VIEWEGER CONSTRUCTION CO. LTD. (*Defendant*) ..... APPELLANT;

AND

RUSH & TOMPKINS CONSTRUCTION LTD. (*Plaintiff*) ..... RESPONDENT.

1964
*Nov. 4, 5
Dec. 21

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contracts—Agreement between subcontractors to undertake highway contract—Subsequent agreement of contractor with one of the subcontractors to perform the contract—Whether contractor entitled to enforce provisions of agreement betwen itself and one of the subcontractors as against the other subcontractor—Counterclaim for arrears of equipment rental—Claim for damages flowing from interim injunction preventing subcontractor removing machinery.

The plaintiff company, which was the successful tenderer for the construction of certain sections of a highway, had proposed an arrangement with another company L that when the tender was accepted the plaintiff would immediately assign the contract in whole to L. The plaintiff had advised L to obtain the services of someone who had knowledge of excavating through rock and who possessed the necessary equipment for that type of work. L made arrangements with the defendant company V and an agreement between them was executed on July 22, 1958. On the following day a copy of this agreement was delivered to the plaintiff's manager, and on July 28th the plaintiff entered into a contract with L. The job was commenced by L and V and some financial assistance required by the latter in connection with its equipment was given by the plaintiff. The work progressed badly and on April 1, 1959, L was to a large extent removed by the plaintiff from the operation of the contract; L formally abdicated its position under the contract on July 23rd.

*PRESENT: Cartwright, Judson, Ritchie, Hall and Spence JJ.

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Under an agreement made between a representative of the plaintiff and a representative of V, and later confirmed by a letter which the plaintiff wrote to V, the plaintiff used V's equipment through the working season of 1959 and certain rental payments were made. When these rentals fell into arrears, V threatened to remove its machinery. The plaintiff took the position that a partnership existed between V and L, which partnership was evidenced by the agreement between the two on July 22, 1958, and that, since such partnership existed, V was bound as was L by the provisions of the contract between the plaintiff and L and particularly by para. 12 thereof, which contained specific provisions in the event of default by the subcontractor.

Upon V insisting that it must be paid the equipment rentals or that it would remove its equipment, the plaintiff applied for and obtained an interim injunction preventing V from so doing. At trial, the judge dismissed the plaintiff's action and allowed the defendant's counterclaim, but refused to grant to the defendant any damages attributable to the interim injunction. On appeal, the Court of Appeal held that the plaintiff was entitled to the interim injunction and dismissed the defendant's counterclaim. The defendant appealed to this Court.

Held: The appeal should be allowed, the judgment in favour of the defendant upon the counterclaim restored, and a reference directed to determine the damages attributable to the interim injunction, such damages to be granted to the defendant.

It was unnecessary to determine whether or not V and L were partners. Even if one presumed that the relationship of these two companies was a partnership, it was abundantly clear that the plaintiff elected to deal with L alone. Having so elected the plaintiff now could not attempt to hold the defendant liable and require it to perform the contract of L even if it were a partner of L. *British Homes Assurance Corporation, Ltd. v. Paterson,* [1902] 2 Ch. 404, applied; *Calder v. Dobell* (1871), 6 C.P. 486; *Basma v. Weekes et al.,* [1950] A.C. 441, distinguished. Accordingly, the plaintiff was not entitled to enforce the provisions of para. 12 of the agreement between itself and L, as against V, and prevent V from removing its equipment either in April 1959, when L abandoned the contract, or later, when the plaintiff failed to pay the equipment rental.

The defendant was entitled to succeed on its counterclaim for the arrears of equipment rental which it alleged was owed to it by the plaintiff. The transaction between the defendant company and the plaintiff company was a contract for the payment of equipment rental at scheduled rates, the schedule being that set out in the agreement of July 22, 1958, between V and L.

With respect to the defendant's claim for damages flowing from the interim injunction, this was an ordinary case of an injunction granted upon a plaintiff's application and upon the plaintiff's undertaking to abide by any order which the Court might make as to damages, and the plaintiff should be required to make good its undertaking. Accordingly, an inquiry as to damages was granted. *Griffith v. Blake* (1884), 27 Ch. D. 474, approved.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], granting an appeal from

[1] (1964), 45 D.L.R. (2d) 122.

a judgment of Riley J. Appeal allowed, judgment of the Appellate Division set aside and judgment at trial varied.

