

CANADA / JUDGMENT

Desrosiers et al. v. Gauthier

[1978] 1 SCR 308

COURT

Supreme Court of Canada

DECIDED

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Desrosiers et al. v. Gauthier

Collection

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Date

1977-04-29

Report

[1978] 1 SCR 308

Judges

Laskin, Bora; Martland, Ronald; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Quebec

Subjects

Contract

Decision Content

Supreme Court of Canada

Desrosiers et al. v. Gauthier, [1978] 1 S.C.R. 308

Date: 1977-04-29

Marcel Desrosiers and Adélard Dufour (Plaintiffs) Appellants;

and

Jean-Marie Gauthier (Defendant)

and

Dame Gisèle Thibault (Defendant in continuance of suit) Respondents.

1977: February 2 and 3; 1977: April 29.

Present: Laskin C.J. and Martland, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Contracts—Contract of undertaking—Penal clause for delay in performance—Partial performance of work—Combination of offset damages and penalty under penal clause—Civil Code, arts. 1065, 1133.

Respondent (the contractor Gauthier) contracted with appellants (the owner) to build a race track for automobiles for a price of \$9,000. The contract of undertaking stipulated a penalty of \$100 for each day's delay in performing the contract. The contractor abandoned the work when he had completed only half of it, for which he had received \$4,500. The owner instituted proceedings to claim both the cost of the work required to complete the contract and the damages owing under the terms of the penal clause. The contractor brought a counterclaim for \$2,500 over and above the amount received for the work that he had already done. The Superior Court attributed the work stoppage to the contractor, ordered him to pay \$5,459.05, that is, the amount considered necessary to complete the work, and dismissed his counterclaim. However, it refused to award the damages stipulated in the penal clause on the grounds that when the contract was terminated, the penal clause was also terminated. The Court of Appeal affirmed the decision; hence the appeal to this Court.

Held: The appeal should be dismissed.

The appeal raises only one question: can the owner claim both the extra cost of the work remaining to be done and the penalty stipulated in the penal clause? If we adopt the position that appellants should have had the work completed if they wished to apply the penal clause, we should be giving a premium to contractors by encouraging them to abandon their contracts as soon as they realize that they will not be able to complete them within the time prescribed.

The penal clause involved in this case is directly related to the delay, and it is the second paragraph of art. 1133 C.C. which should be applied. In cases of failure of performance the creditor can obtain both performance, or the damages substituted for it, and the penalty stipulated for the delay. The practical problem when the work has not been performed is to calculate the number of days during which the penalty will be payable. It is then necessary to determine how long it will reasonably take to do it. The evidence on record leads us to conclude that in the case at bar the work could have been completed forty-five days after the deadline. The owner would therefore be entitled to damages of \$4,500 by reason of the penal clause.

Given the aforementioned conclusion, contractor-respondent should normally pay a further sum of \$4,500 to the owner. However, the trial judge, after assessing the cost of work at \$5,459.05, should have deducted from this sum the second instalment of the payment to which the owner would be entitled if he had completed the work, in other words \$4,500. The additional expense was in effect \$959.05, and the owner is entitled only to this sum. Since the latter receives \$4,500 more than he should under the judgment of the Superior Court, which is the same amount owing under the terms of the penalty clause, the Court sets off the excess amount and must dismiss the appeal.

Pottier c. Boissard, D. 1899. 1. 310, Soc des Ateliers Atlas c. Soc. L'Oyonnithé, Gaz. Pal. 1925. 2. 480, referred to.

APPEAL from a decision of the Court of Appeal of Quebec affirming a judgment of the Superior Court. Appeal dismissed.

René Boucher, for the appellants.

Jean Dionne, for the respondent.

The judgment of the Court was delivered by

DE GRANDPRÉ J.—On January 5, 1972, defendant-respondent (whom I shall call the contractor) contracted with plaintiffs-appellants (whom I shall call the owner) to build a race track for automobiles. The price agreed upon was \$9,000, the first half of which was payable when work commenced, and the second half when it had been completed. The contract was to be terminated on May 1, 1972, failing which (art. 13 of the agreement) [TRANSLATION] “a penalty of \$100.00 per day shall be payable by the contractor if the latter exceeds the deadline, namely May 1, 1972”.

