FIDELE MONDOR AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM A. WILLITS AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1923
*Feb. 12.
*May 1.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Contract—Pulpwood—Agreement by employer for re-sale—Knowledge of contractor—Measure of damages—Monies retained until completion.*

W. entered into a contract to supply a paper company with 3,000 to 5,000 cords of pulpwood at eight dollars per cord with permission to continue cutting on the same terms up to a specific date. W. had previously made a contract with M. who agreed to deliver 4,000 cords to be cut on the limits of the Paper Co. at six dollars. M. was informed of the first-mentioned contract though not of all its terms. At the end of the season M. was more than 1,400 cords short of the quantity he agreed to deliver.

*Held* affirming the judgment of the Court of Appeal (32 Man. R. 383) that as no default by W. was proved he is entitled to recover from M. damages for non-performance by the latter of his contract to deliver 4,000 cords and the measure of those damages is the profit he would have made under his contract with the paper company.

*Held* also, Brodeur J. dissenting, that W. can recover the drawback from the price of the wood actually delivered withheld by the paper company because of failure to deliver the whole 3,000 cords contracted for.

APPEAL from a decision of the Court of Appeal for Manitoba (1), reversing the judgment at the trial in favour of the plaintiffs.

The material facts are stated in the above head-note.

*Holland* for the appellants.

*Hudson K.C.* for the respondents.

THE CHIEF JUSTICE.—At the close of the argument in this case I entertained a great deal of doubt and have since then given the judgments below and the evidence much consideration. I am unable to reach the conclusion that the judgments appealed from are so clearly wrong that the appeal should be allowed. Although I still entertain some doubts, I would concur in dismissing the appeal with costs.

DUFF J.—The appeal should be dismissed. I concur with the judgment of Mr. Justice Cameron and have very little indeed to add to it.

*PRESENT:—Sir Louis Davies C.J. and Duff, Anglin, Brodeur and Mignault JJ.

(1) 32 Man. R. 383.

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It is made clear, I think, to a demonstration that the appellants realized that they were taking a subcontract from the respondent to " cut, haul and deliver " pulpwood from the timber concessions of the Dryden Paper Mill which the respondents as principal contractors had already contracted to, or were about to contract to " cut, haul and deliver " for the Dryden Paper Mill. The Court of Appeal rightly took the view that in these circumstances the appellants must have realized that failure on their part to perform their subcontract would probably involve the respondents in consequential disadvantages by way of penalties or liability to pay damages for breach of their contract as well as occasioning loss of profits whatever the amount of them might be which they would naturally expect to arise from the performance of their contract. It seems rather naive to appeal to a court of justice to act upon the assumption that the appellants believed the respondents to have undertaken responsibility towards the Dryden Paper Mill in respect of the cut of this pulpwood gratuitously with no expectation of making a profit.

The responsibility of the appellants for the damages claimed seems to follow very clearly. If authority be needed it will be found in *Cory* v. *Thames Iron Works Co.* (1).

ANGLIN J.—The appellants failed to satisfy me that they had made out a case entitling them to damages from the defendants for breach of an undertaking to furnish assistance in carrying out their contract. The clause on which they relied is far from being definite; the construction of the word " otherwise " in it is by no means certain; whether it covered the procuring of men for the lumber camps I regard as at least debatable. But, if it did, the evidence of refusal or neglect by the defendants to render such assistance as could reasonably be expected from them is not at all convincing. The appeal on this branch of the case in my opinion cannot succeed.

The question raised as to the measure of damages on the counterclaim requires more consideration. Two items of damage have been allowed, $2 per cord profit lost to

(1) [1868] L.R. 3 Q.B. 181.

defendants on 1,405.6 cords of pulpwood which the plaintiffs failed to deliver at C.P.R. Spur Mile 24.4 for the Dryden Paper Company, Limited, as contracted for, and twenty cents per cord on 2,594.4 cords of pulpwood so delivered by the plaintiffs. For pulpwood—not less than 3,000 cords and up to 5,000—to be delivered to the Dryden Paper Company, Limited, at the spur, the defendants were entitled under their contract with it to receive $8 per cord, and they were to pay to the plaintiffs for pulpwood so delivered by them as subcontractors $6 per cord, the latter having agreed to take out and deliver at C.P.R. Spur Mile 24.4 for the Dryden Paper Company on the defendants' account 4,000 cords. Each of the contracts contained a provision in these terms:

> Payment will be made on the 15th of each month for all wood thus received before the first of the month. Ten per cent of the value of the wood received will be retained by the parties of the first part until this contract has been completed.

