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*Oct. 18, 19.
*Nov. 21.

W. J. HOPGOOD & SON (DEFENDANTS) ..... APPELLANTS;

AND

AUSTIN J. FEENER (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Contract—Price for completion—Percentage—Payable as work progresses—Basis of computation—Security retained—Architect's certificate.

By a building contract the contractor was to be paid a specified amount for the whole work in instalments of eighty per cent of labour and materials delivered on the certificate of the architect.

Held, Mignault J. dissenting, that to make the twenty per cent retained by the owner a valid security for completion of the work, the architect, in certifying the eighty per cent due, should base his estimate on the proportion that the value of the work done bears to the cost of the entire undertaking.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment at the trial in favour of the respondent.

The only question to be determined on the appeal is the basis on which the respondent should be paid under the clause in the contract set out in the head-note. The trial judge held the view stated in the head-note. The full court decided that it should be 80 per cent of the actual value of the work done.

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*PRESENT:—Idington, Duff, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

W. C. Macdonald for the appellant. In *Hawkins* v. *Burrill* (1), where a contractor was to be paid 80 per cent of the "value of the work done," it was held that this value was not the cost to the contractor but that of the partial work measured by the total price. See also 3 Hals. Laws of England, page 213; *Fidelity Co.* v. *Agnew* (2).

Burchell K. C. for the respondent referred to Emden on Building Contracts (4 ed.) page 112; *Société Génerale* v. *Milders* (3).

IDINGTON J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia reversing a judgment of the learned trial judge in an action brought by respondent upon a building contract against the appellants seeking to recover for work and material, and damages for dismissal terminating the contract.

The contract provided for payment by the appellant of $13,875.00 for the entire work and material

in instalments * * * of eighty per cent of labour and materials delivered on the certificate of the architects.

When the respondent contractor had realized that he had undertaken the work at too low a price and could not induce the architects to give him progress certificates for the eighty per cent on his own basis of what was due him, he wrote letters to the appellant and the architects clearly declaring that unless the architects yielded to his wishes the work would cease.

There were negotiations and a fruitless proposal for arbitration designed to override the architects' certificate and decision as to what was due, all of which fails to touch the vital points in question herein.

(1) [1902] 69 N.Y. App. Div. 462. (2) [1907] 152 Fed. R. 955.
(3) [1883] 49 L. T. 55.

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Then the architects gave appellants under article 5 of the contract which reads as follows;

Art. 5. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty after *three* days' written notice to the contractor, to provide any such labour or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereof, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties;

a certificate which reads as follows:—

Halifax, N.S., August 21st, 1919.

W. J. Hopgood & Sons,
Halifax.

Dear Sirs:—In accordance with article 5, of signed contract, dated 20th May, 1919, between Austin J. Feener, contractor and yourselves, we hereby certify that the aforesaid contractor has stopped the work and nothing has been done on the building since Saturday last noon.

We further certify that such neglect and failure of the contractor is sufficient ground for you to terminate the employment of the contractor and to proceed as provided in article 5, of the contract.

Yours truly,

(Sgd.) Harris & Horton.

Thereupon the appellant pursuant thereto and in literal compliance therewith wrote the respondent as follows:—

Halifax, N.S., August 22nd, 1919.

To Austin J. Feener, Esq.,
Halifax, N.S.

Sir:—We beg to enclose herewith copy of certificate of Messrs. Harris & Horton, under article five, of the contract between us, dated May 20th, 1919.

Please take notice that you having stopped the work under said contract and nothing having been done on the building since Saturday noon last, we hereby terminate your employment for the said work and will, on Wednesday morning next, August 27th, 1919, enter upon the said premises and take possession for the purpose of completing the work comprehended under said contract, of all materials, tools and appliances therefor and will employ other person or persons to finish the work and to provide the materials therefor, and we hold you responsible for the excess of the expense incurred by us therefor over the unpaid balance of the contract price, and will also hold you responsible for any damage incurred through your default.

Yours truly,

W. J. Hopgood & Son.

Pursuant thereto appellants after the expiration of the time specified therein and in due accordance with the terms of the contract as expressed in said article five thereof, proceeded to finish the work in question on a basis of paying therefor the cost of labour and materials plus ten per cent.

The work cost them in all over twenty thousand dollars instead of the contract price.

The respondent on the day following the date and delivery of appellants' letter issued the writ commencing this action and pursued it despite all the foregoing circumstances.

I am unable to understand the process of reasoning by which it is sought to overrule the absolute discretion of the architects as to the progress certificate

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upon which alone appellants were bound to pay and the respondent was to become entitled to recover payments unless and until the work had been duly completed.

