MODERN CONSTRUCTION LIMITED (*Plaintiff*) ..... APPELLANT;

1963
*Feb. 22
June 24

AND

MARITIME ROCK PRODUCTS LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Mechanics' liens—Whether last work done under contract performed within 45 days of filing of lien as required by statute—Interest in lands—Mechanics' Lien Act, R.S.N.S. 1954, c. 171, s. 23.

The plaintiff, a general construction company, entered into a contract whereby it agreed among other things to repair and extend a causeway and convert a ship into a wharf at a certain property where the defendant was carrying on the business of quarrying, selling and shipping stone. It was provided that the work would be substantially completed by June 1 so that the defendant would have its plant and wharf ready for the opening of the shipping season, and a list of the drawings and specifications was set out in the contract. By June 16 the wharf and causeway were temporarily operational. The substantial amount of work that remained to be done in order to bring the contract to completion was started on September 6 and completed on September 27. The plaintiff filed a mechanics' lien on October 17 and brought an action to enforce its claim. At the close of the plaintiff's case, the trial judge granted the defendant's motion for nonsuit on the ground that the last work proved to have been done under the contract was completed on June 16, and therefore not within 45 days of the filing of the lien, as required by s. 23 of the *Mechanics' Lien Act*, R.S.N.S. 1954, c. 171. The trial judgment having been affirmed on appeal, the plaintiff further appealed to this Court.

Held: The appeal should be allowed.

By the terms of the contract the plaintiff assumed an obligation to do everything indicated in the specifications and drawings which included sinking the ship complete with superstructure and extending the causeway to the ship. This work was not completed by providing temporary facilities which were not suitable to withstand the winter weather in the area. The evidence in the case constituted *prima facie* proof of the fact that the plaintiff had not done all that it promised to do under the contract until about September 27, and that the last work done by it thereunder was accordingly performed within 45 days of the registration of the lien. *County of Lambton v. Canadian Comstock Co. et al.*, [1960] S.C.R. 86, followed.

As to the defendant's contention that no *prima facie* case had been established to show that the defendant had any estate or interest in the lands described in the statement of claim, there was evidence to the effect that work was done and materials were supplied "in respect of" lands as to which there was some evidence of the defendant's interest. The validity of the lien was not destroyed by the fact that the descrip-

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

1963

MODERN CONSTRUCTION LTD. v. MARITIME ROCK PRODUCTS LTD.

tion in the statement of claim and claim for lien included together with those lands, certain Crown lands to which no lien attached.

Practice—Judgment granting motion for nonsuit reversed on appeal—Action referred back to trial judge.

The trial judge heard the defendant's motion for nonsuit in accordance with the submission of its counsel that he could be prejudiced if he was required to proceed before the Court decided on the issues raised. This left the defendant's counsel in a position where he was entitled to assume that he would be permitted to proceed if the motion were decided against him. In view of these circumstances it would be unjust for the defendant to be precluded from proceeding with its case, and it was therefore directed that the action be referred back to the trial judge so that the trial might proceed in the usual course. *McKee v. Fisher* (1929), 64 O.L.R. 634; *Hayhurst v. Innisfail Motors Ltd.*, [1935] 2 D.L.R. 272; *Cudworth v. Eddy*, [1927] 1 W.W.R. 583; *Protopappas v. B.C. Electric Ry. and Knap*, [1946] 1 W.W.R. 232; *Yuill v. Yuill*, [1945] P. 15, referred to.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *in banco*, affirming a judgment of McKinnon C.C.J., dismissing appellant's claim in a mechanics' lien action. Appeal allowed.

A. L. Caldwell, for the plaintiff, appellant.

A. R. Moreira, for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Supreme Court of Nova Scotia *in banco* affirming a judgment rendered at trial by His Honour Judge A. H. McKinnon whereby he dismissed the appellant's claim for a lien under the *Mechanics' Lien Act*, R.S.N.S. 1954, c. 171, at the close of the appellant's case on the ground that the evidence then adduced did not establish a *prima facie* case to prove that the last work done under the contract upon which the claim is based was performed within 45 days of the filing of the lien on October 17, 1961, as required by the provisions of s. 23 of the said Act.

