

American Surety Company of New York - - - - *Appellants*

v.

Calgary Milling Company, Limited - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 11TH JULY, 1919.

Present at the Hearing :

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

[*Delivered by* LORD DUNEDIN.]

The respondents in this appeal, who are grain millers, were in need of a new elevator to replace one which had been destroyed by fire. With a view to its erection they entered into a contract, on the 18th July, 1910, with a firm of contractors called "Tromanhauser and Mooers." By clause 1 the contractors were bound to :—

"Provide for all materials and perform all the work mentioned in the specifications and shown on the drawings and plans prepared by the contractors . . . for the construction, erection, and completion of a grain elevator situate on the Canadian Pacific Railway right of way in the city of Calgary, to the north of the Canadian Pacific Railway and to the east of Fourth Street West in the said city of Calgary, furnishing and supplying all the material, lumber, and plant of every description required in conformity with said specifications, drawings, and plans. All the work shall be done and said material and plant furnished to the satisfaction of William Henderson, acting for the purpose of this contract as agent of the owner."

The time for the completion was fixed to be the 15th October, 1910, a date which by subsequent agreement was altered to the 30th June, 1911; penalties were fixed for non-completion. Provision was made for the case of abandonment of the contract in a clause which it will be convenient to quote at length at a subsequent stage of this judgment, but which may be at present sufficiently described as giving power to the respondents to enter upon and finish the work, and to charge the contractors for any difference between the cost so incurred and the unpaid balance of the lump sum of \$65,000.

The clauses which are material to the questions raised in this appeal are the 14th, 15th, 16th and 20th, which are as follows :—

“ 14. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractors for said work, materials, and machinery shall be sixty-five thousand (\$65,000·00) dollars subject to deductions as herein provided and that such sums shall be paid in current funds by the owner to the contractors in instalments as follows :—

“ (1) All wages for labour done and performed in and about the works from the commencement of operations until such time as the contractors furnish the bond hereinafter provided upon production of the time sheets and/or wages, accounts duly certified and approved by the agent of the owner.

“ (2) The sum of (\$5,000·00) five thousand dollars to the contractors upon production of the bond hereinafter provided.

“ (3) On and after the production of the bond hereinbefore provided all wages for labour done and performed and sums paid for materials supplied upon production of the time sheets and/or wages accounts and/or vouchers duly certified as aforesaid.

“ Provided that the total amount so paid by the owner during the progress of the work as aforesaid shall not exceed a sum equal to (80%) eighty per cent. of the amount of work done and materials furnished on the premises at the contract price. And the contractors hereby agree that the owner shall be and is hereby authorised to retain out of the monies payable to the contractors under this agreement, the sum of twenty per cent. of the amount of the contract and to expend the same in the manner following, namely: To retain such twenty per cent. until thirty-one days after the completion of the works and to pay thereout the claims of all persons who have done work or furnished material in the execution of any part of this contract to or for the contractors and in repairing the said works or finishing any work left unfinished by the contractors.

“ 15. And it is agreed that the owner may hold and retain the sum above mentioned as a guarantee that the said work has been faithfully performed and as an indemnity against all and any claims and demands against the owner by reason of said work.

“ 16. The final payment shall be made thirty-one days after this contract is fulfilled and completed to the approval of the owners. All payments shall be made upon the written certificate of the said William Henderson or any other agent appointed for the purpose by the owner as hereinbefore provided to the effect that such payments are due. Before the issue of the final or any certificate except the first, the contractors shall, if required, produce to the owner a clearance from the various supply men and pay sheets duly signed by the various employees and showing that all wages have been paid.

"20. The contractors hereby covenant and agree to furnish to the owner a good and sufficient bond to the satisfaction of the owner in the sum of thirty thousand (\$30,000) dollars for the faithful performance of this contract conditional to indemnity and save harmless the owner from all suits or actions of every kind and description brought against the owner for or on account of any damages received or sustained by any party or parties by or from contractors or their servants or agents in the construction of the said works or by or in consequence of any negligence regarding the same or by reason of any improper material furnished by the contractors in the construction thereof, or by or on account of any act or omission of the contractors, and further conditioned for the faithful performance and completion of this contract by the contractors."