Twenty cents per cord was the difference in the drawbacks under these stipulations in the respective contracts.

The case appears to have been treated in the Manitoba courts as one of breach of contract for the sale and delivery of goods. With great respect, the contracts were rather for work and labour to be performed. The limits from which, and from which only, the pulpwood was to be cut belonged to the Dryden Paper Company. That company was providing for the cutting of pulpwood—its property—on its own limits, and for the transfer of it, when cut, to cars on which it would be taken to its mills. The defendants having contracted to perform these services employed the plaintiffs to do the work for them.

The evidence leaves no room for doubt that the plaintiffs knew that they were subcontractors for the defendants and that the defendants would make a profit on the work they undertook to do. It is also, I think, a fair inference that they were aware that, except in regard to the price to be paid, the defendants' contract with the Dryden Company was in terms similar to those in their own subcontract, including the provision for drawback. Contracts and subcontracts in terms identical, except as to price, are such a common feature of the timber-cutting industry in Canada

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that it is reasonable to infer that knowledge of the fact that they were subcontractors carried to the plaintiffs the information that, except as to price, the terms of the defendants' contract with the Dryden Paper Company were the same as the terms which they had accepted.

On that basis the plaintiffs are, in my opinion, liable to the defendants for whatever loss they, as reasonable men, should have expected the latter would sustain as a result of their failure to cut and deliver a substantial part of the 4,000 cords of pulpwood for which they had contracted. The loss of profit of $2 per cord on 1,405 cords not delivered, clearly was of that character. In that respect, while the case is one of breach of contract for services to be rendered, I agree that the measure of damages is similar to that for breach of contract for the sale and delivery of goods not procurable in the market (*Borries* v. *Hutchinson* (1) ), where a resale had been communicated to the original vendor when he made his contract.

*Elbinger Actien-Gesellchaft* v. *Armstrong* (2), and *Grébert-Borgnis* v. *Nugent* (3), cited by Mr. Justice Cameron, seem to shew that knowledge by the plaintiffs of the existence of the principal contract with the defendants, though its precise provisions as to price and drawback had not been communicated, would suffice to support the claim for damages based on loss of profits and of drawback which could not be recovered. As in the case of goods not procurable in the market, the respondents could earn the money payable under their contract with the Paper Company only by delivering the very pulpwood they had contracted to cut and deliver. They could not require the Dryden Paper Company to take any other pulpwood in substitution therefor; neither was that company obliged upon non-delivery to go into the market for other pulpwood in order to mitigate any damages for which the defendants might be liable to it. Its only obligation was to accept and pay for the delivery of its own pulpwood cut on its own limits.

The plaintiffs, however, contest their liability to compensate the defendants for the drawback withheld from

(1) [1865] 18 C.B. N.S. 445. (2) [1874] L.R. 9 Q.B. 473.
(3) [1885] 15 Q.B.D. 85.

them by the Dryden Paper Company asserting that, under the terms of its contract with the defendants, that company is not entitled to keep such retention money. They contend that this money was held by the Paper Company merely as a guarantee fund to protect it against damages by reason of the non-fulfilment of the defendants' contract, and that only to the extent to which such damages can be established is it entitled to withhold payment of that fund from the defendants. No evidence of damages sustained by the Dryden Paper Company having been given, the plaintiffs maintain that, for aught that is shewn to the contrary, the defendants could recover the whole sum retained and that they (the plaintiffs) are therefore not chargeable with any part of it.

