PERINI PACIFIC LIMITED (*Plaintiff*) ...APPELLANT;

AND

GREATER VANCOUVER SEWERAGE AND DRAINAGE DISTRICT (*Defendant*) ..... RESPONDENT.

1966
* Dec. 5, 6
1967
Jan. 24

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Building contract—Action for damages brought by contractor —Loss by way of overhead alleged to have been sustained because contract completion date extended by delays on part of owner—Claim prevented by clause in contract.

Under a contract between the appellant and the respondent the appellant agreed to construct a sewage disposal plant within six hundred days next ensuing from the date of receiving notice from the respondent to proceed with the work. Pursuant to the provisions of the contract, the completion date, initially November 25, 1962, was extended to January 10, 1963. Various delays occurred in the course of the work, and the project was not completed before March 4, 1963.

In an action brought by the appellant against the respondent for damages the former alleged that it had been delayed in the construction by various breaches of the agreement by the respondent. The respondent counter-claimed for $53,000, the contract having stipulated for payment by the appellant of the sum of $1,000 per day for each day by which the putting into operation of the plant was delayed beyond the completion date.

The action was dismissed at trial and judgment was given in favour of the respondent on the counterclaim for the amount of $8,000. On appeal,

*PRESENT: Abbott, Martland, Judson, Ritchie and Spence JJ.

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the appellant's appeal was dismissed, save as to the counterclaim, the counterclaim being dismissed by the Court of Appeal. On appeal to this Court, the counterclaim was not in issue.

Held: The appeal should be dismissed.

What the appellant was seeking, in the way of damages, was compensation for loss which it claimed to have sustained, by way of overhead, because the contract completion date had been extended by reason of breaches of the contract by the respondent. This argument could not succeed by reason of a clause in the contract which read in part: "...the Contractor shall have no claim or right of action against the Corporation for damages, costs, expenses, loss of profits or otherwise...by reason of any delay in the fulfilment of the contract within the time limited therefor occasioned by any cause or event within or without the Contractor's control, and whether or not such delay may have resulted from anything done or not done by the Corporation under this contract."

The appellant was seeking compensation for loss which it claimed to have sustained by reason of delay in the fulfilment of the contract within the time limited, and it was exactly that kind of loss which the above clause said could not be claimed even if it resulted from anything done or not done by the respondent under the contract.

The appellant also appealed from the decision of both Courts below in respect of a second action brought by the appellant against the respondent for holdback moneys alleged to be due under the contract. This action was consolidated with the first one. The Court agreed with the reasons given by Davey J.A. for holding that this claim failed.

APPEAL from a judgment of the Court of Appeal for British Columbia, dismissing an appeal from a judgment of Collins J. Appeal dismissed.

J. S. Maguire, Q.C., and *K. S. Fawcus*, for the plaintiff, appellant.

R. M. Hayman and *B. W. F. Fodchuk*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This action was brought by the appellant against the respondent for damages in respect of various alleged breaches by the respondent of a contract between them in which the appellant agreed to construct for the respondent a sewage disposal plant on Iona Island in the Fraser River. The appellant agreed to construct the plant within six hundred days next ensuing from the date of receiving notice from the respondent to proceed with the work. Pursuant to the provisions of the contract, the completion date, initially November 25, 1962, was extended to January 10, 1963. Various delays occurred in the course of

the work, and it was common ground that the work was not completed before March 4, 1963.

The appellant alleged that it had been delayed in the construction by various breaches of the agreement by the respondent. The respondent counterclaimed for $53,000, the contract having stipulated for payment by the appellant of the sum of $1,000 per day for each day by which the putting into operation of the plant was delayed beyond the completion date.

The action was dismissed at trial and judgment was given in favour of the respondent on the counterclaim for the amount of $8,000. On appeal, the appellant's appeal was dismissed, save as to the counterclaim, the counterclaim being dismissed by the Court of Appeal. The counterclaim was not in issue before this Court.

On the argument before this Court, the number of breaches of contract which the appellant alleged to have occurred had been reduced to three. In each instance it was claimed that the appellant's work had been delayed, and the periods of delay claimed were $3\frac{1}{2}$ days, 14 days and 69 days respectively. In respect of the first item, the majority of the Court of Appeal held that delay had not been proven. With regard to the second, it was held unanimously that delay had not been proven. The Court found that the respondent had caused delay for a period of 12 days in respect of the third matter, but also held, in respect of this claim, that the appellant had not proved the resulting damage.

