

*Privy Council Appeal No. 27 of 1914.*

Charles J. Wills and others - - - *Appellants,*

*v.*

The Central Railway Company of Canada - *Respondent.*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF  
QUEBEC (APPEAL SIDE).

---

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 4TH AUGUST 1914.

---

*Present at the Hearing.*

LORD MOULTON.

LORD SUMNER.

SIR CHARLES FITZPATRICK.

SIR JOSHUA WILLIAMS.

[*Delivered by* LORD MOULTON.]

---

The Appellants in this case are the Plaintiffs in the action and are a firm of contractors carrying on business in Westminster and having an office (among other places) in Montreal, in the Dominion of Canada. The Respondent is a railway company whose head office and principal place of business is in Montreal. It was incorporated for the purpose of constructing and operating a railway between the town of Midland, on the Georgian Bay, and a point in the vicinity of the city of Montreal. The railway so to be constructed (including certain branch lines) was of a total length of 381 miles.

By a contract dated 6th October 1910 the Appellants, for the considerations and upon the conditions therein stated, agreed to construct the railway for the Respondent. The general nature of the contract may be briefly stated as follows:—The Appellants were to purchase the right of way and all necessary material and execute all the works. The Respondent, on the other hand, undertook to use all their statutory powers to enable them so to do. The accounts were to be rendered to the Respondent by the Appellants by the eighth day of each month for all work done, supplies furnished or expenditure made during the preceding month, and, upon verification, the Respondent undertook to pay the amount of such outlay with 10 per cent. commission within seven days.

It was known to the Appellants at the time of entering into the contract that the finances of the Respondent Company entirely depended on the flotation of its bonds, and that it was by no means certain that it would obtain thereby the money requisite to construct the railway. Accordingly, on the said 6th of October 1910, a contemporaneous agreement was entered into to the effect that the contractors should not be bound to commence work under the contract until the Respondent should have satisfied them that arrangements had been made to finance the undertaking and to provide funds to meet the payments which would from time to time become due to the Appellants thereunder.

Between the date of the said contract and July 1911 no effective steps had been taken by the Respondent to obtain the necessary funds for the creation of the railway. On 25th July 1911, however, arrangements were made for an

issue of 1,000,000*l.* First Mortgage 5 per cent. Bonds, of which the Appellants agreed to underwrite 30,000*l.* In the agreement between the Appellants and the Respondent relating thereto there was inserted the following stipulation in favour of the Appellants.

“It is agreed between us that if you should  
“ commence the execution of the works under your  
“ contract you shall be at liberty at any time in your  
“ uncontrolled and uncontrollable discretion to refuse  
“ to proceed further with the works if you are not  
“ absolutely satisfied that there are funds available for  
“ the payment of your monthly contract payments,  
“ including your 10 per cent. commission.”

At the hearing of the Appeal there was much discussion as to whether the true meaning of this clause was that it gave to the contractors the right to suspend work under the contract if and so long as in their opinion adequate funds were not in the hands of the company, and to resume it again as soon as they were satisfied that the funds were in hand, or whether it only gave to the contractors the right to throw up the contract at any time if they were not satisfied as to the provision of adequate funds, thus terminating the contract altogether. In their Lordships' opinion the latter, which is the interpretation contended for by the Respondent, is the correct interpretation.

The issue of the bonds was only partially successful, but work was commenced under the contract, and by October 1912 accounts had been delivered by the Appellants in respect of work done, money expended, and commission to the amount of 257,000 dollars, and had been duly paid. Some further accounts were subsequently delivered at various times down to January 1913, and were also paid. The Appellants' accounts for February 1913, amounting to 3,825 dollars 30 cts., were rejected by the

Respondent, and the amount of these accounts forms part of the sum claimed herein, and Judgment in respect of it (subject to a deduction in respect of a cross account) was given in favour of the Appellants at the hearing, and forms no part of the present appeal.

In the month of October 1912 the difficulties of the Respondent company became acute. Mutual recriminations took place. The railway company reproached the contractors with delay in going on with the track-laying and the ballasting, and in not procuring the track-laying equipment, and the contractors reproached the company for not having provided the funds necessary for carrying on the works. Finally, on 21st October 1912, the contractors wrote to the company a letter, the material portion of which is as follows:—

“It is with great reluctance that we are compelled  
 “ now to give you notice that unless further moneys  
 “ are paid to the trustees for the bondholders, we shall  
 “ have to cease operations on the construction of your  
 “ railway. You will therefore please note that, unless  
 “ in the meantime satisfactory arrangements in this  
 “ respect are made, we will cease work on the 1st of  
 “ November next.

“On being advised that the trustees have received  
 “ further and sufficient cash to ensure the payment of  
 “ our charges and commitments, and to warrant the  
 “ continuation or resumption of the work, we shall be  
 “ pleased to carry on the construction, as we are at all  
 “ times fully prepared and anxious to complete the  
 “ contract undertaken by us, which still remains in full  
 “ force and effect.”