The contention that the alleged cost of labour and materials incurred by the respondent instead of the value thereof having regard to the total price is to be paid therefor by appellants, certainly is in conflict with the express language above quoted from the written contract and with the following provision which therein followed that,

> All payments shall be made upon written certificates of the architects to the effect that such payments have become due.

And in article 10 of the contract there is an express provision that no such certificate

> shall be conclusive evidence of the performance of the contract either wholly or in part.

This provision is evidently designed to protect the appellants against possible errors af the architects in making progress certificates and enable the architects to correct any such when coming to give the final certificates.

I think the appeal should be allowed with costs here and in the court of appeal below and the judgment of the learned trial judge be restored.

DUFF J.—I concur in the view of the contract taken by the learned trial judge. "Labour and materials" means in this context, in my judgment, the value of the labour and materials as represented by the work done, which value, of course, must be ascertained by reference to the standard furnished by the contract price. That is a perfectly reasonable

construction of the language and it gives also reasonable effect to the intention of the parties as disclosed by the contract as a whole. The evidence seems to establish quite conclusively that the respondent found himself in a position in which he considered he was unable to proceed with the work in the absence of some readjustment of the terms. This he made known to the appellants. It is quite true that the respondent desired to go on with the contract but conditionally upon some readjustment of its terms resulting in an arrangement more favourable to himself. There was, I think, a perfectly clear declaration by him that otherwise he could not and would not carry out his agreement.

In these circumstances the respondent cannot successfully allege either that he completed his contract or that he was ready and willing to complete it but that he was prevented from doing so by the appellant. As the learned trial judge says, the essential averment that he was ready and willing to perform his contract is an allegation which is negatived by the evidence. See *Forrestt* v. *Aramayo* (1), at page 338.

ANGLIN J.—I am with great respect of the opinion that the construction put upon the contract between the parties to this action by the learned trial judge was correct and that his judgment dismissing the plaintiff's action was therefore right and should be restored.

Read literally and taken by itself, the clause,

> eighty per cent of labour and materials delivered on the certificates of the architects.

(1) [1900] 83 L. T. 335.

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might support the plaintiff's contention—that is if the architects' certificate should not be regarded as indispensable. But the contract also contains a stipulation for a twenty per cent draw-back payable only 33 days after completion of the work. Now the obvious purpose of inserting this latter provision was to afford reasonable security to the owner for the completion of the work by the contractor as well as to protect him against liens for wages and materials. Having regard to that purpose, the proper construction of such a provision in my opinion is that twenty per cent of the proportion of the contract price earned shall be withheld from time to time as progress payments are made. Otherwise the owner would have no security whatever should the contractor become insolvent or make default during the progress of the work. The two clauses, one for the protection of the contractor, the other for that of the owner, must be read together. The object of the court in construing a contract must be to ascertain and give effect to the intention of the parties gathered from the contract as a whole—not from the consideration of a single provision divorced from its context.

It is conceded that the clause providing for payment of eighty per cent of labour and materials is subject to the later clause providing for the twenty per cent drawback, to the extent that if at any time the payments made for the value of labour and materials should amount to eighty per cent of the whole contract price the contractor would not be entitled to receive any further payment until 33 days had expired after the completion of the work. It might be that with only fifty per cent or even less of the total work completed the actual value of labour and materials furnished would amount to eighty per cent of the

contract price. According to the plaintiff's contention he would then be entitled to be paid such eighty per cent, leaving only twenty per cent of the total price in the owner's hands to secure the completion of the remaining fifty per cent or more of the work. I cannot think that a construction which would lead to such a result can be correct. It does not give to the draw-back clause the effect it was intended to have.

In my opinion the interpretation put upon the contract by the architects was sound and the contractor's right to be paid from time to time eighty per cent of labour and materials furnished was subject to the restriction that a sum equal to twenty per cent of the value of the work done and materials on the ground estimated in proportion to the contract price for the completed work should from time to time be retained by the owner as drawback. In other words, the contractor's right was not to receive on progress certificates eighty per cent of the absolute value of the labour and materials furnished but of the relative or proportionate value thereof estimated on the basis of the contract price representing the total value of the completed work. Fair effect—and I am convinced the effect intended—is thus given to both the eighty per cent and the twenty per cent provisions.

The plaintiff stopped work and practically refused to proceed further unless his interpretation of the contract should be accepted. The architects certified to the owner that there had been such neglect and failure of the contractor as warranted the termination of the contract under article 5. The defendant was thereupon entitled forthwith to terminate the plaintiff's employment. As I read the contract the three days' notice clause applicable to an earlier provision for delay in the work does not apply to this case.

