

1919
Sept. 20.

APPEAL FROM QUEBEC ADMIRALTY DISTRICT
(MONTREAL).

BETWEEN

CANADIAN VICKERS COMPANY, LIMITED,
(PLAINTIFF) APPELLANT;

AND

THE SHIP "SUSQUEHANNA",
(DEFENDANT) RESPONDENT.

Admiralty law — Shipping — Quantum meruit — Overhead charges — Contractor's profits — Cost of construction — Witnesses — Credibility.

The plaintiffs were owners of marine construction works and ship yards and had large capital invested and had large contracts on hand from the Government for the construction of drifters and trawlers for war purposes. The work in question was accepted by the plaintiff only after pressing and urgent request from the defendant, whatever the cost might be, as emergency work and to oblige him, in order that the ship might get out of the river before the close of the navigation. Plaintiffs were obliged to take men off other work and went behind on Government contracts.

Held (varying judgment of the Local Judge in Admiralty) that under all the circumstances of the case, and considering the abnormal state of business and the advanced prices prevailing during the war, 90 per cent. of the cost of labour, as an overhead charge, plus 10 per cent. on the total cost as contractors' profits, were fair and reasonable items to be added to the actual cost of labour and materials, in arriving at the valuation of the work done by plaintiff.

2. That "Cost of Construction" includes, besides actual cost of labour and materials, an allowance for overhead expenses, and a profit on the capital employed in producing an article or doing a piece of work.

3. That where the trial Judge did not hear or see the witnesses, an appellant Court is as competent to appreciate the facts and estimate the credibility of the evidence as the Court of first instance.

APPEAL from the decision of the Honourable Mr. Justice MacLennan, L. J. A. at Montreal, Quebec Admiralty District.¹

¹ Reported. 18 Can. Ex. C. R. 210, 44 D. L. R. 716.

The action *quantum meruit*, was taken by plaintiffs to recover from defendant the sum of \$52,983.34 for work done in repairing the S.S. "Susquehanna." The defendant admitted its liability but claimed that the amount asked was excessive and that too much was charged for overhead expenses and offered the sum of \$35,000 in full settlement.

On December 4, 1917, the case was referred to the Deputy District Registrar, who heard the witnesses and their counsel and on October 5, 1918, filed his report allowing plaintiffs' claim in full.

The case was then heard by the Honourable Mr. Justice Maclellan, at Montreal, on a motion of defendant to vary the report of the Deputy District Registrar, and on November 23, 1918, the said Judge delivered judgment declaring the offer and tender of \$35,000 sufficient and condemning the defendant to pay this amount.

Appeal was then taken from this judgment to this Court sitting in appeal and the appeal was heard at Montreal before the Honourable Mr. Justice Audette, on May 20, 1919.

F. H. Markey, K.C. for appellant.

A. R. Holden, K.C. for respondent.

The facts are stated in the reasons for judgment of the Honourable Mr. Justice Audette.

AUDETTE, J. (September 20, 1919) delivered judgment.

This is an appeal from the judgment of the Deputy Local Judge of the Quebec Admiralty Dis-

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trict, sitting at Montreal, pronounced on November 23, 1918.

The facts concerning the case having already been set forth in the judgment below, it will be sufficient, for the understanding of the matter in controversy, to state briefly that the "Susquehanna," on account of her size, having been cut in two sections at Buffalo, N.Y., with the object of taking her down the St. Lawrence through the Canal, the owners of the vessel approached the plaintiff company, at Montreal, to repair and join her together.

The plaintiff company was at that time overloaded with work at their shipyard, and the negotiation for the repairs, leading to the present suit, originated in the following manner, there being no contract for the same. These negotiations were carried on by Mr. Auditore, on behalf of the vessel, and Mr. Miller on behalf of the company. The former was not heard as a witness, but Mr. Miller was, and I see no reason to question the reliability of his evidence, as was done below. Moreover, it must be said here that the learned trial Judge who pronounced below, was absolutely in no better position than I am to estimate the credibility of the evidence, because it was taken before the Registrar, and the learned Judge did not have the advantage of seeing the witnesses and in this way have an opportunity of determining the weight to be attached to the evidence by their demeanour while under his personal observation.

Now Mr. Miller says that, after the exchange of correspondence, Mr. Auditore, in July, 1917, came to his office and asked that the company should dock

the two portions of his vessel, and he then quoted a price for joining the vessel together, but exclusive of all other work. He further stated that this could only be done provided the dock was not required for other important work, such as repairs to transports or repairs to ocean-going freighters, equivalent to freighters, practically ships over which the Government had control. Mr. Auditore understood this and brought his ship to Montreal, and when she arrived the dock was occupied by the S.S. "Singapore," a large ocean freighter. The consequence was he could not dock his vessel, and then Mr. Auditore said: "What can I do? Can you carry out the other work, such as engine room repairs, and deck repairs and miscellaneous work, such as he had a list prepared. We declined. We not only declined several times, but declined in writing. (p. 7). We declined and I said we could not undertake the work, owing to scarcity of men and so on. Mr. Auditore begged us to do something for him to get his ship out of *the river before the close of navigation*. I then called up Quebec—the dry-dock, and endeavored to get them to undertake the work and finally they succeeded, and the ship was docked at Quebec to be joined together. . . . Before she left our works for Quebec, and before we undertook any work on her at all Mr. Auditore met me at the Grand Trunk Station in Montreal and we met Mr. French, Chief Surveyor of Lloyds Register in New York, and Mr. Auditore explained to Mr. French we had refused to do any work on the ship on account of the scarcity of men, and Mr. French said: 'Mr. Miller, look here, you have to do some-

