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*Oct. 29.
*Dec. 1.

TIDEWATER SHIPBUILDERS LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

SOCIETE NAPHTES TRANSPORTS (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Lease and hire of work—Work by contract—Fixed price—Cancellation at will of owner—Indemnity of the workman—Damages—Art. 1691 C.C.

Article 1691 of the Civil Code of Quebec gives the owner the right to cancel at his own will a "contract for the construction of a building or other works at a fixed price, although the work has been begun,

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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on indemnifying the workman for all his actual expenses and labour, and paying damages according to the circumstances of the case."

Held that the obligation to indemnify the workman for all his actual expenses and labour, to wit, to pay him for the work done, is absolute; and the liability for damages depends on the circumstances of each particular case. But the workman cannot demand, as damages, payment in full as if the work had been entirely performed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, maintaining in part an appeal to that court by the respondents and dismissing a cross-appeal by the appellants.

The material facts of the case are sufficiently stated in the judgment now reported.

C. A. Barnard K.C. and *W. F. Chipman K.C.* for the appellant.

A. R. McMaster K.C. and *L. J. Béïque K.C.* for the respondents.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal from a judgment of the Court of King's Bench, province of Quebec, modifying, by reducing the amount awarded, a judgment of the Superior Court which had granted the present appellant $35,000, under the contract to which I will presently refer. At the same time, the Superior Court rejected a claim of the appellant for $25,000, as damages for loss of profit, and as to this claim its judgment was upheld. The appellant now appeals to this court on both points.

The material facts of the case are as follows.

In 1920, the respondent had a ship under construction at Three Rivers by the Three Rivers Shipyards, Limited. This company went into liquidation before the work was finished, and the respondent then entered into an agreement with the appellant to complete the construction of the ship. This agreement, signed by the respondent in December, 1920, and by the appellant in March, 1921, contained the following covenants:—

Whereas the company (the respondent) are the owners of a ship commonly known as an oil tanker of approximately 6,500 tons deadweight now partially constructed in the yard of the Three Rivers Shipyards Company, Three Rivers, Quebec, and through their representative have mutually agreed with the shipbuilders (the appellant) to complete this vessel

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in accordance with the plans and specifications to be furnished to them by the company, and deliver to them at the port of Three Rivers fully equipped and ready for sea.

Now therefore this agreement witnesseth:

That the shipbuilders on the execution of this agreement will proceed under the supervision and instruction of the company's representatives to engage the necessary men and secure the necessary materials to complete and launch the ship at the yard of The Three Rivers Shipyards, Limited, and take the hull to the works of the shipbuilders, install machinery and complete and equip the ship ready for sea according to the plans and specifications and under the supervision and direction of the company's representative on the following terms and conditions:—

1. That the company's representative will arrange at the company's expense for the use of the facilities of Three Rivers Shipyards, Limited for the aforesaid purpose.

2. That the shipbuilders will engage all necessary men and order all necessary material rates of wages and prices to be made for all materials and deliveries to be approved from time to time by the company's representative.

3. That the company will furnish through their representative all the necessary plans and specifications for the completion of the work.

4. That all materials purchased for the ship will be billed to the company or their representative duly marked for use on this ship.

5. That the company's representative will make the necessary arrangements for prompt payment of wages of the men engaged in the work, and all material, machinery and supplies of every kind.

6. That the shipbuilders will furnish, on completion of the vessel, builder's certificate, and secure the certificate of classification societies, and in the event of the registration of the ship in Canada, the necessary certificate from the Canadian Government.

7. That the shipbuilders will, after the ship is launched and delivered at their shipyard, install engines, boilers and all auxiliary machinery which are to be furnished by the company from the boiler-room bulkhead up to the tail-shaft, and supply and install the necessary piping and valves to connect to the hull piping, sea-suctions, and discharges, all according to the specifications, for the sum of $65,000 in Canadian currency to be paid before the ship leaves the yards of the shipbuilders.