The claim is for work and labour done, services rendered and materials supplied by the appellant, which is a company engaged in the general construction business, under a contract dated April 20, 1961, whereby it agreed among other things to repair and extend a causeway and convert a ship into a wharf at a property situate at Malignant Cove, in the County of Antigonish, where the respondent was carrying on the business of quarrying, selling and shipping stone.

The making of this contract appears to have been first discussed at a meeting of the directors of the respondent company on April 16, 1961, at which representatives of the appellant were present. At this meeting it was disclosed that the respondent company, which has since become bankrupt, was in serious financial difficulties and that it was necessary for it to have its plant and wharf put in operational condition by the opening of the summer shipping season in June. It was reported also that the Nova Scotia Government had not yet made any final decision on the company's application for a loan of $100,000 "to take care of building a new wharf and to put the plant at Malignant Cove into operation", and it was pointed out that this decision might not be made until the middle of May whereas the work had to be done immediately. Some discussion followed concerning an offer by the appellant company to undertake the work forthwith, the upshot of which is perhaps best described in a letter written to the appellant by the respondent on April 20 which reads in part as follows:

> At a meeting of the Directors on April 15, 1961, it was proposed that Modern Construction Limited, Moncton, be granted a contract in the sum of $75,000 to carry out the construction of a wharf and certain repairs as per instructions which you already have, to the tunnel and conveyor of the Company's premises at Malignant Cove, construction operations to commence immediately and Modern Construction to wait until such time as Maritime Rock Products have completed proper financial arrangements for payment of this contract. It was further decided that if Modern Construction Limited would immediately commence operations and be prepared to await payment at a future date, then in consideration of this valuable service, Maritime Rock Products Limited would cause to be issued to Modern Construction Limited as a bonus, 78,948 shares of common capital stock of the Company at the purchase price of 5 cents per share.

The appellant having replied accepting this offer, a contract was prepared and executed by the parties on April 20 which included the following provisions:

> ARTICLE I. The Contractor will:
>
> (*a*) provide all the materials and perform all the work shown on the Drawings and described in the Specifications . . . which have been signed in duplicate by both parties . . .
>
> (*b*) do and fulfill everything indicated by this Agreement, the General Conditions of the Contract, the Specifications, and the Drawings, and
>
> (*c*) complete substantially as certified by the architect, all the work by the 1st day of June.

1963

MODERN CONSTRUCTION LTD. v. MARITIME ROCK PRODUCTS LTD.

Ritchie J.

ARTICLE II. The following is an exact list of the drawings and specifications referred to in Article I:

(a) carry out repairs to existing causeway and to extend causeway to ship,

(b) preparing ship for sinking, towing ship to site and sinking ship complete with superstructure.

(a) and (b) to be carried out as detailed on attached blueprints designated Schedules "A", "B" and "C".

* * *

It is understood that Maritime Rock Products Limited will supply all materials presently on site cost free to Modern Construction Limited, and it is further understood that Modern Construction Limited will supply all materials not otherwise located on the site.

ARTICLE III. The owner will:

(a) pay the contractor in lawful money of Canada for the materials and services aforesaid Seventy-five Thousand dollars ($75,000) subject to additions and deductions as provided in the General Conditions of the Contract.

No architect was engaged under the contract and the only provision with respect to the method of payment was that it would be made

on receipt of funds from Nova Scotia Government loan or the making of other satisfactory arrangements.

Work was commenced at the end of April or early in May 1961 and the evidence discloses that by June 16 the wharf and causeway were temporarily operational so that ships were able to come alongside and load the respondent's rock for the opening of the shipping season. It does not, however, appear that any further work was done during the summer months and the appellant's comptroller, the respondent's general manager, and the foreman on the job all testified that the substantial amount of work remaining to be done in order to bring the contract to completion was not started until September 6 and only completed on or about September 27.

None of this evidence is contradicted as the respondent's motion for nonsuit was granted at the close of the appellant's case on the ground that the last work proved to have been done under the contract was completed by June 16.

It is not disputed that under the provisions of s. 23 of the *Mechanics' Lien Act* the lien here in question was required to be registered within 45 days after the completion or abandonment of the contract but as has been indicated it is the appellant's contention that the work done in September

1961 was done pursuant to the contract and that registration of the lien on October 17 was therefore in conformity with the statutory requirements. The respondent, on the other hand, contends, as the Courts below have found, that the appellant's contractual obligation was completely fulfilled by having the shipping facilities available for transport and that this was done in the month of June and therefore more than 45 days before the registration of the lien.