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"thing to help him out. He has had one trouble
 "after another with this ship. Here he is in Mont-
 "real with every likelihood of his ship being frozen
 "up for the winter.' I told Mr. French I would look
 "into the matter and I told Mr. Auditore I would let
 "him know in a day or two what I could do, and the
 "result of all these *pourparlers* was the letter, Ex-
 "hibit P. 1, which reads as follows:

July 12, 1917.

"Frank Auditore, Esq.,
 "Windsor Hotel,
 "Montreal, Que.

"Dear Mr. Auditore:

"Mr. Cameron has been thoroughly through the
 "'Susquehanna' and finds it absolutely impossible,
 "in the incomplete state in which the various items
 "are, to figure a definite price. He estimates, and
 "judging by the description, I think he is correct,
 "that this work will cost in the vicinity of \$35,000,
 "apart from joining together.

"We are prepared to quote you a firm price for
 "joining together of \$22,000, including dock dues,
 "but not including any repairs to damage done in
 "coming through the canal.

"We would, however, much prefer that you take
 "the ship to New York for completion, as I am fully
 "confident that, notwithstanding the condition of the
 "yards in New York, you are more likely to get a
 "quicker job from your friend Mr. Todd than from
 "us, as we cannot possibly afford to draw a large
 "number of men off present work.

“We will be glad to let you know as soon as we
 “ascertain the extent of the damage to the ‘Singa-
 “pore’ when your ship can get on the dock.”

“I am sorry we cannot quote you a firm price, but
 “you will understand the conditions.

“Yours faithfully,

(Sgd.) B. L. MILLER.”

Now this letter shows the works were accepted under pressure and to oblige the defendant, as the company could not possibly afford to draw a large number of men off present work, and lest too much importance is attached to these figures of \$35,000, which were afterwards offered in settlement by the defendant, it is, in fairness, well to bear in mind that while that estimate is made with the qualification that “Mr. Cameron has been thoroughly through “the ‘Susquehanna’ and finds it absolutely impos- “sible, in the incomplete state in which the “various items are, to figure a definite price,” and with the further hereinafter mentioned statement about the number of items covered at the time.

Mr. Miller at p. 104 of his evidence adds “that Mr. “Auditore, at that time, said: ‘Mr. Miller, for good- “ness sake put your men on, and go on with the “work. I don’t care what it costs, but get my ship “out of the river before the river freezes.’” The work was done and the ship taken down to Quebec to be put together.

Then at pp. 98 and 99, of the evidence, Mr. Miller says that when this estimate of \$35,000 was made,

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as above mentioned, the list of the repairs only contained 65 items,—plus about 7 or 8 more on which work was not done—the actual numbers completed being sixty-five on the first list, to which in August were added 122 more items of repairs making this figure of \$35,000, obviously inadequate.

Captain Barlow in the course of the work also signed three emergency orders (p. 220 and 221) for extras of the list on hand at the works.

The number of men employed on these repairs from July 9 to August 14, as shown in Exhibit R. 4, was 2 on the first day, increasing during the first week to 73, the second week to 200, the third week to the highest total, of 271, and subsequently dropping to 82 on the last day.

A number of men were taken off from some other important works in the yard, the construction of which involved \$1,000,000, and as a result the plaintiffs went behind on their contracts for Drifters and Trawlers, and Mr. Miller further contends that every repair in the yard was interfered with by yielding to the defendant and accepting his work under pressure.

The only question now to be determined, the defendants having accepted and taken over the works, is what is the fair and reasonable value, the market value, so to speak of the said works *under the circumstances*. The defendant having accepted and taken over the works, stands in the position of a person who employs another to do work for him without any agreement as to his compensation, and in such a case the law implies a promise from the em-

ployer to the workman that he will pay him for his services as much as he may deserve or merit—*quantum meruit*.

What can be done in the absence of actual evidence of the fair cost and value of each item of work mentioned in this famous statement of these 65 plus 122 items? Under such circumstances nothing else is left but to take the figures given—which have not been controverted by any evidence, with respect to labour and material,—and consider whether the overhead and profit charges are right and fair. The defendants admit liability for the work done, and materials supplied, but contest the amount claimed.

The defendants have really thrown themselves at the mercy of the plaintiffs with the object of having their work done promptly to enable them to get out of the St. Lawrence before the freezing of the river, and carry on the profitable business of freighting during the war. And the plaintiffs would probably do that work in much less time than any other firm. No price being mentioned, the builder is entitled to the fair and reasonable value of his work, and the materials supplied.