R. A. McLennan and *T. C. Fraser,* for the defendant, appellant.

T. Mayson, for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta[1] pronounced on May 6, 1964, granting an appeal from the judgment pronounced after trial by Riley J. on June 24, 1963. In that judgment, the learned trial judge dismissed the action of the respondent Rush & Tompkins Construction Ltd. and allowed the appellant's, Vieweger Construction Ltd., counterclaim in the amount of $42,769.64, but refused to grant to the appellant any damages attributable to the interim injunction to which reference shall be made hereafter.

Rush & Tompkins Construction Ltd., hereinafter referred to as Rush & Tompkins, had acted as the financial backer of a company known as Layden Construction Ltd., and in some considerable number of cases had submitted tenders under its own name to owners contemplating certain construction work. Then, when its tender was accepted, Rush & Tompkins immediately assigned that contract in whole to Layden Construction Ltd.

Upon a call for tenders having been issued by the Government of Canada for the construction of certain sections of the Trans-Canada Highway in the Rogers Pass area of British Columbia, Rush & Tompkins proposed to make a similiar arrangement with Layden Construction Ltd. but first advised Layden Construction Ltd. to obtain the services of someone who had knowledge of excavating through rock and who possessed the necessary equipment for that type of work. There is some indication in the evidence that Rush & Tompkins actually designated to Layden Construction the appellant company and its chief officer, Mr. Luther Vieweger, as being acceptable. Be that as it may, Layden Construction Ltd., through its officers, Mr. James Layden and Mr. Earl Layden, met with Mr. Luther Vieweger who assisted them with advice and figures and took an active

[1] (1964), 45 D.L.R. (2d) 122.

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part in the preparation of the tenders for two sections of the said highway. The tenders were submitted in Rush & Tompkins' name and upon Rush & Tompkins being advised that they were the successful tenderers the general manager of that company, John Ford, advised Mr. James Layden, the manager of Layden Construction Ltd. of that fact, and told him to make his own arrangements with Vieweger Construction Ltd. Mr. James Layden, at trial, testified:

> Q. Following this meeting, did you or Mr. Vieweger have a meeting or discussion as to your relationship? A. Mr. Ford told me to make my own agreement with Mr. Vieweger, which we done later on.

And Mr. Ford testified:

> I discussed the matter with Jim Layden that I wanted an agreement between he and Vieweger Construction as to how they were going—what arrangements they were going to have between themselves.

Upon receiving such instructions, James Layden, Earl Layden, and their accountant, one James Butler, met with Luther Vieweger and discussed the arrangement between Layden Construction Ltd. and the appellant company. As a result an agreement was prepared and executed by the respective companies. That agreement was produced at trial as Exhibit 4 and will be referred to hereafter.

On the very following day, *i.e.*, July 23, 1958, James Layden delivered a copy of Exhibit 4 to Mr. John Ford, the manager of Rush & Tompkins, and on July 28th Rush & Tompkins entered into a contract with Layden Construction Ltd. This first agreement between Rush & Tompkins and Layden Construction Ltd. was of an informal nature, produced as Exhibit 12, and was later replaced by a formal contract which although it also bore the date July 28, 1958 was not actually executed until some considerable time thereafter. The latter formal contract was produced at trial as Exhibit 9 and it will be referred to hereafter.

Layden Construction Ltd. and the appellant commenced work. It appeared that the appellant company required some financial assistance at the very beginning. Various items of their equipment were repaired and the repairmen were paid directly by Rush & Tompkins. In addition, the latter company paid to various finance companies accounts which were alleged to be in arrears on equipment which the appellant company had purchased. All of these payments were charged in Rush & Tompkins' accounts to

Layden Construction Ltd. and none were charged to nor were payments of any kind received from the appellant company.

Luther Vieweger was active on the site of the work and in a short time differences of temperament between him and the foreman of the Layden Construction company became a source of concern, which seems to have been adjusted by Mr. Luther Vieweger suggesting that a completely independent foreman be retained and given full authority and by Luther Vieweger undertaking to "continue to serve to the best of my ability under the circumstances centering particularly on getting some rock drilled off". The work progressed badly and on April 1, 1959, Layden Construction were to a large extent removed by Rush & Tompkins from the operation of the contract. Layden Construction Ltd., on July 23, 1959, by letter of that date, Exhibit 10, formally abdicated its position under the contract of July 28, 1958.

