

CANADA / JUDGMENT

Calgary (City) v. Janse-Mitchell Construction Co.

(1919) 59 SCR 101

COURT

Supreme Court of Canada

DECIDED

17 June 1919

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Collection

Supreme Court Judgments

Date

1919-06-17

Report

(1919) 59 SCR 101

Judges

Idington, John; Duff, Lyman Poore; Anglin, Francis Alexander; Brodeur, Louis-Philippe; Mignault, Pierre-Basile

On appeal from

Alberta

Subjects

Contract

Decision Content

Supreme Court of Canada

Calgary (City) v. Janse-Mitchell Construction Co. , (1919) 59 S.C.R. 101

Date: 1919-06-17

The City of Calgary (Defendant) Appellant;

and

Janse-Mitchell Construction Company (Plaintiff) Respondent

1919: May 14; 1919: June 17.

Present:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Contract—Construction of sewer—Delay in completion—Sum payable per day after contract's date of completion—Waiver—Penalty or liquidated damages—"Extra work." The respondent contracted to construct for the appellant a sewer to be 12,000 feet long and to complete it by the first of July, 1912. The contract provided that the appellant's engineer might "at any time while the works are in hand, increase, alter, change or diminish the dimensions * * * or vary the form of dimensions of any part of the said work" (clause 7); and that "in the event of delay to the works" for certain reasons, including "extra work," "such additional time as may be deemed fair and reasonable shall be allowed by the" appellant if notified in writing by the respondent: (clause 11). By clause 12, it was also provided that "the time of beginning, rate of progress and time of completion are essential conditions of this contract; and if the contractor shall fail to complete the work by the time specified, the sum of twenty-five dollars per day, for each and every day thereafter as liquidated damages, together with all sums which the corporation may be liable to pay during such delays until such completion, shall be deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final. This sum shall be in addition to any penalties otherwise specified, and shall be paid by the contractor to the corporation, or deducted from any moneys due to the contractor in the event of a failure to complete said work as herein agreed, and in no event as a penalty, but to the full amount thereof, and in addition to any other damages sustained, or the amount may be recovered from the sureties." Clause 13 provided that "any extra work, changes," etc., should not "lengthen the delay within which the works were to be completed" and "shall be considered as if originally in (the) contract." The appellant, a few days after the contract was signed, authorized the construction of 700 additional feet of sewer. On the first of July, 1912, the appellant notified the respondent that two months' extra time would be allowed for the completion of the work. The engineer's certificates as to the amounts due to the respondent were calculated, even after the first of September, 1912, without making any deductions for delay. On the 12th of January, 1914, when the engineer delivered a "final" certificate establishing as the date of the completion of the works the 21st of December, 1913, the appellant retained in its possession 20% of the contract price.

Held, Idington and Anglin JJ. dissenting, that, under the circumstances of this case, the conduct of the appellant and its engineer constitutes a waiver of the provisions making time the essence of the contract and of the clause fixing damages for delay in completion.

Per Idington, Duff and Anglin JJ.—The sums payable under clause 12 must be regarded as liquidated damages, and not as a penalty. Mignault J. contra.

Per Mignault J.—The retention by the appellant of 20% of the contract price could not be construed to cover the \$25 per day for delay in completion. Anglin J. contra.

Judgment of the Appellate Division (14 Alta. L.R. 214; 45 D.L.R. 124; [1919] 1 W.W.R. 142), affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta[1], affirming, the Court being equally divided, the judgment of the trial judge, Ives J., in which he gave judgment for the plaintiff for \$9,288.10 as the balance due on contract and dismissed the defendant's counterclaim for liquidated damages.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur K.C. and Marcus for the appellant.

W. N. Tilley K.C. and H. P. O. Savary for the respondent.

IDINGTON J. (dissenting).—I am of the opinion that the provisions in the contract in question for liquidated damages falls as such well within the rules laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co.*[2], at pp. 89 et seq., for testing whether the sum named is to be treated as a penalty or, as the express language of the contract designates it, as liquidated damages.