8. That in addition to this amount of $65,000 the shipbuilders will be paid by the company before the final delivery of the ship, as their recompense for superintending the construction and completion of the vessel, the sum of $35,000 in Canadian currency if the total cost of the ship, exclusive of this recompense of $35,000, but inclusive of the $65,000 payable under paragraph 7 and all expense for launching ways, trial trip, builders risk insurance, is $700,000 or more, and for every $10,000 less than $700,000 which the completion of the ship costs, the shipbuilders will receive an additional recompense of $3,000, so that, for the purposes of illustration, if the completion, exclusive of this recompense, costs finally $690,000 the shipbuilders will receive $38,000. If the completion costs $680,000 they will receive $41,000, and so on in proportion, but if the completion costs $650,000 or less, exclusive of this recompense, the shipbuilders will receive the sum of $50,000 as their recompense.

9. Further, it is mutually agreed and understood that for any work done in connection with the construction of the ship, exclusive of the installation of boilers, engines and auxiliary machinery, etc., between the

boiler-room bulkhead and the tail shaft, which is done at the works of the shipbuilders, and which is not covered by paragraph 7, the company will pay the actual cost to the shipbuilders of all material and labour, plus an overhead allowance of 65 per cent on labour, the labour contemplated to embrace workmen and the necessary foreman, but will not include anything for the services of the manager, shipyard superintendent or machine shop superintendent, or chief accountant, time-keepers or clerks of the company.

It being understood and agreed that:

The intention of the foregoing agreement is that the company through their representative will pay in addition to the $65,000 for the work and material covered by paragraph 7, all expenses of every kind for material, labour and overhead, as herein defined, incurred in completing the vessel ready for sea, plus the allowance for recompense of from $35,000 according to the total cost of the work of completion from the date of this contract but not including any expenses incurred prior to this date, and all to be paid for before the ship is finally handed over by the shipbuilders to the company's representative.

The appellant completed, at the shipyards of the Three Rivers Shipyards, Limited, the construction of the hull of the ship, which was launched on the 8th of June, 1921. There remained the installation therein of the engines, boilers and auxiliary machinery under clause 7, which was to be done at the appellant's shipyards about a mile up the St. Maurice river. On June 6, 1921, the respondent served a notarial protest on the appellant alleging that there was not in the channel of the St. Maurice river a sufficient depth of water to bring the ship up to the appellant's shipyards for the installation of the machinery, and to remove it from there after such installation, and that the appellant had failed in its obligation to have the channel dredged, and therefore the respondent, reserving the right to demand the cancellation of the contract, notified the appellant that it would itself proceed to have the boilers, engines, and machinery installed, after launching, at the wharf in the St. Lawrence river of The Three Rivers Shipyards, Limited.

The respondent followed up its protest by bringing an action before the Superior Court asking for the cancellation of the above agreement on the ground that the appellant had failed to fulfil its contractual obligations. The appellant then instituted an action against the respondent at Three Rivers, accompanied by a conservatory seizure of the ship, claiming payment of two items, to wit the $35,000 mentioned in paragraph 8 of the agreement, and $25,000 for loss of profit under its undertaking to install the boil-

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ers, engines and machinery. The trial of both actions, which had been consolidated, took place at Three Rivers. We were informed by the parties that at the argument on the first action, the one asking for cancellation, the appellant admitted that under art. 1691 of the civil code the respondent was entitled to cancel the agreement, and this point of view was accepted by the learned trial judge who pronounced the agreement duly cancelled. The appellant states that it acquiesced in the judgment in this action and paid the costs. In the second action, the learned trial judge awarded the appellant the $35,000, but rejected the claim for $25,000 for want of proper proof. Both parties appealed from this judgment to the Court of King's Bench. The latter court affirmed the judgment of the Superior Court in so far as the claim for $25,000 was concerned, but modified it in regard to the item of $35,000, which it reduced to $12,000, the respondent in its factum having expressed its willingness to pay the latter sum. The appellant now comes before this court asking that the judgment of the Superior Court be restored as to the award of $35,000, but reversed in respect of the other item of its demand.