I respectfully agree with the view taken by the majority of the learned judges of the Manitoba Court of Appeal that on a proper construction of the clause of the contract between the Dryden Paper Company and the defendants, which has been quoted above, payment of the ten per cent withheld could be enforced by the latter only on the complete performance of its contract to deliver at least 3,000 cords of pulpwood. The contract does not provide merely for retention money to serve as a fund to be drawn upon either to complete the contractors' work left unfinished, or to compensate for damages occasioned by their default. Completion of the contract is, I think, made a condition precedent to any right on the part of the contractors to receive the ten per cent retained. The contractors must fulfil that condition before they are entitled to any part of that sum. The contract in effect was that, if at least 3,000 cords of pulpwood should be delivered, the price payable to the defendants should be $8.00 per cord; if only part of that quantity should be delivered, the price should be $7.20 per cord. Such was the bargain the parties chose to make, and it was competent for them to make it. I see nothing in the contract to warrant treating the eighty cents a cord withheld as merely a guarantee fund against possible loss to the Dryden Company—nothing to entitle the defendants to payment of any part of the money so retained until the condition under which the Dryden Company had agreed to

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pay it, viz., completion of delivery to it of 3,000 cords of pulpwood—had been fulfilled.

The defendants have voluntarily given the plaintiffs credit for the ten per cent drawback likewise retained by them under the corresponding provision of their contract with the plaintiffs. We are not called upon to express an opinion upon the question whether they were obliged to do so.

The appeal, in my opinion, fails.

BRODEUR J.—This case turns mostly upon the amount of damages to which the respondents would be entitled.

The facts having a bearing on the issue are the following:—

In the fall of 1920, the respondent Willits entered into negotiations with the Dryden Paper Company and he offered to cut, during the ensuing winter 2,000 to 4,000 cords of pulpwood on the timber limits of the company, at a price of $8 per cord. The company would not at first accept his offer unless he would make it 4,000 cords. But Willets having declared that he did not feel in a position to cut such a large quantity his offer was accepted and it was agreed that a formal contract would be prepared and signed.

On the 23rd of December, the contract was signed and by it Willits agreed specifically to cut and deliver 3,000 cords before the end of the logging season, with a proviso that he could deliver a larger quantity. It was stipulated that the payment would be made each month for the quantity then delivered and that 10 per cent should be retained by the company until completion of the contract.

At the same time Willits was negotiating with the appellants, Mondor et al., and induced them to enter into an independent contract with him to cut and deliver 4,000 cords of the same pulpwood, at $6 per cord, on the Dryden Paper limits. The appellants were made aware that Willits had a contract with the Dryden Company to cut pulpwood, but they were not informed as to its quantity, its price and its conditions.

Mondor and his associates went to work and did their best to carry out their contract and they cut 2,594 cords

in spite of the fact, as found by the trial judge, that the snow in the forest, while of sufficient depth, was soft and wet, that their workmen could not be induced to remain long at their unpleasant task, that they had to work under adverse conditions, and that they did all they could to carry out the contract in full.

The appellants having sued Willits for a balance of $3,119.40 claimed to be due under their contract with him, the defendant Willits made a counter claim in damages for $2,811.20, representing a profit of $2 per cord on the cords not delivered, and for $518.80 representing the loss of the sum retained by the Dryden Company, being the 10 per cent above mentioned.

The counter claim was dismissed in the Superior Court but it was maintained in the Court of Appeal. Mr. Justice Prendergast dissented in the Court of Appeal as to the damages for retention money paid by Willits. I am disposed to agree with him.

Some other questions were discussed by the appellants which of course we have to consider.

It is contended first by the appellants that the respondents were bound to assist the appellants in the securing of men, and they rely in that respect on the clause of the contract which stipulated that

every possible assistance will be given to the parties of the second part (Mondor, Coutur and Leonard) in locating roads, procuring and removing cars and otherwise to enable them to carry out the terms of this agreement.

It seems to me that the clause would not justify such a construction, though Willits in his evidence states that he was willing to assist the appellants in the procuring of axemen. But there is no doubt that Willits was bound to assist in the location of roads, and he has not proved that he has done anything to carry out this obligation. This work of locating the roads seems to have been done exclusively by the appellants. This failure on the part of the respondents to fulfil their obligation of giving assistance must have, however, a bearing on the amount of the damages claimed from the appellants for their own breach.

A question has been raised also by the appellants as to the quantity of pulpwood that Willits was bound to deliver to the Dryden Company. The quantity contracted for by

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Willits was 3,000 cords with an option to increase it. But in that regard I am led to inquire how it is that on the 23rd December Willits wanted to take a firm contract with the Dryden Company for 3,000 cords only, when ten days before he was inducing Mondor and his associates to deliver 4,000 cords. He had a great deal of experience with those contracts and he must have felt that a contract of four thousand cords could not be fulfilled during the time specified and that is the reason why he would not oblige himself to deliver that quantity to the Dryden Company, though he bound others less experienced.