It is of some considerable significance that Luther Vieweger has sworn that he was never informed of the final amount of the tenders submitted by Rush & Tompkins to the Canadian Government and that he never received any copy of either Exhibit 12 or the formal agreement which followed it, Exhibit 9, nor was he shown a copy of the abdication letter to which I have just referred. He was informed by Mr. John Ford, the general manager of Rush & Tompkins, that the Layden Construction company was being removed from the operation and he was asked to confer with the new project manager, a Mr. Murphy. He met Mr. Murphy in Vancouver, after Mr. Murphy had inspected the site of the operations, and Mr. Vieweger swore that at this meeting Mr. Murphy, on behalf of Rush & Tompkins, agreed to use certain of the defendant's (here appellant's) equipment and to pay rental therefor "as scheduled" and on July 8, 1959, Rush & Tompkins, over the signature of Mr. Ford, wrote to Mr. Vieweger a letter which read as follows:

> On April 1, 1959, our Mr. B. N. Murphy took over from Mr. Jim Layden as Project Manager on our road contract 15/58/TCH-G at Stoney Creek Siding, Glacier Park, B.C.
>
> This is to confirm arrangements made by Mr. Murphy with you subsequent to that date that you were not required on job. However, as your equipment was to be used on this project, it was agreed that you should draw a salary of $500.00 per month, while job was in operation. Moreover,

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it was agreed that such wages received would be deducted from any machine rental earned.

The appellant company worked under this new arrangement with Rush & Tompkins and the respondent used the equipment through the working season in 1959 and made certain payments on account of rentals to the appellant company. When these equipment rentals fell into arrears, the appellant company threatened to remove its machinery and for the first time the respondent Rush & Tompkins took the position that a partnership existed between the appellant company and Layden Construction Ltd., which partnership was evidenced by the agreement between the two on July 22, 1958, Exhibit 4, and that, since such partnership existed, the appellant company was bound as was Layden Construction Ltd. by the provisions of the contract between Rush & Tompkins and Layden Construction Ltd., Exhibit 9, and particularly by para. 12 thereof, which read as follows:

12. If the Subcontractor shall fail to commence the work or to prosecute the work continuously with sufficient workmen and equipment to insure its completion within the time fixed by the principal contract or to comply with the lawful orders of the Engineer or to perform the work in strict accordance with the provisions of the principal contract, or if for any other cause or reason the Subcontractor shall fail to carry on the work in a manner acceptable to the Engineer or the Contractor, the Contractor may give notice to the Subcontractor requiring it to remedy such defects, orders, defaults or delays and if such orders are not complied with or should such defaults or delays continue for Seventy-two hours after such notice shall have been given or should the Subcontractor make default in completion of the works or should the Subcontractor become insolvent or abandon the work or make an assignment of this contract without the consent of the Contractor, or otherwise fail to observe and perform any of the provisions of the principal contract or of this contract, then in any of such cases the Contractor without process of law and without any further authorization may take all of the work out of the hands of the Subcontractor and may employ such means as the Contractor may see fit to complete the works and in such case the Subcontractor shall have no claim for any further payment in respect of work performed and shall be chargeable with and shall remain liable for all loss and damage which may be suffered by the Contractor by reason of such non-compliance, default, delays or non-completion: PROVIDED that should the expense incurred by the Contractor in taking over and completing the work be less than the sum that would have become payable under this agreement if said work had been completed by the Subcontractor, then the Subcontractor shall be entitled to

the difference, and should such expense exceed the said sum, then the Subcontractor shall be liable to and shall pay the Contractor the amount of such excess. In the event of the Contractor taking over the work as aforesaid, all machinery, tools, plant, equipment or other property of the Subcontractor on the work may be used by the Contractor for the purpose of completing the work without charge. Upon the taking over of the work by the Contractor as herein provided, no further payment will be made to the Subcontractor until the work is completed, and any monies due or that may become due to the Subcontractor under this agreement will be withheld and may be applied by the Contractor to payments for labour, materials, supplies and equipment used in the prosecution of the work by the Contractor, or to the payment of any excess cost to the Contractor of completing the work.

