

1887

April 7.

Coram HENRY, J.

ANDREW BOYD, TRUSTEE OF THE
ESTATE AND EFFECTS OF ALEXANDER } SUPPLIANT;
MORTIMER.....}

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Breach of contract for book-binding—Loss of profits—Measure of damages.

M. entered into a contract with the Dominion Government to do parliamentary and departmental binding for a period of five years. During the continuance of the contract the Government employed other persons to do portions of the work which M. was entitled to do, and in consequence of this M. (through his trustee in insolvency) brought an action by petition of right, claiming damages against the Government for breach of contract.

The breach was admitted by the Crown, and the case was referred by the court to two referees to ascertain the amount due M. for loss of profits in respect to the work that was withheld from him and given to other persons. The referees found that the work done by persons other than M. amounted to \$25,357.79, and that the cost of performing such work amounted to \$10,094.74 leaving a balance for contractor's profit of \$15,263.05. From this balance the referees made deductions for "superintendence generally, wear and tear of plant, building, &c., rent, insurance, fuel and taxes," amounting in the whole to \$3,637.71, and recommended that M. be paid a sum of \$11,625.34 as representing the contractor's profit lost to M. by the breach of contract.

On appeal from the referees' report,—

Held :—That the referees were wrong in making such deductions, and that M. was entitled to be paid the difference between the value of the work done by persons other than himself during the continuance of his contract, and the amount it would have actually cost him, as such contractor, to perform that work.

PETITION of right for damages arising out of a breach of contract by the Crown.

The effect of the contract, in respect of the breach whereof the petition of right was filed, is fully set out in the judgment. The pleas filed on behalf of the

Crown admitted the contract, but denied the breach thereof as alleged in the petition. Issue was joined upon these pleas, but, subsequently, the Crown admitted the breach of contract, and, by consent of parties, the matter was referred to two referees to ascertain and report the amount of loss the suppliant, as assignee of M., the contractor, was entitled to be indemnified for.

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The referees awarded the suppliant the sum of \$11,625.34 as sufficient to cover all loss resulting from the breach of the said contract. From this report the suppliant appealed to the court, on the ground that the referees had made improper deductions from the amount representing the actual loss of profits sustained by the contractor by virtue of the said breach.

The motion by way of appeal from such report was heard before Mr. Justice Henry.

McVeity for suppliant ;

Hogg for Crown.

HENRY J. now (April 7th, 1887) delivered judgment.

This is an action brought by the above named appellant, by petition of right, to recover for damages alleged to have been sustained by Alexander Mortimer for breaches of a contract entered into with him on behalf of the respondent for the binding, from time to time, of all the statutes of Canada, Imperial statutes, Orders-in-Council, treaties and other similar matter, and all the binding required to be done by the several departments of the Government of Canada. The contract was entered into on the 1st of October, 1874, and was to run for five years from that date ; the contractor to be paid as provided in certain schedules and specifications annexed to, and forming part of, the contract. The grounds upon which damages are claimed in the petition of right are: 1st., that although the contractor was called upon to do, and did, large portions of the work,

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and was always ready and willing to perform the whole, the balance was done by others and not given to him; 2ndly., that his contract was profitable, and that he lost the profits from such portions of the work as were given to others. The suppliant's right to claim damages was admitted by the Crown, and, by consent, the matter of such loss was referred to two referees to investigate and report upon.

The report of the referees was made on the 22nd day of December, 1886, whereby the appellant was awarded the sum of \$12,625.34 damages. From this report the appellant appealed to this court, on the ground that the referees had made deductions improperly from the amount of the loss of profits to which he was entitled.

The subject-matter of these deductions was recently argued before me, and I will now proceed to deal with them.

By a very elaborate and carefully prepared detailed statement, returned with the report of the referees, it is shown that the work done by others amounted to \$25,357.79, and that the cost of performance to the contractor would have been \$10,094.74, which would leave for the contractor a profit of \$15,263.05. From this balance the referees made, however, deductions for "superintendence generally, wear and tear of plant, building etc., rent, insurance, fuel and taxes," estimated by them at \$3,637.71, which would leave a balance of \$11,625.34. By a mistake, however, the referees made the sum \$12,625.34, and this award was therefore, if the deductions were properly made, \$1,000 too much. This error I will correct.

In a memorandum showing the amount of net profit arrived at, returned by the referees, they say:—

"If Mr. Mortimer did work to the extent of \$167,408 in 5 years, he would do \$25,357.79 in 9 months, the latter amount being the gross cost of the work done outside at schedule rates.

Upon that basis they make the deductions as by the memorandum appear. I cannot, I must say, understand or admit that the loss to the contractor could be determined or influenced by such a calculation.

There is nothing in the evidence to sustain such a mode of calculation. On the contrary, it is clear from the evidence of Mortimer that the work was withdrawn from time to time during the running of the contract, which he continued to perform for the term contracted for. He shows most conclusively, to my mind, in his evidence, that he had a sufficient staff of operatives always on hand, many of them hired by the year, and sufficient plant and materials to have done the work. He had to keep up his establishment so as at all times to be able to fulfil his contract; he had the same insurance, rent, fuel, &c., to pay as if he had performed the whole of the work; he acted as his own superintendent; and, therefore, without any additional loss of time or money, could have included the performance of the work not done by him.

The items which go to make the deductions are as follows:—

Additional superintendence.....	\$2,000.00
Average value of machinery \$5,577, 65 p.c. (off).	209.16
Rent to include depr. ciation of buildings, valued at \$11,327.51, say 10 p.c. (off).....	849.57
Insurance on building.....	41.48
Machinery.....	37.50
Fuel, say.....	200.00
Taxes and water rates.....	300.00
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	\$3637.71

It will thus be seen that the whole of the deductions were made upon the theory (which is wholly unsustainable by the facts in evidence) that the work given to outside parties was to have been done within a period of nine months, whereas it was withdrawn at different periods during the entire continuance of the

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contract. During all this time the contractor had the necessary superintendence of the work, as well as the necessary plant, and there is no evidence to show that he would have had any more to pay for the additional work,—in fact the opposite is shown, and there is no evidence of any depreciation of the plant. How the five per cent. deduction in the value of the machinery was sustained I have been unable to ascertain.

The rent and depreciation of buildings was not in any way affected by part of the work having been transferred to other parties. The contractor would have paid no more rent, nor would the buildings have been depreciated any more if he had done the whole of the work. The same may be said as to the insurance, fuel, taxes and water rates. As far as the evidence shows, the contractor would not have paid any more than he did for any of these things, under the circumstances, if he had performed the whole of the work. The cost of the extra labour and materials required is, of course, included in the estimate of the cost of production stated by the referees, as before mentioned, at \$10,094.74.

Under the evidence the appellant is entitled to be paid the difference between the value of the work not done by contractor, amounting to..... \$25,357.79 and the amount it would have actually cost

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| him to perform it..... | 10,094.74   |
|                        | \$15,263.05 |

My judgment, therefore, is for the appellant for the sum of \$15,263.05, with all costs.

*Appeal allowed with costs.*

Solicitors for appellant: *McVeity & Code.*

Solicitors for defendant: *O'Connor & Hogg.*

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