HIS MAJESTY THE KING (RESPONDENT). APPELLANT;

AND

ROGER MILLER & SONS LIMITED (CLAIMANT) ..... RESPONDENT.

1929
*Nov. 15.

1930
*Feb. 4.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Contract—Interpretation—Construction of harbour works for the Crown —Dispute as to amount payable to contractor for rental of plant— Interest on delayed payments.

Respondent, under contract with the Crown, performed certain work in connection with harbour improvements. The contract provided for payment on a "cost plus" basis and also for rental, fixed at a percentage per annum on value of the plant (the units whereof, with value of each, were set out), to be paid to respondent "on plant used in the work * * * to be payable only when each individual piece of plant commences operation and to cease when determined by the Engineer." It was agreed that "no rental on any unit of plant shall exceed [said percentage] and rental charged for plant

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

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used for a lesser time than the full rental season in any year shall be calculated in the proportion that the days the plant be retained or used bear to the full rental season of 150 days." At the commencement of a season's work the Crown's engineer would instruct respondent to put on the work the plant that he considered necessary, and that plant, with few exceptions, remained on the work and was employed constantly or intermittently throughout the season. The dispute was as to whether units which became unnecessary for substantial periods during the season should be struck off the rental sheet while idle.

Held: Having regard to the nature of the work and the nature of the plant required, the proper construction of the contract was that respondent was entitled to rental for all the plant while it remained on the work, notwithstanding idleness of some units as aforesaid, until the engineer determined that some unit or units were no longer required on the work and released them. (Judgment of Maclean J., [1929] Ex. C.R. 136, on this point affirmed.)

Held, also, that respondent was not entitled to interest on delayed payments (claimed on the ground that by reason of delay in payment respondent had to borrow at interest, and such interest should be included as part of the cost of the work); it was merely a case of moneys due respondent being withheld beyond due dates, in which case the Crown is not liable for interest except under special circumstances such as existence of statutory provision or contractual obligation. (Judgment of Maclean J., *supra,* in so far as he allowed interest, reversed.)

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), upon a reference to that Court under s. 37 of the *Exchequer Court Act.*

The claimant (the present respondent) entered into a contract with His Majesty the King, represented by the Minister of Public Works of Canada, for the construction and completion of certain public works in the harbour at Toronto. The claimant was to furnish the labour, material, tools, machinery, equipment, facilities and supplies necessary for the completion of the work, and was to be paid the net cost plus 7½% thereof, and, in addition, a rental for machinery or plant described in the contract, at certain stipulated rates. The present appeal was taken against the allowance to the claimant, by the judgment of the Exchequer Court, of a sum of $47,298.21 for rental of plant in excess of what the Crown claimed to be the proper amount, and of a sum of $10,937.71 for interest on payments delayed, the claim to this interest being based upon

(1) [1929] Ex. C.R. 136.

the ground that the claimant, by reason of the delays in payment, had to borrow money at interest, and that such interest should be included as part of the cost of the work.

The appeal was dismissed as to the rental item of $47,298.21, but allowed as to the interest item of $10,937.71.

M. H. Ludwig K.C. for the appellant.

A. C. McMaster K.C. for the respondent.

The judgment of the court was delivered by

SMITH J.—The respondents entered into a contract with the Department of Public Works on the 10th of March, 1919, to do certain work in connection with Toronto Harbour improvements, and to furnish the labour, materials, machinery, equipment facilities and supplies necessary for the completion of the work, for which they were to be paid the net cost plus 7½%, in addition to a rental for machinery or plant described in the contract, at the rates therein stipulated.

The respondents proceeded with the work in 1919 under the directions of the Department Engineer, pursuant to the contract, but at the beginning of the following season the Department commenced negotiations to secure better terms of contract with the respondents, and in the meantime suspended operations. These negotiations resulted in a new contract, dated 12th August, 1920, under which the work proceeded, and which provided that respondents were to be paid as therein provided, both for the work already done and for the work to be done, so that the terms of the original contract are not material to the matters in question here.

The main dispute is as to an item of $47,298.21 allowed the respondents by the learned trial judge for rental of plant in excess of what the appellant claims to be the proper amount. The agreement of 12th August, 1920, has the following provisions in reference to rental of plant:

(c) Rental, to be paid to the Contractor on plant used in the work as hereinafter provided; said rental to be payable only when each individual piece of plant commences operation and to cease when determined by the Engineer on the following basis, namely:—

Twenty per cent. per annum on the value of the plant as set forth in the schedule attached hereto and forming part of this contract in respect of all work performed in the year 1919, and 15 per cent. per annum on said

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valuation after necessary additions, deductions or other amendments in respect of all work performed thereafter under this contract.

* * * * *

The payment for rental of plant shall be calculated on the basis of 150 days of elapsed time in each calendar year.

No rental on any unit of plant shall exceed 20% of the value for 1919, or 15% for the years or portions of years following, and rental charged for plant used for a lesser time than the full rental season in any year shall be calculated in the proportion that the days the plant be retained or used bear to the full rental season of 150 days.

F. Hands, the Department engineer in charge of the work, says that his practice was at the commencement of the season's work to instruct the contractors to put on the work the plant that he considered necessary for the operations, and that plant remained on the work, with few exceptions, continuously throughout the working season. This plant, he says, would all be employed constantly or intermittently throughout the season, and when a unit was put to work and then ceased to work for a month or so and then was put to work again, he did not strike it off the rental sheet, but when a unit became unnecessary for a substantial period during the season, he struck it off the rental sheet while idle. The amount of rental that the Department claims to be the correct amount is arrived at on this basis.