Work began at the end of February. At the end of April the owner granted an extension of one month to complete it. At the beginning of May the contractor abandoned the work. At that time he had completed a portion that is difficult to determine, but certainly not more than half. The contractor's decision was caused, in his view, by the serious problems he was encountering in the performance of his contract, the ground being partly flooded. According to him, the necessary drainage work was the responsibility of the owner, and the latter was refusing to do it.

After putting the contractor in default, the owner instituted proceedings on July 21, 1972, asking the Court to find that the contractor had failed to perform his contract, and order him to pay the owner

- (a) the cost of the work required to complete the contract, namely \$66,343.50;
- (b) the damages owing under the terms of the penal clause, damages initially assessed at \$9,000 and increased to \$18,000 on the morning of the trial.

In reply, the contractor objected that the owner is solely responsible for the stoppage of the work in view of his failure to carry out the drainage work. He added that the work that had already been done at the time of his departure entitled him to a claim of \$2,500, over and above the sum of \$4,500 he admitted he had received.

The Superior Court

- (1) attributed the work stoppage to the contractor; it was his responsibility to take the necessary steps to carry out his contract;
- (2) fixed at \$5,459.05 what it would cost the owner to complete the work, and ordered the contractor to pay this sum;
- (3) dismissed the contractor's counterclaim. The Court of Appeal was in agreement with each of these findings.

The appeal raises only one question: can the owner claim both the extra cost of the work remaining to be done and the penalty stipulated in the penal clause? The Superior Court refused to award the damages stipulated in this clause for the following reasons:

[TRANSLATION] ...what is involved here is not a delay but an abandonment of the contract; in these circumstances it is impossible to apply this penal clause, since if it were applied plaintiffs could claim the penalty indefinitely, that is so long as defendant had not completed his contract; the Court is of the opinion that when the contract was terminated, all its clauses, including number thirteen (13), were also terminated; in these circumstances the Court's task is no longer to apply one or some of the clauses of the contract, but rather to determine what are the real damages suffered by plaintiffs as a result of the fact that defendant wrongfully terminated the contract in question.

Crête J.A., speaking for Casey J.A. also, adopted the opinion of the trial judge:

[TRANSLATION] Even if we accept the fact that respondent terminated his contract of undertaking unilaterally and without authority, the contract must then be treated as null and void, with the result that the delay in performing it could no longer come into question as such; otherwise, as the trial judge said, "plaintiffs could claim it [the penalty] indefinitely, that is so long as defendant had not completed his contract".

It seems to me that this situation is all the more unacceptable in that appellants have also claimed damages as a result of the failure to perform the contract. They have in effect taken the position that respondent's refusal to proceed with his work meant that the contract had been terminated and gave rise to their remedy of compensatory damages.

Montgomery J.A. came to the same conclusions for reasons he expressed as follows:

The facts are somewhat special. On Defendant's refusal to complete the work in accordance with his contract, the normal course for Plaintiffs to have followed would have been to have the work completed by another contractor as quickly as possible. They might then have recovered from

Defendant the difference between the cost of completing the work and the balance payable to Defendant under the contract, i.e. \$4,500.00. They might also have claimed \$100.00 a day for the period between 1st May, 1972, and the date of the actual completion, being liquidated damages for the delay in accordance with the penal clause in the contract.

...

As regards the penal clause, I agree with the trial judge and my colleague that, under the circumstances, it should not be enforced. This clause was not, in my opinion, intended to cover a situation where the completion of the work may be delayed indefinitely. See in this connection Art. 1020 of the Civil Code, which reads as follows:

However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.

If Plaintiffs desired to enforce the penalty clause, then it behooved them to take steps to have the work completed with the least possible delay in order to minimize the damages, and this they failed to do.

