1922] 2 A.C. 74, 91 L.J.K.B. 504.
[3] (1928), 33 Com. Cas. 195.
[4] [1934] A.C. 402, 103 L.J.K.B. 289.

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buyer is relying on the skill and judgment of the seller. As was said by Martland J. in the *Preload Co. of Canada Ltd.* case, *supra,* at p. 820:

> *Manchester Liners Ltd. v. Rea Ltd.* . . . held that, if goods are ordered for a special purpose and that purpose is disclosed to the vendor so that, in accepting the contract, he undertakes to supply goods which are suitable for the object required, such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment. The mere disclosure of the purpose may amount to sufficient evidence of reliance on the skill and judgment of the seller.

The same proposition was recently restated by Diplock J. in *Mash and Murrell, Ltd. v. Joseph I. Emanuel, Ltd.*[1], where he said:

> Counsel for the plaintiffs, in those circumstances, relied on the well-known case of Manchester Liners, Ltd. v. Rea, Ltd. which he says, I think rightly, establishes the proposition that if the particular purpose is made known by the buyer to the seller, then, unless there is something in effect to rebut the presumption, that in itself is sufficient to raise the presumption that the buyer relies on the skill and judgment of the seller;

Mr. McInnes, in the course of his most forceful argument on behalf of the appellant, contended that the appellant's role in supplying the laminated wood trusses was simply that of a selling agent for Timber Structures of Canada Limited and that the evidence in support of this contention was such as to rebut any presumption of reliance which might otherwise arise out of the knowledge on the appellant's part that the laminated wood frame was being ordered for the purpose of the erection of the structure required by the Crown. Going back to the beginning of the matter, Mr. McInnes pointed out, *inter alia,* that there was a strong probability that the change in the original specifications so as to include laminated wood frame as an alternative to steel was expressly made for the benefit of Timber Structures of Canada Limited, that the changed design of the trusses was discussed and determined by the Crown authorities directly with the representative of Timber Structures of Canada Limited, that on the eve of the granting of the respondent's order to the appellant there was a firm request from a Crown agency specifying Timber Structures of Canada Limited as the supplier, and that on March 27, 1952, the respondent disclosed its understanding of the matter

[1] [1961] 1 All E.R. 485 at 489.

when it said in the concluding paragraph of its letter to the Regional Construction Engineer of Central Mortgage and Housing Corporation:

> We placed an order for the structural frame on the above building with Timber Structures of Canada, today, (through the Montreal Office—Laminated Structures Ltd.) as per your wire of this date.

In support of this argument, great reliance was placed on the last sentence of the following paragraph which appears in Halsbury's Laws of England, 3rd ed., vol. 3 at p. 435:

> A person who contracts to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them unless the circumstances of the contract are such as to exclude any such warranty. The contractor, however, cannot be held responsible for the quality of materials or work chosen or directed by the employer or his architect, or in any case where the employer does not rely on the contractor's skill and judgment, as when the employer chooses to supersede the contractor's judgment by using his own.

In applying this statement to the present circumstances, Mr. McInnes contended that laminated wood trusses as constructed by Timber Structures of Canada Limited were the materials chosen by the Crown authorities and, therefore, by the respondent for incorporation in the roof structure of the building in question and that the appellant was in effect directed to obtain these materials.

By way of illustrating the proposition stated in Halsbury's Laws of England, *supra,* reference was made to the judgment of Mr. Justice DuParcq in *Myers & Co. v. Brent Cross Service Co.*[1], where he said at p. 55:

> I think that the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty.
>
> There may be circumstances which would clearly exclude it. A man goes to a repairer and says: "Repair my car; get the parts from the makers of the car and fit them". In such a case, it is made plain that the person ordering the repairs is not relying upon any warranty except that the parts used will be parts ordered and obtained from the makers.
>
> On the other hand, Mr. Wynn Werninck says that it has been, or it can be established, that expressly or impliedly the Defendants were instructed to get parts from the makers, or their recognized agents, and to use those parts, not using their own skill and judgment in the matter at all. If that be so, then I think those facts did afford a Defence, because they did negative any warranty.