To which the company replied on 24th October 1912:—

“Under the circumstances, if you cease work on the  
 “ 1st of November next, as stated in your letter, the  
 “ company will consider your contract cancelled, and  
 “ arrange to go on with the work itself as it may see  
 “ fit, holding you responsible for any loss or damage  
 “ which it may suffer through the non-fulfilment of

“ your contract. Although you repeat that you have  
“ been at all times fully prepared to complete the  
“ contract undertaken by you, we cannot admit that  
“ this is correct, but, on the contrary, we claim that  
“ you have at no time taken the necessary steps to  
“ accomplish the work according to the terms of the  
“ contract.

“ You say it is useless to discuss these terms, and  
“ therefore I will not do it.”

Contemporaneously with this correspondence each party by a notarial protest attempted to strengthen its case against the other. The protest by the contractors is dated 26th October 1912, and it notified (after reciting the various proceedings and events on which they based their case) that if sufficient moneys were not deposited forthwith in London with certain trustees the contractors would not proceed further with the works after the 1st day of November next 1912, and would take such further action in the premises as by Counsel they might be advised. The protest on behalf of the railway company did not confine itself to making protest against the breaches of contract alleged to have been committed by the contractors, but it went on to give them notice (under a power reserved to that effect under the contract) that, unless within one month from that date the work covered by the said contract was proceeded with in such a manner as to ensure its completion at the time agreed upon and in such a manner as to satisfy the company's chief engineer, the said work would be taken out of the contractors' hands.

Their Lordships are of opinion that this threat to take the works out of the contractors' hands was not in accordance with the terms of the contract. Clause 12 of the contract under which it purports to be given makes the right of the railway company to turn the contractor

out depend on the opinion of the engineer, who is made the sole judge as to whether the contractors have so failed in their duty as to bring the clause into force. In the present case the threat was given by the railway company without reference to the engineer. He was not consulted about it, and his own evidence shows that he had never even in his own mind come to the conclusion that the contractors were guilty of any such default as would warrant the clause being put into force. This notice or threat on behalf of the railway company was therefore a mere *brutum fulmen*, and would not have justified any proceedings taken in accordance with it.

Correspondence continued between the parties during the succeeding six months ending with a letter from the solicitors of the railway company to the Appellants, dated the 10th March 1913, notifying that the work had been taken out of their hands in conformity with the notice given on 22nd October 1912, by the protest above referred to and that the company

“ will take such steps as may be deemed proper and  
 “ necessary to continue and complete the works of  
 “ construction covered by the said contract under the  
 “ superintendence of the company’s engineer or by  
 “ letting the work to another contractor as the  
 “ company may see fit.”

This was followed by the Appellants bringing the present action on the 19th March, 1913.

The relief prayed by the Appellants in their declaration so far as is relevant to the present Appeal is two-fold. In the first place they claim a sum of \$18,825.30, which is made up of the sum of \$3,825.30 already referred to, and which has now been disposed of, and a sum of \$15,000 claimed by them as damages for breaches of contract committed by the Respondent prior to the bringing of the action. They were

required to give particulars of these damages and they duly delivered them and evidence was to some extent called by them at the trial to support the particulars, but that evidence was wholly insufficient.

According to English procedure this part of the claim would have been dismissed and no further action could have been brought in respect of damages thus sued for and not supported by evidence at the trial. But the learned Judge by his Judgment reserved to the Plaintiffs the right to recover in a future action any damages which they had suffered or might in future suffer from breaches of contract by the Defendant, including those sued for in the present action. On Appeal to the Court of King's Bench for the Province of Quebec (Appeal Side) this part of the Judgment was reversed. The opinion of their Lordships is entirely in favour of the propriety of this decision of the Appeal Court. But even if that were not the case it is clearly a matter of procedure dependent at best upon the discretion of the Court. It cannot be a matter of right that a Plaintiff having put in issue damages already accrued and having attempted to prove them and failed should be at liberty to bring a fresh action in respect of them, and accordingly their Lordships would be very unwilling to interfere on such a point with the decision of the Court of Appeal.

This, however, is a very minor and subsidiary point. The real substance of the Appeal relates to the Judgment of the Judge at the trial with regard to the following claim in the Plaintiffs' declaration :—

“That by judgment to be rendered herein, the  
“ Company Defendant be enjoined and prohibited from  
“ itself completing the work of construction under  
“ the superintendence of the company's engineer, or

“ otherwise, or from letting the work to any other  
 “ contractor or contractors, and that it be declared  
 “ that the Plaintiffs alone are entitled, by reason of  
 “ the premises, to complete the said work according  
 “ to their agreements.”