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On this ground and also on the ground that the plaintiff had abandoned the work and sufficiently intimated his purpose to repudiate the contract to warrant the defendant in treating it as at an end I think the action was rightly dismissed at the trial.

In the absence of any evidence of fraud or collusion with the defendant on the part of the architects the failure of the plaintiff to produce their certificate for the sum which he claims was due him by the owner presents a formidable obstacle to his success.

The appeal should be allowed with costs in this court and in the court en banc and the judgment of the learned trial judge restored.

MIGNAULT J. (dissenting).—The principal question here turns on the construction of clause 9 of the contract whereby the respondent undertook certain construction and repair work for the appellants for the sum of $13,875.00. A difference arose between the parties owing to the refusal of the architect to grant progress estimates for an amount equivalent to eighty per cent of the labour and materials furnished by the respondent, so that the latter was deprived, during the progress of the work, of the payments to which he claimed he was entitled. The respondent having notified the appellants that he would not continue his work unless he received the amount due according to the agreement, the appellants put an end to his contract. This action was brought by the respondent for the value of his work and for damages.

The material portion of clause 9 reads as follows:—

Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be $13,875.00 (thirteen thousand eight hundred and seventy-five dollars), subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the owner to the contractor in instalments, as follows:—

Eighty per cent of labour and materials delivered on the certificate of the architects.

First payment on the value of labour amounting to five hundred dollars.

Other payments fortnightly as the work progresses.

Twenty per cent of full amount of contract to be paid as herein provided.

The final payment shall be made within thirty-three days after this contract is fulfilled.

All payments shall be made upon written certificates of the architects to the effect that such payments have become due.

The construction which the architect placed on the clause was that the payments during the work were not to be of eighty per cent of the actual value of labour and materials, but, inasmuch as the contractor had undertaken the work for too low a price, the eighty per cent was to be determined with reference to the portion of work executed as compared to what remained to be done. Thus if a quarter of the work contracted for was performed up to a certain date, the payment was to be of eighty per cent of one-quarter of the contract price, and not eighty per cent of the actual value of the labour and materials.

I cannot agree with this construction which the learned trial judge adopted.

In plain English the contractor is entitled, as the work progresses, to instalments of eighty per cent of the labour and materials furnished. There is no reference here to the proportion between what is performed and what remains to be done. The contract provides that the first payment is to be made on the value of labour amounting to $500.00. This clearly refers to the actual value, and in my opinion the actual value of the work done, measured generally but not necessarily by the actual expenditure, is the basis on which the architect should have granted certificates for the fortnightly payments.

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It is true that the final instalment is to be twenty per cent of the full amount of the contract, and is payable within 33 days after completion of the work. And it is urged that, assuming the contract to be for too low a price, the contractor would receive eighty per cent of the contract price before eighty per cent of the work had been completed, and that therefore the owner's security for due performance would be gone, or would be limited to the twenty per cent retained for the final payment.

The only security which the contract provides is this twenty per cent and the owner remains fully entitled to it. The objection is one which the owner should have considered before making the contract, but certainly is no reason to refuse to give effect to the plain meaning of its language. If the appellants are right, where the contract price is too low, in claiming that the eighty per cent should be calculated on the proportion of the work done and not on the actual value of the labour and materials furnished then, when the contract price is too high, the eighty per cent would be estimated on a similar proportion, and might conceivably exceed the actual expenditure. I cannot place so forced a construction on the plain language of this contract, so I may simply say that finding myself in entire agreement with the reasoning of Mr. Justice Russell in the appellate court, I would dismiss the appeal with costs.

CASSELS J.—I am of the opinion that this appeal should be allowed and the judgment of the trial judge, Mr. Justice Mellish, restored.

I agree entirely with the reasons of the learned trial judge. He has dealt fully with the facts of the case and it is unnecessary to repeat them. If the con-

tention of the respondent be correct, the protection of the owners in having 20 per cent held back as security would be wiped out before half of the work was performed. The contractor might have received the whole contract price and if dishonest (not that there is any suggestion of dishonesty on the part of the present contractor) or from pecuniary troubles be unable to finish the work the owner would lose his 20 per cent drawback. I also am of opinion that a certificate of the architect was a condition precedent to the contractor being entitled to payment. There is no allegation of fraud nor proof thereof entitling the contractor to have the architect disqualified.

Appeal allowed with costs.

Solicitor for the appellant: *L. A. Lovett.*

Solicitor for the respondent: *C. J. Burchell.*