In assessing the degree to which these statements of the law can be said to govern the facts in the present case, it is to be remembered that the existence of the warranty of

[1] [1934] 1 K.B. 46, 103 L.J.K.B. 123.

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fitness is not dependent upon exclusive reliance being placed in the seller's skill and judgment, but that it is sufficient if the reliance be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity.

Although there are many factors indicating that the Crown authorities depended on the advice of representatives of Timber Structures of Canada Limited, it nevertheless seems to me that the position adopted by the appellant at the very inception of its association with the respondent invited reliance upon its skill and judgment, and that the subsequent events disclosed by the evidence did not have the effect of materially changing this position. It is to be remembered that when tenders were called for this contract the respondent was totally unfamiliar with glued laminated wood trusses and had never heard of the respondent or of Timber Structures of Canada Limited. On December 13, before it tendered on the contract, it received the appellant's telegram introducing itself as one whose "glued laminated wood trusses had been approved as Alternate B in the specifications" and that the very next day the appellant wrote to the respondent, saying in part: "We will quote on the suply of . . . the *necessary* Glued Laminated Timflat Trusses and the *necessary* purlins." (The italics are mine.) To me the inference is inescapable that the appellant was holding itself out to the respondent as the possessor of the skill and judgment required to determine what was *necessary* in this regard for the purposes of the contract in question, and it is noteworthy that more than a year later, in March 1952, after the respondent had been requested by Central Mortgage and Housing Corporation to place the order with Timber Structures of Canada Limited it still was only prepared to pass this request on to the appellant in the form of the granting of "permission to place order with Timber Structures".

Although it may well be that the sequence of events which includes the bankruptcy of Timber Structures of Canada Limited has placed the appellant in a position which it had never intended to assume, I am nevertheless unable to find sufficient evidence to rebut the presumption of reliance on its skill and judgment arising from the circumstances.

The unanimous opinion of all the judges in both courts below is that the respondent relied on the skill and judgment of the appellant and that there were no circumstances such as to exclude the condition as to fitness which is implied by law. There was abundant evidence to support the finding that there was a breach of such condition. This, therefore, seems to me to be a case to which the following language employed by Martland J. in the *Preload Co. of Canada Ltd.* case, *supra,* can well be adapted. He there said at p. 822:

> The question of the buyer's reliance on the seller's skill or judgment, . . . is, as stated by Lord Sumner in the *Medway* case, a question of fact. That question of fact has been decided by the Courts below in favour of the City. In my view there was ample evidence on which to base such a finding and I think that a preponderance of evidence justifies the conclusion which has been reached.

I do not base my conclusion solely on any implication of reliance which may arise from the contract itself, but, like Mr. Justice MacDonald in the Court below, I prefer to base it on a wider ground, and I am content to adopt the language employed by him in the penultimate paragraph of his reasons for judgment where he says:

> I should prefer, however, to base my conclusion on the wider ground that having regard to the circumstances affecting the parties and the course of the negotiations leading to the contract, there is a clear preponderance of evidence to support the finding of the trial judge that Eastern disclosed to Laminated the purpose for which the wooden frame and component parts were required (namely, to support the roof of the garage and maintenance shed at Shearwater under such ordinary conditions as those which obtained when it collapsed); that it effectively disclosed to Laminated such reliance upon it; and that the cause of the collapse was within the area of that reliance. It is equally clear to me that neither the requirement of conformity to the plans and specifications nor the presence of Timber Structures "in the picture" as the probable, and, as it turned out, actual maker of the materials, operated to exclude such reliance or furnish proof that the reliance was placed on the latter Company and not upon Laminated.

In view of the above conclusions, I do not find it necessary to deal with the argument presented on behalf of the respondent in support of the contention that the appellant was liable in tort.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Donald McInnes, Halifax.

Solicitor for the defendant, respondent: H. P. MacKeen, Halifax.