1928 Dec. 17. — 1929 May 14.

ROGER MILLER & SONS LIMITED......CLAIMANT;

AND

HIS MAJESTY THE KING.............RESPONDENT.

Crown—Contract—Cost plus—Rent of plant—Interest on money borrowed—Interest on drawback and on deposit by contractor.

Claimant contracted to construct certain public works in the harbour of Toronto, on a cost plus basis. It was, inter alia, agreed that the claimant would furnish the plant, for which he was to receive as rental thereof a certain percentage of its value per annum for a working season of 150 days; this to be payable when each piece commenced operation, and to cease when determined by the respondent's engineer. A portion of this rented plant became locked in behind a coffer-dam constructed in connection with the works in question. It was properly there engaged on the works, but it could not be removed when its work was completed on account of the coffer-dam, and while so retained was not available for use, which condition of affairs was not due to any fault of the contractor.

Held, that said portion of the plant never ceased to be part of the rented plant under the terms of the contract and was still retained for use on the works by the respondent's engineer, and the claimant was entitled to recover rent therefor.

On some occasions, payments due by respondent to the claimant under the contract were delayed, compelling him to borrow from banks and pay interest on such loans.

Held, that the claimant was entitled to recover such interest from respondent under the contract as part of the cost of the work.

Under a clause of the contract the Crown was permitted to abandon the works and terminate the contract. The Crown suspended opera-

(1) (1927) 2 D.L.R. 490; (1927) 4 D.L.R. 278; (1928) 2 D.L.R. 352.

tions for a time, but retained contractors' drawback during this period, which consisted of a stated percentage of the total monthly costs retained as security for performance of the contract.

Held, that the contractor was not entitled to claim interest on this amount for the period of suspension, such drawback being in the nature of capital employed, upon which no interest was allowed by the contract.

Held, further that the contractor could not claim interest on the security deposit made by him with the Crown, for the time the same was held by it, it being in the nature of a guarantee for carrying out of the contract, and a condition which it had to fulfil.

REFERENCE by Minister to the Exchequer Court of Canada under section 37 of the Exchequer Court Act.

The action was heard before the Honourable Mr. Justice Maclean, President of the Court, at Toronto.

A. R. McMaster K.C. and *H. L. Steele* for the claimant.

M. H. Ludwig K.C., F. P. Varcoe and *F. W. Fisher* for the respondent.

The facts are stated in the reasons for judgment.

The PRESIDENT now (May 14, 1929) delivered judgment.

This is a reference under sec. 37 of The Exchequer Court Act. The claimant in these proceedings sought to recover from the respondent several different amounts, as set forth in its statement of claim, under the terms of a contract entered into between the parties hereto, and under which contract the claimant was to construct certain public works in the harbour of Toronto. At the trial, all but two of the claims were settled between the parties; of the remaining claims, one relates to a balance said to be due the claimant for the rental of plant employed by the claimant on the works in question, and which claim amounts to $47,298.21; the other claim is for interest, and comprises three different items all of which will be later explained.

The claimant whom I shall hereinafter refer to as the contractor, was to construct certain public works in the harbour of Toronto, upon the basis of the cost of the same to the contractor, plus a fee of seven and one-half per cent of such cost. The only qualification to this was, that the plant necessary to the construction of the works, generally speaking, was to be supplied by the contractor upon a

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rental basis, the rental being fixed at a certain percentage of the value of the plant, for a working season of 150 days in each year; the value of the different units of the plant to be employed was agreed upon between the parties and formed a part of the written contract.

The first contract entered into between the parties in connection with the works in question was in March, 1919; this was followed by another contract, entered into in August, 1920. The provisions of the latter contract, which must be considered in connection with the claim for plant rental, are as follows:—

(c) Rental to be paid to the Contractor on plant used in the work as hereinafter provided; said rental to be payable only when each individual piece of plant commences operation and to cease when determined by the Engineer *on the following basis,* namely:

Twenty per cent per annum on the value of the plant as set forth in the schedule hereto and forming part of this contract in respect of all work performed in the year 1919, and 15 per cent per annum on said valuation after necessary additions, deductions or other amendments in respect of all work performed thereafter under this contract.

* * * * *

The payment for rental of plant shall be calculated on the basis of 150 days of elapsed time in each calendar year.

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No rental on any unit of plant shall exceed 20 per cent of the value for 1919, or 15 per cent for the years or portions of years following, and rental charged for plant for a lesser time than the full rental season in any year shall be calculated in the proportion that the days the plant be retained or used bear to the full rental season of 150 days.

The whole question relating to the claim for plant rental is, whether the contractor is entitled to receive the stipulated rental only when the plant was in actual use in any rental season or whether he is entitled to the rental if the plant was retained on the works, whether always in actual use or not. If the latter is found to be the proper construction of the contract, then it is agreed that the amount claimed is due the contractor. Certain units of the plant were definitely released from time to time, and there is no dispute as to this; the real issue therefore, in respect of this item of the contractor's claims, rests upon a construction of the contract.