The Judgment of the trial Judge in respect of this reads as follows:—

“ The Court doth enjoin and prohibit the Defendant  
 “ from itself undertaking or completing the work of  
 “ construction under the superintendence of the Com-  
 “ pany Defendant’s engineer, or otherwise, or from  
 “ letting the work to any other contractor or con-  
 “ tractors; and doth grant acte to the Plaintiffs of  
 “ their willingness and intention to enter upon and  
 “ complete their work under said contract with all  
 “ diligence, according to the terms thereof, so soon as  
 “ the Defendant shall have performed its obligations  
 “ to make such financial arrangements as shall satisfy  
 “ the Plaintiffs with regard to the payment of their  
 “ expenses and commitments, including their com-  
 “ mission, and doth condemn the Defendant to pay  
 “ the Plaintiffs’ costs.”

On Appeal to the Court of King’s Bench (Appeal Side) this part of the Judgment was set aside. The main question in this Appeal is whether that Court was right in so deciding.

The Contract between the parties is for the execution of certain works, the cost of which is to be borne by the Respondent, the Appellants being entitled to charge ten per cent. on that cost as their remuneration for their services in actually carrying out the work. There can be no doubt that (at all events so soon as the money they have expended is repaid to them with the addition of their remuneration in respect of the same) all the work, materials, &c. become the property of the company. No doubt there remains to the Appellants the right to complete the work and to earn the remuneration to which they would be entitled therefor under



the terms of the contract; but that is all. Their interest is therefore pecuniary only. They have no interest in the thing produced.

Their Lordships are of opinion that this is a typical case of a contract the breach of which can be fully and completely measured by damages. In such a case the Courts in England would certainly refuse to decree specific performance or to compel the company to continue to employ the contractors in the completion of the railway by granting an injunction against their employing any other person to complete it. By bringing in another contractor the company would no doubt be treating the contract as at an end, and if this constituted a wrongful repudiation on their part the contractors would be entitled to sue them for the whole of the profit to which they would have become entitled by the completion of the work. This would be full compensation for the breach, for it would give to the Contractors the full return that the execution of the entire work would have brought them.

But there is here a further reason why no such injunction could be granted. The Appellants neither alleged nor proved that they were willing to proceed with the contract. On the contrary, they insisted and still insist that they have a right, at their own uncontrolled and uncontrollable discretion, to suspend the works during such time as they are not absolutely satisfied that there are funds available for the payment of their monthly contract payments, including their 10 per cent. commission. This is not a mere expression of their opinion on a legal point. They have acted upon it and, indeed, at the date of the bringing of the action, they had definitely and formally acted

on it for several months, and they have continued to do so ever since. Their Lordships have already decided that they had no such right as they thus claimed, so that their refusal to proceed with the contract works was wrongful. Now, the granting of an injunction is always a matter of discretion to some degree, and no Court would grant an injunction to enforce specific performance of a contract or to prevent the other contracting party securing its performance by other means, when the party seeking its aid had wrongfully refused to carry out his part of the contract, and was still persisting in so doing.

Such, then, is the position of the case looked at from the point of view of English law. Is the law of Quebec different in this respect?

— So far as regards the second of the above grounds there can be no doubt that the law is the same in Quebec as it is in England, for it goes to the root of the Plaintiff's right to ask a Court to protect him in the enjoyment of his contract. It is well nigh impossible to believe that the law or the procedure of any civilised country would provide that one contracting party could call in aid the powers of a Court to compel the other contracting party to observe a contract which he himself without lawful excuse was persistently refusing to perform. At all events no authority has been cited, and no grounds suggested in support of the view that either Quebec Law or Procedure would under such circumstances assist the Plaintiffs in the way which they seek by their claim:

But their Lordships are also of opinion that there is nothing in the Civil Code of Lower Canada which countenances the view that injunctions are intended to be given under its provisions in cases where injunctions would

not be given by our Courts in England. Indeed the presumption is the other way. The remedy by specific performance or injunction is not one that originally formed part of the law of Quebec. It has been introduced in imitation of the law prevailing in England. The clauses of the Code of Civil Procedure relating to it were discussed at length on the hearing of the Appeal, but their Lordships are of opinion that they afford no support for the contention of the Appellants. They relied chiefly on Article 957 which specifically relates to interlocutory injunctions only, and which shows by its express language that it is dealing only with the procedure necessary to keep matters in an unchanged state during the period of the litigation so far as is necessary to prevent the final Judgment from being rendered ineffectual. The absence of specific directions as to the cases in which injunctions will be granted points to an intention to follow the well-known rules of English Law on this subject which are based not on specific enactments but on the practical experience of Courts that have exercised the jurisdiction for centuries past and have thus arrived at the rules which it is necessary or prudent to follow. Their Lordships are of opinion that the law of Quebec certainly does not go further than the English Law in these respects. It is not necessary in this case to decide whether it goes so far.

Their Lordships are, therefore, of opinion that the decision appealed from was correct, and they will humbly advise His Majesty that this Appeal should be dismissed with costs.

---

In the Privy Council.

---

CHARLES J. WILLS AND OTHERS

v.

THE CENTRAL RAILWAY COMPANY  
OF CANADA.

---

DELIVERED BY LORD MULLTON.

LONDON:  
PRINTED BY EYRE AND SPOTTISWOODE, LTD.  
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1914.