Upon the appellant company insisting that it must be paid the equipment rentals or that it would remove its equipment, the respondent company applied for and on October 13, 1959, obtained an injunction preventing the appellant company so doing. That injunction contained the usual provision reading:

and the Plaintiff, by its Counsel, undertaking to abide by any order which this Court may make as to damages in case this Court shall hereafter be of opinion that the defendant shall have sustained any by reason of this order which the Plaintiff ought to pay.

The defendant moved to vacate that injunction order and such application was refused by the order of the Court on November 6, 1959.

Much argument before this Court was directed to whether in these circumstances a partnership existed between Layden Construction Ltd. and the appellant company and if so, whether the appellant company was bound by the provisions of s. 12 of the agreement between the respondent and Layden Construction Ltd. which I have set out above. The learned trial judge was of the opinion that such partnership did not exist and in carefully considered reasons based his finding upon the circumstances to which I have referred briefly aforesaid, although he did take into consideration the agreement between Layden Construction Ltd. and the appellant company, Exhibit 4.

The Appellate Division of the Supreme Court of Alberta in reversing the judgment of the learned trial judge relied very strongly upon the terms of that agreement, Exhibit 4, and were of the opinion that the presumption of

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partnership which it evidenced was not in any way rebutted by the circumstances upon which the learned trial judge had relied.

I am of the opinion that it is not necessary to determine whether or not the appellant company and Layden Construction Ltd. were partners. Even if one presumes that the relationship of these two companies was a partnership, it is abundantly clear that the respondent elected to deal with Layden Construction Ltd. alone. It is to be remembered that the respondent company had in its possession, when it drafted the agreements between it and Layden Construction Ltd.—both the early informal agreement, Exhibit 12, and the later formal agreement, Exhibit 9—a copy of Exhibit 4, yet it chose to make both the informal and later the formal agreements with Layden Construction Ltd. alone. As I have recited above, Mr. Ford earlier instructed Mr. James Layden to make what arrangements *he* deemed fit with the appellant company. It is not necessary to recite the many occasions in his testimony in which Mr. Ford reiterated his position that he was dealing with Layden Construction Ltd. and James Layden alone, and every piece of evidence is consistent with that position and inconsistent with any other. It was argued before us that the respondent company was not required to make an election as to what remedies it would pursue until the appellant company threatened to remove its equipment from the site. At that time, it was submitted, in a further consideration of the contract between the appellant company and Layden Construction Ltd., Exhibit 4, it came to the view that such agreement created a partnership and it could then elect to hold the partner, the appellant company, bound by the provisions of the contract between it, the respondent, and Layden Construction Ltd., *i.e.*, Exhibit 9. I cannot accept this argument. I am of the opinion that the date on which the respondent company came to the conclusion that the appellant company and Layden Construction Ltd. were partners is quite irrelevant. The respondent company knew throughout that the other two were in some sort of business relationship. It had, in fact, caused that relationship to be

created and it had knowledge of the details of that relationship and yet the respondent company carefully chose to enter into contractual arrangements with Layden Construction Ltd. alone.

I am of the opinion that *British Homes Assurance Corporation, Ltd. v. Paterson*[1] is sound authority for the proposition that having so elected the respondent company now cannot attempt to hold the appellant company liable and require it to perform the contract of Layden Construction Ltd. even if it were a partner of Layden Construction Ltd. There, Farwell J., at p. 408, quoted Lord Blackburn in *Scarf v. Jardine*[2]:

> Where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered.

Lindley on Partnership, 11th ed., accepts the authority of this decision at p. 183 where, after quoting s. 5 of the *Partnership Act* of 1890, which is a counterpart of s. 7 of the Alberta *Partnership Act*, the learned author states:

> It is hardly necessary to observe that this section imposes no liability on a firm for acts done by a partner, who is acting and is dealt with as acting, on his own behalf, and not on behalf of the firm.

giving the *British Homes Assurance* case as the authority for that proposition.

And at p. 248, the learned author states:

> The general proposition that a partnership is bound by those acts of its agents which are within the scope of their authority, in the sense explained in the foregoing pages, must be taken with the qualification that the agent whose acts are sought to be imputed to the firm was acting in his character of agent, *and not as a principal.* (The italicizing is my own.)

The learned trial judge accepted the authority of this decision and quoted therefrom as I have.