The damages in each case claimed by the appellant were for increased overhead costs resulting from the delays. The proof of its loss consisted in determining the average daily overhead costs for the entire period of the work, from commencement to conclusion. The loss for each period of delay was then said to consist of the number of days' delay multiplied by that average daily figure.

This was rejected by the trial judge and by all the members of the Court of Appeal. The position of the Courts below may be summarized in the following passage from the reasons of Bull J.A., in the Court of Appeal:

> The *quantum* of these items claimed was arrived at by translating the respondent's fault into the number of days' delay caused thereby and multiplying the result by a daily average "overhead" (including indirect

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costs) over the lifetime of the whole construction period, such daily average being calculated by taking the total of those items of overhead and indirect costs incurred from the beginning of the work to its completion and dividing same by the number of the days in that period. Obviously, as found by the learned trial Judge, the overhead referred to continued for other works bearing no relevance to that in respect to which the delays occurred, and the appellant made no effort at all to establish that such overhead (whether in gross or daily average) was increased in any respect by, or had included therein, any amount that could be said to have been sustained either directly or indirectly by the breaches of contract of the respondent. This difficulty was brought to the attention of the appellant by the learned trial Judge during the trial, when he indicated that such daily average overhead claimed was no proof of any amount of loss sustained by the appellant through the delays caused by the respondent, and that he required some evidence of increases in overhead resulting therefrom. This evidence was not forthcoming, and in fact one witness for the appellant said it was not possible to break down the overhead and indirect cost figures to show what was allocatable to the respondent's breaches of contract. This same difficulty was raised by this Court on the appeal before us, and again we were not directed to any evidence to show any such attributable damage, the appellant maintaining throughout that it was entitled to damages on the basis of the daily average overhead for each day's delay caused by the respondent.

With deference, I am in agreement with what the learned trial Judge in effect held that an average daily overhead amount calculated on the total overhead over the whole construction period divided by the number of days of construction, was not in the circumstances of this case, a proper measure of damages.

The appellant's submission to this Court, in answer to these reasons, was stated in its factum, as follows:

The Appellant submits that once it has proved that the contract completion date has been extended by reason of a breach of contract by the Respondent, it is entitled to damages calculated on the basis advanced by the Appellant at the trial. The method adopted at the trial by the Appellant was to show the amount of all the items of expenses or costs for the whole construction period that were extended by the passage of time. To find the cost per day, the Appellant divided this total by the number of days in the construction period. The cost per day was found to be $738.47.

The Appellant submits that such a method is the only reasonable method of calculating the cost of the delay because the effect on cost of the breach of contract extends beyond the period in which the breach occurs. In any event, it is submitted that the method of calculation by the Appellant would have been acceptable to the learned Justices in the Courts below if they had appreciated that the result of the Respondent's breaches of contract caused delay in the overall completion of the contract, or in other words, increased the number of days required by the Appellant to complete the contract.

This contention makes it clear that what the appellant is seeking, in the way of damages, is compensation for loss which it claims to have sustained, by way of overhead,

because the contract completion date had been extended by reason of breaches of the contract by the respondent.

In my opinion this argument cannot succeed in view of the provisions of clause 6-04 of the general conditions of the contract. This clause is one of a group of clauses headed "PROSECUTION OF WORK" and it reads as follows:

> *6-04. No Claim against Corporation*
>
> Unless otherwise particularly provided in the contract, the Contractor shall have no claim or right of action against the Corporation for damages, costs, expenses, loss of profits or otherwise howsoever because or by reason of any delay in the fulfilment of the contract within the time limited therefor occasioned by any cause or event within or without the Contractor's control, and whether or not such delay may have resulted from anything done or not done by the Corporation under this contract.

The opening words of the portion of the argument above quoted—"once it has proved that the contract completion date has been extended by reason of a breach of contract by the Respondent"—make it clear that what the appellant is seeking is compensation for loss which it claims to have sustained by reason of delay in the fulfilment of the contract within the time limited, and it is exactly that kind of loss which clause 6-04 says cannot be claimed even if it results from anything done or not done by the respondent under the contract.

The claim in respect of the last item of delay was in respect of the failure by the respondent promptly to furnish, and set on the foundations constructed under the contract, six engine generator units, which it was required to furnish under clause 7-05(2) of the specifications. These generators were supplied by a supplier, under contract with the respondent, and proved to be defective. This resulted in delay of the appellant's work while the necessary repairs were being made.

The specifications did not provide any specific date for furnishing them. It must be implied that they should be furnished within a reasonable time so as to permit the appellant to proceed with its work within the contract period. The respondent would, in my opinion, only be legally responsible for such delay in performing this obligation as would prevent the appellant from completing its work within the stipulated period. But for loss occasioned by

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that kind of delay there can be no claim because of clause 6-04 of the general conditions.

