*Privy Council Appeal No. 6 of 1918.*

**Foley Brothers and Others** - - - - *Appellants,*

*v.*

**James A. McIlwee and Others** - - - *Respondents,*

FROM

**THE APPEAL COURT OF BRITISH COLUMBIA.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH NOVEMBER, 1918.

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*Present at the Hearing:*

LORD BUCKMASTER.
LORD DUNEDIN.
LORD ATKINSON.

[*Delivered by* LORD BUCKMASTER.]

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In 1913 the Canadian Pacific Railway Company were in the course of laying a double track railway-line from Glacier to Bear Creek in British Columbia, and on the 30th June, 1913, they entered into a contract with the appellants, who carry on the business of railway contractors, whereby the appellants undertook the construction of the line. In order to carry out the work it was necessary to bore a tunnel of some 5 miles in length through the Selkirk Mountains near the Pass known as Roger's Pass, and the appellants, with the consent and approval of the Railway Company, entered on the 18th December, 1913, into an agreement with the respondents, by which the respondents engaged to drive seven or eight-foot pioneer-heading and cross cuts, the centre heading being 8 × 11, for an estimated distance of 25,000 feet.

The terms of the agreement were contained in a letter dated the 18th December, 1913, written by the appellants, Messrs. Foley Brothers to Messrs. McIlwee, the respondents, and accepted by them. It was in the following terms:—

"Messrs. J. A. McIlwee & Sons,
"Gas and Electric Building,
"Denver, Colo.

"Gentlemen, *December* 18, 1913.

"We make you the following proposition for driving seven or eight-foot pioneer heading and cross cuts, and

centre heading eight by eleven, for the solid rock portion of Canadian Pacific Railway's Rogers Pass tunnel for an estimated distance of 25,000 feet; we to have the option of discontinuing the pioneer heading outside of the regular tunnel section and driving it as a centre heading for the last 4,000 feet.

"We will pay your monthly pay rolls, including bonus to men, furnish comfortable and sanitary quarters for your men and good board at $1.00 per day, your men to conform to our sanitary and camp regulations.

"We will furnish small cars and mules for transporting muck from headings to our standard-gauge cars back of shovel and handle at our expense after delivery into our standard-gauge cars. We will furnish air, water, light, ventilating plant, tools, track, and all other material and plant necessary except explosives. Explosives will be furnished you at cost price to us on the work, and you will be given the same concessions as we receive from C.P.R. as to freight and passenger rates.

"We will pay you on or before the 15th of each month $20.00 per lineal foot for pioneer tunnel, $22.50 per lineal foot of cross cut and centre heading, and $30.00 per lineal foot for headings to dip where cars are handled by cable, driven the previous month, less pay roll, explosives, and other proper charges, and will on the completion of the work pay your bonus of $1,000.00 per foot as bonus for each foot over 900 feet that you average per month for the entire pioneer heading. Should the pioneer be discontinued near the finish and centre heading only driven, the centre heading rate of $22.50 and pioneer bonus will then apply, provided, however, that the bonus in no case will exceed $250,000.

"We will turn the work over as a going concern with headings on rock at both ends and in case of shortage of power, tools, supplies, or other items will give your work preference. You to furnish foremen when requested, to be paid by us, to get headings started and work organized, and plant installed to conform to your methods, previous to your taking over the work. On taking over the work you are to supply all labour and superintendence in connection with driving these headings, including drill repairers, blacksmiths, track, and pipe work and labour of whatever nature you require.

"You are to be governed by our contract and specifications of the Canadian Pacific Railway, and their contract with us is to form part of your agreement with us, except as to payments. You are to assume all of our obligations with respect to the part of the work covered by this proposition, and to be granted all the privileges granted us in our contract. You agree to average 900 feet or more per month in the pioneer headings and to keep the centre

heading as close as practicable behind the pioneer heading, but will be granted the same extension of time as we are entitled to under our contract with the C.P.R.

"This proposition and your acceptance will be withdrawn and cancelled on the demand of the Chief Engineer of C.P.R. if your work is not carried out to his satisfaction. In the event of your work being stopped by C.P.R. you are to be paid the bonus of $1,000.00 per foot for each foot that you average in the pioneer heading over 900 feet per month from the time of taking over the work until the time of such stoppage.

"Yours truly,

"ACD/ "FOLEY BROS., WELCH & STEWART.

Per

"FOLEY BROS., WELCH & STEWART,

"By A. C. DENNIS."

"Per J. A. McIlwee.