This circumstance also should not be forgotten when we come to assess the damages for breach.

The measure of damages, as laid down in the leading case of *Hadley* v. *Baxendale* (1), should be such as may fairly and reasonably be considered either as arising naturally, according to the usual course of things, from a breach of contract or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach.

When Willits made his contract with Mondor et al., he should have disclosed to them (if he wanted to have the right to claim all the damages which he now claims) the whole nature and the extent of his own contract with the Dryden Company.

The fact that the appellants, Mondor et al, knew of the existence of the Dryden contract is not sufficient to withdraw the case from the application of the rule laid down in *Hadley* v. *Baxendale* (1). This special circumstance of a main contract with the Dryden Company is a fact of course which should be considered in assessing the damages, but it does not alter the rule that the damages which the party ought to receive in respect of the breach should be such as may be fairly and reasonably considered or may reasonably be supposed to have been in the contemplation of both parties at the time they made their contract.

We have no right to assume in assessing the damages that a profit as large as two dollars per cord was in the contemplation of both parties. It looks to me pretty

(1) 9 Ex. 341.

evident that Mondor et al would not have made this contract if they had been apprised by Willits of the price he was going to receive. We should then consider what would be a reasonable assessment of damages in these circumstances.

The court below has given the full profits which Willits would have made not only on 3,000 cords but on 4,000 cords; and besides they have granted the damages which the Dryden Company claimed from Willits.

I hesitate a great deal in confirming the part of this judgment concerning the profits Willits was to make, because he should have disclosed his exorbitant profit.

Halsbury, vol. 10, page 315, no. 581, says:

> If a buyer or consignee has at the date of the contract entered into a subcontract, its terms, so far as they affect the principal contract, are special circumstances of which notice must be given in order that damages may be recovered in respect thereof. In order to fix the seller or carrier who has delayed or refused delivery with liability for damages incurred by the buyer or consignee by reason of his inability to fulfil the subsidiary contract, it is not enough that it is made known that the goods are intended for resale, neither, on the other hand, is it necessary that the terms of the subcontract should be completely disclosed. Liability is incurred in respect of so much of the terms of the subcontract as is communicated.

I cannot concur however in the judgment below concerning the damages which Willits had to pay to the Dryden Company for retention money, and I rely in that respect on *Borries* v. *Hutchinson* (1) decided in 1865, which presents facts almost similar to this case. The defendant Hutchison had contracted to sell to Borries a commodity not ordinarily procurable on the market. At the time of entering into the contract Hutchison was aware that Borries was purchasing this commodity for a foreign correspondent. Later on he learned that the goods were designed for St. Petersburg and had been sold at an advanced price. The goods were not delivered at the time stipulated to the St. Petersburg merchant. It was conceded that Borries was entitled to recover the profit which he would have made on the transaction and that he could also recover the excess of freight and insurance resulting from a rise in the freight rates between the time of the contract and the time of the delivery; but the court held that

(1) 18 C.B.N.S. 445.

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the original vendor was not chargeable with the damages that Borries had paid to his purchaser, these damages being too remote.

Applying the principle of the decision to the present case, I say that it may be conceded, though with a great deal of doubt, that Willits is entitled to his loss of profit of $2 per cord but that he could not be entitled to recover the damages which he paid to the Dryden Paper Co.

I am fortified in this conclusion by the fact that Willits himself was to help in the locating of the roads and that he has done nothing to fulfil this obligation and also by the fact that he induced the appellants to contract for 4,000 cords of wood when he knew himself that they were unable to cut as much and when he would not himself contract with the Dryden Company for such a quantity.

The damages to which the respondents are entitled on their counterclaim are $2,811.20 being $2 per cord on the quantity not delivered. They have already in their hands a sum of $1,556.64 of retention money. The latter should be deducted from the $2,811.20.

The appeal should be allowed with costs and the judgment on the counter claim should be reduced to $1,254.56.

