

Privy Council Appeal No. 146 of 1915.

Foley Brothers and others - - - - *Appellants,*

v.

James A. McIlwee and others - - - - *Respondents,*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY, 1916.

Present at the Hearing:

EARL LOREBURN.

LORD ATKINSON.

LORD PARKER OF WADDINGTON.

LORD SUMNER.

[*Delivered by* EARL LOREBURN.]

This is a dispute arising out of a contract between Messrs. Foley Brothers and Messrs. McIlwee and Sons.

Messrs. McIlwee, who are the plaintiffs, agreed to construct a tunnel some 5 miles long. It would be necessary to make the tunnel from both ends.

In September 1914 a quarrel arose between Mr. Dennis, who was acting on behalf of Messrs. Foley Brothers, and Mr. McIlwee, acting on behalf of his firm. Mr. Dennis in his haste sent a notice cancelling, at all events, part of the contract, and he also thereupon stopped the supply of air which was necessary to enable the work to continue. After some fruitless interviews, Mr. McIlwee broke up his staff, and treated the contract as ended, inasmuch as the action and the notice of Mr. Dennis went to the very root of the contract. Their Lordships feel no doubt that the letter of the 24th September containing the notice and the action of Messrs. Foley Brothers through Mr. Dennis justified Messrs. McIlwee in treating the contract as having been repudiated in respect of matters going to the root of it. The work was in fact discontinued by Messrs. McIlwee and Co. because of the action of and the notice that had been given by Mr. Dennis.

An argument was addressed to the Board to the effect that the discontinuance of the work and the cancellation or annulment of the contract was due to a common agreement by both

sides. This view seems to be quite untenable. It did not commend itself either to the Trial Judge or the Court of Appeal, and it is not necessary to elaborate the facts bearing upon that issue.

Messrs. McIlwee thereupon brought an action, and certainly are entitled to damages ; but an important question has been raised upon what principle those damages ought to be assessed. With regard to that matter, the Trial Judge, Mr. Justice Clement, and the Court of Appeal differed, and it is desirable to explain how that difference arose. The unwise letter of the 24th September had hardly been written, and action hardly taken, before the author of it appeared to have had some misgivings, and he wished and his principals wished that the contract should be continued. Messrs. McIlwee for obvious reasons were anxious to continue the contract, but seem to have been annoyed at the treatment they thought they had unjustly received. Thereupon two offers were made by Mr. Dennis on behalf of Messrs. Foley Brothers. He offered upon the 9th October that the work should be continued, and that Messrs. Foley Brothers should pay damages up to date. At this time the workmen originally engaged had been discharged by Messrs. McIlwee and Co., and part of the staff—nearly all of the staff, apparently—had been disbanded. Of course, the damage arising from the breach of contract might continue beyond the date of the 9th October. Messrs. McIlwee professed to be ready to renew the contract, but were uncertain as to whether the terms of the offer included damage which might occur after the 9th October. They could not obtain any assurance that this was intended, or that this was offered, and they would not renew the contract without being satisfied upon that point. The Court of Appeal thought this was reasonable ; their Lordships agree with that view, and must regard the letter of the 9th October as being, to say the least, doubtful in construction.

The second offer was made upon the 10th November, by which time five more weeks had elapsed, and Messrs. McIlwee had now been kept from work for six weeks. The offer by Messrs. Foley Brothers amounted to this—that they would pay all damage of every kind arisen or to arise from the breach, and would restore the terms of the old contract. By this time it had become necessary that considerable modifications should be made in the old contract to meet the new situation, as regards the time, for example, and other matters. Messrs. McIlwee expressed their demands in a letter of the 11th November. If any legal adviser, by which is meant any person competent to give an impartial opinion upon this contract, had been asked in regard to this letter of the 11th November, their Lordships think he would have said there must be considerable modification in the contract before any renewal could be advised, and that he could not advise a renewal unless the points raised in that letter were cleared up and satisfactorily settled. In point of fact when the letter was received it was

not treated as being a basis of settlement, and the offer of the 10th November came to nothing. The Court of Appeal thought that this was not unreasonable conduct on the part of Messrs. Mellwee, and their Lordships are not prepared in any way to differ from that opinion.

Perhaps it would be advisable to say one or two words in view of some of the expressions that have been made use of in the judgments. Their Lordships think that the quotation by Mr. Justice Gallihier from the judgment of Lord Chief Justice Cockburn in the case of *Frost v. Knight* (L.R. 7 Ex. 111) truly expresses the law. The Lord Chief Justice, in speaking of the event of one person treating a contract as broken and suing at once for breach of it, says :—

“ he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time . . . and in assessing the damages for breach of performance a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.”

In many cases the nature of the contract, or its circumstances, may make it extremely difficult, if not impossible, to apply any such rule, but that rule of law seems applicable to all contracts where it can practically take effect.

Under these circumstances, their Lordships will humbly advise His Majesty that this appeal ought to be dismissed with costs.

In the Privy Council.

FOLEY BROTHERS AND OTHERS

v.

JAMES A. McILWEE AND OTHERS.

DELIVERED BY EARL LOREBUEN.