The actual effect of certain portions of this agreement will need to be considered; but, as far as payment is concerned, it is perfectly clear the amounts to be paid are to be paid monthly on the actual workings during the preceding month and the amount is at a fixed rate per lineal foot less the pay roll, explosives, and other proper charges, with a bonus under a certain condition of 1,000 dollars a foot.

It follows from this that the lower the pay roll, the higher the monthly payments; and that the bonus was dependent simply upon the average rate of progress.

On the 2nd April the respondents accordingly began their operations at the east end of the tunnel, but, as the west end was not then ready, this work was not begun until the 24th July, 1914. On the 24th September, 1914, the appellants cancelled the agreement and refused to allow the respondents to continue, and on the 24th October of the same year the respondents commenced an action against the appellants in the Supreme Court of British Columbia, claiming damages for breach of the agreement.

This action came on for trial in January 1915 before Mr. Justice Clement, with two assessors, and on the 18th December, 1915, he gave judgment, deciding that the appellants had wrongfully repudiated the agreement, and assessed the damages at 31,460 dollars. The respondents appealed against this judgment to the Court of Appeal of British Columbia, and the appellants, by cross appeal, raised once more the contention that the contract was lawfully cancelled and that they were under no liability for damages.

The Court of Appeal, on the 10th August, 1915, gave judgment in favour of the respondents, and it was then ordered that the respondents were entitled to recover against the appellants for damages the following sums, viz.: (*a*) the difference between the amount payable to the defendants under the

terms of the said agreement for the work specified therein and the amount it would have cost the respondents to carry out the work if the agreement had not been cancelled by the appellants; (*b*) the amount of bonus (if any) that the respondents would have earned under the said agreement of December 1913; and they directed that there should be a new trial limited to the assessment of the damages. From this judgment the appellants appealed to His Majesty in Council, and by an Order, dated 27th January, 1916, their appeal was dismissed.

The case, therefore was once more opened at Vancouver before Mr. Justice Morrison, who, on the 30th June, 1916, gave judgment for the respondents for the sum of 325.698 dollars for damages and 250,000 dollars for bonus. From this judgment the appellants again appealed to the Court of Appeal of British Columbia, who, on the 6th November, 1917, dismissed the appeal, Mr. Justice Galliher dissenting. From that judgment the present appeal has been brought. No question is raised as to the bonus of 250,000 dollars. The only point argued before their Lordships was as to the general claim for damages. It appears that at the trial before Mr. Justice Morrison a number of expert witnesses were called on behalf of the respondents, and that in answer to their evidence the appellants, who had themselves performed and completed the work after the cancellation of the contract, put forward what they alleged to be the actual cost of the work done, and they contended that this and this only should be the basis upon which the damage should be assessed. Mr. Justice Morrison, however, refused to accept this view and took, without qualification, the evidence of a Mr. Brunton, an engineer of great and admitted experience. The appellants contended before the Court of Appeal, and to some extent, but more faintly, before their Lordships, that this was a fatal flaw in the learned Judge's judgment, and that as the honesty of the figures put forward by the appellants was not doubted this formed the only sound basis upon which the damages could be assessed, so that the learned Judge was not at liberty to accept against it the opinion of any expert. This contention is obviously unsound. The learned Judge before whom the matter was heard was at full liberty, having considered the evidence on both sides, to decide that he would trust and accept *in toto* the evidence given by one witness, and had this been the only matter for consideration there would be no ground for this appeal. It is unnecessary to repeat the warnings frequently given by learned Judges, both here and in Canada, against displacing conclusions of disputed fact determined by a tribunal before whom the witnesses have been heard and by whom their testimony has been weighed and judged, and did the question depend solely on the decision between rival evidence the case would be free from difficulty. There is, however, another contention on which the appellants rely which needs more careful consideration. They allege that, in estimating the cost of the work, which it was essential to ascertain in order to determine the profit that was lost,

Mr. Brunton had accepted as the basis of his conclusions the actual figures of expense which the respondents had incurred in the work that they performed. These figures had from time to time been sent in to the appellants, and payments had been made by them for the amounts that they disclosed as due, but it is said that none the less they were imperfect, and that in certain particulars, that amounted in all to 12,000 dollars, shown in exhibit 89, there were further charges that ought to have been made which would have reduced the profit earned; the omission to include these charges, according to their contention, invalidated the value of Mr. Brunton's evidence. They consequently asked that a further enquiry should be directed, not, indeed, reopening the whole question, but for the purpose of ascertaining whether any, and if so which, of the items which made up the 12,000 dollars ought properly to have been included in the expense for the work originally done, and that if any sum was found to have been omitted under this head a corresponding sum should also be brought into account in fixing the amount to be charged for the work that was unperformed. They also claimed to have an extra sum added to the expense of powder, which had risen in price during the latter part of the work, and a sum for insurance against accidents, both of which had been omitted by Mr. Brunton.