The only judgment before us is that rendered in the appellant's action claiming $35,000, under clause 8 of the agreement and $25,000 damages for loss of profit under clause 7.

The appellant in its factum as well as in its argument before us, endeavoured to take the position that art. 1691 C.C. did not apply to the agreement in question, or, if it did, it was only with respect to the installing of the boilers, engines and machinery. Had the appellant taken that position before the trial court, it is likely that the learned trial judge would have made a finding on the question whether the appellant had fulfilled its contractual obligations, and whether the respondent had valid cause for cancelling the contract. The admission of the appellant that the case came within the scope of art. 1691 C.C., while to some extent an admission of law rather than of fact, no doubt influenced the course of the trial and the judgment. I am not disposed therefore to deal with the litigation on any other basis. Much of the evidence adduced at the trial is irrelevant on an issue governed by art. 1691 C.C.

The respondent, on the other hand, led considerable evidence to show that the contract had become impossible of performance for the reasons alleged in its protest, i.e., that the ship, for lack of sufficient depth in the channel of the St. Maurice, could not be brought to the appellant's shipyards for installation of the boilers, engines and machinery, or removed therefrom after the work was done. The testimony on this point is contradictory, and I am not satisfied that the respondent, which had the onus of establishing it, has shewn beyond doubt that performance of the contract had become impossible within the meaning of art. 1202 C.C. Moreover, the most that could be said is that, if the performance of the contract became impossible, it was through no fault of the appellant, which clearly could not be expected to dredge the bed of a navigable stream, and therefore the respondent would be bound to the extent of the benefit received by it. I prefer therefore to rest nothing on the alleged impossibility of performance, but I will view the case as being one calling for the application of art. 1691 C.C.

This article gives the owner the right to cancel at his own will a contract for the construction of a building or other works at a fixed price, although the work has been begun,

on indemnifying the workman for all his actual expenses and labour, and paying damages according to the circumstances of the case.

The obligation to indemnify the workman for all his actual expenses and labour, to wit, to pay him for the work done, is absolute. Liability for damages depends on the circumstances of each particular case. The workman is certainly entitled to payment for the work actually done and money expended by him, and the circumstances of the case may also, as a matter of justice, give him the right to claim damages.

It would be quite impossible, in my opinion, to say that the workman can demand, as damages, payment in full as if the work had been entirely performed, for the owner may have cancelled the contract because such payment would be beyond his means. Article 1794 of the Code Napoléon allows the owner to cancel the contract

en dédommageant l'entrepreneur de toutes ses dépenses, de tous ses travaux *et de tout ce qu'il aurait pu gagner dans cette entreprise;*

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it does not mention other damages. The codifiers in their report make no special mention of art. 1691 C.C., being content to say that

the articles numbered from 78 to 84 (art. 1691 to 1697 C.C.), while they express the existing law, coincide substantially with the articles of the Code Napoléon cited under them.

The coincidence, in so far as art. 1691 C.C. is concerned, is certainly not very marked, and, in my opinion, while the French code has laid down a definite rule as to the basis of assessment of damages, our code has done so only in regard to " actual expenses and labour."

Pothier, *Louage,* no. 440, Bugnet ed., vol. 4, pp. 147, 148, to whom the codifiers refer under art. 1691 C.C., says:

Par exemple, si j'ai fait marché avec un entrepreneur pour la construction d'un bâtiment, et que, depuis le marché conclu et arrêté entre nous, je lui déclare que je ne veux plus bâtir, et que je demande en conséquence la résolution du marché, l'entrepreneur ne peut pas s'opposer absolument à la résolution du marché, et prétendre que je doive lui payer le prix entier du marché, aux offres qu'il fait de remplir son obligation, et de construire le bâtiment porté au devis; car il a pu me survenir, depuis la conclusion de notre marché, de bonnes raisons pour ne pas bâtir, dont je ne suis pas obligé de rendre compte; il a pu me survenir des pertes dans mes biens, qui me mettent hors d'état de faire la dépense que je m'étais proposée. Mais si je dois être reçu à demander la résolution du marché, ce ne peut être qu'à la charge de dédommager l'entrepreneur, s'il souffre quelque dommage de son inexécution; *puta,* si avant que je lui eusse déclaré mon changement de volonté, il avait déjà fait emplette de quelques matériaux qu'il sera obligé de revendre à perte; s'il avait déjà loué des ouvriers qui lui deviennent inutiles. On doit aussi comprendre, dans les dommages et intérêts de l'entrepreneur, le profit qu'il aurait pu faire sur d'autres marchés que celui dont on demande la résolution lui a fait refuser.