The respondents claim that they are entitled to rental for the full season for all the plant while it remained on the work until the engineer determined that some unit or units were no longer required on the work, and released them, so that respondents would be entitled to take them away and employ them elsewhere, and that until the engineer so determined, the plant was "retained" by the Department within the meaning of the terms of the contract quoted above.

Having regard to the nature of the work to be done and its requirements as to plant described in the contract, the respondents' interpretation of the meaning of the language used in the clauses quoted above seems to be correct.

Units of the plant described, such as dredges with their attendant tugs and scows, derrick scows with air compressor and electric plant, diving scow with air compressor equipment and electric light plant, concrete mixer with boiler, sand and gravel bins, travelling derricks, pile drivers, etc., could not with any degree of practicability be

moved about for short periods from this particular work to some other similar work and then brought back again when required. The words of the contract, "cease when determined by the Engineer on the following basis, namely," and "the plant be retained or used," employed in connection with such an undertaking and the plant to be used in carrying it out are significant of what was intended. The plant that remained on the work throughout was kept there because it was required for the undertaking, and was therefore "retained," and the engineer accordingly did not "determine" that it should be released so that rental should cease. A time did arrive when certain small units, such as motor boats, were not further required, and the engineer as to these did "determine" that rental as to them should cease, and released them, so that they were no longer "retained or used," and rental for them ceased.

Nothing seems to turn on the fact that the part of the plant closed in by the coffer-dam was idle during the first part of the season of 1920. This plant was placed there in 1919, and worked there in that season under the contract. The Department chose to suspend work while negotiating for better terms, but did not "abandon the work and cancel the contract," as provided by one of its terms. The respondents were not at liberty to remove their plant, because they were under contract to supply this plant, and they might have been required at any moment to proceed with the work.

As to the determination of the contract, dated 10th March, 1919, authorized by the Order in Council of 17th February, 1919, there need be no misunderstanding. The Government, by the provisions of the 12th clause, reserved the right, if deemed advisable or necessary, to "abandon the work and terminate the contract." There is an Order in Council of 18th March, 1920, which provides,

> That the contract with Messrs. Roger Miller and Sons, Limited, for the execution of works in the Harbour of Toronto, as authorized by Order in Council of February 17, 1919, be cancelled.

And, in the appellant's factum, it is stated that, "By Order in Council dated 18 March, 1920, the said contract with the respondents was cancelled" (meaning thereby the contract of 10th March 1919). This Order in Council, however, so far from providing for the abandonment of the

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work, expressly provides for its continuance, under a new contract to be made with the respondents, which was accordingly entered into on the 12th day of August, 1920.

In the new contract it is recited:

> It has been found expedient and has been mutually agreed by and between the respective parties hereto that the said contract shall be cancelled and superseded by a new contract in relation to the said works.

and this recital is followed by a mutual release and discharge of the contract; but it is, however, provided, at the foot of the 8th clause, that

> The release clause of this contract shall not operate to release the party hereto of the second part from payment of any sum or sums of money due under the contract for partial performance of the same computed under the terms and conditions of the released contract and modified by this agreement.

By the statement of defence,

> The respondent says that by *the said contract, dated the twelfth day of August, 1920,* the said contract, dated the tenth day of March, 1919, was cancelled.

At the opening of the case, however, we were informed by the appellant's counsel that the *contract had not been cancelled.* It seems clear that the Order in Council of 18th March, 1920, could not effectively cancel the existing contract, as clause 12 authorizes such cancellation only on the abandonment of the work, whereas the Order in Council expressly provides for continuance of the work by the respondents. Moreover, there is no evidence that the respondents had any notice of this Order in Council prior to the execution of the new contract. The appellant cannot therefore base any claim for reduction of rental on the alleged cancellation of the contract.

The contention of the appellant as to the basis on which rental of the plant is to be calculated is not therefore well founded, because there was no "determination" by the engineer that rental claimed should cease, and because the plant for which the rental is claimed was "retained." It is conceded that in the event of the contract being construed as indicated above, the item of $47,298.21 was correctly allowed. The appeal as to this is therefore dismissed.

The only other amount in question here is the item of $10,937.71 allowed by the learned trial judge to the respondents for interest on moneys not paid to the respondents at the times stipulated in the contract. The total sum claimed by the respondents for interest was $28,700.16,

of which $17,762.45 was allowed and paid by the appellant, voluntarily as appellant claims.

It was argued that the interest claimed should be treated as part of the cost of the work, and therefore is payable under the terms of the contract, but this argument seems quite unsound. It is a mere case of moneys becoming due to respondents at certain times and being withheld beyond the due dates, in which case the Crown is not liable to pay interest during default except under special circumstances such as the existence of statutory provision or contractual obligation.

The appeal therefore as to this item is allowed.

The appellant, having been obliged to appeal in order to get relief from the judgment for the latter item, would ordinarily be entitled to the costs of the appeal. Of the two items involved in the appeal, the one for $47,298.21 was much the larger and as to this, the appellant fails. A considerable portion of the costs is attributable to that item, and there will therefore be no costs of the appeal.

Appeal allowed in part.

Solicitors for the appellant: *Ludwig, Shuyler & Fisher.*

Solicitors for the respondent: *McMaster, Montgomery, Fleury & Company.*