Their Lordships are in agreement with the view that the Order of the Court of Appeal of the 10th August, 1915, does not involve an acceptance as a final and closed account of the different claims for payment that were made by the respondents and accepted by the appellants while the respondents were actually engaged on work. If there were any omissions from these accounts they are capable of being adjusted in determining the final amount of damage. The difficulty lies in knowing whether any such omissions have been made. It will be observed that the contract of the 18th December, 1913, throws upon the appellants the obligation of paying the respondents' monthly pay-rolls, including bonus, and furnishing proper quarters for the men with board at a fixed rate per day. They also undertook to furnish cars and mules for transporting the broken stone and air, water, light, ventilating plant, tools, track, and all other material and plant except explosives; the respondents on their part undertaking to supply all labour and superintendence in connection with driving the headings, including drill repairers, blacksmiths, track and pipe work, and labour of whatever nature should be required. Their Lordships think that the true meaning of this contract is that the appellants were bound to furnish all the materials and equipment that are mentioned so as to turn the work over as a going concern, but that as the work proceeded, while the appellants were bound to furnish all the material except the explosives, it lay upon the respondents to furnish all the necessary labour required either for extension of track or pipe, or for any other purpose connected with the work. The appellants allege that

this has not been done, and there were many instances given which are dealt with in detail by Mr. Justice Galliher as items said to have been omitted.

It is unfortunate that all these details were not put to Mr. Brunton. He states that in his evidence he has assumed for the purpose of his calculations that in the work done all the charges that ought to have been made against the respondents' work were in fact made, and that he had no other data than that for the figures that he produced. Mr. McIlwee was asked about the matter in detail, and as to some of the items he said that they were included in his expenses, as to others that they were not required, and as to others, as, for example. the stable foreman, the car repairer, and the electrician, no charges had in fact been made for those in connection with the work that he actually executed, an answer which by itself is not conclusive. With the evidence left in this position, their Lordships find it impossible to say that the point raised and urged by the appellants was in fact considered by the learned Judge by whom the damages were assessed, and if it were omitted from his consideration there is a flaw in his judgment which requires to be remedied. There is, however, no need to have any further investigation into the question relating to the insurance and the powder. With regard to the latter, the respondents had the benefit of a contract which was to continue until the 10th September, 1915, and thereafter from year to year, unless notice was given sixty days prior to the 10th September to terminate it. Owing to the war the price of powder had undoubtedly risen after September 1915, and the appellants say that it is reasonable to assume that the contract would accordingly have been terminated and the higher price charged, but this is not certain, nor does it exhaust the possibilities of the appellants having been able to obtain powder either from stocks of their own or by making further arrangements with the powder merchants to enable the contract to be completed at the same price, and their Lordships are not prepared to say that the learned Judge was wrong when he heard the evidence and decided that the powder should be charged at the same rate throughout.

With regard to insurance, there is no general principle of law involved in determining this question. It is no doubt an expense usually incurred in connection with large and hazardous works of construction, but the respondents say that no accidents in fact occurred while they were engaged upon the work, and it was a question of fact for the Judge to decide whether or no any allowance should be made in this respect. Their Lordships regard his judgment as saying that it was unnecessary; the only order, therefore, that should be made is an order which will remit this case, so that it may be determined whether any, and if so which, of the items included in the exhibit No. 89 were omitted in the accounts sent in by the respondents for the work they actually performed, and ought properly to have been charged as expenses in connection

with such work, having regard to the construction which their Lordships have placed upon the contract, and if it be found that there are any such items, what is the proper amount that should be added to the expenses of the whole work in connection therewith, and to what extent the damages ought in consequence to be reduced? They do not think that the costs can be properly awarded until the result of the enquiry is known. It may turn out that in the end there will be little or no disturbance of the figures found by the learned Judge who heard the case. They will therefore send the case back with this direction and reserve the advice that they will finally give until the result of this enquiry has been known.

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In the Privy Council.

FOLEY BROTHERS AND OTHERS

*v.*

JAMES A. McILWEE AND OTHERS.

DELIVERED BY

LORD BUCKMASTER.

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1918.