

1920
Nov. 15.

IN THE MATTER OF THE PETITION OF
RIGHT OF A. G. CREELMAN AND } SUPPLIANTS;
H. H. VERGE.....}

AND

HIS MAJESTY THE KING.....RESPONDENT.

Petition of Right—Damages—Tort—Reasonable Delay—Contracts—Tender.

In July, 1916, the Crown called for tenders for the construction of a Drill Hall in Calgary, Alta., such tenders to be received not later than August the 8th. On the 4th of August, suppliants mailed their tender from Calgary, and on the 12th September, they were advised their tender had been accepted and that the contract would be sent shortly for execution. On the 15th they were advised that the contract etc., was being expressed, and on the 19th the letter was received by suppliants; but the plans, etc., did not arrive for several days, not later than the 29th, when it was signed. At the trial suppliants stated they had no objection to the delays in staking, and no proof was offered as to delay in giving possession. The action was taken for damages due to delays above mentioned.

Held: That as the acts of the Crown complained of could not be considered as amounting to a breach of contract; and as the present action was one sounding in tort for which no action lies against the Crown, apart from special statutory authority, suppliants' action could not be entertained.

Semle: That owing to the abnormal conditions prevailing during the war and the unavoidable delays in communication due to the parties being over 2,000 miles apart, the delays in accepting the tender, advising thereof and sending the contract for signature, were not unreasonable or oppressive.

PETITION of Right seeking to recover \$35,453.58, amount of loss alleged to have been suffered by suppliants by reason of delays in connection with the contract with the Crown for the construction of a Drill Hall at Calgary.

The action was tried before the Honourable Mr. Justice Audette at Calgary, Alta., on the 27th day of September, 1920.

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R. B. Bennett K.C., and *W. D. Gow*, for suppliants.

I. W. McArdle and *W. S. Davidson*, for respondent.

The facts are stated in the reasons for judgment, and the material averments in the petition may be summarized as follows:

Suppliants claim that the delays in accepting their tender, in forwarding the contract for execution, in the staking and giving possession of the land for the building were unreasonable, and by reason thereof they were thrown into the winter months, when the work of excavation could not be done, and these operations had to be suspended till the following spring, and they were unable to undertake the work of construction when and in the manner contemplated by them and respondents. That the cost of labour and material was speedily increasing at all times during the construction, and, that in consequence, they suffered damages, from such delays to the extent of \$35,453.58.

AUDETTE J. now (November 15, 1920), delivered judgment.

The suppliants, by their Petition of Right, seek to recover the sum of \$35,453.58, the amount of a loss they allege to have suffered as hereinafter set forth, in connection with their contract with the Crown, for the construction of a Drill Hall, at the city of Calgary, in the province of Alberta.

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The Crown, during July, 1916, called for and invited tenders for the construction of this drill hall, under the conditions mentioned in the notice to that effect, as set forth in exhibit No. 1, and stating, among other things, that tenders for the same would be received at the office of the secretary of the Department of Public Works, at Ottawa, until 4 o'clock, p.m., on the 8th August, 1916.

After acquainting themselves with the plans and specifications, the suppliants, on the 4th August, mailed their tender in the form shewn in Exhibit No. 2, under the form supplied by the respondent.

On the 12th September, 1916, the suppliants were by telegram advised and notified that their tender had been accepted and the following letter, bearing same date, was sent, by the Department of Public Works, to the suppliants, viz.:—

“I beg to inform you of the acceptance of your tender, at \$282,051.45, for the construction of a Drill Hall, at Calgary, Alta., \$9.25 per cubic yard to be paid for any additional concrete, as per specification, including all extra excavation, filling and wood forms, etc.

“The contract in this connection is being prepared and will be forwarded shortly for execution.

“I have the honour to be, Gentlemen,

“Your obedient servant,

“(Sgd.) L. H. Coleman,

Asst. Secretary.”

“Messrs. A. G. Creelman & Co.

“Calgary, Alta.

Then on the 15th September the Department addressed to Mr. Leo Dowler, their resident engineer, at Calgary, the following letter:—

“Sir:—I beg to transmit to you herewith, in duplicate, the draft of contract to be entered into between His Majesty and Messrs. Creelman & Verge, for the construction of a drill hall at Calgary, Alta., and to ask you to kindly have these documents, and plans, forwarded to you under separate cover, signed by the contractors in your presence as witness.

“You will please fill in the blank spaces left for the date of signature and for the first names of the contractors, and return me these documents, together with the plans, for completion by the Department, after which, one of the duplicates will be returned to the contractors.

“Your obedient servant,

“R. C. Desrochers,

Secretary.”

“Leo Dowler, Esq.,

“Resident Architect, P.W.D.,

“Calgary, Alta.”

As may be inferred from this letter the draft of the contract, the specification and plans were being transmitted to Calgary, under separate cover.

This letter (exhibit A) appears to have been received at Calgary, on the 19th September, but the draft of the contract and plans, etc., which were sent by express only came several days afterwards. The resident architect testified he could not swear on what date they arrived; but he made repeated enquiries for these documents at the Express office, and on the day they came into his possession, he immediately advised the suppliants who came and signed the contract on the 29th September.

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[His LORDSHIP here recited certain averments of the petition, the substance of which is stated *Ante*. p. 199.]

Can it be said, with justification, that the tender having reached Ottawa on the 8th August and the notice of acceptance having emanated on the 12th September,—that the delay between these two dates was unreasonable and oppressive?

