INTERPRETATION OF SURETYSHIP BOND

Privy Council Defines Amount Owners Could Pay Without Breaking Bond

ON July 11th, 1919, the Privy Council handed down a judgment in the case of the American Surety Co. vs. Calgary Milling Co., an appeal from the Supreme Court of Alberta, which is interesting in view of the meaning given by their Lordships to certain covenants regarding bonds of suretyship.

The facts of the case as reported in the Dominion Law Reports, briefly, are: The Calgary Milling Co. was in need of a new grain elevator, for the construction of which they entered into a contract with a firm of contractors who agreed to erect the building for $65,000. The following clause was part of the agreement:—"Provided that the total amount so paid by the owner during the progress of the work as aforesaid shall not exceed a sum equal to 80% of the amount of work done and materials furnished on the premises at the contract price. And the contractors hereby agree that the owner shall be and is hereby authorized to retain out of the moneys payable to the contractors under this agreement, the sum of 20% of the amount of the contract and to expend the same in the manner following, namely: To retain such 20% until 31 days after the completion of the works and to pay thereout the claims of all persons who have done work or furnished material in the execution of any part of this contract to or for the contractors and in repairing the said works or finishing any work left unfinished by the contractors." (Clause 14, 2nd paragraph).

The section of the agreement of interest here is section 20 which relates that: "The contractors hereby covenant and agree to furnish to the owner a good and sufficient bond to the satisfaction of the owner in the sum of $30,000 for the faithful performance of this contract conditional to indemnify and save harmless the owner from all suits or actions of every kind and description brought against the owner for or on account of any damages received or sustained by any party or parties by or from contractors or their servants or agents in the construction of the said works or by or in consequence of any negligence regarding the same or by reason of any improper material furnished by the contractors in the construction thereof, or by or on account of any act or omission of the contractors, and further conditioned for the faithful performance and completion of this contract by the contractors."

Contract Not Carried Out

The work was begun and the bond was secured, but shortly afterwards the contractors found it impossible to go on with the work, whereupon the Calgary Milling Co. continued the work, but was forced to spend over $30,000 more than the 20 per cent. of the agreed $65,000 which was in their hands for the completion of the work. Action was brought and the Surety Co. defended themselves by claiming that the conditions of the bond had not been fulfilled. This view was upheld by the trial judge but reversed by the Court of Appeal whereupon this appeal was lodged.

The chief point in question was as to the meaning and application of sections 14 (2nd para.) and 20, supra. The bond required bound the surety (the appellants) to indemnify the obligee (the respondents) against loss in the contract owing to default of the contractors. The material terms of the bond are:—

"Provided however and upon the express condition the performance of each of which shall be a condition precedent to any right of recovery hereon. . . .

"Fourth: that the obligee shall faithfully perform all the terms, covenants and conditions of such contract on the part of the obligee to be performed; and shall retain that proportion, if any, which such contract specifies the obligee shall or may retain of the value of all work performed or materials furnished in the prosecution of such contract (not less, however, in any event, than 10% of such value) until the complete performance by the principal of all the terms, covenants and conditions of said contract on the principal's part to be performed. . . ."

The appellants claimed this condition was broken in two respects, only one of which is of importance here, that being that the respondents infringed the condition as to retaining 20 per cent. out of payments made. In this connection, the respondents asked the appellants by letter the meaning to be read into the said terms regarding the retention of 20 per cent. of the contract price. In their letter they said that the contractors claimed that section 3 of clause 14 of this agreement "binds us to pay them after our acceptance of the bond, 100 per cent. or in full for all paid vouchers produced for work done and material supplied on the building; up to a point where we have paid them 80 per cent. of the contract price or $52,000, after which all payments cease until 31 days after the completion of the contract to our satisfaction, when final payment will be due them. Now it appears to us that the wording of this section of clause 14 is rather ambiguous and you may have interpreted it as binding us to pay them not more than 80 per cent. of the amount of such paid vouchers; up to a point where we will have paid them $52,000, or 80 per cent. of the contract price, after which all payments cease, until they are entitled to their final payment."

In answer the appellants said: "Our company is of opinion that payments to be made to the contractors should be on an 80% basis, that is, 20% of every payment should be retained until the final completion and acceptance of the work."

Acting on this the respondents paid the contractors 80 per cent. of the certified accounts for labor and materials up to and inclusive of November 15, and on November 17 refused to pay a further account presented to them.

Judgment of the Court

Their Lordships' judgment and explanation was delivered in these words:—

"The respondents, therefore, did not infringe the contract if the true construction is that they were entitled to pay till the limit of 80% of the whole contract was reached. On the other hand, if they were only entitled to pay 80% *toties quoties* as the certificates were issued, then, inasmuch as the total amounts paid amounted to 80% of the whole contract price and the whole contract had not been finished, there had not been enough retained. This question depends entirely upon the true construction of the proviso above quoted. Now it is to be observed that the 80% which is to be paid is expressed as a supplement of the 20% which is to be retained. The 20% which is to be retained is expressed as 20% 'of the amount of the contract,' and that necessarily refers to the total price. It would, therefore, seem to follow that the 80% must be based on the same calculation. The other interpretation would necessitate a calculation which would be practically impossible except by a sort of rough and ready guess-work, for it would be necessary for the giver of the certificate to calculate the amount of work done and materials furnished from time to time, 'according to the contract price.' Now the contract here had no schedule prices, and such a calculation would, therefore, be practically impossible according to any reliable standard. In view of these considerations, their Lordships agree with the learned Chief Justice that the proper interpretation of the proviso is to hold that the respondents were entitled to make payments for all work certified as actually done and materials as actually supplied, provided that the total of such payments did not exceed 80% of the total contract price."

The appeal was dismissed with costs.

A seat on the New York Stock Exchange has been sold for $100,000, the largest amount ever paid for membership. The previous record was $96,000.

The Mahon Bond Corporation, of Halifax, N.S., is opening an office in St. John, N.B., which will be under the management of A. G. Shatford, formerly with the Bank of Commerce in that city.