In the very nature of the things the parties were contracting about, it seems to me most appropriate that they should contemplate the loss to the appellant by a daily deprivation of the use of that which was being contracted for; and none the less so when in all probability there would have been paid by it ere the time for the clause in question becoming operative, the substantial part of the cost price of the work and hence intend to anticipate and decide what would be reasonable damages. Having regard to the sum involved and paid and the result of the deprivation of the use of the work, the daily payment fixed does not seem so harsh or extravagant as to suggest a mere penalty was only being considered.

The case of *Jones v. St. Johns College*[3], seems to answer the objection in law relative to the construction of the instrument involved in the provisions for extra work as an excuse for relief.

And as a matter of fair dealing I think the engineer's allowance of time in that regard covers the ground, and I suspect was in fact intended to be in conformity with the expectation implied in the contract though not literally observing its terms.

And in the same sense I think the view of the learned Chief Justice below, as to the final estimate of the engineer being taken as substantial completion, should be adopted.

I fail to find any ground of waiver on which respondents should be permitted to rest. I think the appeal should be allowed and judgment go in the manner the learned Chief Justice and Mr. Justice Stuart in the court below indicated, and with costs of appeal here and below.

DUFF J.—The appeal turns in my judgment upon the construction and application of articles 11 and 12 of the contract. These articles are in the following terms:

11. If the engineer or corporation should at any time be of the opinion that the work is unreasonably or unnecessarily delayed, or that the contractor is not on his part fulfilling this contract, or that the force employed is not sufficient to complete the work within the time herein provided; the said engineer shall thereupon require said contractor to proceed within such delay as may be mentioned in the notice with such force as he shall direct, and in case of his refusal or neglect to comply with such requirements, or if at the expiration of the time specified for the completion of the works embraced in this contract, such works are not fully completed, the said corporation may put on sufficient force as it may see fit or take possession of and complete said work at the expense of said contractor, as herein provided in case of failure or insolvency, and all money paid by the corporation in such case shall be deemed payment made on account of this contract. But in the event of delay to the works by reason of strikes or combinations on the part of the workmen employed, or by extra work, or by any act or omission of the corporation, such additional time as may be deemed fair and reasonable shall be allowed by the corporation: provided that the contractor notify the engineer in writing within 24 hours of the cause of such delay otherwise he shall have no claim.
12. The time of beginning, rate of progress and time of completion are essential conditions of this contract; and if the contractor shall fail to complete the work by the time specified, the sum of twenty-five dollars per day, for each and every day thereafter as liquidated damages, together with all sums which the corporation may be liable to pay during such delays until such completion, shall be deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final. This sum shall be in addition to any penalties otherwise specified, and shall be paid by the contractor to the corporation, or deducted from any moneys due to the contractor in the event of failure to complete said work as herein agreed, and in no event as a penalty, but to the full amount thereof, and in addition to any other damages sustained, or the amount may be recovered from the sureties.

The sums payable under article twelve must, I think, be regarded as liquidated damages, and not as a penalty.

The judgment of Lord Dunedin in *Commissioner of Public Works v. Hills*[4], at p. 375, furnishes the appropriate test. The question is, can the sums mentioned be considered as a genuine pre-estimate of the creditor's probable or possible interest in the performance of the contract? If so, it is immaterial that the parties may be reasonably supposed to have relied upon the clause as an "instrument of restraint." As Lord Robertson pointed out in the *Clydebank Engineering Co. v. Ramos*[5], at pp. 19 & 20, the intention that such agreements shall so take effect in some degree may always be assumed to be present. That is nevertheless of no importance unless you come to the conclusion, to use Lord Halsbury's phrase in the same case, "that the parties only intended" the agreement "as something in terrorem."

I have no doubt that this article must be construed as a genuine appraisal of the value of a real interest of the municipality in the performance of the contractor's principal obligation.

