

MUNICIPAL COUNCIL OF SYDNEY V. WATSON & CO. LIMITED.

ORDER.

Appeal allowed with costs. Judgment of Full Court discharged.
Verdict and judgment of Davidson J. restored. Respondent to
pay costs of Full Court proceedings.

MUNICIPAL COUNCIL OF SYDNEY

V. WATSON & CO LIMITED.

O R D E R.

Appeal allowed with costs. Judgment of Full Court discharged.

Judgment of Davidson J. restored. Respondent to pay costs of Full

Court proceedings ~~and of hearing before Davidson J.~~

*See corrected
order herewith*

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*31 Jul. 1906
1576*

*quest of Davidson J
per 40 of transcript*

MUNICIPAL COUNCIL OF SYDNEY V. W.G.WATSON & CO LIMITED .

JUDGMENT.

MR JUSTICE RICH.

MUNICIPAL COUNCIL OF SYDNEY V. W.G.WATSON & CO LIMITED.

JUDGMENT.

RICH J.

I have had the advantage of reading the judgment of my brother Dixon and agree with it. In my opinion the appeal should be allowed with costs and the judgment of Davidson J. restored.

JUDGMENT

STARKE J.

EVATT J.

The dispute in this case arises out of a contract made between the parties in October of 1928. It was a contract to supply deliver erect set to work and maintain certain power transformers and induction regulators. The contractor, the respondent, agreed to execute, upon and subject to the conditions of the contract, the said works, for the sum of £38,953, and the Council, the appellant, agreed to pay that sum at the time and in the manner specified in the conditions. Plans, specifications, and conditions were annexed to the contract, and one of its terms was that the conditions, plans, sections, specifications, the contractor's tender, and a copy of the Town Clerk's letter of acceptance dated 12th October 1928, should be read and construed as forming part of the agreement. The contractor originally tendered the sum of £28,975 for the complete erection of the works, including freight insurance landing charges and duty, a provisional sum of £1,000 to be expended at the discretion of the engineer, and £562 for spares. It agreed, for a nominal consideration, not to withdraw the tender for one month. But with the tender was a covering letter (10th September 1928) stating that the rate of customs duty used in making up the tender was, as to Sections A and C free, and as to Section B 10% ad valorem, and that any alteration would be for the Council's account. But the next day the contractor intimated that there was some doubt whether the transformers would be admitted free and that if they were not so admitted the rate would be 35% ad valorem and the duty would amount to the sum of £8450. On the 13th September the contractor withdrew the statement made in its letter of the 10th September, and substituted instead the following (so far as material):

"In our tender, owing to misinterpretation of the Tariff Regulations, we estimated that the power transformers under Sections A and C would be admitted free. We have since applied to the Customs Department for a ruling on the matter, but in the meantime we ask to be allowed to increase our total price.....

"This price increase is to cover duty charges, and for Section C this extra amount is a total of £8450 for 11 transformers. Increase for price for spares for this Section is as follows - Low voltage coils..£131, spare motor £51/5/0.

"The tender prices should now read as follows:..

Section C ..11 units ...£38,425/0/0
spares... .. 744/5/0 "

The Council on the 12th October 1928 informed the contractor that the tender submitted by it for Section 6 (£38,425) was accepted, and that it had been decided to purchase spares at a cost of £528 (including duty

£131), making a total contract price of £38,953. It should be added that the fortieth clause of the conditions of the contract provided that the contractors should pay all customs duties on materials machinery and plant used in connection with the contract, according to the scales of duties in force at the date of the tender by the contractors, and that if any duties should be increased after such date the increase should be paid by the Council, and if reduced then the amount represented by the reduction should be deducted from the amount payable under the contract.

It appears that customs duties on some of the machines etc included in the tender were altered, by way of either increase or reduction, by Tariff Acts, after the date of the tender, and it is not disputed that these items are subject to adjustment, under the fortieth clause of the contract or under the Customs Act. It also appears that customs duties were never altered on some of the machines included in the tender, and that these machines were admitted at a lower duty than that estimated in the tender. Thus duty on regulators was estimated in the tender at 35% ad valorem, but they were admitted at a rate of 10%, representing a difference in amount of no less than £1208.

The dispute turns upon these items. The contractor contends that the sum of £38,425 (including duty £8450) for transformers and regulators, and the sum of £528 (including duty £131) in respect of spares accepted by the Council, together constituted a lump sum or fixed contract price, and that the parties themselves assessed values and duties in order to reach an agreed price as a whole for the work. On the other hand, the Council insists that the amounts included in the contractor's quotations of duty were provisional or tentative only, and subject to adjustment in accordance with the duty imposed pursuant to the Customs Tariff Acts. Davidson J., who tried the action, accepted the Council's view, but on appeal the contractor's view was accepted.

In ~~our~~ opinion, the decision of Davidson J. is right and should be restored. In making up the tender originally, the contractor made it plain enough, by the letter of 10th September, that the rates it then quoted were subject to adjustment, for it stipulated that any alteration in the rates of duty mentioned should be for the Council's account. On the 11th September the contractor doubts whether its quotation of duty is accurate, and points out that transformers if dutiable would be liable

to a duty of 35% ad valorem, or £8450. On the 13th September the contractor withdraws its quotation, and states that it has applied to the Customs Department for a ruling on the matter, and in the meantime asks that it be allowed to increase its price so as to cover duty charges amounting to £8450 and £131 respectively. It is impossible, ~~we~~ think, to treat this as the offer of a firm price: it was the offer of a price subject to alteration in accordance with the duty imposed under the Customs Tariff Acts. A ruling as to the amount would be obtained from the Customs Department, and in the meantime - that is, as ~~we~~ understand the phrase, until such time as a ruling is given - the duty shall be taken at the quoted figure. The whole tenor of the letters of the 11th and the 13th September is quite opposed to the view that the contractor assessed values and duties in order to reach an agreed price. It was quite uncertain as to the rates of duty, and required a ruling for the purposes of ascertaining the true amount. Indeed, ~~we~~ think these letters show that the contractor was there insisting just as much as in its letter of the 10th September that alterations in the rates of duty quoted were for the Council's account. Unless the contractor did so stipulate, then Clause 40 would throw the burden of any excess over the rate quoted upon it, and that is, in ~~our~~ opinion, far from its intention as expressed in the carefully guarded language of its letters. And if this be the meaning of the contractor's offer, then the Council's acceptance of the tenders for £38,425 and £528 does not alter or change the terms of the tender or offer, but is an acceptance of that tender or offer, including the stipulation for the adjustment of duties when ascertained.