Clause 6-04 was referred to in the reasons for judgment of the learned trial judge, but with no specific expression of opinion as to whether it was applicable. In the Court of Appeal, the majority held that it was not applicable, while Davey J.A. did not find it necessary to deal with it. Bull J.A. discusses its application in the following passage in his reasons:

> As I have indicated earlier, it is not too clear from the learned trial Judge's reasons for judgment as to what importance he placed on the relieving provisions of article 6-04 of the General Conditions of the contract in dismissing the claims being discussed. As it is my view that the claim was properly dismissed on the grounds set out above, the question of whether it was barred by the provisions of the article need not be considered. However, should I be wrong in my conclusions, or a higher court should consider that nominal damages should have been awarded or a new assessment of damages had, I consider that it might be useful to express my views as to the proper construction of that article. Accordingly I have come to the conclusion that the respondent could not with respect to this particular claim, rely on these provisions. The relief to the respondent is only against damages (*inter alia*) "because of or by reason of any delay in the fulfilment of the contract within the time limited therefor," notwithstanding that such delay may be the sole fault of the respondent. The claim for damages for the delay being considered has nothing to do with the revised contract completion date of January 10, 1963. It is damages for breach of contract and it is immaterial to that claim whether the contract was completed before, at or after the time limited for completion thereof. The relief given by the article does not purport to cover damages for any delay other than one involving the time limit for completion. Although of no relevance in this appeal, it would appear that the article was designed to and would protect the owner from any claim or set-off by a contractor for liquidated damages or penalties payable by it under an unrelieved completion clause when breach thereof was caused by the owner's actionable breach of contract; such situations have not been unusual.

In view of the position taken by the appellant before us, to which I have already referred, I am not able to agree that:

> The claim for damages for the delay being considered has nothing to do with the revised contract completion date of January 10, 1963. It is damages for breach of contract and it is immaterial to that claim whether the contract was completed before, at or after the time limited for completion thereof.

As already indicated, my understanding of the appellant's position in respect of the claims urged before us is that, because the delays caused by the respondent extended the work period beyond the contract completion date, full overhead can be recovered for the number of days' delay which

led to that result. I interpret clause 6-04 as preventing the making of that kind of claim. I understand this clause to mean that if the appellant complains that, because of causes or events outside its control, it has not been able to complete the contract within the contract period and has thereby incurred expense, it shall not be entitled to recover such expense from the respondent, even though the respondent had caused such delay.

The appellant also appealed from the decision of both Courts below in respect of a second action brought by the appellant against the respondent for payment of the holdback money. That action was consolidated with the other one. The nature of this claim is described in the following extract from the reasons of Davey J.A. and I agree with the reasons which he gives for holding that that claim fails:

> The plaintiff commenced a second action to recover the holdback money. That action was consolidated with the first one. General condition 7-02 provides that the defendant shall pay the balance of the contract price to the plaintiff 40 days after presentation of the engineer's certificate that he has accepted the work, and upon delivery by the plaintiff of, *inter alia,* releases of all its claims and demands under the contract or in connection with its subject matter. The delivery of such a release and payment of the holdback money are thus to be concurrent acts. The plaintiff delivered only a qualified release, which reserved all its claims in respect of the specific matters that have been litigated. The defendant refused to accept it. The learned trial Judge held that since the disputes had not been adjudged until after the second writ had issued and the plaintiff had not delivered or tendered an unqualified release, the cause of action for the holdback money was not complete when the second writ was issued. He dismissed that action, without prejudice to the plaintiff's bringing a new one when its cause of action was complete. The plaintiff appeals. I agree with the reasoning of the learned trial Judge. The intention of the provision seems to be that if the plaintiff does not release all outstanding claims, and wants to litigate some of them, it cannot get the holdback money until it has done so. So, if the defendant is harassed by expensive litigation, it will have security through the holdback money for its taxed costs if successful. That provision may seem harsh—I do not say it is—or unnecessary with respect to this plaintiff, but that is no ground upon which to relieve the plaintiff from the plain meaning of an otherwise lawful provision by which it has bound itself: *Roberts v. Bury Commissioners,* (1870) L.R. 5 C.P. 310 at pp. 325 and 326. I would dismiss this part of the appeal.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Clark, Wilson, White, Clark & Maguire, Vancouver.

Solicitors for the defendant, respondent: Russell & DuMoulin, Vancouver.