1901

Dec. 2.

IN THE MATTER OF THE PETITION OF RIGHT OF

ROBERT WEDDELL, MICHAEL McAULIFF AND RULIFF GRASS, CARRYING ON TOGETHER THE BUSINESS OF CONTRACTORS UNDER THE NAME OF THE WEDDELL DREDGING COMPANY..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract for improvement of Government Canal—Change in works—Breach of contract—Spoil grounds—Cost of—Allowance for.

The suppliants were contractors for certain works of improvement on the Rapide Plat Division of the Williamsburg Canals. For their own use and benefit, and without notice to or request of the Crown in such behalf, they obtained certain grounds upon which to waste the material excavated by them.

Held, that the Crown was not bound to indemnify them for money expended in obtaining the said spoil grounds.

2. In order to carry on the works in the way contemplated by the contract and specification the contractors changed certain dump scows into deck scows. Thereafter a change was made by the Crown in the manner of carrying out the work, which required the contractors to convert the deck scows into dump scows.

Held, that the contractors were not entitled to recover from the Crown the expense they were put to in respect to the scows, because the change in the works being provided for in the contract, there was no breach; but that such expense might be taken into account in considering the increased cost of doing the work under the circumstances in which it was done as compared with the cost of doing it in the way contemplated by the contract.

PETITION OF RIGHT for damages arising out of an alleged breach of a contract with the Crown for the construction of certain works of improvement of the Rapide Plat Division of the Williamsburg Canals.

The facts of the case are stated in the reasons for judgment.

1901

WEDDELL v. THE KING.

Argument of Counsel.

September 3rd, 1901.

The case was heard at Ottawa.

A. B. Aylesworth, K.C. for the suppliants. The claim here arises under a contract for the widening and deepening of section No. 2 of the Williamsburg Canals. The work consisted of excavating, and, as provided by the specification, for the most part re-handling, the excavated material and depositing it at the places mentioned in the specification. Then the change which was made from the specification upon which we entered into the contract, put us to considerable expense, in the matter of remodelling scows and part of our plant, amounting to $3,628.65; and an additional expense of $500 for the purchase of a place to deposit the dry earth taken from the excavation occasioned by the change of the works. Our total claim at the conclusion of the work was $80,261.75 more than we received. The Crown has waived the provisions of the contract which stand in the way of justice being done, and refers the case to the court to be arbitrated upon by your lordship. It is, of course, not a submission to the award of your lordship; but the order in council waives the disability clauses of the contract, and so we have a right, not perhaps to loss of profits, but a right to be indemnified as upon the contract to the extent to which we made preparations to execute the contract according to the original specification.

W. M. German, K.C., followed for the suppliants.

F. H. Chrysler, K.C., for the respondent, contended that there was no liability on the part of the Crown to provide spoil grounds other than those mentioned in the specification. It is not a matter for which the suppliants can be paid under the specification. They are paid for the excavation, and they must find a place to deposit it.

1901

WEDDELL v. THE KING.

Reasons for Judgment.

As to the claim for changing the scows, that is clearly a claim outside the contract. There can be no allowance here in respect to that.

A. B. Aylesworth, K.C., replied.

THE JUDGE OF THE EXCHEQUER COURT now (December 2nd, 1901) delivered judgment.

The claim put forward in the petition of right filed in this case arises out of a contract made on the twelfth of January, one thousand eight hundred and ninety-one, between the suppliants and Her late Majesty, whereby they undertook, for the prices mentioned in a schedule embodied in the contract, to complete within a time therein fixed all the dredging and other work connected with the deepening and widening of section two, Rapide Plat Division of the Williamsburg Canals. From the specification annexed to the contract it will be seen that it was in the contemplation of the parties thereto that the material excavated or dredged out in the execution of the work should, unless otherwise specially provided for, be deposited in Heagle's Bay and in Stata's Bay. After the work had been in progress a few months a complete change in the plan of disposing of the material excavated or dredged was made. It was decided to use such material in widening and strengthening the south bank of the canal, and not to fill in Heagle's Bay and Stata's Bay, but to leave these bays as reservoirs for surplus water for the canal. That was a change which under the fifth clause of the contract the engineer had a right in the manner therein mentioned to make. The direction should have been given in writing and the engineer should at the same time have fixed in writing the additional price, if any, to be paid to the contractors, or at least to have given some direction or decision by which such price might be determined as the work

1901

WEDDELL v. THE KING.

Reasons for Judgment.

progressed. But that was not done. The contractors without any writing or any arrangement which they might then have insisted upon as to the extra cost of the work by reason of the change, did as they were bid, and now their claim would be barred but for the order in council by which the Crown in this case waives certain defences which under the contract it might otherwise have invoked.