The parties, ~~we~~ understand, are agreed, or can agree, about the figures in the case, but ~~we~~ did not understand that the amount of the judgment entered by Davidson J. for the plaintiff was challenged if his construction of the contract were upheld.

The appeal should be allowed.

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THE MUNICIPAL COUNCIL OF SYDNEY

V

W. G. WATSON & CO LTD

JUDGMENT

DIXON J.

THE MUNICIPAL COUNCIL OF SYDNEY

v

W. G. WATSON & CO LTD

It is undeniable that the general conditions, the formal tender and the schedule of prices, are all plainly drawn to express an agreement upon the part of the contractor to supply the plant at a specified price or prices which shall cover customs duty at the rates in force at the time of the contract, subject to a special provision that, if the duties in force at the time of the contract are increased, the Municipality shall pay the increase and, if they are reduced, the amount of the reduction shall be deducted from the contract price .

But I have come to the conclusion that the letters from the

contractor to the Municipality, dated 11th and 13th September 1928, are documents forming part of the contract and that they contain a sufficient expression of intention that in respect of the eleven transformers the rate of duty in force at the time of the contract shall be taken to be 35% ad valorem and that any variation from this rate in the duty actually levied upon the importation of the transformers shall be for the purchaser's account, that is to say that any excess shall be added to and any reduction shall be deducted from the contract price otherwise payable by the Municipality.

There are two grounds upon which these letters must, in my opinion, be considered part of the contract. First, they are " covering letters " within the meaning of the definition of " contrac

contained in the first clause of the General Conditions.

Second, by the third clause of the contract itself, the contractor's tender and a copy of the Town Clerk's letter of acceptance are to be read and construed as forming part of the agreement, and the Town Clerk's letter of acceptance accepts the tender at the price substituted by the letter of 13th September, which itself is expressed to be " further to " the letter of 11th September, and is not correctly understood if read without it. That the letters were documents forming part of the contract does not appear to have been in dispute in the Supreme Court. But I am unable to agree with the judgments appealed from as to the contractual intention to be

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collected from or ascribed to these letters. The letter of 11th September appears to me to make it clear to the Municipality that the contractor considered that the price contained in its tender was based upon the assumption that the transformers were duty free, and it made its tender upon the footing that, if any duty was levied, it should be borne by the Municipality. The letter states that there is some doubt whether the Customs would admit the transformers free and proceeds " We stated in our tender that we had estimated on these " transformers as being free under this decision and any variation of " the duty would be to the buyer's account and we would point out " that if the decision is that they are dutiable, the rate would be " 35% ad valorem and would amount to, on this section, the sum of " £8450 /0/0.

" We regret if we have prepared our tender under a wrong

" decision and trust that you will take this into consideration "

In the letter of 13th September, the previous " estimate " of the contractor that they would be admitted free is put down to a " misinterpretation of the Tariff Regulations ". The letter goes on " We have since applied to the Customs Department for a ruling on the " matter but in the meantime we ask to be allowed to increase our " total price.....This price increase is to cover duty charges and " for section C this extra amount is a total of £8450/0/0 for 11 " transformers..... The tender prices should now read as follows " and the revised amounts are set out.

On the whole, I think that the meaning is that the contractor, now having reason to believe that the rate of duty is 35%, asks to substitute in its tender a price calculated upon that assumption

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unless and until the Customs have given their ruling, still, however, proceeding upon the footing already expressed that " any variation of " duty would be on the buyer's account." I take the withdrawal with which the letter opens to be directed to a letter of 10th September containing a statement that the transformers are duty free. In adopting this construction of the letters, I have not forgotten that the " Conditions to be Observed in Tendering ", which are annexed to the Contract, say that if a tender is made subject to any modification, addition, or alteration of the General Conditions, or the form of the Tender, it will be rejected. But this statement must give way to any modification which is in fact made if the tender is not rejected but

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is accepted. Doubtless, weight must be given to it in considering whether a modification has been attempted, and accepted. But the nature of the modification must also be considered. In the present case, the conditions disclose a general policy of placing upon the Municipality the consequences of all fluctuations in Customs Duty. But, in working ~~out~~ that policy out, they are framed upon the assumption that the contractor can and will ascertain the existing rate and incorporate it in his price. The modifications contained in the letters arose from the practical difficulty of the contractor's doing so. The change contemplated was in the method of working out the general policy of the contract, Indeed, it may be said that

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the letters treat the matter, not so much as requiring a modification of the conditions of the formal contract, but as no more than a necessary result of applying them where the rate of duty is uncertain or ~~as~~ unascertainable.

For these reasons I think the decision of Davidson J. was correct and should be restored.

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THE MUNICIPAL COUNCIL OF SYDNEY

E A W J

V

W. G. WATSON & CO. LTD.

JUDGMENT

McTIERNAN J.

I am of opinion that the judgment of Davidson J.
who tried the action is correct, and that the appeal should be
allowed.