I cannot share this conclusion. In my opinion this would be giving a premium to contractors who have no professional ethics, by encouraging them to abandon their contracts as soon as they realize that they will not be able to complete them within the time prescribed. Moreover, I am not convinced that the owner is in a better position, if instead of having the work completed immediately, as Montgomery J.A. suggests, he simply takes action to claim the cost, as the owner did in the case at bar. It is true that the course of action decided upon by the owner in this case makes it more difficult to assess the damages; this difficulty does not, however, mean he is not entitled to them.

The penal clause involved in this case is directly related to the delay. It is therefore the second paragraph of art. 1133 C.C. which should be applied. To put it in context, I shall cite the entire article:

The creditor may enforce the performance of the primary obligation, if he elect so to do, instead of demanding the stipulated penalty.

But he cannot demand both, unless the penalty has been stipulated for a simple delay in the performance of the primary obligation. The entire section VI of c. 7, as well as art. 1065 C.C. must obviously be added to this provision. The law allows two types of penal clause: those providing for liquidated damages for failure of performance and those providing a penalty for a simple delay. In the first case the creditor must choose between performance and the penalty. In the second case such a choice is not imposed upon him; the creditor can obtain both performance, or the damages substituted for it, and the penalty stipulated for the delay. It should be noted that the second paragraph of art. 1133 C.C. is to the same effect as the second paragraph of art. 1229 of the French Code. As the codifiers noted at page 21 of the relevant report, the articles in section VI “make no departure from the rules established in the articles of the French Code, numbered from 1226 to 1233, except in the omission of the article 1229, declaring the penalty to be the

compensation for damages suffered from the inexecution of the obligation". The omission mentioned by the codifiers obviously refers only to the first paragraph of art. 1229. It is thus permissible when studying the question to rely on the French as much as on the Quebec authorities.

The principle that the effective performance of the principal obligation can be joined with an exacting of the penalty provided for delays (Jurisclasseur civil, arts. 1226-1233, No. 117) has not been seriously disputed. However, respondent submits that such joinder is not permitted where the actual performance is replaced by compensatory damages, as in the case at bar, and the Quebec courts agreed with him. I am not of this opinion. We are not dealing here with a case of complete failure of performance, a situation which the Cour de cassation has examined on several occasions, for example in *Soc. des Ateliers Atlas c. Soc. L'Oyonnithé*[1]. We therefore do not have to decide what our conclusion would be in that case.

In the case at bar, the contractor abandoned the work midway through, relatively soon before the end of the stipulated period. The parties had agreed on the construction of a race track for a specified date, so that it could be in operation during the summer months. On the date agreed upon the owner had received only half of his track, for which he had paid half the price. There is nothing to prevent the courts from awarding him damages for the extra cost of the work required to complete the project—\$5,459.05 instead of \$4,500—as well as the damages resulting from the delay, liquidated by the penal clause.

This plurality is accepted by Trudel in his *Droit civil* Vol. 7-bis under art. 1065, at p. 243, No. 351. After setting out the remedies available to the creditor, and after pointing out that the third of these remedies is rescission of the contract, the author writes:

[TRANSLATION] The creditor may join to each of the three remedies we have just discussed a claim for any damages he may have suffered by reason of the failure to perform the obligation, or by reason of any delay in the debtor's performance.

A major segment of French legal opinion is of this view, and I fall in with it readily. Thus Planiol and Ripert, *Droit civil*, Vol. VII, (2d) 1954, at p. 208, No. 875, write:

[TRANSLATION] The situation is different if the penalty was provided for the case of a simple delay. It can then be joined either to the actual performance, where the creditor finally obtains it belatedly, or to the damages, determined by the court or under the agreement, which are owing by reason of definitive failure of performance.

Demogue in fact observed in his *Traité des Obligations en général*, T. VI, Vol. 2, 1931, at p. 504, No. 471:

[TRANSLATION] It is also possible to obtain enforcement of the penal clause for delay and rescission for failure of performance with damages, since moratory and compensatory damages can be had together.