One item of the claim is an amount of five hundred dollars which the suppliants paid for certain spoil grounds on which to deposit and waste a part of the material taken out by them. These grounds they obtained for their own use and benefit without any notice to or request of the Crown; and I see no reason why they should be indemnified for the amount so expended. It will also be seen that this part of the claim is not referred to in the order in council mentioned, and that nothing has in consequence been waived in respect thereof.

Another item of the claim has reference to the cost of converting certain dump scows the suppliants had into deck scows in order to execute the work in the manner originally contemplated, and then converting them from deck scows to dump scows to carry out the work in the manner rendered necessary by the change in plan mentioned. The expense to which the suppliants were put in this connection amounted in all to three thousand six hundred and twenty-eight dollars and sixty-five cents, and this amount was wholly lost to them. If the change in plan that was made had constituted a breach of the contract this amount might have been recoverable as part of the damages. But there was no breach of the contract. The change was one of the things provided for, and I do not see any ground on which the amount can be allowed as a specific item in the suppliants' claim. It will also be observed that this item does not form part of the claim stated in the order in council. It is, however, a

1901

WEDDELL v. THE KING.

Reasons for Judgment.

matter that may be taken into account in estimating the allowance, if any, that should be made to the suppliants for the increased cost to them of the work by reason of the change that was made. It is something that the engineer ought to have taken into account when the change was made, and which may now, I think, be taken into consideration in connection with the remaining item of the claim.

Of the material taken out by the suppliants during the progress of their work 335,895 cubic yards, according to their estimate, and 330,735 according to Mr. Rhéaume's figures, was deposited on and over the south bank of the canal. Of this quantity, whichever is correct, 82,117.26 cubic yards was returned in the estimates and paid for under item six of the schedule of prices at thirty cents per cubic yard therein fixed as the rate for "earth provided, delivered and spread "in a satisfactory manner to raise towing-path where "required." The suppliants contended that the balance of the quantity mentioned should be returned and paid for at the same rate. But I do not agree with that contention. The engineer, when the change referred to was decided upon and made, ought in a business-like way to have come to some agreement with the contractors as to what proportion of the material to be so disposed of would be returned under this item, and what should be allowed for at a fair extra price, if as alleged the change increased the cost of the work, and if no agreement could be affected he ought then to have exercised the power the contract gave him to determine the matter and have communicated his decision to the contractors. And the problem now before the court is, it seems to me, under the petition and the order in council mentioned, to go back to that point and to come to some decision as to how much of the quantity of material deposited on and over the south bank of the canal ought to be paid for under item six of the schedule of prices, and as to the balance,

1901

WEDDELL v. THE KING.

Reasons for Judgment.

what, if any, extra or additional price should be allowed for handling the material in that way instead of the way contemplated when the contracts were entered into. Mr. McAuliff puts the additional cost at an average of ten cents per cubic yard. The amounts are however large, and the questions to be determined are from that standpoint important. Before disposing of them, it will, I think, be convenient and proper to have a reference to competent and impartial engineers. The questions to be referred will be (1) what proportion or quantity of the material deposited on and over the south bank of the canal by the suppliants ought to be allowed under item six of the schedule of prices; and (2) whether anything, and if anything, what should be allowed in respect of the balance of such material to cover any increased cost of handling it as it was handled instead of its being disposed of in the way originally contemplated.

I shall be glad if the parties would each submit for my consideration the names of three or four engineers whom they think to be competent and indifferent between the parties. The referees when appointed will in no sense represent either of the parties. They will, for the purposes of the reference, be officers of the court and appointed by it. Possibly to save time and expense the same referees may be appointed for this case and for that of *Poupore, and others* v. *The King*, (1) in which a similar question to that first stated is at issue.

December 17th, 1901.

W. M. German K.C. for the suppliants;

F. H. Chrysler K.C. for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now delivered judgment.

The parties, by their respective counsel having appeared to discuss the further steps to be taken in

(1) Reported *post*.

this matter, and it being agreed between them that the judge of the court should himself determine the quantities and prices to be allowed, without the expense and delay of a reference, the following quantities and amounts are allowed, that is to say: 103,075 cubic yards (as calculated by Mr. Rhéaume in addition to the 82,117.26 already allowed and paid for) as earth provided, delivered and spread in a satisfactory manner to raise towing-path where required, at thirty cents per cubic yard, as per schedule of prices.....$ 30,922.50

145,542.72 cubic yards at 10 cents per cubic yard..... 14,554.27

$45,476.77

The 145,542.74 cubic yards are made of by

deducting the sum of..	82,117.26
and.....	103,075.00
	185,192.26
from the total as given by Mr. Rhéaume and mentioned in my notes of reasons for judgment.....	330,735.00
Difference.....	145,542.74

There will be judgment for the suppliants for forty-five thousand four hundred and seventy-six dollars and seventy-seven cents ($45,476.77), and the costs will follow the event.

Judgment accordingly.

Solicitors for suppliants: *German & Petit.*

Solicitors for respondent: *Chrysler & Bethune.*