In the course of his reasons for judgment, Judge McKinnon refers at length to the evidence of Mr. Ingalls, the appellant's comptroller, in which that witness agrees that the two principal items discussed at the directors' meeting of April 15 were that the respondent's wharf be made suitable for accommodating vessels and that the plant had to be made ready for the summer season. The learned trial judge quotes the following excerpts from the cross-examination of Mr. Ingalls regarding these two items:

> Q. Isn't it true that those were substantially done by the 19th of June of that year?
>
> A. The answer to that has to be a little indirect in that there was such a tremendous rush to get the plant into operation and take advantage of the shipping contract.
>
> Q. But those two necessary items we just discussed—they were completed June 19th.
>
> A. It was possible. I visited the site by that time and enough had been done that temporarily it was possible to operate the plant for shipping material. It would be shown the shipping date was very quickly achieved.
>
> Q. (by the Court): What is the answer to that question. The work contemplated by the agreement was completed by June?
>
> A. It was possible to begin shipping quickly on a basis that was almost temporary. The company had entered into the contract with Mussens of Canada whereby if the shipping was not moving there would be heavy penalties. It was possible to achieve shipping by that date.

The interpretation placed on the contract by Judge McKinnon appears to be based in large measure upon this evidence, as to which he states:

> It would appear to me that this evidence indicates the full purpose and extent of the contract. It was necessary to get the plant in operation and shipping facilities available for transport at some date in June, or the company would be subject to heavy penalties.

1963

MODERN CONSTRUCTION LTD. v. MARITIME ROCK PRODUCTS LTD.

Ritchie J.

That it was this concept which controlled the conclusion reached by the learned trial judge is shown by the following two paragraphs from his decision:

> It appears that the contract called for substantial compliance with the terms of the contract by June 1st and it would seem from the evidence herein that all the work contemplated by the contract was performed by the plaintiff by the early part of that month, and a careful review of the testimony of Mr. Ingalls, Mr. Chapman, as well as an examination of Schedules "A", "B" and "C" under the contract.
>
> In September, after the conclusion of the shipping season, the plaintiff proceeded to do further work on the causeway and boat although he must have been fully aware that he had no prospect of payment from the proceeds of a Nova Scotia Government loan as provided in the contract or, as it may be fairly assumed, from any other source. In view of this, it can well be that the defendant has some cause to contend that the plaintiff was simply securing the ship and causeway against the heavy winter weather to be expected in this area and this work had no connection with the purpose for which the contract was entered into.

With the greatest respect, it appears to me from a consideration of the terms of the contract itself that the appellant had thereby assumed an obligation to do everything indicated in the specifications and drawings which included sinking the ship *complete with superstructure* and extending the causeway to the ship and that this work was not completed by providing temporary facilities which were not suitable to withstand the winter weather in the area. It was no doubt recognized by all concerned with the project that it was necessary for the respondent to have its wharf and causeway in operational condition by the opening of the summer shipping season and it could be inferred from the evidence that the appellant had agreed to bring this about but this does not, in my opinion, justify the further inference that no more work was to be done under the contract or that the wharf and causeway were intended to be temporary structures only.

Mr. Chapman, to whose evidence the learned trial judge refers, was the respondent's general manager and one of the signatories to the contract on its behalf. In the course of his evidence this witness was specifically directed to the contract specifications and the attached drawings, and after referring to them he stated that in the month of September "approximately 35-45% of the rock was yet to be placed in and around the boat and causeway and 15-20% piling had to be completed around the back of the boat" in order to complete

the work indicated by those documents. In my view, this evidence was admissible and constituted *prima facie* proof of work having been done under the contract in September 1961.

In affirming the decision of the learned trial judge, Mr. Justice MacQuarrie who delivered the reasons for judgment of the Supreme Court *in banco* had occasion to say that "the circumstances disclosed by the evidence in this case indicate the value and importance of the learned trial judge having seen and heard the witnesses. This Court considering all the circumstances should attach great weight to this opinion".