The same opinion is found in Mazeaud, *Responsabilité civile*, Vol. III, 5th ed., 1960, at p. 454, No. 2323:

[TRANSLATION] In cases of definitive failure of performance (total or partial), however, moratory damages can be awarded at the same time as compensatory damages. The person responsible is obliged to redress the injury from the moment he caused it, a redress which must be made in kind, or, failing that, in an equivalent. If the person responsible does not make redress immediately, the victim may suffer a further injury arising out of the delay in redressing the first injury; this second injury resulting from the delay will give rise to moratory damages, which will be awarded in addition to the compensatory damages owing by reason of the first injury.

See also Demolombe, *Cours de Droit civil*, Vol. 26, T. 3, 1880, at p. 577, No. 655; Marty-Raynaud, *Droit civil*, T. II, Vol. 1, 1962, at p. 591, No. 544; and the note on *Pottier v. Boissard*[2].

I therefore conclude that the owner can claim both the extra cost of the work remaining to be done and the penalty stipulated by the penal clause. As I said earlier, the practical problem in the case at bar is to calculate the number of days during which the sum of \$100 stipulated by the penal clause for each day of delay will be payable. Where the work has in fact been done, as Montgomery J.A. pointed out, the date on which the work was terminated makes it easy to calculate the liquidated damages. If, as in the case at bar, the work has not been performed, it is necessary to determine how long it will reasonably take to do it. Unfortunately we do not have the benefit of a complete record on the question, and we must find the ingredients of solution in a few bits of evidence. It seems to me that those ingredients are as follows:

- (1) since the deadline was extended from May 1 to June 1, 1972, the starting point for calculating the liquidated damages should be this latter date;
- (2) the contract provided for a performance period of approximately 110 days, and respondent said in his testimony that he thought he could complete the whole project in 45 days;
- (3) approximately half the work had been done when the contractor left the site at the beginning of May;
- (4) from this time the owner was in a position to give the work to someone else, and it can be assumed that it could have been completed sixty days later, in view of the trial judge's finding that this work could be done more easily during the cold season. From these facts, which once again are very incomplete and imprecise, it can be concluded that if the work had been commenced as soon as the contractor-respondent left, it could have been completed about mid-July, that is forty-five days after June 1. The owner would therefore be entitled to damages of \$4,500 by reason of the penal clause.

If it were not for the point I have yet to deal with, the appeal should be allowed and respondent ordered to pay a further sum of \$4,500 in addition to the sum mentioned in the judgment *a quo*. However, there is a set-off to be determined. As Montgomery J.A. pointed out, if the contractor-respondent had completed the work in accordance with the contract, he would have been

entitled to the second instalment of the payment, in other words to the sum of \$4,500. When the trial judge assessed the cost of the work to be done after May 1, 1972 at \$5,459.05, he was in essence concluding that the owner would incur, as a result of the contractor's default, an additional expense of \$959.05, or the difference between the cost of the work to be done by a second contractor (\$5,459.05) and the amount (\$4,500) the owner would have had to spend for the second part of the work if the contractor-respondent had fulfilled his obligations. By mistake, instead of awarding only this difference of \$959.05 the trial judge awarded the full amount of the work to be done, that is \$5,459.05. The net result is that under the judgment of the Superior Court the owner receives \$4,500 more than he should. No cross-appeal was brought, but this does not prevent us from setting the excess amount awarded by the Superior Court off against the amount owing under the terms of the penalty clause. Since these two amounts are equal, being \$4,500 each, I must conclude that the appeal should be dismissed.

In view of the very special circumstances of this case, each party should bear its own costs.

Appeal dismissed without costs.

Solicitors for the appellants: Desrosiers & Boucher, Sept-Îles, Quebec.

Solicitors for the respondent: Dionne, Gauthier & Lebel, Sept-Îles, Quebec.

[1] Gaz. Pal. 1925. 2. 480.

[2] D. 1899. 1. 310.

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