The issue, as I understand it, largely arises from the fact that a portion of the contractor's plant was imprisoned for a time within a coffer-dam on the works, and was not during that period available for use. The contractor's contention is that the plant thus rendered unavailable for

use was not due to it; that the plant was in any event retained for use by the respondent; and that it is entitled to the agreed rental even if this portion of the plant was for a time idle. The contract means that the contractor was to rent its plant for a working season of 150 days in each calendar year, on the basis already stated. A plant valued at $400,000 could not well be rented upon any equitable basis without a stipulation that it would be reasonably employed during each working season, that is to say, the owner of a large and valuable plant could not afford to rent to another that plant without the assurance that it would be retained and used substantially during any working season, and for this reason 150 days was adopted as the rental season of each year while the works were under construction. The respondent must have considered that the plant mentioned in detail in the schedule to the contract was necessary in the execution of the work; and the logical provision was made, that as any units of the plant became unnecessary in the construction and completion of the work, it was within the power of the respondent's engineer to determine when such units became unnecessary and should cease to comprise a part of the rented plant. If and when any portion of the plant was determined by the engineer to be unnecessary, the rental therefor was to be calculated in the proportion that the days that portion of the plant was retained or used, bore to the full rental season of 150 days. This of course was a provision one would expect to find in the contract. The rental season was 150 days, but if, say a dredge, became unnecessary in the further completion of the undertaking, it was only but equitable that it should cease to be a part of the rented plant and it would thereupon be released to the contractor when and as by the engineer determined; the contractor would then be at liberty to rent the same to others, or to employ it itself on some other work. The plant was subject to the rental terms so long as it was retained for use by the respondent; when any portion of it was determined to be no longer necessary and was released to the contractor, the rental ceased. That I think is the plain meaning of the contract in so far as the rental of plant is concerned. To attach any other meaning to it would seem to be unreasonable, and nothing else I believe was ever intended by the parties to the contract;

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one could hardly understand the rental of a large and valuable construction plant except upon that or a similar basis.

The respondent's engineer stated at the hearing that at the commencement of each season, he instructed the contractor to put on the work such plant as he considered necessary for that season, and with few exceptions that plant would remain on the work till the end of the season, and what was the end of the working season was usually agreed upon by the engineer and the contractor. According to the evidence of the engineer, if any unit of the plant was temporarily not in actual operation, say in the middle of a working season, it was not thereupon struck off from the plant rented and formally released to the contractor; this of course would only seem rational. The plant rented was what was deemed necessary for the work as a whole, and the engineer stated it was there to be drawn upon, as and when required. With a few exceptions, when certain units of the plant were definitely released, the plant under rental would at the end of a season largely be left on the works, to come into use again at the opening of the next working season; in the interval between the working seasons the plant was repaired by the respondent. There seems to have been no dispute about all this, as between the engineer and the contractor. The principal point of difference regarding this claim arises from the fact, that a portion of the rented plant as already stated, became locked in behind a coffer-dam which was constructed in connection with the works in question; the rented plant was properly there engaged on the works, but it could not be removed when its work was completed on account of the coffer-dam, and while so detained there it was not available for use. The engineer says that this was not the contractor's fault. This portion of the plant had not in my opinion ceased to be under rental. It had never ceased to be a part of the rented plant under the terms of the contract; it was still retained for use on the works by the respondent's engineer, and I do not believe anything else was ever in the engineer's mind. Altogether I have no hesitation whatever in concluding, that upon this point, the contractor's contention is the correct one.

The remaining point for determination in fact comprises three different items. The first one is whether the

contractor is entitled to interest payments it disbursed on moneys borrowed on account of the works, and which interest payments, it is said, were caused by delays in payments of moneys previously earned and due under the contract. This claim is put upon the basis that the interest payments so made were a part of the cost of the works, which the contractor incurred, just as he might for anything else which was necessary in the prosecution of the work, such for example, as his engineers or time-keepers.