The value and importance of seeing and hearing the witnesses which is enjoyed by the trial judge and denied to an appellate court should never be underestimated, but in the present case as the evidence for the appellant is entirely uncontradicted and as I do not read the learned trial judge's reasons and conclusion as being inconsistent with his having believed this evidence I do not, with respect, feel that this Court is under the same disadvantage as is the case where there is some conflict of evidence or some indication that the demeanour of the witnesses has affected the result. As I interpret the decision of the trial judge, it is based upon his construction of the contract and the fact that he differs in this regard from some of the witnesses does not, in my opinion, indicate that he was influenced by their demeanour.

In holding that "the September work does not confer or revive any lien", Mr. Justice MacQuarrie made reference to the case of *County of Lambton v. Canadian Comstock Company Ltd. et al.*[1] In that case, Judson J., speaking on behalf of this Court, with respect to s. 21(1) of the Ontario *Mechanics' Lien Act,* said at pp. 93-4:

> The fact that a contractor, who has substantially completed his work, may sue for the contract price, subject to deductions for minor defects or omissions, if there are any, does not and cannot determine when time begins to run against him under *The Mechanics' Lien Act.* Completion means what it says. I do not think that time begins to run under s. 21(1) until it can be said that the contractor or sub-contractor has done all that he promised to do and is entitled to maintain his account for the full amount.

[1] [1960] S.C.R. 86.

1963

MODERN CONSTRUCTION LTD. v. MARITIME ROCK PRODUCTS LTD.

Ritchie J.

In my opinion, this language applies with equal force to s. 23 of the Nova Scotia *Mechanics' Lien Act* and as I have indicated, the evidence in the present case appears to me to constitute *prima facie* proof of the fact that the appellant had not done "all that it promised to do" under the contract here in question until about September 27, 1961, and that the last work done by it thereunder was accordingly performed within 45 days of the registration of the lien on October 17.

This does not, however, dispose of this appeal as the respondent's motion for nonsuit was also based on the ground that no *prima facie* case had been established to show that the respondent had any estate or interest in the lands described in the statement of claim, or that the appellant had contracted to do any work on those lands, or that the amount claimed was owed with respect to work performed thereon.

The lands described in the statement of claim are said to be situate "at or near Malignant Cove, in the County of Antigonish, and to border on the highway leading from Georgeville to Malignant Cove". This description includes "a certain causeway", "the conveyor to the causeway", and "the hull of a sunken ship", and while denying that it is "the registered owner of the lands" the respondent pleaded, by para. 4(*f*) of its defence:

> In the further alternative, that the bankrupt is not the owner of the lands and premises referred to . . . but is entitled only to the equity of redemption in certain portions thereof, the same (in so far as the bankrupt has any interest therein) being subject to a mortgage the holder whereof is the owner of the legal estate and fee simple in the said lands and premises.

In the course of his evidence, Mr. Chapman was asked where the causeway on which the work was done was located, and he replied "off the causeway and wharf adjacent to the plant and situate at Georgeville, Malignant Cove, Antigonish area". It will be remembered also that in its letter of April 20 the respondent described the work to be done as "to carry out the construction of a wharf and certain repairs . . . to the tunnel and conveyor to the company's premises at Malignant Cove . . ."

The attitude adopted by the appellant is made plain in its factum, where it is said:

> The estate or interest of the defendant in the lands described in the statement of claim is of two kinds:
>
> (1) actual possession of the causeway and ship located on lands of the Crown, and
>
> (2) the holder of the equity of redemption in the remaining lands described in the statement of claim and claim for lien.

As to the lands other than the Crown lands, although the proof is slim indeed I do not think that it can be said that there is no evidence of the respondent having an estate or interest therein capable of being the subject of a mechanics' lien.

The respondent, which held itself out to be the owner of these lands when the contract was made and accepted the work and labour on that basis, is at a grave disadvantage when, having called no evidence to disprove its estate or interest in such lands, it seeks to have the action dismissed on the ground that no such estate or interest has been shown to exist. Under such circumstances, the Court is, in my opinion, entitled to resolve any doubts as to the respondent's interest in the lands in favour of the lien claimant.

