1945
*May 10, 11
*June 20

W. A. BECHTEL COMPANY AND OTHERS, CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF BECHTEL - PRICE - CALLAHAN (DEFENDANTS) ..... } APPELLANTS;

AND

STEVENSON & VAN HUMBECK SAWMILL AND OTHERS (PLAINTIFFS). } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contract—Whether such delay in performance as to warrant repudiation —Measure and computation of damages for breach—Reference back for reassessment.

APPEAL by the defendants from the judgment of the Supreme Court of Alberta, Appellate Division (1), dismissing (Harvey C.J.A. dissenting) their appeal from the judgment of the trial judge, Macdonald J., in favour of the plaintiffs for damages for breach (as he found) of a verbal contract to take delivery of and pay for a minimum of 500,000 feet of lumber and bridge timber to be manufactured by the plaintiffs. The trial judge allowed as damages $9,415.30, being for 500,000 feet at $30 a thousand ($15,000), less $4,019.30 paid, and less the cost (estimated at $6 per thousand) of sawing into lumber and bridge timber 260,901 feet of unmanufactured logs ($1,565.40).

L. A. Forsyth K.C. and *Paul F. Renault* for the appellants.

J. N. McDonald K.C. for the respondents.

The judgment of the Court was delivered by

RAND J.—The Courts below concur in finding a contract for the work of logging and sawing not less than 500,000 feet of lumber and the questions here are as to delay and damages.

Considering all the circumstances admittedly contemplated by the persons actually making the engagement, the

*PRESENT: Hudson, Taschereau, Rand, Kellock and Estey JJ.

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urgency and pressure under which the Canol project in the north country was set in motion, the difficulties of communication, the proposed all season road, with the first object to get things done rather than to frame engagements, made in good faith, in a form satisfactory to official punctilio, I find myself unable to say that there was such a delay as warranted the repudiation of liability by the appellants for the work done or being done beyond the 139,000 feet of lumber accepted by them. I do not say the continuing intimation to Stevenson by Stites, throughout January, 1943, in effect, "to do the best he could and get the lumber out as quickly as possible," can be taken to mean the effort could go on indefinitely; yet assuming this in turn to be bounded by a reasonable period, it would carry performance to the time within which the respondents, had they not been told to desist, could have finished sawing the remaining logs.

On the question of damages, it was argued by Mr. Forsyth that an order given on November 23rd, in ignorance, apparently, of both the terms and circumstances of the arrangement and subsequently put aside by Stites, must be treated as representing a quantity which Weiss, his successor, toward the middle of February, was prepared then to take and that it should, in any event, be deducted from the 500,000 feet. It is claimed the order was afterwards filled from another mill but that is by no means clear. The lumber had been intended for the construction of a bridge across the Hay River but the conditions at the river in January dispensed with its necessity. It appears from a letter sent by the defendants on June 23rd, 1943, to the United States Army Engineers Department recommending a settlement, that the subsequent field orders, ten in number, filled by the respondents, were designed to take up approximately the quantity of the original order. There is nothing to indicate that, if, in February, the respondents had filled that order, the subsequent orders would have been given. I am, consequently, unable to treat this 145,000 feet as chargeable against the minimum quantity.

There remains, then, the amount recoverable. The question is very narrow: what would it have cost the respondents to complete the sawing of approximately 260,000 feet then in log? The respondent Van Humbeck estimated six

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Rand J.

dollars a thousand feet. Stevenson gave the same figure but he was not a lumberman and his opinion is of little value. On the other hand, statements furnished by Van Humbeck of the expenses of the entire operation, for the purpose of supporting the original claim to be reimbursed for the total outlay, indicate quite a different cost: and he appeared to acquiesce in suggestions that various amounts shown covering wages, supplies and other expenses, could be taken as cost items for the balance of 260,000 feet. On that basis, the cost works out to about thirty dollars a thousand feet, the price allowed. But on the face of the statements there are patent errors and, with them corrected, some surplus over expense would remain.

It is said by the respondents that the items included wages from the time the mill was set up until the sawing ceased and in one case, that of McLarty, a witness, that seems to be so. Admittedly, too, they covered the cost of additional logging of approximately 100,000 feet. On the other hand, in the details of the commissary there were four men whose expenses ranged from $60.25 to $94.54; two others $115 and $117 respectively, another $162 and the last two $241 and $251 respectively. It seems quite impossible to say that four, at least, of these items represented commissary expenses over a period of four full months: and two and possibly three others could only doubtfully be such. With that conflict furnished by the evidence of the respondents, the finding of the trial judge cannot be supported and I see no escape from a reference back for reassessment.

The reference will be limited to the cost of sawing the remaining quantity of 260,000 feet. There will then be deducted from $15,000 the sum of $4,019.30 already paid plus the cost so ascertained, and judgment will go for the balance. The appellants are entitled to one-half of their costs in this Court and in the Court of Appeal. The respondents will have the costs of the trial, but they must bear the costs of the reassessment.

Appeal allowed in part.

Solicitors for the appellants: *Field, Hyndman, McLean.*

Solicitors for the respondents: *Simpson & Manning.*