The contractor and engineer, on or about the first day of each month, were required by the contract to prepare a statement showing as completely as possible, the cost of the works up to and including the last day of the previous month, and the respondent was to pay on the fifteenth day of each month the cost of the work mentioned in such statement. The contract provides that interest on capital employed, or on borrowed money, shall not be included in the cost of the work. I do not think this is a bar to this claim. The payments constituting this claim were costs incurred by the contractor in extending loans that would have been liquidated had the respondent promptly paid to the contractor the sums due it, on the fifteenth day of each month; and I have reference only to cases where the cause of the delay was not attributable to the contractor. I am satisfied that in any case where the delay in payment was chargeable to the contractor, no claim is being made. The initial borrowing was capital employed in the works, but it ceased to be such within the meaning and spirit of the contract, when it went into the works and became a debt due the contractor. It then became a charge entering into the cost of the work to the contractor. It is suggested, and there is some evidence to support it, that payments were delayed in order to force the contractor to vary the terms of the contract. It matters little what was the reason for the delay in payments due the contractor; the question is whether these interest payments should be included in the cost of the works, within the meaning of the contract. The respondent allowed the contractor interest upon amounts due under the contract, where any delay in payment was due to the lack of a Parliamentary expropriation. The claim for interest charges, which the contractor was obliged to pay on monies borrowed, owing to amounts due to the contractor by the respondent being

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deferred, is not, I think, distinguishable from the cases where interest was paid upon overdue payments caused by lack of a Parliamentary expropriation. The contract provides that the cost of the work should include any item which in the opinion of the engineer should be so included, and it was not contended that the engineer had refused to include such expenditures as are here claimed in the cost of the work. The contractor was bound to take advantage to the extent of his ability of all discounts available, and if he was unable to do so, he was obliged to notify the engineer of his inability in this regard, and his reasons therefor. It is a fair inference from this, that if the contractor was to use borrowed capital to obtain discounts for materials purchased for the works, he should be paid for the cost of such materials as and when due under the terms of the contract, and should not be obliged to bear the expense of extending a loan originally made for the particular purpose of obtaining such discounts. Such disbursements, in my opinion, properly constitute a part of the cost of the work. The essence of the contract was that the contractor was to be paid for the cost of the work to him, and as compensation for his services, he was to receive a fee of seven and a half per cent upon the cost of the work, as defined by the contract. I think that interest charges incurred by the contractor, owing to delayed payments by the respondent, as in the circumstances here, should in all justice enter into the computation of the cost of the work. To refuse payment of such a claim, would in my opinion, be contrary to the spirit and intent of the contract. The evidence as to the precise amount due under this claim is perhaps not clearly established, and I reserve the right to refer the same to a referee for inquiry, if the parties are unable to agree upon the amount. I hope however that this shall not be necessary.

There is another claim for interest. The contract for the construction of the works in question was first entered into in March, 1919, soon after the termination of the war, and a clause was introduced into the contract, permitting the respondent to abandon the works and terminate the contract. From November 18, 1919, to August 12, 1920, the respondent suspended operations under the contract, but retained the contractor's drawback during the period of suspension. The drawback consisted of a stated per-

centage of the total monthly cost of the works retained by the respondent, as security for the performance of the contracts. The contractor makes claim to interest upon the amount of the drawback for this period on the ground that the drawback had lost the character of a drawback; that the contract might never have been proceeded with; and that the right to abandon the contract required payment to the contractor of the cost of the work up to the time of the abandonment, plus its fee. It is urged that the respondent should not be heard to say that the contract was at an end, and also that he was entitled to the drawback.

The retention of the drawback was a matter of contract, and no provision was made for the payment of interest thereon in any circumstance. I cannot read from the contract that the amount of the drawback constitutes a part of the cost of the work, which was determinable by sec. 6 of the contract of March, 1919. I think that the drawback, which was retained by the way of security for the performance of the contract, was in the nature of capital employed in the cost of the work and upon which the contractor was not entitled to interest under the terms of the contract. I assume it remained in the hands of the respondent, because it was anticipated by the parties to the contract that the work would sometime be resumed, even if under a new contract. There is no evidence that the amount of the drawback was ever demanded by the contractor upon the abandonment of the work. I know of no principle upon which I might allow this claim, although as a matter of simple justice it perhaps should be paid.

There is still another claim for interest. Under the contract of August, 1920, the respondent held a security deposit or drawback of $50,000. On November 26, 1925, the sum of $40,000 was returned to the contractor, and on March 27, 1926, the balance of $10,000 was returned. This claim is for interest at the rate of three per cent on the principal amount and the balances. It seems to be admitted that the respondent recovered interest at the rate of three per cent on these amounts during the time it was in his hands, and the contractor is claiming the payment of interest at the same rate. It seems to me that this deposit cannot be regarded as a portion of the cost of the work, as

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defined by the contract; it was in the nature of a guarantee for the carrying out of the contract, and was a condition which the contractor had to fulfill. In the absence of any provision in the contract, whereby the respondent was to pay the contractor interest upon deposits of this character, I do not see how this claim can be allowed. It may be, that the failure of a statutory provision enabling the payment of interest upon sums of money deposited in such circumstances as found here, may work a hardship upon those required to make such deposits. However, I can find no authority which would justify me in allowing this claim. In fact the authorities are, I think, the other way.

The claimant will therefore have judgment for the amounts I have allowed, together with his costs of this reference.

Judgment accordingly.