Article twelve contemplates the deduction of the penalties as the primary method of recovery. It does not differ materially in this respect from the article construed by the Exchequer Chamber in *Laidlaw v. Hastings Pier Co.*[6], at pp. 15 and 16, in which it was provided that the penalty was to be paid to and retained by the company as ascertained and liquidated damages.

The provision for drawback does not, I think, materially affect this point.

The power to extend time was given to the engineer, and the granting of certificates by him, from time to time, subsequent to the date fixed for completion, without deduction for penalties, was treated as overwhelming evidence of the intention to exercise this power. Here the power is given to the municipality. But article eleven does more than vest in the municipality the power to extend the time, it creates in the cases specified in article eleven an obligation to do so if the contractor shall reasonably be entitled to demand it.

In the case before us, certificates were granted by the engineer, without deduction, and paid by the municipality, without deduction. Coupled with the circumstance that the municipality had taken possession, and with the correspondence, these facts constitute, I think, sufficient ground for requiring us to draw the inference that the time for completion was extended until the date when the works were substantially completed by the contractor in July, 1913.

ANGLIN J. (dissenting).—The facts of this case, so far as material, may be found in the opinions delivered by the learned judges of the Appellate Division[7].

Several questions are presented on this appeal—

(1) Whether a provision of the 12th clause of the contract that

if the contractor shall fail to complete the work by the time specified, a sum of twenty-five dollars per day for each and every day thereafter as liquidated damages * * * shall be deducted from the money payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final,

should be regarded as a contractual pre-ascertainment of damages for delay or as in the nature of a penalty; (2) Whether by directing an extension of the sewer for 700 feet at its lower end, from which the work was to begin, the city waived the provision of the contract making time of its essence and thus rendered the clause fixing the amount of damages for delay inapplicable;

(3) Whether certificates given by the city engineer for amounts payable to the contractor, and particularly his certificate of the 12th of January, 1914, marked "final," in which no deduction was made for damages for delay in completion, preclude the city from claiming such damages;

- (4) Did the city by making partial use of lower portions of the sewer as constructed waive the provision for damages for delay in completion of the entire work?
- (5) If damages at the rate stipulated are recoverable, for what period should they be allowed?

The date fixed by the contract for completion was the first of July, 1912. The additional 700 feet of sewer (the original length was 12,000 feet, for the construction of which the contract allowed eleven months), was authorized by the engineer a few days after the contract was signed and before actual work upon it was begun. The contract expressly provided that the engineer might at any time while the works are in hand, increase, alter, change or diminish the dimensions * * * or vary the form of the dimensions of any part of the said work

(clause 7), and that extra work, changes, alterations, increases or diminutions should not lengthen the delay within which the works were to be completed but must themselves also be completed by the 1st of July, 1912, as if originally in the contract (clause 13). I agree with the learned Chief Justice of Alberta that this latter provision distinguishes the case at bar from *Dodd v. Churton*[8], at p. 567, relied on by the learned trial judge and the two learned appellate judges who affirmed his judgment, and brings it within the authority of *Jones v. St. Johns College*[9].

The works were "in hand" from the moment when the contract was executed. It stipulated that they should be commenced immediately. The contract further provided that should the works be delayed by extra work, if the contractor should advise the engineer of such delay and its cause, the corporation should allow such additional time for completion as might be deemed fair and reasonable (clause 11).

If, as I incline to think and as all parties seem to have treated it, the addition of the 700 feet was "extra work" within the meaning of the foregoing provisions, no notice of delay thereby occasioned or of its cause was given by the contractor. Nevertheless, the city engineer, either proprio motu or by direction of the municipal corporation, by letter of the 1st of July, 1912, formally notified the contractor that two months' extra time would be allowed it for the completion of the work on account of the extra 700 feet. I think the city may fairly be held bound by this act of its official and that the time for completion should therefore as against it be regarded as having been extended to the 1st of September, 1912. Not having taken advantage of the provision in its favour made by clause 11, the contractor cannot complain that it has not been allowed for delay entailed by extra work. But, if it could, the allowance of two months for 700 feet additional seems eminently reasonable in view of the fact that the time for construction of the 12,000 feet originally contracted for was eleven months. I agree with Harvey C.J. that the city engineer's estimate of the 12th of January, 1914, certifying to work done up to the 31st of December, 1913, and marked "final" should also be taken to establish that the works were completed on that date so that the contractor's default should be computed as from the 1st of September, 1912, to the 31st of December, 1913, or 487 days in all. There is no evidence in my opinion that would justify a finding that the works had been completed at an earlier date. Moreover, under clause 4 of the contract it was the function of the engineer to determine all questions as to its execution and his decision is made

final and conclusive and unimpeachable for any cause.