The work was begun and the contractors procured the bond stipulated for under section 20. This bond is in the form of a contract between the contractors (denominated as the Principal) the appellants, the American Surety Company of New York, (denominated as the Surety), and the respondents (denominated as the Obligee). By it, under certain terms and conditions presently to be specified, the appellants promised, to the extent of \$30,000, to guarantee the performance of the contract.

The contractors carried on the work so far and received certain payments, as will be subsequently more particularly stated, but a disagreement having occurred between the partners, Mooers retired, and the firm assigned the interest in the contract to Tromanhauser. Tromanhauser continued the work for a time, but found himself unable, from want of financial support, to go on with the contract. This fact he intimated to the respondents by a letter of date the 26th November, 1910. The respondents then entered upon the work and finished it themselves. The expenses incurred and the damage for delay having amounted, as alleged, to more than \$30,000 more than the portion of the \$65,000 still unpaid, they raised this action against the contractors and against the Surety on their bond.

The facts above stated were not substantially controverted, and judgment was entered against the contractors, as to which there is no question. The Surety Company, however, defended themselves on the ground that the conditions of the bond had not been fulfilled by the respondents. This view was upheld by the Trial Judge, but on appeal his judgment was reversed by the Court of Appeal, who gave judgment in favour of the respondents. From that judgment the present appeal is taken to this Board.

It now becomes necessary to set forth the terms of the bond so far as material. As already stated, it binds the Surety (the appellants) to indemnify the Obligee (the respondents) against loss in the contract owing to the default of the contractors. It then proceeds:—

" Provided, however, and upon the express condition the performance of each of which shall be a condition precedent to any right of recovery hereon : . . .

" *Fourth* : That the Obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the Obligee to

be performed; and shall also retain that proportion, if any, which such contract specifies the Obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, than ten per centum of such value) until the complete performance by the Principal of all the terms, covenants and conditions of said contract on the Principal's part to be performed. . . ."

The appellants argue that the respondents have broken this condition in two respects. It will be convenient to deal with the two grounds separately.

They urge first that the respondents infringed the condition as to retaining 20 per cent. out of payments made. What happened was as follows:—

Prior to the granting of the bond the respondents paid the contractors the full amount of their wages bill as certified by their agent Henderson. Upon the bond being granted they paid the \$5,000 as provided by clause 14 (2) of the contract. They then wrote the following letter to the appellants:—

"DEAR SIRS,

"Referring to your \$30,000 surety bond, Tromanhauser and Mooers, Principals, and ourselves, Obligee, dated August 10th, 1910, and our agreement with these contractors in connection with the same dated July 18th, 1910,—a copy of which we presume you have retained—would say that the contractors claim that section three of clause fourteen of this agreement binds us to pay them after our acceptance of the bond, 100 per cent. or in full for all paid vouchers produced for work done and material supplied on the building; up to a point where we have paid them 80 per cent. of the contract price or \$52,000; after which all payments cease, until thirty-one days after the completion of the contract to our satisfaction, when final payment will be due them.

"Now, it appears to us that the wording of this section of clause fourteen is rather ambiguous, and you may have interpreted it as binding us to pay them not more than 80 per cent. of the amount of such paid vouchers; up to a point where we will have paid them \$52,000.00 or 80 per cent. of the contract price after which all payments cease, until they are entitled to their final payment.

"It is agreeable to us to make these payments in accordance with the interpretation of the contractors, providing we will not thereby be invalidating your bond.

"Kindly let us know how you have interpreted this clause, and what, in your opinion, is our obligation to you in respect to same. . . ."

to which they received the following reply:—

"DEAR SIRS,

"Supplementing our letter of the 10th instant, which was an acknowledgment of your letter of the 30th ultimo in *re* the above entitled matter, I desire to state that, after carefully reading over the contract, our company is of opinion that payments to be made to the contractors should be on an 80 per cent. basis, that is, 20 per cent. of every payment should be retained until the final completion and acceptance of the work. . . ."

