

CASE NO.**VOL. NO.****PAGE**THE ATTORNEY GENERAL OF
CANADAD.W. MATHESON & SONS
CONTRACTING LIMITED

- and -

(Appellant)

(Respondent)

CA 156692

Halifax, N.S.

CROMWELL, J.A.

[Cite as: Canada v. D.W. Matheson & Sons Contracting Ltd., 2000 NSCA 44]**APPEAL HEARD:**

January 24, 2000

JUDGMENT DELIVERED:

April 5, 2000

SUBJECT:**Building Contract - Damages - Remoteness - Interest;
Costs - Disbursements - Fees charged by non-expert witness for
preparation time - Whether Recoverable****SUMMARY:**

Matheson contracted with Public Works to build a breakwater. The work was not completed within the time set in the contract and Public Works removed Matheson from the project, calling on its bonding company to complete the work. The bonding company subcontracted with Matheson to complete the work. Matheson sued Public Works for wrongfully removing it from the contract and, as assignee of the bonding company, for amounts it alleged were due in connection with the completion of the work. The trial judge held that Public Works had breached the contract by wrongfully taking over the role of the contract engineer which had the effect of Matheson wrongly being denied an extension, which it was within the discretion of the contract engineer to grant. He also found that Public Works had contrived to avoid Matheson's contractual right to renegotiate prices for certain materials. He established the prices for these and for other disputed materials. The trial judge awarded interest as provided for in the contract with respect to amounts he found due under the contract and ordered interest pursuant to Statute on other amounts. He rejected Matheson's claim for loss of future profits holding that they were too remote and he disallowed Matheson's claim for fees paid to two engineers called to testify as fact witnesses about their supervision of Matheson's work.

ISSUE:

1. Did the trial judge err in finding that interest was payable pursuant to the contract on certain amounts?

2. Did the trial judge err in failing to limit the period of statutory interest by virtue of Matheson's long delay in bringing its claims before the Court?
3. Did the trial judge err in dismissing Matheson's claim for future profits?
4. Did the trial judge err in disallowing as a disbursement the fees paid to the engineer witnesses?

RESULT:

Appeal by Public Works dismissed. The cross-appeal by Matheson with respect to loss of future profits claim dismissed. Appeal by Matheson with respect to disallowance of disbursements allowed.

The judge's decision with respect to statutory interest was a discretionary one based on his findings of fact. As a general rule, reasonable limits must be placed on the extent to which the plaintiff's financial inability to pursue a claim will justify interest being payable through a period of what would otherwise be unreasonable delay. However, the judge did not err in taking into account that Matheson was financially unable to pursue litigation sooner and that this inability was brought about, at least in part, by Public Works. While the eight year delay here was very long, the trial judge did not apply a wrong principle nor was his decision to award interest unjust.

The trial judge did not err in awarding contractual interest. He found, in effect, that had Public Works not breached the contract, new prices would have been agreed upon and the amounts based on them would have become due under the contract so as to attract contractual interest if payment were delayed.

The trial judge did not err in finding Matheson's loss of future profits claim too remote. Generally, claims for loss of other business opportunities caused by financial stringency resulting from breach of contract will be recoverable only when the circumstances of the transaction are such that the financial vulnerability of the plaintiff and the likely impact of the breach are within the reasonable contemplation of the parties at the time of contracting. The trial judge found that was not the case here and he made no error in reaching that conclusion.

The trial judge did err, however, in holding that he had no discretion to allow as a disbursement the fees charged by the engineer fact witnesses for the extensive time spent preparing to give their evidence at trial. Where an unusual amount of witness preparation is necessary

as a practical matter, where it is reasonable to pay a fee to the witness in all of the circumstances for such preparation and where a fee is paid or liability for it is incurred, an allowance on account of the preparation fee may be allowed as a disbursement in an award of party and party costs. Both the allowance of such a disbursement and its amount are discretionary.

This information sheet does not form part of the court's decision. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 42 pages.