If, on the other hand, the additional 700 feet was not "extra work" which the contract allowed the engineer to direct, but should be regarded as an independent undertaking upon which the contractor was at liberty to enter or not as it might elect, its doing so did not affect its rights or obligations under the existing contract and would not entitle it to an extension of time for its completion.

Connecting with lateral sewers as sections of the trunk sewer were finished was quite a usual course and must from the first have been contemplated by the parties to the contract. Such partial user of the trunk sewer as these connections entailed would not involve the waiver of the provision fixing damages for non-completion of the entire work.

The engineer's certificates of amounts due the contractor calculated without making any deductions for delay at first blush present a little difficulty. But when it is borne in mind that the city retained a drawback too of 20%, amounting to \$36,489.22 on the final estimate of the 12th of January, 1914, that difficulty largely disappears. It was, no doubt, intended by the engineer that any damages the city should be entitled to for delay in completion and other matters should be taken from the sum so withheld on the final adjustment of accounts with the contractor. The omission of a deduction for delay from the certificates therefore does not imply any abandonment of the city's right to claim it or any judgment of the engineer adverse to such a claim. In his letter of the 31st of July, 1912, granting the contractor the two months' extension

on account of the extra 700 feet of sewer laid at the lower end and sundry unforeseen and unavoidable delays

the engineer expressly notified them that after September 1st

the penalty clause in your contract will be enforced,

adding

it would be to your advantage therefore to put on such extra force and appliances to ensure a speedy closing up of your contract.

The effect of this letter was to put matters in the same position as if the date originally fixed for completion of the works had been the 1st of September, 1912, instead of the 1st of July, 1912. The contract conferred power on the corporation to make this change and it was exercised by its officer. From time to time we find letters to the contractor complaining of delay and urging, the employment of more men—a night shift—more rapid progress. But no further extension of time was ever granted and I fail to find in the correspondence and certificates or in the conduct of the corporation and its engineer a waiver of the provisions making time of the essence or of the clause fixing damages for delay in completion.

We had in the comparatively recent case of *Canadian General Electric Co. v. Canadian Rubber Co.* [10], to consider with some care when a clause providing for the payment of a fixed sum for each day's delay in completing a contract should be regarded as

a genuine covenanted pre-estimate of damage,

and when it should be deemed a penalty. The English authorities were there so fully discussed that further reference to them is scarcely necessary. The parties in the present instance have themselves designated the sum fixed as "liquidated damages;" it is payable on only one event, not on the occurrence of one, or more, or all of several events, some of which may occasion serious and others trifling damage: it is not extravagant or unconscionable under the rule indicated by Lord Davey in *Clydebank Engineering & Shipbuilding Co. v. Don Jose Ramos*[11], at p. 17, being in fact slightly less than the equivalent of interest on the contract price at 5%: there were no adequate means of ascertaining either before or after the default the damage attributable to the breach of the contract. All these tests of

a genuine covenanted pre-estimate of damage

indicated by Lord Dunedin in the *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*[12], at pp. 87-8, are present here. It is in such a case that the parties might be expected to have intended to contract that they should estimate the damages for default at a certain figure and thus dispense with the extremely difficult, if not impossible, proof of the actual damage to which delay in completion of the work would subject the municipal corporation.