As to the ship and causeway, I am not prepared to hold that mere possession without any claim or colour of right coupled with an admission that the lands in question belong to the Crown can give rise to an estate or interest in lands capable of being the subject of a mechanics' lien. In this regard, reference may usefully be had to the reasons for judgment rendered by Laidlaw J.A. on behalf of the Court of Appeal of Ontario in *Pankka v. Butchart et al.*[1]

It is, however, to be remembered that a lien attaches to "any estate or interest in the land upon *or in respect of which* the work or service is done or materials are placed or furnished . . ." (s. 1(*d*) and s. 5) and I am of opinion that there is some evidence to the effect that the work done and materials supplied to the wharf and causeway were done and supplied "in respect of" the remaining lands as to which there is some evidence of the respondent's interest, and I do not think that the validity of the lien is destroyed by the fact that the description in the statement of claim

[1] [1956] O.R. 837, 4 D.L.R. (2d) 345.

1963

MODERN CONSTRUCTION LTD. v. MARITIME ROCK PRODUCTS LTD.

Ritchie J.

and claim for lien includes together with those lands, certain Crown lands to which no lien attaches.

In conclusion, I should add that it appears to me that there was also some evidence that the amount claimed in the statement of claim was owed pursuant to work done under the contract hereinbefore referred to.

In view of all the above, I would allow this appeal and set aside the judgment of the Supreme Court *in banco* and of the learned trial judge.

In his factum, the appellant's counsel asks that judgment be entered for the relief claimed in the statement of claim but we did not hear argument on this phase of the matter and we were referred to no reported case, nor have I been able to find one, establishing the practice in Nova Scotia when a judgment granting a motion for nonsuit is reversed on appeal.

The practice under such circumstances appears to be well established in Ontario (see *McKee v. Fisher*[1]), Alberta (see *Hayhurst v. Innisfail Motors Ltd.*[2]), and in British Columbia (see *Cudworth v. Eddy*[3], and *Protopappas v. B.C. Electric Ry. and Knap*[4]), and is well described by Harvey C.J. in the *Hayhurst* case, *supra,* where he said at p. 277:

> . . . we see no reason why we should not apply the same rule of practice as that of Ontario. It is to be understood therefore that for the future when a defendant applies for a dismissal at the close of the plaintiff's case he does so at the risk of not having the right to give any evidence on his own behalf for if the trial Judge grants his application and the Appellate Court comes to the conclusion that it was wrong, it will feel itself at liberty to finally dispose of the case on the evidence already given and will do so *unless in its discretion it considers that in the interests of justice some other course should be taken.*

The English practice in this regard is discussed by Lord Greene in *Yuill v. Yuill*[5], where, after referring to *Laurie v. Raglan Building Co. Ltd.*[6], he goes on to say:

> The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of

[1] (1929), 64 O.L.R. 634, [1930] 2 D.L.R. 14.
[2] [1935] 2 D.L.R. 272.
[3] [1927] 1 W.W.R. 583 at 585, 37 B.C.R. 407.
[4] [1946] 1 W.W.R. 232, 2 D.L.R. 330, 62 B.C.R. 218.
[5] [1945] P. 15 at 18.
[6] [1942] 1 K.B. 152.

no case to his election, and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of counsel's argument, the judge does not put counsel to his election, and no election in fact takes place, counsel is entitled to call his evidence just as if he had never made the submission.

In the present case, the learned trial judge explained his reasons for entertaining the respondent's motion for nonsuit on the following basis:

> It was further contended by the defendant that as none of these essentials were properly and sufficiently established, the case for the defendant could be prejudiced if he was required to proceed before the Court decided on the issues raised. Accordingly, decision was reserved and the trial adjourned until today . . .

It appears to me that the learned trial judge heard the respondent's motion in accordance with the submission of its counsel that he could "be prejudiced if he was required to proceed before the Court decided on the issues raised". In my view, this left the respondent's counsel in a position where he was entitled to assume that he would be permitted to proceed if the motion were decided against him.

In view of these circumstances, I am of opinion that it would be unjust for the respondent to be precluded from proceeding with its case and I would therefore direct that the action be referred back to the learned trial judge so that the trial may proceed in the usual course.

The appellant should have the costs of this appeal and of the appeal to the Supreme Court of Nova Scotia *in banco*. The costs of the trial, however, should abide the result thereof.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: A. L. Caldwell, Halifax.

Solicitor for the defendant, respondent: L. F. Daley, Halifax.