Pothier's reference to claims which may be considered under the head of damages, is clearly only by way of examples. Our code, as I have said, is definite merely with regard to " actual expenses and labour," but I think it may be stated that Pothier's refusal to allow the contractor to claim

le prix entier du marché aux offres qu'il fait de remplir de sa part son obligation

holds good under the true construction of art. 1691 C.C.

Coming now to the appellant's claim of $35,000 under clause 8 of the agreement, it is therein expressly stated that this sum is to be paid to it

as their recompense for superintending the construction and completion of the vessel.

This supposes that the appellant has exercised this superintendence until full completion of the vessel, which of course would include the installation of the engines, boilers and machinery "which are to be furnished by the company (the respondent)," and that it supplied and installed the necessary piping and valves to connect to the hull piping, sea-suctions and discharges.

In other words, this "recompense," with the special price stipulated for installation of engines, boilers and machinery and the supplying and installation of the necessary piping and valves, may be assimilated to what Pothier calls "le prix entier du marché." In my opinion, only the part of this "recompense" which corresponds to the actual "superintendence" can be allowed either as damages or as "actual expenses or labour," and I think it comes better under the heading of "damages," for, under reserve of the question of the "sea chest" to which I will presently refer, it is not contended that all actual expenses and sums spent for labour or materials were not paid by the respondent.

I do not think the judgment of the Superior Court can be restored, for it awarded to the appellant the whole of the sum payable for superintending the construction until full completion of the vessel. There is however room for a difference of opinion whether an allowance of approximately one-third of the $35,000 is sufficient compensation for damages suffered by the appellant by reason of the cancellation of the contract under art. 1691 C.C. The question, however, whether any damages at all should be granted, and, if so, what should be their amount, are questions to be determined by the court under this article. The Court of King's Bench came to the conclusion that the appellant was entitled to damages, and granted it the sum of $12,000, and this court does not interfere with the quantum of such damages unless a wrong principle has been followed by the court in assessing them. This has not been shewn. I therefore do not feel justified in increasing the award with respect to these damages.

I may add that I do not find the proof satisfactory as to the portion of the "recompense" which can be said to correspond to the superintendence actually exercised. The appellant's witnesses say that the expenditure up to the launching amounted to $350,000, and that ten per cent of

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this would be a fair compensation. This is not the proper test when dealing with an express contract stating for what superintendence the $35,000 is to be paid.

Both courts, including Mr. Justice Tellier who dissented, were of the opinion that the appellant had not sufficiently proved its claim for $25,000 for loss of the profit it would have made in installing the boilers, engines and machinery under clause 7 of the contract. In that I agree, but as to such a claim, it would suffice to say that the profit which the workman would have made, had the contract gone on to completion, is not, under art. 1691 C.C., the proper basis for the assessment of his damages. That, I have already stated, is clearly the effect of the article.

The appellant also claims that it is entitled to $2,896.70, which it expended in building a " sea chest " in connection with the carrying out of clause 7 of the contract. The " sea chest " was delivered to the respondent but was never paid for.

This the respondent does not deny, but its objection is that this amount was not specifically claimed in the action. The appellant admitted that in the argument before the Superior Court these expenses were overlooked. It seems to me that as this " sea chest " was really made and delivered to the respondent, it would be only fair to add the amount of the expenditure to the $12,000 granted by the Court of King's Bench.

With this variation, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. A. Barnard.*

Solicitors for the respondent: *Béïque & Bissonnette.*