In the Court of Appeal, Johnson J. A., giving the judgment for the Court, outlined the reliance of the present appellant upon the decision and then continued:

> In entering into the contract the Layden company was acting as agent for itself and the respondent and *Calder v. Dobell*, (1871), L.R. 6 C.P. 486, would be applicable.

[1] [1902] 2 Ch. 404.

[2] (1882), 7 App. Cas. 360.

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And then quoted Kelly C. B. at p. 499, noting that the passage was approved in *Basma v. Weekes et al.*[1]

Those two decisions and the others which are discussed in the judgments deal with cases where a partner or agent was acting as such for either a disclosed or non-disclosed principal and with the subsequent suit by the opposite party against such principal.

In the present case, the learned trial judge concluded, and for the reasons which I have outlined I agree with his conclusion, that Layden Construction Ltd. was dealing with the appellant company as principal and was doing so at the insistance of the respondent company through the agency of its general manager Ford. Therefore, with respect, the cases cited by Johnson J. A. are not applicable and *British Homes Assurance* is exactly applicable.

For these reasons, I have come to the conclusion that the respondent company was not entitled to enforce the provisions of s. 12 of the agreement between itself and the Layden Construction company, Exhibit 9, as against the appellant company, and prevent the appellant company from removing its equipment either in April 1959, when Layden Construction Ltd. abandoned the contract, or later, when the respondent company failed to pay the equipment rental. Having come to that conclusion, therefore, I turn to the counterclaim of the appellant company for the arrears of equipment rental which it alleges is owed to it by the respondent company. The learned trial judge gave effect to this counterclaim acting on the basis which he termed an implied contract.

Johnson J.A., giving judgment for the Court in the Appellate Division, took the view that Murphy, as the agent for the respondent company in his conversations with Mr. Luther Vieweger, "went no further than to assume the obligations which the partnership by the agreement of July 22nd assumed to the respondent".

I have concluded that no partnership assumed such obligations; Layden Construction alone did so. It is to be

[1] [1950] A.C. 441.

remembered that this was certainly the view of Mr. Luther Vieweger at the time of his conversation with Mr. Murphy, and Mr. Ford for the respondent company has admitted that it never took the position that it could bind the appellant company as a partner of Layden Construction Ltd. until months after when it ceased paying the equipment rental.

I am of the opinion, therefore, that the transaction between the appellant company and the respondent company, the former represented by Mr. Luther Vieweger and the latter by Mr. Murphy, was simply a contract for the payment of equipment rental at scheduled rates, the schedule being that set out in Exhibit 4, the agreement between the appellant company and Layden Construction Ltd. I cannot appreciate the argument of counsel that what Mr. Vieweger was doing then was agreeing to continue the agreement between the Layden company and the respondent company, Exhibit 9, and be paid the schedule of rentals only from possible profits. It is agreed that at that time the contract was $300,000 in deficit, and I do not see how it can be imagined that Mr. Vieweger would agree to have his equipment worked with such a faint hope of reward, when he did not then and for months later know that the respondent company was taking the position that they were entitled to hold the equipment on the site and he has never yet, let alone in April 1959, agreed to that contention. An attempt was made to interpret the agreement between Mr. Murphy and Mr. Vieweger as being to pay rentals in accordance with Exhibit 4. That is not Mr. Vieweger's evidence of what occurred. He swore that Mr. Murphy said:

> Mr. Vieweger, we will pay you for them, we will maintain them and keep them in order, and we will pay you rentals as scheduled.

And in cross-examination, he was asked these questions:

> Q. Now, I say to you that your arrangement, if you ever had one with Murphy, was that you were to get the rentals on the same terms as you were entitled to under your agreement with Layden? A. My understanding with Murphy, as I have told you, it was that we would be paid at that rate, on the 15th of the month following, basis.

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Q. Did you understand that Rush & Tompkins was stepping in, and was going to do the best he could to see that you were paid rentals, if the project made money? A. Nobody ever told me that, no.

Mr. Murphy did not give evidence for the respondent company.