“Such reasonable price must include payment for “skill, supervision and services of contractor himself.” Hudson, 4th Ed. 476.

The amount claimed by the plaintiffs is the sum of \$53,190.00, and the account rendered, filed as Exhibit p. 2, reads, as follows:

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"Naval Construction Works,

"Maisonneuve,

"Montreal, P. Q., Dec. 3, 1917.

"Mr. Frank Auditore,

"44 Sackett Street,

"Brooklyn, N.Y.,

"Bought of Canadian Vickers Limited.

"To joining together S.S. "Susquehanna" as per
 "statement attached:

"Material from stock	\$5,517.57	
"Material purchased.	829.98	6,347.55
		<hr/>
"Handling charges 5		
" per cent.		317.88 6,665.43
		<hr/>
"Labour	14,905.73	
"Overhead factor 90		
" per cent. on labour	13,415.16	
		<hr/>
		28,320.89
		<hr/>
		34,986.32
"Profit, etc.		16,554.89
		<hr/>
		51,541.21
"Tug services as per		
" copy invoices at-		
" tached		2,000.00
		<hr/>
"		\$53,541.21

The items with respect to the material, handling charges and labour, while not admitted are not contested. The contestation centres on the two items

of overhead factor at 90 per cent. on labour and the rate of profit.

The defendant, as we have seen, was very anxious to get the work done as expeditiously as possible, with the object of using his vessel, the freight rates being then very high on account of the war—and on the other hand, the cost of ship building and repairs had again, on account of the war, increased to abnormal figures.

I think I may state that both parties will agree as to the principle that both overhead and profit charges are properly allowable in such a case as this; and that controversy arises only as to the respective rates of such charges. The percentage of overhead made in this case refers to works of the yard outside of the floating dock, and the shell shop operations. It is the percentage that overhead bears to productive labour. Having said so much it becomes unnecessary to go into the question of “overhead” beyond saying that “overhead” is part of the actual costs (Evd. p. 233). “Overhead” takes care of the general expenses of the business, not coming under the head of material and labour, but such expenses as cannot be charged up to any one job, and have to be apportioned over the whole business of the firm. So that “overhead,” if properly ascertained, is just as much actual costs as the other items.

Mr. Fawcett, in his “*Manual on Political Economy*,”¹ lays down that: “The term ‘cost of production,’ includes not simply the cost of material and “the wages of labour, but also the ordinary profit “upon the capital employed in producing the particular commodity.”

¹ 8th Edition, p. 351.

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After taking into consideration all the circumstances of the case, the abnormal state of the business during the war followed by advanced prices, and moreover weighing the conflicting evidence upon the subject—inclusive of the view cited from the authorities,—to the list of which I might add “Cost of Accounting,” Nicholson & Rohrback,—I have come to the conclusion not to interfere with the overhead charge. It is of common and general knowledge that during the war the Government of Canada entered into contracts allowing over 90 per cent. on overhead charges, but with only 10 per cent. profit.

Coming to the question of profit, I must say I am entirely at variance with any conception that could, under the present circumstances, justify a profit of 47 3-10 per cent. as charged. What reason is there to depart from the usual rate of profit under contractual works, I fail to see. Some evidence upon this question is furnished by witnesses who have no idea, as appears upon the face of their testimony—of our Canadian climatic conditions, if it has any bearing upon the question.

“Although the average profits realized in different trades may greatly and permanently differ, yet there is a certain rate of profit belonging to each trade. Such a rate indicates a point of equilibrium about which the average profits of the trade may be considered to oscillate. And the competition of capital is an agency which is ever at work to restore the average rate of profit to the position of equilibrium whenever disturbed from it.” Fawcett,—*Manual of Political Economy*, p. 349.

A good normal profit under the circumstances would be between 10 per cent. and 15 per cent., but in view of the large overhead charges allowed, I have come to the conclusion that 10 per cent. will reasonably and justly compensate the plaintiff.

The item of \$2,000 for towage is a disbursement made by the plaintiff at the request of the defendant, and should be allowed in full.

The plaintiff is therefore entitled to recover from the defendant the sum of \$40,484.95, arrived at in the following manner:

“Material from stock ..	\$ 5,517.57	
“Material purchased	829.98	6,347.55
		<hr/>
“Handling charges 5 per		
“ cent. (Dubitante, but		
“ de minimis)		317.88
“Labour	\$14,905.73	
“Overhead factor 90 per		
“ cent. on labour	13,415.16	28,320.89
		<hr/>
“		\$34,986.32
“10 per cent. profit		3,498.63
		<hr/>
“		\$38,484.95
“Tug services		2,000.00
		<hr/>
“		\$40,484.95

The appeal is allowed, with all costs.

Solicitors for plaintiff: *Markey, Skinner and Hyde.*

Solicitors for respondent: *Meredith, Holden, Hague, Shaughnessy and Heward.*

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