MIGNAULT J.—Had the appellants fulfilled their contract with the respondents to cut, haul and deliver 4,000 cords of pulpwood at $6 per cord, the respondent—who had contracted to cut, haul and deliver at least 3,000 cords, and had received permission to increase this amount to 5,000 cords, as found by the trial judge and the Court of Appeal, for the Dryden Paper Company, Limited, at $8 per cord—would have made a profit of $2 per cord, or in all $8,000. The appellants cut and delivered only 2,594.4 cords, leaving a deficiency of 1,405.6 cords. They sue the respondents for the April and last deliveries, to wit 532 cords (comprised in the 2,594.4 cords) at $6 per cord, deducting however 10 per cent (or sixty cents per cord) under the following clause of their contract.

> Payments will be made on the 15th of each month for all wood thus received before the first of the month. Ten per cent of the value of the wood received will be retained by the parties of the first part (the respondents) until this contract has been completed.

The respondents admit that this amount is due, but by their counterclaim demand $3,330 for loss of profits and other damages. Their contract with the Dryden company had an identical clause as to the retention of ten per cent (or eighty cents per cord) from payments until completion of the contract, and the amount of their counterclaim is calculated as follows:—

| | |
|---|---|
| Loss of profits on the deficiency of 1405.6 cords..... | $2,811 20 |
| Loss of 20 cents per cord, being the difference between 80 cents retained by the Dryden Co. and 60 cents retained by the respondents, on the quantity delivered, 2594.4 cords.... | 518 80 |
| Total ..... | $3,330 00 |

The counterclaim alone is in question on this appeal.

I will test the respondents' claim against the appellants by another mode of calculation.

| | | |
|---|---|---|
| Total profit had the appellants' contract been fulfilled ..... | | $8,000 00 |
| Cr. | | |
| Received from the Dryden Company on the portion of the price representing the respondents' profit of $2 per cord, after deduction of 80 cents per cord, on the quantity delivered, 2,594.4 cords, to wit: $1.20 per cord..... | $3,113 28 | |
| Retained from the appellants and also deducted by the latter in their claim for the 532 cords unpaid, 60 cents per cord, on 2,594.4 cords..... | 1,556 64 | 4,669 92 |
| Net loss of profits..... | | $3,330 08 |

There is a difference of eight cents between this net loss of profits and the respondents' figures, which is explained by the fact that the respondents neglected the decimal 4 in calculating the 20 cents per cord on the quantity delivered, 2,594.4 cords.

The learned trial judge stated that a settlement in full was made between the respondents and the Dryden Company on the basis of the retention by the latter of the 80 cents per cord deducted by it under the clause of its con-

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tract to which I have referred. Not having completed their contract I cannot see how the respondents could have recovered this retention money from the Dryden Company and I look on it as a loss occasioned by the breach of the appellants' contract. The appellants knew that the respondents had a contract for this wood with the Dryden Company and the retention clause is not an unusual clause in contracts of this kind.

I cannot appreciate for what reason Mr. Justice Prendergast, at the end of his dissenting judgment, stated that the respondents were allowed on their counterclaim $1,237.44 in addition to the $3,330 granted to them. In their factum, the appellants state that this is an error of the learned judge, and that the figure intended is $1,556.64 instead of $1,237.44, being the 60 cents per cord retained from the appellant on their contract price. The calculation I have made shews that this full amount is credited to the appellants and the $3,330.08 is the net balance.

In my opinion the contention of the appellants under the clause obliging the respondents to render them assistance is unfounded. This was the opinion of all the judges of the Court of Appeal.

The respondents occupy the rather fortunate position of middlemen who get their full profit on a contract the execution of which they had passed on to the appellants, while the latter were charged with the entire risk and must bear the whole loss incurred by reason of the non-fulfilment of this contract. The liability of the respondents towards the Dryden Company would have been fully discharged had the appellants delivered to the company 3,000 cords, the minimum quantity which the appellants contracted to cut for the latter, and then the only claim of the respondents would have been for loss of profits on 1,000 cords, which they had the privilege of cutting for the company, but which they had not bound themselves to deliver. The misfortune of the appellants is that they fell materially short of the minimum quantity which the Dryden Company was entitled to demand from the respondents, thus

giving the former the right to keep the retention money. And for this reason there is no escape from the conclusion that the respondents' counterclaim is well founded.

I would dismiss the appeal with costs.

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*Appeal dismissed with costs.*

Solicitors for the appellants: *Bonnar, Hollands & Philp.*
Solicitor for the respondents: *William Manahan.*