Acting on this they paid to the contractors 80 per cent. of the certified accounts for labour and materials up to and inclusive of the 15th November. On the 17th November they received a further certificate for \$4,061. Previously, however, to this date they had received two assignments by Tromanhauser to two persons, Prince and Kerr, for \$5,000 and \$3,500 respec-

tively. They therefore refused to pay the contractors more than the sum which, with the sums assigned and the sums already paid, amounted to 80 per cent. of the whole contract price. The respondents, therefore, did not infringe the contract if the true construction is that they were entitled to pay till the limit of 80 per cent. of the whole contract was reached. On the other hand, if they were only entitled to pay 80 per cent. *toties quoties* as the certificates were issued, then, inasmuch as the total amounts paid amounted to 80 per cent. of the whole contract price and the whole contract had not been finished, there had not enough been retained. This question depends entirely upon the true construction of the proviso above quoted. Now it is to be observed that the 80 per cent. which is to be paid is expressed as a supplement of the 20 per cent. which is to be retained. The 20 per cent. which is to be retained is expressed as 20 per cent. "of the amount of the contract," and that necessarily refers to the total price. It would, therefore, seem to follow that the 80 per cent. must be based on the same calculation. The other interpretation would necessitate a calculation which would be practically impossible except by a sort of rough and ready guess-work, for it would be necessary for the giver of the certificate to calculate the amount of work done and materials furnished from time to time "according to the contract price." Now the contract here had no schedule prices, and such a calculation would, therefore, be practically impossible according to any reliable standard. In view of these considerations, their Lordships agree with the learned Chief Justice that the proper interpretation of the proviso is to hold that the respondents were entitled to make payments for all work certified as actually done and materials as actually supplied, provided that the total of such payments did not exceed 80 per cent. of the total contract price.

The learned counsel for the appellants put forward an alternative argument on this head. He said that, if the above were the true construction, the payments to the contractors had not been really enough, inasmuch as after the 2nd September they were only paid 80 per cent. of each account rendered. Their Lordships are of opinion that this argument is not open to the appellants in respect that they are estopped by their letter of the 13th September, 1910. On what their Lordships have held to be the true construction of the contract, the contractors might, it is true, have insisted on the full certified payments up to the total limit, but inasmuch as the respondents put the matter fairly to the appellants, and in acceptance of their view only paid the 80 per cent., it is impossible for the appellants to found on that as a breach of contract on the respondents' part.

The second point in which the appellants say the respondents broke the condition is founded upon the clause which provides for the entry of the owner upon the work, in default of the contractors, in order to finish it. It goes on to say:—

"and in case of such discontinuance of the employment of the contractors, they shall not be entitled to receive any further payment under this

contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractors ; but if such expenses shall exceed such unpaid balance, the contractors shall pay the difference to the owner. The expenses incurred by the owner herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be agreed upon between the contractors and owner, and failing such agreement, shall be settled by arbitration as hereinafter provided."

This provision, it is argued, was disregarded by the respondents, inasmuch as they paid Kerr and Prince the sum of \$8,500 at dates subsequent to themselves taking over the work in default of the contractors.

Their Lordships agree with the learned judges of the Court of Appeal that in the case of both Kerr and Prince there were orders which effected given assignments of monies due to the contractors up to the limits within which the contractors were entitled to be paid. When the last certified account for \$4,061 was presented, on the 17th November, 1910, the respondents only paid \$1,982, because the sum required to honour the assignments for \$8,500, together with \$1,982, brought the total payments up to the 80 per cent. of the contract price. In so doing they appropriated the \$8,500 for payment of the intimated assignments, and their Lordships do not consider that the fact that the money was actually handed over to Prince and Kerr at a subsequent date constitutes any contravention of the clause quoted.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.



AMERICAN SURETY COMPANY OF NEW YORK

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CALGARY MILLING COMPANY, LIMITED.



DELIVERED BY LORD DUNEDIN.

Printed by Harrison & Sons, St Martin's Lane, W C.
1919.