I must answer in the negative. The parties in question were more than 2,000 miles apart. The Crown was not obliged to accept the tender,—it had only invited the contractors to submit figures for the erection of that building; and, on the other hand, at any time, between the date of the tender and the notice of acceptance the suppliants were at liberty to revoke their tender which must be construed as speaking from day to day, expressing willingness from day to day to perform that contract. If they found the delay in answering their tender was too long, they could at any time put an end to it; they could have withdrawn by revoking it.

Now, if the suppliants had found, at any time after the 8th August, that the Crown was taking too long in advising them whether their tender was accepted or rejected, it was always opened to them to revoke it. If they did not do it and if they received, on the 12th September, the notice of acceptance without protest, and if they entered into and signed the contract on the 29th September without protest, have they not acquiesced in what was done, are they not to-day estopped from setting up contentions so inconsistent with their conduct? And this would apply as well to the delay in accepting and in signing the contract.

Halsbury, The Laws of England, Vol. 7, pp. 346, 347:

[His Lordship here gives the citation.]

Apart from these considerations, I find that the delay in question cannot be qualified as unreasonable and oppressive. Under normal conditions, taking into consideration that the parties were over 2,000 miles away from one another, that the Crown is necessarily a slow body to move, as a matter of this kind has first to be taken up by the officials, then by the minister who finally takes the matter before the Governor in Council. All these contingencies are well known to experienced contractors as the suppliants.

However, in this case we have more than normal conditions to consider. In 1916 the country was engaged in this gigantic mondial war, when all the resources of the country were taxed to their limits and when all the ministers of the Crown gave their chief and paramount attention to the innumerable questions involved in the prosecution of the war, I unhesitatingly find that the delays complained of were decidedly not oppressive, but quite reasonable and what might be expected, under the circumstances.

The suppliants were, as just said, always at liberty to revoke their tender before its acceptance, and they therefore cannot construe a right of action against the Crown for such delay. The delays which elapsed between the notice of acceptance (12th September) and the signature of the contract (29th September) were not unreasonable as far as the Crown is concerned when consideration is given to the necessary delay involved in forwarding any document from Ottawa to Calgary,—and moreover, in the present instance, the delays in the transmission of this contract, specification and plans seem to have been caused by the express company.

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With respect to the complaint of delays in staking and giving possession of the land upon which the building was to be erected, it must be found that there is no evidence bearing upon the delay in giving possession of the land, but only in respect of the staking, which seems to have been attended to just as soon as it was mentioned by the contractor and witness G. E. Hughes, the suppliants' manager, speaking of this delay, said: "After the receipt of the plans, I would say it (the staking) was not done promptly, but I do not object to the time it took. It was staked on October 7th. It might have been staked sooner." Indeed, many things might have been done sooner; the suppliants also might have started the excavation sooner than the day they did—they might also have held their sub-contractors to their contracts, etc. However, all of these matters in the view I take of the case become unnecessary to pass upon.

This action is for the recovery of damages, under the above mentioned circumstances, and is therefore in its very essence one sounding in tort. Apart from breach of contract or from special statutory authority no such action will lie against the Crown.

The complaints made herein cannot be construed as amounting to a breach of contract for the reasons already mentioned.

By the third clause, on page 4 of the specification, which forms part of the contract and which had been in the suppliants' possession before making any tender,—it is provided, among other things, that "no charge shall be made by the contractors for any delay or hindrance from any cause during the progress of any portion of the work embraced in his contract."

The clause 44 of the contract provided that: "The contractor shall not have, nor make any claim or demand, nor bring any action or suit or petition against His Majesty for any damage which he may sustain by reasons of any delay or delays, from whatever cause arising in the progress of the work."

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Failing to establish that the delays complained of were oppressive, as contemplated in the case of *Bush v. Trustees of Port and Town of Whitehaven*, (1) cited at bar in the able argument presented on behalf of the suppliants,—no right of action will lie against the Crown under the circumstances. The present case is clearly distinguishable from the latter in that the works contemplated by the contract in that case were to be performed in the space of four months and that the delay in giving possession of the land extended for a period of three months and thirteen days and ran into the winter.

It is true the suppliants discharged in a creditable manner the works contracted for at the sum of \$282-, 051.45, plus the charges for concrete, and that under the evidence adduced by both parties, the building, as erected, was worth, at the time of the trial, between \$350,000 to \$400,000. However, the contractors would appear to have been the victims of circumstances. In the autumn of 1916, the climatic conditions were worse than usual and the cold weather set in earlier; then the war was being carried on with all due energy with the result that the price of labour and materials kept soaring up. Had the weather been more favourable, had prices gone down instead of jumping up, the result would have been different. Did not the con-

(1) Hudson on Building Contracts, (4th Ed.) Vol. II, p. 122.

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tractors tender at too low a price under the circumstances, when prices were so unsteady? However, these are matters that cannot be judicially weighed, the contract is the law of the parties.

Under clause 3 of the contract the works had to be fully completed by the 12th September, 1918. They were completed on the 25th October, 1918, with extras to the small amount of \$940, and the Crown made no complaint in that respect. Perhaps I should not close without mentioning, that there is endorsed, on the outside cover of the contract a memo, that the contract was authorized on the 9th September, 1916, by an Order in Council; however that may be, there has been no evidence on the record establishing that any such Order in Council was ever passed and if any were passed, the nature of the same.

The suppliants have established that they have performed their contract in good workmanship, to the satisfaction of the Crown; but they have failed to show a right of action, under the circumstances. They have been the victims of circumstances over which neither party had any control.

There will be judgment declaring that the suppliants are not entitled to any portion of the relief sought by their Petition of Right.

Judgment accordingly.