A reported case resembling this in its nature and circumstances is *Law v. Local Board of Redditch*[13], where in default of completion by a specified date of sewerage works to cost £630 the contractor agreed to pay the sum of £100 and £5 for every seven days during which the work should be uncompleted after the date fixed as and for liquidated damages. It was held by the Court of Appeal that these sums were recoverable as liquidated damages.

On the whole case I think judgment should be entered as indicated in the opinion of the learned Chief Justice of Alberta, including the disposition of costs. The appellant is entitled to its costs of the appeal to this court.

BRODEUR J.—The question in this appeal is whether the appellant corporation is entitled to claim \$25.00 a day from the respondent company for delay in the construction of the sewer the latter undertook to build. The trial judge dismissed that claim and the judges of the Appellate Division being equally divided the decision of the trial judge stood confirmed.

It is not necessary for me to decide whether the clause upon which the corporation based its claim was a penalty clause or constituted liquidated damages, because I have come to the conclusion that this clause was waived.

By the contract the engineer of the corporation is the sole judge to determine the amounts of work to be paid and to decide all questions which may arise relative to the interpretation and execution of the contract; and his estimates, directions and decisions are final and unimpeachable for any cause.

Cash payments were to be made monthly on the written certificate of the engineer

apportioning same in accordance with the actual value of the work done in proportion to the contract as a whole.

The contract should have been completed on the 1st July, 1912: but an extension of two months was given by the engineer for some extra work. The engineer, from September, 1912, to October, 1913, gave very frequently progress estimates and in none of those estimates does he claim any damages for delay in the execution of the contract. It would have been however very easy to do that because a sum of \$25.00 a day had been stipulated for such delay; but for reasons which appealed, I suppose, to the sense of justice of the engineer he did not find it advisable that the contractor should pay that penalty.

Now that the work is completed and accepted by the municipal authorities, the corporation of Calgary claims, when they are sued for the payment of the balance due on the contract that a penalty exceeding \$12,000 should be paid.

It seems to me that the engineer had been satisfied that the work had been carried out properly or that the provision of the time limit had ceased to operate after the extension of the work. In that case, the city lost its right to demand the penalty or liquidated damages.

The appeal should be dismissed with costs.

MIGNAULT J.—The principal question here is whether the appellant is entitled to claim from the respondent the sum of \$25.00 a day for delay in completion of a sewer which the respondent contracted to build and built for the appellant. The contract allowed eleven months for its construction, and under clause 12 the appellant, when sued for the balance due the respondent, claimed the sum of \$28,125.00 for liquidated damages at the rate of \$25.00 per day from September 1st, 1912, to October 1st, 1915. The trial judge, Mr. Justice Ives, dismissed the appellant's counterclaim and allowed the respondent the sum of \$9,288.10. He also found as a fact that the work was completed on July 5th, 1913, while the date fixed by the contract for completion was July 1st, 1912, the appellant admitting that it cannot complain of any delay prior to September 1st, 1912; Both parties appealed from the judgment of the trial court, the appellant in order to get judgment on its counterclaim, the respondent because it was not satisfied with the rate of interest granted by the learned trial judge. In the Appellate Division, the learned judges were equally divided, so the judgment of the trial court stands unless it is interfered with by this court.

The first point to be considered is the nature of the right claimed by the appellant under clause 12 of the contract. Is it a penalty or liquidated damages? The learned trial judge held that it was a penalty, while Chief Justice Harvey and Mr. Justice Stuart were of the opinion that it was liquidated damages. Mr. Justice Beck (Mr. Justice Hyndman concurred with him but gave no reasons), held that the appellant had waived any right to this sum of \$25.00 per day and did not think it necessary to discuss the nature of the claim.

This, however, is the first point to be dealt with. I will cite clause 12 of the contract between the parties:

PENALTY.

12. The time of beginning, rate of progress and time of completion are essential conditions of this contract; and if the contractor shall fail to complete the work by the time specified, the sum of twenty-five dollars per day, for each and every day thereafter as liquidated damages, together with all sums which the corporation may be liable to pay during such delays until such completion, shall be deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final. This sum shall be in addition to any penalties otherwise specified, and shall be paid by the contractor to the corporation, or deducted from any moneys due to the contractor in the event of a failure to complete said work as herein agreed, and in no event as a penalty, but to the full amount thereof, and in addition to any other damages sustained, or the amount may be recovered from the sureties.