Counsel for the respondent company submitted that practically all subcontracts bear a clause similar to cl. 12 of Exhibit 9 and that Mr. Vieweger would know the existence of such a clause and would expect that Rush & Tompkins would keep his equipment on the site and use it for the completion of the contract. On the other hand, Mr. Vieweger knew that he had made no such agreement and he could be under no such impression. The agreement made between Mr. Vieweger and Mr. Murphy was, in my opinion, confirmed by the letter which the respondent company wrote to the appellant company on July 8, 1959, which I have recited above. I have no difficulty in finding consideration for this contract. By virtue of it the machines were left on the site and were used for months by the respondent company, and the learned trial judge has found that there were payments made on account of the equipment rentals, although no invoices were rendered by the appellant company. The amount of the equipment rental in arrears has been agreed at by counsel at the sum of $42,769.64 and the judgment at trial in favour of the appellant on its counterclaim should be restored to such an extent.

I turn now to the appellant company's claim for damages flowing from the interim injunction granted on October 13, 1959, and continued on the motion to vacate. The learned trial judge in refusing the appellant company's claim for such damages adopted the principle stated by Hyndman J. in *McBratney et al. v. Sexsmith*[1], at p. 459, as follows:

> The law is well settled that it does not follow that because an interlocutory injunction is dissolved before or after trial the successful defendant is therefore or in any event entitled to damages. The test is whether the plaintiff, by the suppression of facts, or misrepresentation, or maliciously, improperly obtains the injunction.

[1] [1924] 2 W.W.R. 455.

It would appear that the proper test was laid down by the Court of Appeal in *Griffith v. Blake*[1]. There, the Court of Appeal was concerned with a dictum of the late Master of the Rolls in *Smith v. Day*[2], to the effect that the undertaking as to damages only applies where the plaintiff has acted improperly in obtaining the injunction, and all the members of the Court expressed dissent with that view. Baggallay L.J. said, at p. 476:

> If the Defendants turn out to be right, it appears to me that they can, under the undertaking, obtain compensation for all injury sustained by them from the granting of the injunction.

And Cotton, L.J., said at p. 477:

> But I am of opinion that his *dictum* is not well founded, and that the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted *unless there are special circumstances to the contrary.* (The italicizing is my own.)

Counsel for the respondent company before this Court agreed to such statement of the principle, but submitted that in this case there were special circumstances as it had not been shown that the respondent company obtained the injunction by any perjury or misrepresentation and that since two judges in the Trial Division and three judges in the Court of Appeal were of the opinion that the respondent company was entitled to its injunction, if this Court were of the other view it would be an example of judicial error and not any misrepresentation by the respondent company which caused the injunction to issue.

I am of the opinion that these circumstances do not constitute such "special circumstances" as were in the mind of Cotton L.J. There are examples of plaintiffs who are public bodies and who acted in the public interest to hold the situation in *statu quo* until the rights were determined. There are other cases where the defendant, although he succeeded upon technical grounds, certainly had been guilty of conduct which did not move the Court to exercise its discretion in his favour. In these cases, the Court has found the "special circumstances" which entitled it to

[1] (1884), 27 Ch. D. 474. [2] (1882), 21 Ch. D. 421.

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refuse a reference as to damages. Here, the respondent company throughout has insisted that very considerable items of heavy construction machinery be held so the defendant could not use them and therefore make any profit from them, and that situation continued for months until the respondent company's use for the equipment ended. I am of the opinion that it is an ordinary case of an injunction granted upon a plaintiff's application and upon the plaintiff's undertaking, and that the plaintiff should be required to make good its undertaking. I would, therefore, direct that there be a reference in the ordinary course of procedure in the Province of Alberta to determine such damages and that the appellant company be granted judgment for such damages and the costs of the reference.

It is said that the damages can now be ascertained at the sum of $30,500. Counsel for the respondent, however, submits that there has been no proper proof of damages in that amount and, reading the record, I am of the opinion that under the circumstances in this case this Court would not be entitled to make a specific award of damages upon the evidence set out therein.

In the result, I would allow the appeal, restore the judgment in favour of the appellant company upon the counterclaim for $42,769.64, direct a reference as aforesaid, and allow the appellants its costs throughout.

Appeal allowed, judgment of the Appellate Division set aside and judgment at trial varied, with costs.

Solicitors for the defendant, appellant: Becker, Weeks, Peterson, Clark, McLennan and Fraser, Edmonton.

Solicitors for the plaintiff, respondent: Milner, Steer, Dyde, Massie, Layton, Cregan and Macdonnell, Edmonton.