The language of this clause is not aptly chosen, and very likely it was modified or added to in the drafting. It obviously opens the door to two constructions. Apparently, but of course this is only a surmise, the parties, as the title shews, started out with the idea of providing for a penalty in case of delay in completion, and then it was thought better to make it a stipulation for liquidated damages. Possibly a doubt was felt whether some kind of damages should not be expressly provided for, so it was agreed that the sum of \$25.00 per day of delay should be paid

together with all sums which the corporation may be liable to pay during such delays until such completion.

So the "liquidated damages" do not include these sums, which obviously are damages caused by the delay to complete the works during the time prescribed.

Then the clause says that

this sum shall be paid in addition to any penalties otherwise specified * * * and in addition to any other damages sustained.

Viewing the whole clause and the portions to which I have specially referred, I cannot say that the learned trial judge was wrong in holding that this sum of \$25.00 per day was a penalty and not liquidated damages, and if this be so, *cadit questio*, for no proof of damages for delay has been made.

It appears further that this sum was to be

deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final.

As a matter of fact, the engineer gave a certificate which he marked "final" on January 12th, 1914, and in this certificate no deduction of the \$25.00 per day was made, and he certified that \$2,740.86 was then due the respondent. It is true that the certificate shewed that 20% of the contract price was held back, amounting to \$36,489.22, but this retention of 20% was governed by clause 20 of the contract, and its object was not to cover the \$25.00 per day for delay in completion: It was to be held back until 33 days after the completion of the works,

to pay thereout the claims of all persons who have done work or furnished material in execution of any part of this contract to or for the contractor.

After the 33 days, 15 per cent. was to be paid to the contractor, and the appellant was to keep 5% for twelve months to cover repairs or the cost of finishing work. It therefore cannot be said that the retention of the 20% on the certificate of January 12th, 1914, was a reservation of the right of the engineer to deduct the \$25.00 per day, the more so as the work, as found by the trial judge, had then been completed for more than six months.

Mr. Craig, the engineer, first claimed this penalty in an estimate dated November 30th, 1917, nearly four years after his final estimate of January 12th, 1914, and in his evidence says that he never rendered an account for the \$25.00 per day before that time. I cannot help thinking that the claim first made by the appellant on November 30th, 1917, was an afterthought, to defeat the right of the respondent to be paid the drawback, and it does not commend itself to my mind as coming within any rule of fair dealing between the parties to such a contract.

I may add that immediately after the contract, the appellant ordered the respondent to begin the sewer at a point 700 feet further away from the point determined in the contract for its starting point. Without stopping to enquire whether this was an extra. or an independent contract, it is obvious that this addition to the work changed all the time conditions of the contract. After this order of the appellant, I would think the parties were at large in so far as the penalty for delay in completion is concerned.

I would not interfere with the judgment of the learned trial judge as to the interest he allowed the respondent, that is to say five per cent. which is the legal rate.

In the result the appeal should in my opinion be dismissed with costs here and in the Appellate Division. The respondent should not have the costs of its cross-appeal to the latter court.

Appeal dismissed with costs.

[1] 14 Alta. L.R. 214; 45 D.L.R. 124; [1919] 1 W.W.R. 142.

[2] [1915] A.C. 79.

- [3] L.R. 6 Q.B. 115.
- [4] [1906] A.C. 368.
- [5] [1905] A.C. 6.
- [6] 2 Hudson on Building Contracts, 13.
- [7] 14 Alta. L.R. 214; 45 D.L.R. 124.
- [8] [1897] 1 Q.B. 562.
- [9] L.R. 6 Q.B. 115.
- [10] 52 Can. S.C.R. 349.
- [11] [1905] A.C. 6.
- [12] [1915] A.C. 79.
- [13] [1892] 1 Q.B. 127.
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